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Part I: The Branches of the Federal Government

Chapter 1: The Judicial Power

B. Congressional Checks on the Judicial Power

1. Jurisdiction

Insert at the bottom of page 34:

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.

Assume the Court applies the *Schor* balancing test. Does Treadwell's argument prevail under that test?

2. Other Means of Congressional Control Over the Courts

Insert at page 45, 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 105, before Subpart (c):

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?

Problem: Hacking PINs

In 2009, Congress enacted a banking reform law that required banks to take special care to guard customers' passwords, such as those controlling debit cards and access to online banking services. That law gave any person a right to sue if their passwords were disclosed to any third party without the customer's consent.

In 2024, Mary Mendoza learned that her Bank of Illinois debit card password (her "personal identification number" or "PIN") had been hacked. She sues Bank of Illinois. The Bank responds by arguing that she lacked standing to sue. The Bank points out that the hack was detected early enough to prevent any financial loss to Mendoza; thus, it argues that she did not suffer a concrete harm and therefore lacked standing.

Is the Bank correct? What would you want to know before deciding that question?

c. Ripeness

***Insert at page 112, 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 119:

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?

Problem: Placement on a No-Fly List

Keji Fukre is a U.S. citizen who was born and raised in Sudan before he moved to Chicago in 2005 and became a U.S. citizen in 2011. Upon traveling on business to Sudan in 2018 he was notified by U.S. Embassy personnel in Sudan that he would not be allowed to fly back

home because he had been placed on the U.S. Government's Terrorist No-Fly List. Fukre sued the U.S. Government for failing to give him an explanation for his placement on the list and for placing him on the list for unconstitutional reasons, for example, because he attended a particular mosque near his Chicago home and declined the government's demand that he become an informant about activities at that mosque. Despite filing the lawsuit, Fukre ended up having to live in Sudan for several years until the government relented and removed him from that list. Upon removing him from the list, the government moved to have Fukre's lawsuit dismissed as moot. In support of that motion, the government provided an affidavit from the official in charge of the No-Fly List, stating that he "will not be placed on the No-Fly List in the future based on the currently available information."

What are the strongest arguments for finding that Mr. Fukre's lawsuit is or is not moot? What other facts would you want to know before you can reach a more definitive answer to that question?

Chapter 2: The Distribution of National Regulatory Powers

B. Presidential Immunity from Judicial Process

***Insert at the bottom of page 164*:**

Note: A Current President's Immunity from Indictment

While *Trump* resolved the question of a former president's immunity from criminal prosecution, it is worth noting that, before that case, other views were expressed on analogous issues. 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.

Again, *Trump* presumably moots the analysis in the following memos: if even a *former* President enjoys the broad immunity the Court found the President to enjoy, presumably a *sitting* President enjoys at least that much immunity, if not more. Nevertheless, these memos provide a different perspective on the immunity question in general and the particular question of a sitting President's immunity.

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 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

[13] The Federalist, No. 69: "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.

> 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."

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 resident 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

[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].

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.

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*, 520 U.S. 681 (1997) (Note *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"? Finally, does anything in *Trump* change your view on the question of prosecuting a *current* president?

C. Congress, the President, and the Administrative State

1. Limits on Congressional Authority to Delegate Legislative Power

Insert at page 190, 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?

3. Executive Control Over the Bureaucracy

Insert at the end of the "Congressional 'Aggrandizement'" Note at page 239:

6. While much of the modern Court's jurisprudence regarding presidential control of high-ranking officials has focused on the President's removal authority, the Court has also focused on the appointment power. Appointment power issues largely, although not exclusively, turn on whether the official in question is a "principal" officer who, according to Article II's Appointments Clause, must be appointed by the President, or a mere "inferior" officer, whose appointment Congress may vest, as it wishes, in either the President, the "Courts of Law," or the "Heads of Departments." (Note that that Clause does not speak of "principal" officers, but rather refers to them simply as "Officers of the United States".)

Recall from *Morrison v. Olson* that the Court cited several criteria to decide that the Independent Counsel at issue in that case was an inferior officer. Nine years after *Morrison*, in *Edmond v. United States*, 520 U.S. 651 (1997), the Court, speaking through Justice Scalia, explained that "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior [other than the President]." Applying that criterion to the officials in question (the judges of the Coast Guard Court of Criminal Appeals, an Article I court), *Edmond* noted that those judges were supervised both by the Judge Advocate General of the Coast Guard, who exercised administrative control over them, and the Court of Appeals for the Armed Forces, an Article I court that had the power to reverse those officials' rulings. Evaluating that control, *Edmond* concluded: "What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." For that reason, the Court held that those judges were inferior officers.

In later Appointments Clause cases, the Court has applied the *Edmond* "does the official in question have a superior?" test. For example, in *United States v. Arthrex, Inc.*, 141 S.Ct. 1970 (2021), the Court applied *Edmond* to Article I judges who heard claims about the validity of patents. It concluded that those patent judges, unlike the Coast Guard judges in *Edmond*, were principal officers who thus could be appointed only by the President. The Court, speaking through Chief Justice Roberts, acknowledged that the patent judges, just like the Coast Guard judges in *Edmond*, were subject to administrative supervision by a higher ranking official (the Director of the Patent and Trademark Office). However, unlike the Coast Guard judges in *Edmond*, the patent judges in *Arthrex* were not subject to the supervision of other executive branch officers when they decided patent claims. The Chief Justice concluded: "Given the insulation of [the patent judges'] decisions from any executive review, the President can neither oversee [those judges] himself nor attribute [their] failings to those whom he can oversee. [Those judges] accordingly exercise power that conflicts with the design of the Appointments Clause to preserve political accountability."

Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, dissented. He insisted that "The Court has been careful not to create a rigid test to divide principal officers … from inferior ones." Applying *Edmond*, he argued that the Director of the Patent and Trademark Office exerted both administrative control over patent judges and also control over the procedures by which those judges decided patent claims, with the result that those judges were subject to the same types of control by other executive branch officials as the Coast Guard judges in *Edmond*. Thus, he concluded, the patent judges, like those Coast Guard judges, should have been understood as inferior officers. Justice Breyer, joined by Justices Sotomayor and Kagan, wrote a separate dissent to argue for what he called a "functional," as opposed to a "formalistic" understanding of the principal/inferior officer distinction.

D. Foreign Affairs and the War Power

2. The War Power

c. The War Power in a World of Small Wars

Insert at page 268, 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 341, 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 342-357) and the note about *United States v. Morrison* (pages 358-359).

Return to this question again after you read *Gonzalez v. Raich* (pages 359-372).

How does your analysis change after each successive case?

Chapter 5: Residual State Powers—and Their Limits

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

3. Modern Applications

***Insert at the bottom of page 416*:**

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

B. The Prohibition on "Commandeering"

***Insert at the bottom of page 477*:**

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? The note after this problem explains the Court's reasoning in the case on which the second of these fact patterns is based. Make sure to think about that fact pattern before continuing on to that note.

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?

Note: *Haaland v. Brackeen*

The second of the fact patterns in the previous problem, dealing with a federal statute regulating the placement of Indian children with non-Indian parents, is based on a case the Court decided in 2023, *Haaland v. Brackeen*, 599 U.S. 255 (2023). In *Brackeen*, the Court rejected the plaintiffs 'anti-commandeering challenges to the law (the Indian Child Welfare Act, or ICWA). (The plaintiffs also made non-delegation and equal protection arguments, which the Court refused to decide based on its conclusion that no plaintiff had standing to raise them.)

The Court's anti-commandeering analysis rested heavily on its conclusion that most of the burdens the ICWA imposed applied to both states and to private parties—for example, in both states 'and private parties 'capacities as plaintiffs in proceedings to terminate the parental rights of Indian parents. In reaching that conclusion, the Court cited, as an example of such a generally-applicable statute, the one upheld in *Reno v. Condon*, 528 U.S. 141 (2000) (Note *supra* this Chapter), where the Court rejected an anti-commandeering challenge on this same ground. Writing for the Court in *Brackeen*, Justice Barrett, citing *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) (Note *supra* this Chapter), wrote that "Legislation that applies evenhandedly to state and private actors does not typically implicate the Tenth Amendment." Justice Barrett conceded that the statute directed state courts to apply the federal statute's child-placement preferences in relevant cases. However, she observed that Congress may direct state courts to either entertain a federal cause of action or, as in this case, to apply federal law rules to state law causes of action (such as those dealing with parental rights). Finally, she concluded that nothing in the Tenth Amendment prohibited Congress from imposing record-keeping and record-transmittal requirements on state courts.

Justices Thomas and Alito dissented, arguing that Congress lacked any Article I authority to enact the statute.

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

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

***Insert at the bottom of page 529*:**

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 10: Modern Due Process Methodologies

***Insert at page 693, 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 page 719, before the Note*:**

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 "cohabitation," 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

Insert at page 766, before the Note:

Note: Identifying Discrimination

1. The Court's modern approach to equal protection, as largely (although not entirely) reflected by the *Carolene Products* footnote you just encountered, operates on the assumption that the challenged law does in fact discriminate on a particular ground—for example, on the basis of race or sex. But when does a law discriminate on such a ground? Sometimes a law is facially neutral, but is alleged to nevertheless discriminate on a particular ground. For example, a law may require that firefighters be of a certain height or weight: while that law is facially neutral as regards to sex, a female plaintiff may nevertheless claim that, since on average women are shorter and lighter than men, the law discriminates on the basis of sex. As you'll see in Chapter 14, in such cases the Court requires the plaintiff to show that, despite its facial neutrality, the law was motivated by an intent to discriminate on the alleged ground (in this case, sex). (To be sure, that hypothetical law facially discriminates on the basis of height and weight, but as you'll see in the rest of this chapter, height and weight classifications *per se* are unlikely to trigger significant judicial scrutiny.) As Chapter 14 lays out, the intent requirement is controversial, and is governed by a set of evidentiary factors embedded within an intricate doctrinal framework.

2. But a more basic question confronts litigants and courts in equal protection cases: when does a law facially discriminate? One might think that, regardless of any complexity in uncovering the intent behind a facially-neutral law, determining whether a law is in fact facially neutral presents a straightforward issue—literally, the statute's text either does or does not discriminate (or "classify") based on any particular ground. But that question is not always straightforward. For example, what about a law that classifies based on whether a person is pregnant? One might think that such a law either absolutely or nearly absolutely classifies based on sex, since, at the very least, the overwhelming majority of persons who can become pregnant are women. (The qualifier "nearly absolutely" refers to the ambiguity of the proper reference to transgender persons as it relates to the capacity to give birth. Indeed, the next case considers the relationship between transgender status and sex.)

In 1974, before transgender identity became a major social and legal issue, the Court in *Geduldig v. Aiello*, 417 U.S. 484 (1974) considered the pregnancy question. As you'll see in the following case, which discusses *Geduldig*, the *Geduldig* Court held that pregnancy discrimination does not constitute sex discrimination. *Geduldig* has been heavily criticized; nevertheless, it remains the law and indeed, was relied on in the next case, decided in 2025.

3. The current controversy over gender-affirming care for transgender persons (and in particular, for transgender minors) provided another opportunity for the Court to consider the question of when a statute facially classifies on the ground alleged by the plaintiffs. In *United*

States v. Skrmetti, 145 S.Ct 1816 (2025), the Court faced a claim by transgender minors, their parents, and (until it switched sides after President Trump's inauguration), the federal government that a Tennessee law discriminated on the basis of both sex and transgender status when it banned the use of puberty blockers and other medical therapies for use by minors experiencing gender dysphoria, while allowing the use of those therapies on minors for other reasons. As the opinion explains, the stakes in this determination were high. If the statute was deemed to constitute sex discrimination, then longstanding caselaw (which you'll encounter immediately after *Skrmetti*) would require the Court to give careful scrutiny to that discrimination. The status of transgender discrimination remains undecided: thus, if the Tennessee statute was held to constitute transgender discrimination, the Court would then have to determine whether such discrimination, just like sex discrimination, merited more careful judicial review. On the other hand, if the statute was held not to constitute either type of discrimination, then, as the opinion explains, the Court would review the law with significant deference to the state legislature's choices.

4. *Skrmetti* is important in part because it reflects the Court's first significant constitutional encounter with transgender equality claims. (*Statutory* equality claims have previously been decided, in favor of transgender victims of discrimination.) While the Court majority did not reach the question of what level of scrutiny transgender discrimination triggers, individual Justices did; their dueling analyses are presented at the end of this chapter.

But more generally, *Skrmetti* is an appropriate introduction to the Court's modern thinking about equal protection because, to repeat a point raised earlier in this note, it raises a foundational question about equal protection: when does a law actually discriminate on a given ground? The dueling opinions in *Skrmetti* reveal that, at least sometimes, that seemingly simple question is far from straightforward.

United States v. Skrmetti

145 S.Ct. 1816 (2025)

Chief Justice ROBERTS delivered the opinion of the Court.

In this case, we consider whether a Tennessee law banning certain medical care for transgender minors violates the Equal Protection Clause of the Fourteenth Amendment.

I

A

***

B

SB1 [the Tennessee law] ban[s] the use of certain medical procedures for treating transgender minors. In particular, the law prohibits a healthcare provider from "surgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being," or "prescribing, administering, or dispensing any puberty blocker or hormone," for the purpose of (1) "enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex," or (2) "treating purported discomfort or distress from a discordance between the minor's sex and asserted identity." Among other things, these prohibitions are intended to "protect minors from physical and emotional harm"

by "encouraging minors to appreciate," rather than "become disdainful of," their sex.

SB1 is limited in two relevant ways. First, SB1 does not restrict the administration of puberty blockers or hormones to individuals 18 and over. Second, SB1 does not ban fully the administration of such drugs to minors. A healthcare provider may administer puberty blockers or hormones to treat a minor's congenital defect, precocious (or early) puberty, disease, or physical injury. The law defines the term "congenital defect" to include an "abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex," but excludes from the definitions of "congenital defect" and "disease" "gender dysphoria, gender identity disorder, [and] gender incongruence." …

II

The Fourteenth Amendment's command that no State shall "deny to any person within its jurisdiction the equal protection of the laws," "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," We have reconciled the principle of equal protection with the reality of legislative classification by holding that, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." We generally afford such laws "wide latitude" under this rational basis review, acknowledging that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."

Certain legislative classifications, however, prompt heightened review. For example, laws that classify on the basis of race, alienage, or national origin trigger strict scrutiny and will pass constitutional muster "only if they are suitably tailored to serve a compelling state interest." We have similarly held that sex-based classifications warrant heightened scrutiny. … We accordingly subject laws containing sex-based classifications to intermediate scrutiny, under which the State must show that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."

A

We are asked to decide whether SB1 is subject to heightened scrutiny under the Equal Protection Clause. We hold it is not. SB1 does not classify on any bases that warrant heightened review.

1

On its face, SB1 incorporates two classifications. First, SB1 classifies on the basis of age. Healthcare providers may administer certain medical treatments to individuals ages 18 and older but not to minors. Second, SB1 classifies on the basis of medical use. Healthcare providers may administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence. Classifications that turn on age or medical use are subject to only rational basis review.

The plaintiffs argue that SB1 warrants heightened scrutiny because it relies on sex-based classifications. We disagree.

Neither of the above classifications turns on sex. Rather, SB1 prohibits healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses*, regardless of a minor's sex.

The plaintiffs resist this conclusion, arguing that SB1 creates facial sex-based classifications by defining the prohibited medical care based on the patient's sex. This argument takes two forms. At times, the plaintiffs suggest that SB1 classifies on the basis of sex because its prohibitions reference sex. Alternatively, the plaintiffs contend that SB1 works a sex-based classification because application of the law turns on sex. Neither argument is persuasive.

This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny. See, *e.g.*, *Tuan*

Anh Nguyen v. INS, 533 U.S. 53 (2001) ("The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction."). Such an approach, moreover, would be especially inappropriate in the medical context. Some medical treatments and procedures are uniquely bound up in sex. The Food and Drug Administration itself recognizes that "research has shown that biological differences between men and women (differences due to sex chromosome or sex hormones) may contribute to variations seen in the safety and efficacy of drugs, biologics, and medical devices." Indeed, the agency frequently approves drugs for use by only one sex. In the medical context, the mere use of sex-based language does not sweep a statute within the reach of heightened scrutiny.

We also reject the argument that the application of SB1 turns on sex. The plaintiffs and the dissent contend that an adolescent whose biological sex is female cannot receive puberty blockers or testosterone to live and present as a male, but an adolescent whose biological sex is male can, while an adolescent whose biological sex is male cannot receive puberty blockers or estrogen to live and present as a female, but an adolescent whose biological sex is female can. So conceived, they argue, SB1 prohibits certain treatments for minors of one sex while allowing those same treatments for minors of the opposite sex.

The plaintiffs and the dissent, however, contort the meaning of the term "medical treatment." Notably absent from their framing is a key aspect of any medical treatment: the underlying medical concern the treatment is intended to address. The Food and Drug Administration approves drugs and requires that they be labeled for particular indications—the diseases or conditions that they treat, prevent, mitigate, diagnose, or cure. Different drugs can be used to treat the same thing (would you like Advil or Tylenol for your headache?), and the same drug can treat different things (take DayQuil to ease your cough, fever, sore throat, and/or minor aches and pains). For the term "medical treatment" to make sense of these various combinations, it must necessarily encompass both a given drug and the specific indication for which it is being administered.

When properly understood from the perspective of the indications that puberty blockers and hormones treat, SB1 clearly does not classify on the basis of sex. Both puberty blockers and hormones can be used to treat certain overlapping indications (such as gender dysphoria), and each can be used to treat a range of other conditions. These combinations of drugs and indications give rise to various medical treatments. When, for example, a transgender boy (whose biological sex is female) takes puberty blockers to treat his gender incongruence, he receives a different medical treatment than a boy whose biological sex is male who takes puberty blockers to treat his precocious puberty. SB1, in turn, restricts which of these medical treatments are available to minors: Under SB1, a healthcare provider may administer puberty blockers or hormones to any minor to treat a congenital defect, precocious puberty, disease, or physical injury; a healthcare provider may not administer puberty blockers or hormones to any minor to treat gender dysphoria, gender identity disorder, or gender incongruence. The application of that prohibition does not turn on sex.

Of course, a State may not circumvent the Equal Protection Clause by writing in abstract terms. See *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) (explaining that both overt and covert sex-based classifications are subject to heightened review). The antimiscegenation law that this Court struck down in *Loving v. Virginia*, 388 U.S. 1 (1967), would not have shed its race-based classification had it, for example, prohibited "*any* person from marrying an individual of a different race." Such a law would still have turned on a race-based classification: It would have prohibited Mildred Jeter (a black woman) from marrying Richard Loving (a white man), while permitting a white woman to do so. The law, in other words, would still "proscribe generally accepted conduct if engaged in by members of different races."

Here, however, SB1 does not mask sex-based classifications. For reasons we have explained, the law does not prohibit conduct for one sex that it permits for the other. Under SB1, *no* minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence; minors of *any* sex may be administered puberty blockers or hormones for other purposes.

Nor are we persuaded that SB1's prohibition on the prescription of puberty blockers and hormones to "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to "treat purported discomfort or distress from a discordance between the minor's sex and asserted identity," reflects a sex-based classification. In the dissent's view, this language "plainly classifies on the basis of sex" because it "turns on inconsistency with a protected

characteristic." The dissent analogizes to a hypothetical law that "prohibits minors from attending any services, rituals, or assemblies if done for the purpose of allowing the minor to identify with a purported identity inconsistent with the minor's religion." Such a law, the dissent argues, would plainly classify on the basis of religion. "Whether the law prohibits a minor from attending any particular religious service turns on the minor's religion: A Jewish child can visit a synagogue but not a church, while a Christian child can attend church but not the synagogue."

But a prohibition on the prescription of puberty blockers and hormones to "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex," is simply a prohibition on the prescription of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, or gender incongruence. A law prohibiting attendance at a religious service "inconsistent with" the attendee's religion may trigger heightened scrutiny. A law prohibiting the administration of specific drugs for particular medical uses does not.

Finally, we reject the plaintiffs' argument that, "by design, SB1 enforces a government preference that people conform to expectations about their sex." The plaintiffs note that SB1's statutory findings state that Tennessee has a compelling interest in "encouraging minors to appreciate their sex" and in prohibiting medical care "that might encourage minors to become disdainful of their sex." They argue that these findings reveal that the law operates to force conformity with sex.

To start, the plaintiffs' allegations of sex stereotyping are misplaced. True, a law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes. But where a law's classifications are neither covertly nor overtly based on sex, we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose. No such argument has been raised here. …

2

The plaintiffs separately argue that SB1 warrants heightened scrutiny because it discriminates against transgender individuals, who the plaintiffs assert constitute a quasi-suspect class. This Court has not previously held that transgender individuals are a suspect or quasi-suspect class. And this case, in any event, does not raise that question because SB1 does not classify on the basis of transgender status. As we have explained, SB1 includes only two classifications: healthcare providers may not administer puberty blockers or hormones to minors (a classification based on age) to treat gender dysphoria, gender identity disorder, or gender incongruence (a classification based on medical use). The plaintiffs do not argue that the first classification turns on transgender status, and our case law forecloses any such argument as to the second.

We have explained that a State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), for example, we held that a California insurance program that excluded from coverage certain disabilities resulting from pregnancy did not discriminate on the basis of sex. In reaching that holding, we explained that the program did not exclude any individual from benefit eligibility because of the individual's sex but rather "removed one physical condition—pregnancy—from the list of compensable disabilities." We observed that the "lack of identity" between sex and the excluded pregnancy-related disabilities became "clear upon the most cursory analysis." The California insurance program, we explained, divided potential recipients into two groups: "pregnant women and nonpregnant persons." Because women fell into both groups, the program did not discriminate against women as a class. We thus concluded that, even though only biological women can become pregnant, not every legislative classification concerning pregnancy is a sex-based classification. …

By the same token, SB1 does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions. SB1 divides minors into two groups: those who might seek puberty blockers or hormones to treat the excluded diagnoses, and those who might seek puberty blockers or hormones to treat other conditions. Because only transgender individuals seek puberty blockers and hormones for the excluded diagnoses, the first group includes only transgender individuals; the second group, in contrast, encompasses both transgender and nontransgender individuals. Thus, although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender incongruence—just as only biological women can become pregnant—there is a "lack of

identity" between transgender status and the excluded medical diagnoses. The plaintiffs, moreover, have not argued that SB1's prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals. Under these circumstances, we decline to find that SB1's prohibitions on the use of puberty blockers and hormones exclude any individuals on the basis of transgender status.[3] …

B

[The Court then applied the "rational basis" standard of review to the Tennessee law, and concluded that the law satisfied that standard. This part of the Court's analysis is discussed in a note later in this chapter.]

Justice THOMAS, concurring. [omitted]

Justice BARRETT, with whom Justice THOMAS joins, concurring. [omitted]

Justice ALITO, concurring in part and concurring in the judgment.

I concur in the judgment and join Parts I and II–B of the opinion of the Court. I agree with much of the discussion in Part II–A–1, which holds that Tennessee's Senate Bill 1 (SB1) does not classify on the basis of "sex," but I set out my own analysis of this issue in Part I of this opinion. I do not join Part II–A–2 of the opinion of the Court, which concludes that SB1 does not classify on the basis of "transgender status." There is a strong argument that SB1 does classify on that ground, but I find it unnecessary to decide that question. I would assume for the sake of argument that the law classifies based on transgender status, but I would nevertheless sustain the law because such a classification does not warrant heightened scrutiny. ...

I

A

To begin, I agree with the Court that SB1 does not classify on the basis of "sex" within the meaning of our equal protection precedents. What those cases have always meant by "sex" is the status of having the genes of a male or female. That was the common understanding of the term in 1971 when the Court, in *Reed v. Reed*, 404 U.S. 71 (1971), first held that a law that discriminated against women violated the Equal Protection Clause. And all the Court's subsequent cases in this line have shared that understanding. …

While the earliest cases in this line referred solely to discrimination on the basis of "sex," see, *e.g.*, *Reed*, later equal protection cases referred to classifications based on "gender." But it is clear that these cases used "gender" as a synonym for "sex." … Thus, our use of the term "gender" had no substantive significance. None of our equal protection decisions has used "gender" in the sense in which it is now sometimes used, *i.e.*, to denote "a group of people in a society who share particular qualities or ways of behaving which that society associates with being male, female, or another identity."

For these reasons a party claiming that a law violates the Equal Protection Clause because it classifies on the basis of sex cannot prevail simply by showing that the law draws a distinction on the basis of "gender identity." Rather, such a plaintiff must show that the challenged law differentiates between the two biological sexes: male and female.

B

1

[3] The dissent argues that our analysis "may well suggest that a law depriving all individuals who 'have ever, or may someday, menstruate' of access to health insurance would be sex neutral merely because not all women menstruate." But such a law is different from both SB1 and the law at issue in *Geduldig*. As we have explained, SB1 regulates certain medical treatments; *Geduldig* involved a state disability insurance system that excluded certain pregnancy-related disabilities from coverage. The dissent's hypothetical law, in contrast, does not regulate a class of treatments or conditions. Rather, it regulates a class of *persons* identified on the basis of a specified characteristic. Neither our analysis nor *Geduldig* speaks to a law that classifies on such a basis.

What, then, does it mean for a law to "classify" based on sex? The succinct answer is that a law classifies based on sex for equal protection purposes when it "[p]rescrib[es] one rule for [women], [and] another for [men]." *Sessions v. Morales-Santana*, 582 U.S. 47 (2017). And as we have explained, the general rule is that a law meets this test if it employs an "overt gender criterion."

A few examples illustrate the point. A law setting one drinking age for women and another for men is a sex classification. A college policy granting admission to women but not to men (or vice versa) is a sex classification. A law imposing different citizenship requirements for children with citizen fathers compared to children with citizen mothers is a sex classification.

What is apparent in each of these cases is that sex serves as an explicit "criterion," dictating that a particular legal standard applies to one sex but not the other.

In contrast to what our cases have demanded, we have "never suggested that mere reference to sex is sufficient to trigger heightened scrutiny." We have also explicitly rejected the proposition that a law classifies based on sex when it employs a non-sex classification that correlates with differential treatment of men and women. In *Geduldig v. Aiello*, for example, we considered a California insurance program that "exclude[d] from coverage certain disabilities resulting from pregnancy." Although we recognized that "only women can become pregnant," we explained that "it does not follow that every legislative classification concerning pregnancy is a sex-based classification." In the absence of a showing that the pregnancy classification at issue was being used as a "mere pretext designed to effect an invidious discrimination against the members of one sex or the other," we were unwilling to conclude that it was a proxy for a sex classification.

We applied a similar principle in *Personnel Administrator of Mass. v. Feeney*. There, we considered a Massachusetts policy that conferred an "absolute advantage" on veterans who applied for state civil service positions. At the time of the lawsuit, "over 98% of the veterans in Massachusetts were male," and we acknowledged that "the impact of the veterans' preference law upon the public employment opportunities of women has thus been severe." Even so, such "severe" disparate impact did not make the law a sex classification. The distinction made by the law was "quite simply between veterans and nonveterans, not between men and women." And such a classification was not a sex classification unless it could be "shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."

The upshot of all these prior equal protection cases is that we will *generally* not find that a law classifies on the basis of sex unless it does so overtly, but that a challenger may escape this general rule by showing that a purportedly sex-neutral classification has been used as a "mere pretext designed to effect an invidious discrimination against the members of one sex or the other." *Geduldig*.

2

When these principles are applied to Tennessee's SB1, it is clear that the law is not a sex classification. As the Court notes, SB1 classifies based on the purpose for which a minor seeks the covered medical treatments. Specifically, it restricts those treatments if they are sought either for the purpose of "enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or for the purpose of "treating purported discomfort or distress from a discordance between the minor's sex and asserted identity." This scheme certainly refers to sex and may be seen as indirectly related to sex, but it is clearly not the sort of discrimination between males and females that our cases have treated as sex discrimination. It does not lay down one rule for males and another for females. Instead, it classifies based on something quite different: a minor's reason for seeking particular treatment.

This classification scheme is also not a "mere pretext designed to effect an invidious discrimination against the members of one sex or the other." *Geduldig*. The law begins with a panoply of legislative findings that make clear that the legislature's purpose was to "protect the health and welfare of minors." The legislature concluded that the prohibited medical procedures were "experimental in nature and not supported by high-quality, long-term medical studies," and that often "a minor's discordance can be resolved by less invasive approaches that are likely to result in better outcomes."

These findings are consistent with those made by other respected bodies that cannot be charged with hostility to minors experiencing gender dysphoria or to transgender people in general. And the limited scope of SB1 strongly supports the conclusion that the legislature's true purpose was exactly the one set out in the statutory findings. SB1 targets only the experimental medical procedures that the legislature found to be unsupported and dangerous. It does not regulate any other behavior in which minors might engage for the purpose of expressing their gender identity. It says nothing at all about names, pronouns, hair styles, attire, recreational activities or hobbies, or career interests. And the law's restrictions apply only to the treatment available to *minors*. Once individuals reach the age at which they are able to make informed decisions about medical care, the law imposes no restrictions. …

II

My main point of disagreement with the Court concerns its analysis of the plaintiffs' argument that SB1 unconstitutionally discriminates on the basis of transgender status. The Court holds that the law does not classify on this ground, and the Court therefore applies rational basis review. I am uneasy with that analysis and would reject the plaintiffs' argument for a different reason: because neither transgender status nor gender identity should be treated as a suspect or "quasi-suspect" class. …

Justice SOTOMAYOR, with whom Justice JACKSON joins, and with whom Justice KAGAN joins as to all but Part V, dissenting.

To give meaning to our Constitution's bedrock equal protection guarantee, this Court has long subjected to heightened judicial scrutiny any law that treats people differently based on sex. … Today, the Court considers a Tennessee law that categorically prohibits doctors from prescribing certain medications to adolescents if (and only if) they will help a patient "identify with, or live as, a purported identity inconsistent with the minor's sex." In addition to discriminating against transgender adolescents, who by definition "identify with" an identity "inconsistent" with their sex, that law conditions the availability of medications on a patient's sex. Male (but not female) adolescents can receive medicines that help them look like boys, and female (but not male) adolescents can receive medicines that help them look like girls.

Tennessee's law expressly classifies on the basis of sex and transgender status, so the Constitution and settled precedent require the Court to subject it to intermediate scrutiny. The majority contorts logic and precedent to say otherwise, inexplicably declaring it must uphold Tennessee's categorical ban on lifesaving medical treatment so long as "any reasonably conceivable state of facts" might justify it. … By retreating from meaningful judicial review exactly where it matters most, the Court abandons transgender children and their families to political whims. In sadness, I dissent. …

II

A

The level of constitutional scrutiny courts apply in reviewing state action is enormously consequential. Where a state law neither "proceeds along suspect lines nor infringes fundamental constitutional rights," reviewing courts generally uphold a challenged law under the Equal Protection Clause so long as "any reasonably conceivable state of facts ... could provide a rational basis for the classification." That lenient standard, which the majority erroneously applies today, demands hardly more than a cursory glance at the State's reasons for legislating.

This Court has long recognized, however, that a more "searching" judicial review is warranted when the rights of "discrete and insular minorities" are at stake. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) [Note *supra* this Chapter]. Because such minorities often face systemic barriers to vindicating their interests through the political process, courts have a comparative advantage over the elected branches in safeguarding their rights. Such judicial scrutiny is at its apex in reviewing laws that classify on the basis of race and national origin. States may not enact laws that classify on those bases unless they can pass through the "daunting two-step examination known in our cases as 'strict scrutiny.'"

For nearly half a century, the Court has applied a different standard, known as intermediate scrutiny, to all "statutory

classifications that distinguish between males and females." States can differentiate on the basis of sex only to "serve important governmental objectives" and only if the sex classification is "substantially related to the achievement of those objectives." The standard is an intermediate one because it strikes an important balance. On the one hand, there are some genuine "physical differences between men and women," so not all sex-based legislation is discriminatory or constitutionally proscribed. On the other hand, sex-based legislation always presents a serious risk of invidious discrimination that relies on "overbroad generalizations about the different talents, capacities, or preferences of males or females." Intermediate scrutiny is the core judicial tool to differentiate innocuous sex-based laws from discriminatory ones.

B

SB1 plainly classifies on the basis of sex, so the Constitution demands intermediate scrutiny. Recall that SB1 prohibits the prescription of hormone therapy and puberty blockers only if done to "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to alleviate "discomfort or distress from a discordance between the minor's sex and asserted identity." Use of the same drugs to treat any other "disease" is unaffected. Physicians may continue, for example, to prescribe hormones and puberty blockers to treat any "physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex."

What does that mean in practice? Simply that sex determines access to the covered medication. Physicians in Tennessee can prescribe hormones and puberty blockers to help a male child, but not a female child, look more like a boy; and to help a female child, but not a male child, look more like a girl. Put in the statute's own terms, doctors can facilitate consistency between an adolescent's physical appearance and the "normal development" of her sex identified at birth, but they may not use the same medications to facilitate "inconsistency" with sex. All this, the State openly admits, in service of "encouraging minors to appreciate their sex." Like any other statute that turns on inconsistency with a protected characteristic, SB1 plainly classifies on the basis of sex. …

… Consider the mother who contacts a Tennessee doctor, concerned that her adolescent child has begun growing unwanted facial hair. This hair growth, the mother reports, has spurred significant distress because it makes her child look unduly masculine. The doctor's next step depends on the adolescent's sex. If the patient was identified as female at birth, SB1 allows the physician to alleviate her distress with testosterone suppressants. What if the adolescent was identified male at birth, however? SB1 precludes the patient from receiving the same medicine.

Now consider the parents who tell a Tennessee pediatrician that their teenage child has been experiencing an unwanted (but medically benign) buildup of breast gland tissue. Again, the pediatrician's next move depends on the patient's sex. Identified male at birth? SB1 allows the physician to prescribe hormones to reduce the buildup of such tissue. Yet a child identified as female at birth experiencing the same (or more) distress must be denied the same prescription. In both scenarios, SB1 "provides that different treatment be accorded to persons on the basis of their sex," and therefore necessarily "establishes a classification subject to scrutiny under the Equal Protection Clause." …

III

…[The] majority rests its conclusion on an … implausible ground: that SB1's prohibition on treatments "inconsistent with a minor's sex" contains no sex classification at all. As the statute's text itself makes clear, that conclusion is indefensible.

A

How does the majority wriggle itself …free of any obligation to take a closer look? It abstracts away the sex classification on SB1's face, asserting that the law classifies based only on "age" and "medical purpose." The theory, apparently, is that SB1 is sex neutral because it simply allows doctors to "administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria." …

The problem with the majority's argument is that the very "medical purpose" SB1 prohibits is defined by reference to the patient's sex. Key to whether a minor may receive puberty blockers or hormones is whether the treatment facilitates the "medical purpose" of helping the minor live or appear "inconsistent with" the minor's sex. That is why

changing a patient's sex yields different outcomes under SB1. Again, take the adolescent distressed by newly developing facial hair. Was the patient identified female at birth? SB1 authorizes the prescription of medication. Male at birth? SB1 prohibits it.

For truly sex-neutral laws, it is impossible to imagine a single scenario where changing a patient's sex yields a different result. To borrow from the majority's catalog of apparently benign medical-use distinctions, imagine Tennessee allowed consumption of DayQuil to ease coughs, but not minor aches and pains. The regulated medical purposes (treatment of coughs, aches, and pains) are unrelated to sex, so a patient's sex will never determine whether she can consume DayQuil. All that matters is whether the patient has a cough. …

That the majority finds a way to recast SB1 in sex-neutral terms is no evidence that SB1 is sex neutral in the way hypothetical prohibitions on DayQuil … would be. The majority emphasizes that, in Tennessee, "*no* minor may be administered puberty blockers or hormones to treat gender dysphoria," while "minors of *any* sex may be administered puberty blockers or hormones for other purposes." But nearly every discriminatory law is susceptible to a similarly race- or sex-neutral characterization. A prohibition on interracial marriage, for example, allows *no* person to marry someone outside of her race, while allowing persons of *any* race to marry within their races. The same is true of a hypothetical law prohibiting attendance at services "inconsistent with" a child's religion, while allowing all children to attend religion-consistent services. Indeed, the majority itself seems to recognize that laws prohibiting professions "inconsistent" with a person's sex, marriages "inconsistent" with a person's race, or religious services "inconsistent" with a person's faith must be subject to heightened review, even if rewritten as ostensibly neutral prohibitions on sex-, race-, and faith-inconsistent behavior. And although the majority insists that its logic would not apply to the hypothetical religion-consistent services law, it offers no principled reason to differentiate that law from SB1's prohibition on promoting "inconsistency with" the patient's sex. …

C

In a final bid to avoid applying our equal protection precedents, the majority asserts that "mere reference to sex" is insufficient to trigger intermediate scrutiny, especially in the "medical context." Of course, not every legislative mention of sex triggers intermediate scrutiny. A law mandating that no person, "regardless of sex," can consume a dangerous drug, for example, would be subject to rational-basis review. Yet SB1 does not just mention sex. It defines an entire category of prohibited conduct based on inconsistency with sex. And it is hard to imagine a law that prohibits conduct "inconsistent with" sex that could avoid intermediate scrutiny.

Nor does the fact that SB1 concerns the "medical context" change the relevant analysis. No one disputes that "some medical treatments and procedures are uniquely bound up in sex" or that there are "biological differences between men and women." That there are such physical differences is, after all, one of the reasons why sex is not altogether a proscribed classification. A law that allowed only women to receive certain breast cancer treatments, for example, might well be consistent with the Constitution's equal protection mandate if the State establishes that the relevant treatments are suited to women's (and not men's) bodies. Laws that differentiate based on biological distinctions between men and women are precisely the sort that States might successfully defend under intermediate scrutiny. Biological differences between the sexes, however, are no reason to skirt such scrutiny altogether. …

IV

Having blithely dispensed with the notion that SB1 classifies on the basis of sex, the majority next asserts that "SB1 does not classify on the basis of transgender status." That too is contrary to the statute's text and plainly wrong.

SB1 prohibits Tennessee physicians from offering hormones and puberty blockers to allow a minor to "identify with" a gender identity inconsistent with her sex. Desiring to "identify with" a gender identity inconsistent with sex is, of course, exactly what it means to be transgender. The two are wholly coextensive. That is why it would defy common sense to suggest an employer's policy of firing all persons identifying with or living as an identity inconsistent with their sex does not discriminate on the basis of transgender status.

Left with nowhere else to turn, the Court hinges its conclusion to the contrary on the by-now infamous footnote 20 of *Geduldig v. Aiello*, which declared that discrimination on the basis of pregnancy is not discrimination on the basis of sex. The footnote reasoned that, although "only women can become pregnant," "normal pregnancy is an objectively identifiable physical condition with unique characteristics" and "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation ... on any reasonable basis, just as with respect to any other physical condition." The takeaway, according to the majority, is that "not ... every legislative classification concerning pregnancy is a sex-based classification," and so (apparently) not every legislative classification concerning "gender incongruence" (at least in the context of medical treatments) classifies on the basis of transgender status.

Geduldig was "egregiously wrong" when it was decided, both "because pregnancy discrimination is inevitably sex discrimination" and because discrimination against women is so "tightly interwoven with society's beliefs about pregnancy and motherhood." *Coleman v. Court of Appeals of Md.*, 566 U.S. 30 (2012) (Ginsburg, J., dissenting). That the majority must resuscitate so unpersuasive a source, widely rejected as indefensible even 40 years ago, is itself a telling sign of the weakness of its position. That the Court today extends *Geduldig*'s logic for the first time beyond pregnancy and abortion is more troubling still. Divorced from its fact-specific context, *Geduldig*'s reasoning may well suggest that a law depriving all individuals who "have ever, or may someday, menstruate" of access to health insurance would be sex neutral merely because not all women menstruate.

In any event, even *Geduldig*'s faulty reasoning cannot save the majority's conclusion that SB1 is innocent of transgender discrimination. Unlike pregnancy, a desire to "identify with, or live as, a purported identity inconsistent with one's sex," is not some "objectively identifiable physical condition" that legislatures can target without reference to sex or transgender status. And while not all women are pregnant, all transgender people, by definition, "identify with, or live as, a purported identity inconsistent with their sex." So, unlike the classes of pregnant persons and women, the class of minors potentially affected by SB1 and transgender minors are one and the same.

That SB1 discriminates on the basis of transgender status is yet another reason it must be subject to heightened scrutiny. …

V

SB1's classifications by sex and transgender status clearly require the application of intermediate scrutiny. The majority's choice instead to subject SB1 to rational-basis review, the most cursory form of constitutional review, is not only indefensible as a matter of precedent but also extraordinarily consequential. Instead of scrutinizing the legislature's classifications with an eye towards ferreting out unconstitutional discrimination, the majority declares it will uphold Tennessee's ban as long as there is " '*any* reasonably conceivable state of facts that could provide a rational basis for the classification.' " … As a result, the Court never even asks whether Tennessee's sex-based classification imposes the sort of invidious discrimination that the Equal Protection Clause prohibits. …Justice KAGAN, dissenting. [omitted]

Note: The Debate in *Skrmetti*

1. Who do you think has the better argument about the proper understanding of the Tennessee law? Does it facially classify based either on sex or transgender status, or does it simply prohibit the use of particular therapies for particular medical conditions? Is it possible that the statute both classifies on sex/transgender status grounds *and* simply prohibits particular therapies for particular medical conditions? If so, then how should courts untangle the relationship between those two types of classifications? As the opinions make clear, the answer to this question is, to quote the last part of Justice Sotomayor's dissent, "extraordinarily consequential," given that sex (and possibly transgender) discrimination receives unusually careful judicial scrutiny. Are you uncomfortable that such high stakes accompany the answer to a question that you might consider highly contingent and, in a sense, based on simply how one

chooses to view the statute?

2. For the rest of this chapter (and indeed, for Chapter 13 as well), we will assume that the law challenged in a given case classifies based on the ground alleged by the plaintiffs—for example, sex, race, or citizenship status. Chapter 14 will return to the question of determining whether a given statute "really" classifies on the ground alleged by the plaintiff. But Chapter 14 will focus on the distinct question of how facially neutral statutes will be analyzed. Until then, though, we will assume that, for example, a woman alleging sex discrimination is indeed challenging a statute that discriminates based on sex. Throughout the rest of this chapter and in Chapter 13, the focus will be on how much judicial scrutiny should be applied to statutes that discriminate on the ground the plaintiff alleges.

3. That question—how much scrutiny a particular type of classification merits—will return us one more time to *Skrmetti*. At the end of this chapter, you'll encounter a note that engages the question of how much scrutiny transgender discrimination merits. The *Skrmetti* majority declined to reach that question, since it concluded that the statute didn't discriminate based on transgender status. However, two Justices who joined that majority—Justices Alito and Barrett—each wrote separate concurrences that assumed arguendo that the law classified on that ground, and then concluded that transgender discrimination does not merit heightened scrutiny. Justice Sotomayor's dissent concluded that the law did in fact discriminate based on transgender status. In turn reaching the question how much scrutiny such discrimination should receive, she reached the opposite conclusion than did Justices Alito and Barrett, and concluded that such discrimination does in fact merit increased judicial scrutiny.

The final note at the end of this chapter's supplement presents these diametrically opposite perspectives. That note will thus allow you to evaluate how Justices on today's Court consider the "extraordinarily consequential" question of how to determine when a particular type of discrimination merits heightened judicial scrutiny. This chapter tells that story roughly chronologically, beginning with the Court's first experiments in the early 1970s with heightened scrutiny for classifications other than those based on race, and ending (where it started) with *Skrmetti*.

A. Sex Discrimination

***Insert at page 809, 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 2025 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?

Problem: Establishing Derivative Citizenship

Federal immigration law has intricate requirements for establishing derivative citizenship—that is, establishing citizenship via the person's relationship with a U.S. citizen. For a time, federal citizenship law provided the following rule:

"A child born outside of the United States of alien parents … becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) (a)The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or

(b) the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation."

Paul Reynaud was born in France, to two French citizens who never married each other. After Paul was born, his father moved to the United States and became a naturalized U.S. citizen. Paul eventually joined his father. Years later, the U.S. Government sought to deport Paul after he was convicted of several crimes. Paul challenged that deportation, alleging that section (3)(b) of the statute violated equal protection because, if it had been his mother (rather than his father) who had moved to the United States and been naturalized, Paul would have obtained U.S. citizenship.

He alleges that this statutory provision encodes stereotypes of the sort condemned in *Sessions v. Morales-Santana* (2017) (*Supra* this Chapter). The government defends the provision's constitutionality by citing *INS v. Nguyen,* 533 U.S. 53 (2001) (Note *supra* this Chapter).

Which side do you think is correct? Why?

E. Suspect Class Analysis Today

Insert at Page 842, at the end of the chapter:

Note: Transgender Status as a Quasi-Suspect Class?

1. This chapter began, after presenting *Carolene Products* Footnote 4, by providing an excerpt from *United States v. Skrmetti*, 145 S.Ct. 1816 (2025), which rejected challenges to a Tennessee law severely limiting minors' access to particular gender affirming medical and surgical therapies. That excerpt focused on a preliminary question the Court confronted in *Skrmetti*: whether the Tennessee law actually classified on the basis of sex or transgender status.

Recall from that excerpt that a majority of the Court held that the Tennessee law did not classify on either of those grounds. For that reason, the majority opinion neither applied the heightened scrutiny applicable to sex classifications nor considered whether transgender status itself constituted a distinct suspect or quasi-suspect class that, leaving sex aside, itself justified heightened scrutiny. However, three separate opinions—concurrences from Justices Barrett and Alito, and a dissent from Justice Sotomayor—did reach that question. Their analyses shed important insights on how Justices on today's Court approach the suspect class question, and raise issues about suspect class analysis more generally.

2. Justice Barrett (joined by Justice Thomas) joined the Court's opinion in full. However, she reached out to consider the suspect class question that the majority rendered moot by deciding that the law did not discriminate on the basis of transgender status. In contrast, Justice Barrett observed that that question was likely to return to the Court, and took the opportunity *Skrmetti* presented to offer her views on it.

Early in her analysis, Justice Barrett observed that "the set [of suspect/quasi-suspect classes] has remained virtually closed," citing a lower court's statement recognizing that the Court has not recognized a new suspect class in over four decades. Based on that history, she concluded that "the [*Skrmetti*] plaintiffs face a high bar" in arguing that transgender persons should be considered a suspect class.

After stating the basic criteria for suspect class status (criteria she noted traced ultimately to Footnote 4), she began her examination of the plaintiffs' claim by stating that "transgender status is not marked by the same sort of obvious …or distinguishing characteristics as race or sex." Moreover, that status is not an immutable one, since at least some persons "de-transition" later in life. In addition, she described that group as "large, diverse, and amorphous," in contrast to the

"discrete" groups that had previously been identified as suspect or quasi-suspect classes. She further observed that government treatment of transgender persons—for example, via regulation of their medical care—implicates complex policy choices normally best left to legislatures.

The argument Justice Barrett sketched out above convinced her that "transgender status does not define a suspect class." But she nevertheless continued her analysis by considering whether that group had historically suffered the type of discrimination that justified bestowing suspect or quasi-suspect status. Importantly, she concluded that this determination turned solely on *governmental* discrimination, not discrimination by private actors or society in general. She tied this more limited understanding of the "history of discrimination" element for suspect class status to the Fourteenth Amendment's original aspiration to eliminate *state-sponsored* discrimination. She also observed that limiting the "history of discrimination" inquiry in this way rendered it more manageable for courts, as it excused them from having to analyze and draw conclusions based on broad social attitudes and conduct toward any given group. She applied the same limitation to her estimation of whether transgender persons were currently politically powerless: rather than engaging in "sociological intuitions about a group's relative political power" in society, she argued that confining the inquiry to state government action rendered the political powerlessness inquiry more "objective" and "legally grounded."

Justice Barrett conceded that the litigants, by assuming that private discrimination was relevant to the suspect class determination, had not "thoroughly discuss[ed]" whether transgender persons had suffered a history of state-sponsored discrimination. Still, she described that fact as "largely academic" because "the group of transgender individuals is an insufficiently discrete and insular minority" to qualify for suspect class status. Nevertheless, she cautioned that, in any future case where a plaintiff claimed suspect class status, she "would not recognize a new suspect class absent a demonstrated history of *de jure* discrimination."

3. Justice Alito concurred in the judgment and concurred in the majority opinion in part. He did not join the majority's conclusion that the Tennessee law did not classify based on transgender status; indeed, he stated that there was "a strong argument" that it did. However, he concluded that, regardless of the answer to that question, rational basis was the proper standard to apply to the law, because discrimination against transgender persons did not merit heightened judicial scrutiny.

Like Justice Barrett, Justice Alito traced the Court's suspect class doctrine back to Footnote 4, which he observed focused on whether a group had historically faced discrimination from state governments and had been "impeded from participation in the political process." He tied those criteria to what he described as the Court's moves in the post-*Carolene Products* era to insist on strict scrutiny of race and, ultimately, national origin classifications. Reviewing that evolution, he concluded that heightened scrutiny would be provided only in "truly extraordinary" situations. He observed that this history demonstrated that "entitlement to suspect class status is largely reserved for those groups whose members tend to carry an obvious badge of their membership in the suspect class, which in part explains the severity or pervasiveness of the historic legal and political discrimination against the group." Moving on to the history of sex discrimination, Justice Alito concluded that the same factors that justified conferral of

heightened scrutiny on racial and national origin classifications justified at least some heightened scrutiny of sex classifications. Finally, turning to groups that had failed in their claims for heightened scrutiny, Justice Alito observed as follows:

> Overall, our decisions refusing to identify new suspect and "quasi-suspect" classes exhibit two salient features. First, the identification of a suspect or "quasi-suspect" class has been exceedingly rare …. Second, no single characteristic is independently sufficient to qualify a proposed class as suspect or "quasi-suspect"; instead, in the rare instances in which the Court has identified a suspect or "quasi-suspect" class, it has done so based on a strong showing of multiple relevant criteria: a history of widespread and conspicuous discrimination, *de facto* or *de jure* exclusion from equal participation in the political process, and an immutable characteristic that tends to serve as an obvious badge of membership in a clearly defined and readily identifiable group.

Applying this understanding of the cases, Justice Alito concluded that transgender status was not a suspect or quasi-suspect classification. He concluded that the plaintiffs had not shown "a history of widespread and conspicuous discrimination that is similar to that experienced by racial minorities or women." He also concluded that there is "no evidence that transgender individuals, like racial minorities and women, have been excluded from participation in the political process." Just as Justice Barrett had, Justice Alito also concluded that transgender status was not an immutable characteristic, but instead defined a "diverse" and "amorphous" class. He explained the relevance of those observations by stating that "Since such [diverse and amorphous] classes are not rigidly defined, it is hard to pin down whether they share the relevant characteristics that make closer scrutiny warranted. And it is difficult for both courts and legislatures to identify the outer bounds of such groups."

4. Justice Sotomayor's dissent for herself and (for the most part) Justices Kagan and Jackson, focused mainly on whether the Tennessee law in fact discriminated based on sex and transgender status. Still, toward the end of her opinion she explained why she thought transgender status constitutes a suspect classification. She noted that transgender persons had experienced discrimination in "healthcare, employment, and housing," "rampant harassment and physical violence," and "a lengthy history of *de jure* discrimination in the form of cross-dressing bans, police brutality, and anti-sodomy laws." She also noted then-recent federal government actions to expel transgender persons from the military and defund organizations that support them.

Engaging both Justices Barrett's and Alito's conclusions that transgender persons constitute a diverse and amorphous class that thereby disqualifies them from suspect class status, Justice Sotomayor stated the following:

> Transgender persons, moreover, have a defining characteristic (incongruence between sex and gender identity) that plainly bears no relation to [the individual's] ability to perform or contribute to society. As a group, the class is no more "large, diverse, and amorphous," (opinion of BARRETT, J.); (ALITO, J.,

> concurring in part and concurring in judgment), than most races or ethnic groups, many of which similarly include individuals with "a huge variety" of identities and experiences. (opinion of BARRETT, J.).

She concluded this part of her analysis by observing that "As evidenced by the recent rise in discriminatory state and federal policies and the fact that transgender people are underrepresented in every branch of government, moreover, the class lacks the political power to vindicate its interests before the very legislatures and executive agents actively singling them out for discriminatory treatment."

5. One way to think about the debate between, on the one hand, Justices Barrett and Alito and, on the other Justice Sotomayor is that it focuses simply on the proper application of the standard criteria for identifying a suspect class. Of course, even that framing reveals the stringency with which the former two Justices applied those criteria, as compared to the way Justice Sotomayor did. That stringency—and statements in both the Barrett and Alito opinions about the rarity of suspect class status—suggests that at least three Justices (Barrett, Thomas (who joined her opinion), and Alito) are unenthusiastic about a more liberal application of the standard suspect class criteria. Consider, for example, both Justices Barrett's and Alito's insistence that the only history of discrimination that matters for suspect class purposes is discrimination emanating from state governments themselves. Is there good reason for that narrow application of the "history of discrimination" element? What are the strongest arguments for and against that position?

6. Another way to think about the Barrett/Alito v. Sotomayor debate focuses on the deeper understanding of the standard suspect class criteria, and how well they fit modern conditions. For example, in a world where many identities that persons value highly are nevertheless at least technically changeable, what role should immutability play in suspect class analysis? Large numbers of Americans now accept that one can change one's sex. Indeed, even race is potentially immutable: persons can "pass" as members of different races, and may embrace or reject particular racial or ethnic identities over the courses of their lives. How should courts think about "immutability," given these realities?

Think also about the basic formula from Footnote 4, which spoke of "prejudice against *discrete and insular* minorities." It may have been the case in 1938 that a minority's discreteness and insularity rendered that group politically powerless, as those characteristics rendered it easier for majoritarian forces to isolate those groups. But in 1985, a prominent legal academic threw that idea into question. *See* Bruce Ackerman, *Beyond* Carolene Products," 98 HARV. L. REV. 713 (1985). Professor Ackerman suggested that discreteness and insularity could in fact *increase* a group's political power, if it allowed them to identify and associate with each other, and join together for political action. By contrast, he suggested, amorphous and socially- and geographically-dispersed groups might be the ones who find themselves truly politically powerless, especially if the nature of their characteristic (for example, their sexual orientation), allowed them to "pass" as members of the majority group and thus decline to engage in political activism on behalf of their identity. Updating Professor Ackerman's insights, today we might wonder whether the rise of social media, and its enormous capability for allowing members of an

otherwise-dispersed group to locate each other and gather virtually, mitigates much of his analysis from forty years ago.

These are obviously large, fraught questions. But as you leave this chapter's presentation of suspect class analysis, consider this possibility: Footnote 4's political process-based insights are fundamentally sound, but their proper application requires an exceedingly nuanced and sophisticated understanding of social reality. If you think that statement is even partially correct, how confident are you in the ability of generalist judges to apply Footnote 4's insights with the degree of sophistication necessary for them to play a useful role in ensuring equality in a dynamic and diverse society where, more than ever, identities can be adopted and discarded as people move through their lives?

Chapter 14: The Intent Requirement

***Insert at Page 979, 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 the bottom of page 1134*:**

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?