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William D. Araiza

Stanley A. August Professor of Law

Brooklyn Law School

Carolina Academic Press

Durham, North Carolina

Carolina Academic Press

700 Kent Street

Durham, North Carolina 27701

Telephone (919) 489-7486

Fax (919) 493-5668

E-mail: cap@cap-press.com

www.cap-press.com

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1. Jurisdiction

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Problem: Forging Immigration Documents

For many years it has been a federal crime, punishable by fines and/or imprisonment, to possess forged documents purporting to allow a non-citizen to work legally in the United States. In 2017, Congress, without repealing the criminal statute, enacts a new statute making such conduct a civil violation as well. The new law contemplates civil penalties of up to $2,000 for possession of each forged document. Adjudication of claims that a person has violated this new civil penalty provision are heard, in the first instance, by Administrative Law Judges (ALJs) housed in a court Congress sets up in the Department of Homeland Security (DHS). The law governing such adjudications provides as follows:

- ALJs shall decide all questions of law and fact relevant to the claim that the individual has violated the statute, and shall have the power to decide whether the individual has in fact committed that civil violation.
- Either the defendant or the government may appeal any fact-finding or legal conclusion to the Article III circuit court where venue is proper. The Article III court has the power to reverse any fact-finding that is "unsupported by substantial evidence" and the power to reject any legal conclusion "that the appellate court concludes is incorrect."
- If the ALJ orders the payment of a fine and the defendant refuses to pay, the government may apply to the Article III circuit court where venue is proper for an order enforcing the ALJ's judgment.

After a DHS investigation, Tyler Treadwell is charged by the agency with violating the statute. Rather than submit to the Article I adjudication process, Treadwell sues in federal court, arguing that the agency adjudication process violates Article III. In support, he offers, beyond the features of the adjudication scheme noted above, legislative history in the form of congresspersons' statements during debate on the bill, indicating an impatience with prosecutorial delays and difficulties in obtaining convictions under the pre-existing criminal statutory scheme.

Does Treadwell's argument prevail under *Schor*?

2. Other Means of Congressional Control Over the Courts

Insert at page 50, before the Note:

Problem: Targeting Assets

It has long been suspected that the government of Upper Riparia has encouraged and abetted acts of terrorism against Americans. Several years ago, victims of those terrorist attacks sued the Government of Upper Riparia in United States District Court for the Southern District of New York. After consolidating those cases under the title *Jackson v. Government of Upper Riparia*, the court issued default judgments against Upper Riparia, in the amount of several billion dollars. The plaintiffs have attempted to collect on those judgments by having the court attach assets of the Central Bank of Upper Riparia held by New York City-based banks. Those efforts have floundered because of foreign sovereign immunity principles.

In order to overcome those roadblocks, Congress last year enacted the Upper Riparia Terrorism Justice Act. That statute reads as follows:

> Section 1: Financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Jackson v. Government of Upper Riparia*, Case No. 10 Civ. 4518(BSJ)(GWG), that were restrained by attachments secured by the plaintiffs in those proceedings, and that are proven to be the sole property of the government of Upper Riparia or any of its subdivisions, may be obtained by that court in order to satisfy any federal court judgment against the Government of Upper Riparia that is rendered based on illegal terrorist activities committed by that government.
>
> Section 2: Nothing in this section shall be construed—(a) to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than the proceedings referred to in Section 1; or (b) to apply to assets other than the assets described in Section 1.

When the district court attempts to seize the assets Section 1 describes, the Central Bank of Upper Riparia files a motion to quash the seizure, alleging that the statute violates the separation of powers by prescribing a rule of decision. What result? Does your answer change if, before Congress enacted this statute, the court in *Jackson* had decided that all of the assets identified in that case were in fact the sole property of the Government of Upper Riparia?

C. Self-Imposed Limits on the Judicial Power

2. The Case or Controversy Requirement

b. Standing

Insert at page 108, before the Note:

Problem: Standing

Read the following two fact patterns and analyze whether and why (or why not) the plaintiff(s) in each case would have standing.

1. Wrestling with Standing

Title IX of the federal Civil Rights Act of 1964 prohibits the federal government from funding any institution that "fails to provide equal opportunities to both sexes." In 1975, the Department of Education, which is responsible for distributing federal assistance to private universities and colleges, promulgated a regulation regarding gender equity in intercollegiate sports, to enforce Title IX. The regulation states that "The Department determines whether an institution provides equal athletic opportunities to both sexes by examining, *inter alia*, 'whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.'"

In 1990 the Department issued guidelines clarifying the 1975 regulation. Those guidelines explain that an institution's compliance with the "interests and abilities" requirement of the 1975 regulation will be assessed pursuant to a three-part test that asks:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The guidelines explain that satisfaction of any one prong of this three-pronged test will satisfy the 1975 regulation.

Over the course of the succeeding two decades, several colleges eliminate their men's wrestling programs, or demote them from intercollegiate to "club" status. A group of wrestling coaches and college wrestling fans sue the Department. They do not challenge the underlying

1975 regulation; instead, they argue that the 1990 guidelines are too rigid, and violate both the 1975 Regulation and the 1964 law.

Would the coaches have standing? The fans? Why or why not?

2. Witnessing Animal Cruelty

Tom Jenkovic loves to visit zoos. Whenever he travels to a city on business he makes it a point to visit that city's zoo. On a recent business trip to Kansas City, when Tom visited the Kansas City Zoological Park, he was appalled to witness what he believed to be the substandard, inhumane conditions in which several primates were exhibited. After researching the matter, he comes across the federal Animal Welfare Act (AWA), which seeks to ensure that animals kept in captivity are treated humanely. Tom alleges that the AWA requires the Department to issue stringent regulations regarding primates' living conditions, and further alleges that the Department has failed to issue such regulations.

Does Tom have standing? Why or why not?

Insert at page 109, after Item 2 of the Note:

Note: Statutory Grants of Rights and "Injuries in Fact"

1. Cases such as *Havens* seemed to establish broad congressional authority to create statutory rights (for example, the right to truthful rental information in *Havens* itself), the deprivation of which creates Article III injury. Even *Lujan v. Defenders of Wildlife* acknowledged that authority, simply finding a problem with the generalized nature of the right Congress was said to have created by enacting the citizen-suit provision in the Endangered Species Act. However, in recent years the Court has cut back on Congress's latitude to influence standing analysis in this way.

2. In *Spokeo, LLC v. Robins*, 136 S.Ct. 1540 (2016), the Court considered an individual's lawsuit against a consumer reporting agency that, among other things, allegedly failed to follow statutorily-specified procedures relevant to collection and dissemination of consumer information. The plaintiff (Robins) had somehow found out that Spokeo had allegedly violated those procedures when providing information about Robins to a third party who had made an information request about Robins to Spokeo.

By a 6-2 vote (Justice Scalia having died before the case was decided), the Court held that the lower court had failed to adequately consider whether Robins' injury was sufficiently concrete to satisfy Article III. Writing for the majority, Justice Alito explained that a "concrete" injury was not the same thing as a tangible injury, such as an injury to one's property or bodily integrity. Thus, some intangible injuries could be sufficiently concrete to satisfy Article III's requirements. Justice Alito wrote: "'Concrete' is not . . . necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v.*

Hialeah, 508 U.S. 520 (1993) (free [religious] exercise)." According to the Court, therefore, injuries to persons' rights to free speech or the free exercise of religion, while seemingly intangible, are nevertheless sufficiently concrete to count for Article III purposes.

3. But how should courts decide whether an intangible injury is in fact sufficiently concrete? Justice Alito provided some guideposts:

> In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may "elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." Similarly, Justice Kennedy's concurrence in that case explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."

The Court also observed that a risk of concrete harm, and not just the actual existence of such harm, could suffice for Article III purposes.

4. Justice Thomas concurred. He argued for a distinction based on whether the plaintiff was seeking to vindicate a private right—that is, a right the plaintiff had against the defendant—as opposed to a public right—that is, a right the defendant owed to the public at large. (Note that this use of "private rights" and "public rights" is different from how those terms are used in the Article I courts context discussed earlier in this chapter. His dissenting opinion in the next case will make this clear.) Applying that distinction, he concluded that most of Robins' claims involved public rights. He wrote:

> The Fair Credit Reporting Act creates a series of regulatory duties. Robins has no standing to sue Spokeo, in his own name, for violations of the duties that Spokeo owes to the public collectively, absent some showing that he has suffered concrete and particular harm. These consumer protection requirements include, for example, the requirement to "post a toll-free telephone number on [Spokeo's] website through which consumers can request free annual file disclosures."

He continued:

> But a remand is required because one claim in Robins' complaint rests on a statutory provision that could arguably establish a private cause of action to vindicate the violation of a privately held right. Section 1681e(b) [of the statute] requires Spokeo to "follow reasonable procedures to assure maximum possible

> accuracy of the information *concerning the individual about whom the report relates*." (emphasis added). If Congress has created a private duty owed personally to Robins to protect his information, then the violation of the legal duty suffices for Article III injury in fact.

Justice Thomas observed that, on remand, the lower court could consider whether that claim did in fact involve a private right.

5. Justice Ginsburg, joined by Justice Sotomayor, dissented. While she stated that she agreed "with much of the Court's opinion," she argued that Robins had shown concrete injury because Spokeo's dissemination of inaccurate information about him could have affected his job prospects.

6. *Spokeo* thus suggested that the mere fact that Congress had regulated an industry (here, the consumer information industry) for the benefit of individuals did not necessarily give one any particular individual the required concrete injury when the regulated party allegedly violated that regulation. Rather, something more—a concrete injury "in fact"—was required. What that "something more" entailed was further fleshed out in five years later.

TransUnion LLC v. Ramirez

141 S.Ct. 2190 (2021)

Justice KAVANAUGH delivered the opinion of the Court.

To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm.

In this case, a class of 8,185 individuals sued TransUnion, a credit reporting agency, in federal court under the Fair Credit Reporting Act. The plaintiffs claimed that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files, as maintained internally by TransUnion. For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim. The internal credit files of the other 6,332 class members were not provided to third-party businesses during the relevant time period. We conclude that those 6,332 class members have not demonstrated concrete harm and thus lack Article III standing to sue on the reasonable-procedures claim. . . .

I

In 1970, Congress passed and President Nixon signed the Fair Credit Reporting Act. The Act seeks to promote "fair and accurate credit reporting" and to protect consumer privacy. To achieve those goals, the Act regulates the consumer reporting agencies that compile and disseminate personal information about consumers.

The Act "imposes a host of requirements concerning the creation and use of consumer reports." . . . First, the Act requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports. § 1681e(b). . . .

The Act creates a cause of action for consumers to sue and recover damages for certain violations. The Act provides: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or for statutory damages not less than $100 and not more than $1,000, as well as for punitive damages and attorney's fees.

TransUnion is one of the "Big Three" credit reporting agencies, along with Equifax and Experian. As a credit reporting agency, TransUnion compiles personal and financial information about individual consumers to create consumer reports. TransUnion then sells those consumer reports for use by entities such as banks, landlords, and car dealerships that request information about the creditworthiness of individual consumers.

Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. OFAC is the U. S. Treasury Department's Office of Foreign Assets Control. OFAC maintains a list of "specially designated nationals" who threaten America's national security. Individuals on the OFAC list are terrorists, drug traffickers, or other serious criminals. It is generally unlawful to transact business with any person on the list. TransUnion created the OFAC Name Screen Alert to help businesses avoid transacting with individuals on OFAC's list.

When this litigation arose, Name Screen worked in the following way: When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against the OFAC list. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list. TransUnion did not compare any data other than first and last names. Unsurprisingly, TransUnion's Name Screen product generated many false positives. Thousands of law-abiding Americans happen to share a first and last name with one of the terrorists, drug traffickers, or serious criminals on OFAC's list of specially designated nationals.

Sergio Ramirez learned the hard way that he is one such individual. On February 27, 2011, Ramirez visited a Nissan dealership in Dublin, California, seeking to buy a Nissan Maxima. Ramirez was accompanied by his wife and his father-in-law. After Ramirez and his wife selected a color and negotiated a price, the dealership ran a credit check on both Ramirez and his wife. Ramirez's credit report, produced by TransUnion, contained the following alert: "***OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE." A Nissan salesman told Ramirez that Nissan would not sell the car to him because his name was on a "'terrorist list.'" Ramirez's wife had to purchase the car in her own name. . . .

In February 2012, Ramirez sued TransUnion and alleged three violations of the Fair Credit Reporting Act. . . . First, he alleged that TransUnion, by using the Name Screen product, failed to follow reasonable

procedures to ensure the accuracy of information in his credit file.[*] . . . Ramirez requested statutory and punitive damages.

Ramirez also sought to certify a class . . . .Before trial, the parties stipulated that the class contained 8,185 members, including Ramirez. The parties also stipulated that only 1,853 members of the class (including Ramirez) had their credit reports disseminated by TransUnion to potential creditors during the period from January 1, 2011, to July 26, 2011. The District Court ruled that all 8,185 class members had Article III standing. . . . After six days of trial, the jury returned a verdict for the plaintiffs. The jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages for a total award of more than $60 million. . . . The U. S. Court of Appeals for the Ninth Circuit affirmed in relevant part. . . .

We granted certiorari.

II

The question in this case is whether the 8,185 class members have Article III standing as to their three claims. In Part II, we summarize the requirements of Article III standing—in particular, the requirement that plaintiffs demonstrate a "concrete harm." In Part III, we then apply the concrete-harm requirement to the plaintiffs' lawsuit against TransUnion.

A

The "law of Art. III standing is built on a single basic idea—the idea of separation of powers." Separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."

Therefore, we start with the text of the Constitution. Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." For there to be a case or controversy under Article III, the plaintiff must have a "'personal stake'" in the case—in other words, standing. To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: " What's it to you?'" Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

To answer that question in a way sufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. *Lujan v. Defenders of Wildlife* (1992) [*Supra.* this Chapter]. If "the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve."

Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only "the rights of individuals," *Marbury v. Madison* (1803) [*Supra.* this Chapter], and that federal courts exercise "their proper function in a limited and separated government." Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions. As Madison explained in Philadelphia,

[*] [Ed. Note: Ramirez's complaint also alleged other violations of the statute. This excerpt omits the Court's discussion of those other allegations.]

federal courts instead decide only matters "of a Judiciary Nature." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 430 (M. Farrand ed. 1966).

In sum, under Article III, a federal court may resolve only "a real controversy with real impact on real persons."

B

The question in this case focuses on the Article III requirement that the plaintiff 's injury in fact be "concrete"—that is, "real, and not abstract." What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." And with respect to the concrete-harm requirement in particular, this Court's opinion in *Spokeo v. Robins*, 136 S.Ct. 1540 (2016) [Note *supra.* this Chapter Supplement], indicated that courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.

As *Spokeo* explained, certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.

Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. *Spokeo.* Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. And those traditional harms may also include harms specified by the Constitution itself. *See, e.g., id.* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (abridgment of free speech), and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (infringement of free exercise)).

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

Importantly, this Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*. As the Court emphasized in *Spokeo*, "Article III standing requires a concrete injury even in the context of a statutory violation."

Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their

responsibility to independently decide whether the law violates the First Amendment. As Judge Katsas has rightly stated, "we cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so." *Trichell v. Midland Credit Mgmt., Inc*, 964 F.3d 990 (CA11 2020); *see Marbury*; *see also Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976) [Note *supra.* this Chapter]; *Muskrat v. United States* (1911) [*Supra.* this Chapter].

For standing purposes, therefore, an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court. . . .

To appreciate how the Article III "concrete harm" principle operates in practice, consider two different hypothetical plaintiffs. Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.

Even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available) to sue over the defendant's legal violation, Article III standing doctrine sharply distinguishes between those two scenarios. The first lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property. But the second lawsuit may not proceed because that plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's "compliance with regulatory law" (and, of course, to obtain some money via the statutory damages). Those are not grounds for Article III standing.

1

The lead dissent notes that the terminology of injury in fact became prevalent only in the latter half of the 20th century. That is unsurprising because until the 20th century, Congress did not often afford federal "citizen suit"-style causes of action to private plaintiffs who did not suffer concrete harms. . . . All told, until the 20th century, this Court had little reason to emphasize the injury-in-fact requirement because, until the 20th century, there were relatively few instances where litigants without concrete injuries had a cause of action to sue in federal court. The situation has changed markedly, especially over the last 50 years or so. During that time, Congress has created many novel and expansive causes of action that in turn have required greater judicial focus on the requirements of Article III. *See, e.g., Spokeo*; *Lujan*.

As those examples illustrate, if the law of Article III did not require plaintiffs to demonstrate a "concrete harm," Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent. In our view, the public interest that private entities comply with the law cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Lujan*.

A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected branches when necessary to decide an actual case." But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law. *See Lujan*.

In sum, the concrete-harm requirement is essential to the Constitution's separation of powers. To be sure, the concrete-harm requirement can be difficult to apply in some cases. Some advocate that the concrete-harm requirement be ditched altogether, on the theory that it would be more efficient or convenient to simply say that a statutory violation and a cause of action suffice to afford a plaintiff standing. But as the Court has often stated, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *United States v. Chadha*, 462 U.S. 919 (1983). So it is here.[3]

III

We now apply those fundamental standing principles to this lawsuit. [The Court found that only members of the class who had had incorrect information about them disseminated to third parties were injured by TransUnion's failure to comply with the statutorily-required procedures. As to those persons, the Court concluded that they had suffered a concrete harm with a "close relationship" to the harm associated with the tort of defamation. Persons whose information had been handled in violation of the statute, but who had not had their information disseminated to third parties, were held not to have suffered a concrete injury.]

* * *

It is so ordered.

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

TransUnion generated credit reports that erroneously flagged many law-abiding people as potential terrorists and drug traffickers. In doing so, TransUnion violated several provisions of the Fair Credit

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

Reporting Act (FCRA) that entitle consumers to accuracy in credit-reporting procedures . . . . Yet despite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing. . . .

II

A

Article III vests "[t]he judicial Power of the United States" in this Court "and in such inferior Courts as the Congress may from time to time ordain and establish." This power "shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." (emphasis added). When a federal court has jurisdiction over a case or controversy, it has a "virtually unflagging obligation" to exercise it.

The mere filing of a complaint in federal court, however, does not a case (or controversy) make. Article III "does not extend the judicial power to every violation of the constitution" or federal law "which may possibly take place." Rather, the power extends only "to 'a case in law or equity,' in which a right, under such law, is asserted."

Key to the scope of the judicial power, then, is whether an individual asserts his or her own rights. At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community. Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation. But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required "not only injuria [legal injury] but also damnum [damage]." This distinction mattered not only for traditional common-law rights, but also for newly created statutory ones. . . .

2

The "public rights" terminology has been used to refer to two different concepts. In one context, these rights are "taken from the public"—like the right to make, use, or sell an invention—and "bestowed ... upon the" individual, like a "decision to grant a public franchise." Disputes with the Government over these rights generally can be resolved "outside of an Article III court." Here, in contrast, the term "public rights" refers to duties owed collectively to the community. For example, Congress owes a duty to all Americans to legislate within its constitutional confines. But not every single American can sue over Congress' failure to do so. Only individuals who, at a minimum, establish harm beyond the mere violation of that constitutional duty can sue.

The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases. See *Havens Realty Corp. v. Coleman* (1982) [*Supra.* this Chapter] ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing"). And this understanding accords proper respect for the power of Congress and other legislatures to define legal rights. No one could seriously dispute, for example, that a violation of property rights is actionable, but as a general matter, "property rights are created by the State." In light of this history, tradition, and common practice, our test should be clear: So long as a "statute fixes a minimum of recovery ..., there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum

without any specific showing of loss." T. Cooley, LAW OF TORTS. While the Court today discusses the supposed failure to show "injury in fact," courts for centuries held that injury in law to a private right was enough to create a case or controversy. . . .

B

Here, each class member established a violation of his or her private rights. The jury found that TransUnion violated three separate duties created by statute. All three of those duties are owed to individuals, not to the community writ large. Take § 1681e(b), which requires a consumer reporting agency to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." This statute creates a duty: to use reasonable procedures to assure maximum possible accuracy. And that duty is particularized to an individual: the subject of the report. . . .

C

The Court chooses a different approach. Rejecting this history, the majority holds that the mere violation of a personal legal right is not—and never can be—an injury sufficient to establish standing. What matters for the Court is only that the "injury in fact be 'concrete.'" "No concrete harm, no standing."

That may be a pithy catchphrase, but it is worth pausing to ask why "concrete" injury in fact should be the sole inquiry. After all, it was not until 1970—"180 years after the ratification of Article III"—that this Court even introduced the "injury in fact" (as opposed to injury in law) concept of standing. And the concept then was not even about constitutional standing; it concerned a statutory cause of action under the Administrative Procedure Act.

The Court later took this statutory requirement and began to graft it onto its constitutional standing analysis. *See, e.g., Warth v. Seldin* (1975) [*Supra.* this Chapter]. But even then, injury in fact served as an additional way to get into federal court. Article III injury still could "exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Ibid.* So the introduction of an injury-in-fact requirement, in effect, "represented a substantial broadening of access to the federal courts." *Eastern Ky. Welfare Rights.* A plaintiff could now invoke a federal court's judicial power by establishing injury by virtue of a violated legal right or by alleging some other type of "personal interest." *Ibid.*

In the context of public rights, the Court continued to require more than just a legal violation. In *Lujan,* for example, the Court concluded that several environmental organizations lacked standing to challenge a regulation about interagency communications, even though the organizations invoked a citizen-suit provision allowing "any person [to] commence a civil suit ... to enjoin any person ... who is alleged to be in violation of " the law. Echoing the historical distinction between duties owed to individuals and those owed to the community, the Court explained that a plaintiff must do more than raise "a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws." "Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." "'The province of the court,'" in contrast, "'is, solely, to decide on the rights of individuals.'" *Ibid.* (quoting *Marbury*). . . .

In *Spokeo,* the Court built on this approach. Based on a few sentences from *Lujan* . . . the Court concluded that a plaintiff does not automatically "satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." But the Court made clear that "Congress is well positioned to identify intangible harms that meet minimum

Article III requirements" and explained that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Spokeo.*

Reconciling these statements has proved to be a challenge. But "the historical restrictions on standing" offer considerable guidance. A statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing. *See Lujan*. A statute that creates a private right and a cause of action, however, does gives plaintiffs an adequate interest in vindicating their private rights in federal court. See *Spokeo*.

The majority today, however, takes the road less traveled: "Under Article III, an injury in law is not an injury in fact." No matter if the right is personal or if the legislature deems the right worthy of legal protection, legislatures are constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law. The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts.

This approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is inherently insufficient to support standing.[5] And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights.

III

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

I respectfully dissent.

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

The familiar story of Article III standing depicts the doctrine as an integral aspect of judicial restraint. The case-or-controversy requirement of Article III, the account runs, is "built on a single basic idea—the idea of separation of powers." Rigorous standing rules help safeguard that separation by keeping the courts away from issues "more appropriately addressed in the representative branches." In so doing, those rules prevent courts from overstepping their "proper—and properly limited—role" in "a democratic society." *Warth*.

After today's decision, that story needs a rewrite. The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III. I join Justice THOMAS's dissent, which explains why the majority's decision is so mistaken. As he recounts, our

[5] See, e.g., *Lujan* ("Nothing in this contradicts the principle that the injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing" (internal quotation marks, brackets, and ellipsis omitted)); *Warth* ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute").

Article III precedents teach that Congress has broad "power to create and define rights." . . . Under those precedents, this case should be easy. In the Fair Credit Reporting Act, Congress determined to protect consumers' reputations from inaccurate credit reporting. TransUnion willfully violated that statute's provisions by preparing credit files that falsely called the plaintiffs potential terrorists . . . . To say, as the majority does, that the resulting injuries did not "exist in the real world" is to inhabit a world I don't know. And to make that claim in the face of Congress's contrary judgment is to exceed the judiciary's "proper—and properly limited—role." *Warth*. . . .

I differ with Justice THOMAS on just one matter, unlikely to make much difference in practice. In his view, any "violation of an individual right" created by Congress gives rise to Article III standing. But in *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation." I continue to adhere to that view, but think it should lead to the same result as Justice THOMAS's approach in all but highly unusual cases. As *Spokeo* recognized, "Congress is well positioned to identify both tangible and intangible harms" meeting Article III standards. Article III requires for concreteness only a "real harm" (that is, a harm that "actually exists") or a "risk of real harm." And as today's decision definitively proves, Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, courts should give deference to those congressional judgments. Overriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue. Subject to that qualification, I join Justice THOMAS's dissent in full.

Note: The "Injury in Fact" Requirement

1. The majority, seeking to delineate the proper role for Congress in identifying harms that constitute concrete Article III injury, writes that "even though Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." Does the Court offer any guidance for what impacts count as something more than "remotely harmful," and thus eligible for "elevation" to an Article III injury?

2. The quotation in the previous item appears to prohibit Congress from "simply enact[ing] an injury into existence." That statement implies that some injuries exist independently of congressional action. How would you identify such injuries? Do non-legislative sources of law (for example, the common law) help identify such injuries? If so, why should Congress be precluded from also having the power to "enact an injury into existence"?

3. In a footnote not reprinted in the excerpt, the Court said the following: "if there were no concrete-harm requirement, the requirement of a particularized injury would do little or nothing to constrain Congress from freely creating causes of action for vast classes of unharmed plaintiffs to sue any defendants who violate any federal law. (Congress might, for example, provide that everyone has an individual right to clean air and can sue any defendant who violates any air-pollution law.)" Why is the deprivation of clean air necessarily not a particularized and concrete injury if Congress decides that persons should have a right to it? Is some other imperative motivating the Court to refuse to credit such harms as creating Article III injury?

4. Before *TransUnion*, one might have thought that the availability of statutory damages would suffice to provide a plaintiff a concrete stake in the outcome of the case, and thus standing. Consider the majority's comparison between the Maine and Hawaii property owner-plaintiffs in Part II-B. How does the Court's analysis of those two persons' standing to sue affect the role statutory damages plays in creating Article III standing?

5. Justice Thomas offers a very different approach to determining whether an injury is concrete. What role does his approach allot to Congress, and how is that role different than the one the majority gives it? Under the majority's approach, what is left of *Havens*' holding recognizing Congress's authority to enact "statutes creating legal rights, the invasion of which creates standing"? How would Justice Thomas's approach limit *Havens*?

c. Ripeness

***Insert at page 121, before Sub-part d*:**

Problem: We Didn't Start the Fire

In August, 2018, a fire destroyed 20,000 acres of forest belonging to the Yakima Tribe of Washington State, land that, under federal Native American law, is held in trust for the tribe by the U.S. Department of Interior ("Department"). Two months later, the Department sent a "Notice of Trespass" letter to Public Service Electric Company of Yakima County ("Utility"), a utility company located in the same general area as the tribe's forest. The Notice stated the Department's view that the Utility caused the fire through negligent maintenance of power lines that crossed the forest where the fire occurred. The letter reserved the right to assess treble damages for such conduct, with interest on such damages accruing daily, citing a federal statute that authorized the Department "to take such measures as are necessary to protect lands held in trust for native tribes." It also stated that "a preliminary assessment" indicated that the damage to the forest totaled approximately $20 million. The Notice also informed the Utility of an agency appeal process the Utility could invoke if it disagreed with any aspect of the Notice.

Rather than invoke that appeals process, the Utility sued in federal court. It denied that it was responsible for the fire, and it sought a declaratory judgment that federal law does not permit recovery of treble damages in such situations except in cases of "gross negligence."

The Department argues that the Utility's claim is not ripe. Is it correct?

d. Mootness

Insert at the bottom of page 127:

Problem: Prisoner Placement in Special Housing Units

Your client is Justin James, a federal prisoner who has served seven years of a 20-year sentence for a crime of which he was duly convicted. He explains to you that he has served those seven years in four different prisons. At each of the four prisons, he was placed in a "Special Housing Unit," or "SHU," sometimes for administrative reasons (*e.g.*, overcrowding in the general housing units) and sometimes for disciplinary reasons. SHUs are considered less desirable than the general prison housing to which a federal prisoner is otherwise subject, as they involves some degree of isolation.

James's stays in SHUs are generally short, normally lasting less than a week, although his longest single stay in a SHU was one month. He tells you that, at every prison where he has spent time, federal Bureau of Prisons (BoP) personnel consistently deny him reading materials and exercise time when he is in a SHU, and in so doing violate BoP policy that guarantees such materials and such time to "all prisoners." He also tells you that he has never received a hearing before being placed in a SHU, despite BoP regulations requiring such a hearing. Federal law prohibits a prisoner in James's situation from receiving monetary compensation for BoP violations of this type. Indeed, James tells you that all he wants is an injunction requiring BoP personnel to follow the law when they confine him to a SHU.

James has just arrived two days earlier at the prison where you are speaking with him, the fifth one in which he has spent time. He has not spent time in a SHU at his new location.

Why might the BoP argue that James's claims are moot? Based on James's statements, what counter-arguments could you make?

Chapter 2: The Distribution of National Regulatory Powers

B. Presidential Immunity from Judicial Process

***Insert at page 156, before Part C*:**

Note: Immunity from Indictment

Perhaps the most serious instance of presidential amenability to judicial process would be the commencement of a criminal prosecution of the President while he was still in office. Would such a prosecution violate any constitutional principle that impeachment is the sole means of calling the President, or any senior federal official, to account for wrongdoing? Is the President different from any other federal official, such as a federal judge or even the Vice President, because of the uniqueness of the office the President of the United States? In 1973 and again in 2000, the White House Office of Legal Counsel (OLC) analyzed these difficult questions.

MEMORANDUM Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office.

Office of Legal Counsel
September 24, 1973

The question whether a civil officer of the federal government can be the subject of criminal proceedings while he is still in office has been debated ever since the earliest days of the Republic. This inquiry raises the following separate although to some extent interrelated issues. First, whether the constitutional provisions governing impeachment, viewed in general terms, prohibit the institution of federal criminal proceedings prior to the exhaustion of the impeachment process. Second, if the first question is answered in the negative, whether and to what extent the President as head of the Executive branch of the Government is amenable to the jurisdiction of the federal courts as a potential criminal defendant. Third, if it be determined that the President is immune from criminal prosecution because of the special nature of his office, whether and to what extent such immunity is shared by the Vice President.

I.

Must the Impeachment Process be Completed Before Criminal Proceedings May be Instituted Against a Person Who is Liable to Impeachment?

A. Textual and Historical Support for Proposition that Impeachment Need Not Precede Indictment.

1. Views of early commentators. Article II, section 4 of the Constitution provides:

> "The President, the Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high crimes and Misdemeanors."

Article I, section 3, clause 7 provides:

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

The suggestion has been made that Article I, section 3, clause 7 prohibits the institution of criminal proceedings against a person subject to impeachment prior to the termination of impeachment proceedings. Support for this argument has been sought in Alexander Hamilton's description of the pertinent constitutional provision in the Federalist Nos. 65, 69 and 77, which explain that after removal by way of impeachment the offender is still liable to criminal prosecution in the ordinary course of law.

Article I, section 3, clause 7, however, does not say that a person subject to impeachment may be tried only after the completion of that process. Instead the constitutional provision uses the term "nevertheless." The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate, i.e., to forestall a double jeopardy argument.

A speech made by Luther Martin—who had been a member of the Constitutional Convention--during the impeachment proceedings of Justice Chase shows that Article I, section 3, clause 7 was designed to overcome a claim of double jeopardy rather than to require that impeachment must precede any criminal proceedings. . . .

2. Interpretations of the impeachment clause by official bodies. The practical interpretation of the Constitution has been to the same effect. During the life of the Republic impeachment proceedings have been instituted only against 12 officers of the United States. In the same time, presumably scores, if not hundreds, of officers of the United States have been subject to criminal proceedings for offenses for which they could have been impeached. . . .

There have been several instances of legislative actions envisaging the criminal prosecution of persons while still in office, and of the actual institution of criminal proceedings against federal officers while in office.

i. Section 21 of the Act of April 30, 1790, 1 Stat. 117, provided that a judge convicted of having accepted a bribe "shall forever be disqualified to hold any office of honour, trust or profit under the United States." The disqualification provision of this section thus indicates that Congress anticipated criminal trials for bribery--an impeachable offense--prior to a judgment of the Senate providing for the removal and disqualification of the offender. It should be remembered that this statute was enacted by the First Congress many members of which had been members of the Constitutional Convention. Obviously they, and President Washington who approved the legislation, did not feel that it violated the Constitution. The disqualification clause is now a part of the general bribery statute and applies to every officer of the United States.

ii. In 1796, Attorney General Lee advised the House of Representatives that if a judge is convicted of a serious crime his "removal from office may and ought to be a part of the punishment.". . . The House Committee, to which the matter had been referred, concurred in that recommendation. Here again it was felt at that early stage of our constitutional life that, at least in regard to judges, impeachment did not have to precede the institution of criminal proceedings. Hence, Congress could provide for removal of a judge for bad behavior, evidenced by a criminal conviction, although it has not done so, except in the instance of a bribery conviction.

iii. Circuit Judge Davis retired in 1939 under the provisions of what is now 28 U.S.C. 371(b). In 1941 he was indicted for obstructing justice and tried twice. In both cases the jury was unable to agree and the indictment was ultimately dismissed. Only then did the Attorney General request Congress to impeach Judge Davis. The latter thereupon resigned from office waiving all retirement and pension rights. This in effect mooted the need for impeachment, but arguably not the power of impeachment.

iv. Judge Albert W. Johnson was investigated by a grand jury and testified before it prior to his resignation from office.

v. The Department of Justice concluded in 1970 on the strength of precedents ## i and ii, supra, that criminal proceedings could be instituted against a sitting Justice of the Supreme Court. . . .

In sum, the analysis of the text of the Constitution and its practical interpretation indicate that the Constitution does not require the termination of impeachment proceedings before an officer of the United States may be subjected to criminal proceedings. The caveat is that all of the above instances concerned judges, who

possess tenure under Article III only during "good behavior," a provision not relevant to other officers. However, although this clause may be the basis for a congressional power to remove judges by processes other than impeachment, it is not directly responsive to the question whether impeachment must precede criminal indictment, nor was the clause the basis for the actions in the historic instances noted above.

B. Troublesome Implications of a Proposition that Impeachment Must Precede Indictment.

The opposite conclusion, viz., that a person who is subject to impeachment is not subject to criminal prosecution prior to the termination of the impeachment proceedings would create serious practical difficulties in the administration of the criminal law. As shall be documented, infra, every criminal investigation and prosecution of persons employed by the United States would give rise to complex preliminary questions. These include, first, whether the suspect is or was an officer of the United States within the meaning of Article II, section 4 of the Constitution, and second, whether the offense is one for which he could be impeached. Third, there would arise troublesome corollary issues and questions in the field of conspiracies and with respect to the limitations of criminal proceedings. An interpretation of the Constitution which injects such complications into criminal proceedings is not likely to be a correct one. Indeed, impractical or self-defeating interpretations of constitutional texts must be avoided. The Framers were experienced and practical men. This fact, coupled with the purposive spirit of constitutional interpretation set by Chief Justice Marshall, has been the foundation for the endurance of our constitutional system for 186 years.

[The memo then considered these three issues in detail.]

In sum, an interpretation of the Constitution which requires the completion of impeachment proceedings before a criminal prosecution can be instituted would enable persons who are or were employed by the Government to raise a number of extremely technical and complex defenses. It also would pressure Congress to conduct a large number of impeachment proceedings which would weigh heavily on its limited time. Such an interpretation of the Constitution is prima facie erroneous.

II.

Is the President Amenable to Criminal Proceedings while In Office?

This part of the memorandum deals with the question whether and to what extent the President is immune from criminal prosecution while he is in office. It has been suggested in the preceding part that Article I, sec, 3, clause 7 of the Constitution does not require the exhaustion of the impeachment process before an officer of the United States can be subjected to criminal proceedings. The question therefore arises whether an immunity of the President from criminal proceedings can be justified on other grounds, in particular the consideration that the President's subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive branch.

It has been indicated above that there is no express provision in the Constitution which confers such immunity upon the President. Inasmuch as Article I, sec. 6, clause 1 expressly provides for a limited immunity of the members of the legislative branch, it could be argued that, e contrario, the President is not entitled to any immunity at all. This proposition, however, is not necessarily conclusive; it could be said with equal validity that Article I, sec. 6, clause 1 does not confer any immunity upon the members of Congress, but rather limits the complete immunity from judicial proceedings which they otherwise would enjoy as members of a branch co-equal with the judiciary.

Further, as indicated by statements of Alexander Hamilton in The Federalist, No. 69,[13] it could be said that the immunity of the President to criminal indictment and trial during his office may have been too well accepted

[13] The Federalist, No. 69:

to need constitutional mention (by analogy to the English Crown), and that the innovative provision was the specified process of impeachment extending even to the President.

Hamilton's comments were made in the context of calming fears about Executive power and distinguishing the President from the English king. Regarding criminal liability, his strongest statement would have been, to suggest that the President was subject to criminal liability before or after impeachment, yet on the occasion when he made the comparison he spoke only of criminal liability after impeachment. To be sure, there are strong statements by others to the point that the Convention did not wish to confer privileges on the President, but these were made in most general terms, end did not refer to the question now in issue.[14] Further, despite these statements an early Congress did recognize one form of privilege in the Executive in at least one instance.[15] The historical evidence on the precise point is not conclusive.

A. Ambiguities in a Doctrinal Separation of Powers Argument.

Any argument based on the position or independence of one of the three branches of the Government is subject to the qualification that the Constitution is not based on a theory of an airtight separation of powers, but rather on a system of checks and balances, or of blending the three powers. The Federalist, Nos. 47, 48 (James Madison). We must therefore proceed case-by-case and look to underlying purposes. This facet of any reasoning based on the doctrine of the separation of powers is necessarily stressed by those who oppose independence or immunity in a given instance. Examples include two dissenting opinions of Mr. Justice Holmes.

In Springer v. Philippine Islands, 277 U.S. 189 (1928), he gave graphic expression to the extent which the blending element in the Constitution has blunted the principle of the separation of powers:

> "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. * * * When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on."

And again in Myers v. United States, 272 U.S. 52 (1926), he warns that any legal arguments drawn merely from the Executive power of the President, his duties to appoint officers of the United States and to commission them, and to take care that the laws be carefully executed seem to him "spider's webs inadequate to control dominant facts."

"The President [unlike the King] would be liable to be impeached, tried, and upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."

See also the following from Hamilton, The Federalist, No. 65:

"The punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to perpetual ostracism * * *; he will still be liable to prosecution and punishment in the ordinary course of law."

The Federalist, No. 77:

"The President is at all times liable to impeachment, trial, dismission [*sic*] from office * * * and to the forfeiture of life and estate by subsequent prosecution in the common course of law."

[14] The Framers of the Constitution made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England. . . .

[15] See, e.g., President Washington's refusal in 1794 to submit to the Senate those parts of a diplomatic correspondence which in his "judgment for public considerations, ought not to be communicated." 1 Richardson, Messages and Papers of the Presidents 152. See Attorney General Randolph's note to President Washington that the message "appears to have given general satisfaction, Mr. M--d--n, in particular thinks it will have good effect." The Writings of George Washington (Bicentennial Edition) Vol. 33 p. 282 fn 8.

Whether or not one agrees with Holmes or the full thrust of his rhetoric, most scholars would concede that there are few areas under the Constitution to which a single branch of the Government can claim a monopoly. An argument based on the separation of powers must be illuminated therefore by constitutional practice.

The difficulty of developing clear rules regarding the various possible facets of Presidential immunity is demonstrated by the limited and ambivalent case law developed in the fields of the amenability vel non of the President to civil litigation and to the judicial subpoena power. . . .

In the Burr treason trial. Chief Justice Marshall at first concluded that since the President is the first magistrate of the United States, and not a King who can do no wrong, he was subject to the judicial subpoena power. United States v. Burr, 25 Fed. Cas. 30(C.C.D. Va., 1807) [Note *supra* this Chapter]. In the Burr misdemeanor trial, however, which took place only a few months later, the Chief Justice had to qualify significantly his claim of the subpoena power over the President by conceding that the courts are not required

> "to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187 (C.C.D. Va., 1807).

And by acquiescing in the privileges claimed by President Jefferson of not attending court in person and of withholding certain evidence for reasons of State, Chief Justice Marshall recognized that the power of the judiciary to subpoena the President is subject to limitations based on the needs of the Presidential office.

Marshall's recognition of the special character of the Presidential office was expanded in Kendall v. United States ex rel. Stokes, 12 Pet. 524 (1838), where the Court seemed to deny that it had any jurisdiction over the President;

> "The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeachment."

It is significant that this apparent total disclaimer of any judicial authority over the President also was qualified by adding the clause "so far as his powers are derived from the constitution."

There have been countless examples in which courts have assumed jurisdiction to scrutinize the validity of Presidential action, such as proclamations, Executive orders,[17] and even direct instructions by the President to his subordinates.[18] It is true that, as a matter of convention the party asserting the validity of the Presidential action (whether plaintiff or defendant) is usually a party other than the President, such as his subordinate, or the custodian of the res. Nevertheless there have been recent dicta that when this convention is inadequate to protect the citizen, i.e., where the President alone can give the requested relief, the courts may assume jurisdiction over the litigation.

Again, Attorney General Stanbery's famous oral argument in Mississippi v. Johnson, 4 Wall. 475 (1867), . . . is prefaced by the statement that the case made against President Johnson "is not made against him as an individual, as a natural person, for any acts he intends to do as Andrew Johnson the man, but altogether in his official capacity as President of the United States." Hence, Attorney General Stanbery's reasoning is presumably limited to the power of the courts to review official action of the President, and does not pertain to the question whether or not the courts lack the authority to deal with the President "the man" with respect to matters which have no relation to his official responsibility.

Thus it appears that under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency.

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[17] See, e.g., United States v. Curtiss-Wright, 299 U.S. 304(1936) (Embargo Proclamation); United States v. Bush, 310 U.S. 371 (1940) (Customs Proclamation).

[18] Youngstown Sheet & Tube Co. v. Sawyer, (1952) (Steel Seizure) [*Supra* this Chapter].

B. Competing Interests.

An assessment designed to determine the extent to which the status of the Presidency is inconsistent with giving the courts plenary criminal jurisdiction over the President may be divided into two parts. First, the applicability vel non to the Presidency of any of the considerations which in Part I of this memorandum led to rejection of the proposition that impeachment must precede criminal proceedings, and, second, whether criminal proceedings and execution of potential sentences would improperly interfere with the President's constitutional duties and be inconsistent with his status.

1. Is court trial of a President too political for the judicial process? Part I of this memorandum, for a variety of reasons, concluded that the considerations which led to the establishment of the congressional impeachment jurisdiction, e.g., that the courts were not well equipped to handle (a) political offenses and (b) crimes committed by high office-holders, were insufficient to exempt every officer of the United States from criminal prosecution for statutory offenses prior to the termination of the impeachment proceedings. The question to be examined here is whether these reasons are so much stronger in the case of the President as to preclude his prosecution while in office.

a. Political offenses. Political offenses subject to indictment are either statutory or nonstatutory offenses. The courts, of course, cannot adjudicate nonstatutory offenses. With respect to statutory political offenses their very inclusion in the Penal Code is an indication of a congressional determination that they can be adjudicated by a judge and jury, and there appear to be no weighty reason to differentiate between the President and other officeholder, unless special separation of powers based interests can be articulated with clarity.

It should be noted that it has been well established in civil matters that the courts lack jurisdiction to reexamine the exercise of discretion by an officer of the Executive branch. Marbury v. Madison, 1 Cranch (1803) [*Supra* Chapter 1]. By the same token it would appear that the courts lack jurisdiction in criminal proceedings which have the effect of questioning the proper exercise of the President's discretion. This conclusion, of course, would involve a lack of jurisdiction over the subject matter and not over the person.

b. Intrinsically political figures. The second reason for the institution of impeachment, viz., the trial of political men, presents more difficulties. The considerations here involved are that the ordinary courts may not be able to cope with powerful men, and second, that it will be difficult to assure a fair trial in criminal prosecutions of this type.

i. The consideration that the ordinary courts of law are unable to cope with powerful men arose in England where it presumably was valid in feudal time. In the conditions now prevailing in the United States, little weight is to be given to it as far as most officeholders are concerned.

ii. We also note Alexander Hamilton's point that in well-publicized cases involving high officers, it is virtually impossible to insure a fair trial. In Part I we assumed without discussion that this point was not of sufficient importance to require impeachment prior to indictment with respect to every officeholder. Undoubtedly, the consideration of assuring a fair criminal trial for a President while in office would be extremely difficult. It might be impossible to impanel a neutral jury. To be sure there is a serious "fairness" problem whether the criminal trial precedes or follows impeachment. However, the latter unfairness is contemplated and accepted in the impeachment clause itself, thus suggesting that the difficulty in impaneling a neutral jury should not be viewed, in itself, an absolute bar to indictment of a public figure.

2. Would criminal proceedings against a President be ineffective and inappropriate because of his powers regarding (a) prosecution, (b) Executive privilege, and (c) pardons? The Presidency, however, creates a special situation in view of the control of all criminal proceedings by the Attorney General who serves at the pleasure and normally subject to the direction of the President and the pardoning power vested in the President. Hence, it could be argued that a President's status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions. In other words, just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time. This objection would lose some of its persuasiveness where, as in the Watergate case, the President delegates his prosecutorial functions to the Attorney General, who in

turn delegates them to a Special Prosecutor. However, none of these delegations is, or legally can be, absolute or irrevocable.

Further, the problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case. If the President claims the privilege he would be accused of suppressing evidence unfavorable to him. If he fails to do so the charge would be that by making available evidence favorable to him he is prejudicing the ability of future Presidents to claim privilege. And even if all other hurdles are surmounted, he would still possess the pardoning power.

3. Would criminal proceedings unduly interfere in a direct or formal sense with the conduct of the Presidency?

a. Personal attendance. It has been indicated above that in the Burr case, President Jefferson claimed the privilege of not having to attend court in person. And it is generally recognized that high government officials are exempted from the duty to attend court in person in order to testify. This privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter. . . .

b. Direct interference with official duties. A necessity to defend a criminal trial and to attend court in connection with it, however, would interfere with the President's unique official duties, most of which cannot be performed by anyone else. It might be suggested that the same is true with the defense of impeachment proceedings; but this is a risk expressly contemplated by the Constitution, and is a necessary incident of the impeachment process. The Constitutional Convention was aware of this problem but rejected a proposal that the President should be suspended upon impeachment by the House until acquitted by the Senate.

During the past century the duties of the Presidency, however, have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution. This might constitute an incapacitation so that under the provisions of the Twenty-fifth Amendment, Sections 3 or 4, the Vice President becomes Acting President. The same would be true, if a conviction on a criminal charge would result in incarceration. However, under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent.

This would suggest strongly that, in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation. [The non-physical yet practical interferences, in terms of capacity to govern, are discussed infra as the "fourth question."] The physical interference consideration, of course, would not be quite as serious regarding minor offenses leading to a short trial and a fine. It has been shown . . . that Presidents have submitted to the jurisdiction of the courts in connection with traffic offenses. However, in more serious matters, i.e., those which could require the protracted personal involvement of the President in trial proceedings, the Presidency would be derailed if the President were tried prior to removal.

A possibility not yet mentioned is to indict a sitting President but defer further proceedings until he is no longer in office. From the standpoint of minimizing direct interruption of official duties--and setting aside the question of the power to govern--this procedure might be a course to be considered. One consideration would be that this procedure would stop the running of the statute of limitations. . . . While this approach may have a claim to be considered as a solution to the problem from a legalistic point of view, it would overlook the political realities. As will be shown presently, an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction. To be sure, there could also be damage flowing from unrefuted charges. . . .

4. Would initiation or prosecution of criminal proceedings, as a practical matter, unduly impede the power to govern, and also be inappropriate, prior to impeachment, because of the symbolic significance of the Presidency? In Mississippi v. Johnson, supra, Attorney General Stanbery made the following statement:

> "It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President."

This may be an overstatement, but surely it contains a kernel of truth, namely that the President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs. It is not to be forgotten that the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries. The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Perhaps this thought is best tested by considering what would flow from the reverse conclusion, i.e., an attempted criminal trial of the President. A President after all is selected in a highly complex nationwide effort that involves most of the major socio-economic and political forces of our whole society. Would it not be incongruous to bring him down, before the Congress has acted, by a jury of twelve, selected by chance "off the street" as Holmes put it? Surely the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidably political by the nature of the "defendant."

The genius of the jury trial has been that it provides a forum of ordinary people to pass on matters generally within the experience or contemplation of ordinary, everyday life. Would it be fair to such an agency to give it responsibility for an unavoidably political judgment in the esoteric realm of the Nation's top Executive?

In broader context we must consider also the problems of fairness, and of acceptability of the verdict. Given the passions and exposure that surround the most important office in the world, the American Presidency, would the country in general have faith in the impartiality and sound judgment of twelve jurors selected by chance out of a population of more than 200 million? If based on "some" evidence it is unlikely a guilty verdict would be reversible on appeal (assuming no procedural error), and yet it could be tantamount to removal and probably would force a resignation. Even if there were an acquittal, would it be generally accepted and leave the President with effective power to govern?

A President who would face jury trial rather than resign could be expected to persist to the point of appealing an adverse verdict. The process could then drag out for months. By contrast the authorized process of impeachment is well-adapted to achieving a relatively speedy and final resolution by a nation-based Senate trial. The whole country is represented at the trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation.

To be sure it is arguable that despite the foregoing analysis it would be possible to indict a President, but defer trial until he was out of office, without in the meantime unduly impeding the power to govern, and the symbolism on which so much of his real authority rests. Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.

A counter-argument which could be made is that the indictment alone should force a resignation, thus avoiding the trauma either of a trial during office, or an impeachment proceeding. This counter-argument, however, rests on a prediction concerning Presidential response which has no empirical foundation. The reasons underlying the Founding Fathers' decision to reject the notion that a majority of the House of Representatives could suspend the President by impeaching him apply with equal force in a scheme that would permit a majority of a grand jury to force the resignation of a President. The resultant disturbance to our constitutional system would be equally enormous. Indeed, it would be more injudicious because the grand jury, a secret body, could interrupt Presidential succession without affording the incumbent the opportunity for a hearing to voice his defense.

A further factor relevant here is the President's role as guardian and executor of the four-year popular mandate expressed in the most recent balloting for the Presidency. Under our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it. . . . Because only the

President can receive and continuously discharge the popular mandate expressed quadrennially in the presidential election, an interruption would be politically and constitutionally a traumatic event. The decision to terminate this mandate, therefore, is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution.

In suggesting that an impeachment proceeding is the only appropriate way to deal with a President while in office, we realize that there are certain drawbacks, such as the running of a statute of limitations while the President is in office, thus preventing any trial for such offenses. In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability. We doubt, however, that this gap in the law is sufficient to overcome the arguments against subjecting a President to indictment and criminal trial while in office.

[The memo then continued to consider whether the Vice President is amenable to criminal proceedings while in office. It concluded that the unlike the President, the Vice President is amenable to such proceedings.]

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel

Note: The 2000 Update

In 2000, the same office (OLC) issued a new memo addressing the same question the 1973 memo considered. That memo came to the same conclusion as the earlier one with regard to the question of presidential immunity to indictment while in office. However, it took account of cases that the Supreme Court had decided since 1973: *Nixon v. United States* (1974) (*Supra* this Chapter); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (Note *supra* this Chapter); and *Clinton v. Jones* (1997) (*Supra* this Chapter). The 2000 memo concluded that "these precedents are largely consistent with the Department's 1973 determinations that (l) the proper doctrinal analysis requires a balancing between the responsibilities of the President as the sole head of the executive branch against the important governmental purposes supporting the indictment and criminal prosecution of a sitting President; and (2) the proper balance supports recognition of a temporary immunity from such criminal process while the President remains in office." The memo continued:

> Indeed, *United States v. Nixon* and *Nixon v. Fitzgerald* recognized and embraced the same type of constitutional balancing test anticipated in this Office's 1973 memorandum. *Clinton v. Jones*, which held that the President is not immune from at least certain judicial proceedings while in office, even if those proceedings may prove somewhat burdensome, does not change our conclusion in 1973 and again today that a sitting President cannot constitutionally be indicted or tried.

The memo harmonized its conclusion with the Court's ruling against presidential immunity in *Clinton* by stressing the difference between civil and criminal cases, in terms of the effects of such litigation on the President's time and energy and thus ability to fulfill the functions of the presidency, the stigma of a criminal prosecution and that stigma's potential to impair effective presidential functioning, and the impossibility of such effective functioning if the criminal prosecution resulted in criminal confinement while the President still occupied the office. Echoing the 1973 memo, the 2000 memo continued:

> It is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions. It would be perilous, however, to make a judgment in advance as to whether a particular criminal prosecution would be a case of this sort. Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.

Addressing a familiar concern with such an immunity, the memo observed:

> Finally, recognizing a temporary immunity would not subvert the important interest in maintaining the "rule of law." To be sure, as the Court has emphasized, "[n]o man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196 (1882). Moreover, the complainant here is the Government seeking to redress an alleged crime against the public rather than a private person seeking compensation for a personal wrong, and the Court suggested in *Nixon v. Fitzgerald* that "there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." However, unlike the immunities claimed in both *Nixon* cases, the immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance, of any criminal trial.

Do you agree with the analyses in these memos? What about the "balancing" methodology the 2000 memo discerns in both the earlier memo and the subsequent cases? Consider the likelihood that delay—in this case, the delay of a criminal prosecution until the President leaves office or is removed—normally helps defendants (since the prosecution has the burden of proof and thus might be handicapped by the passage of time). Does the unique nature of the office of the President necessarily mean that the holder of that office enjoys an especially powerful immunity from criminal prosecution, given that under the OLC's analysis any such prosecution might be delayed for months or even years? Does that mean he's effectively "above the law"?

C. Congress, the President, and the Administrative State

1. Limits on Congressional Authority to Delegate Legislative Power

Insert at page 180, before Section 2:

Problem: Delegated Authority to Limit Immigration

Article I grants Congress the power to "establish an [*sic*] uniform rule of Naturalization," a power that has generally been understood to encompass power over immigration. A federal immigration statute, 8 U.S.C. § 1182(f), contains the following congressional grant of power to the President:

> (f) Suspension of entry or imposition of restrictions by President
>
> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend

> the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. . . .

In 2019, the President issued a proclamation finding that the entry into the nation of aliens who lack health insurance seeking to immigrate is "detrimental to the interests of the United States" because of the costs they impose on the American healthcare system. Relying on Section 1182(f), he orders a halt to such entries.

Relatives of uninsured aliens seeking to immigrate sue, alleging that Section 1182(f) constitutes an unconstitutional delegation of legislative authority to the President. How would Justice Kagan analyze that claim? What about Justice Gorsuch? What facts about, or characteristics of, immigration regulation generally or this proclamation in particular would be relevant to his analysis?

Reconsider this problem after you've read the materials on presidential authority in foreign affairs. Do those materials change your analysis?

D. Foreign Affairs and the War Power

2. The War Power

c. The War Power in a World of Small Wars

Insert at page 257, before the Note:

Problem: Capturing a Renegade

In early 2022, U.S. intelligence agencies begin picking up signals that a military commander in the Central Asian nation of Balistan has become a renegade. He refuses orders from his nation's military establishment, proclaims himself the "Protector" of the province in which he is located, and offers safe haven to terrorists who have sought to destabilize neighboring nations. Officials worry that Balistan lacks the power to capture the Protector and his force of several hundred well-armed soldiers, who he can continue to pay due to the province's lucrative traffic in rare minerals. Even more worryingly, the Protector threatens to block the flow of electricity from a large hydroelectric plan in the province that supplies a substantial amount of the power needs of several neighboring nations, and to continue doing so until the world community recognizes his sovereignty over the province.

After the Protector cuts off the electricity from the plant for several days, "as a warning," and after a failed attempt by the Balistan Army to dislodge him, the President decides to act. His military advisors prepare a plan that would entail a cruise missile attack on the Protector's base, followed by an airborne assault. The assault would entail several thousand U.S. paratroopers, backed up by air support. His advisors predict that U.S. forces can establish control of the base within two days, at a cost of 25-50 American combat deaths. However, they explain to the President that there is a 10% chance that the Protector will be able to disperse his forces after the cruise missile attack and before the airborne assault. If that happens, they warn, U.S. forces could

be forced essentially to chase down the hostile forces, a process that could take up to three weeks. That eventuality could raise casualties substantially, especially if local leaders remain loyal to the Protector and require American forces to guard against attacks by the local population. In the worst-case scenario, capturing the Protector and neutralizing his forces might require a deployment, not just of combat troops but of supply and rear echelon support forces which themselves would have to be protected, thus increasing the ground troop footprint and raising the attendant risks of casualties.

As a lawyer in the Office of Legal Counsel, you're tasked with writing a memo explaining whether the President has the authority to go forward with this mission without getting congressional approval. Military leaders warn that any public debate of this option would significantly raise the cost and risk, as it will give the Protector time to disperse his forces and potentially cause havoc in the region by cutting off the electricity supply and unleashing his terrorist allies on neighboring nations.

What would your analysis look like?

Part II: The Division of Federal and State Regulatory Power

Chapter 4: Congress's Regulatory Powers

B. Federal Power to Regulate Interstate Commerce

3. The Evolution of Expanded Federal Power

***Insert at page 328, before Section 4*:**

Problem: The Federal Commerce Power—Then and Now

Tom Tyringham was arrested by federal authorities and charged with violating a federal statute that criminalized the possession of obscene material. Tom had set up a hidden tripod and camera in his bedroom and had taken photos of himself and his wife (without her knowledge) that would qualify as obscene, and thus would not enjoy any constitutional protection as free speech. Tom had no intention of distributing the material, or even showing it to anyone else (including his wife), nor has he ever purchased any obscene material in his lifetime.

You are an assistant U.S. Attorney for the district in which Tom was arrested. Your supervisor asks you to analyze whether it would be constitutional to apply the federal obscenity statute to Tom. What would you need to know about that statute to make that determination? How relevant would the particular facts about Tom be? Are there other facts about the case that you think might be relevant?

Return to this question after you read both *United States v. Lopez* (pages 329-345) and the note about *United States v. Morrison* (pages 345-346).

Return to this question again after you read *Gonzalez v. Raich* (pages 346-360).

How does your analysis change after each successive case?

4. A More Limited Commerce Power

Insert at page 362, before the Note:

Note: Enumerated Powers—and Implied Ones, Too?

1. In *McCulloch v. Maryland* (1819) (*Supra.* Chapters 3 & 4), Chief Justice Marshall went out of his way to "acknowledge" that the federal government is "one of enumerated powers." But he also noted that "[t]o [the Constitution's] enumeration of powers is added" what we know as the Necessary and Proper Clause. In *National Federation*, Chief Justice Roberts, writing for himself, rejected the argument that the ACA's individual mandate was constitutional under that clause, since it was not an "exercise[] of authority derivative of, and in service to, a granted power," or an exercise of "an authority that is narrow in scope or incidental to the exercise of the commerce power." Writing for four justices, Justice Scalia also rejected the Necessary and Proper Clause argument, in part because the individual mandate "violate[d] the background principle of enumerated (and hence limited) power."

But what if Congress had implied regulatory powers, beyond those enumerated in Article I? That question implicitly arose in a 2021 case about eminent domain.

2. "Eminent domain" is the power government has to "take" a property owned by someone else. For example, if a government wishes to build a highway, and owners of property along the proposed route choose not to sell their land voluntarily, the government can bring a lawsuit to "condemn" the property and "take" it, as long as it pays the owner "just compensation."

In 2018, a federal agency, acting pursuant to a federal statute, authorized a pipeline company, PennEast, to commence eminent domain actions against owners of property along the route of a pipeline the agency had approved. One of those owners was the State of New Jersey. As you'll see in Chapter 6, an eminent domain action against an unconsenting state would normally be barred by the doctrine of state sovereign immunity, as reflected in the Eleventh Amendment. And indeed, New Jersey refused to consent to PennEast's lawsuit, asserting its Eleventh Amendment immunity. In so doing, the state relied heavily on the fact that in 1996, the Court had held that Congress could not use its Commerce Clause authority to abrogate (or wipe away) that immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (*Infra.* Chapter 6). It was precisely under that authority that Congress had enacted the pipeline statute.

3. Despite the seeming straightforwardness of the state's sovereign immunity argument, the Court rejected it. *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244 (2021). A note in Chapter 6 sets forth the details of the Court's sovereign immunity analysis. For now, the important point about the five-justice majority opinion was that it concluded that, in ratifying the Constitution, the states had implicitly waived their sovereign immunity to federal eminent domain lawsuits even when brought, not by the federal government itself, but by authorized private parties. The Court stated its conclusion early in its opinion: "Although nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution."

But where is "the eminent domain power"? It is not enumerated in the Constitution. (The Fifth Amendment requires government to pay "just compensation" if it takes property, but it does not explicitly authorize eminent domain actions, and the Court did not rely on it.) If *Seminole Tribe* prohibits Congress from using its Commerce Clause authority to abrogate states' sovereign immunity, then the pipeline statute's authorization of PennEast's eminent domain suit against New Jersey had to be found somewhere else. In her dissent, Justice Barrett argued that that statute was based on the Commerce Clause, as "augmented" by the Necessary and Proper Clause. Thus, she argued, the case was governed by *Seminole Tribe*. (She did not even discuss the possibility that somehow the Necessary and Proper Clause authorized lawsuits against states that the Commerce Clause itself did not. What problems would such a conclusion raise?)

4. Chief Justice Roberts, writing for the majority, never explicitly located "the eminent domain power" in any particular constitutional provision. Instead, he quoted Nineteenth Century caselaw as follows:

> As we explained in *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641 (1890), "[i]f it is necessary that the United States government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it."

Does this mean that the federal government has inherent powers that transcend those granted by the Necessary and Proper Clause? Consider the language the Chief Justice quoted from *Cherokee Nation*, referring to the federal government having powers "in order that it may fully carry out the objects and purposes of the Constitution." Doesn't that sound just like the Necessary and Proper Clause? But to the majority, it seems as though this inherent power was more powerful than that contained in the Necessary and Proper Clause, since that power included the power to overcome a state's Eleventh Amendment sovereign immunity—something the Necessary and Proper Clause presumably lacks.

5. Does the majority opinion in *PennEast* suggest that, in fact, the federal government is not merely a government of enumerated powers, but also has implied powers? *Compare United States v. Lopez* (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'"). Recall also the language from *McCulloch* and *National Federation*, quoted in Item 1, above, all to the same effect. Is *PennEast* consistent with this basic understanding of federal power?

Chapter 5: Residual State Powers—and Their Limits

A. The Commerce Clause as a Limitation on State Regulatory Power

3. Modern Applications

***Insert at page 402, before part 4*:**

Problem: Regulating Health Care Clinics

In the last decade, there has been rising interest among states in regulating health care clinics that offer sophisticated bone and organ imaging services. The machines that perform these services are very expensive, and there is concern that a proliferation of clinics offering them will cause destructive price competition that will lead to a decline in proper care, and that, as part of that competition, these businesses will seek to promote these services even when they are not medically appropriate.

The State of Franklin is one of these states. Last year it enacted a law that requires a license before a new clinic of this sort may be opened. That license will be granted only if the State Department of Health concludes that the community where the clinic is proposed to be located has a "demonstrated need" for such services—*e.g.*, if that community is underserved with regard to this technology. Clinics in operation when the law was enacted are not subject to this requirement.

Imaging Resources, Inc., is a corporation based in California that owns and operates a chain of such clinics. It wishes to expand into Franklin. Upon being denied licenses for those clinics, it sues the Franklin Department of Health, the agency responsible for licensing these clinics in Franklin. Imaging Resources alleges that the Franklin law violates the dormant Commerce Clause, as it discriminates against new entrants into the market for the benefit of existing clinics.

What facts would you want to know before you decide how you would analyze this case? Why would you want to know them?

Chapter 6: Federal Regulation of the States

A. The Prohibition on "Commandeering"

***Insert at page 461, before Part C*:**

Problem: Applying Commandeering and Preemption Doctrine

Consider the following two fact patterns. Do they both violate the anti-commandeering principle, or do they both reflect constitutionally-valid federal preemption of state law? Or are different results appropriate for the two cases? Why?

Fact Pattern One: Cellular Boosters

Extend-Net is a company that builds and installs small booster stations that extend the reach of a signal sent by a cellular tower. It installs these stations on public rights-of-way, such as utility poles, in localities where cellular coverage is poor and a full-scale tower impracticable.

In 2013, Extend-Net gets approval from the New York State Department of Utilities to install several booster stations on utility poles owned by the state in the town of Hampden, New York, at the request of Extend-Net's customer, Ameri-Call, a large cellular network whose coverage in Hampden is poor. It installs the stations. Five years later, Extend-Net requests approval from the State to modify those stations, to allow them to boost the signal not just of Amer-Call's network, but also that of Value-Call, another large cellular network. The State rejects the application, concluding that Extend-Net has failed to show, as state law requires, that Value-Call's network needs boosting within the town.

Extend-Net sues, claiming that the State's denial violates a federal telecommunications statute which reads as follows: "A State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base or booster station that does not substantially change the physical dimensions of such tower or base or booster station." The parties agree that the rejected modifications of the existing booster stations "do[] not substantially change the physical dimension" of the booster stations. Nevertheless, the State argues that the federal law unconstitutionally commandeers the actions of the state government. Extend-Net counters that the federal law simply preempts state law.

Which side is correct?

Fact Pattern Two: Native American Child Welfare

Congress has broad power under the Indian Commerce Clause to regulate the affairs of Native American tribes and their members. In the Indian Child Welfare Act of 1978 (ICWA), Congress declared that it was the policy of the United States "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their

families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."

Among other provisions, the ICWA provides that parents of Native American children are given the right to intervene in child custody proceedings. This right applies both to proceedings that seek an involuntary termination of parental rights (from the Native American parent's perspective) or a voluntary termination, as for example, when a Native American parent chooses to give a child up for adoption. The law also provides for a preference for placement of such children in the homes of Native American families and requires adoption agencies to respect, "if at all possible," the placement wishes of the tribe to which the child belongs. It also requires that any party seeking to place a native child in foster care or terminate a native parent's parental rights demonstrate that efforts have been made to provide remedial services to prevent breaking up the native family, and that those efforts have failed.

Thus, state family law courts (when they otherwise have jurisdiction over the Native American child) must provide these procedural and substantive rights in their adoption proceedings, and adoption agencies seeking to place Native American children in adoptive homes must provide the intervention right and respect, "if at all possible," the tribe's wishes for the child's placement.

A collection of states, joined by non-Native families who each wish to adopt a particular Native American child, sued, alleging that these provisions of the ICWA violated the anti-commandeering principle by regulating how state entities proceed when placing children through the state adoption system. The defendants counter that the ICWA simply pre-empts inconsistent state family law statutes as applied to Native American children.

What facts would you need to know before deciding which side is right?

C. Constitutional Limits on Judicial Remedies Against States

1. The *Young* Doctrine

***Insert at page 480, before the Note*:**

Note: Applying *Coeur d'Alene*

The Court's cryptic and fractured holding in *Coeur d'Alene* might make you wonder how the case has been applied in the lower courts. Most courts that have applied it have done so in factual contexts similar to that in *Coeur d'Alene* itself—that is, requests for injunctions against state officials involving disputes over control of land. *E.g.*, *W. Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2nd Cir. 2004) (applying *Coeur d'Alene* in a case brought against several defendants, including the Governor of New York, alleging that the state was in wrongful possession of land that belonged to the plaintiff tribe).

For an example of the rare case relying on *Coeur d'Alene* in a non-land context, consider

Barton v. Summers, 293 F.3d 944 (6th Cir. 2002). *Barton* considered a claim by Medicaid recipients that they had a right to money the state stood to receive from a nationwide settlement of claims against tobacco companies. Under that settlement, states were to receive significant amounts of money to compensate them for the Medicaid expenses they incurred to pay for treatment of their citizens' tobacco-related illnesses. The plaintiffs argued that money the state received that exceeded those expenses should be passed on to the former tobacco users themselves.

The court rejected that claim on Eleventh Amendment grounds. Citing *Coeur d'Alene*, the court stated that "an attempt to force the allocation of state funds implicates core sovereign interests." Noting also that Congress, anticipating the tobacco settlement, had amended the Medicaid statute so as to allow states to disburse the settlement money as they saw fit, the court concluded that "[i]nterference with the allocation of state funds, where Congress has expressly enacted that states may allocate such funds as they please, is an interference with a 'special sovereign interest' under *Coeur d'Alene*."

2. State "Waiver" of Sovereign Immunity

Insert at page 496, before the Note:

Note: Eminent Domain Suits, State Sovereign Immunity, and "the Plan of the Convention"

1. The federal government, like states, has the power of "eminent domain"—that is, the power to take property from private landowners as long as it pays what the Fifth Amendment calls "just compensation." For example, if the government wants to build a highway, it can insist that the highway run through someone's property by "condemning" the property, which then triggers the just compensation requirement. Usually, such condemnations occur not by the government simply walking onto someone's land and literally "taking" it, but by the government bringing a condemnation suit in the appropriate court, where the landowner could dispute the legality of the condemnation (for example, by arguing that the taking was not for a public purpose, as the Constitution requires) or (more commonly) where it could dispute the amount of compensation the government is offering to pay.

In 2021, the Court considered whether Congress could delegate to a private party the power to use eminent domain to condemn state-owned property. Federal law authorizes persons constructing federally-approved pipelines to bring eminent domain suits to obtain the necessary property, just like the federal government itself could do if it wished to take a piece of property. A Delaware-based pipeline company, PennEast, brought a suit in federal court in New Jersey, seeking to condemn land New Jersey owned that the company wanted to use for a pipeline that the relevant federal regulatory agency had approved. New Jersey argued that the Eleventh Amendment barred the company's eminent domain lawsuit, noting that the federal pipeline statute was enacted pursuant to the Interstate Commerce Clause and thus arguing that *Seminole Tribe* precluded Congress from using the commerce power to authorize private-party eminent domain lawsuits against unconsenting states.

2. In *PennEast Pipeline v. New Jersey*, 141 S.Ct. 2244 (2021), a five-justice majority rejected New Jersey's sovereign immunity argument and allowed the eminent domain lawsuit to proceed in federal court. Speaking for the Court, Chief Justice Roberts acknowledged that

Seminole Tribe precluded Congress from using the commerce power to make unconsenting states liable for lawsuits. But he argued that in "the plan of the [constitutional] convention," states had surrendered any sovereign immunity to federal eminent domain actions, including those brought by private parties acting under federal authority. He concluded: "PennEast's condemnation action to give effect to the federal eminent domain power falls comfortably within the class of suits to which States consented under the plan of the Convention."

Justice Barrett, joined by Justices Thomas, Kagan, and Gorsuch, dissented. She disagreed with the majority's suggestion that the eminent domain power is a distinct power, over which states surrendered their immunity in the plan of the convention. Instead, she argued that "a taking is a garden variety exercise of an enumerated power like the Commerce Clause." According to Justice Barrett, because PennEast's eminent domain suit was authorized by the Natural Gas Act (NGA), and because Congress enacted the NGA based on its Commerce Clause authority, the case presented a straightforward application of *Seminole Tribe*. She also argued that Congress could ensure construction of federally-approved pipelines simply by requiring that the federal government itself bring eminent domain suits against states, since the Eleventh Amendment has been held not to prohibit the federal government from suing states. Justice Gorsuch, joined by Justice Thomas, joined Justice Barrett's dissent but also wrote a short separate dissent.

3. The justices' debate in *PennEast* about state sovereign immunity raises important questions about federal power more generally. The NGA was undoubtedly enacted pursuant to Congress's power to regulate interstate commerce. Why, then, as Justice Barrett argued, didn't the case present a simple application of *Seminole Tribe*'s rejection of a congressional power to abrogate state sovereignty when legislating pursuant to that power? In addressing that question, Chief Justice Roberts wrote:

> [C]ongressional abrogation is not the only means of subjecting States to suit. As noted above, States can also be sued if they have consented to suit in the plan of the Convention. And where the States "agreed in the plan of the Convention not to assert any sovereign immunity defense," "no congressional abrogation [is] needed." . . . [T]he States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees. The plan of the Convention reflects the "fundamental postulates implicit in the constitutional design." *Alden v. Maine*, 527 U. S. 706 (1999) [Note *supra.* this Chapter]. And we have said regarding the exercise of federal eminent domain within the States that one 'postulate of the Constitution [is] that the government of the United States is invested with full and complete power to execute and carry out its purposes.'

Where is "the federal eminent domain power" located? The majority opinion implies that it is an inherent government power. (Indeed, Chief Justice Roberts briefly traced the history of that power back to biblical times.) But recall that cases such as *United States v. Lopez* (1995) (*Supra.* Chapter 4) insist that the Constitution created a government of enumerated powers. Justice Barrett disagreed with the majority's implication of an inherent federal eminent domain power, arguing that "the Constitution enumerates no stand-alone 'eminent domain power.'" (She argued

that the Takings Clause merely requires compensation when the federal government takes property, presumably acting pursuant to some enumerated power.)

How the Court approaches this question of implied federal power is important in itself, as suggested by the note on this case that appears in Chapter 4. But it is also important for the Court's state sovereign immunity jurisprudence. The extent to which the Court finds such implied federal powers that involve the states' surrender of their sovereign immunity "in the plan of the convention" will say much about how much room Congress actually has to limit state sovereign immunity despite *Seminole Tribe*'s seemingly near-absolute rule against Article I-grounded abrogations of that immunity.

D. The Taxing and Spending Power as an Alternative to Regulation

1.5. State Immunity from Federal Taxation

Insert at page 504, before Section 2:

Note: Intergovernmental Tax Immunities

1. Recall from Chapter 3 that in *McCulloch v. Maryland* (1819), the Supreme Court prohibited states from imposing direct taxes on federal instrumentalities, such as the Bank of the United States. This note considers the question of a reciprocal immunity—that is, an immunity state instrumentalities might enjoy from federal taxation. While it focuses on state immunity from federal taxation, it also explains the evolution of the federal government's immunity from state taxation in order to highlight the similarities and differences between the two immunities.

2. In *Collector v. Day*, 78 U.S. 113 (1870), the Court held that the federal government could not tax the salary of state court judge. Writing for the Court, Justice Fuller relied on states' reserved powers, in particular, their power to establish governing institutions (such as state courts) that were sovereign within the realm allowed by the Constitution. Essentially, then, just as state taxation of the Bank of the United States in *McCulloch* would impair the federal government's power to act pursuant to its constitutional powers, so too the Court reasoned that federal taxation of state court judges' salaries would impair states' power to act pursuant to their own constitutional powers.

Justice Bradley dissented. He echoed Marshall's point in *McCulloch* that state taxation of federal instrumentalities would allow states to tax persons who were not its constituents and not represented in its political process, a problem that did not arise when the federal government taxed state entities or employees.

3. *Day*'s reciprocal tax immunity began to deteriorate in the early Twentieth Century. For example, in 1905, the Court upheld a federal tax on a license to sell liquor as an agent of the state. *South Carolina v. United States*, 199 U.S. 437 (1905). The Court suggested that the business nature of the taxed activity opened it up to federal taxation, despite the activity being carried out by an agent of the state. Later, and in some tension with the trend against a reciprocal

approach to tax immunities, in two cases from the late 1930s the Court overruled *Day*'s precise holding when it allowed the federal government to tax state employees and states to tax federal employees. *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (allowing the federal government to tax state employees); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (allowing states to tax federal employees).

Despite that continued hint of a reciprocity approach, starting in the 1940s the Court's tax immunity jurisprudence began to diverge depending on the entity that was doing the taxing and the one that was being taxed. With regard to state taxation of the federal government, the Court began to develop a test that inquired into "the legal incidence of the tax." *State of Alabama v. King & Boozer*, 314 U.S. 1 (1941). Under that test, the Court inquired into the identity of the entity that was being forced to pay the tax, to ensure that the state was not directly taxing the federal government itself. For example, in *King & Boozer*, a business bought lumber in order to build a military camp for the federal government and was assessed a state sales tax. The Supreme Court held that the tax was valid because it fell upon the contractor, not the federal government, even though the construction contract obliged the federal government to pay for all taxes incurred in the project.

Even though the "legal incidence" test had the effect of opening up some federal activity to state taxation, the converse test, relating to federal taxation of states, allow more inter-governmental taxation. In *New York v. United States*, the Court allowed any non-discriminatory taxation of state income, including income earned by the state itself, except for income that was "uniquely capable of being earned by a state." 326 U.S. 572 (1946).

4. In 1988, the Court summarized the state of inter-governmental tax immunity as follows:

> [U]nder current intergovernmental tax immunity doctrine, the States can never tax the United States directly, but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals. . . . The rule with respect to state tax immunity is essentially the same, except that at least some nondiscriminatory federal taxes can be collected directly from the States, even though a parallel state tax could not be collected directly from the Federal Government.

South Carolina v. Baker, 485 U.S. 505 (1988). For an example of the non-discrimination requirement in action, see *Davis v. Michigan Dept of Treasury*, 489 U.S. 803 (1989) (striking down a Michigan law that exempted from state income tax state government retirement income while still taxing federal government retirement income).

5. The asymmetry of these immunities reflects the different foundations for each one. As Marshall explained in *McCulloch*, federal immunity from state taxation rests on both the Supremacy Clause and the theory that a state should not have the power to levy taxes that would fall on persons who lack access to that state's political process. By contrast, state immunity from federal taxation rests on Tenth Amendment-based conceptions of residual state sovereignty, and

thus on the Court's estimations of what is necessary for states to exercise that sovereignty. As Chief Justice Stone said in *New York*:

> By its terms the Constitution has placed only one limitation upon [the federal taxing] power, other than limitations upon methods of laying taxes not here relevant: Congress can lay no tax "on Articles exported from any State." Barring only exports, the power of Congress to tax reaches every subject. But the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government.

2. The Spending Power as a Means of Influencing State Government Conduct

***Insert at the end of page 510*:**

Problem: Using Pandemic Recovery Funds

The COVID-19 pandemic wreaked havoc on the budgets of many state governments, as tax revenues plummeted and social service and first responder and healthcare costs soared. In 2021, Congress enacted a massive spending program that offered money to states to assist them with their expenditures.

The American Renewal Act (ARA) provides the following conditions on state use of the money the statute allocates to that particular state. Under the ARA, states must use their money:

> (A) to respond to the public health emergency with respect to COVID-19 or its negative economic impacts . . .
>
> (B) to compensate workers performing essential work during the COVID-19 public health emergency . . .
>
> (C) for the provision of government services to the extent of the reduction in revenue of such State . . . relative to revenues collected in the most recent full fiscal year of the State ... prior to the pandemic ... or
>
> (D) to make necessary investments in water, sewer, or broadband infrastructure.

The State must use the funds by December 31, 2024. Id. The law also imposes one more term. In a section labeled "Further Restriction On Use Of Funds," the ARA provides that:

"(A) IN GENERAL.—A State or territory shall not use the funds provided under this section ... to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

North Carolina is set to receive $5.5 billion in funds under the law, an amount equal to 7.4% of the state's total spending last year. It wants to sue the federal government, alleging that the law violates Congress's powers to attach conditions to spending grants to states. What arguments could it make? How successful do you think they would be?

Problem: Medicaid Conditions—Again

In addition to the Medicaid expansion that was the subject of the Spending Clause analysis in *National Federation*, the 2010 Affordable Care Act (ACA) also made other changes to Medicaid. Recall that Medicaid is a joint federal-state program that is largely funded by the federal government but administered by individual states, each of which sets its own eligibility rules, subject to federal restrictions. Medicaid has been in existence since 1965; since then, all states have participated in the program. Beyond the eligibility expansion condition that was struck down in *National Federation*, another Medicaid change the ACA made in 2010 was to require that any state accepting federal Medicaid funds "not discriminate based on the basis of sex in its administration of [its Medicaid] program." Under the law, any state that violates this condition forfeits all of its Medicaid funding.

Nebraska, like all states, participates in the Medicaid program. But it has a policy that it will not provide Medicaid coverage for gender-affirming surgery (also sometimes called gender transition procedures)—that is, surgery that conforms persons' sex organs to their self-identified gender. Nebraska sues the federal government, claiming that the condition violates the limits on the Spending Clause established by *South Dakota v. Dole*.

What would you like to know before determining whether Nebraska's claim is likely to succeed?

Part III: Substantive Rights Under the Due Process Clause

Chapter 9: The Right to an Abortion

C. The *Casey* Resolution (?)

***Insert at the end of page 611*:**

Problem: Abortion Consultations

The State of East Dakota already bans post-viability abortions, with exceptions for the life and health of the woman. In 2021, the state legislature enacts the "Abortion Safety Act" ("ASA"). The ASA requires that any woman seeking a non-emergency pre-viability abortion consult with three obstetricians before having the procedure. The law's introduction states that this requirement is designed to generate three different opinions about the safety of the abortion the woman seeks, to ensure that the abortion can be performed safely. When a woman seeking a pre-viability abortion challenges this law, the factual record developed during the litigation reveals the following:

1. As a sparsely-populated, rural state, only 10% of the state's women live within a hundred-mile radius of three obstetricians. By contrast, 80% live within a hundred-mile radius of at least one obstetrician.

2. The vast majority of non-emergency pre-viability abortions present straightforward safety issues that any competent obstetrician can assess through a questionnaire and a simple physical examination.

3. Pre-viability abortions performed by medical personnel are extremely safe, with serious complications occurring in fewer than one percent of cases.

4. The state has no comparable laws for medical procedures that pose the same (low) levels of risk to patients.

The judge in the case recognizes that she must apply the law embraced by a majority of the justices in *June Medical*. How would she likely rule on the woman's challenge, and why?

Chapter 10: Modern Due Process Methodologies

***Insert at page 672, before the Note*:**

Problem: Sex Toys

In the State of Jefferson, a law reads as follows:

> "The sale or other distribution of any device whose primary purpose is to stimulate the sexual organs of any person is hereby prohibited."

Sam's Playland is an adult-oriented book and novelty shop in Jefferson City, the capital of the State of Jefferson. The store sells, among other things, items that come within the statute's prohibition (*e.g.*, vibrators). The owner of the store and one of its customers sues, alleging that the law violates the Due Process Clause as construed in *Lawrence v. Texas*.

What arguments would you make for the plaintiffs? For the State? How do you think a court would rule, and why?

Insert at the end of page 699:

Problem: Plural Marriage

Plural marriage ("polygamy") has been an issue in American constitutional law since the establishment of the Church of Jesus Christ of Latter-day Saints, colloquially known as the Mormon Church, which in the nineteenth century embraced polygamy as a central tenet of that faith. In 1878, the Supreme Court rejected a claim that the federal government's prohibition of polygamy in the Utah Territory violated Mormons' rights under the First Amendment's guarantee of the right to free religious exercise. *Reynolds v. United States*, 98 U.S. 145 (1878).

In recent years, attention has focused on the continued polygamist beliefs and preferences of certain fundamentalist offshoots of the Mormon Church, but also on the wishes of non-Mormons to enter into plural marriages. Leave aside the Free Exercise Clause argument. Consider instead claims, both by fundamentalist Mormons and non-Mormons, that their substantive due process rights are violated by state laws restricting polygamy. In particular, consider two hypothetical laws, and challenges to those laws:

First, consider a law that bans "co-habitation," with "co-habitation" defined as "a legally-married couple living with a third (or additional) person as if that third person was a member of the married couple's intimate life." Assume that a three-person grouping wishes to live a polygamous lifestyle, in which the three share a household and a common intimate life. (They do not seek a marriage license officially recognizing their relationship as a legal marriage.) Two of the three persons are legally married to each other; the third is legally single; thus, they would violate the statute. What arguments could that group make that *Lawrence v. Texas* supports their claim that the statute violates the Due Process Clause?

Second, consider a law that defines marriage as "the union of two adults." A three-person grouping applies for, and is denied, a marriage license. What arguments could that group make that *Obergefell v. Hodges* supports their argument that the law violates the Due Process Clause?

Part IV: Constitutional Equality

Chapter 12: Suspect Classes and Suspect Class Analysis

A. Sex Discrimination

***Insert at page 778, before Part B*:**

Problem: Single-Sex Public Education

In recent years, some educational experts have suggested that some junior high and high school students might benefit from attending a single-sex, rather than a co-ed, school. Among other theories, it has been suggested that single-sex education diminishes social and dating pressures in the classroom, that it helps girls take leadership positions that they would shy away from in a co-ed environment, and that it helps both girls and boys develop their interests and talents free from gendered stereotypes. It is further suggested that these phenomena lead to better academic outcomes and outcomes for students' socio-emotional development.

In 2015 the State of Nebraska Department of Education commissioned a study by several educational experts to consider this issue. The executive summary of that study reads as follows:

> "As in previous reviews, the results are equivocal. There is some support for the premise that single-sex schooling can be helpful, especially for certain outcomes related to academic achievement and more positive academic aspirations. For many outcomes, there is no evidence of either benefit or harm. There is limited support for the view that single-sex schooling may be harmful or that coeducational schooling is more beneficial for students."

Based on this study, the Department decides to require every school district in the state to offer a single-sex educational experience to any junior high or high school student who would like one. Traditional co-ed schools would be the norm, but any junior high or high school student who wished to avail himself or herself of a single-sex education could obtain one from the state.

You are a lawyer employed by the State Department of Education. You are asked to outline the arguments you would make defending the constitutionality of this program. (Assume that someone would have standing to sue.) How would you structure that defense? Is there any additional information you'd like from the Department to help your argument? Would you suggest any particular features for the program in order to buttress your argument?

Chapter 14: The Intent Requirement

***Insert at Page 951, before the Note*:**

Note: Two Examples of Discriminatory Intent Analysis

It should be clear from *Davis*, *Arlington Heights*, and *Feeney* that the discriminatory intent inquiry is highly fact-specific. The following lower court cases provide examples of that inquiry in action. Note the lack of a "smoking gun" revealing the alleged discriminatory intent—*e.g.*, explicit statements about residents wanting to exclude minorities from their community. Do you agree with how the courts analyzed the intent question in the absence of such a "smoking gun"? Why or why not?

Mhany Management, Inc. v. County of Nassau
819 F.3d 581 (2nd Cir. 2016)

[This case dealt with a city's plan to convert under-used city-owned real estate into housing, and the ensuing controversy about the type of housing that would be built.]

A. Nassau County and Garden City

The Village of Garden City is a municipal corporation organized under the laws of the State of New York and located in Nassau County. As of the year 2000, individuals of Hispanic or African–American ethnicity comprised 20.3% of Nassau County's population. However, these minority groups comprised a disproportionate share of the County's low-income population. While constituting 14.8% of all households in Nassau County, African–Americans and Hispanics represented 53.1% of the County's "very low" income, non-elderly renter households. In addition, African-Americans made up 88% of the County's waiting list for Section 8 housing. Under the Section 8 program, the federal government provides funds to local housing authorities, which then subsidize rental payments for qualifying low-income tenants in privately-owned buildings.

Garden City's African-American and Hispanic population in the year 2000 was 4.1%. However, excluding the 61% of the minority population representing students living in dormitories, Garden City's minority population was only 2.6%. In addition, only 2.3% of the households in Garden City were headed by an African–American or Hispanic person. However, several of the communities surrounding Garden City are "majority-minority," communities in which minorities make up a majority of the population.

Although the lack of affordable housing has long been a problem for Nassau County, Garden City contains no affordable housing. Indeed, in the past, Garden City and its residents have resisted the introduction of affordable housing into the community. . . .

B. The Social Services Site

In 2002, Nassau County faced a budget and infrastructure crisis. Under the leadership of then-County Executive Thomas Suozzi, the County undertook a Real Estate Consolidation Plan, which involved consolidating County operations in several facilities and selling excess government property in order to raise revenue to fund renovations of the County's existing operations.

One of the properties proposed for sale under the Real Estate Consolidation Plan was a parcel of land owned by Nassau County within the boundaries of Garden City. This parcel of land was part of Garden City's Public or P– Zone. Garden City's P–Zone encompasses numerous Nassau County Buildings, including the Nassau County Police Headquarters, the County Executive Building, and the Nassau County Supreme Court Building.

The portion of the P–Zone site at issue in this case, referred to as the "Social Services Site," is an approximately 25–acre site that housed the former Nassau County Social Services Building . . . .

C. Garden City's Rezoning

In June 2002, at the County's request, Garden City began the process of rezoning the Social Services Site. This process was managed by the Garden City Board of Trustees, the elected body which governs Village affairs. In response to the County's request, the Board of Trustees created a sub-committee (the "P–Zone Committee") charged with retaining a planner and reviewing zoning options for the Social Services Site, as well as the remainder of the P– Zone properties in Garden City. This P–Zone Committee consisted of Village Trustees Peter Bee, Peter Negri, and Gerard Lundquist. Trustee Bee was the chairman of the P– Zone Committee. Garden City also retained the planning firm of Buckhurst Fish and Jacquemart ("BFJ") to provide a recommendation with regard to the rezoning of the Social Services Site. . . .

On April 29, 2003, BFJ submitted its proposal to the P–Zone Committee, recommending a "CO–5(b) zone" for the Social Services Site. BFJ proposed applying "multi-family residential group" or "R–M" zoning controls to this property. R–M zoning would have allowed for the construction of up to 311 residential apartment units on the Site, or 75 single-family homes. BFJ reiterated the proposed R–M zoning in a May 2003 report to the P–Zone Committee, stating that the rezoning would "be likely to generate a net tax benefit to the Village." . . .

Throughout the rezoning process, the P–Zone Committee also kept Garden City's four Property Owners' Associations ("POAs") apprised of the process. . . . The Social Services Site is located within the neighborhood of the Eastern Property Owners' Association. On May 29, 2003, BFJ gave a PowerPoint presentation of its May 2003 report at a public forum. At the first forum, designed to solicit public input on the proposal, several residents expressed concern about the impact of 311 residential units on traffic and schools. In response to these citizen concerns, BFJ analyzed these issues further.

In July 2003, BFJ issued a revised version of its study, which reiterated the proposal for R–M zoning. BFJ emphasized again that its proposal "would be careful of not overwhelming the neighborhoods with any significant adverse environmental impacts, particularly traffic, visual effects, or burdens on public facilities." Responding to issues raised at the citizen forum, the July 2003 report states that "there would be a smaller number of school children generated by the new development than with the development of single-family homes. . . . With a community aimed at young couples and empty nesters, there could be as few as 0.2 to 0.3 public school children per unit." Upon review of the report, the P–Zone Committee adopted BFJ's recommendation for R–M zoning for the approval of the Board of Trustees.

In September 2003, as required by state law, BFJ issued a draft Environmental Assessment Form ("EAF") for the proposed rezoning. The EAF concluded that the proposed rezoning to R–M "will not have a significant impact on the environment." The EAF further stated that the proposed multi-family development at the Site would not "result in the generation of traffic significantly above present levels" and would have a minimal impact on schools. In addition, the EAF emphasized that "in terms of potential aesthetic impacts, the proposed zoning controls were specifically designed to accommodate existing conditions, respect existing neighborhoods—particularly residential neighborhoods, maximize the use of existing zoning controls and minimize adverse visual impacts." Michael Filippon, the Superintendent of the Garden City Buildings Department, concurred in these conclusions.

On October 17, 2003, an ad was placed in the Garden City News entitled, "Tell Them What You Think About the County's Plan for Garden City." This notice stated:

> Where is the Benefit to Garden City? Are We Being Urbanized? . . .
>
> The County is asking the Village to change our existing zoning—P (Public use) ZONE—to allow the County to sell the building and land . . . now occupied by the Social Services Building, to private developers. Among the proposed plans: Low-density (high-rise?) housing—up to 311 apartments. . . .
>
> These proposals will affect ALL of Garden City.

The Village held a subsequent public forum on October 23, 2003, where BFJ gave another PowerPoint presentation summarizing the proposed rezoning. The record indicates that at this meeting, citizens again raised questions about traffic and an increase in schoolchildren. BFJ again reiterated that traffic would be reduced relative to existing use, and that multi-family housing would generate fewer schoolchildren than the development of single-family homes. In keeping with these conclusions, in November 2003, BFJ presented an additional report to the P–Zone Committee, again confirming its proposal for the R–M zoning control that allowed for a possible 311 apartment units on the Social Services Site. The November 2003 report set forth a draft text for the rezoning.

In light of BFJ's final report, on November 20, 2003, the Garden City Village Board of Trustees unanimously accepted the P–Zone Committee's recommendation for the rezoning. In addition, on December 4, 2003, the Board made a finding pursuant to New York State's Environmental Quality Review Act that the zoning incorporated in what was now termed proposed Local Law 1–2004 would have "no impact on the environment." . . .

Starting in January 2004, three public hearings occurred in the span of one month. At the first hearing, on January 8, 2004, residents voiced concerns that multi-family housing would generate traffic, parking problems, and schoolchildren. In response, Filippon emphasized, "you have to remember that the existing use on that site now generates a certain amount of traffic, a fair amount of traffic. That use is going to be vacated. The two residential uses that are being proposed as one of the alternates, each of which on their face automatically generate far less traffic than the existing use. That is something to consider also." In addition, although assured by Garden City officials that the rezoning could result in single-family homes, one resident expressed concern that Nassau County would ultimately only sell the property to a multi-family developer in order to maximize revenue.

On January 20, 2004, the Eastern Property Owners' Association held a meeting at which Trustee Bee discussed BFJ's recommendation for the Social Services Site. A summary of the meeting reports that "Trustee Bee addressed many questions from the floor" and, in doing so, expressed the opinion that "Garden City demographically has a need for multi-family housing." Trustee Bee also reiterated that because relatively few schoolchildren resided in existing multi-family housing in Garden City, BFJ and the Board had reasonably predicted that multi-family housing would have less of an impact on schools than single-family housing. Trustee Bee "indicated he would keep an open mind but he still felt the recommended zoning changes were appropriate." In addition, Trustee Bee addressed citizen concerns about the possibility of affordable housing on the Site. In response to one question, Trustee Bee stated that "although economics would indicate that a developer would likely build high-end housing, the zoning language would also allow 'affordable' housing (as referred to by [the] resident asking the question) at the [Social Services Site]." The meeting notes further indicate that a majority 15 of the residents "who asked questions or made comments" at the meeting 16 supported restricting the rezoning of the Site to single-family homes. According to these notes, "residents wanted to preserve the single-family character of the Village. One resident in particular requested the [Eastern Property Owners' Association] Board take a firmer stand on the P–Zone issue and only support R–8 zoning, i.e. zoning for single-family housing.

On February 5, 2004, the Village held a third public hearing on the proposed rezoning. The record indicates that this hearing was well attended and much more crowded than usual. After an introduction by Trustee Bee, the meeting commenced with two presentations. First, Tom Yardley of BFJ emphasized that the proposed rezoning preserved the possibility of single-family homes, and that any multi-family housing would not result in high-rise apartments due to height and density restrictions. Second, Nassau County Executive Suozzi, the author of the County's Real Estate Consolidation Plan, emphasized the County's need to sell the Social Services Site to a private developer, as well as the benefits of developing multi-family housing on the property. During this discussion, a member of the audience interrupted Suozzi.

> Thomas Suozzi: Instead of putting commercial there or single family there, you do something right in between the two that creates a transition from the commercial area from one to the other. I guarantee you that it will be much better than what is there now, which is a building that is falling apart with a lot of problems in the building, a lot of problems going on around the building on a regular basis and a huge sea of parking. This will make it a much more attractive area for the property. Multi-family housing will be more likely to generate empty nesters and single people

> moving into the area as opposed to families that are going to create a burden on your school district to increase the burden on the school district.
>
> Unidentified Speaker: You say it's supposed to be upscale.
>
> Thomas Suozzi: It's going to be upscale. Single people and senior citizen empty nesters. If you sell your $2 million house in Garden City and you don't want to take care of the lawn anymore, you can go into . . . who lives in Wyndham for example?[*] It's a very upscale place. There's a lot of retirees that live there.

When Suozzi finished his presentation, the meeting was opened to questions from the public. The first question from the audience related to Trustee Bee's statements "last time," referring to the January 20, 2004 meeting of the Eastern Property Owners' Association.

> Lauren Davies: I'm just confused between what Mr. Suozzi said about the Social Services Building. You said you wanted it to be upscale, from what I understand from what Peter Bee said the last time is that they wanted it to be affordable housing. . . .
>
> Trustee Bee: Well, either I mis-spoke or you misheard, because I do not recollect using that phrase. If I did it was an inappropriate phrase. The idea was a place for Garden City's seniors to go when they did not wish to maintain the physical structure and cut the lawns and do all the various things. But not necessarily looking at a different style of life. In terms of economics.
>
> Thomas Suozzi: We're absolutely not interested in building affordable housing there and there is a great need for affordable housing, but Garden City is not the location. We need to build housing there. . . . We would generate more revenues to the County by selling it to upscale housing in that location. That is what we think is in the character of Garden City and would be appropriate there.
>
> Unidentified Speaker: How do you have control over what the developer does . . .
>
> Trustee Bee: Before the next speaker though, just to finish on that last remark, neither the County nor the Village is looking to create . . . so-called affordable housing at that spot.
>
> Unidentified Speaker: Can you guarantee that, that it won't be in that building?

In response to these questions, Suozzi indicated that the County "would be willing to put deed restrictions on any property that we sold" so "that it can't be anything but upscale housing." In response to further questioning, Suozzi stated "Don't take my word for it, we'll put whatever legal codifications that people want. This will not be affordable housing projects. That's number one." Gerard Fishberg, Garden City's counsel, further noted that the estimated sale prices for multi-family residential units "don't suggest affordable housing."

Throughout the remainder of the meeting, residents indicated their opposition to multi-family housing and their preference for single-family homes. One resident emphasized that the proposed multi-family development was not "in the flavor and character of what Garden City is now. Garden City started as a neighborhood of single family homes and it should remain as such. Others stated, to applause from the audience, that "we're not against residential, we're against multi-level residential. (Applause)." One resident expressed concern about the possibility of "four people or ten people in an apartment and nobody is going to know that."

In keeping with these statements, citizens repeatedly expressed concern about limiting the options of a developer. . . .

Another citizen expressed concerns about the possibility of what any multi-family housing might eventually become.

> Anthony Agrippina: We left a community in Queens County that started off similar, single family homes, two family homes, town houses that became—six story units. It was originally for the

[*] [Ed. note: The ellipses in this sentence appear in the full text of the opinion.]

> elderly, people who were looking to downsize. It started off that way. Right now you've got full families living in one bedroom townhouses, two bedroom co-ops, the school is overburdened and overcrowded.

In response, another resident emphasized that the only way to control such consequences was to restrict the zoning.

As at the previous meetings, residents also expressed concern about traffic and schools. County and Village officials reiterated that a transition to residential use, including multi-family housing, would generate far less traffic than the existing use of the Social Services Site.

> Thomas Suozzi: One thing that would happen is that you would have 1,000 less employees that work in that building, that would no longer be working there anymore.
>
> Sheila DiMasso: But, we would also have more traffic because of more people owning cars and leaving there in and out. As opposed to . . . [applause]
>
> Thomas Suozzi: You may want to clap for that, but that's irrational. (Applause)

In addition, Suozzi and Garden City officials tried to explain to citizens their view that the proposed multi-family housing would actually generate fewer schoolchildren than development of single-family homes.

> David Piciulo: If you have 311 units you will have more children potentially in there than 956 single family homes.
>
> Thomas Suozzi: That's not accurate. Based upon statistics, people spend their whole lives looking at this stuff. That's not true. So you may feel that way, but it's not accurate.
>
> David Piciulo: Those are statistics having to do with a national study. If you drive down into the neighborhood, the average home here has two kids. They're in the system for 15 years and you are going to have children in the system . . . let me just make a point.
>
> Gerard Fishberg: Not to argue with you, again, I don't think anybody has prejudged this. How many apartments are there in Wyndham?
>
> Michael Filippon: 312.
>
> Gerard Fishberg: How many school children are there in 312 apartments?
>
> Tom Yardley: Less than twenty.
>
> Gerard Fishberg: Less than twenty children in 312 apartments.

BFJ's Fish later testified that those residents who claimed to prefer single-family homes because of school impacts were "simply wrong."

In response to these questions Suozzi made clear that before any development project was approved at the Site, the developer would have to satisfy state environmental guidelines, including addressing concerns regarding traffic and impact on public services, such as schools. He further emphasized that these conclusions would be subject to public comment.

In March 2004, in the weeks after this meeting, a flyer began circulating around Garden City. The flyer stated, in relevant part:

> WILL GARDEN CITY PROPERTY VALUES DECREASE IF OVER 300 APARTMENTS ARE BUILT AT THE SITE OF SOCIAL SERVICES? . . .
>
> The Garden City Village Trustees are close to voting on how to zone this property. They might choose to zone it for multi-family housing (If Senator Balboni's current bill passes in June, as many as 30 of those apartments would be considered "affordable housing". According to this bill,

> "Affordable workforce housing means housing for individuals or families at or below 80% of the median income for the Nassau Suffolk primary metropolitan statistical area as defined by the Federal Department of housing and urban development." . . . NOT JUST GARDEN CITY INCOMES! . . .
>
> ISN'T OUR SCHOOL DISTRICT CROWDED ENOUGH NOW?
>
> The trustees are saying that there will be fewer additional students to the Garden City school district if there are 340 apartments or townhouses built at the "P ZONE" as opposed to 90 single family homes. HOW CAN THEY BE SURE OF THAT? ISN'T IT TRUE THAT MANY FAMILIES MOVE TO GARDEN CITY TO ASSURE THEIR CHILDREN OF A QUALITY EDUCATION? WHAT WILL BRING MORE STUDENTS, OVER 300 FAMILIES OR 90 FAMILIES?

The reference to "Senator Balboni's current bill" in the flyer related to legislation pending at the time which would impose affordable-housing requirements on developers on Long Island. The flyer reached Garden City Village Administrator Schoelle, who faxed it to Fish and at least one member of the Board of Trustees. The flyer also came to the attention of Trustee Lundquist.

At a Board meeting held on March 18, 2004, residents again raised concerns about the possibility of affordable housing at the Social Services Site. Schoelle's notes from that meeting indicate that residents expressed concern that the Balboni Bill might apply "retroactively." One resident urged decision-makers to "play it safe" with respect to the Balboni Bill and "vote for single family homes." . . .

In response to public pressure, BFJ and Garden City began modifying the rezoning proposal. In materials produced in April 2004, BFJ changed the proposal, reducing the number of multi-family units potentially available at the Social Services Site to 215. However, by a memorandum to the Board dated May 4, 2004, BFJ scrapped the proposed R–M zoning entirely. Instead, BFJ proposed rezoning the vast majority of the Social Services Site "Residential–Townhouse" ("R–T"), an entirely new zoning classification. The May 2004 proposal only preserved R– M zoning on the 3.03 acres of the Social Services Site west of County Seat Drive, and only by special permit. Thus, the development of multi-family housing would be restricted to less than 15% of the Social Services Site, and only by permit. BFJ's proposed description of the R–T zone defined "townhouse" as a "single-family dwelling unit."

Whereas the previous proposed rezoning took more than a year to come before the Board, the shift to R–T zoning moved rapidly through the Village's government. BFJ issued a final EAF for R–T rezoning in May 2004. Even though BFJ officials testified that a switch from R–M zoning to R– T zoning was a significant change, no draft EAF was ever issued for the R–T rezoning. In addition, the shift from the P– Zone to R–T zoning was proposed by the Board as Local Law No. 2–2004 and moved to a public hearing on May 20, 2004.

The Trustees further stated at this meeting that they hoped to have a final vote on the rezoning as soon as June 3, 2004, and that the bill had already been referred to the Nassau County Planning Commission. Explaining the switch, Fish offered the following rationale:

> This was, this was a conscious decision, and I think those of you who might have been at the last two . . . workshops, this was discussed in quite a bit of detail, that there was, there was a concern that if the whole 25 acres were developed for multi family it would generate too much traffic and it didn't serve, it didn't serve as a true transition. . . .
>
> So, that, the proposal has been modified where previously multi family would have been allowed in all 25 acres, as of right, the proposal's been modified so that it's no longer allowed at all as-of-right, you'd have to get a special permit for it, through the Trustees, and it is a condition of the permit is that it can only be to the west of County Seat Drive. So, in essence, what the Trustees have done, is they have reduced the multi family to less than 15 percent of [the] site.

At this meeting, a member of the Garden City community thanked the Board of Trustees for responding to the concerns of residents:

> My husband works twelve hour, fourteen hour days so that we can live here. We didn't inherit any money from anyone. We weren't given anything. We didn't expect anything from anyone. We worked very hard to live in Garden City because [of] what it is. And I feel like very slowly it's creeping away by the building that is going on. . . . And I just think to all of you, just keep, be strong, like, just keep Garden City what it is. That is why people want to come here. You know, it's just a beautiful, beautiful town, people would like to live here, but I just think, just think of the people who live here, why you yourselves moved here. You don't move here to live near apartments. You don't move here so that when you turn your corner there's another high-rise.

Toward the close of this meeting, a member of former Plaintiff ACORN spoke about the need for affordable housing in Nassau County and asked that Garden City consider building affordable housing. . . .

On June 3, 2004, the Garden City Board of Trustees unanimously adopted Local Law No. 2–2004 and the Social Services Site was rezoned R–T. The following month, Nassau County issued a Request for Proposals ("RFP") concerning the Social Services Site under the R–T zoning designation. The RFP stated that the County would not consider bids of less than $30 million.

Plaintiffs were unable to submit a bid meeting the specifications of the RFP. Ismene Speliotis, Executive Director of NYAHC/MHANY, analyzed the R–T zoning and concluded that it was not financially feasible to build affordable housing under R–T zoning restrictions at any acquisition price. Testifying at trial, Suozzi concurred with this assessment. . . . NYAHC and New York ACORN met with Suozzi and other County officials to discuss the possibility of including affordable housing on the Social Services Site. But the County did not reissue the RFP. . . .

The County ultimately awarded the contract to develop the Social Services Site to Fairhaven Properties, Inc. ("Fairhaven"), a developer of single-family homes, for $56.5 million, the highest bid. Fairhaven proposed the development of 87 single-family detached homes, and did not include any townhouses.

After the contract was awarded to Fairhaven, NYAHC prepared four proposals, or "pro formas," for development at the Social Services Site under the R–M zoning designation, with the percentage of affordable and/or Section 8 housing units of the 311 total rental units ranging from 15% to 25%. Plaintiffs' expert Nancy McArdle evaluated each proposal in conjunction with the racial/ethnic distribution of the available pool of renters and determined that, had NYAHC been able to build housing under any of the four proposals in accordance with the rejected R–M zoning designation, the pool of renters likely to occupy all units, including market-rate, affordable, and Section 8 units, would have likely been between 18% and 32% minority, with minority households numbering between 56 and 101. Under the proposal predicting 18% minority population, NYAHC would have been able to bid $56.1 million for the Social Services Site.

McArdle further analyzed the likely racial composition of the pool of homeowners who could afford to purchase single-family units potentially developed by Fairhaven. She determined that between three and six minority households could afford such a purchase. Thus, while the NYAHC proposals would likely increase racial diversity in Garden City, McArdle testified, the Fairhaven proposal would likely leave the racial composition of Garden City "unchanged." . . .

In finding intentional racial discrimination here, the district court applied the familiar Arlington *Heights* factors. Because discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it bears more heavily on one race than another may provide an important starting point." *Arlington Heights*. But unless a "clear pattern, unexplainable on grounds other than race, emerges," *id.*, "impact alone is not determinative, and the Court must look to other evidence," *id*. Other relevant considerations for discerning a racially discriminatory intent include "the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," "departures from the normal procedural sequence," *id.*, "substantive departures," and "the legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *id*.

Here, the district court premised its finding of racial discrimination primarily on two of these factors:

(1) impact, i.e. "the considerable impact that [the Village's] zoning decision had on minorities in that community"; and

(2) sequence of events, i.e. "the sequence of events involved in the Board's decision to adopt R–T zoning instead of R– M zoning after it received public opposition to the prospect of affordable housing in Garden City." The district court noted a history of racial discrimination in Garden City, but declined to place "significant weight" on this factor. Trial court opinion ("Although [past events] could tend to suggest that racial discrimination has historically been a problem in Garden City, the Court declines to place significant weight on them for various reasons.").

The district court first noted statistical evidence that the original R–M proposal would have created a pool of potential renters with a significantly larger percentage of minority households than the pool of potential renters for the zoning proposal ultimately adopted as law by Garden City. However, in making its finding of discrimination, the district court relied primarily on the sequence of events leading up to the implementation of R–T zoning. The court first noted that Garden City officials and BFJ were initially enthusiastic about R–M zoning. BFJ's proposal permitted the development of up to 311 multi-family units, and Trustee Bee expressed the opinion at a January 20, 2004 meeting that "Garden City demographically has a need for multi-family housing," and that "he would keep an open mind but he still felt the recommended zoning change were appropriate." Trial court opinion.

However, the district court concluded that BFJ and the Board abruptly reversed course in response to vocal citizen opposition to the possibility of multi-family housing, including complaints that affordable housing with undesirable residents could be built under this zoning. At a February 4, 2004 meeting, Trustee Bee stated that "neither the County nor the Village is looking to create . . . so-called affordable housing." BFJ and the Board subsequently endorsed the R–T proposal, which banned the development of multi-family housing on all but a small portion of the Social Services Site and then only by special permit.

The district court focused on the suddenness of this change. Although the P–Zone Committee had consistently recommended R–M zoning for eighteen months, R–T zoning went from proposal to enactment in a matter of weeks. The district court noted that BFJ's consideration of R–T zoning was not nearly as comprehensive and deliberative as that for R–M zoning. In addition, the court found it strange that members of the P–Zone Committee—the Village officials most familiar with the situation—were excluded from the discussions regarding R–T zoning. Indeed, after a final public presentation on the proposed R–M zoning in April 2004, Schoelle, Filippon, and Fishberg met with BFJ to review the public comments. For some unknown reason, members of the P–Zone Committee did not participate in this meeting, and neither did the Village's zoning counsel Kiernan. The district court also found it peculiar that Local Law 2–2004, adopting R–T zoning, was moved to a public hearing even though no zoning text had yet been drafted and no environmental analysis of the law's impact had been conducted. Thus, in rejecting Garden City's argument below that the adoption of R–T zoning was business as usual, the district court concluded that Garden City was "seeking to rewrite history."

Although now recognizing the oddness and abruptness of this sequence of events, Garden City argues that these facts should not raise any suspicion. The Village contends that because BFJ, the Village Trustees, and Village residents had discussed the zoning of the Site for more than a year, there was no need to spend additional time discussing the same issues once they settled on a preferable lower-density approach. While the adoption of R–T zoning may seem rushed, and appear to be an abrupt change from Garden City's prior consistent course of conduct, according to Garden City, this was actually just efficient local government. Given the amount of time already invested in studying the Social Services Site, R–T zoning could proceed more quickly through the legislative process. While this may be one reasonable interpretation of the facts, the district court was nevertheless entitled to draw the contrary inference that the abandonment of R–M zoning was an abrupt change and that the "not nearly as deliberative" adoption of R–T zoning was suspect. Indeed, it is a bedrock principle that "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

In considering the sequence of events leading up to the adoption of R–T zoning, the district court also focused closely on the nature of the citizen complaints regarding R– M zoning. Citizens expressed concerns about R–M zoning changing Garden City's "character" and "flavor." In addition, contrary to Garden City's contentions that any

references to affordable housing were isolated, citizens repeatedly and forcefully expressed concern that R– M zoning would be used to introduce affordable housing and associated undesirable elements into their community. Residents expressed concerns about development that would lead to "sanitation [that] is overrun," "full families living in one bedroom townhouses, two bedroom co-ops" and "four people or ten people in an apartment." Other residents requested that officials "guarantee" that the housing would be "upscale" because of concerns "about a huge amount of apartments that come and depress the market for any co-op owner in this Village."

The district court also noted Garden City residents' concerns about the Balboni Bill and the possibility of creating "affordable housing," specifically discussing a flyer warning that property values might decrease if apartments were built on the Site and that such apartments might be required to include affordable housing under legislation pending in the State legislature. This flyer came to the attention of at least two trustees, as well as Fish and Schoelle. Concerned about the Balboni Bill, Garden City residents urged the Village officials to "play it safe" and "vote for single family homes." Viewing this opposition in light of (1) the racial makeup of Garden City, (2) the lack of affordable housing in Garden City, and (3) the likely number of minorities that would have lived in affordable housing at the Social Services Site,—the district court concluded that Garden City officials' abrupt change of course was a capitulation to citizen fears of affordable housing, which reflected race-based animus.

We find no clear error in the district court's determination. The tenor of the discussion at public hearings and in the flyer circulated throughout the community shows that citizen opposition, though not overtly race-based, was directed at a potential influx of poor, minority residents. Indeed, the description of the Garden City public hearing is eerily reminiscent of a scene described by the Court in [an earlier, unrelated, case, *United States v. Yonkers Bd of Education*, 837 F.2d 1181 (2nd Cir 1987), involving public housing]:

> At the meeting . . . the predominantly white audience overflowed the room. The discussion was emotionally charged, with frequent references to the effect that subsidized housing would have on the "character" of the neighborhood. The final speaker from the audience . . . stated that the Bronx had been ruined when blacks moved there and that he supported the condominium proposal because he did not want the same thing to happen in Yonkers.

Yonkers. Although no one used explicitly racial language at the Garden City public hearing, the parallels are striking. Like the residents in Yonkers, Garden City residents expressed concern that R–M zoning would change the "flavor" and "character" of Garden City. Citizens requested restricting the Site's zoning to single-family homes in order to preserve "the flavor and character of what Garden City is now." Citizens repeatedly requested "guarantees" that no affordable housing would be built at the Social Services Site and that the development would only be "upscale." Expressing concerns about the sort of residents who might occupy an eventual complex, one resident feared that the proposed development "could have four people or ten people in an apartment and nobody is going to know that." And, as with the emotionally charged scene in Yonkers, Suozzi stated that citizens at the public hearing were "yelling at him." Finally, recalling the Yonkers resident who spoke regarding the Bronx being "ruined," one resident explained that he had left Queens because apartment buildings originally intended for the elderly resulted in "full families living in one bedroom townhouses, two bedroom co-ops, the school is overburdened and overcrowded. You can't park your car. The sanitation is overrun." Another resident stated that she had left Brooklyn to avoid exactly the sort of development potentially available for the Social Services Site.

The district court concluded that, in light of the racial makeup of Garden City and the likely number of members of racial minorities that residents believed would have lived in affordable housing at the Social Services Site, these comments were code words for racial animus. See *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074 (3d Cir.1996) (observing that it "has become easier to coat various forms of discrimination with the appearance of propriety" because the threat of liability takes that which was once overt and makes it subtle). "Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare. . . . Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms." *Id.* "Racially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications." *Smith v. Fairview Ridges Hosp*., 625 F.3d 1076 (8th Cir.2010).

Empirical evidence supports the reasonableness of the district court's conclusion. Indeed, "research suggests that people believe that the majority of public housing residents are people of color, specifically, African American." See Carol M. Motley & Vanessa Gail Perry, Living on the Other Side of the Tracks: An Investigation of Public Housing Stereotypes, 32 *J. Pub. Pol'y & Marketing* 48 (2013); see also *id.* ("In the United States, public housing residents are perceived as predominantly ethnic peoples (mainly African American). . . ."). Here, the comments of Garden City residents employ recognized code words about low-income, minority housing. For example, "opponents of affordable housing provide subtle references to immigrant families when they condemn affordable housing due to the fear it will bring in 'families with lots of kids.'" Mai Thi Nguyen, Victoria Basolo & Abhishek Tiwari, Opposition to Affordable Housing in the USA: Debate Framing and the Responses of Local Actors, 30 *Housing, Theory & Soc'y* 107 (2013). Here, invoking this stereotype, Garden City residents complained of "full families living in one bedroom townhouses," and "four people or ten people in an apartment," as well as the possibility of "overburdened and overcrowded" schools. In addition, research shows that "opponents of affordable housing may mention that they do not want their city to become another 'Watts' or 'Bayview–Hunters–Point,' both places with a predominantly African–American population." Nguyen, at 123. So too here, Garden City residents expressed concerns about their community becoming like communities with majority-minority populations, such as Brooklyn and Queens. Moreover, "a series of studies have shown that when Whites are asked why they would not want to live near African–Americans (no income level is indicated in the question), common responses relate to the fear of property value decline, increasing crime, decreasing community quality (e.g. physical decay of housing, trash in neighborhood, and unkempt lawns) and increasing violence." Nguyen. Repeatedly expressing concerns that R–M zoning would lead to a decline in their property values as well as reduced quality of life in their community, Garden City residents urged the Board of Trustees to "keep Garden City what it is" and to "think of the people who live here." Considering these statements in context, we find that the district court's conclusion that citizen opposition to R–M zoning utilized code words to communicate their race-based animus to Garden City officials was not clearly erroneous. See *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir.1982) (finding "'camouflaged' racial expressions" based on concerns "about an influx of 'undesirables,'" who would "'dilute' the public schools"). While another factfinder might reasonably draw the contrary inference from these facially neutral statements, "the district court's account of the evidence is plausible in light of the record viewed in its entirety."

In response, Garden City notes that its officials testified that they did not understand the citizen opposition to be race-based. But, quite obviously, discrimination is rarely admitted. See *Rosen v. Thornburgh*, 928 F.2d 528 (2d Cir.1991) ("A victim of discrimination is . . . seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence."); *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir.1999) ("An employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent."). The district court reached its conclusion after a lengthy trial, during which the court had the opportunity to hear and evaluate the testimony of numerous witnesses, including all of the relevant Garden City officials. Moreover, there is ample evidence from which to question the credibility of these officials. Trustee Lundquist stated during his trial testimony that he was unsure if Garden City—an overwhelmingly white community—was majority black. Similarly, Building Superintendent Filippon stated that he did not know if Garden City was majority white. Trustee Negri further stated that he could not recall if he had ever had a conversation about affordable housing.

In addition to these incredible statements, which the district court would have been entitled to discredit, there was abundant evidence from which the district court could find that Garden City officials clearly understood residents' coded objections to R–M zoning. During his testimony, Village Administrator Schoelle indicated that he knew low-income residents of Garden City were primarily African Americans and Latinos. In addition, County Executive Suozzi testified to his knowledge that race is generally a factor in opposition to affordable housing in Nassau County, and that Garden City residents' opposition to affordable housing was motivated, at least in part, by discriminatory animus. Furthermore, employing the code words apparently employed by Garden City residents, Trustee Negri testified that housing occupied by low-income minorities is not consistent with the "character" of Garden City.

Garden City's argument appears to boil down to the following—because no one ever said anything overtly race-based, this was all just business as usual. But the district court was entitled to conclude, based on the Arlington Heights

factors, that something was amiss here, and that Garden City's abrupt shift in zoning in the face of vocal citizen opposition to changing the character of Garden City represented acquiescence to race-based animus. . . .

Jones v. DeSantis
2020 WL 2618062 (N.D. Fl. 2020)

[For nearly two centuries, Florida has prohibited felons from voting. In 2018, Florida voters enacted a constitutional amendment by referendum which restored voting rights to most felons "upon completion of all terms of [the felon's] sentence." In 2019, the Florida Legislature enacted a statute, SB7066, which explicitly included financial obligations within the "terms of sentence" that must be satisfied in order for a felon to have his voting rights restored. These obligations included fines, costs, and restitution awards. The Florida Supreme Court later interpreted "all terms of sentence" to include those obligations, but did not address what constituted "completion" of those obligations. SB7066 pre-dated that judicial interpretation of Amendment 4; moreover, it defined those obligations to include fines, costs, and restitution awards that, as often happens in Florida, were converted into civil liens at the time of sentencing. This conversion takes collection of those obligations out of the criminal justice system and places them in the civil justice system. SB7066 nevertheless required such civil obligations to be satisfied before a felon could regain voting rights.

The inequality alleged in *Jones* was based on the fact that felons who have paid or were able to pay their financial obligations had their voting rights restored, while those who could not pay remained ineligible to vote. The court eventually held that the law unconstitutionally burdened the right to vote based on wealth. In addition to that successful claim, the plaintiffs made a variety of other claims, including claims that that the law discriminated on the basis of both race and gender. The court's discussion of those claims is excerpted here.]

XI. Race Discrimination

The Gruver plaintiffs assert a claim of race discrimination. This order sets out the governing standards and then turns to the claims and provisions at issue.

A. The Governing Standards

To prevail on a claim that a provision is racially discriminatory, a plaintiff must show that race was a motivating factor in the provision's adoption. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252 (1977) [Note *supra.* this Chapter]; Washington v. Davis (1976) [*Supra.* this Chapter]. A racially disparate impact is relevant to the question whether race was a motivating factor, but in the absence of racial motivation, disparate impact is not enough.

If race was a motivating factor, the defendant may still prevail by showing that the provision would have been adopted anyway, even without the improper consideration of race.

B. Amendment 4

The plaintiffs make no claim that race was a motivating factor in the voters' approval of Amendment 4. The amendment was intended to restore the right to vote to a large number of felons. It was an effort to expand, not contract, the electorate. Most voters probably were aware that the proportion of African Americans with felony convictions exceeds the proportion of whites with felony convictions—this is common knowledge. But if anything, the voters' effort was to restore the vote to African American felons, as well as all other felons, not to withhold it.

C. The Florida Supreme Court Ruling

The plaintiffs also do not assert the Florida Supreme Court was motivated by race when it issued its advisory opinion holding that "all terms of sentence," within the meaning of Amendment 4, include financial obligations.

D. SB7066

The plaintiffs do assert that SB7066 was motivated by race. The State makes light of the argument, asserting that SB7066 merely implements Amendment 4, and that SB7066, like Amendment 4, expands, not contracts, the electorate. But that is not so. SB7066 includes many provisions that go beyond Amendment 4 itself, including some that limit Amendment 4's reach in substantial respects. Amendment 4 had already expanded the electorate; SB7066 limited the expansion.

The State also offers lay opinion testimony that key legislators were not motivated by racial animus—testimony that would not be admissible over objection, proves nothing, and misses the point. It is true, and much to the State's credit, that the record includes no evidence of racial animus in any legislator's heart—no evidence of racially tinged statements, not even dog whistles, and indeed no evidence at all that any legislator harbored racial animus.

Under *Arlington Heights*, though, the issue is not just whether there was racial animus in any legislator's heart, nor whether there were other reasons, in addition to race, for a legislature's action. To establish a prima facie case, a plaintiff need only show that race was a motivating factor in adoption of a challenged provision.

The issue is far more serious than the State recognizes. Indeed, the issue is close and could reasonably be decided either way.

Four aspects of SB7066 are adverse to the interests of felons seeking reenfrachisement and are worthy of discussion here.

SB7066's most important provision, at least when it was adopted, defined "all terms of sentence," as used in Amendment 4, to include financial obligations. The Florida Supreme Court later ruled that this is indeed what this phrase means, rendering this part of SB7066 inconsequential. This does not, however, establish that the Legislature's treatment of this issue was not motivated by race.

When SB7066 was enacted, it was possible, though not likely, that the court would reach a different result. More importantly, it was possible the court would not rule on this issue before the 2020 election, and that felons with unpaid financial obligations would be allowed to register and vote. Indeed, this was already occurring. Some Supervisors of Elections believed Amendment 4 did not apply to financial obligations. So SB7066's provision requiring payment of financial obligations was important.

SB7066's second most important provision was probably its treatment of judicial liens. Florida law allows a judge to convert a financial obligation included in a criminal judgment to a civil lien. Judges often do this, usually because the defendant is unable to pay. The whole point of conversion is to take the obligation out of the criminal-justice system—to allow the criminal case to end when the defendant has completed any term in custody or on supervision.

When a defendant's criminal case is over, and the defendant no longer has any financial obligation that is part of or can be enforced in the criminal case, one would most naturally conclude the sentence is complete. The Senate sponsor of [a competing bill] advocated this view. But the House sponsor's contrary view prevailed, and, under SB7066, conversion to a civil lien does not allow the person to vote.

This result is all the more curious in light of the State's position in this litigation that when a civil lien expires, the person is no longer disqualified from voting. So the situation is this. The State says the pay-to-vote system's legitimate purpose is to require compliance with a criminal sentence. When the obligation is removed from the criminal-justice system, the person is still not allowed to vote. But when the obligation is later removed from the civil-justice system—when the civil lien expires—the person can vote. Curious if not downright irrational.

In any event, it cannot be said that on the subject of civil liens, SB7066 simply followed Amendment 4.

The third SB7066 provision that bears analysis is the registration form it mandates. The form is indefensible, provides no opportunity for some eligible felons to register at all, and is sure to discourage others. It is so obviously

deficient that its adoption can only be described as strange, as was the Legislature's failure to correct it after the State was unable to defend it in any meaningful way in this litigation and actively sought a legislative cure.

The fourth aspect of SB7066 that warrants attention is its failure to provide resources to administer the system the statute put in place. The Legislature was provided information on needed resources and surely knew that without them, the system would break down. SB7066 provided no resources.

SB7066 included many other provisions, some favorable to felons seeking reenfranchisement. The issue on the plaintiffs' race claim is not whether by enacting SB7066, the Legislature adopted the only or even the best reading of Amendment 4 or implemented the amendment in the best possible manner. The issue is whether the Legislature was motivated, at least in part, by race.

SB7066 passed on a straight party-line vote. Without exception, Republicans voted in favor, and Democrats voted against. The defendants' expert testified that felon reenfrachisement does not in fact favor Democrats over Republicans. He based this on studies that might or might not accurately reflect the situation in today's Florida and might or might not apply to felons with unpaid LFOs as distinguished from all felons. What is important here, though, is not whether the LFO requirement actually favors Democrats or Republicans, but what motivated these legislators to do what they did.

When asked why, if reenfranchisement has no partisan effect, every Republican voted in favor of SB7066 and every Democrat voted against, the State's expert suggested only a single explanation: legislators misperceived the partisan impact. As he further acknowledged, it is well known that African Americans disproportionately favor Democrats. He suggested no other reason for the legislators' posited misperception and no other reason for the straight party-line vote.

This testimony, if credited, would provide substantial support for the claim that SB7066 was motivated by race. If the motive was to favor Republicans over Democrats, and the only reason the legislators thought these provisions would accomplish that result was that a disproportionate share of affected felons were African American, prohibited racial motivation has been shown. The State has not asserted the Legislature could properly consider party affiliation or use race as a proxy for it and has not attempted to justify its action under *Hunt v. Cromartie*, 526 U.S. 541 (1999) (noting that a state could engage in political gerrymandering, "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact"). . . .

Before turning to the contrary evidence, a note is in order about two items that do not show racial motivation.

First, the House sponsor of SB7066 emphatically said during legislative debate that the bill was simply a faithful implementation of Amendment 4—in effect, "nothing to see here." This is not true. SB7066 included much that was not in Amendment 4, even as later construed by the Florida Supreme Court. The plaintiffs say this "faithful steward" argument was a pretext to hide racial motivation. And the plaintiffs are correct that pretextual arguments often mask prohibited discrimination. But there are other, more likely explanations for the sponsor's argument. It was most likely intended simply to garner support for SB7066 and perhaps to avoid a meaningful discussion of the policy choices baked into the statute. The argument says nothing one way or the other about the policy choices or motivation for the legislation.

Second, the House sponsor also said during debate that he had not sought information on racial impact and had not considered the issue at all. The plaintiffs say this shows willful blindness to the legislation's obvious racial impact and was again a pretext for racial discrimination. Properly viewed, however, the sponsor's statement does not show racial motivation. It probably shows only an awareness that a claim of racial discrimination was possible, perhaps likely, and a reasonable belief that, if the sponsor requested information on racial impact, the request would be cited as evidence of racial bias. *See, e.g., N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (citing the request for and use of data on race in support of a finding of intentional race discrimination in voting laws). And while any suggestion that the sponsor did not know SB7066 would have a racially disparate impact could reasonably be labeled pretextual, that is not quite what the sponsor said. On any fair reading, the sponsor's assertion was simply that race should not be a factor in the analysis—an entirely proper assertion. The statement says nothing one way or the other about whether perceived partisan impact was a motivating factor for the legislation, about whether

the perceived partisan impact was based on race, or about whether race was thus a motivating factor in the passage of SB7066.

In sum, the plaintiffs' race claim draws substantial support from the inference—in line with the testimony of the State's own expert—that a motive was to support Republicans over Democrats, coupled with the legislators' knowledge that SB7066 would have a disparate impact on African Americans, who vote for Democrats more often than for Republicans. The plaintiffs' other evidence adds little.

There are also other explanations for these SB7066 provisions, as well as evidence inconsistent with the inference of racial motivation.

First, a substantial motivation for the SB7066 definition of "all terms of sentence" was the belief that this is what Amendment 4 provides. This was not a pretext to hide racial motivation. Indeed, as it turns out, the view was correct. The Florida Supreme Court has told us so.

Second, while it is less clear that SB7066's treatment of judicial liens was based on an honest belief that this is what Amendment 4 requires, it is also less clear that this was an effort to favor Republicans over Democrats or that the only reason for believing this provision would have that effect was race.

Third, while the SB7066 registration form is indefensible, there is no reason to believe this was related to race. A more likely explanation is inattention or shoddy craftsmanship or perhaps lack of concern for felons of all races.

Fourth, there is no reason to believe the failure to provide resources was based on race. A more likely explanation is budgetary.

More importantly, there are other provisions in SB7066 that promote, rather than restrict, reenfranchisement. SB7066 provides that to be reenfranchised, a felon need not pay financial obligations that are not included in the four corners of the sentencing document or that accrue later. SB7066 allows courts to modify sentences to eliminate [felons' financial obligations] if specific conditions are met. And of less significance—it provides a remedy that, if not entirely illusory, will rarely matter—SB7066 authorizes courts to allow defendants to satisfy LFOs through community service. These provisions would not have made it into SB7066 if the only motivation had been to suppress votes or to favor Republicans over Democrats.

On balance, I find that SB7066 was not motivated by race.

A note is in order, too, about the limited effect of this finding.

A contrary finding for the SB7066 definition of "all terms of sentence" would make no difference, for two reasons. First, for this provision, the State would prevail on its same-decision defense; the Florida Supreme Court's decision now makes clear the State would read "all terms of sentence" to include financial obligations, with or without SB7066. Second, striking this part of SB7066 as racially discriminatory would make no difference—the Florida Supreme Court's decision would still be controlling. . . .

The bottom line: the plaintiffs have not shown that race was a motivating factor in the enactment of SB7066.

XII. Gender Discrimination

The McCoy plaintiffs assert the pay-to-vote requirement discriminates against women in violation of the Fourteenth Amendment's Equal Protection Clause and violates the Nineteenth Amendment, which provides that a citizen's right to vote "shall not be denied or abridged ... on account of sex."

To prevail under the Fourteenth Amendment, the plaintiffs must show intentional gender discrimination—that is, the plaintiffs must show that gender was a motivating factor in the adoption of the pay-to-vote system. This is the same standard that applies to race discrimination, as addressed above.

The plaintiffs assert the Nineteenth Amendment should be read more liberally, but the better view is that the standards are the same. . . .

On the facts, the plaintiffs' theory is that women with felony convictions, especially those who have served prison sentences, are less likely than men to obtain employment and, when employed at all, are likely to be paid substantially less than men. The problem is even worse for African American women. This pattern is not limited to felons; it is true in the economy at large.

As a result, a woman with [felony-based financial obligations] is less likely than a man with the same [obligations] to be able to pay them. This means the pay-to-vote requirement is more likely to render a given woman ineligible to vote than an identically situated man.

This does not, however, establish intentional discrimination. Instead, this is in effect, an assertion that the pay-to-vote requirement has a disparate impact on women. For gender discrimination, as for race discrimination, see supra Section IX, disparate impact is relevant to, but without more does not establish, intentional discrimination. Here there is nothing more—no direct or circumstantial evidence of gender bias, and no reason to believe gender had anything to do with the adoption of Amendment 4, the enactment of SB7066, or the State's implementation of this system.

Moreover, the pay-to-vote requirement renders many more men than women ineligible to vote. This is so because men are disproportionately represented among felons. As a result, even though the impact on a given woman with [felony-based financial obligations] is likely to be greater than the impact on a given man with the same [obligations], the pay-to-vote requirement overall has a disparate impact on men, not women. Even if disparate impact was sufficient to establish a constitutional violation, the plaintiffs would not prevail on their gender claim.

Note: Applying the Intent Requirement

1. What do you think about these two courts' application of the *Arlington Heights* factors? Note how carefully the appellate court in *Mhany* phrases its task in reviewing the trial court's findings about intent. What does that care—and the review suggested by that standard—suggest about the intent requirement?

2. Despite the fact-intensiveness of the discriminatory intent inquiry, you should not assume that a district court's decision about discriminatory intent is absolutely immune from appellate correction. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court unanimously affirmed the appellate court's decision reversing the trial court's finding of no discriminatory intent. (Justice Powell did not participate.) *Hunter* dealt with a challenge to a provision of the Alabama Constitution, enacted in 1901, that disenfranchised persons convicted of certain crimes. Historical evidence made it clear that the provision's aim was to disenfranchise African-Americans, even though evidence existed suggesting that the delegates to the constitutional convention also intended to disenfranchise poor whites who were seen as potential populist allies of African-Americans. The Court wrote:

> The evidence of legislative intent available to the courts below consisted of the proceedings of the [1901 Alabama constitutional] convention, several historical studies, and the testimony of two expert historians. Having reviewed this evidence, we are persuaded that the Court of Appeals was correct in its assessment [finding discriminatory intent]. That court's opinion presents a thorough analysis of the evidence and demonstrates conclusively that [the provision] was enacted with the intent of disenfranchising blacks.

The Court thus concluded that the appellate court had correctly concluded that the district court had committed the "clear error" required to set aside the district court's fact-finding under the Federal Rule of Civil Procedure applicable to appellate review of trial court fact-findings (Rule 52(a)).

Is there something about the particular fact at issue in *Hunter* that perhaps made the Court more comfortable upholding the appellate court's reversal of the trial court's finding of no intent?

3. The *Mhany* opinion notes that, today, discrimination is usually not explicit—that is, there are relatively few situations where the government expressly classifies persons based on their race. The major exception is in affirmative action cases, where the government asserts that its race consciousness was justified by benign goals. This irony—that "discriminatory" intent is most easily found in cases of so-called "benign" or "affirmative action" cases—has not been lost on scholars, who cite it as a reason to critique the intent requirement more generally.

Similarly, the district court in *Jones* states that the issue was not "whether there was racial animus in any legislator's heart," but rather, whether the *Arlington Heights* factors revealed that race was a motivating factor in the legislature's decision. Leaving aside for the moment the appropriateness of the discriminatory intent requirement more generally, how would you guide courts' determinations of whether a given government action, while neutral on its face, was nevertheless motivated by a desire to classify on some suspicious ground, such as race or sex?

4. Consider, finally, the intent requirement itself, apart from questions about how to apply it. While no justice expressly dissented from *Davis*'s announcement of that requirement, some scholars have sharply criticized it. They call instead for some version of an effects test, in which disparate results on the alleged ground (*e.g.*, race) triggers more searching judicial review without a formal inquiry into whether that disparate impact was the result of intentional government action. Do you agree with Justice White's objection in *Davis* that an effects test would necessarily be unmanageable?

How did the *Mhany* court's application of the intent test deal with the disparate impact of the town's zoning decision? Is it accurate to say that that court did in fact apply something akin to a modified effects test? How did the *Jones* court deal with "the inference . . . that a motive [of the legislature] was to support Republicans over Democrats, coupled with the legislators' knowledge that SB7066 would have a disparate impact on African Americans, who vote for Democrats more often than for Republicans"?

Part V: General Fourteenth Amendment Issues

Chapter 18: The Problem of "State Action"

D. Cross-Cutting State Action Issues

***Insert at end of page 1106*:**

Problem: Postal Services in a Church Building

The following is an excerpt of a case in which a plaintiff alleged that the United States Postal Service, a government entity, violated the First Amendment's prohibition on government establishment of religion when it entered into an agreement with a church organization to host and operate a "Contract Postal Unit" (which, as you'll read below, is essentially a satellite post office). As you'll see, it was the private church organization that was actually expressing religious views; nevertheless, the plaintiff claimed that the Postal Service's involvement with that organization, and the organization's performance of mailing functions, was such that the church's religious expression should be imputed to the federal government.

This excerpt presents the facts of this case. How do you think the court in this case should have analyzed the state action issue?

A. THE POSTAL SERVICE AND CONTRACT POSTAL UNITS (CPUs).

The Postal Service . . . acts as an independent establishment of the executive branch of the federal government. The general duties of the Postal Service are to plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees, and to receive, transmit, and deliver written and printed matter and parcels throughout the United States and the world. See 39 U.S.C. § 403. Congress has bestowed the Postal Service with the power "to provide and sell postage stamps and other stamped paper, cards, and envelopes and to provide such other evidences of payment of postage and fees as may be necessary or desirable."

In certain circumstances, the Postal Service enters into contracts establishing CPUs, which are distinguishable from traditional, government-run "official" post offices (also known as "classified units") staffed and operated by Postal Service employees. The Postal Service's Glossary of Postal Terms defines a CPU as

> "a postal unit that is a subordinate unit within the service area of a main post office. It is usually located in a store or place of business and is operated by a contractor who accepts mail from the public, sells postage and supplies, and provides selected special services (for example, postal money order or registered mail)."

CPUs are operated by persons who are not postal employees. CPUs are not permitted to provide products from competing services such as Federal Express or the United Parcel Service, but they may conduct non-postal business on the premises in an area that is separate and distinct from the postal products. All postal funds must be kept separate from the non-postal funds.

The Postal Service relies upon CPUs to bring postal services to areas in which the Postal Service has determined that the establishment of a classified unit would be unfeasible. There are approximately 5,200 CPUs nationwide, and they are currently operated in, among other places, colleges, grocery stores, pharmacies, quilting shops, and private residences. . . .

Each CPU has a contracting officer representative appointed to oversee that CPU. The contracting officer representative is responsible for administering the contract. Once a CPU contract has been awarded, the contracting

officer representative has the responsibilities of conducting on-site reviews, performing an annual review of the CPU's bond, conducting periodic financial reviews with an annual audit, and reviewing the operating/service hours at the CPU. There is no required schedule that a contracting officer representative must keep with regard to a CPU, although he must conduct on-site reviews "periodically."

B. THE SINCERELY YOURS, INC. CONTRACT POSTAL UNIT

. . . Before the CPU contract [at issue in this case] was awarded to the Church . . . , the Town of Manchester had two prior CPUs in operation, the Weston Pharmacy CPU and the Community Place CPU . . . . Boyne [the postmaster for that community] was the contracting officer representative for the Community Place CPU from 1998 through October 2001, when the Community Place CPU closed.

. . . There was substantial community interest generated by this closing, as the community sought to find a suitable replacement. . . . [On] November 20, 2001, the Postal Service awarded the CPU contract to the Church. . . . On October 9, 2003, the Church and the Postal Service modified the CPU contract by replacing the Church with [Sincerely Yours, Inc. (SYI)], a corporation set up by the Church for the purpose of establishing the CPU, and SYI began to run the CPU ("the SYI CPU").

Pursuant to the terms of the SYI CPU contract, the interior and exterior of the SYI CPU premises are to be kept clean, neat, uncluttered, and in good repair. The SYI CPU must contain signage indicating that the establishment is a contract postal unit and providing the address of the nearest Postal Service Administrative Office. All money collected at the SYI CPU is the property of the Postal Service, and all payments to SYI by the Postal Service are made in arrears after each Postal Service accounting period. As part of the SYI CPU contract, the Postal Service was required to pay for, among other things, the build-out of the SYI CPU counter and the construction of post office boxes at the SYI CPU. SYI was to pay for all other renovations to the building that housed the SYI CPU. Under the terms of the SYI CPU contract, SYI receives, as compensation, 18% of all sales made at the SYI CPU and 33% of all post office box rental proceeds. As the contracting officer representative, Boyne (or one of his supervisors) conducts periodic on-site reviews of the SYI CPU to ensure that SYI is in compliance with the contract; Boyne's contact and oversight of the SYI CPU is, however, minimal. SYI runs the day-to-day operations of the SYI CPU, and SYI has the authority to hire and fire its CPU employees. SYI pays for its employees to receive training from the Postal Service with regard to running a CPU; this training includes learning about accounting procedures and equipment operation. SYI employees do not, however, wear Postal Service uniforms.

C. DISPLAYS IN THE SYI CPU

As stated above, the Church is a religious organization. . . . The SYI CPU contains both religious and non-religious displays. The exterior wall of the SYI CPU, which faces the street, has a label with the stylized eagle of the Postal Service indicating that the premises contains a Postal Service contract postal unit. The sign over the threshold to the building reads "Sincerely Yours." Another sign on the outside of the SYI CPU reads, in cursive type, "Sincerely Yours, Inc." and, in print type, "United States Contract Post Office."

The interior of the SYI CPU contains evangelical displays, including posters, advertisements, artwork, and photography, which change at various times during the year. Upon entering the SYI CPU, a postal counter, built by the Postal Service, sits immediately to the customer's right; behind the counter is a slat wall, also built by the Postal Service. In their submissions to the court, the parties describe the religious displays in the SYI CPU as follows:

(1) On the wall directly to the right of the postal counter and slat wall is a large religious display that informs customers about Jesus Christ and invites them to submit a request if they "need prayer in their lives." . . .

(2) Directly on the postal counter adjacent to this display sits a pile of "prayer cards" and a box into which postal service customers can put their prayer requests. . . .

(3) There is another display in the SYI CPU containing a framed advertisement for World–Wide Lighthouse Missions, the missionary organization incorporated by the Church to which the SYI CPU's profits are donated. This display,

which sits directly opposite a shelving unit containing official USPS postal supplies and forms and above a table used by customers filling out USPS paperwork, offers biblical quotations and explains that the organization is "Endeavoring to Reach the World with the Love of Jesus Christ, one life at a time."

(4) Directly to the right of the World–Wide Lighthouse Missions display is yet another display that provides additional information about World–Wide Lighthouse Missions . . . . To the right of this display, immediately to the left of the Postal Service postal boxes, is a donation box, decorated with World–Wide Lighthouse Missions mission photographs.

(5) A "World–Wide Lighthouse Missions" coin donation jar, decorated with mission photographs, sits on the postal counter.

(6) To the left of the postal counter, a television monitor displays Church-related religious videos directly ahead, and in plain view, of customers waiting in line at the postal counter. . . .

(7) Above the official Postal Service rental post boxes and on the wall across from the transaction counter are various 8 ½″ x 14″ photographs of a number of the Church's events. Among these photographs is a picture of "Wally," a character who delivers Bibles, and conveys religious messages through puppets acting out skits, to children in the community. Wally is depicted standing beside George Washington and Abraham Lincoln.

(8) In addition to the above-listed displays, the SYI CPU features additional seasonal displays, including a large extended crèche, which is displayed in the SYI CPU's storefront window during the Christmas holiday season. In addition, there are, at various times, video presentations displayed on a television set inside the SYI CPU.

For its part, the Postal Service states that it does not encourage or induce SYI to display the religious materials in the SYI CPU. On the SYI CPU transaction counter, there is a sign, provided by the Postal Service, which reads: "The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit." To the right of this disclaimer is another sign, which reads: "[The SYI] United States Contract Postal Unit is operated by the Full Gospel Interdenominational Church. Thank you for your patronage." The Intervenor Defendants maintain that SYI does not permit its employees to proselytize at the SYI CPU, and that, if a SYI CPU customer requests a prayer, SYI employees are instructed to refer such customers to the Church itself. . . .

Problem: City Involvement with a Neighborhood Association

The City of Shoreline maintains a "Community Promotion Program" (CPP), which seeks to assist neighborhood associations in Shoreline with organizing and operating. One of the ways the CPP does this is by providing funding for such associations. In order to receive CPP funding, a neighborhood association must have (1) an elected leadership board and (2) duly enacted bylaws that, among other things, delineate the geographical boundaries of the association and specify "a democratic process" for electing the board.

The CPP also features a grievance procedure by which residents could complain to the CPP that a city-funded association is failing to satisfy these criteria. If the administrator of the CPP concludes that an association's bylaws do not satisfy these criteria, she may recommend that the association revise its bylaws and practices. If she concludes that the association has continued to fail to satisfy these criteria, her only recourse is to withdraw CPP funding. The North Shoreline Neighborhood Association ("NSNA" or "Association") receives such funding, as well as funding from private sources.

Last year a group of residents of the North Shoreline neighborhood complained that their applications to run for leadership positions in the Association were unfairly denied and put up

signs in the neighborhood explaining their position. The NSNA rejected the complaint and the residents appealed to the CPP using its grievance process. The CPP also rejected the complaint. However, it recommended that the Association revise its bylaws to be clearer about the NSNA's election process and residents' eligibility to run for leadership positions. The CPP tasked Tom Ramirez, a city-employed "neighborhood empowerment counselor" to work with the Association on the revision process. After consulting with Ramirez, the NSNA adopted revised bylaws. Those bylaws provided more clarity with regard to the election process, but they also provided that "a resident who has engaged in defamatory conduct against the Association or failed to engage constructively with the Association over the past year" would be barred from running for a board position.

The disgruntled residents sued the Association, claiming that the new bylaws punished them for their speech criticizing the Association, and thus violated their First Amendment rights. When their brief turned to the state action issue, it argued that "the city was responsible for the deprivation of their First Amendment rights because the city commanded and encouraged the Association by exercising coercive power or overtly or covertly significantly encouraging" it to act unconstitutionally. In particular, the residents argued that the city encouraged the adoption of the new bylaws by both adopting a grievance procedure and requiring neighborhood organizations to have democratic processes and elections as "preconditions" for the receipt of public funds.

How likely is the court to find state action in this case? Why or why not? What facts would help you make that determination with more confidence? Why would those facts help you?