SECTION 2

TRANSPORTATION AND THE UNITED STATES CONSTITUTION

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A. THE CONSTITUTION AND TRANSPORTATION

The U.S. Constitution was drafted in 1789. In part, it was designed to rectify the failings of the Articles of Confederation, with its weak federal government and inability to prohibit state restrictions on interstate commerce. The first 10 Amendments to the Constitution were ratified on December 15, 1791, and comprise what is known as the Bill of Rights. They became applicable to the states with ratification of the Fourteenth Amendment. [1]

Explicit constitutional references to transport are few. The Constitution conferred upon Congress the power to build post roads. Though in the Jeffersonian era there was construction of national pikes, the post roads power lay largely dormant for much of the nation's later history. However, the power to regulate interstate and foreign commerce was, early on, applied to transportation.

The federal/state relationship on road building has early historic origins, traced back to the Jefferson-Jackson era, and resurrected with the Federal-Aid Road Act of 1916. The federal government funds and establishes standards, while the states and local governments actually build and maintain the highways.

Transportation has been the battleground for the resolution of many important issues. Many transportation cases (such as *Palsgraff* and *McPherson v. Buick* in the Torts context, and *Overton Park, Garcia,* and *Adarand* in the Constitutional Law context) have become seminal decisions, carefully examined in law reviews and in law school classrooms.

Much of highway litigation in the constitutional context has focused on disputes between the federal and state governments on interstate commerce and spending issues, or between governments and individuals on issues of takings and eminent domain, search and seizure, due process, and equal protection. The most critical constitutional provisions impacting transportation are the Commerce Clause, the Spending Clause, the (Fifth Amendment) Takings Clause, and the (Tenth and Eleventh Amendments[1]) provisions on state sovereignty. These are addressed first herein, with constitutional issues of more generic applicability to all federal activities addressed subsequently.

Historically, constitutional jurisprudence involving transit providers can be divided into two broad periods. Running from the establishment of the first private transit operators in the late 19th century until the middle of the 20th century, constitutional cases focused on such issues as whether economic regulation of private transit companies violated the contract, commerce, due process, and equal protection clauses of the U.S. Constitution. The role of the government as regulator is quite different from the role of government as a service provider. In the latter case, more of the Constitution comes into play.

This essay attempts to examine the major reported federal court decisions in which federal, state, and local highway departments or transit agencies have been litigants on constitutional law issues. Roughly speaking, the first half of this essay examines the constitutional conflicts arising from the exercise of federal power vis-à-vis state power, such as the federal government's exercise of its spending or commerce powers, which sometimes collide with different priorities and objectives exercised by the states under their police powers. The latter half examines the constitutional conflicts between individuals and federal, state, and local governments, such as the conflict when the exercise of individual freedoms guaranteed by the Bill of Rights collides with different governmental priorities. Increasingly, transit providers, highway departments, and other governmental institutions are defending claims based on federal and state constitutional causes of action.

To understand the constitutional relationship between the federal and state governments, one must understand something about how this relationship evolved within the history of the Republic. Government involvement in road building precedes the formation of the nation. The first major road on the American continent was built by the British government for military purposes.[2] With the adoption

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[1] Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 239 (1897).

[2] In 1758, British General Edward Braddock ordered 200 woodsmen to widen a narrow Indian trace into a 12-ft wide road across streams and eight major mountains. Some 2,200 British and Colonial troops then marched from Fort Cumberland, at the head of the Potomac River, to drive the French from Fort Duquesne. TOM LEWIS, DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE 56 (1997). With the European settlement of North America, towns and villages sprang up first along the Atlantic and Gulf coasts, at bays and rivers deep enough for navigation. Settlers gradually moved inland, and towns began to spring up along rivers. Away from the rivers, most roads were Indian trails, which could be traversed by only packhorses or mules. A few private toll roads were constructed during the 18th century, some with governmental assistance. At the dawn of the 19th century, it took a week to travel by stagecoach from New York to Boston, and nearly 3 weeks to reach Charleston. ARTHUR TWINING HADLEY, RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS 24 (1903).

of the U.S. Constitution on July 2, 1789, Congress was given the responsibility "to regulate interstate and foreign commerce," and "to establish Post Offices and post roads." The Post Office Act of 1792 authorized the creation of post roads. Following its promulgation, a number of communities implored their Congressmen to encourage the Post Office Department to construct roads to connect parts of the country. Often, Congressmen were flooded with petitions for new post roads. Despite the position of many of the country's founding fathers (including James Madison and James Monroe) that the power to establish post roads was intended as a power to designate, and not to build,[3] Congress responded to public demand and authorized the construction of new post roads and post offices. The first post road statutes designated the precise routes to be built.[4] Though there were only 6,000 miles of post roads in 1792, by 1829 there were 114,780 miles of roads.[5] Stagecoach trails were improved into post roads, and quickly became arteries of commerce.[6] In 1838, Congress declared all railroads to be post roads.[7]

The states jumped into the road-building business quite early as well. For example, the hard-surfaced 60-mile Lancaster Pike[8] linking Philadelphia and Lancaster, Pennsylvania, was built between 1792 and 1795.[9] New York and southern New England followed Pennsylvania in road building. Many states (notably Pennsylvania and Kentucky) subsidized private turnpikes.[10]

It became increasingly apparent that transportation was essential to link the remote parts of the sparsely settled nation together and to facilitate communications, trade, economic growth, and defense. Public sentiment for increased governmental support for infrastructure construction began to grow.

In 1808, Treasury Secretary Gallatin became the first national figure to urge a national system of roads.[11] President Thomas Jefferson championed the first federal highway, the National Road. It followed the old Cumberland Road to the West, stretching from Cumberland, Maryland, to Vandalia, Illinois.[12] Construction began in 1808; 9 years later the road reached the Ohio border.[13]

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[3] Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power*, 43 DUKE L. J. 267 n.3 (1993); Christina Bates, *From 34 to 37 Cents: The Unconstitutionality of the Postal Monopoly*, 68 MO. L. REV. 123, 136 (2003).

[4] For example, the first post road statute provided for the following route:

> From Wisscassett in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah….

Act of Feb. 20, 1792, 1 Stat. at 232 § 1, quoted in Gary Lawson, *Delegation and Original Meaning,* 88 VA. L. REV. 327, 403 (2002).

[5] Joseph Belluck, *Increasing Citizen Participation in U.S. Postal Service Policy Making,* 42 BUFF. L. REV. 253, 257 (1994).

[6] Nan McKenzie, *Ambiguity Commercial Speech and the First Amendment,* 56 U. CINN. L. REV. 1295 (1988).

[7] Belluck, *supra* note 5, at 253, 258–59.

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> The first improved roads were primarily constructed through private enterprise, and therefore took the form of turnpikes or toll roads to provide a return on investment. Blocking access to these roads was a pole on a hinge. The pole was referred to as a pike, and once payment was made, the pike would be swung or turned (either upward or outward) to allow passage. Hence, derivation of the word "turnpike." By the 1800s, there were hundreds of turnpike companies.

PAUL DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 5-6 (1997).

[9] RUSSELL BOURNE, AMERICANS ON THE MOVE: A HISTORY OF WATERWAYS, RAILWAYS AND HIGHWAYS 27 (Fulcrum 1995).

[10] HADLEY, *supra* note 2, at 26. Pennsylvania paid about $1,000 a mile, about a third of the total cost.

[11] His proposal included a road system stretching from Maine to Georgia, roads or canals linking the Atlantic Coast to the Mississippi River, and roads to Detroit, St. Louis, and New Orleans radiating from Washington, D.C. *Id.* at 27–28.

[12] It was to be no steeper than a 4 percent grade, with a 30-ft roadbed. BOURNE, *supra* note 9, at 7-10. By purchasing the Louisiana Territory, President Thomas Jefferson also may have made it inevitable that the federal government would play a role in building transportation corridors west, beyond the Mississippi River. As Professor Daniels observed, "When to the vast acreage of national land east of the Mississippi, the purchase of Louisiana added a continental principality of almost boundless extent west of the river, the public illusion of wealth 'beyond the dreams of avarice' was created, and the floodgates of legislative profusion were certain eventually to be

To assert his objection to the constitutional principle involved, in 1822, President Monroe vetoed a bill for repairs on the Cumberland Road.[14] When State's rights champion Andrew Jackson became President in 1832, national policy moved against federal support of highways. Though Jackson approved several bills to push the National Road further west, and was himself a major proponent of rail expansion,[15] he vetoed the Maysville Turnpike from Wheeling, West Virginia, to Maysville, Kentucky.[16] Presidents Tyler, Polk, and Pierce also vetoed federal aid to roads.[17] The National Road became important in settling the Midwest. But the structure Jackson established, of state primacy in road construction (albeit with federal support), became the model upon which America's roads and highways were developed through the remainder of the 19th century.[18] Thus, the states traditionally have been the dominant force in road building.

The first federal agency addressing roads was the Office of Road Inquiry, established in 1893 within the U.S. Department of Agriculture. From 1893 until 1916, the federal government focused on disseminating scientific, engineering, and economic information to assist in the design and construction of proper roads.[19] Congress recognized the potential importance of motor carriages,[20] and began to promote their growth with federal matching grants for highway construction, first with the Federal-Aid Road Act of 1916[21] (which established the Bureau of Public Roads), and then the Federal Highway Act of 1921.[22]

The 1916 Act was the first major federal foray into the realm of road building since Jackson put the brakes on federal road building in 1832. Significantly, it established the basic pattern of federal/state relationships on roads and highways (and subsequently airports). Henceforth, the federal government would subsidize planning and funding of highway projects, while the states would construct, own, and maintain their highways.[23] The federal government helped fund, and the states built, the nation's roads. This relationship set the stage for a number of constitutional conflicts between the federal and state governments, with the states exercising their police power to enhance the health, welfare, and safety of their citizens, and the federal government exercising its spending, commerce, and post roads powers under the Constitution.[24]

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opened." WINTHROP DANIELS, AMERICAN RAILROADS: FOUR PHASES OF THEIR HISTORY 38 (1932).

[13] After that, high costs slowed additional construction. The National Road reached Columbus, Ohio, in 1833, and Vandalia, Illinois, in 1852. Senator John C. Calhoun was also a major proponent of national aid to roads as early as 1818. HADLEY, *supra* note 2, at 27.

[14] *Id.*

[15] DANIELS, *supra* note 12, at 65–66.

[16] BOURNE, *supra* note 12, at 35.

[17] DANIELS, *supra* note 12, at 37.

[18] DEMPSEY & GESELL, *supra* note 8, at 6. Local jurisdictions also built roads as they later built airfields. In 1879, the North Carolina legislature passed the Mecklenburg Road Law, permitting the county to levy a property tax to support road construction. The Act was repealed the following year, but reenacted in 1885. By 1902, Mecklenburg was acknowledged to have the best roads in the State. Other states adopted similar laws. But not until the 20th century did the federal government resume its role in building highways.

[19] ROSS NETHERTON, FEDERALISM AND THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991, 32 (NCHRP Legal Research Digest No. 7, 1995).

[20] The early 20th century saw the emergence of a new form of competition, the motor carrier. In 1904, there were but 700 trucks operating in the United States, most powered by steam or electrical engines. The following year, the first scheduled bus service began in New York City. But still, growth of this important means of transport was hampered by poor roads and the economic dominance of the railroad industry.

[21] Pub. L. No. 64-156 (July 11, 1916). WALTER MCFARLANE, STATE HIGHWAY PROGRAMS VERSUS THE SPENDING POWER OF CONGRESS 3 (NCHRP Research Results Digest No. 136, 1982).

[22] Soon dirt horse and wagon trails were extended, straightened, and paved.

[23] DEMPSEY & GESELL, *supra* note 18, at 7; MCFARLANE, *supra* note 21.

[24] World War I demonstrated the potential for motor transport. Thousands of motor vehicles were produced for the Army. On the fields of battle, they quickly proved their superiority over mules in transporting men and materiel to the front. After the Great War, thousands of surplus Army trucks became the vehicles for growth of the commercial motor transport industry.

By 1918, the nation had more than 600,000 trucks. With the development of a national system of highways in the 1920s, motor carriers became an increasingly viable competitor to railroads. The combination of the pneumatic tire, the internal combustion engine, assembly line production, and hard surface roads brought sensational growth to the industry.

Soon, the nation had an extraordinary distribution system, which vigorously stimulated national economic growth. Manufacturers of apparel, appliances, hardware, and a thousand other commodities soon found that their markets were no longer limited to large cities. The new distribution system of trucks taking merchandise to the farthest corners of the nation meant that manufacturers could now sell their goods on Main Street of the thousands

During the 1950s, President Dwight Eisenhower "saw the need to build a national system of interstate highways to link the country for, *inter alia*, purposes of national defense."[25] Eisenhower launched a 17-year construction period of the U.S. Interstate highway program. The Federal-Aid Highway Act of 1956 launched the largest public works project ever undertaken—the 43,000-mi National System of Interstate and Defense Highways—which would provide the infrastructure to propel the nation to new levels of prosperity. The companion Highway Revenue Act of 1956 created the Highway Trust Fund, which was comprised of revenue from user charges (sales of gasoline, diesel, tires, and a weight tax for heavy trucks and buses)—the first time Congress had earmarked taxes for specific purposes.[26]

With the decline of the private transit companies,[27] legislation passed by President Kennedy in 1961 provided the first federal program of urban transit support.[28] After transit providers became public entities, cases arose addressing whether they violated the free speech and religion, search and seizure, and due process and equal protection clauses, as well as whether their activities were shielded from liability as state actors.

B. FEDERAL POWERS AND EXECUTIVE BRANCH AGENCIES

1. Administrative Agencies

Congress has passed transportation laws in Titles 23 and 49 of the U.S.C., which are implemented by the President and his subordinates in the Executive Branch, including the U.S. DOT (and its various modal agencies, including, of particular relevance here, the FHWA and FTA), and interpreted by the courts. The Constitution is silent as to what powers governmental agencies may hold, or even whether they may be established. Nevertheless, in the ensuing 200 plus years after its adoption in 1789, a plethora of administrative agencies have been created and given broad quasi-judicial, quasi-legislative, and quasi-executive powers. Some commentators have described this as the "headless fourth branch" of our federal government.

Federal administrative agencies are defined by the Administrative Procedure Act (APA)[29] and by what they are not: they do not consist of the legislature, the courts, or the governments of the states or the District of Columbia. In the executive branch of the federal government, most agencies are pyramidal in structure, with a single individual at the apex of the pyramid, appointed by and serving at the discretion of the President with the "advice and consent" of the Senate. Under Article II, Section I of the Constitution, the President "shall…nominate, and by and with the Advice and Consent of the Senate, shall appoint…Officers of the United States…." Examples of Executive Branch agencies include the Department of Transportation, Department of Commerce, and Department of Defense. These nonregulatory agencies

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of small towns and hamlets sprinkled across the continent.

And the complexion of Main Street itself changed. No longer would general stores, which carried everything from fertilizer to soap, dominate the market. Specialized shops sprang up. Consumer choices multiplied. A lady on the plains of Kansas could now buy the same fashions on Main Street that were available on Park Avenue. The distribution system of the trucking industry made possible tremendous expansion in production and sales, and thus served as a catalyst for one of the most significant periods of economic growth in the nation's history. *See* PAUL STEPHEN DEMPSEY, THE SOCIAL & ECONOMIC CONSEQUENCES OF DEREGULATION: THE TRANSPORTATION INDUSTRY IN TRANSITION 15 (1989).

[25] *Id.* at 19.

[26] MARK SOLOF, HISTORY OF METROPOLITAN PLANNING ORGANIZATIONS—PART II, at 6 (1998).

[27] With the advent of the automobile, urban transit also began to decline. In 1917, electric streetcars carried 1.1 billion passengers. But by 1923, fixed-guideway systems began to be replaced by buses, with their lower capital costs and greater operational flexibility. EDWARD WEINER, URBAN TRANSPORTATION PLANNING IN THE UNITED STATES 10 (Praeger, 2d ed. 1999). All transit—bus and rail—began to experience a loss of ridership beginning in the mid 1930s, as road improvements and automobile affordability created disbursed suburban housing patterns less conducive to transit. Automobile production stopped during World War II, as car factories turned to producing tanks, jeeps, and fighter and transport aircraft; fuel and rubber were rationed. Between 1941 and 1946, transit ridership grew by 65 percent to an all-time high of 23 billion trips annually. *Id.* at 15. But after World War II, demand for rail service began to decline, as passengers chose alternative means to get them to their destination—the bus, the airplane, or the automobile. By 1953, transit had fallen to fewer than 14 billion trips annually. U.S. DEP'T OF TRANSP., URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: AN HISTORICAL OVERVIEW 17–19 (3d ed. 1988).

[28] Congress created a comprehensive program of transit assistance in the Urban Mass Transit Act of 1964. H.R. REP. NO. 204 (1963). The first long-term commitment for transit was the Urban Mass Transportation Assistance Act of 1970. The Federal Highway Act of 1973 opened the highway trust fund to transit, while the National Mass Transportation Assistance Act of 1974 made operating expenses eligible for federal funding.

[29] 5 U.S.C. § 551.

typically dispense monies (e.g., government insurance and pensions) to promote social and economic welfare.

The FHWA and FTA are Executive Branch agencies housed in the U.S. DOT. The FHWA Administrator, the FTA Administrator, and the Secretary of Transportation are appointed by the President and confirmed by the Senate.

2. From Dual Federalism to Cooperative Federalism to Interactive Federalism

For much of U.S. history, the relationship between the federal and state governments can be described as one of "dual federalism," in which the national and state governments functioned independently as parallel sovereigns. By the 1940s, however, "cooperative federalism" began to supplant the coexistence of dual federalism. Cooperative federalism constitutes a blended program in which federal funding is used to support state and local action and federal goals are achieved indirectly through state and local action.[30] One source summarized how cooperative federalism manifested itself in the context of transportation:

> [I]n the case of federal highway aid, it was the states that set the goal of "getting the farmer out of the mud" through improved rural road networks. State and local bodies decided where, when, and how their roads would be built. Federal oversight was chiefly to ensure that funded work was carried out efficiently and economically. In the process, federal influence also worked to improve standards of design and construction and preserve the system's engineering integrity by preventing deprivation as a result of local political pressure….
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> In the 1960s, cooperative federalism entered a new phase, with dramatic increases in national programs directly addressing activities that previously had been the responsibility of state and local governments…. In the field of surface transportation, grants of federal-aid funds for highways, mass transit, and highway traffic safety were made conditional on the recipient's compliance with national standards and regulations laid down by Congress and the Administration for achieving the goals of other non-transportation programs.[31]

Thus, neither FHWA nor FTA are regulatory agencies *per se*. Both are primarily funding agencies, implementing congressional power under the Spending Clause of the Constitution. Nonetheless, these agencies (and the parent U.S. DOT) have promulgated a number of regulations and imposed a wide range of legal obligations contractually (through the Master Agreement and various compliance statements), with the possibility of suspending or terminating funds for noncompliance. A state highway department or transit provider can avoid some (but not all) of these obligations by refusing the federal funding attached thereto.[32] Hence, though these agencies do not regulate in the *de jure* sense, they do so in the *de facto* sense. The use of conditional grants has certain pragmatic political advantages:

> As Congress sought state implementation of national policies and goals, it remained insulated from the public who, in the face of things, was being regulated by state authority. And at the state level, departments of transportation could counter opposition from governors, legislators, local officials, and the public by pointing out that failure to comply with federal requirements could jeopardize the state's share of federal funding.[33]

More recently, some commentators have observed that cooperative federalism is evolving into "interactive federalism," whereby negotiated compromises are resulting from informal give-and-take federal/state relationships. With the promulgation of the ISTEA of 1991, regional Metropolitan Planning Organizations (MPOs) were empowered to help coordinate regional transportation, land use, and environmental issues.[34]

C. FEDERAL COMMERCE POWER

1. Interstate vs. Intrastate Commerce

Article I, Section 8 gives Congress plenary power to regulate interstate, foreign, and Indian commerce. Specifically, "The Congress shall have power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…." Congress has used its preemptive authority in different ways—in some cases by direct regulations that assert the federal government's authority over particular activities, and in other cases, by simply preempting inconsistent state law, but leaving it to the courts to enforce the preemption.

Federal power over interstate and foreign commerce is both substantively vast and potentially preemptive of state power. In *Caminetti v. United States*,[35] the Supreme Court held, "The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the

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[30] NETHERTON, *supra* note 19, at 3.

[31] *Id.* at 4.

[32] 5 PAUL STEPHEN DEMPSEY, *Transit Law*, in SELECTED STUDIES IN TRANSPORTATION LAW 1-6 – 1-7 (2004).

[33] NETHERTON, *supra* note 19, at 7.

[34] NETHERTON, *supra* note 19, at 15; DEMPSEY, *supra* note 32, at 1-13 – 1-14, 2-3 – 2-4, 2-25 – 2-26 (2004).

[35] 242 U.S. 470 (1917).

channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."[36] Beginning in the mid-1930s, Congress began to expand Congress's Commerce Clause power.[37] Three broad areas have since been identified that Congress may legitimately regulate:[38]

1. Congress may regulate the use of the channels of interstate commerce;[39]

2. Congress may regulate instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the concern arises from intrastate activities;[40] and

3. Congress may regulate those activities having a substantial relation to, or substantial effect on, interstate commerce.[41]

In order for Congress to preempt state activity under the Commerce Clause, two requirements must be met: (1) there must be a rational basis for Congress's conclusion that the activity has a substantial impact on interstate commerce, and (2) the means chosen must be reasonably adapted to a constitutional end.[42]

In order to constitute interstate commerce, an actual single movement does not have to be between states. The U.S. Supreme Court has observed that the Commerce Clause "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."[43] As an example, steel from Indiana moves by train to Wisconsin, where a Wisconsin trucker picks it up at the rail head and trucks it 10 miles. The truck movement, though wholly within a single state, is also interstate commerce. The issue of whether a given movement is intrastate, interstate, or foreign traditionally has turned on the essential character of the commerce.[44] Federal transportation agencies have focused on the "fixed and persisting transportation intent of the shipper at the time of shipment," and concluded that such character is retained throughout the movement in the absence of the interruption of its continuity.[45]

In upholding the desegregation requirements of the Civil Rights Act of 1964 against local hotels and restaurants, the U.S. Supreme Court in *Heart of Atlanta Motel v. United States*,[46] concluded that racial discrimination by hotels, motels, and restaurants burdens interstate travel.[47] Even Ollie's Barbeque in Montgomery, Alabama, which served few

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[36] 242 U.S. at 491.

[37] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[38] In English v. General Electric Co., 496 U.S. 72, 78 (1990), the Supreme Court observed:

> Our cases have established that state law is pre-empted under the Supremacy Clause, …U.S. Court., Art. V1, Cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law…. Pre-emption fundamentally is a question of congressional intent, …and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one. Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation…so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress touch[es] "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." …Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where…the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be 'clear and manifest….'"
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> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, …or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

[citations omitted].

[39] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[40] *See Shreveport Rate Cases,* 234 U.S. 342 (1914).

[41] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[42] Hodel v. Va. Surface Min. & Recl. Ass'n, 452 U.S. 264 (1981). *See* Robert McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor and Rail Carriers*, 24 TRANSP. L.J. 155, 167 (1997).

[43] Perez v. United States, 402 U.S. 146, 151 (1971). *See* McFarland, *supra* note 42, at 155, 168.

[44] Atlantic Coast Line R.R. Co. v. Standard Oil of Ky., 275 U.S. 257, at 268 (1927).

[45] United States v. Majure, 162 F. Supp. 594, 598 (S.D. Miss. 1957); Dallum v. Farmers Coop. Trucking Ass'n, 46 F. Supp. 785 (D. Minn. 1942). Paul Stephen Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 13 TRANSP. L. INST. 121, 126–29 (1980).

[46] 379 U.S. 241 (1964).

[47] 379 U.S. at 253.

interstate travelers but purchased food that moved in interstate commerce, was deemed to fall under the power of Congress to regulate. Thus, the Court expanded the reach of the Congressional authority under the Commerce Clause to local establishments:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce…Thus, the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof.…[48]

Channels of commerce include the transportation corridors (e.g., roads and highways) through which persons and commodities move. Instrumentalities of commerce include automobiles and other vehicles. Congressional power to regulate the channels and instrumentalities of commerce may extend beyond the direct flow of commerce to include activity that is local in character.[49] With the expansive interpretation given interstate commerce, Congress's reach can be quite vast.

a. Highway Safety

Though road safety is often described as falling within the police powers of the states, federal regulation thereof has been upheld under the Commerce Clause. Beginning in 1966, Congress instituted a number of programs to improve federal and state cooperation to improve highway safety. Among these programs was the Hazard Elimination Program,[50] which provides federal funds to enable the states to improve their most dangerous road segments. But shortly after it was inaugurated, states began to complain that the absence of confidentiality would increase their risk of liability on dangerous highway segments before improvements could be made. In response, Congress amended the Highway Safety Act to provide that information compiled for the purpose of addressing potential accident sites "shall not be admitted into evidence in Federal or State court.…"[51] Congress subsequently expanded the evidentiary bar.

The constitutionality of the statute was assailed in *Pierce County v. Guillen*.[52] The Supreme Court earlier had noted that the Commerce Clause conferred upon Congress the power to "regulate the use of the channels of interstate commerce."[53] In *Guillen,* the Court held that "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement…would result in more diligent efforts to connect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads."[54] Such regulation, aimed at improving safety and increasing protection for interstate commerce by gathering highway data, fell within Congress's power under the Commerce Clause.[55]

b. Drivers' Licenses

Similarly, federal regulation within the realm of drivers' licenses also has been upheld under the Commerce Clause. In *Reno v. Condon*,[56] a unanimous U.S. Supreme Court upheld the constitutionality of the Driver's Privacy Protection Act of 1994,[57] which restricted the ability of state Departments of Motor Vehicles (DMV) to disclose personal information about a driver without his consent.[58] The Court found that the statute regulated personal information that constituted a "thing in interstate commerce," that might be sold or released "into the interstate stream of business," and that this was sufficient to support federal regulation under the Commerce Clause.[59] The Court found that, unlike the situations in *New York* and *Printz* (discussed below), the statute at issue here regulated activities of states as owners of databases, rather than requiring state officials to assist in the enforcement of federal standards against their own citizens.[60]

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[48] 379 U.S. at 258, quoting from United States v. Darby, 312 U.S. 100, 118 (1941).

[49] United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005).

[50] 23 U.S.C. § 152.

[51] 23 U.S.C. § 409 (added Pub. L. No. 100-17, tit. I, § 132(a), Apr. 2, 1987, 101 Stat. 170.).

[52] 537 U.S. 129 (2003).

[53] United States v. Lopez, 514 U.S. 549, 558 (1995).

[54] 537 U.S. at 147.

[55] 537 U.S. at 147.

[56] 528 U.S. 141 (2000).

[57] 18 U.S.C. §§ 2721–2725.

[58] In enacting the Driver Privacy Protection Act, Congress did not run afoul of the federalism principles enunciated in New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) and Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). Reno v. Condon, 528 U.S. 141, 143 (2000).

[59] *Reno*, 528 U.S. at 148.

[60] *Reno*, 528 U.S. at 151. In enacting the Driver Privacy Protection Act, Congress did not run afoul of the federalism principles enunciated in New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)

c. Highway and Bridge Tolls

Recently, two federal Courts of Appeal have had occasion to address the applicability of the dormant Commerce Clause in the context of highway tolls.[61] In *Doran v. Massachusetts Turnpike Authority*,[62] a highway user challenged the tolls levied to finance Boston's "Big Dig," a project designed to bury portions of I-93 beneath the city and extend I-90 to Boston Logan International Airport. The Massachusetts Turnpike Authority (MTA) implemented a Resident Only Discount Program for vehicles using Fast Lane transponders. The dormant Commerce Clause prohibits economic protectionism, or measures designed to benefit in-state economic interests at the expense of out-of-state economic interests.[63] However, the First Circuit held that the MTA toll program affected both Massachusetts and out-of-state vehicles evenhandedly, without burdening interstate commerce, and served a legitimate state interest unrelated to economic protectionism.[64]

Endsley v. City of Chicago[65] involved a dormant Commerce Clause challenge to tolls imposed on the Chicago Skyway toll bridge linking the Indiana Tollway with the rest of I-90 on grounds that the tolls were not apportioned to the use or cost of operating the highway. Under the dormant Commerce Clause, a fee is reasonable so long as it: (1) is based on a fair approximation of the use of the facilities; (2) is not excessive relative to the benefits conferred; and (3) does not discriminate against interstate commerce.[66]

However, the Seventh Circuit found the city acted as a market participant, rather than a regulator—a property owner using its property to raise money, not as a regulator.[67] Using market participant jurisprudence,[68] the court found that the city was free to influence a discrete class of economic activity in which it was a participant, and that the operation of private toll roads was a legitimate economic activity.[69]

2. Collision with State Sovereignty

Although the Commerce Clause has been expansively interpreted by numerous courts, in recent decades significant limitations on Congress's power have been identified. In several narrowly decided cases, the Court has given state sovereignty increased emphasis as a limitation on congressional power.[70] Though these are not transportation cases, their potential impact on the exercise of Commerce Clause power by Congress is profound.

In *New York v. United States*[71] (a case holding a federal statute unconstitutional because it sought to require the states to take title of low-level radioactive waste), the Supreme Court observed, "Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts…. The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[72] Hence, Congress cannot require the states to enact or enforce a federal regulatory program.[73]

In *Printz v. United States*,[74] the U.S. Supreme Court struck down the Brady Bill's requirement that local chief law enforcement officers conduct background checks on handgun purchasers as not "necessary and proper" to the execution of congressional power under the Commerce Clause. The Court found, "the whole *object* of the law to direct the functioning of the state executive and hence to compromise the structural framework of dual sovereignty" offended "the very *principle* of separate state sovereignty…."[75] The Court emphasized that "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer

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and Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). *See* Reno v. Condon, 528 U.S. 141 (2000).

[61] On the issue of user fees and the Commerce Clause, *see generally* Sullen Wolfe, *Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the "Silver Bullet"?,* 26 STETSON L. REV. 727 (1997).

[62] 348 F.3d 315 (1st Cir. 2003).

[63] 348 F.3d at 318, citing New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988).

[64] 348 F.3d at 322–23.

[65] 230 F.3d 276 (7th Cir. 2000).

[66] 230 F.3d at 284, citing Northwest Airlines v. County of Kent, Mich., 510 U.S. 355, 369 (1994).

[67] 230 F.2d at 284.

[68] *See* South-Central Timber Dev. v. Wunnicke, 467 U.S. 125 (1984).

[69] 230 F.2d at 284, citing Overstreet v. North Shore Corp., 318 U.S. 125, 127 (1943).

[70] State prevailing wage rate laws fall within a regulatory field traditionally occupied by the states. Frank Bros., Inc. v. Wisc. Dep't of Transp., 297 F. Supp. 2d 1140 (W.D. Wis. 2003); Cal. Division of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 325, 330, 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997).

[71] 505 U.S. 144 (1992).

[72] 505 U.S. at 166.

[73] Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); FERC v. Miss., 456 U.S. 742 (1982).

[74] 521 U.S. 898 (1997).

[75] 521 U.S. at 932 (emphasis in original).

or enforce a federal regulatory program…[for] such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[76] Hence, it is unlikely that a federal requirement that state highway patrolmen enforce federal truck standards would be enforced.

Other limitations on Congress's power have been found in attempts to regulate noneconomic areas, such as creating new federal criminal laws. In *United States v. Lopez*,[77] the Court struck down a federal statute seeking to prohibit possession of a firearm in a school zone, an attempt to regulate noneconomic, criminal activity, as beyond the pale of Commerce Clause authority. Similarly, in *United States v. Morrison*,[78] the Court struck down a federal statute seeking to create a civil remedy for victims of gender-motivated violence, saying "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[79] The Court continued:

> We…reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local…. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States…. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[80]

Thus, although the federal government could punish a state that refused to adopt federal highway speed limits by denying it federal highway money under the Spending Clause, it could not coerce a state's law enforcement officers to enforce federal speed limits under the Commerce Clause. A state that chose to forego the federal money could chart its own course. This may be a *de jure* distinction without a *de facto* difference, however, since the economic penalty may be too dear to bear. Though a rose, under any other word, would smell as sweet, coercion, under any other word, smells of treachery most foul.

[76] 521 U.S. at 935.

[77] 514 U.S. 549 (1995).

[78] 529 U.S. 598 (2000).

[79] 529 U.S. at 613.

[80] 529 U.S. at 617–18.

D. FEDERAL SUPREMACY AND PREEMPTION OF STATE LAW

1. Examples

Article VI of the Constitution (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding….[81]

The Supremacy Clause of the U.S. Constitution "invalidates any state law that contradicts or interferes with an Act of Congress."[82] As one commentator observed, "The power of the federal government to displace state law in those areas in which Congress has the ability to legislate is a potent one; it divests states of the ability to regulate in an area within the state's domain."[83]

With the gradual recognition of the legitimacy of state police powers, and deferential "rational basis" analysis, the Supreme Court began to retreat from dormant Commerce Clause preemption. Nevertheless, three circumstances exist under which state police power regulation of a matter of local concern will be deemed preempted by federal law:

1. *Explicit Preemption*—Where Congress explicitly preempted the states;[84]
2. *Occupy the Field*—Where the scheme of federal regulation is so pervasive as to leave no room for the states to supplement it;[85] or
3. *Same Purpose Covered*—Where the object to be obtained by the federal law and the character of the obligations imposed by it reveal the same purpose as the state regulation.[86]

[81] U.S. CONST. art. VI, cl. 2.

[82] Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 627, 81 L. Ed. 2d 527, 104 S. Ct. 2610 (1984).

[83] Susan Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?,* 40 VILL. L. REV. 1, 90 (1995).

[84] *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977).

[85] Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).

[86] Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983).

Congress has used its preemptive authority in different ways—in some cases by direct regulations that explicitly assert the federal government's authority over particular activities, and in other cases by simply preempting inconsistent state law, but leaving it to the courts to enforce the preemption. But courts also have deemed state law preempted even where it appears Congress never expressed an intention to preempt it, and indeed, in areas where Congress has never legislated at all. Sometimes, preemption is avoided via the technique of "cooperative federalism," whereby Congress offers the states the choice of implementing the federal regulations, as for example, in the field of environmental regulation.[87]

The most obvious case for federal preemption exists when Congress has expressly declared its intent.[88] For example, the Testing Act provides that "a State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section."[89] Yet, Congress is rarely so clear in demarking the jurisdictional lines between the federal and state spheres.

Among the most troublesome forms of preemption is where, under the "dormant" Commerce Clause (or negative Commerce Clause doctrine), a court holds that state action is preempted. Under the judicially created dormant Commerce Clause analysis, preemption is appropriate where (1) the federal scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it";[90] (2) the field of regulation has a federal interest "so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject";[91] and (3) the prospect of a conflict between the federal and state regimes creates "a serious danger of conflict with the administration of the federal program."[92]

The Commerce Clause itself speaks in terms of *congressional* power to regulate, and is silent as to whether the unexercised commerce power of the Congress has preemptive authority, or whether the judiciary may infer preemption as desirable. The Commerce Clause says nothing about the authority of the judiciary to proclaim that congressional silence on an issue prohibits state regulation thereof.[93] In his concurring opinion in *American Trucking Associations v. Smith*[94] (a case holding that a flat tax on interstate commerce offended the Commerce Clause because it imposed a greater burden on out-of-state vis-à-vis in-state motor carriers), Justice Scalia described negative Commerce Clause jurisprudence as a "quagmire," "arbitrary, conclusory, and irreconcilable with the constitutional text," "inherently unpredictable," and "has only worsened with age."[95] Keep this description in mind as we review the inconsistent and unpredictable Commerce Clause preemptive jurisprudence below.

a. Motor Carrier Safety Regulation

The Federal Aviation Administration (FAA) Authorization Act of 1994 included an odd provision for an FAA authorization bill, one preempting state economic regulation of intrastate trucking. Without a committee hearing on the subject, Senator Wendell Ford (D-Ky.), then Chairman of the Senate Commerce Committee, had the preemption provision inserted as a rider on behalf of Kentucky's largest employer, United Parcel Service, whose air cargo operations are hubbed at Louisville. It was oddly worded legislation, with certain provisions preserving state regulation of certain functions (including safety regulation) to the "authority of a State,"[96] while others restoring it to the "authority of a State or a political subdivision of a State."[97] Literally, it would seem that the elimination of the reference to political subdivisions in some provisions, but not others, evidenced a congressional intent that certain functions could be performed by a state, while others could be per-

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[87] Craig Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification,* 48 KAN. L. REV. 460, 519, 520 (2000).

[88] *See, e.g.,* Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31, 134 L. Ed. 2d 237, 116 S. Ct. 1103 (1996); Greenwood Trust Co. v. Commonwealth of Mass., 971 F.2d 818, 822 (1st Cir. 1992). *See also* National Freight v. Larson, 760 F.2d 499 (3d Cir. 1985) (state statute imposing overall truck trailer lengths conflicted with a federal statute, and was therefore preempted under the Supremacy Clause).

[89] 49 U.S.C. § 5331(f)(1). *See* 49 C.F.R. §§ 653.9, 654.9. *See also* United States v. Ohio Dep't of Highway Safety, 635 F.2d 1195 (6th Cir. 1980) (federal government may bring suit against state highway department that fails to implement emission inspection requirements mandated by the Clean Air Act).

[90] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[91] *Id.*

[92] Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956).

[93] *See* Kassel v. Consolidated Freightways, 450 U.S. 662, 691 (1981) (Rehnquist, J., dissenting).

[94] 496 U.S. 167, 200 (1990).

[95] 496 U.S. at 202 (Scalia, J., concurring).

[96] 49 U.S.C. § 14501(c)(2)(A).

[97] 49 U.S.C. § 14501(c)(2)(C), (3)(A).

formed by a state or political subdivision thereof.[98] The Courts of Appeals were divided on the issue.

The Supreme Court confronted the issue head on in *City of Columbus v. Ours Garage and Wrecker Service*,[99] in which a tow-truck operator and its trade association sought to enjoin the City of Columbus's tow-truck regulations as preempted.[100] In considering preemption, the Court noted that it begins "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[101] Emphasizing the "basic tenets of our federal system," the Court concluded that the statute did not manifest a clear intent that Congress sought to supplant local authority over the traditional state function of highway safety.[102] The Court found the purpose of Congress was to ensure that federal preemption of state motor carrier economic regulation not impinge upon "the preexisting and traditional state police power over safety."[103] That power includes the discretion to delegate state regulatory authority over safety to local governments.[104] However, where local safety regulation conflicts with a federal safety statute, preemption rules apply.[105]

b. Railway and Highway Crossing Safety Standards

Several federal statutes deny claimants tort relief when a railroad is complying with federal requirements.[106] Congress has insisted that "Laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable."[107] States may only regulate in a manner not incompatible with federal standards.[108]

The U.S. Supreme Court has had two occasions to review the preemptive effect of the Federal Railroad Safety Act of 1970[109] in the context of state tort actions. In *CSX Transportation, Inc. v. Easterwood*,[110] the Court was confronted with a preemption claim raised against a negligence suit that included allegations that the train that injured the plaintiff was traveling at excessive speed, and that the railroad failed to maintain adequate warning devices at the grade crossing. The Supreme Court held that the excessive speeding allegation was preempted because the Federal Railroad Safety Administration had promulgated regulations establishing the speed limit over that segment of track, and the railroad had not exceeded them. However, the allegation of inadequate warning devices was not preempted, for neither were federal funds used in their purchase, nor were federal specifications as to the type of grade crossing warnings issued. The Court observed that the language in the statute preempting state law provides that it must "cover" the same subject matter, which the Court interpreted as mandating preemption "only if the federal regulations substantially subsume the relevant state law."[111]

Seven years later, the Supreme Court revisited these preemption provisions in *Norfolk Southern Railway Co. v. Shanklin*.[112] Here, the Court found that allegations of negligence surrounding inadequate grade crossing warnings were preempted because, in this case, the devices were installed with federal funds, and as a consequence, federal regulations specified the precise warning devices to be installed, and the devices installed were subject to FHWA approval.[113] "Once the FHWA approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby pre-empting respondent's claims."[114]

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[98] But of course, there was no legislative history to review unless, of course, one had access to the files of United Parcel Service's lobbyists.

[99] 536 U.S. 424 (2002).

[100] City of Columbus v. Ours Garage & Wrecker Service, 536 U.S. 424 (2002) (municipalities may regulate safety of tow truck operators).

[101] 536 U.S. at 432.

[102] 536 U.S. at 434.

[103] 536 U.S. at 439. *See also* Scadron v. Des Plaines, 1993 U.S. App. LEXIS 4694 (7th Cir. 1991) (unpublished decision), holding that a city's regulation of billboards under the Illinois Highway Advertising Control Act was not preempted. Note, however, that unpublished decisions, though illustrative of an application of law, are of no precedental value.

[104] 536 U.S. at 439.

[105] *See* CSX Transp. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996) (municipal ordinance that limited the time that trains could disrupt local traffic preempted by the Federal Railway Safety Act).

[106] *See, e.g.,* 49 U.S.C. § 11707 (no liability when railroad acts in compliance with routing instructions of the Surface Transportation Board).

[107] 49 U.S.C. § 20106 (1994 ed., 2005 Supp.)

[108] *Id.*

[109] 49 U.S.C. § 20101 *et seq*.

[110] 507 U.S. 658 (1993). This case is discussed in McFarland, *supra* note 42, at 155, 177–80.

[111] 507 U.S. at 664.

[112] 529 U.S. 344 (2000).

[113] 529 U.S. at 353–54.

[114] Norfolk Southern Ry. Co. v. Shanklin, 529 U.S. 344 at 359 (2000) (state tort action alleging negligence in installation of warnings at railway grade crossings preempted where federal funds used in their installation).

Though the Circuit Courts of Appeals are divided on the issue, the prevailing view favors preemption. Some courts have held tort claims preempted where federal money participated in the installation of warning devices at grade crossings.[115] Others have found railroad grade crossing suits preempted where federal participation was more than casual, though federal financial participation may be non-cash in nature.[116] Still others have found preemption unless claimants could prove that the U.S. DOT Secretary had concluded that "the crossbucks, though desirable, were not adequate in themselves to warn the public of the danger" at the grade crossing in question.[117] A few have hesitated, requiring the federally funded safety devices to have been installed and operating.[118] At least one has bucked the trend, resisting the notion that federal funding would trigger preemption of state common law tort suits at grade crossings and refusing to accept that satisfaction of minimum federal requirements would be adequate from a safety standpoint.[119]

c. Vehicle Safety Standards

In *Geier v. American Honda Motor Co.*,[120] the Supreme Court was confronted with two conflicting provisions in the National Traffic and Motor Vehicle Safety Act of 1966. One, a preemption provision, provided: "Whenever a Federal motor vehicle safety standard…is in effect, no State or political subdivision of a State shall have any authority…to establish…any safety standard applicable to the same aspect of performance…which is not identical to the Federal standard."[121] The second, a savings clause, provided that "compliance with" a federal safety standard "does not exempt a person from liability at common law."[122] In a five-to-four decision, the U.S. Supreme Court found that neither provision precluded implied conflict preemption,[123] and with the collision of the preemption clause with the savings clause, effectively held the former clause trumped the latter. The Court concluded that a state common law "no-airbag" action was preempted since it would have been an obstacle to the implementation of the Federal Motor Vehicle Safety Standard regarding passive automobile restraints.[124]

In *Geier,* the Court reasoned that

> the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost and occasional risk to safety itself that too many different safety-standard cooks might otherwise create…. This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict….[125]

In a lengthy and impassioned dissent on behalf of four members of the Court, Justice Stevens insisted that

> the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States. Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers—are not to be preempted by a federal statute unless it is the clear and manifest purpose of Congress to do so.[126]

Further, this statute included a savings clause that, according to Stevens, "unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common law liability."[127] *Geier* has stimulated a considerable amount of law review commentary, much of it critical of the majority's decision.[128]

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[115] Hester v. CSX Transp., 61 F.3d 382 (5th Cir. 1995).

[116] Hatfield v. Burlington Northern R.R., 64 F.3d 559 (10th Cir. 1995).

[117] Armijo v. Atchison, Topeka & Santa Fe Ry., 87 F.3d 1188 (10th Cir. 1996).

[118] *See* Elrod v. Burlington N. R.R., 68 F.3d 241 (8th Cir. 1995). *See also* Thiele v. Norfolk & Western Ry., 68 F.3d 179 (9th Cir. 1995).

[119] Shots v. CSX Transp., 38 F.3d 304 (7th Cir. 1994). For an excellent discussion of these cases, *see* McFarland, *supra* note 42, at 155, 177–83.

[120] 529 U.S. 861 (2000).

[121] 80 Stat. 719, now codified at 49 U.S.C. § 30103(b)(1) (1994 ed.). *See* Ellen Therof, *Preemption of Airbag Litigation: Just a Lot of Hot Air?,* 76 VA. L. REV. 577 (1990).

[122] 49 U.S.C. § 30103(e).

[123] 529 U.S. at 869.

[124] 529 U.S. at 886.

[125] 529 U.S. at 871.

[126] 529 U.S. at 894, footnote omitted.

[127] 529 U.S. at 898.

[128] *See, e.g.,* Alexander Haas, *Chipping Away at State Tort Remedies Through Pre-emption Jurisprudence:* Geier v. American Honda Motor Co., 89 CAL. L. REV. 1927 (2001); Joseph Mulherin, *Geier v. American Honda Motor Co.: Has the Supreme Court Extended the Pre-emption Doctrine Too Far?*, 21 NAALJ 173 (2001); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?,* 17 BYU J. PUB. L. 1 (2002).

d. Labor Regulation

Since 1931, the Davis-Bacon Act[129] has mandated that wages paid on federally funded projects be not lower than those prevailing in the project's locale on similar construction projects. However, in order to facilitate the purposes of the National Apprenticeship Act,[130] wages may be lower than prevailing journeyman levels for apprentices. The Employee Retirement Income Security Act of 1974 (ERISA) included a rather broad and vague preemption provision, providing that ERISA "shall supercede any and all State laws insofar as they may…relate to any employee benefit plan…."[131] The U.S. Supreme Court has accepted *certiorari* in more than a dozen cases in an attempt to resolve conflicts in the lower courts' applying ERISA preemption to various state laws.[132]

Though recognizing that ERISA's preemption provision is "clearly expansive" and of "broad scope," the Supreme Court in *California Division of Labor Standards Enforcement v. Dillingham Construction*[133] upheld California labor laws on apprentice wages as not relating to an employee-benefit plan and thus not preempted. It found that apprentice wages were remote from the areas that ERISA addressed—"reporting, disclosure, fiduciary responsibility, and the like."[134] Moreover, it concluded that interpreting the statute to preempt "traditional state-regulated substantive law in those areas where ERISA has nothing to say would be 'unsettling.'"[135] It would also be contrary to the Courts' ordinary assumption that "federal laws do not supercede the historic police powers of the states."[136]

However, in a number of transport contexts, federal courts have found state and local governmental action preempted. For example, in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Missouri*,[137] the U.S. Supreme Court held that the state statute authorizing the governor's seizure of the transit company was invalid under the Supremacy Clause of the U.S. Constitution as making unlawful a peaceful strike, in conflict with Section 7 of the National Labor Relations Act (NLRA),[138] which guarantees the right to bargain collectively and the right to strike.[139] In *CF&I Steel v. Bay Area Rapid Transit District,*[140] a federal district court held that the Bay Area Rapid Transit District's attempt to debar a steel provider from doing further business with it because of alleged violations of the NLRA was beyond the power of state and local governments.[141] In *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Oliver*,[142] the U.S. Supreme Court held that state antitrust law was preempted where the allegedly anticompetitive agreement concerning wages and working conditions fell within the terms of a collective bargaining agreement negotiated under the NLRA.

2. Sovereign Immunity and the Supremacy Clause

Sovereign immunity will be discussed in detail below. However, the relationship between the Supremacy Clause and state sovereign immunity was discussed by the U.S. Supreme Court in *Alden v. Maine*[143] (a case involving a suit against a state employer for alleged violation of federal labor laws), in which the Court held that the Supremacy Clause did not trump immunity:

> The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because the law derives not from the State itself but from national power…. We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. When a State asserts its immunity to suit, the question is not one of the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.[144]

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[129] 46 Stat. 1494, 40 U.S.C. § 276a–276a-5.

[130] 50 Stat. 664, 29 U.S.C. § 50.

[131] 29 U.S.C. § 1144(a).

[132] *See* cases cited in Justice Scalia's concurring opinion in Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316, 335 n.1 (1997).

[133] 519 U.S. 316 (1997).

[134] 519 U.S. at 330, citation omitted.

[135] *Id.*

[136] 519 U. S. at 331. State prevailing wage rate laws fall within a regulatory field traditionally occupied by the states. Frank Bros., Inc. v. Wis. Dep't of Transp., 297 F. Supp. 2d 1140 (W.D. Wis. 2003); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 325, 330, 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997).

[137] 374 U.S. 74 (1963).

[138] 29 U.S.C. § 157 (2000).

[139] *See also* Bus Employees v. Wis. Bd., 340 U.S. 383 (1951) (holding that the Wisconsin Public Utility Anti-Strike Law conflicted with the NLRA).

[140] 2000 U.S. Dist. LEXIS 13810 (N.D. Cal. 2000).

[141] 2000 U.S. Dist. LEXIS 13810 (N.D. Cal. 2000). Wis. Dep't of Indus. v. Gould, 475 U.S. 282 (1986), citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 at 236 (1959).

[142] 358 U.S. 283 (1959).

[143] 527 U.S. 706 (1999).

[144] *Alden*, 527 U.S. at 732.

E. FEDERAL SPENDING POWER

1. Conditional Grants as a Mechanism for Federal Regulation of State and Local Governments

Article I, Section 8 of the Constitution provides, *inter alia:* "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States…."[145] FHWA and FTA are funding agencies primarily, implementing congressional power under the Spending Clause (sometimes referred to as the General Welfare Clause) of the Constitution.[146] The Spending Power includes the ability to impose requirements on state and local governments and private entities as a condition of receiving federal funds.

Often, federal appropriation statutes condition the receipt of federal funds on the state's enactment of uniform statewide regulation.[147] For example, federal funds for highway safety have been conditioned on promulgation of a motorcycle helmet law applicable throughout the state.[148] Similarly, federal highway funds have been conditioned on a state's promulgation of laws setting the drinking age at 21, or the enactment of a 55-mph speed limit.[149] Many of these federal mandates have been repealed as "the burden on the states that wanted a lesser degree of regulation became intolerable."[150]

The power of the purse is among Congress's most effective tools in forcing its will upon the Nation, particularly as the federal budget has grown over the last century. The Spending Clause is a major means of forcing states to abide by federal mandates.[151]

Federal preemption under the Commerce Clause differs significantly from preemption under the Spending Clause. In the former case, the Commerce Clause trumps inconsistent state law directly via the Supremacy Clause. In the latter case, the states are given a choice—they may comply with the federal mandate and receive federal funds, or they may avoid those mandates by refusing the federal funds attached thereto.[152] In other words, if the state objects to the strings attached to the federal funds, it has the simple expedient of declining the money.[153] As the Supreme Court has observed, "legislation enacted pursuant to the spending power is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions."[154] Moreover, under the spending clause, Congress can effectively regulate matters of local concern that it could not regulate directly.[155]

The power to regulate via the spending clause is broad. In 1936, the U.S. Supreme Court, in *United States v. Butler,*[156] rejected the argument that the general national welfare is confined to those powers enumerated in the Constitution as within the province of Congress, and instead concluded that the power of Congress to tax and spend in order to promote the "general welfare" was not limited to explicit grants of power set forth in the Constitution. Specifically, the U.S. Supreme Court held that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[157] However, the Court believed a balance must be struck to prevent federal encroachment on powers left to the states.[158]

In *Butler,* the Court found the Federal Agricultural Adjustment Act to be an unconstitutional intrusion into the reserved powers of the states, as "a

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[145] Article 1 also provides, in part:

> Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States…; Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;, …To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

[146] San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983).

[147] City of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424, 438 (2002).

[148] 23 U.S.C. § 153 (1994 ed.).

[149] 23 U.S.C. § 158 (1994 ed.).

[150] Albert, *supra* note 87, at 463, 530.

[151] For a review of cooperative federalism and conditional grants *see* Netherton, *supra* note 19. *See also* McFarlane, *supra* note 21.

[152] Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 112 (1989).

[153] McFarlane, *supra* note 21, at 9. "If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." New York v. United States, 505 U.S. 144, 168 (1992).

[154] Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

[155] McFarlane, *supra* note 21, at 8.

[156] 297 U.S. 1 (1936).

[157] United States v. Butler, 297 U.S. 1, at 66 (1936).

[158] McFarlane, *supra* note 21, at 6.

scheme for purchasing with federal funds submission to federal regulation…. The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action."[159] To allow Congress to so intrude upon state sovereignty would enable the spending power to "become the instrument for the complete subversion of the governmental powers reserved to the individual states."[160]

Cases since *Butler* have retreated from the restrictions it placed upon the spending power.[161] However, four limitations have been identified which circumscribe Congress's spending power:

1. The Constitution requires that spending be in pursuit of the "general welfare";[162] the expenditure must benefit society at large and not just a particular group; however, courts tend to defer to the judgment of Congress on this issue, for the discretion as to what constitutes general welfare "is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment";[163]
2. Where Congress seeks to impose conditions on federal funds, it "must do so unambiguously…enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation";[164]
3. Conditions upon receipt of federal funds must be related "to the federal interest in particular national projects or programs";[165] and
4. Such conditions must not run afoul of other constitutional provisions that provide an independent bar to the imposition thereof.[166]

a. Minimum Age Drinking Laws

The Supreme Court has had occasion to address congressional exercise of state "encouragement" under the Spending Clause in the context of interstate highways. In the National Minimum Drinking Age Amendment of 1964,[167] Congress penalized states "in which the purchase or public possession…of any alcoholic beverage by a person who is less than twenty-one years of age is lawful" by directing the Secretary of Transportation to withhold 5 percent of their allocation of federal highway funds. South Dakota, which allowed persons 19 years old and older to purchase 3.2 percent beer, appealed the decision of U.S. DOT to withhold 5 percent of its federal highway money. With respect to the five aforementioned criteria, in *South Dakota v. Dole,*[168] the Supreme Court concluded:

1. Congress found that different drinking ages in different states encouraged young people to combine drinking and driving in interstate commerce—it gave them an incentive to drive to states where the drinking age was lower; prohibiting this clearly was in the public interest;
2. The conditions could not be more unambiguously stated—a state that allows its citizens under the age of 21 to drink alcoholic beverages results in losing 5 percent of federal highway money;
3. The condition imposed is directly related to one of the principal reasons why highway funds are expended—to encourage safe interstate travel; and
4. Though South Dakota contended that the Twenty-First Amendment prohibited Congress from regulating drinking ages, and contended further that Congress could not do indirectly what it was prohibited from doing directly, the fourth criterion was not so circumscribed; it only prohibits inducing states to engage in unconstitutional activities.[169]

In *South Dakota v. Dole,* the Supreme Court also recognized that congressional exercise of the Spending Clause potentially could run afoul of the Tenth Amendment. The Court noted that the financial inducement must not be so coercive as to go beyond the point at which "pressure turns into compulsion."[170] Here, the financial penalty constituted "relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such

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[159] 297 U.S. at 72–73. McFarlane, *supra* note 21, at 6–7.

[160] 297 U.S. at 75. McFarlane, *supra* note 21, at 7.

[161] McFarlane, *supra* note 21, at 8.

[162] 297 U.S. at 65.

[163] Helvering v. Davis, 301 U.S. 619, 640 (1937). "The [Supreme] Court has taken the position that general welfare is whatever Congress finds it to be." McFarlane, *supra* note 21, at 9.

[164] Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[165] Massachusetts v. United States, 435 U.S. 444, 461 (1978).

[166] Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269–70 (1985).

[167] 23 U.S.C. § 158.

[168] South Dakota v. Dole, 483 U.S. 203 (1987).

[169] 483 U.S. at 209–10. The court offered an example: "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." *Id.* at 210–11.

[170] Stewart Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

laws remains the prerogative of the States not merely in theory but in fact."[171] As a consequence, the Supreme Court held that even if Congress lacked the power to enact a national minimum drinking age, the encouragement of states to do so falls legitimately within the spending power of Article 1.[172]

b. Maximum Speed Limits

In *People v. Williams,*[173] a lower California state court upheld the provisions of the Emergency Highway Energy Conservation Act,[174] which made a state's receipt of federal highway funds contingent on its establishment of a maximum speed limit of 55 mph as a legitimate exercise of power under the Spending Clause. The court summarized federal precedent on the subject:

> Although article I, section 8 lists certain specific areas for which Congress has the "power to spend," it has been held that the "power to spend" encompassed within the "general welfare" clause is not limited to these specific areas. The "general welfare clause" is itself an independent—and expansive—source of Congress' spending authority. Moreover, Congress may attach conditions to the disbursement of federal funds as long as those conditions are related to a legitimate national goal of providing for the general welfare of the nation, have a rational relationship to the purpose of the federal funds whose receipt is conditioned, and are unambiguous. The conditions need not be restricted to those areas over which Congress has direct regulatory authority. Moreover, when Congress is legislating for the "general welfare," the means chosen by Congress to effectuate the congressional purpose are necessarily valid if Congress could reasonably conclude that "the means are 'necessary and proper' to promote the general welfare.[175]

c. Drug Testing Requirements

In *O'Brien v. Massachusetts Bay Transportation Authority,*[176] the First Circuit addressed the Omnibus Transportation Employee Testing Act of 1991,[177] which required states to conduct random drug and alcohol tests upon transit employees responsible for safety-sensitive functions as a condition of receiving federal transit funds. In *O'Brien*, the court held that when the federal government conditions the receipt of federal money on complying with certain requirements (in this case drug and alcohol testing), and the state accepts the money, the local law must yield.[178] If it accepts federal money, the state must comply with the federal requirements.

d. Highway Beautification

Before the federal government intervened, every state had promulgated legislation regulating outdoor advertising.[179] At least half the states exercised their police powers to restrict advertising through amortization rather than compensation. Under amortization, a state allows the billboard owner a reasonable time to continue the prohibited use to recover its investment before termination.[180] The Highway Beautification Act of 1965 (HBA) does not allow amortization as a manner of just compensation for any signs along a highway subject to the HBA.[181] This is but one of several ways in which the HBA interferes with local zoning prerogatives, and another example of how grant conditions may trump well-established state and local prerogatives.

With the construction of the Interstate Highway system in the 1950s, the federal government began to turn its attention to highway beautification,

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[171] 483 U.S. at 211–12. In this case, the Court held that Congress may impose conditions on federal money in order to regulate the states. The U.S. Supreme Court held that Congress may legitimately withhold funds in order to encourage a state to enforce the age 21 drinking age if the condition: 1) is in pursuit of the general welfare, which is up to Congress to decide; 2) is unambiguous, so the state can exercise a choice; 3) is related to the national interest (drinking age goes up, drunk driving goes down); 4) does not conflict with other constitutional rights; and 5) is not coercive upon the state.

[172] 483 U.S. at 212.

[173] 175 Cal. App. 3d Supp. 16 (Superior Ct. Cal. 1985).

[174] 23 U.S.C. § 154.

[175] 175 Cal. App. 3d Supp. at 18–19 [citations omitted].

[176] 162 F.3d 40 (1st Cir. 1998).

[177] Pub. L. No. 102-143, 105 Stat. 952.

[178]

> Massachusetts authorities have elected to draw on federal coffers to finance a bevy of mass transit projects. Having accepted those funds, they must abide by the conditions that Congress attached to them, one of which mandates random drug and alcohol screens for employees who…perform safety-sensitive functions. Because applicable law includes an express preemption provision, contrary state law cannot stand as an obstacle to the testing protocol.

O'Brien, 162 F.3d at 45.

[179] Albert, *supra* note 87, at 463, 469. *See, e.g.,* Adams Outdoor Advertising v. City of Lansing, 1998 U.S. Dist. LEXIS 19058 (W.D. Mich. 1998); and Scadron v. City of Des Plaines, 734 F. Supp. 1437 (N.D. Ill. 1990).

[180] Albert, *supra* note 87, at 463, 501.

[181] See ROSS NETHERTON, REEXAMINATION OF THE LINE BETWEEN GOVERNMENTAL EXERCISE OF THE POLICE POWER AND EMINENT DOMAIN AT 32–35 (NCHRP Legal Research Digest No. 44, 2000).

first, in a weak system of bonus payments to states that agreed to control "outdoor advertisement signs, displays, or devices within six hundred and sixty feet of the edge of the right-of-way and visible from the main-traveled way of all portions of the Interstate System constructed upon any part of the right-of-way."[182] Congress transformed the beautification system from a reward to a coercive system with the HBA, denying states that did not conform federal highway dollars.[183] It was a carrot and stick approach. The federal government promised a carrot of federal money to assist in paying for sign removal, while threatening to strike a blow with the stick of denial of 10 percent of all federal highway money allocated to the state if the state was naughty and did not comply. Yet, though the carrot was dangled but never delivered, the stick was vigorously employed under the principle of "Spare the rod; spoil the child."[184]

In *South Dakota v. Adams,*[185] a federal district court addressed the constitutionality of the HBA's authorization of a withholding of 10 percent of a state's apportionment of federal highway funds where it failed to effectively control billboards through its zoning power. With respect to the Spending Clause challenge, the court held the Act "to be in furtherance of the general welfare" for it was designed "to protect the public interest in the highways, and promote the scenic and recreational value of the highways, and promote safety on the highways."[186] The court noted that "the federal government may require the State to comply with certain conditions in order to obtain funds that the federal government grants to the State…. There is a vast difference between requiring a state to adopt certain regulations and denying funding to a state that refuses to adopt them."[187] The court also upheld the Act's challenge on interstate commerce ("public travel is part and parcel of interstate travel"),[188] and Tenth Amendment grounds ("the very fact that South Dakota chose not to enact billboard compliance legislation after having been specifically warned of the ten percent penalty shows (the conditional grant was not coercive)").[189] Other cases have addressed the conflict between state police power in regulating public advertising vis-à-vis the First Amendment right of free speech.[190]

2. Are There No Limits on Federal Spending Power?

In his insightful essay, *State Highway Programs Versus the Spending Powers of Congress,*[191] Walter McFarlane points out the seeming impossibility of proving that a federal mandate is coercive:

> Under the test, if the "simple expedient" of refusing the federal-aid threatens "economic catastrophe," the statute will be struck down. Such a test bodes ill for any strength the States may seek in arguing coercion. It remains questionable "whether any showing of economic hardship, no matter how great, would be sufficient to compel a finding of coercion.
>
> [T]he test for coercion is extremely rigid. A state's chance of successfully attacking federal control appears very slim at present. The state will only be successful if it can prove that the coercion rises to a level that would prove "catastrophic" to the state's function if it were to refuse the federal-aid or that coercion must emanate from a source other than the "inducement" of federal-aid.[192]

But in *New York v. United States,*[193] the Supreme Court revealed limitations on congressional authority in terms of how far it may go in coercing state behavior. It concluded that certain monetary incentives of the Low-Level Radioactive Waste Policy Amendments Act of 1985[194] satisfied the requirements of the Spending Clause. However, the Act's requirement that states either regulate according to Congress's instructions, or take title of radioactive waste, violated the core of state sovereignty reserved by the Tenth Amendment, was not an exercise of any of Congress's enumerated powers, and crossed the line from encouragement to coercion.[195] Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[196] The Constitution does not give Congress the authority "to require the States to

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[182] Sec. 1, 72 Stat. at 905 (amending 23 U.S.C. § 131).

[183] Albert, *supra* note 87, at 463, 499.

[184] *See generally* Albert, *supra* note 87, at 463, 501.

[185] 506 F. Supp. 50 (C.D.S.D. 1980), *aff'd* South Dakota v. Goldschmidt, 635 F.2d 698 (8th Cir. 1980).

[186] *Adams*, 506 F. Supp. at 55.

[187] *Adams*, 506 F. Supp. at 57.

[188] *Adams*, 506 F. Supp. at 55.

[189] *Adams*, 506 F. Supp. at 58.

[190] *See, e.g.,* Scadron v. City of Des Plaines, 734 F. Supp. 1437 (N.D. Ill. 1990).

[191] McFarlane, *supra* note 21.

[192] McFarlane, *supra* note 21, at 10, 16 (citations omitted).

[193] 505 U.S. 144 (1992).

[194] 42 U.S.C. § 2021b.

[195] 505 U.S. at 175, 177. *But see* Dana Lee*, Federal Implementation Plan Withstands Virginia's Tenth Amendment Challenge,* 17 J. LAND RESOURCES & ENVTL. L. 142 (1997).

[196] Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).

govern according to Congress' instructions."[197] In other words, in the absence of explicit constitutional authority (such as the power to regulate interstate commerce), Congress may not enact laws that coerce the states to perform an act that violates their sovereignty. Said the court:

> We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts….
>
> That is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.[198]

Relying on *New York v. United States,* Professor Craig Albert argues forcefully that the HBA is ripe for constitutional challenge.[199] He points out that the federal power to regulate highways resides solely in the Spending Clause: "if commerce were the basis for road building and regulation, then there would be no need for a Post Roads clause because the power to designate and build roads would be subsumed in the Commerce Clause."[200]

Though Professor Albert concedes the U.S Supreme Court has never invalidated a conditional spending program under the Tenth Amendment, neither has it been confronted with "a refusal by Congress to spend that which it promised."[201] He argues that the billboard control provisions of the Act "constitute an unconstitutional infringement on the sovereignty of those states that would like to regulate or eliminate billboards through use of the police power but are not permitted to do so."[202] Moreover, Professor Albert finds strong parallels between the application of the HBA and the facts of *New York v. United States.* In both cases, he points out, the states were required either to take title to the item (radioactive waste or billboards, respectively), or be "forced to recognize them as 'property,' when in fact the very definition of property is a state-based concept."[203] Again, before the federal camel put its nose under the tent, the states handled billboard removal under its police powers and through the vehicle of amortization, rather than eminent domain and just compensation.[204]

Although neither the FHWA nor the FTA is a regulatory body, *per se*, pursuant to legislative authority, each has the ability to impose regulatory obligations on recipients of transit funding through regulations directly or through their funding agreements contractually. These agencies carry both a carrot and a stick. A wide range of statutes, regulations, and contractual agreements impose a plethora of federal requirements upon states, which they can either honor or violate at their own peril, the reward for compliance being the receipt of federal funds, and the penalty for violation being the withholding of federal funds. As *New York v. United States* reveals, there is a potential Tenth Amendment limit on the federal government's ability to coerce the states into enforcing a federal regulatory program. The perimeters of this limitation have yet to be developed, but the door has been opened.

F. EMINENT DOMAIN AND TAKINGS

1. Takings

The subject of eminent domain is a complex web of federal and state constitutional law, with a veritable patchwork quilt of statutes thrown in for good measure.[205] However, the first aspect that must be grasped is the distinction between the exercise of

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[197] 505 U.S. at 162. *But see* Reno v. Condon, 528 U.S. 141 (2000), which upheld a statute that did "not require the States in their sovereign capacity to regulate their own citizens," nor did it require the state legislature "to enact any laws or regulations" or to "assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151.

[198] 505 U.S. at 166. One source argues that the amendments to the Highway Beautification Act violate the Tenth Amendment standards of New York v. United States. Albert, *supra* note 87, at 463, 535, 536.

[199] Professor Albert argues that the amendments to the Highway Beautification Act violate the Tenth Amendment standards of New York v. United States. Albert, *supra* note 87, at 463, 518 *et seq*. (2000).

[200] *Id.*

[201] Albert, *supra* note 87, at 463, 524.

[202] Albert, *supra* note 87, at 463, 537.

[203] Albert, *supra* note 87, at 463, 536.

[204] *See, e.g.,* Donrey Communications Co. v. City of Fayetteville, 660 S.W.2d 900 (Ark. 1983). Such amortization is

> not a public taking of private property without just compensation…. The principle of amortization rests on the reasonable exercise of the police power, and the financial detriment imposed upon a property owner by the reasonable exercise of police power does not constitute the taking of private property within the inhibition of the constitution.

Id. at 905.

[205] Readers interested in this subject are encouraged to review NETHERTON, *supra* note 181, for a comprehensive treatment of the subject in the transportation context.

ordinary government police powers vis-à-vis "takings," the latter being the focus of eminent domain actions. This distinction has proven problematic for courts in the past,[206] and will likely continue to be so for the foreseeable future.[207]

The takings issue has its origins in the Fifth Amendment to the U.S. Constitution, which provides that "private property [shall not] be taken for public use without just compensation."[208] This principle was extended to the state governments through the Fourteenth Amendment, which provided that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of…property, without due process of law…."[209] Many state constitutions and statutes also embrace the public use and just compensation requirements. A state may not provide a lesser degree of protection than the U.S. Supreme Court has interpreted the Fifth Amendment as granting, because the takings clause has been incorporated into the Fourteenth Amendment and thereby extended to the states.[210] A state may, however, provide greater protection than that accorded under federal law, either through its own constitution or by statute. Should a state not have the power to condemn property for highway purposes, ample federal legislative authority exists to authorize condemnation.[211]

Until the early 20th century, the federal courts had held that a taking occurred only where there was direct appropriation of property for public use, or where there was physical intrusion upon the property.[212] Yet even a physical appropriation or intrusion was not a taking if done to protect the health, safety, or morals of a community, as in such instances the action was deemed to constitute the legitimate exercise of police power.[213] Today, a taking is deemed to have occurred when the owner has been substantially deprived of the beneficial use and enjoyment of his property.[214]

A case that illustrates the collision between state police power and constitutionally protected property rights is *Panhandle Eastern Pipe Line Co. v. State Highway Commission*.[215] Without condemnation, the Kansas Highway Commission ordered the Panhandle Eastern Pipe Line Company to relocate certain transmission lines, located on its own rights-of-way, which would conflict with a proposed highway. However, the U.S. Supreme Court concluded that the company's easements constituted property whose taking was restricted by requirements of the Fourteenth Amendment. Because the lines did not present a serious danger to the public, their removal was a takings for which just compensation was required. The Court observed:

> The police power of a State, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the State to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self protection, and permits reasonable regulation of rights and property in par-

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[206] Bohannon v. Camden Bend Drainage Dist., 208 S.W.2d 794 (Mo. Ct. App. 1948).

[207] For readers interested in the relationship between police power and condemnation, it is recommended that they consult NETHERTON, *supra* note 181, and volume 1 of SELECTED STUDIES IN HIGHWAY LAW (hereinafter SELECTED STUDIES). *See also* Paul Dempsey, *Local Airport Regulation: The Constitutional Tension between Police Power, Preemption & Takings*, 11 PENN ST. ENVTL. L. REV. 1 (2002).

[208] U.S. CONST. amend. V.

[209] U.S. CONST. amend. XIV.

[210] Chicago B.&Q. R.R. v. City of Chicago, 166 U.S. 226, 239 (1897).

[211] 23 U.S.C. §§ 107, 317.

[212] Paul W. Garnett, *Forward-Looking Costing Methodologies and the Supreme Court's Takings Clause Jurisprudence*, 7 COMMLAW CONSPECTUS 119, 121–23 (1999) (Garnett).

[213] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887); "police power" is a broadly defined term that encompasses governmental regulatory authorities as well as law enforcement authorities proper.

[214] Generally speaking, a taking is not deemed to have occurred merely because the threat of condemnation causes a decline in market value or the loss of another financial opportunity. However, a taking generally will be deemed to have occurred where the owner of commercial property loses rental income to such a degree that he risks losing the property before condemnation occurs. Since there is no hard-and-fast rule defining what constitutes a substantial deprivation of the use and enjoyment of property, a case-by-case approach has been used to determine whether a *de facto* taking has occurred. Four factors have been identified: (1) the inevitability of condemnation; (2) unreasonableness of delay and severity of the hardship imposed; (3) oppressive or unreasonable conduct; and (4) physical invasion or direct legal restraint on the property. Ultimately, the issue is "whether there has been an abuse of the power of eminent domain." JOHN VANCE, PLANNING AND PRECONDEMNATION ACTIVITIES AS CONSTITUTING A TAKING UNDER INVERSE LAW 12 (NCHRP Research Results Digest No. 150, 1986), and NCHRP Legal Research Digest No. 18 (1991), at 9.

[215] 294 U.S. 613 (1935).

> ticulars essential to the preservation of the community from injury.[216]

In *Wright v. City of Monticello*,[217] a property owner used a street for ingress and egress that the city abandoned and transferred to his neighbors. In determining that a property owner has a right of access in the nature of an easement over streets and highways providing access to his property, the confiscation for which just compensation is required, the Arkansas Supreme Court held:

> Under our decisions, the owner of property abutting upon a street or highway has an easement in such street or highway for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself; and any subsequent act by which that easement is substantially impaired for the benefit of the public is a damage to the lot itself within the meaning of the constitutional provision for which the owner is entitled to compensation. The reason is that its easement in the street or highway is incident to the lot itself, and any damage, whether by destruction or impairment, is a damage to the property owner and independent of any damage sustained by the public generally….
>
> A property owner whose land abuts the land being taken by the government and who has a property right of egress and ingress through such land suffers a distinct injury not suffered by the general public [and therefore has standing to complain].[218]

Without more, mere planning in anticipation of condemnation does not constitute a taking.[219] Moreover, an aggrieved property owner must demonstrate more than mere inconvenience shared by all. In *Warren v. Iowa State Highway Commission*,[220] the Iowa Supreme Court addressed a claim by a property owner that highway construction had closed off plaintiff's secondary road, causing her to travel more than 3 mi to arrive at the closed access point. The court was unsympathetic to her plight:

> [O]ne whose right of access from his property to an abutting highway is cut off or substantially interfered with by the vacation or closing of the road has a special property which entitles him to damages. But if his access is not so terminated or obstructed, if he has the same access to the highway as he did before the closing, his damage is not special, but is of the same kind, although it may be greater in degree, as that of the general public, and he has lost no property right for which he is entitled to compensation….[221]
>
> Many owners of motels, or gasoline stations, or other business establishments find themselves left in a bywater of commerce when the route of a highway is changed so that the main flow of traffic is diverted…. But this gives the business man no claim for damages against the authority which has installed the traffic regulators which injure him.[222]

In an apparent recognition of the expanding power and authority of administrative agencies at all levels of government, in *Pennsylvania Coal Co. v. Mahon*,[223] the U.S. Supreme Court addressed more directly the distinction between compensable takings and property losses or damages resulting from noncompensable police powers. The Court concluded that no "bright-line" rule existed, but suggested that the extent of the damage to the owner's property rights was one factor to be considered,[224] and that it was possible for police powers to go "too far" and become takings.[225] Yet the Court assiduously avoided making a definite decision about what constituted going "too far," and during the ensuing decades, the Court gave great deference to the expansion of government regulatory powers, particularly at the federal level.[226]

This began to change, however, in 1978, with the decision in *Pennsylvania Central Transportation Co. v. New York City*.[227] In that case, the Court suggested four factors to consider when attempting to determine whether a taking has occurred: (1) the

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[216] 294 U.S. at 622. In a case involving pipeline relocation for the construction of an Interstate highway, the U.S. Court of Claims held the United States was contractually bound to reimburse the State for these costs. In dictum, however, the Court observed that "the expectation of continued enjoyment of a revocable license is not mandated by the Fifth Amendment as an element of damage for an eminent domain taking. On this authority we may assume that the United States might have built the highway itself and not have had to reimburse the utility for the cost of relocating the pipeline." Arizona v. United States, 494 F.2d 1285, 1288 (Ct. Cl. 1974) (citations omitted).

[217] 47 S.W.3d 851 (Ark. 2001).

[218] 47 S.W.3d at 855.

[219] JOHN VANCE, PLANNING AND PRECONDEMNATION ACTIVITIES AS CONSTITUTING A TAKING UNDER INVERSE LAW (NCHRP Research Results Digest No. 150, 1986), and NCHRP Legal Research Digest No. 18 (1991), at 4.

[220] 93 N.W.2d 60 (Iowa 1958).

[221] *Id.* at 65.

[222] 93 N.W.2d at 68.

[223] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (*Pennsylvania Coal Co.*); the traditional legal term for damages that cannot be redressed is *damnum absque injuria*, meaning "injury without wrong," however the term appears to be lapsing from use in favor of "non-compensable damages."

[224] *Pennsylvania Coal Co.*, 260 U.S. at 413.

[225] *Pennsylvania Coal Co.,* 260 U.S. at 415.

[226] Garnett, *supra* note 212, at 119, 125–26.

[227] Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. 104 (1978).

character of the government action; (2) the economic impact of the action on the property owner; (3) the extent to which the government's action has interfered with the property owner's "distinct investment-backed expectations"; and (4) the effects of the action as taken on the parcel of land as a whole, rather than portions of it.[228] Yet the Court declined to establish a "set formula" for takings, suggesting that, instead, takings proceedings are "essentially ad hoc factual inquiries."[229]

The *Penn Central* decision was followed by several more years of inactivity before the Court again returned to the subject of takings in 1986 with the case *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[230] This decision held that even where a property owner's rights are only temporarily abridged by regulatory action, compensation is owed for the value of the time period and degree of abridgement.[231] Close on the heels of that ruling, the Court established what has become known as the "essential nexus" rule.[232] This rule provides that, in addition to the traditional questions of whether a particular regulatory restriction constitutes a legitimate government interest and whether it denies an owner any economically viable use of the owner's property, there must also be a logical relationship (an "essential nexus") between the public purpose of the restriction and the nature of the restriction on the property.[233]

In 1992, the U.S. Supreme Court further refined its position by finding that a complete regulatory forfeiture of property without compensation is permissible only where the contemplated use of the property was already forbidden by the common law or statutes at the time the owner originally purchased the property.[234] The Court's rationale was that in such instances the property owner had no reasonable expectation of being able to use the property for such purposes in the first place, so it would not be as great a hardship to infringe upon his property rights.[235] The Court's decision also established a new principle—the "per se takings" rule, which provides that where a regulation "denies all economically beneficial or productive use of land," a taking has occurred.[236]

Finally, in 1994, the Court brought the law of eminent domain at the federal level to its current state with the creation of another takings rule.[237] The new rule, which supplements the essential nexus test discussed above, is the "rough proportionality" rule. This rule holds that even if an essential nexus exists between the public purpose of a regulatory restriction and the nature of the restriction, the nature and degree of the restriction must be approximately proportional to the damage it is intended to prevent or the benefit it is intended to create.[238]

A government agency need not have the ability to use eminent domain for a taking to result under any of these rules. It must only substantially deprive a property owner of the beneficial use of the property for public use to give rise to a question of whether a taking has occurred.[239] It should be noted, however, that a Section 1983 action may only lie against a governmental entity when the government employee engaged in the taking had authority to do so. For example, in *Krmencik v. Town of Plattekill*,[240] a city's superintendent of highways ordered a strip of land 8–12 ft wide and 275 ft long taken to widen a road. This prompted the property owner to file a Section 1983 action against the town. The federal district court noted that although the highway superintendent had authority to maintain and repair the town's roads, the authority to exercise eminent domain remained in the town's board and had never been delegated to him. The court held, "When an alleged infringement of a constitutionally protected right is traced

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[228] *See Penn Cent*., 438 U.S. at 124–31.

[229] 438 U.S. at 124.

[230] 482 U.S. 304 (1987) (following a flood that destroyed structures essential to the plaintiff's business, the county adopted a new ordinance that prohibited the reconstruction of buildings in the flood zone).

[231] 482 U.S. at 317–18, 322.

[232] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (as part of obtaining a new building permit, the plaintiffs were informed that they were required to grant an easement along the edge of the property to allow beachgoers to cross between two public beaches).

[233] *Nollan*, 483 U.S. at 834, 837.

[234] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014, 1030–31 (1992) (*Lucas*) (the plaintiff acquired property for the purpose of building housing; however the State enacted legislation that had the effect of banning all new construction on the property).

[235] *Lucas*, 505 U.S. at 1030–31.

[236] *Lucas*, 505 U.S. at 1015. *See also* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326–27, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002), on when a regulatory taking is not triggered.

[237] Dolan v. City of Tigard, 512 U.S. 374 (1994) (*Dolan*) (plaintiff was ordered by city to dedicate part of her property to flood control in exchange for a redevelopment permit).

[238] 512 U.S. at 391.

[239] Pumpelly v. Green Bay Co., 80 U.S. 166, 177–78 (1872); *see also* Fountain v. Metro. Atlanta Rapid Transit Auth., 678 F.2d 1038 (11th Cir. 1982) (hereafter *Fountain*).

[240] 758 F. Supp. 103 (N.D.N.Y. 1991).

to an abuse of discretion by a municipal employee, no municipal liability exists under § 1983."[241]

While the U.S. Supreme Court spent decades struggling with whether to include damages and other infringements less than direct physical entry/appropriation within the term "takings," most states historically have embraced broader criteria for defining takings, with roughly half the states specifically including damages to property within the terms of their constitutions.[242] However, state projects that receive certain types of federal funding must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URARPAPA),[243] which may give property owners more or less rights relative to those of the state where the action is transpiring.

Where private parties are intended beneficiaries of governmental activity, fairness and justice do not require temporary losses of use that may result from that activity to be borne by the public as a whole through payment of compensation, even though the activity may also be intended incidentally to benefit the public. Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside, or every time firemen enter upon burning premises or adjacent properties and deprive the private owners of any use of the premises in order to fight the fire, or enter into evacuate buildings to prevent damage or destruction by rioters, or evacuate areas threatened by terrorist attacks.[244]

2. Public Use/Public Purpose

The next principal constitutional element in a takings action is the question of what constitutes "public use." Eminent domain is the power of the government to take property without the owner's consent. The Constitution requires that property must "be taken for public use," for which taking "just compensation" must be paid to the property owner.[245] The plain meaning of the term "public use" would suggest that property may not be taken by government for a "private use." But since the U.S. Supreme Court's decision in *Berman v. Parker*,[246] the literal language has not been followed, local governments have been given wide deference, and anything constituting a "public purpose" has been held to satisfy the constitutional requirement.[247] This issue was usually not considered in early eminent domain cases, as in those instances property was usually acquired for roads, canals, railways, utilities, or government buildings that for the most part had clear value for the general public.[248] But today, the terms "public use" and "public purpose" are used interchangeably, and any acquisition that can be justified on the basis of creating higher tax revenues, for example, can satisfy the "public use" requirement.[249]

In the late 1920s, the Michigan highway commissioner began a project to construct and widen a highway between Detroit and Pontiac. Part of the route was a rail line owned by the Detroit, Grand Haven & Milwaukee Railway Company. The state highway commissioner entered into an agreement with the railroad to acquire the right-of-way and relocate the rail line. He then entered into condemnation proceedings to fulfill that agreement and secure the necessary right-of-way for the relocated track. The property owner objected on grounds that the taking of his land for the purposes of exchanging it for land owned by the railroad was for a private (railway), and not for a public (highway), purpose.

Reviewing the Fourteenth Amendment and the Michigan Constitution, the U.S. Supreme Court in *Dohany v. Rogers, State Highway Commissioner of Michigan*,[250] found that just compensation would be provided to the property owner for the taking. As to the issue of whether the taking was for a public purpose, the Court concluded:

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[241] *Krmencik*, 758 F. Supp. at 107.

[242] *Compare* COLO. CONST. art. II, § 15 (provides for compensation for damage) *with* MASS. CONST. ANN. pt. 1, art. X (provides for compensation only where property is directly taken).

[243] 42 U.S.C. §§ 1415, 2473, 3307, 4601–02, 4621–38, 4651–55.

[244] Nat'l Bd. of YMCA v. United States, 395 U.S. 85, 23 L. Ed. 2d 117, 89 S. Ct. 1511 (1969); Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 41 Cal. Rptr. 2d 658, 895 P.2d 900 (1995*);* El-Shifa Pharm. Indus. Co. v. United States, 55 Fed. Cl. 751, 2003 U.S. Claims LEXIS 47 (2003); Bennis v. Michigan, 516 U.S. 442, 134 L. Ed. 2d 68, 116 S. Ct. 994 (1996).

[245] Jennifer Kruckeberg, Can Government Buy Everything? The Takings Clause and the Erosion of the "Public Use" Requirement, 87 MINN. L. REV. 543, 544 (2002).

[246] Berman v. Parker, 348 U.S. 26 (1954).

[247] Some parties have attempted to argue that there is a meaningful difference between "public use" and "public purpose," but the courts often have rejected these attempts. See Rabinoff v. Dist. Court of Denver, 360 P.2d 114 (Colo. 1961).

[248] 1 SELECTED STUDIES IN TRANSPORTATION LAW 48 (hereinafter SELECTED STUDIES).

[249] Kruckeberg, supra note 245, at 543. An eminent domain taking for strictly economic development purposes is for a public use. See Kelo v. City of New London, 125 S. Ct. 2655 (2005).

[250] 281 U.S. 362 (1930). 125 S. Ct. 2655 (2005).

> We need not inquire whether…the proposed taking of appellant's land is for highway or railway purposes. It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use.[251]

In the late 19th and early 20th centuries, property was increasingly taken for reasons that had little obvious connection to the general public's interests. This culminated in the U.S. Supreme Court's 1954 decision in *Berman v. Parker*, which concerned condemnation of property for an urban redevelopment project.[252] In *Berman*, the Court stated:

> The concept of [public use] is broad and inclusive…The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled….[253]

> It is not for the courts to oversee the choices of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.[254]

The Court explained that once something was determined to fall under the legislature's control (in this case, zoning), the courts had no further authority to limit the scope of the legislature's action on the subject.[255] This effectively abdicated any significant role for the federal courts in determining what constituted "public use." More recently, the U.S. Supreme Court has held that it "will not strike down a condemnation on the basis that it lacks a public use so long as the taking 'is rationally related to a conceivable public purpose.'"[256] Despite the gradual return to a more favorable view of property owners' rights in regards to takings, there appears to be no parallel in the realm of public use doctrine.

For example, in *United States v. Union County 16.29 Acres of Land, More or Less,*[257] a federal district court reviewed a federal condemnation of land for purposes of environmental mitigation, riprap and gravel along a river, and wetlands mitigation along Oregon Forest Highway Route 154. Finding the proposed use rationally related to a conceivable public purpose, specifically authorized under the Federal Aid to Highways Act, and encouraged under the federal Clean Water Act and the Endangered Species Act, the court concluded, "Wetlands mitigation is a proper public use."[258]

In 2005, the U.S. Supreme Court revisited the takings issue in the context of a city's urban redevelopment efforts in *Kelo v. City of New London.*[259] Reviewing its jurisprudence, the Court concluded that state and local governments would be precluded from taking the property of A for the sole purpose of giving it to B, even if just compensation were paid. They could not transfer property from one to another for the purpose of conferring a private benefit to the transferee. But a government could legitimately transfer private property from one owner to another if "use by the public" were the purpose of the taking. Thus, property has long been transferred to common carriers, such as railroads, since the public uses the transportation corridor.[260] Though the transfer at issue was not of that type—unlike common carriers, the transferees were not required to make their services available to the public—the Court noted that it has long rejected the formalistic requirement that the condemned property be directly used by the public.[261] The Court observed that what constitutes a "public purpose" varies regionally and evolves over time; the determination is best made by the state legislatures and state courts, to which the federal courts owe great deference.[262] According to the Court, "our public use jurisprudence has wisely eschewed rigid formulas and intensive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[263]

Most state courts have adopted the broad definition of "public use" articulated in *Berman*.[264] However, in certain instances, eminent domain actions undertaken by private firms that were granted eminent domain powers have been successfully challenged as not being consistent with the principle of public use.[265] This rejection of the public use

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[251] 281 U.S. at 366.

[252] 348 U.S. 26 (1954).

[253] 348 U.S. at 33, citations omitted.

[254] 348 U.S. at 35–36.

[255] 348 U.S. at 33–36.

[256] Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992).

[257] 35 F. Supp. 2d 773 (D. Or. 1997).

[258] 35 F. Supp. at 776.

[259] 125 S. Ct. 2655 (2005).

[260] 125 S. Ct. at 2661.

[261] 125 S. Ct. at 2662.

[262] 125 S. Ct. at 2664.

[263] *Id.*

[264] 1 SELECTED STUDIES 49–50; *see* Joseph J. Lazzarotti, *Public Use or Public Abuse?*, 68 UMKC L. REV. 49 (1999), for a more complete discussion of courts' deference to legislative will on the subject as well.

[265] 1 SELECTED STUDIES 50.

doctrine is particularly noticeable in efforts to acquire land for private parking facilities that are being justified on the basis of their purported benefit to the public.[266] Yet urban redevelopment projects that seize property for demolition and subsequently turn over the property to private parties have been almost universally held to be within the terms of "public use."[267] Takings that are made to secure a source of income that will further a project that has a public use are also ordinarily acceptable, even when the property in question is not directly put to a public use.[268]

Under the "related-use doctrine," many states have given highway departments wide latitude to acquire real estate for highway-related activity. For example, the Minnesota Supreme Court upheld the condemnation of land by the state highway department for the purpose of allowing the federal government to reconstruct a channel over a waterway adversely impacted by construction of a bridge. The court concluded, "While the property involved here will serve a purpose in the general scheme of navigation and flood control, it will also bring the channel of the river close to the high west bank, and thus essentially improve the public highway system."[269]

Similarly, in *East Oaks Development v. Iowa Department of Transportation*,[270] the Iowa Supreme Court had occasion to evaluate the public use attributes of condemnation of private property for relocation of an existing recreational bikeway threatened by a highway-widening project. Though the court found that the state DOT had no general eminent domain power to establish recreational trails or bikeways, nonetheless the taking was for the legitimate public purpose of improving "the highway system by allowing bikers to remain on a designated recreational trail without the necessity of crossing or traveling upon a highly traveled roadway."[271]

[266] Compare Wilmington Parking Auth. v. Rankin, 105 A.2d 614 (Del. Ch. 1954) and City and County of S.F. v. Ross, 279 P.2d 529 (Cal. 1955).

[267] *See, e.g., Rabinoff*, 360 P.2d 114; David Jeffrey Co. v. City of Milwaukee, 66 N.W.2d 362 (Wis. 1954); and Belovsky v. Redevelopment Auth. of Phila., 54 A.2d 277 (Pa. 1947).

[268] *See, e.g.,* Courtesy Sandwich Shop v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963) and Lerch v. Md. Port Auth., 214 A.2d 761 (Md. 1965).

[269] Kelmar Corp. v. Dist. Court, 130 N.W.2d 130 N.W.2d 228, 233 (1964), 22 (Minn. 1964).

[270] 603 N.W.2d 566 (1999).

[271] *East Oaks*, 603 N.W.2d at 568.

3. Just Compensation

Where a "taking" has occurred, the measure of damages has been consistently held to be the constitutionally required "just compensation," meaning that the property owner is to be put "in as good a position [financially] as if his property had not been taken."[272] In most instances involving real estate acquisition, the means of calculating this figure has been the "fair market value" rule (i.e., "what a willing buyer would pay in cash to a willing seller" in an arm's length transaction at the time the taking occurred).[273] This rule has often been criticized by commentators as being unfair, particularly to businesses, as it ignores both direct relocation and opportunity costs.[274] Indeed, the U.S. Supreme Court has explicitly ruled that no award for consequential damages resulting from a condemnation is necessary.[275]

Most states generally follow the fair market value rule as well,[276] although they may also be subject to URARPAPA guidelines if federal funds are involved. Yet there has recently been movement in some states to recognize a broader definition of just compensation.[277] These state-level reforms have included such things as permitting recovery of lost profits, attorney's fees, loss of goodwill, and other costs flowing logically from the taking action.[278] However, most states do not recog-

[272] Olson v. United States, 292 U.S. 246, 255 (1934).

[273] United States v. Miller, 317 U.S. 369, 374 (1943). In most states, and under DOT's regulations implementing URARPAPA, "fair market value" will also include compensation for residual property that has not been taken but has had its economic value damaged as a byproduct of the taking. *See* 49 C.F.R. § 24.102(k) (2001) for DOT's regulation.

[274] *See* Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 580–81 (1995) for a lengthy list of critics and their writings.

[275] United States v. Fifty Acres of Land, 469 U.S. 24, 33 (1984). URARPAPA has attempted to partially remedy this situation by offering limited relocation assistance to individuals and businesses that suffer dislocation due to certain types of federally financed activities, but its scope is limited, leaving many types of property owners without compensation or grossly inadequate compensation for their losses. *See* Norfolk Redevelopment and Housing Auth. v. Chesapeake & Potomac Tel. Co. of Virginia, 464 U.S. 30 (1983) (utilities cannot ordinarily receive compensation under URARPAPA).

[276] *DeBow* at 585.

[277] *DeBow* at 585–86.

[278] *DeBow* at 586–88. *See also* Vivien J. Monaco, *The Harris Act: What Relief From Government Regulation Does it Provide for Private Property Owners?*, 26 STETSON L. REV. 861 (1997) (Monaco) for a detailed discussion of

nize such losses and continue to limit recovery to fair market value with minor exceptions, such as additional recovery for specific types of property being forfeited or where property is taken exclusively for a particular purpose.[279]

There are differences among the states on the issue of whether just compensation is limited to the taking of property or whether it is also recoverable for damage to property. The federal government and about 26 states fall into the former category (allowing compensation for property takings only), while about 24 states fall into the latter category (allowing compensation for either taking or damage to property). Another issue is whether loss of direct access to a highway without land-locking a parcel is a police power action not requiring compensation or is a taking or damage that does require compensation.

For example, in *National Auto Truckstops v. State of Wisconsin DOT*,[280] the Wisconsin Supreme Court overturned a lower court's finding that relegating a truck stop to access via a frontage road during a highway reconstruction project was not a taking subject to compensation. In Wisconsin, compensation is to be paid for a partial taking of premises, such as a diminution of highway access.[281] The court concluded that "The essential inquiry is whether a change in access is 'reasonable,'" which is a question of fact for the jury.[282] If substituted access was reasonable, no compensation was due. However, if substituted access was inadequate, the court identified three methods of appraising the value of the partial taking of commercial property: (1) the "income approach" (focusing on the income generated by the property); (2) the "comparable sales approach" (comparing the sales price of comparable properties); and (3) the "cost approach" (the cost of replacement).[283] In *de jure* condemnation, the depreciation of the value of the land caused by the project for which the property is condemned generally is excluded from its valuation.[284]

Viewing the just compensation clause as intended to make the landowner whole for any government taking or damage to his property, but no more, many states have adopted a "setoff rule," requiring the financial injury of public construction to be set off by the financial benefit thereof.[285] The majority approach is to classify benefits as either general (those flowing to the public in general) or special (those flowing uniquely to the aggrieved property owner), allowing setoff only for the latter.

In *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.*,[286] the California Supreme Court jettisoned its traditional general/special setoff distinction and joined the minority of states that have rejected the distinction on grounds that it was fundamentally difficult to determine whether a particular benefit was special or general. The case involved the acquisition of a narrow strip of land for construction of an elevated light rail line. The unacquired property of the plaintiff near the station would increase in value, as would all surrounding property, given its proximity to a convenient transit corridor. The California Supreme Court noted that, in abolishing the special/general benefits distinction, it was joining a "respectable minority" of states that included Illinois, Michigan, New York, New Mexico, North Carolina, and West Virginia.[287]

4. Condemnation and Inverse Condemnation

There are two principal mechanisms by which an eminent domain power (EDP), most often a governmental entity, may take property.[288] The first is

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Florida's efforts to statutorily adjust its just compensation rule.

[279] *DeBow* at 589–90.

[280] 665 N.W.2d 198 (Wis. 2003).

[281] *National Auto*, 665 N.W.2d at 204.

[282] *National Auto,* 665 N.W.2d at 206. However, not all courts leave the question of reasonableness to the jury. For example, in Ginn Iowa Oil Co. v. Iowa Dep't of Transp., 506 F. Supp. 967 (D. Iowa 1980), concerning the construction of a highway median in front of plaintiff's service station, the court concluded that the plaintiff had failed to prove that the action ran "counter to the common experience of mankind to such extent as to be unreasonable." *Id*. at 972.

[283] *National Auto*, 665 N.W.2d at 207.

[284] 42 U.S.C. § 4651(3). However, in inverse condemnation, the courts have taken at least three different approaches to this question: (1) there is no *de facto* taking without a showing of physical invasion; (2) a *de facto* taking can occur where the precondemnation activities have been such as to substantially impair, interfere with, or extinguish the beneficial use and enjoyment of the property; and (3) recovery may be allowed even absent a *de facto* taking where the condemnation authority has engaged in unreasonable delay, bad faith, or other egregious conduct. JOHN VANCE, PLANNING AND PRECONDEMNATION ACTIVITIES AS CONSTITUTING A TAKING UNDER INVERSE LAW (NCHRP Research Results Digest No. 150, 1986), and NCHRP Legal Research Digest No. 18 (1991), at 3.

[285] This approach was approved in McCoy v. Union Elevated R.R. Co., 247 U.S. 354 (1918).

[286] 941 P.2d 825 (Cal. 1997).

[287] 941 P.2d at 825.

[288] For the purpose of this analysis, the term "EDP" will include both entities that have direct eminent domain abilities, such as a city government itself, and those that

condemnation, which is litigation initiated by a governmental entity; the second is *inverse condemnation*, which is where a taking results from a governmental actor's omissions or actions.[289]

An action for condemnation is brought by the EDP against the party whose property the EDP wishes to take or whose project will otherwise infringe upon the landowner's property, but such actions are rare except where the EDP wants to acquire actual possession of the property.[290] More commonly, the EDP takes steps that a property owner perceives as infringing on his or her property rights. The property owner may then bring an action against the EDP either to obtain compensation or to force the EDP to cease its activities and, if necessary, disgorge the property if its conduct is determined by a court to have been impermissible.[291] This sort of conduct is termed an "inverse condemnation."[292]

Inverse condemnation is a "cause of action against a governmental defendant to recover the value of property which has been taken in fact by [the governmental defendant], even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[293] Property owners may allege that their property has been taken without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.[294] In cases of a partial takings, the courts may impose an equitable servitude upon the land, requiring the defendant to pay past, present, and future damages caused by the offending nuisance.[295]

For example, in *Fountain v. Metropolitan Atlanta Rapid Transit Authority*,[296] a case involving an alleged inverse condemnation on grounds that the Authority closed off the streets providing vehicular access to plaintiff's gasoline section, the Eleventh Circuit observed, "[a] taking occurs whenever a public entity substantially deprives a private party of the beneficial use of his property for a public purpose."[297] Some courts, embracing the notion of inverse condemnation, have imposed equitable servitude on the property owners' land, forcing offenders to pay damages for past, present, and future harm caused by the nuisance.[298] Similarly, in *Mekuria v. Washington Metropolitan Area Transit Authority*,[299] inverse condemnation was found as a result of the closure by a transit agency of a street for 3 years as part of the construction of a new Metrorail station.[300]

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are of a character that makes them amenable to suits related to takings, such as MARTA in the *Fountain* case, where although the agency lacked express eminent domain power, the nature of its acts produced an inverse condemnation situation. Not all transit agencies have explicit eminent domain power, but their character and the nature of their activities usually make them vulnerable to inverse condemnation suits. If a transit agency is not of the nature that makes it subject to inverse condemnation suits, it may instead be subject to suits for trespass if it deprives a landowner of the use or value of his or her property. With respect to the takings issue in the transportation context, *see* NETHERTON, *supra* note 205, and VANCE, *supra* note 214.

[289] WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 526 (3d ed. 2000) (STOEBUCK & WHITMAN).

[290] STOEBUCK & WHITMAN, *supra* note 289, at 526.

[291] STOEBUCK & WHITMAN, *supra* note 289, at 526.

[292] STOEBUCK & WHITMAN, *supra* note 289, at 526.

[293] United States v. Clarke, 455 U.S. 253, 257 (1980).

[294] United States v. Causby, 328 U.S. 256 (1946). Paul Stephen Dempsey, *Trade & Transport Policy in Inclement Skies—The Conflict Between Sustainable Air Transportation and Neo-Classical Economics,* 65 J. AIR L. & COM. 639, 680 (2000).

[295] *See generally* PAUL STEPHEN DEMPSEY & LAURENCE GESELL, AIR COMMERCE AND THE LAW 695 (2004); Dempsey, *supra* note 207, at 1.

[296] 678 F.2d 1038 (11th Cir. 1982).

[297] 678 F.2d at 1043.

[298] Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). Generally, temporary injuries, inconveniences, annoyances, and discomforts resulting from the actual construction of public improvements are not compensable, provided that such interferences are not unreasonable. It is often necessary to break up pavement, narrow streets, and block ingress and egress of adjoining property when airports are being repaired, improved, constructed, or expanded. As one court noted,

> It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement.

Orpheum Bldg. Co. v. S.F. Bay Area Rapid Transit Dist., 146 Cal. Rptr. 5, 80 Cal. App. 3d 863 (1978).

[299] 45 F. Supp. 2d 19 (D.D.C. 1999).

[300] Mekuria v. Wash. Metro. Area Transit Auth., 45 F. Supp. 2d 19 (D.D.C. 1999). Readers interested in examining the development of inverse condemnation proceedings should examine the decision of Orpheum Bldg. Co. v. S.F. Bay Area Rapid Transit Dist., 80 Cal. App. 3d 863, 146 Cal. Rptr. 5 (Cal. Ct. App. 1978) (*Orpheum*). The *Orpheum* case presented a nearly identical fact pattern to that of *Merkuria*; however, in the earlier case the plaintiffs failed to recover any of their losses. *See* 80 Cal. App. 3d at 866–68, 871–72, 874. The significance of the *Orpheum* case is that it was decided at the absolute peak of

Occasionally, an action is brought for mandamus to force the government to take property that has been adversely impacted by governmental activity. For example, in *Shaffer v. West Virginia Department of Transportation*,[301] a property owner filed mandamus proceedings to force the state to conduct eminent domain proceedings after his home and garage were flooded following the construction of highway stormwater drainage ditches and culverts. The plaintiff pointed to a provision in the West Virginia Constitution requiring that private property "shall not be taken or damaged for public use without just compensation."[302] The West Virginia Supreme Court quoted from earlier cases: "If a highway construction or improvement project results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the West Virginia Commissioner of Highways has a statutory duty to institute proceedings in eminent domain within a reasonable time after completion of the work to ascertain the amount of damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings."[303]

Inverse condemnation proceedings were historically disfavored, but today they are routine,[304] largely due to the expansion of "takings" to include regulatory acts and other indirect means, which frequently result in an EDP being unaware that a potential taking has resulted. Such behavior by an EDP is constitutionally permissible where the property owner is permitted to bring an inverse condemnation suit for recovery[305] or some other mechanism exists to assure the owner of receiving just compensation.[306] However, even where an EDP knows that its acts will result in a potential taking, it may decide to proceed without providing prior notice, hearing, or compensation so long as there exists an adequate means for obtaining just compensation.[307]

In the event of either a condemnation or inverse condemnation action, the general procedure followed by courts is largely the same. The court will determine whether a taking occurred and what the remedy should be by applying several factors:

1. Whether the EDP's act promotes the health, safety, or morals of the public (*i.e.,* represents a use of the police power rather than a taking);[308]

2. Whether there was a physical invasion of the property;[309]

3. Whether the EDP's act is reasonably necessary to achieve a substantial public benefit or imposes an unduly harsh private harm;[310]

4. Whether the EDP's act reflects a logical relationship between the nature of the act and its effect on the property (the "essential nexus" test);[311]

5. Whether the nature and degree of the EDP's act is proportional to the benefit it is intended to create or the harm it is intended to prevent (the "rough proportionality" rule);[312] and

6. The degree and period for which there is a diminution in value of the property (including a determination of the property's original value).[313]

Traditionally, courts focused on the final point of the analysis, as it is unusual that a taking is sufficiently complex or novel in nature as to require a detailed examination of the other points,[314] but recently the "essential nexus" test has received an increasing amount of attention.[315] Certainly the most important thing an attorney can do in preparation for a takings action is to assemble a compre-

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court deference to government takings actions. (The *Penn Cent.* case was decided 2 1/2 months after *Orpheum*.)

[301] 542 S.E.2d 836 (W.Va. 2000).

[302] W.VA. CONST. art. III, § 9.

[303] *Shaffer*, 242 S.E.2d at 840, quoting from State ex rel Rhodes v. W. Va. Dep't of Highways, 187 S.E.2d 218 (1972).

[304] *See* STOEBUCK & WHITMAN, *supra* note 289, at 526.

[305] *Fountain*, 678 F.2d at 1043–44.

[306] *See, e.g.,* Monaco, *supra* note 278, at 897 *et seq.* for a discussion of the Harris Act as an alternative means of compensation in place of inverse condemnation.

[307] *See, e.g.,* Yearsley v. Ross, 309 U.S. 18 (1940), Hurley v. Kincaid, 285 U.S. 95 (1932), and Stringer v. United States, 471 F.2d 381 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973). However, FTA does not endorse the use of inverse condemnation actions. No reference to "inverse condemnation" or related actions is found on the FTA's Web site. All FTA references to property acquisition assume that eminent domain or negotiation is being used to obtain the property.

[308] Mugler v. Kansas, 123 U.S. 623, 661–66 (1887).

[309] 505 U.S. at 1015.

[310] *Penn Cent*., 438 U.S. at 127.

[311] 483 U.S. at 836–37.

[312] 512 U.S. at 390–91.

[313] *Pa. Coal Co*., 260 U.S. at 413. *See also First English*, 482 U.S. at 316–18, 322 ("'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings"); *Lucas*, 505 U.S. at 1015–19 (a taking results "where regulation denies all economically beneficial or productive use of land").

[314] 1 SELECTED STUDIES at 109.

[315] *See, e.g.*, Town of Flower Mound v. Stafford Estates L.P., 71 S.W.3d 18, 30 (Tex. App. 2002).

hensive estimation of the disputed property's value, supported by corroborating expert witnesses.[316]

A particularly grievous inverse condemnation recently took place in Washington, D.C., as part of the construction of a new Metrorail station.[317] The plaintiffs were the owners and lessees of properties along a stretch of street that was to be excavated by the Washington Metropolitan Area Transit Authority (WMATA) in conjunction with the construction project.[318] While WMATA did formally condemn several businesses in the construction zone, it reassured the plaintiffs that there "would be reasonable vehicular, pedestrian, and vendor access for deliveries" to their properties and that reasonable parking would be made available.[319] WMATA began construction in June 1994, eventually closing the entire street to vehicles in October of that year.[320] The street did not reopen for more than 3 years.[321] While pedestrian access remained open, it was "a circuitous, uneven [route] with holes, depressions, and chunks of broken concrete."[322] At some points the sidewalk narrowed to as little as 3 ft.[323] The plaintiffs filed numerous complaints with WMATA, but no action was taken to remedy the situation.[324] Ultimately, four of the businesses were obligated to close, while the remainder suffered heavy losses and were only able to remain open because their landlord accepted reduced rents or even permitted them to operate for free.[325] The plaintiffs' appraiser estimated their total losses to be over $362,600.[326]

While the court elected to use the *Penn Central* factors to evaluate whether WMATA's actions constituted a taking, it recognized that the plaintiffs had attempted to demonstrate that WMATA's actions fell within the U.S. Supreme Court's analysis in *Lucas v. South Carolina Coastal Council*.[327] The court concluded, however, that it was not necessary to use the *Lucas* analysis,[328] suggesting that *Lucas* and other recent takings cases should be understood as supplemental to traditional takings jurisprudence. First, the court briefly assessed the character of WMATA's actions, noting that for over 3 years direct access to the plaintiffs' businesses was obstructed, the detour constructed was inadequate, and pedestrian traffic was impeded as well.[329] The court next briskly considered the economic impact of WMATA's construction work, concluding, "WMATA's actions inflicted serious economic harm on Plaintiffs' properties and businesses."[330] Most of the court's energy was expended on the third *Penn Central* factor—investment-backed expectations.

WMATA argued that at least two of the plaintiffs had been making minimal profits before the construction began and therefore had no reasonable investment-backed expectations.[331] However, the court characterized this as "too narrow a view" of the matter.[332] While those plaintiffs were not "eco-

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[316] 1 SELECTED STUDIES 111. Real estate salespersons and professional appraisers are usually the preferred types of witnesses for actions pertaining to eminent domain. Barring possible conflicts of interest, witnesses in those professions are rarely successfully challenged. *See* 1 SELECTED STUDIES 109 – 570-s19 for a detailed discussion of all aspects of a condemnation or inverse condemnation action.

[317] Mekuria v. Wash. Metro. Area Transit Auth., 45 F. Supp. 2d 19 (D.D.C. 1999). Readers interested in examining the development of inverse condemnation proceedings should examine the decision of *Orpheum*. The *Orpheum* case presented a nearly identical fact pattern to that of *Merkuria*; however, in the earlier case the plaintiffs failed to recover any of their losses. *See Orpheum*, 80 Cal. App. 3d at 866–68, 871–72, 874. The significance of the *Orpheum* case is that it was decided at the absolute peak of court deference to government takings actions. (The *Penn Cent.* case was decided 2 1/2 months after *Orpheum*.)

[318] 45 F. Supp. 2d at 21.

[319] 45 F. Supp. 2d at 22.

[320] 45 F. Supp. 2d at 21–22.

[321] 45 F. Supp. 2d at 22. WMATA did construct a detour to permit vehicles to reach the properties, but it was designed in a manner that prevented most motorists from realizing it was available. 45 F. Supp. 2d at 23. The detour, by WMATA's own admission, was also too narrow to admit delivery trucks, despite the transit authority having informed the plaintiffs prior to construction that the detour would be large enough for such purposes. No parking was provided. 45 F. Supp. 2d at 23.

[322] 45 F. Supp. 2d at 23.

[323] *Id.*

[324] *Id.*

[325] 45 F. Supp. 2d at 26.

[326] 45 F. Supp. 2d at 27.

[327] 45 F. Supp. 2d at 28. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). *See also* Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 326–27; 122 S. Ct. 1465; 152 L. Ed. 2d 517 (2002), on when regulatory taking not triggered.

[328] *Id.*

[329] *Id.*

[330] 45 F. Supp. 2d at 28–29. The court spent a mere two paragraphs to reach this part of the decision, relying heavily on the evidence adduced at trial, where WMATA itself admitted that the plaintiffs suffered large financial losses and merely contested the amount of the loss. *Merkuria*, 45 F. Supp. 2d at 27—29.

[331] 45 F. Supp. 2d at 29.

[332] *Id.*

nomic successes," the court found they were at least recouping their costs prior to the construction, and WMATA had promised them that access would remain effectively unimpeded; thus they could have reasonably expected to continue to operate.[333] The court did, however, agree with WMATA that three of the plaintiffs who renewed their leases during the construction could not have had reasonable expectations of income at that point in time.[334] Yet even here WMATA was dealt a blow, as the court noted that WMATA had informed the public that the project would be completed by "summer 1997," yet did not actually complete work and reopen the street until December 21, 1997.[335] Therefore, the court concluded that even the plaintiffs who renewed their leases during construction had reasonable investment-backed expectations, both from the beginning of construction to the time they renewed their leases and again from "summer 1997"[336] to December 21, 1997, when the street was in fact reopened.[337]

WMATA made a final stand on the last factor—the extent of interference with a parcel of land as a whole, rather than a specific portion of it—but the court showed little sympathy for the transit authority's arguments. WMATA argued that because two of the plaintiffs each owned multiple buildings on a single lot and only some of those buildings were affected by the construction, they should be precluded from recovering.[338] The court considered WMATA's interpretation of the factor "overly-restrictive," noting that the U.S. Supreme Court in *Lucas* stated that a "parcel" should be defined by the owner's reasonable expectations under state property law.[339] The court observed that each building had a separate mailing address and separate utilities and was physically separated from each of the other buildings, with no joint access.[340] Thus, the court determined that it would not be appropriate to disqualify those two plaintiffs under the final *Penn Central* factor.[341] Therefore, the court ruled that a taking had occurred, and WMATA was obligated to pay the plaintiffs the fair rental value of their properties, less the actual rents received,[342] plus compound interest through the time the award was to be paid.[343]

G. STATE AND LOCAL AUTHORITY

1. The Police Power of the States

Opposite the Supremacy Clause prohibitions against state action lies the inherent police power of the states.[344] As one state court described it, "The police power is an attribute of sovereignty, possessed by every sovereign state and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written Constitution."[345] The U.S. Supreme Court described the po-

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[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] Noting that "summer" is ordinarily understood to include the months of June, July, and August, the court found that the midpoint of those months, July 17, would be the expected date of completion. 45 F. Supp. 2d at 29 n.8.

[337] 45 F. Supp. 2d at 29.

[338] 45 F. Supp. 2d at 30.

[339] 45 F. Supp. 2d at 30 (quoting *Lucas*, 505 U.S. at 1016).

[340] 45 F. Supp. 2d at 30. Furthermore, the only reason the buildings were now on the same lots was because the District of Columbia had consolidated separate, yet adjoining, lots owned by the same person as an efficiency measure for collecting property taxes. 45 F. Supp. 2d at 30.

[341] *Id.*

[342] And for those plaintiffs who renewed their leases, less the fair rental value for the period in which their expectations were found to be unreasonable. *Merkuria*, 45 F. Supp. 2d at 30.

[343] 45 F. Supp. 2d at 30–31. WMATA does not appear to have challenged the court's ruling, as over 3 years have passed with no further action on the case. Only one news story mentioned *Merkuria* after the decision, and a WMATA lawyer cited in the story "declined to comment" on the case. *See* Vanessa Blum, *Making D.C. Welfare System Work*, LEGAL TIMES, Apr. 26, 1999, at 2.

[344] *See* Dempsey, *supra* note 295, at 1.

[345] *Ex Parte Tindall*, 229 P. 125, 130 (Okla. 1924) (citing 6 R.C.L. § 182, at 183):

> While the term "police power" has never been specifically defined nor its boundaries definitely fixed, yet it may be correctly said to be an essential attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.

Another court stated:

> The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government, is vested in the legislatures of the several states of the union, the only limit to its exercise being that the statute shall not conflict with any provision of the state constitution, or with the Federal Constitution, or laws made under its delegated powers.

Bagg v. Wilmington, Columbia & Augusta R.R. Co., 14 S.E. 79, 80 (N.C. 1891).

lice power as "the power of the State…to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."[346]

Since the end of the *Lochner*[347] era, courts have been relatively deferential to state and local government in areas historically of local concern, so long as the legislative decisions do not conflict with federal regulation exerted under the Commerce Clause.[348] The U.S. Supreme Court has upheld local regulation of public health, safety, and welfare where "any state of facts either known or which could reasonably be assumed" supported the regulation.[349] The Court has resorted to wholly hypothetical facts to uphold the legislation, concluding that the "day is gone when this Court uses the Due Process Clause…to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[350] Under the rational basis test, courts have upheld state or local regulation where any facts actually exist or would convincingly justify the classification if the facts did exist, or have been urged in the classification's defense by those who either promulgated the regulation or argued in support of the regulation.[351]

In *South Carolina Highway Department v. Barnwell Brothers,*[352] the Supreme Court addressed state size and length restrictions on trucks. It found that

> there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has for the most part been left to the states.[353]

States possess inherent power to protect the safety, health, and welfare of their citizens. Typically, such regulation does not impinge upon fundamental rights. The presumption against federal preemption of state and local regulation of the health and safety of their residents is a strong one.[354] As a consequence, the means states choose to protect such interests are entitled to judicial deference unless

1. The means chosen do not bear a rational relationship to the ends the state seeks to achieve;[355]

2. The regulation impermissibly affects interstate commerce;[356] or

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[346] Barbier v. Connolly, 113 U.S. 27, 31 (1884); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

[347] Lochner v. New York, 198 U.S. 45 (1905). Justice Oliver Wendall Holmes dissented, saying:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract.... But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen of the [S]tate or *of laissez faire*.

Id. at 75.

[348] Beginning with Nebbia v. New York, 291 U.S. 502 (1934), the U.S. Supreme Court generally has been deferential to the exercise of police power by the states in regulating matters of local concern.

[349] United States v. Carolene Products Co., 304 U.S. 144, 154 (1938); *See also* McGowan v. Maryland*,* 366 U.S. 420, 426 (1961) and Hold Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74 (1978).

[350] Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955). The Nevada Supreme Court has echoed this holding, concluding "[i]t is well-settled under rational basis scrutiny that the reviewing court may hypothesize the legislative purpose behind legislative action." Boulder City v. Cinnamon Hills Assocs., 871 P.2d 320, 327 (Nev. 1994).

[351] Briscoe v. Prince George's County Health Dep't, 593 A.2d 1109 (Md. 1991); Dep't of Transp. v. Armacost, 474 A.2d 191, 201 (Md. 1984); Furgeson v. Skrupa, 372 U.S. 726, 729–31 (1963).

[352] 303 U.S. 177 (1938).

[353] 303 U.S. at 185. In *Barnwell,* the U.S. Supreme Court held that in determining whether a state regulation is constitutional, the test is "whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." (citing Stephenson v. Binford, 287 U.S. 251, 272 (1932)). In resolving the latter inquiry, "the courts do not sit as Legislatures…[to weigh] all the conflicting interests." "[Fairly] debatable questions as to [a regulation's] reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body." The court must assess "upon the whole record whether it is possible to say that the legislative choice is without rational basis." 303 U.S. at 190–93. "[T]he Court has been most reluctant to invalidate under the Commerce Clause state regulation in the field of safety where the propriety of local regulation has long been recognized [citing cases]." Raymond Motor Transp. v. Rice, 434 U.S. 429, 443 (1978).

[354] California v. ARC Am. Corp., 490 U.S. 93, 101 (1989); Bizzard v. Roadrunner Trucking, 966 F.2d 777, 780 (3d Cir. 1992).

[355] *See, e.g.,* Dallas v. Stanglin, 490 U.S. 19 (1989).

3. The regulation discriminates against nonresidents.[357]

In *Southern Pacific Co. v. Arizona,*[358] the Supreme Court held that "the states [have] wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."[359] This was a case in which the Supreme Court held that state limitations on train lengths were an unreasonable burden on interstate commerce. Similarly, in *Hendrick v. State of Maryland*,[360] the Court held that state regulation of the highways has long been recognized as "an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens…."

Although in *Kassel v. Consolidated Freightways Corp*.,[361] the U.S. Supreme Court struck down truck length regulations on grounds that they failed to advance safety concerns and were therefore an unreasonable burden on interstate commerce, the Court acknowledged:

> [A] State's power to regulate commerce is never greater than in matters traditionally of local concern. For example, regulations that touch upon safety—especially highway safety— are those that "the Court has been most reluctant to invalidate.'" Indeed "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with the related burdens on interstate commerce." Those who would challenge such bona fide safety regulations must overcome a "strong presumption of validity."'[362]

In *Kassel,* the Court invalidated Iowa's restriction on twin trailer vehicles as an undue burden on interstate commerce, just as it had previously done with regard to Wisconsin's prohibition in *Raymond Motor Transportation v. Rice.*[363] These decisions and Wisconsin's reaction to them (i.e., designating a system for their operation), led to federal National Network designation of routes on which longer combinations of truck tractors and semitrailers may operate.[364]

2. Interaction Between State Police Power and the Commerce Clause

a. State Economic Regulation of Transportation

The need to regulate interstate commerce was one of the principal reasons the Nation came together to replace the Articles of Confederation with the Constitution. Article I, Section 8 of the U.S. Constitution vests in Congress the "power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[365]

State and local regulatory institutions may exercise "public utility" regulatory functions over public and private common and contract carriers. For example, they may regulate entry into the marketplace under "public convenience and necessity" and "fit, willing and able" standards,[366] and require that rates be filed in tariffs and be "just and reasonable" and "nondiscriminatory."[367] Under their police powers, state regulatory bodies may also regulate safety of vehicles (their age, inspection, mainte-

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[356] *See, e.g.,* Camps Newfound/Owatonna v. City of Harrison, 520 U.S. 564 (1997).

[357] *See, e.g.,* Turner v. Maryland, 107 U.S. 38 (1882).

[358] 325 U.S. 761 (1945).

[359] In Southern Pac. Co. v. Ariz. ex. rel Sullivan, 325 U.S. 761 (1945), a case in which the Supreme Court held that state limitations on train lengths were an unreasonable burden on interstate commerce, the Court nevertheless observed

> the states [have] wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

The Court noted that in *Barnwell*, "The fact that [the regulation of highways] affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuse." *Id*.

[360] 235 U.S. 610, 622 (1915).

[361] Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 67 L. Ed. 2d 580, 101 S. Ct. 1309 (1981). In this case, the Supreme Court struck down truck length regulations on grounds that they failed to advance safety concerns and were therefore an unreasonable burden on interstate commerce.

[362] *Kassel*, 450 U.S. at 670 (citing Raymond Motor Transp. v. Rice, 434 U.S. 429 (1978), and Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959)).

[363] Raymond Motor Transp. v. Rice, 434 U.S. 429, 54 L. Ed. 2d 664, 98 S. Ct. 787 (1978).

[364] The federal government mandates the minimum system. 49 U.S.C. § 31111, and 23 C.F.R. pt. 658.

[365] U.S. CONST. art I, § 8.

[366] PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 49–150 (1986); Paul Dempsey, *Taxi Industry Regulation, Deregulation, and Reregulation: The Paradox of Market Failure,* 24 TRANSP. L.J. 73 (1996).

[367] DEMPSEY & THOMS, *supra* note 366, at 161–206.

nance, and repair); drivers (age and qualifications); and companies (financial and insurance requirements).[368] The U.S. Supreme Court has noted that the Commerce Clause is both a "prolific [source] of national power and an equally prolific source of conflict with legislation of the [states.]"[369]

Three 19th century decisions of the Supreme Court were instrumental in defining Congress's power over interstate commerce, and gave impetus to federal economic regulation.

Gibbons v. Ogden[370] addressed the question of whether the State of New York could grant a monopoly franchise to operators of steamboats in New York waters and prohibit others from entering the trade. Aaron Ogden, who had been assigned the monopoly franchise (earlier granted to Robert Livingston and Robert Fulton), argued that the constitutional phrase "commerce" referred only to the purchase and sale of goods and did not comprehend navigation. The court disagreed, concluding that commerce included "every species of commercial intercourse" between states, or between the United States and foreign nations, including navigation, and that such commerce was subject to the exclusive regulatory province of Congress.

Munn v. Illinois[371] addressed the fundamental issue of whether private property was under the exclusive control of its owners, or whether certain enterprises were of such character as to become quasi-public institutions, in which the people had an interest. The case involved the question of whether Illinois could properly regulate the rates of grain storage elevators within the state. In *Munn,* managers and lessees of grain storage elevators in Chicago were prosecuted for ignoring state licensing and rate-setting statutes. The defendants argued that the state had no right to infringe on their economic freedom through such regulations and that the state law was inconsistent with the commerce clause of the U.S. Constitution.[372] The Supreme Court held that private property used in a manner affecting the general community becomes "clothed with a public interest" and subject to control "by the public for the common good."[373] Hence, a state government could regulate private property dedicated to a public use. The Court also noted that regulation of the grain elevators was a domestic concern and therefore found that the state was free to exercise its governmental powers over such a concern, "even though in so doing it [might] indirectly operate upon commerce outside its immediate jurisdiction."[374] Thus, the state's power to regulate would be restricted only when Congress itself enacted legislation dealing with interstate rate regulations. Said the court:

> [I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, [and] common carriers…and, in so doing, fix a maximum charge to be made for the services rendered….
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> [W]hen private property is "affected with a public interest, it ceases to be *juris privati* only." Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large…. [Common carriers stand] in the very "gateway of commerce," and, take a toll from all who pass. Their business most certainly "tends to a common charge, and is becom[ing] a thing of public interest and use."[375]

Hence, a state government may regulate private property dedicated to a public use. But the real catalyst for federal legislation establishing economic regulation over common carriers was the case of *Wabash, St. Louis and Pacific Railway v. Illinois*,[376] issued in 1886. In *Wabash*, the U.S. Supreme Court struck down an Illinois law regulating interstate rail rates as unconstitutional. Although numerous bills proposing federal railroad regulation were introduced into Congress prior and subsequent to *Munn*,[377] Congress did not feel compelled to act until the Court decided *Wabash*.[378]

In *Wabash,* the Court held unconstitutional an Illinois law that prohibited a rail carrier from charging the same or higher rate for transporting the same commodity over a lesser distance than

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[368] *See, e.g*., Dempsey, *supra* note 366, at 73, 77–86.

[369] H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 534 (1949).

[370] 9 Wheat. 1, 6 L. Ed. 23 (1824).

[371] 94 U.S. 113 (1876).

[372] *Id.* at 119.

[373] *Id.* at 126. Although *Munn* did not directly involve rail carriers, subsequent decisions applied this principle to railroads. *See, e.g.,* Winona & St. P.R.R. v. Blake, 94 U.S. 180 (1876) (railroad rates subject to regulation by Minnesota legislature); Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1876) (railroad rates subject to ceilings prescribed by Wisconsin legislature); Chicago, B. & Q.R.R. v. Iowa, 94 U.S. 155 (1876) (railroads engage in public employment and affect public interest; rates subject to legislative control).

[374] Munn v. Illinois, 94 U.S. 113, 135 (1876).

[375] *Munn,* 94 U.S. at 125–26, 132. Although *Munn* dealt with grain elevators, the principle announced therein was subsequently extended to railroads. *See* C B & Q R Co. v. Iowa, 94 U.S. 155 (1876), Ruggles v. Illinois, 108 U.S. 526 (1883), and Illinois Central v. Illinois, 108 U.S. 541 (1883).

[376] 118 U.S. 557 (1886).

[377] Between 1868 and 1886, Congress considered approximately 150 bills and resolutions. Harris, *Introduction, Symposium on the Interstate Commerce Commission*, 31 GEO. WASH. L. REV. 1, 11 (1962).

[378] 118 U.S. 557 (1886).

over a greater distance in the same direction. The Supreme Court of Illinois had conceded that the statute might affect interstate commerce, but ruled that the state legislature was free to act until Congress exercised its power to regulate interstate rail traffic.[379] In overturning the state court's ruling, the U.S. Supreme Court recognized that Congress had not enacted legislation in this area, yet focused on the oppressive conditions that would be imposed on carriers if the individual states regulated interstate transportation within their borders. The Court emphasized that the framers of the Constitution had vested in Congress the sole authority to regulate interstate commerce: "the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the state might choose to impose upon it."[380]

Wabash appeared to state a conclusion contrary to that expressed in *Munn.* The Court was holding that even when Congress had not exercised its jurisdiction under the Commerce Clause of the Constitution, the state could not regulate businesses operating in interstate or foreign commerce.[381] Under the dormant Commerce Clause, [382] the Court held that even in the absence of federal regulation, the states could not regulate the interstate rates of the railroads.[383] Because nearly three-fourths of the commodities shipped at the time were transported in interstate commerce, which was rendered immune from state control, the *Wabash* decision became a powerful stimulus for federal legislation, leading to the creation of the Interstate Commerce Commission (ICC) in 1887.[384] Under the notion that congressional power was plenary and exclusive, the dormant Commerce Clause continued to preempt state regulation of interstate commerce for some time.

In upholding the power of a state to regulate interstate ferries, the U.S. Supreme Court, in *Port Richmond and Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County,*[385] distinguished *Wabash* as focusing on the interstate character of

> railroad transportation, which might extend not only from one State to another but through a series of States, or across the Continent, and the consequences which would ensue if each State should undertake to fix rates for such portions of continuous interstate hauls as might be within its territory, the conclusion was reached that "this species of regulation" was one "which must be, if established at all, of a general and national character" and could not be "safely and wisely remitted to local rules."[386]

Ferries were of a different character, for they "are simply means of transit from shore to shore. These have always been regarded as instruments of local convenience which, for the proper protection of the public, are subject to local regulation."[387]

So, too, was economic regulation extended to transit companies. In *Honolulu Rapid Transit & Land Company v. Territory of Hawaii*,[388] the U.S. Supreme Court held,

> The business conducted by the Transit Company is not purely private. It is of that class so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administra-

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[379] *Id.* at 566.

[380] *Id.* at 572–73.

[381] *Id.* at 577.

[382] In Leisy v. Hardin, 135 U.S. 100 (1890), the U.S. Supreme Court held:

> Whenever…a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent…the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation…of commodities is national in character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states to do so, it thereby indicates its will that such commerce shall be free and untrammeled.

Leisy v. Hardin, 133 U.S. 100 (1890).

[383] 118 U.S. at 572–73.

[384] Initially, Congress conferred upon the ICC the power to ensure that rail rates were "just and reasonable," and in 1920 added a requirement that no new rail lines should be built unless the applicant satisfied the "public convenience and necessity" (Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 272–73 (2003)).

[385] 234 U.S. 317 (1914). The Supreme Court held that state regulation of commuter ferries between New York and New Jersey did not violate the commerce clause. Today, economic regulation by states undergoes rational basis review.

[386] 234 U.S. at 330–31.

[387] *Port Richmond,* 234 U.S. at 331. *But see* Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204 (1894), which held that a state could not impose a toll upon an Interstate bridge on persons both entering and leaving the state without unduly infringing federal Commerce Clause power.

[388] 211 U.S. 282 (1908).

tive body the execution in detail of the legislative power of regulation.[389]

By the mid-1920s, 33 states regulated motor freight transport, and 43 regulated bus companies. But the U.S. Supreme Court in 1925 handed down a decision that stripped the states of their ability to regulate interstate movements.[390] At issue in *Buck v. Kuykendall*[391] was the denial by the State of Washington of a motor common carrier's application for operating authority on the ground that the routes were adequately served by four connecting auto stage lines and frequent steam rail service.[392] Although the Supreme Court recognized that a state legitimately may constrain interstate transportation in order to promote safety or conservation of the highways, the Court concluded that states could not obstruct the entry of motor carriers into interstate commerce for purposes of prohibiting competition.[393] Prior to this decision, 40 states had denied the use of their highways to motor carriers operating without certificates of public convenience and necessity.[394] The ruling in *Buck* prohibited state controls on entry for motor carriers engaged in interstate commerce.[395] Nonetheless, the Court recognized an appropriate role for the states: "With the increase in number and size of the vehicles used on a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid."[396]

Congress subjected motor carriers to economic regulation (including the requirement that rates be "just and reasonable" and entry be consistent with the "public convenience and necessity") in 1935. The states continued to regulate their intrastate activities until the mid-1990s.[397] Such economic regulation was challenged on due process grounds. As described below, applying the rational basis test, these statutes were almost universally upheld.

b. State Safety Regulation of Transportation

Although the regulation of highway safety falls within the state's police power, it cannot legitimately be employed to advance the interests of in-state vis-à-vis an out-of-state carriers. In *Kassel v. Consolidated Freightways*,[398] the U.S. Supreme Court noted that state regulation of highway safety is an important part of state police power, an area the Court has been most reluctant to invalidate on dormant Commerce Clause grounds. Nevertheless, in *Kassel*, the Court did precisely that, striking down Iowa's prohibitions on the use of 65-ft double-trailer trucks upon its highways, as it had in *Raymond Motor Transportation v. Rice*,[399] with respect to Wisconsin's prohibition. In both cases, the Court found the safety justification to be illusory and a significant impairment of interstate commerce. The court also found the "special deference" normally accorded state highway safety regulation to be unwarranted where local economic interests suffer less burden vis-à-vis out-of-state interests from such regulation because of specially tailored exemptions from their application favoring local interests.[400] In *Kassel*, the Court concluded that, instead of being motivated that 65-ft doubles were less safe than 550-ft singles, the state instead "seems to have hoped to limit the use of its highways by deflecting some through traffic,"[401] thereby imposing an impermissible burden on interstate commerce, for which "the deference traditionally accorded a State's safety judgment is not warranted."[402]

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[389] 211 U.S. at 290–91.

[390] *See* Buck v. Kuykendall, 267 U.S. 307 (1925).

[391] 267 U.S. 307 (1925).

[392] *Id*. at 313.

[393] *Id.* at 315–16.

[394] Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 92 (1976).

[395] *See, e.g.,* Panhandle Eastern Pipe Line Co. v. Mich. Pub. Service Comm'n, 44 N.W.2d 324 (Mich. 1950).

[396] 267 U.S. 307 at 315 (1925).

[397] The rationale for economic regulation of common carriers was expressed by one court as follows:

> The primary consideration for requiring motor carriers to secure [certificates of public convenience and necessity] is "to promote good service by excluding unnecessary competing carriers." …The practical necessity for regulation of this and similar business affected with a public interest…is to promote public interest by preventing waste…. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one's choice should be denied…. It is true that certified carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service by the avoidance of useless duplication with its consequent impairment of service and increase of rates charged the public. The public interest is paramount.

In re *Dakota Transp., Inc.,* 291 N.W. 589 (S.D. 1940), quoting Justice Brandeis' dissenting opinion in New State Ice Co. v. Liebman, 285 U.S. 262.

[398] 450 U.S. 662 (1981).

[399] 434 U.S. 429 (1978).

[400] 434 U.S. at 444 n.18; 450 U.S. at 675–76.

[401] 450 U.S. at 677.

[402] 450 U.S. at 678.

In *Kassel,* the Court observed that the state regulation significantly burdened interstate commerce:

> Iowa's law substantially burdens interstate commerce. Trucking companies that wish to continue to use 65-foot doubles must route them around Iowa or detach the trailers of the doubles and ship them separately. Alternatively, trucking companies must use the smaller 55 foot singles or 60-foot doubles permitted under local law. Each of these options engenders inefficiency and added expense.[403]

If, indeed, the burden of state regulation of trailer lengths is so severe, one wonders why Congress had not yet exercised its plenary powers under the Commerce Clause to promulgate a uniform nationwide statute governing trailer lengths, for Article I, Section 8 confers such power upon Congress, not the courts. By striking down state statutes by means of the unexercised Commerce Clause, the courts arguably exercise power reserved to the legislative branch by the Constitution. The Commerce Clause, after all, explicitly gives to Congress, not the courts, the power to regulate interstate commerce.[404]

Statutes that impose greater burdens on out-of-state carriers than in-state motor carriers violate the Commerce Clause. Thus, the Supreme Court, in *American Trucking Assns v. Scheiner*,[405] struck down a flat tax on motor carriers because it fell disproportionately on out-of-state carriers who are likely to drive fewer miles on state highways than in-state carriers.[406] Nebraska was also held to have violated the Commerce Clause by imposing retaliatory taxes on tractors and trailers registered in other states.[407] The Illinois splash guard requirement for trucks was held to have violated the Commerce Clause because it conflicted with mudguard regulations of other states, and placed too great a burden on motor vehicles crossing state lines.[408]

[403] *Kassel*, 450 U.S. at 674. However, Texas size and weight limits on trucks were upheld as a legitimate exercise of state police power and constitutional in Sproles v. Binford, 286 U.S. 374 (1932).

[404] *See Kassel*, 450 U.S. at 690–91 (Rehnquist, J., dissenting), and *Am. Trucking Ass'ns*, 496 U.S. at 202–24 (Scalia, J., concurring).

[405] 483 U.S. 266 (1987).

[406] In Am. Trucking Ass'ns v. Smith, 496 U.S. 167 (1990), the Court took some of the sting out of this conclusion by deciding to apply its doctrine prospectively only.

[407] Dennis v. Higgins, 498 U.S. 439 (1991).

[408] Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

3. Interaction of State Police Powers and the Due Process Clause

As noted above, the question of whether a state may regulate business practices consistent with the due process obligations of the Fourteenth Amendment was addressed early on by the Supreme Court in *Munn v. Illinois,*[409] in which the court upheld state regulation of grain elevator rates. The court observed that the critical test was whether the "private property is 'affected with a public interest,' [for when] one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good." Under *Munn,* once business was determined to be clothed with a public interest, "the legislature was free to impose whatever rate regulations seemed to it desirable."[410] Other courts have noted that, "It is laid down as a fundamental principle that persons engaged in occupations in which the public have an interest or use may be regulated by statute."[411]

Lochner v. New York,[412] a decision that struck down maximum hours regulations for bakers, inaugurated a period from 1905 until 1934 in which the Supreme Court invalidated approximately 200 economic regulations, principally under the Due Process Clause of the Fourteenth Amendment. *Lochner* inaugurated a period when the Court, under the doctrine of substantive or economic due process, reviewed the constitutionality of state and federal legislation against claims that it arbitrarily, unnecessarily, or unwisely interfered with the individual's liberty of contract. During the *Lochner* era, the Court upheld regulation if it believed the regulation truly necessary to protect the health, safety, or morals of the public, but struck down the regulation if the Court perceived it designed to readjust the market in favor of one party over another.[413] One source described *Lochner* as "one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse."[414]

The *Lochner* era came to an end with the Supreme Court's decision in *Nebbia v. New York.*[415] In *Nebbia,* the Court upheld a law that set minimum

[409] 94 U.S. 113 (1876).

[410] D. BOIES & P. VERKUIL, PUBLIC CONTROL OF BUSINESS 103 (1977).

[411] *Ex Parte Tindall,* 229 P. 125 (Okla. 1924).

[412] 198 U.S. 45 (1905).

[413] GEOFFREY STONE, LOUIS SEIDMAN, CASS SUNSTEIN & MARK TUSHNET, CONSTITUTIONAL LAW (1986).

[414] B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980).

[415] 291 U.S. 502 (1934).

prices for milk in order to ensure that producers received a reasonable return for their labor and investment, as a prophylactic against milk contamination.[416]

Since the end of the *Lochner* era, courts have been extremely deferential to legislative decisions in areas of economic regulation. Where neither a fundamental right nor a suspect class is involved, the legislative decision withstands constitutional assault where the "classification is based on rational distinctions and bears a direct and real relation to the legislative object or purpose of the legislation."[417] Thus, the Supreme Court has held, "if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative discretion."[418]

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[416] Referring to *Munn's* insistence that property can be regulated only if "affected with a public interest," the Court observed that this phrase "means no more than an industry, for adequate reason, is subject to control for the public good." The Court held:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit government regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to attained. …[The] Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases….
>
> So far as the requirement of due process is concerned, …a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it…. [If] the legislative policy be to curb unrestrained and harmful competition…[it] does not lie within the courts to determine that the rule is unwise. …Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

Id. at 525, 527, and 537–38.

[417] Old South Duck Tours v. Mayor and Aldermen of the City of Savannah, 2000 Ga. LEXIS 700 (Oct. 10, 2000), citing Love v. State, 517 S.E.2d 53 (Ga. 1999).

[418] Day-Bright Lighting v. Missouri, 342 U.S. 421 (1952). As noted above, many states began to regulate railroads in the 19th century, and motor carriers in the 1920s. Such economic regulation was challenged on due process grounds. For example, in a Montana case, an aggrieved carrier argued:

> The state cannot, under the guise of the regulation of the use of the highways, regulate the business of those who use the highways. A permit to use the highway may be required, a tax may be charged, but the business of those who use the highway cannot be regulated to the extent that it is prohibited. The commission in this case did not attempt to forbid the plaintiff from using the highways because of the size of his trucks, or the reckless manner in which he operates his trucks, or because of excessive speed that he travels on the highways, but because of the fact that if he is permitted to operate, some common carriers assert that their business will be deprived of some of their traffic.

Barney v. Bd. of R.R. Comm'rs, 1932 Mont. LEXIS 7, 10, 17 P.2d 82 (Mont. 1932). The Montana Supreme Court disagreed, holding:

> The power to select, limit, and prohibit uses of the highways by carriers for hire, which is implied in the requirement of a certificate of public convenience and necessity, is justified both as a regulation of the business, and as a regulation for the protection and safety of the highways. There is thereby no unequal protection of law, but a reasonable classification. Complainant does not show that it is likely to be deprived of any liberty or property without due process of law, but only of a privilege on a highway to which he has no constitutional or statutory right.

Id. quoting S. Motorways v. Perry, 39 F.2d 145, 147 (D.C.). Similarly, the Oklahoma Supreme Court upheld the constitutionality of its state's regulation of motor carriers:

> The principle applied in the regulation of the use of the highways for private enterprise rests upon public convenience and public necessity, a principle recognized and in large degree applied by the national government in placing the control and regulation of the railroads of the country in the hands of the Interstate Commerce Commission….
>
> It was upon this theory and the application of this principle that this court… held that the state was within the rightful exercise of its police power in the regulation of the use of the highways in sustaining the constitutionality of the law here again challenged, and denied that it in anywise was in contravention of either the Fourteenth Amendment to the federal Constitution as in abridgment of any right or privilege of the citizen, or in deprivation of property without due process of law, or in denial to the citizen of the equal protection of the law. …
>
> The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control. …[418]

Barbour v. Walker, 259 P. 552 at 554 (Okla. 1927), citing Barbier v. Connolly, 113 U.S. 27. The Virginia Supreme Court agreed with the notion that states may lawfully prescribe the use of its highways, saying,

The U.S. Supreme Court has concluded:

> [I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy…[That doctrine] has long since been discarded…[It] is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition…."[419]

Applying the rational basis test, the Supreme Court has held that a statutory classification is to be struck down only if the means chosen by the legislature are "wholly irrelevant to the achievement of the State's objective."[420]

Where a state has decided to regulate a business, the judicial focus is on the application of the regulation—whether the regulation is reasonable and its decision not arbitrary or capricious.[421] "The exercise by a state of its police powers will not be interfered with by the Courts unless such exercise is of an arbitrary nature having no reasonable relation to the execution of lawful purposes."[422] Where a regulation is subject to rational basis review, most states accord it a "strong presumption of constitutionality and a reasonable doubt as to its constitutionality is sufficient to sustain it."[423]

4. Interaction of State Police Power and the Contracts Clause

Article 1, Section 10 of the Constitution provides, in part, "No State shall…pass any…Law impairing the Obligation of Contracts…."[424] When transit services were provided by private firms, this clause spurred litigation between transit companies and their regulators or municipal governments. As transit began to be provided by public entities, the clause became less relevant, for the provider and the regulator were, in essence, part and parcel of the government. Hence, it deserves only brief mention here, for its historical contribution to the law.

In *City of Cleveland v. Cleveland City Railway Company,*[425] the U.S. Supreme Court held that the Contracts Clause was violated when a city ordinance attempted to set transit fares at levels different from those previously agreed to contractually. The court found the ordinance "impaired the obligations of contracts entered into by the City of Cleveland fixing the rate of fare to be charged on the lines of railroad operated by the complainant…."[426] Conversely, in *Underground Railroad of New York v. the City of New York*,[427] where a preexisting subway complained that the city had granted exclusive property rights owing to it to a new transit company, the Court found that no right was violated because the property rights complained of were never vested; therefore the complainant had no contract rights that were impaired.[428]

5. Tenth Amendment Limits on Federal Power

The Tenth Amendment of the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." On its face, the Amendment would seem to limit the federal government to enumerated powers explicitly conferred in the Constitution, leaving to the states and the people all of the remaining power. In practice, however, this

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> notwithstanding the constitutional guarantees…no private individual, firm, or corporation has any right to use the public highways in the prosecution of the business of a common carrier for hire without the consent of the State; that such consent may be altogether withheld or granted as a privilege upon such terms and conditions as the State may prescribe in the exercise of its police power; and that in such exercise of the police power there may be limitations and conditions, and thereby discriminations made between those to whom the privilege is granted and denied, provided the discriminations are based on some reasonable classification which is not purely arbitrary, does not disclose personal favoritism or prejudice, and is fair and just.
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> Gruber v. Commonwealth, 125 S.E. 427 (Va. 1924).

[419] Ferguson v. Skrupa, 372 U.S. 726 at 729–30 (1963).

[420] McGowan v. Maryland, 366 U.S. 420, 425 (1961); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).

[421] Bluefield Tele. Co. v. Pub. Serv. Comm'n, 135 S.E. 833 (W.Va. 1926). Long Motor Lines v. S.C. Pub. Serv. Comm'n, 103 S.E.2d 762 (S.C. 1958).

[422] Long Motor Lines v. S.C. Pub. Serv. Comm'n, 103 S.E.2d 762 (S.C. 1958), citing Jones v. City of Portland, 245 U.S. 217. *See also In re Dakota Transp.,* 291 N.W. 589 (S.D. 1940): "the reviewing court cannot substitute its judgment for that of the Commission and disturb its finding where there is any substantial basis in the evidence for the finding or where the order of the Commission is not unreasonable or arbitrary."

[423] Briscoe v. Prince George's County Health Dep't, 593 A.2d 1109, 1113 (Md. 1991), quoting State v. Good Samaritan Hosp., 473 A.2d 892.

[424] U.S. CONST., § 10, provides that, "No State shall…pass any…law impairing the Obligation of Contracts, …."

[425] 194 U.S. 517 (1904).

[426] 194 U.S. at 538.

[427] 193 U.S. 416 (1904).

[428] 193 U.S. at 430.

Amendment has done little to circumscribe broad and growing federal power. Nonetheless, the Supreme Court's short-lived flirtation with the Tenth Amendment as a potential limitation on federal power arose in a transportation context.

Originally, the wage and overtime provisions of the Fair Labor Standards Act of 1938 (FLSA)[429] did not apply to employees of state and local governments. In 1961, however, Congress extended the Act's minimum-wage coverage to employees of any private mass transit carrier with annual gross revenue exceeding $1 million.[430] In 1966, Congress extended FLSA coverage to state and local government employees by withdrawing the exemptions from, *inter alia,* transit carriers whose rates and services were subject to state regulation; Congress also eliminated the overtime exemption for public transit employees other than drivers, operators, and conductors.[431] In 1974, Congress repealed the remaining overtime exemption for transit employees and extended FLSA to virtually all state and local government employees.[432] Acting pursuant to the Commerce Clause, Congress amended the FLSA to include all employees of state and local governments as subject to minimum wage and maximum hour provisions.

In *National League of Cities v. Usery*,[433] the Supreme Court held that the Commerce Clause does not empower Congress to enforce minimum wage and overtime pay provisions of the FLSA against the states in areas of traditional governmental functions; such powers are reserved to the states under the Tenth Amendment.[434] The Court also held that the 1974 Amendments were invalid "insofar as they operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[435] The FLSA Amendment was deemed unconstitutional, for states should be able to act as "sovereign governments."

In *Garcia v. San Antonio Metropolitan Transit Authority,*[436] the U.S. Supreme Court overruled *Usery,* concluding that there was nothing in the FLSA, as applied to a transit agency, that was destructive of state sovereignty or in violation of the Tenth Amendment.[437] In *Garcia,* the Court held that governmental employees were subject to overtime restrictions.[438] The Court concluded that deciding which are, or are not, traditional government functions is "unworkable." Instead, political checks will provide the necessary oversight, and state sovereignty will not be destroyed. Transit employees are covered under FLSA, and they can enforce their claims in suits brought in federal or state court.[439]

6. State Immunity from Suit Under the Eleventh Amendment

The Eleventh Amendment was ratified on February 7, 1795. It provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Two core principles were identified by the U.S. Supreme Court in *Hans v. Louisiana* in 1890: (1) each state is a sovereign entity in the federal system; and (2) it is an inherent attribute of sovereignty that a state is not amenable to suit brought by an individual absent its consent.[440] Moreover, although the Eleventh Amendment explicitly bars foreign citizens from bringing suit against another state in federal court, it implicitly bars a citizen from bringing suit against his own state in federal court as well.[441] The Supreme Court has repeatedly acknowledged that when Article III judicial power was created, the framers did not contemplate that federal jurisdiction would exist for suits against unconsenting states.[442]

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[429] Pub. L. No. 718, 52 Stat. 1060, Fair Labor Standards Act, as amended, 29 U.S.C. §§ 206 and 207 (2000).

[430] Fair Labor Standards Amendments of 1961, 75 Stat. 65 (1961).

[431] Fair Labor Standards Amendments of 1966, 80 Stat. 831 (1966).

[432] Fair Labor Standards Amendments of 1974, 88 Stat. 58 (1974).

[433] 426 U.S. 833 (1976).

[434] 426 U.S. at 852.

[435] 426 U.S. at 852.

[436] 469 U.S 528 (1985).

[437] Gregg Rubenstein, *The Eleventh Amendment, Federal Employment Laws and State Employees: Rights Without Remedies?,* 78 B. U. L. REV. 621 (1998).

[438] Following *Garcia*, there were several lawsuits in which transit workers requested overtime. The defense was that *Garcia* should be applied prospectively, not retroactively. *See* Bester v. Chicago Transit Auth., 887 F.2d 118 (7th Cir. 1989).

[439] Welch v. State Dep't of Highways and Pub. Transp., 780 F.2d 1268, 1272 (5th Cir. 1986); Mineo v. Port Auth. of N.Y. and N.J., 779 F.2d 939 (3d Cir. 1985).

[440] Hans v. Louisiana, 134 U.S. 1 (1890).

[441] 134 U.S. at 10.

[442] North Carolina v. Temple, 134 U.S. 22 (1890). The *Pennhurst* line of cases affirm that states are not subject to suit in federal courts unless they consent. Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89 (1984). *Pennhurst* held that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that]

Recent Eleventh Amendment jurisprudence has followed an uneven line, but appears to be moving toward a more expansive interpretation, trumping federal statutory efforts to intrude upon state sovereignty. In *Parden v. Terminal Railway of Alabama Docks Dep't*,[443] the Supreme Court held that by entering into the business of operating a railroad, a State waives its immunity from suit in federal court and therefore becomes subject to suits for damages under the Federal Employee Liability Act (FELA), which applies to "every common carrier by railroad."[444]

Then, in *Welch v. Texas Dep't of Highways and Public Transportation*,[445] a state highway employee brought a suit against her employer under the Jones Act for injuries suffered while working on a ferry dock operated by the state DOT.[446] The Court held that Congress had not unmistakably expressed its intention to abrogate the Eleventh Amendment by allowing suit under the Jones Act in federal court. Therefore, such suits were barred.[447] The Court in *Welch* reexamined its holding in *Parden*, and concluded that its Eleventh Amendment findings were no longer good law, particularly as it had concluded that the state had consented to suit in federal courts. *Welch* overruled *Parden* to the extent that it was inconsistent with the requirement that Congress can only abrogate the Eleventh Amendment in unmistakably clear language.[448]

Then, the Supreme Court appeared to change course again in *Hilton v. South Carolina Public Railways Commission*,[449] retreating back to *Parden* in another FELA case. *Hilton* involved a suit brought by an employee of a state-owned railroad injured in the course of employment. Notwithstanding *Welch's* repudiation of *Parden,* the Court in *Hilton* refused to abrogate 28 years of *stare decisis* and held FELA applicable to state-operated railroads.[450]

Two recent, but narrowly decided, U.S. Supreme Court cases expand state sovereign immunity from suit. The first hinges its analysis on the Eleventh Amendment. The second extends immunity beyond the boundaries of the Eleventh Amendment. Though they are not transportation cases, their impact on the transportation sector likely will be of significance, and for that reason, they are discussed here.

Seminole Tribe of Florida v. Florida[451] was a suit brought by an Indian tribe against the State of Florida under the Indian Gaming Regulatory Act, which gave a tribe the right to bring suit in federal court against a state to enforce the Act's requirement that the state negotiate in good faith to conclude a compact allowing the tribe to engage in gaming activities.[452] To determine whether the federal statute has abrogated a state's sovereign immunity, the Court asked two questions: (1) has Congress unequivocally and unmistakably expressed its intention to abrogate the state's immunity; and (2) has Congress acted pursuant to a valid exercise of power?[453]

With respect to the first question, the Supreme Court found that Congress did indeed intend to abrogate sovereign immunity by subjecting states to suit in the Indian Gaming Regulatory Act. With respect to the second question, the Court noted that it previously had found Congressional authority to abrogate in only two provisions of the Constitution—the Fourteenth Amendment and the Commerce Clause.[454] Adopted well after the original Constitution and the Eleventh Amendment, the Fourteenth Amendment, "by expanding federal power at the expense of state autonomy,"[455] "operated to alter the pre-existing balance between the state and federal power achieved by Article III and the Eleventh Amendment."[456] The Court noted that the Fourteenth Amendment extended federal power to intrude upon the Eleventh Amendment, and therefore Section 5 of the Fourteenth Amendment gave Congress the power to abrogate its immunity from suit.

However, the abrogation of the Eleventh Amendment by the Commerce Clause had been found in only a single case, *Pennsylvania v. Union*

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limits the grant of judicial authority in Article III." 465 U.S. at 98.

[443] 377 U.S. 184 (1964).

[444] 45 U.S.C. § 51.

[445] 483 U.S. 468 (1987).

[446] *Id.* (state highway department immune from suit under the Jones Act because that statute did not expressly abrogate Eleventh Amendment immunity).

[447] 483 U.S. at 476.

[448] 483 U.S. at 478.

[449] 502 U.S. 197 (1991).

[450] 502 U.S. at 201–02.

[451] 517 U.S. 44 (1996) held that Congress may waive state immunity from suit if Congress passes a law seeking to enforce either the Thirteenth, Fourteenth, or Fifteenth Amendments (e.g., equal protection, due process) and Congress explicitly reveals its intention to subject states to federal suits. However, Congress may not abrogate a state's immunity when Congress legislates based on a separate enumerated power.

[452] 25 U.S.C. § 2710(d).

[453] 517 U.S. at 55.

[454] 517 U.S. at 59.

[455] *Id.*

[456] 517 U.S. at 65–66.

Gas Co.,[457] a plurality opinion. Both the interstate Commerce Clause and the Indian Commerce Clause are found in Article 1, Section 8 of the Constitution, and the Court could find no principled distinction between them; in fact, plenary power had been conferred on the federal government over the Indian tribes, while the states retained authority over some aspects of intrastate and interstate commerce.[458] In *Seminole Tribe*, the Court found that *Union Gas* was wrongly decided and overruled it, finding:

> In overruling Union Gas today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.[459]

Though in *Ex Parte Young*[460] the Supreme Court had allowed federal jurisdiction against a state official in order to avoid a violation of federal law, the Court in *Seminole Tribe* refused to allow suit against the Florida Governor, holding that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*."[461] Because Congress had enacted a remedial scheme for the enforcement of a right, this "narrow exception" to the Eleventh Amendment could not be used to enforce it against a state official.[462]

In *Kimel v. Florida Board of Regents*,[463] the U.S. Supreme Court held that although the ADA reflects a clear congressional intent to abrogate state sovereign immunity, the abrogation exceeded its authority under the Eleventh Amendment to the U.S. Constitution, which shields unconsenting states from suit in federal court.[464] Neither the Fourteenth Amendment nor the Commerce Clause conferred on Congress the authority to arrest age discrimination. Thus, a public transit operator that enjoys sovereign immunity may be shielded from suit under the ADA.[465] Decisions concerning the hiring, firing, and disciplining of employees are discretionary (as opposed to ministerial) in nature, and therefore enjoy immunity from judicial review.[466] However, where the public transit operator is not considered an arm of the state for Eleventh Amendment purposes, it enjoys no such immunity.[467]

Reviewing this jurisprudence, Professor James Leonard concluded that federal courts have lost jurisdiction over suits against nonconsenting states based on Article I legislation. Leonard summarized contemporary Eleventh Amendment principles as

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[457] 491 U.S. 1 (1989).

[458] 517 U.S. at 63.

[459] 517 U.S. at 72–73 [citations omitted].

[460] 209 U.S. 123 (1908).

[461] 517 U.S. at 74.

[462] 517 U.S. at 76.

[463] 528 U.S. 62 (2000).

[464] *See also* Fed. Maritime Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002), which held that, absent its consent, a state could not be subject to a private cause of action brought in a quasi-judicial proceeding before a federal administrative agency.

[465] Jones v. WMATA, 205 F.3d 428 (D.C. Cir. 2000); Taylor v. Wash. Metro. Area Transit Auth., 109 F. Supp. 2d 11 (D.D.C. 2000).

[466] The hiring, training, and supervising of employees is a discretionary function subject to immunity. Burkhart v. WMATA, 112 F.3d 1207 (D.C. Cir. 1997) (hiring and supervision of a bus driver is discretionary in nature; court denied claim of negligent hiring, training, and supervision in a case of a physical altercation between a deaf passenger and a bus driver and thus fails to hold WMATA liable on the claim of negligent hiring, training, and supervision). *See also* Taylor v. WMATA, 109 F. Supp. 2d 11, 16 (D.D.C. 2000)

> (An activity that amounts to a "quintessential" governmental function, such as law enforcement, is clearly "governmental" and falls within the scope of sovereign immunity. For activities that are not quintessential governmental functions, the Court must consider whether the activity is "discretionary" or "ministerial." *Id.* Only if the activity is "discretionary" will it be considered "governmental" and therefore protected by sovereign immunity. An activity that is found to be "ministerial" is not protected by sovereign immunity.) [citations omitted].

Beebe v. WMATA, 129 F.3d 1283 at 1287 (D.C. Cir. 1997)

> (To determine whether an activity is discretionary, and thus shielded by sovereign immunity, we ask whether any statute, regulation, or policy specifically prescribes a course of action for an employee to follow. If no course of action is prescribed, we then determine whether the exercise of discretion is grounded in social, economic, or political goals. If so grounded, the activity is "governmental," thus falling within section 80's retention of sovereign immunity.).

[467] Williams v. Dallas Area Rapid Transit, 242 F.3d 315 (2001).

(1) nonconsenting states are immune to suit *eo nominee* in federal courts by private individuals, foreign citizens, foreign sovereigns, and Indian tribes, but not to suits by other states or the United States; (2) plaintiffs may obtain prospective relief against a continuing violation of federal law by bringing suit against a state official; and (3) Congress may abrogate Eleventh Amendment immunity if it legislates properly under section 5 of the Fourteenth Amendment.[468]

Certain transit providers that are state agencies enjoy the Eleventh Amendment shield against a federal court claim brought by a private individual.[469] However, local governmental institutions do not enjoy immunity under the Eleventh Amendment.[470] For example, in *Williams v. Dallas Area Rapid Transit*,[471] the Fifth Circuit found that DART was not a state agency immune from suit under the Eleventh Amendment. Similarly, in *Pendergrass v. The Greater New Orleans Expressway Commission*[472] (involving a claim that the officers of the Greater New Orleans Expressway Commission (GNOEC) violated a speeding and intoxicated motorist's Fourth Amendment rights by using excessive force on him), the Fifth Circuit concluded that GNOEC was not entitled to Eleventh Amendment immunity as an "arm of the state." In both cases, the court analyzed the transit provider's functions under the six-part test developed in *Clark v. Tarrant County*:

1. whether the state statutes and case law characterize the agency as an arm of the state;

2. the source of funds for the entity;

3. the degree of local autonomy the entity enjoys;

4. whether the entity is concerned primarily with local, as opposed to statewide, problems;

5. whether the entity has authority to sue and be sued in its own name; and

6. whether the entity has the right to hold and use property.[473]

However, employing similar criteria, both the Georgia DOT[474] and the Alabama DOT[475] have been found to be arms of the state for purposes of the Eleventh Amendment shield.

7. State Sovereignty Beyond the Eleventh Amendment

Alden v. Maine[476] took state immunity from suit beyond the Eleventh Amendment, vesting it in general principles of state sovereignty that preceded the Constitution and were confirmed by it. *Alden* involved a suit brought by state probation officers against their employer, the State of Maine, for violating the overtime provisions of the FLSA.[477] After the lower federal courts dismissed the employees' suit on *Seminole Tribe* grounds, they filed the same action in state court, which dismissed the suit on sovereign immunity grounds. The court in *Alden* performed an exhaustive review of the history of state sovereignty at the time the Constitution was drafted and the reasons for promulgation of the Eleventh Amendment.

The Eleventh Amendment was adopted in response to the errant U.S. Supreme Court decision in *Chisholm v. Georgia*,[478] decided only 5 years after the Constitution was ratified, and holding that a state could be subject to suit without its consent under Article III, which gave the federal judiciary jurisdiction to hear suits "between a State and Citizens of another State." The Eleventh Amendment was quickly adopted "not to change but to restore the original constitutional design,"[479] for at the time the Constitution was drafted and ratified, it was

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[468] James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans With Disabilities Act After Seminole Tribe and Flores,* 41 ARIZ. L. REV. 651, 659 (1999). *See also* Sullen Wolfe, *Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the "Silver Bullet"?,* 26 STETSON L. REV. 727 (1997).

[469] MARTIN COLE & CHRISTINE BROOKBANK, STRATEGIES TO MINIMIZE LIABILITY UNDER FEDERAL AND STATE ENVIRONMENTAL LAWS (TCRP Legal Research Digest No. 9, 1998).

[470] The Eleventh Amendment "bars suits against states but not lesser entities." Alden v. Maine, 527 U.S. 706, 710 (1999).

[471] 242 F.3d 315 (5th Cir. 2001).

[472] 144 F.3d 342 (5th Cir. 1998).

[473] 798 F.2d 736, 744 (5th Cir. 1986).

[474] Robinson v. Ga. Dep't of Transp., 966 F.2d 637 (11th Cir.), *cert. denied*, 506 U.S. 1022 (1992); Hatmaker v. Ga. Dep't of Transp., 973 F. Supp. 1047 (M.D. Ga. 1995).

[475] Harbert Int'l v. James, 157 F.3d 1271 (11th Cir. 1998). However, a state agency that accepts federal funds waives Eleventh Amendment immunity for suits brought under the Civil Rights Act of 1964, 42 U.S.C. § 2000d-7(a)(1). Powers v. CSX Transp., 105 F. Supp. 2d 1295, 1301 (S.D. Ala. 2000).

[476] 527 U.S. 706 (1999) (Immunity from suit in federal courts extends to immunity from suit in state court. State could not be sued in its own court under the FLSA, such would be "ultimately to commandeer the entire political machinery of the State against its will….") *Id*. at 749.

[477] 29 U.S.C. § 210 *et seq*.

[478] 2 Dall. 419 (1793).

[479] 527 U.S. at 722.

universally the doctrine that a sovereign could not be sued without its consent.[480]

To address the anomaly created by *Chisholm,* the Eleventh Amendment exempted states from suit brought by citizens of another, or a foreign, state. Though the Supreme Court often referred to state immunity from suit as Eleventh Amendment immunity, the Court in *Alden* described this reference as "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment."[481] The Court was careful to note that the immunity extended well beyond the language of that Amendment:

> [S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.[482]

The Court in *Alden* concluded that Congress lacks power under Article I to subject the states to private suits in state courts.[483] Nonetheless, the Court acknowledged that sovereign immunity does not prohibit all judicial review of state conformity with its obligations under the Constitution and federal law. Sovereign immunity limits litigation only in the absence of state consent, and many states have enacted statutes waiving sovereign immunity to various degrees, thereby making themselves subject to suit. In ratifying the Constitution, states also consented to suits brought by other states or the federal government to ensure that the laws are faithfully executed. Additionally, the states consented to Congressional authorization of private suits under Section 5 of the Fourteenth Amendment.[484] Moreover, though sovereign immunity bars suits against states,[485] it does not prohibit suits against the federal government,[486] nor against a city or other governmental unit that is not an arm of a state.[487] Moreover, administrative determinations have been held not to constitute adjudicatory determinations barred by state sovereign immunity.[488]

8. State Immunity from Suit Under the Interstate Compact Clause

According to the Interstate Compact Clause, agreements between states require the blessing of Congress. Article 1, Section 10 of the Constitution provides, in part: "No State shall, without the Consent of the Congress…enter into any Agreement or Compact with another State…."[489] Pursuant to this clause, in 1966, the U.S. Congress approved establishment of WMATA in an Interstate Compact between Maryland, Virginia, and the District of Columbia, creating WMATA to deal with growing traffic problems in the Washington area.[490] The legislation created sovereign immunity for suits based on tort actions caused by its employees in the performance of a governmental function. In *Beebe v. Washington Metropolitan Area Transit Authority,* the D.C. Circuit Court of Appeals held that the employment, training, hiring, firing, and supervis-

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[480] 527 U.S. at 715–16.

[481] 527 U.S. at 713.

[482] 527 U.S. at 728–29 [citations omitted].

[483] 527 U.S. at 748.

[484] *Alden*, 527 U.S. at 756.

[485] *See, e.g.,* Fireman's Fund Ins. Co. v. Dep't of Transp. and Dev., State of La., 792 F.2d 1373 (5th Cir. 1986) (state transportation department immune from suit in federal court on action brought by insurer to rid itself of an obligation under a contract with a highway contractor); Higganbotham v. Oklahoma, 328 F.3d 638 (10th Cir. 2003) (taxpayer suit brought against the state of Oklahoma for issuance of highway bonds was held barred by Eleventh Amendment); Kissinger v. Ark. State Hwy. Comm'n, 1995 U.S. App. LEXIS 3782 (8th Cir. 1995) (unpublished) (Section 1983 suit against the state highway commission for wrongly taking property by exercising its right of way was dismissed under Eleventh Amendment).

[486] In many suits involving the federal and state governments, such as NEPA suits, only the federal government may be subject to suit (unless the state voluntarily stays involved—which is often the case). The opportunity to participate or not participate can be an important factor in such litigation. There are a number of NEPA "delegation" provisions either in existing law (for HUD grant programs—see 42 U.S.C. § 5304(g)) or being considered (as is the case with the Transportation reauthorization legislation). Consent by a state to suit in federal court has been seen as an essential element of these delegation proposals.

[487] *Alden*, 527 U.S. at 756. *See* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978) (local governing bodies are "persons" within § 1983 and can be sued directly. However, the Eleventh Amendment provides state immunity for suits brought under § 1983). JAMES HENDERSON, JR., RICHARD PEARSON & JOHN SILICIANO, THE TORTS PROCESS 803 (5th ed. 1999).

[488] Tennessee v. USDOT, 326 F.3d 729 (6th Cir. 2003) (interpreting under 49 U.S.C. § 5125(d)).

[489] U.S. CONST. art. 1, § 10, cl. 3 provides that, "*No State shall, without the Consent of the Congress…enter into any Agreement or Compact with another State….*"

[490] *See* Pub. L. No. 89-774, 80 Stat. 1324 (1966). *See, e.g.,* Dant v. District of Columbia, 829 F.2d 69, 71, 74 (D.C. Cir. 1987); Morris v. WMATA, 781 F.2d 218, 219, 222 (D.C. Cir. 1986).

ing of employees was a discretionary governmental function shielded from liability.[491]

Similarly, in *Sanders v. Washington Metropolitan Area Transit Authority,*[492] 18 bus or rail employees involved in on-the-job incidents who had failed their blood and urine tests brought a § 1983 and Fourteenth Amendment claim against the WMATA. The D.C. Circuit held that WMATA was immune from suit because, in the charter establishing the multistate authority, the local jurisdictions had conferred upon it both sovereign immunity and Eleventh Amendment insulation from suit in federal courts.[493]

H. DUE PROCESS

1. Which Liberty and Property Interests Are Constitutionally Protected?

The affirmation of individual rights is emphasized in the first 10 amendments to the Constitution, which were ratified on December 15, 1791, and comprise what is known as the Bill of Rights. They became applicable to the states with ratification of the Fourteenth Amendment. As we have seen, the first 2 of these 10 amendments guarantee the sovereign rights of the states vis-à-vis the federal government. The rest guarantee individual liberty, as do many of the subsequent amendments. It is the intersection (some would say collision) of the inherent "police powers" of the states with the powers delegated to the federal government or the constitutional rights of the people that has achieved some prominence in constitutional litigation.

The Fifth Amendment provides, in part, that "No person shall…be deprived of life, liberty, or property, without due process of law…."[494] Ratified on July 9, 1868, the Fourteenth Amendment provides, in part, that "No State shall…deprive any person of life, liberty, or property, without due process of law…."[495]

The Fifth and Fourteenth Amendments to the U.S. Constitution protect individuals against deprivation of life, liberty, and property without due process of law.[496] In due process analysis, the initial question is whether life, liberty, or property is implicated by the government action at issue. Though initially the courts focused on whether the individual had a "right" or a "privilege" in the liberty or property, contemporary courts look not to the weight, but to the nature of the interest at stake.[497]

To have a property interest in a benefit, the individual must have more than an abstract need or desire for it and more than a unilateral expectation of it; he or she must have a "legitimate claim of entitlement."[498] The concept of property denotes a broad range of interests secured by existing rules or understandings.[499] Property rights are not created by the Constitution, but stem from an independent source, such as state law.[500]

Several cases have arisen in the employment context. Public employees subject to dismissal who have a property interest in their job created by common law or by statute (sometimes referred to as a "legitimate claim of entitlement") may not be discharged[501] or suspended[502] without due process. In *Cleveland Board of Education v. Loudermill,*[503] the U.S. Supreme Court held that one is not deprived of a liberty when he or she "is not rehired in one job, but is free as before to seek another."[504] "While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once committed, without appropriate procedural safeguards."

In *Lerner v. Casey,*[505] decided in the shadow of McCarthyism, the Supreme Court held that due process was not violated when a subway conductor was dismissed by the New York Transit Authority when he refused to answer the question of whether he was a member of the Communist Party. The Court found his dismissal was not predicated upon his exercise of his Fifth Amendment rights, but because his refusal to answer cast doubt on his trustworthiness and reliability.[506]

In *Burns v. Greater Cleveland Transit Authority*,[507] an employee alleged the transit authority had denied him due process in dismissing him during the probationary period. The Sixth Circuit held

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[491] 129 F.3d 1283 (D.C. Cir. 1997).

[492] 819 F.2d 1151 (D.C. Cir. 1987).

[493] *Id.*

[494] U.S. CONST. amend. 5.

[495] U.S. CONST. amend. 14, § 1.

[496] See generally Paul Stephen Dempsey, *Transit Law*, in 5 SELECTED STUDIES 10-14 – 10-15.

[497] Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 at 572 (1972).

[498] *Id*. at 577.

[499] Perry v. Sinderman, 408 U.S. 593 (1972).

[500] Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 at 577 (1972).

[501] Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972).

[502] Gilbert v. Homar, 520 U.S. 924 (1997).

[503] 470 U.S. 532 (1985).

[504] Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 at 576 (1972).

[505] 357 U.S. 468 (1958).

[506] 357 U.S. at 476–79.

[507] 1991 U.S. App. LEXIS 30363 (6th Cir. 1991).

that the issue of whether one has a liberty or property interest protected by the due process clause is determined by reference to state law. The court held that where the state law holds that a probationary employee does not have a legitimate claim of entitlement in a job, his dismissal therefrom does not violate the due process clause. Similarly, in *Medellin v. Chicago Transit Authority,*[508] a federal district court reviewed the relevant state statutes and concluded they created neither a property interest in, nor a legitimate claim of entitlement for, employment. Some courts have taken the position that, absent a statute that confers a right to employment, employment is "at will" and not a property interest to which due process applies.[509]

To have a constitutionally protected liberty interest, one must allege more than the loss of reputation alone. More than a mere stigma—such as a tangible interest in employment—is required.[510] For example, in *Schlesinger v. New York City Transit Authority*,[511] a federal district court reviewed the allegation in a transit employee's due process claim that his employer defamed him. The court found that the defamatory statements did not go to the heart of his professional competence, but only accused him of acting in an unprofessional manner; he was neither terminated nor demoted from his job. Hence, he failed to satisfy the "stigma plus" requirement in order to establish a constitutionally protected liberty interest.[512]

In *Ward v. Housatonic Area Regional Transit District,*[513] a passenger denied the opportunity to ride transit buses lost his due process challenge because he failed "to point to the existence of any state law which would allow him to assert a property interest in fixed route bus service."[514]

2. What Process Is Due?

If a liberty or property interest is deemed to exist, the government may not take it without due process. Notice and an opportunity for comment are the essential components of due process. Must the opportunity for comment be conducted pre- or post-deprivation, and may it be in writing, or must it use oral procedures (including a trial-type hearing)? In assessing a due process claim, the courts examine (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through the existing procedures and the value of additional safeguards; and (3) the government's interest.[515]

In *Cleveland Board of Education v. Loudermill,*[516] the Supreme Court held that due process requires "some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment."[517] There must be a pretermination hearing of a security guard accused of lying on his application, though it need not be elaborate, to serve as

> an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.[518]

However, in *Gilbert v. Homar*,[519] the Supreme Court held that temporary job suspension requires only a prompt post-suspension hearing.[520]

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[508] 1994 U.S. Dist. LEXIS 10370 (N.D. Ill. 1994).

[509] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

[510] Paul v. Davis, 424 U.S. 693, 701 (1976).

[511] 2001 U.S. Dist. LEXIS 632 (S.D.N.Y. 2001).

[512] Id. at *20–24.

[513] 154 F. Supp. 2d 339 (D. Conn. 2001).

[514] 154 F. Supp. 2d at 348.

[515] Mathews v. Eldridge, 424 U.S. 319 (1976). *See* Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136, 158–59 (E.D.N.Y. 1999) (holding that a transit employee who was involuntarily placed on medical leave for pregnancy suffered only a temporary loss of job and salary that was "relatively minor and correctable at a later point. Furthermore, the procedural safeguards that were in place, and the government's overwhelming interest more than satisfy the limited due process protections implicated."). *Id.* at 159.

[516] 470 U.S. 532 (1985).

[517] *Id.* at 542.

[518] *Id*. at 545–46.

[519] 520 U.S. 924 (1997).

[520] *Id*. This case involved the suspension of a university police officer who was arrested and charged with drug offenses. Where the justification for suspension is not so clear cut, the courts may reach a different conclusion. *See e.g.,* Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895 (8th Cir. 1994). Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986):

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job....While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes

In *Grandi v. New York City Transit Authority*,[521] a bus driver was placed on involuntary medical leave and ultimately discharged on the ground that he was psychologically unfit for the job. The court held that an employee is not denied due process when he fails to avail himself of a grievance procedure established under a collective bargaining agreement.[522] Hence, a claimant must use the available procedural opportunities.

In *Marsh v. Skinner*,[523] the Second Circuit held that the plaintiff who alleged he had a mental disability had "failed to demonstrate a constitutionally protected property interest deserving of due process safeguards under the Fifth and Fourteenth Amendments. In short, because Marsh is not entitled to Half-Fare Program benefits under the applicable statutory provisions, he lacks a cognizable property interest in those benefits."[524] The New York City DOT and Metropolitan Transportation Authority found he was not a "handicapped person" eligible for the Half-Fare benefits.

Denial of continued eligibility to a disabled person for paratransit services requires due process, for disability rights have also been deemed civil rights. The U.S. DOT has opined, "Once an entity has certified someone as eligible, the individual's eligibility takes on the coloration of a property right…. Consequently, before eligibility may be removed 'for cause'…the entity must provide administrative due process to the individual."[525]

Though the due process clause refers only to procedural requirements, it also contains a substantive component that prohibits arbitrary and wrongful acts irrespective of the fairness of the procedures by which they are implemented.[526] Even where a property interest is not implicated, the government may not deny a person a benefit on a basis that infringes his or her constitutional rights, for such a decision would be patently arbitrary and discriminatory, and therefore a denial of due process.[527] Such unconstitutional means, for example, might include deprivation of a privilege on grounds of racial discrimination[528] or retaliation for exercise of free speech.[529] Vagueness in the standards governing public officials has led to claims of arbitrary and discriminatory conduct on behalf of transit officials in denying proposed bus advertising.[530]

However, substantive due process claims are difficult to establish, requiring proof that the governmental action is egregious, outrageous, and consciousness-shocking, and not sufficiently advancing any legitimate state interest. Thus, for example, an allegation that a highway authority had denied a property owner's due process rights by allegedly misinterpreting the law on drainage issues, and approving an environmental impact statement that allegedly resulted in highway water runoff causing flooding, was held insufficient to "meet the extreme

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> that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals— are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause. 476 U.S. at 274, 275.

With respect to employee reclassification, see Bahr v. State Inv. Bd., 521 N.W.2d 152 (Wis. 1994), where a person was moved legislatively from a classified civil service position to an unclassified employment at will position.

[521] 1999 U.S. App. LEXIS 2697 (2d Cir. 1999).

[522] *See also* Costello v. Town of Fairfield, 811 F.2d 782, 784 (2d Cir. 1987); McDarby v. Dinkins, 907 F.2d 1334, 1337 (2d Cir. 1990); Narumanchi v. Bd. of Trustees, 850 F.2d 70, 72 (2d Cir. 1988).

[523] 922 F.2d 112 (2d Cir. 1990).

[524] The Court cited Mathews v. Eldridge, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

[525] *Transportation for Individuals with Disabilities,* 56 Fed. Reg. 45584 (Sept. 6, 1991) (codified at 49 C.F.R. pts. 27, 37, and 38); 49 C.F.R. pt. 37, app. D. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

[526] Daniels v. Williams, 474 U.S. 327, 331 (1986).

[527] Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

[528] This was alleged in the Title VII employment context in Pate v. Alameda-Contra Costa Transit Dist., 697 F.2d 870 (9th Cir. 1983). Plaintiffs failed to prove a grooming code violated Title VII as sexual discrimination in Hearth v. Metro. Transit Comm'n, 436 F. Supp. 685 (D. Minn. 1977). Fare increases were not deemed to be arbitrary or discriminatory in D.C. Transit Sys. v. WMATA, 466 F.2d 384 (D.C. Cir. 1972).

[529] *See* Perry v. Sinderman, 408 U.S. 583 (1972). Examples in the general area of transportation include: Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (requiring that regulation limiting distribution of literature and solicitation to exterior of airport terminals be reasonable); Jacobsen v. Howard, 109 F.3d 1268 (8th Cir. 1997) (state regulation that bans newspaper machines from rest stops unreasonable infringement of newspaper's first amendment rights); Jews for Jesus, Inc. v. Bd. of Airport Comm'rs, 785 F.2d 791 (9th Cir. 1986) (city ordinance that prohibits all U.S. Const. amend. I activity is unconstitutional).

[530] United Food and Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998). However, in Searles v. Se. Pa. Transp. Auth., 990 F.2d 789 (2d Cir. 1993), the Second Circuit found that the Constitution was not implicated when a patron was killed upon an accidental derailment.

circumstances warranted for a substantive due process action to prevail under § 1983."[531]

Similarly, in *Imrie v. Golden Gate Bridge, Highway and Transportation District*,[532] a substantive due process claim against a bridge and highway district failed. Marissa Renee Imrie was a 14-year-old girl who took a taxi to the Golden Gate Bridge, where she jumped to her death. The estate alleged the district violated her constitutional rights by failing to erect a suicide barrier, although after more than 1,200 individuals had jumped to their death off the bridge (making it the number one suicide venue in the Nation), the district should have known about the danger and prevented it. The federal district court noted that the Due Process Clause generally confers no affirmative right to governmental assistance, except (1) where the government has affirmatively acted to place one in danger; or (2) when the government has a special relationship with the individual.[533] The court found neither circumstance present in Ms. Imrie's case, but merely "that defendants failed to take action knowing that the Bridge was dangerous to those who wished to commit suicide, a claim of negligence that is not remediable through the Due Process Clause."[534] The district did not leave the decedent in a more dangerous position than the one in which it found her.[535]

However, a substantive due process claim was sustained in *Davis v. Brady*,[536] a case in which police officers arrested a drunk, then deposited him in a nearby town on the curb of a 55-mph highway with few street lights and no sidewalk, where he was hit by a car, causing his leg to be amputated. The Sixth Circuit held that, "where the plaintiff suffered injury as a result of being placed in the state's custody…a constitutional claim arises when the injury occurred as a result of the state's deliberate indifference to the risk of such an injury."[537]

3. Due Process Under the Administrative Procedure Act

Federal agency due process is governed by the APA. Most state legislatures have promulgated state administrative procedure acts that contain similar provisions governing due process.

Section 553 of the APA defines the procedural obligations applicable to most rulemaking proceedings. Notice of proposed rulemaking must be published in the *Federal Register*, unless relevant parties have actual notice.[538] Interpretive and procedural rules, as well as general statements of policy, are exempt from the requirement of publication. Also exempt are situations where the agency finds it "impracticable, unnecessary, or contrary to the public interest."[539]

Parties have a right to participate through submission of written pleadings, with or without the opportunity to advocate their position or introduce evidence orally. More formal procedures are available only if the "rules are required to be made on the record after opportunity for an agency hearing…."[540] Publication or service of a substantive rule must ordinarily be accomplished 30 days prior to its effective date.

Rulemaking involves an agency's exercise of its quasi-legislative powers in the promulgation of prospective standards of conduct. Adjudication involves the performance of its quasi-adjudicatory powers in the resolution of issues that usually involve factual situations occurring at some prior point in time.

Rulemaking is prospective in nature. It prescribes future standards of conduct rather than consequences of past conduct. Adjudication ascribes legal obligations based upon present or past conduct.

Rulemaking usually impacts the rights of a large number of persons. A subsequent proceeding is ordinarily required before an individual will be sanctioned for its violation. Adjudication usually applies immediately to named persons and specific factual situations.

The APA provides some rather obscure definitions of rulemaking and adjudication. An adjudication consists of the agency process for the formulation of an "order."[541] An "order" constitutes the final disposition of agency business in a matter other than "rulemaking," but including licensing.[542]

A rule consists of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.[543] The procedural obligations for rulemaking are usually "informal," consisting of notice published in the *Federal Register* and the disposition of

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[531] Castro Rivera v. Fagundo, 310 F. Supp. 2d 428, 436 (D.P.R. 2004).

[532] 282 F. Supp. 2d 1145 (N.D. Cal. 2003).

[533] 282 F. Supp. 2d at 1148.

[534] 282 F. Supp. 2d at 1149.

[535] *Id.*

[536] 143 F.3d 1021 (6th Cir. 1998).

[537] 143 F.3d at 1026.

[538] 5 U.S.C. § 553(b).

[539] 5 U.S.C. § 553(b)(3)(B).

[540] 5 U.S.C. § 553(c).

[541] 5 U.S.C. § 551(7).

[542] 5 U.S.C. § 551(6).

[543] 5 U.S.C. § 551(4).

the proceeding on the basis of written pleadings. The procedural obligations for adjudication are more frequently "formal," or trial-type, in nature.

There are four types of rules:

1. *Substantive rules* are the most significant of the four. They identify appropriate standards of future conduct and have the force and effect of law;

2. *Procedural rules* identify the procedural obligations for agency or regulated activity;

3. *Housekeeping rules* deal with relatively trivial executive-type administrative matters; and

4. *Interpretive rules* clarify or explain existing law, rather than create new law. Standing alone, they do not have the force and effect of law. While they may explain the agency's interpretation of its enabling statute, they are normally not deemed binding on either the agency or persons subject to its jurisdiction.

Courts will not ordinarily construe the agency's statutory language identifying procedural obligations for rulemaking as essentially synonymous with the "on the record" language of § 553(c), thereby triggering the formal procedures expressed in §§ 556 and 557.

As an example, in *United States v. Florida East Coast Railway Co*.,[544] the ICC promulgated "incentive per diem" rules designed to provide an economic incentive for railroads to promptly return boxcars to their owners. The procedures employed by the agency somewhat exceeded those specified in 5 U.S.C. § 553 for informal rulemaking, but were somewhat less than the formal rulemaking procedures identified in §§ 556 and 557. The Interstate Commerce Act provides that the ICC "may, after hearing," *inter alia*, promulgate various rules affecting rail transportation, including use of boxcars.[545] Various railroads challenged the rules on the ground that formal procedures should have been utilized.

The U.S. Supreme Court acknowledged that the words "on the record" of § 553(c) are not words of art; often statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings. Moreover, the APA neither limits nor repeals additional procedural requirements to those specified in the APA, such as those imposed by the "after hearing" language at issue here.[546]

But the Court held that the meaning of a term such as "hearing" will vary depending upon whether it is found in the context of statutory provisions involving adjudication or rulemaking. If the former, it is more likely that formal procedures will be required. If the latter, it is a rare case in which formal procedures will be mandated.

Even the modest procedural hurdles of § 553 do not apply to interpretive rules, general statements of policy or procedural rules, or when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. Even if §§ 556 and 557 are triggered because the rulemaking statute is interpreted to require § 553(c) "on the record" procedures, nevertheless § 556(d) allows the submission of the evidence in written form if the parties will not be "prejudiced thereby." As a result of *United States v. Florida East Coast Railway Co*., most agency ratemaking is through informal, legislative, notice-and-comment procedures.

For formal rulemaking, utilizing the "trial-type" procedures in an "on the record" proceeding pursuant to 5 U.S.C. §§ 556 and 557, the scope of review is whether the agency's decision is supported by "substantial evidence."[547] The APA is silent as to what the appropriate scope of review is for informal or hybrid rulemaking. Courts ordinarily apply the "arbitrary or capricious" standard.[548]

Under 5 U.S.C. § 554(a), "every case of adjudication required by statute to be determined on the record after opportunity for agency hearing" requires formal, trial-type procedures under §§ 556 and 557, unless it falls within one of the exemptions specified by statute. The scope of review for formal adjudication is "substantial evidence."

Almost 90 percent of agency actions taken with respect to individuals are done in the context of informal adjudication. Although the agency need not prepare a contemporaneous record for purposes of potential judicial review, many now do. Here again, the scope of review is "arbitrary and capricious."

As explained below, *de novo* judicial review under 5 U.S.C. § 706(2)(E) has been circumscribed by the decision of the U.S. Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, [549] to two situations: (1) where agency fact-finding was inadequate; and (2) where new factual issues are raised in actions for judicial enforcement of agency sanctions.

An administrative agency is free to apply a new principle retroactively in an adjudicatory proceeding. It need not utilize rulemaking as the sole means of announcing new policy on a prospective basis.

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[544] 410 U.S. 224 (1973).

[545] 49 U.S.C. § 1(14)(a).

[546] 5 U.S.C. § 559.

[547] 5 U.S.C. § 706(2)(E).

[548] 5 U.S.C. § 706(2)(A).

[549] 401 U.S. 402 (1971).

4. Judicial Review of Administrative Agency Action

Judicial review of administrative agency findings of questions of fact is governed by the substantial evidence rule. The substantial evidence rule originated in the 1912 U.S. Supreme Court decision of *ICC v. Union Pacific R. Co*.[550] Substantial evidence is more than a mere scintilla. It is such evidence as a reasonable mind might accept to support a conclusion. Mere uncorroborated hearsay or rumor is not substantial evidence. It is such evidence as would be sufficient to justify a refusal to direct a verdict if the case were before a jury.

The substantial evidence standard has since been codified in the APA.[551] In determining whether an agency decision is supported by substantial evidence, courts must evaluate the whole record in its entirety, not merely those portions on which the agency relied.

Judicial review of factual conclusions is essential as a means of checking agency abuse of discretion. Yet *de novo* review is impractical for the bulk of agency decisions. They are simply too numerous and complex. The substantial evidence standard exists as a compromise between total judicial deference and *de novo* review.

The "clearly erroneous" standard, which applies to appellate review of trial court findings, differs from the substantial evidence standard of review of administrative agency decisionmaking. The latter is a narrow standard of review, thereby permitting agencies greater discretion than accorded trial courts. The technical rules of evidence (including in particular the hearsay rule and its multitude of exceptions) are generally inapplicable in administrative proceedings.

The APA provides that "the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions." Formal rulemaking and formal adjudication under §§ 556 and 557 are subject to the substantial evidence test. Presumably, then, agency decisions not subject to §§ 556 and 557 or otherwise "on the record" are subject to reversal or remand if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." These criteria relate to whether the decision was based on relevant factors, or whether it constituted a clear error of judgment. Few courts have invalidated agency action on the ground that it was a clear error of judgment. This standard essentially requires a party to persuade the court that the agency's decision has no rational basis—a difficult burden to carry. Of course, no agency decision can sustain judicial scrutiny if it is unconstitutional.

The APA requires a reviewing court to overturn agency actions deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The U.S. Supreme Court, in *Citizens to Preserve Overton Park v. Volpe*, [552] emphasized that this standard of review is a narrow one and that the courts are not to substitute their judgment for that of the agency. In essence, one must prove that the agency's action is without a rational basis, a difficult task given the talents of agency opinion writers.[553]

In *Overton Park v. Volpe,*[554] the Secretary of Transportation authorized construction of an Interstate highway through Overton Park in Memphis, Tennessee. The highway would consume 26 acres of the 343-acre city park. The Secretary made no findings explaining his decision and its consistency with federal statutes, but provided litigation affidavits asserting that the decision was his and was supportable by law. Federal legislation prohibited federal highway construction through public parks where a "feasible and prudent" alternative route exists.[555] The Supreme Court required the case to be remanded so that the full record before the DOT Secretary at the time he rendered his decision could be evaluated. A 27-day trial in the federal district court followed. At trial, it was revealed that the Secretary had never made the corridor determination the statute required, and even if he had done so, it was based on an incorrect view of the law. The case was remanded back to the U.S. DOT for the appropriate findings. Ultimately, Secretary Volpe concluded that building the Interstate highway through the park would not satisfy the statutory standards and could not be approved.[556]

Subsequently, the Supreme Court would hold that, "It is quite plain from our holding in *Citizens to Preserve Overton Park v. Volpe* that de novo re-

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[550] 222 U.S. 541 (1912).

[551] 5 U.S.C. § 706(2)(E) (where the proceeding is subject to 5 U.S.C. §§ 556 and 557 or otherwise "on the record").

[552] 401 U.S. 402 (1971).

[553] For example, a FHWA regulation banning the use of radar detectors in CMVs held not formulated in an arbitrary and capricious manner in Radio Ass'n on Defending Airwave Rights v. USDOT, 47 F.3d 794 (6th Cir. 1995). NHTSA rulemaking on vehicle fuel economy was held not arbitrary and capricious because its statutory interpretation of the Energy Policy and Conversation Act of 1975 was a reasonable accommodation of competing factors in Competitive Enter. Inst. v. NHTSA, 901 F.2d 107 (D.C. Cir. 1990).

[554] 401 U.S. 402 (1971).

[555] 23 U.S.C. § 138.

[556] PETER STRAUSS, TODD RAKOFF & CYNTHIA FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW 995–96 (10th ed. 2003).

view is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions."[557] *De novo* review would be available only if the agency's action was "unwarranted by the facts," *i.e.*, if it was adjudicatory in nature and its factfinding was inadequate, or when issues not before the agency are proffered in a proceeding to enforce nonadjudicatory agency action.[558] Hence, proper agency due process is essential to sustaining agency action.

Overton Park has become a landmark case of both Constitutional Law and Administrative Law, for it established the importance of the administrative record that documents the basis for the decision.[559] Both *Overton Park* and the cases that followed establish the standards by which that record—the "whole record"—will be judged and what it might contain. There remains considerable controversy about what should be in the record. Modern agency practice is to include everything relevant to the decision. Transparency is thereby enhanced.

Under the APA, in formal adjudicative or rulemaking proceedings, "[t]he transcript of testimony and exhibits, together with all papers…filed…constitutes the exclusive record for decision."[560] Hence, agency decisions utilizing formal procedures must be based on the record. However, an agency may take official notice of matters of common knowledge not within the record, *i.e.*, facts that are commonly known or that can be referred to by administrative agencies. Ordinarily such facts must be set forth in the record in formal rulemaking or adjudication, and opposing parties must be given an opportunity to rebut them.[561]

For example, in *United States v. Abilene & Southern Railway, Co.*,[562] the ICC set joint rates among a bankrupt railroad and 40 other railroads, utilizing the annual reports of the 40 rail carriers. The Abilene & Southern Railway argued that the ICC's order was void, since it relied upon information not formally introduced as evidence.

Agency decisionmaking must be based on the evidentiary record, and nothing can be considered as evidence that has not been properly introduced as such. Such a rule is necessary to protect the rights of the parties in an adversary proceeding. The Supreme Court held that the ICC may not rely on information not introduced as evidence.

However, in *Market Street Railway v. Railroad Commission*,[563] the Supreme Court held that although due process requires that the agency base its conclusions upon matters in the record and that parties have an opportunity to rebut the conclusion, absent any demonstration of error or prejudice, the reliance upon a matter of incidental importance (here, reports filed subsequent to the hearing) is not error. This case involved a decision of the California Railroad Commission to reduce the fares of the San Francisco Market Railway from 7 to 6 cents. The Railway contended the Commission's order was invalid, because it evaluated the evidence without the assistance of expert testimony, and its decision was based on evidence outside the record.

An agency action may be attacked on grounds that it is *ultra vires*,[564] or has serious procedural infirmities.[565] Of course no agency decision can sustain judicial scrutiny if it is unconstitutional.[566]

Section 15(g)(5) of the Model State APA provides for judicial reversal of agency decisions that are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." However, the 1982 Model Act revokes the "clearly erroneous" standard in favor of the federal "substantial evidence" test. Where the agency decision "substantially affects a fundamental vested right," some state courts have exercised their independent judgment as to the evidence.[567]

Between the extremes of *de novo* review and strong deference to administrative decisionmaking, some courts have taken a "hard look" at the agency's decisional process, ensuring that they have considered all relevant issues and policies and taken a good look at the facts, while allowing the agency the discretion to determine policy. It is the agency's process and its justification or rationale for its selection of a policy alternative that becomes the focus of this approach.[568]

Many jurists have conceded the pragmatic realities posed by judicial review of highly complex technical issues for which administrative agencies have greater expertise. For example, in *Motor Ve-*

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[557] Camp v. Pitts, 411 U.S. 138, 141 (1973) (citations omitted).

[558] 5 U.S.C. § 706(2)(F).

[559] *See* Peter Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community,* 39 U.C.L.A. L. REV. 1251 (1992).

[560] 5 U.S.C. § 556(e).

[561] *Id.*

[562] 265 U.S. 274 (1924).

[563] 324 U.S. 548 (1945).

[564] 5 U.S.C. § 706(2)(C).

[565] 5 U.S.C. § 706(2)(D).

[566] 5 U.S.C. § 706(2)(B).

[567] Strumsky v. San Diego Employees Ret. Ass'n, 520 P.2d 29 (Cal. 1974).

[568] Scenic Hudson Pres. Conference v. FPC (I), 354 F.2d 608 (2d Cir. 1965).

hicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,[569] the U.S. Supreme Court observed the inherent problems faced in assessing the wisdom of seat belt regulation. Over the course of 60 ratemaking notices beginning in the mid-1960s, the U.S. DOT issued various rules requiring installation of mobile seat belts. Passive restraints were, under the rules, to be installed in large cars in 1982 and in all cars by 1985. However, in 1981, President Reagan's Secretary of Transportation, Drew Lewis, announced that the rulemaking would be reopened because of the deleterious economic circumstances in which the domestic automobile industry found itself. The U.S. DOT's National Highway Traffic Safety Administration (NHTSA) rescinded the earlier rules on grounds that it could no longer find that significant safety benefits would be realized therefrom. In 1977, it had anticipated that air bags would be installed in 60 percent of new vehicles and automatic seat belts in 40 percent. By 1981, it appeared that seat belts would be installed in 99 percent and could be detached easily. Because of the $1 billion cost that would be imposed upon the industry by the rule, the NHTSA found that anticipated safety benefits would not warrant the expenditure.

The U.S. Supreme Court held the rule rescission arbitrary and capricious. Rule rescission or modification is significantly different from a failure to act. Where an agency changes direction, it must provide a reasoned analysis for the change. While an agency need not promulgate rules to last forever and must be given sufficient latitude to adjust its policies to comport with contemporary needs, deregulation is not always in the best public interest.

The Court held that the scope of review under the arbitrary and capricious standard is narrow; the courts may not substitute their judgment for that of the agency. However, the agency must review the relevant evidence and provide a satisfactory explanation of its result, including a rational connection between the facts and its conclusion. An agency rule could be deemed arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence…or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[570]

NHTSA failed to consider what benefits might be realized by an "air bag only" rule. Although a rulemaking will not be deemed inadequate merely because it failed to consider "every alternative device and thought conceivable to the mind of man," [571] the air bag is a technological alternative within the scope of the existing rule. Also, NHTSA was too quick to dismiss the benefits of automatic seat belts. An agency that changes its course must supply a reasoned analysis.

The test on review for an agency's factual findings is often whether they are supported by substantial evidence, as discussed above. In making factual determinations, the findings of the agency, if supported by substantial evidence, are conclusive. It is not the task of the court to substitute its judgment of factual questions for those of the agency if they are supported by evidence. But issues of statutory interpretation are for the judiciary to resolve giving appropriate weight to the initial legal determinations of the agency.[572]

In reviewing agency interpretations of their enabling statutes, many modern courts apply the rational basis test.[573] Under it, courts uphold the agency's statutory findings, if they are reasonable, even where the court might have construed the language of the statute differently. But some courts refuse to accord an agency's legal conclusions as great a deference as they ascribe to its factual findings, insisting that questions of law are for the independent judgment of the reviewing court.[574]

In *Chevron, Inc. v. Natural Resources Defense Council*,[575] the U.S. Supreme Court established a policy of giving broad deference to administrative agencies' interpretation of their statutes. It held that if the intent of Congress is clear in the statute, the court and the agency are bound to give effect to the express intent of Congress. If Congress explicitly or implicitly left a gap in the provisions of the statute for the agency to fill, the agency may clarify the provisions by regulation. The gap is deemed to be an express delegation of authority to the agency, and a court may not on review substitute its own construction of the statutory provision. The regulation is given controlling weight unless it is "arbitrary, capricious, or manifestly contrary to the statute." [576]

Statutory ambiguity and unilluminating legislative history provide the agency with broad discretion in implementing regulations, and agencies are not bound to follow prior agency interpretation. Challenges to agency construction of statutory pro-

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[569] 463 U.S. 29 (1983).

[570] *Id*. at 43.

[571] *Id*. at 57, quoting Vt. Yankee Nuclear Power Comp. v. Natural Res. Def. Council, 435 U.S. at 551.

[572] NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944).

[573] Gray v. Powell, 314 U.S. 402 (1941).

[574] *See* Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

[575] 467 U.S. 837 (1984).

[576] *Id*. at 844.

visions based on the wisdom of the agency's policy must fail if the agency has made a reasonable and legitimate policy choice.

Agencies have frequently been given authority to promulgate regulations, the violation of which is a statutorily created criminal offense. The legislature mandates the imposition of criminal sanctions, a task that cannot be performed by an administrative agency. But when an agency promulgates regulations, the violations of which may lead to the imposition of criminal penalties, it must do so with a reasonable level of precision.

For example, in *Boyce Motor Lines, Inc. v. United States*,[577] the ICC promulgated a regulation that required drivers of vehicles containing dangerous or hazardous materials to "avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." The statute imposed penalties of fines and/or imprisonment for a knowing violation. Boyce Motor Lines was charged with transporting carbon bisulphide through the Holland Tunnel in New York, a congested thoroughfare, on three occasions, on the third of which there was an explosion of the material, injuring some 60 persons.

The U.S. Supreme Court upheld the regulation. It acknowledged that criminal statutes must be sufficiently definite to give notice to the public, so that their prohibitions may be avoided, and to allow one charged with an offense arising thereunder to know with what he is being charged. Nevertheless, the English language is inherently ambiguous and cannot command the precision of mathematics. Hence, only a reasonable degree of certainty can be expected. Some courts have insisted that agencies adopt more specific standards for the performance of their statutory responsibilities—that they narrow or crystallize their area of discretion.[578]

Regulations that are properly promulgated and within the scope of authority delegated have the force and authority of law. Stated differently, a rule or regulation has the same effect as the statute upon which it is based, so long as the rule of regulation is not *ultra vires* of jurisdiction conferred by the statute, and its method of promulgation does not suffer from procedural infirmities. And, as a general principle, a regulation is binding upon the agency that promulgated it.

The U.S. Supreme Court evaluated the ICC's ratemaking power in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*.[579] In 1920, railroads charged $1.045 per 100 lb of sugar between Phoenix and California. Shippers objected, and the ICC on July 26, 1922, ordered the rates lowered to $0.965 and awarded reparations. Later that year, shippers again challenged these rates as unreasonable and sought reparations. In 1925, the commission ordered the rates reduced to $0.73 and awarded reparations on shipments after July 1, 1922.

The Court held that the ICC may not award reparations with respect to rates charged that were set at a level approved by it. The Court acknowledged that the ICC's ratemaking powers were comprehensive, and when it declared a rate to be just and reasonable, it spoke as the legislature, and its pronouncement has the force of a statute.

Nevertheless, the ICC had earlier declared the $0.965 rate to be just and reasonable. The ICC may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed. The Commission may not order reparations when it has declared the earlier, higher rate to be lawful.

Arizona Grocery is usually cited in support of the proposition that an agency must ordinarily follow its own rules, until they are properly amended or repealed. Many cases have held that an agency must abide by the rules it promulgates when it subsequently engages in *ad hoc* adjudication.[580]

Procedural requirements that agencies must employ for adjudication and rulemaking have five sources:

- The *organic statute* creating the agency, which may specify the procedures it is to utilize;
- *Procedural regulations* promulgated by the agency itself;
- The *Administrative Procedure Act*, which establishes procedural requirements for most federal agencies;
- *Federal common law* created by judges to facilitate judicial review; and

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[577] 342 U.S. 337 (1952).

[578] Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

[579] 284 U.S. 370 (1932). Prior to 1906, the ICC had jurisdiction to declare rates unreasonable and award reparations for sums unlawfully collected, but it could not prescribe rates for the future. In 1906, it was given the latter power. All railroad rates must be filed with the ICC, which determines if they are "just and reasonable." In 1920, the Commission was given authority to prescribe minimum as well as maximum rates.

[580] *See, e.g.,* United States v. Caceres, 440 U.S. 741 (1979).

• The *United States Constitution*, particularly its Fifth and Fourteenth Amendment due process requirements, as interpreted by the courts.

Constitutional due process requirements may create a hearing obligation where a "relatively small number of persons are exceptionally affected, in each case upon individual grounds…."[581] But conversely, where a large number of persons are affected by an agency action essentially analogous to that performed by the legislature, a formal hearing is not required.[582] The U.S. Supreme Court has noted that there is "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards on the other hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."

For example, in *Southern Railway v. Virginia*,[583] the U.S. Supreme Court reviewed a decision of the highway commissioner of the Commonwealth of Virginia, who, acting under authority of Virginia law, but without notice or hearing, ordered the Southern Railway to eliminate a grade crossing and construct an overhead passage. The Southern Railway refused, arguing that the procedures employed failed to satisfy the due process requirements of the Fourteenth Amendment. The statute was silent as to the availability of judicial review.

The Court concluded that the summary decrees of the highway commissioner ordering bridge construction were inconsistent with Fourteenth Amendment due process obligations. Clearly, a requirement to expend money to eliminate a railway grade crossing and construct a bridge in its place constitutes the taking of property. Whatever the summary ability of the legislature to confiscate property, there is a significant difference where that power is delegated to an administrative official. Since the statute conferring such powers includes no provision for a hearing or judicial review, it constitutes the delegation of arbitrary and unconstitutional authority.

[581] Londoner v. Denver, 210 U.S. 373 (1908).

[582] Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). Where a large number of individuals are affected by agency action, it is impractical that they each be given a hearing. The machinery of government would grind to a halt if all aggrieved parties were given a formal hearing.

[583] 290 U.S. 190 (1933).

I. JUDICIAL REVIEW

1. Standing

Article III of the Constitution vests review of governmental decisions in the courts.[584] In the seminal decision of *Marbury v. Madison,*[585] the U.S. Supreme Court held that judicial review is the power to review legislation/executive acts and declare such laws unconstitutional: "It is emphatically the province and duty of the judicial department to say what the law is." This power to interpret the Constitution and declare the acts of the coordinate branches of government unconstitutional is enormous power indeed. Yet, judicial review also is limited to justiciable "cases or controversies" in which plaintiffs have standing to seek review.

Standing is a threshold question in every federal case, determining the authority of the federal court to entertain the suit.[586] Article III of the United States Constitution limits judicial power to the resolution of "cases and controversies." One who seeks redress in federal courts must demonstrate that: (1) he personally has suffered actual or threatened injury as a result of the defendant's putatively illegal conduct;[587] (2) the injury is fairly traceable to the defendant's actions; and (3) that such injury is likely to be redressed by the re-

[584] U.S. CONST. art. III:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish….
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another state;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects….

[585] 5 U.S. (1 Cranch.) 137 at 177 (1803).

[586] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[587] Gladsone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979). *See also* Reynolds v. McInnes, 380 F.3d 1303 (11th Cir. 2004) (non-African American employees had standing to bring civil contempt action against the Alabama DOT on the basis of a consent decree imposing race-conscious standards).

quested relief.[588] These requirements tend to assure that an actual case or controversy exists, and that the court will not be adjudicating some abstract issue. The dispute must be presented in an adversary context and in a form capable of judicial resolution.

Leibovitz v. New York City Transit Authority[589] involved a transit employee who alleged she suffered emotional distress because of sexual harassment of other employees. Though the U.S. Court of Appeals for the Second Circuit denied her relief, it engaged in a detailed discussion of Article III standing jurisprudence.[590] Diane Leibovitz was one of 40 Deputy Superintendents of the 44,000 employees of the New York City Transit Authority. She became emotionally distressed as she heard the several complaints of other female employees of incidents of sexual harassment. She claimed she began to suffer a major depressive disorder because of her inability to secure a remedy for the women who had been subjected to a hostile work environment. The jury found that Leibovitz herself had not been the subject of sexual harassment, nor had she witnessed it firsthand. The jury found, however, that Ms. Leibovitz suffered emotional distress as a result of the sexual harassment of other women in her shop, and awarded her damages based on her hostile work environment claim.[591] The Second Circuit concluded that the jury's finding that Leibovitz was emotionally traumatized as a result of her workplace being permeated by sexual harassment was sufficient to establish Article III standing.[592] It mattered not that she suffered nontangible, noneconomic injury, nor that her injury may have been the indirect result of the sexual harassment of other women, for the Court found her injury to be distinct and palpable, and that it was remediable through a damage award. Thus, she had standing.[593]

Statutes may also create standing. Where a statute clearly reflects an intent to protect a competitive interest, the protected party has standing to bring suit to require compliance.[594] But in *Area Transportation, Inc. v. Ettinger,*[595] a federal district court held that a school bus operator lacked standing to force FTA to declare the public transit provider ineligible for future federal transit assistance grants and require the recipient to repay the grants it received for each year it was in violation. In order to establish standing under the APA, a plaintiff must prove: (1) he or she suffered an "injury in fact"—an invasion of a concrete and particularized legally recognized interest; (2) there was a causal connection between defendant's action and plaintiff's injury, such that the injury is fairly traceable to defendant's action and not caused by some third party not before the court; and (3) a favorable decision will likely redress the injury. The court found that the private carrier failed to prove its injury was fairly traceable to the FTA's decision, and that the remedy sought would not redress its injury.

State and federal law diverges on the issue of whether taxpayers have standing to challenge governmental actions as taxpayers. In general, no statutory authorization is necessary for a "taxpayer's action" in a state court. The right of a taxpayer to sue to restrain the alleged improper expenditure of public funds derives from the common law. "Of the right of resident tax payers to invoke the interposition of a court…to prevent an illegal disposition of [public] moneys…or the illegal creation of a debt…there is at this day no serious question. The right has been recognized by the state courts in numerous cases."[596] However, as an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's "interest in the moneys of the Treasury…is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of

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[588] Allen v. Wright, 468 U.S. 737, 751 (1984). In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the U.S. Supreme Court identified several requirements for standing:

- *Injury in Fact:* The plaintiff must suffer "concrete" harm, not "vague, uncertain harm." Such harm can be "physical, economic or deprivation of a particular right."
- "*Causal Connection:* If the sought relief were granted, would harm against plaintiff continue?
- *Redressability:* Even if the plaintiff sought relief they wanted, would they secure the result they are seeking?

[589] 252 F.3d 179 (2d Cir. 2001).

[590] *See* Christopher O'Connor, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment,* 50 CASE. W. RES. L. REV. 501 (1999), which discusses the lower court decision in her favor.

[591] 252 F.3d at 182–83.

[592] 252 F.3d at 184–85.

[593] 252 F.3d at 185.

[594] City of Evanston v. Reg'l Transp. Auth., 825 F.2d 1121, 1123 (7th Cir. 1987); S. Suburban Safeway Lines v. City of Chicago, 416 F.2d 535, 539 (7th Cir. 1969); Bradford Sch. Bus Transit v. Chicago Transit Auth., 537 F.2d 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977). However, some courts have found that the Federal Transit Act was intended to benefit the public at large and not create special benefits for particular classes of persons. *See e.g.,* ABC Bus Lines v. Urban Mass Transp. Admin., 831 F.2d 360 (1st Cir. 1987), and Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982).

[595] 75 F. Supp. 2d 862, 1999 U.S. Dist. LEXIS 18503 (N.D. Ill. 1999); *aff'd,* Area Transp. Inc. v. Ettinger, 219 F.2d 671 (7th Cir. 2000).

[596] Crampton v. Zabriskie, 101 U.S. (11 Otto) 601, 609, 25 L. Ed. 1070 (1880).

the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention]."[597]

One may satisfy the personal injury requirement of standing by a showing of economic or noneconomic loss, including injuries to aesthetic values or environmental well-being.[598] For example, in *Hatmaker v. Georgia Department of Transportation,*[599] a group of citizens complained that the Georgia DOT had failed to research the historic value of a certain oak tree (the "Friendship Oak") when it approved a road-widening project, in violation of Section 4(f) of the Department of Transportation Act of 1966,[600] and Section 18 of the Federal Highway Act of 1968.[601] The federal district court held plaintiffs had satisfied both the economic and noneconomic strands of standing. They had invested more than $8,000 in maintaining the health of the Friendship Oak; they visited the tree to stand in awe of its natural beauty, decorated it with Christmas lights, and studied the tree in their capacity as licensed arborists. They also proved an injury fairly traceable to the alleged unlawful conduct—the failure of Georgia DOT to research adequately the history of the Friendship Oak had led the Secretary of U.S. DOT to make a decision in violation of Section 4(f). Thus, all elements of standing were satisfied.[602]

2. Preclusion

Under the APA, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved…is entitled to judicial review thereof."[603] However, the judicial review provisions are inapplicable where "statutes preclude judicial review…."[604] Preclusion statutes are ordinarily narrowly construed.

The APA allows judicial review except to the extent statutes preclude review, or the agency's determination is committed to its discretion by law.[605] Preclusion of review is limited to those situations where agency action is reasonable rather than arbitrary. Thus, although an agency action may be committed to its discretion by law, review is permitted where the agency abuses its discretion.[606]

The APA has been construed to mean that agency decisionmaking may be precluded if committed to its discretion by law only if the exercise of discretion is reasonable. Stated differently, the courts may properly reverse agency action for abuse of discretion. The exception for action committed to agency discretion has been described as rather narrow, and exists in those rare circumstances where the "statutes are drawn in such broad terms that in a given case there is no law to apply."[607] There appears to be a strong presumption in favor of judicial review.[608]

3. Ripeness

The case-or-controversy requirement of Article III requires that the action be "ripe" for judicial review. The purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[609]

Only final agency decisions are subject to review. When one seeks discretionary relief from the judiciary for an agency action, the courts may resist review until the controversy is "ripe." This avoids premature adjudication of disputes that have not reached sufficient concreteness to warrant judicial interference, and avoids disruption of agency decisionmaking until the impact thereof has run its course.

In 1994, Michael Cuffley, a representative of the Missouri Realm of the Knights of the Ku Klux Klan submitted an application with the Missouri Highway and Transportation Commission to participate in the state's Adopt-A-Highway program. The Adopt-A-Highway program is designed to reduce the state's litter collection expenses by enlisting volunteers to help. The state neither approved nor denied the Klan's application, but instead filed an action in federal district court seeking a declaratory judgment that would allow it to deny the Klan's application; the Klan counterclaimed, seeking a declaratory judgment and writ of mandamus or-

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[597] Frothingham v. Mellon, 262 U.S. 447, 487 (1923); ASARCO v. Kadish, 490 U.S. 605, 613; 109 S. Ct. 2037; 104 L. Ed. 2d 696 (1989).

[598] *See* Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. SCRAP, 412 U.S. 669 (1973).

[599] 973 F. Supp. 1047 (M.D. Ga. 1995).

[600] 49 U.S.C. § 303.

[601] 23 U.S.C. § 138.

[602] *Hatmaker,* 973 F. Supp. at 1051–52.

[603] 5 U.S.C. § 702.

[604] 5 U.S.C. § 701(a)(1).

[605] 5 U.S.C. § 701(a)(1)&(2).

[606] 5 U.S.C. § 706(2)(A).

[607] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[608] *See, e.g.*, Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958).

[609] Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 at 200 (1983), Citing Abbott Labs. v. Gardner, 387 U.S. 136 (1951).

dering the Highway Commission to allow it to participate in the program. The district court granted the Klan's motion and awarded it attorney's fees.[610]

On appeal, the Eighth Circuit, in *Missouri Highway and Transportation Commission v. Cuffley*,[611] concluded that, because the State had never acted on the Klan's application, "the critical facts involved in this dispute are hypothetical and speculative" and therefore not ripe for review.[612] "Until the State acts on the Klan's application and creates a concrete record for judicial consideration, this dispute is simply not ripe for review," observed the court. "If the State is unsure how to handle the Klan's application, it should seek the advice of its legal staff, not the advice of a federal judge."[613]

Nevertheless, the modern trend has been to relax the ripeness prohibition of discretionary judicial review. Where a party is faced with an agency decision having immediate adverse effects, and the consequences for noncompliance are severe, courts have been willing to open the doors to judicial review.

4. Primary Jurisdiction

Primary jurisdiction is closely related to the doctrine of exhaustion. Exhaustion applies whenever the dispute is first cognizable solely in an administrative agency.[614] The courts will defer action until the agency has concluded its proceedings. Primary jurisdiction involves a dispute that, although originally cognizable by the judiciary, requires resolution of certain issues within the special competence of an administrative agency. Here, judicial review is deferred until these issues have been first resolved by the agency.

The advantages of the application of the primary jurisdiction doctrine are:

- *Agency expertise.* The agency has been entrusted by the legislative branch to regulate a particular industry or area of public concern and has developed some expertise in the regulated affairs and application of the governing statute. The insights gained through agency experience and specialization may be useful in resolving complex issues of law or fact; and
- *Uniformity.* Allowing the administrative agency an opportunity to decide all major issues surrounding the substance of its jurisdiction encourages uniformity of decisionmaking, as well as stability and predictability in the law. These are objectives the legislature probably desired when it established the agency.

Nevertheless, referring questions to administrative agencies that the courts must ultimately review may only consume unnecessary time and money, and lead to less efficient and less economical decisionmaking.

In *United States v. Western Pacific Railroad*,[615] Western Pacific Railroad brought an action against the United States in the court of claims for payment for the transportation of napalm bombs without fuses. The Railroad argued that the napalm constituted "incendiary bombs" for which a higher tariff applied, rather than the classification of "gasoline in steel drums" as maintained by the United States, for which a lower tariff applied. The court of claims held for the United States. The Railroad argued that the question is one to be resolved by the ICC. The U.S. Supreme Court held that the court of claims should have applied the doctrine of primary jurisdiction and referred the issue of rail tariff interpretation to the ICC for its initial determination.

Early cases relied upon the desire to encourage uniformity of treatment of issues within the specialized competence of administrative agencies as a principal rationale for primary jurisdiction.[616] This avoids one string of agency precedent, and a separate line or lines of federal court precedent.

More recently, courts have stressed agency expertise and specialized knowledge as a rationale for the primary jurisdiction doctrine. The complex and technical issues of tariff interpretation presented here are well suited for agency disposition. The agency, rather than the courts, has familiarity with issues such as why a higher tariff was ascribed to bombs than to gasoline, and whether these reasons would be applicable to the instant shipment. Courts, which do not make rates, cannot discern precisely all the factors that comprise the ratemaking process.

The rationale of the agency expertise as a reason for applying the doctrine of primary jurisdiction has led to the creation of an exception where only a question of law is presented and no factual issue is in dispute. Thus, preliminary resort to the ICC was not deemed necessary in *Great Northern Railway*

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[610] Mo. Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248 (E.D. Mo. 1996).

[611] 112 F.3d 1332 (8th Cir. 1997).

[612] 112 F.3d at 1337.

[613] 112 F.3d at 1338.

[614] For example, employment discrimination claims must first be brought before the EEOC or the corresponding state agency before filing suit. Paul Stephen Dempsey, *Transit Law*, 5 SELECTED STUDIES 10–18.

[615] 352 U.S. 59 (1956).

[616] *See* Tex. & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

Co. v. Merchants Elevator Co.,[617] where the Court held that, "The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to undisputed facts."[618]

5. Deprivation of Individual Rights: Section 1983 Actions

The vehicle by which many constitutional rights violations are alleged against state and local governments is § 1983 of Title 42 of the U.S.C.[619] The Civil Rights Act of 1871 (now codified at 42 U.S.C. § 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress.[620]

In order to prevail under § 1983, a plaintiff must prove:

1. He held a constitutionally protected right;
2. He was deprived of this right in violation of the Constitution;
3. The governmental authority intentionally caused this deprivation; and
4. The governmental unit acted under color of state law.[621]

To determine whether a statute gives rise to a federal right enforceable under § 1983, the courts examine whether: (1) Congress intended the provision to benefit the plaintiff; (2) the right assertedly protected by the statute is not so amorphous as to strain judicial competence; and (3) the statute unambiguously imposes a mandatory, binding obligation upon the states.[622] If these criteria are satisfied, a presumption exists that § 1983 provides a remedy unless Congress intended to foreclose one.

Employing these criteria, the Seventh Circuit in *Indianapolis Minority Contractors Association v. Wiley*[623] concluded that the statutory scheme created by ISTEA and STURAA, though requiring that states expend at least 10 percent of federal funds with small business concerns owned and controlled by socially and economically disadvantaged individuals (DBEs), imposed an obligation on the states rather than creating entitlements upon individuals. Therefore, the claims that the Indiana DOT had improperly satisfied the DBE requirement by awarding contracts to "sham" or "front" companies owned by wealthy black businessmen who were not truly disadvantaged were not cognizable under § 1983.[624]

A local governmental entity may be held liable under § 1983 for: (1) an explicit policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, though not authorized by law or express municipal policy, is so established as

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[617] 259 U.S. 285 (1922).

[618] 259 U.S. at 294. Primary jurisdiction was not applied in Nader v. Allegheny Airlines, 426 U.S. 290 (1976), which held that courts have applied the doctrine of primary jurisdiction even where common law remedies exist and the agency lacks jurisdiction to resolve the controversy on grounds that uniformity and consistency of decision making are thereby enhanced. In this case, considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Civil Aeronautics Board. The issues here of fraudulent misrepresentation fall within the traditional competence of the judiciary.

Primary jurisdiction was applied in Far East Conference v. United States, 342 U.S. 570 (1952), where the Court held the questions posed under the Shipping Act are highly technical and complex. They require the exercise of a high degree of expertise by those who, like the members of the FMB, are highly trained and experienced in such matters. In cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. Uniformity and consistency of decision making are enhanced by preliminary resort to administrative agencies better equipped than courts to gain insight by specialization and experience.

[619] *See* Dempsey, *supra* note 614, at 10–12.

[620] 42 U.S.C. § 1983. *See, e.g.,* Monell v. Dep't of Social Services of the City of N.Y., 436 U.S. 658, 691 (1978). Allegations of racial discrimination are handled under § 1981; constitutional violations other than racial discrimination are handled under § 1983. Gorman v. Roberts, 909 F. Supp. 1479 (M.D. Ala. 1995) (white Alabama DOT highway employee did not have a § 1981 claim because he failed to demonstrate he suffered discrimination based on his race).

[621] Sims v. Mulcahy, 902 F.2d 524, 538 (7th Cir. 1990), *cert. denied,* 498 U.S. 897 (1990); Webb v. City of Chester, 813 F.2d 824, 828 (7th Cir. 1987); Patrick v. Jasper County, 901 F.2d 561, 565 (7th Cir. 1990); Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995). The U.S. Supreme Court has rejected the defense that the "under color of" language applies only to conduct authorized and not forbidden by state law. Monroe v. Pape, 365 U.S. 167 (1961).

[622] Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509–11 (1990).

[623] 187 F.3d 743 (7th Cir. 1999).

[624] 187 F.3d at 751.

to constitute a "custom or usage" with the force of law; or (3) a constitutional injury that was caused by a person with final policymaking authority.[625]

Section 1983 actions have been brought against state highway departments and regional transit agencies for a number of alleged constitutional violations, including advertising restrictions;[626] employee drug testing;[627] employee disciplinary actions, suspensions, or dismissals;[628] and assault and battery or other abuses.[629]

In *Bivens v. Six Unknown Federal Narcotics Agents,*[630] the U.S. Supreme Court held that, although not explicitly authorized by § 1983, federal officials may be sued for damages flowing from their denial of a person's constitutional rights, implying a cause of action directly from the Constitution itself.[631] The Court held a plaintiff must show (1) a constitutionally protected right, (2) an invasion of that right, and (3) that the requested relief is appropriate.[632]

A number of § 1983 actions against state and local governments have been dismissed under the *Rooker-Feldman* doctrine,[633] which holds that federal courts (other than the U.S. Supreme Court) do not have jurisdiction to review state court decisions, or issues inextricably intertwined therewith. For example, in *Shooting Point v. Cumming*,[634] a property owner brought suit against neighboring landowners and the resident engineer of the Virginia Department of Transportation (VDOT) for violating a 15-ft-wide easement for purposes of egress and ingress to Virginia Highway Route 622. The Fourth Circuit concluded:

> The Virginia courts have clearly held that Shooting Point was required to obtain a commercial entrance permit and that, under the then prevailing law, Shooting Point was not entitled to that permit. Because the Virginia courts implicitly held that Shooting Point was properly subject to the VDOT regulations, a federal court finding of selective enforcement in violation of the equal protection clause of the Fourteenth Amendment would clearly contravene the state courts' judgment. The district court, therefore, correctly concluded that the *Rooker-Feldman* doctrine precludes its exercise of federal jurisdiction over Shooting Point's selective enforcement claim….[635]

> Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officers is simply not the business of federal courts…. Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes.[636]

Similarly, in *Sophocleus v. Alabama Department of Transportation*,[637] a landowner filed a § 1983 action complaining that state condemnation pro-

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[625] Allen v. Chicago Transit Auth., 2000 U.S. Dist. LEXIS 11499 (E.D. Ill. 2000).

[626] Examples of such cases include Maldonado v. Harris, 370 F.3d 945 (9th Cir. 2004) (First Amendment challenge against California's Outdoor Advertising Act); Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985) (claim brought under 1983 for denial of advertising); Lebron v. WMATA, 585 F. Supp. 1461 (D.D.C. 1984) (1983 claim brought for restrictions on advertising).

[627] Tanks v. Greater Cleveland Reg'l Transit Auth., 930 F.2d 475 (6th Cir. 1991) (1983 action brought against drug testing); Moxley v. Reg'l Transit Servs., 722 F. Supp. 977 (W.D.N.Y. 1977) (1983 claim brought against drug testing); Dykes v. SEPTA, 68 F.3d 1564 (3d Cir. 1994) (1983 action brought challenging drug test).

[628] Morris v. WMATA, 781 F.2d 218 (D.C. Cir. 1986).

[629] Ricciuti v. N.Y. City Transit Auth., 941 F.2d 119 (2d Cir. 1991) (1983 action brought against assault and battery by transit police); Fisher v. WMATA, 690 F.2d 1133 (D.C. Cir. 1982) (1983 action brought for arrest, search and seizure, and stripping of patron).

[630] 403 U.S. 388 (1971). In *Bivens,* the plaintiff alleged that police officers entered and searched his apartment and arrested him on narcotics charges without a warrant and without probable cause.

[631] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). The Court briefly summarized the facts of this case:

> This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

[632] Davis v. Passman, 442 U.S. 228 (1979). A private cause of action against deprivation of a constitutional protected right may be pursued against the federal government unless special factors counsel hesitation, or Congress has explicitly decreed an alternative remedy to be a substitute for recovery directly under the Constitution and that remedy is equally as effective. Carlson v. Green, 466 U.S. 14 (1980).

[633] D.C. Ct. of App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

[634] 368 F.3d 379 (4th Cir. 2004).

[635] 368 F.3d at 384.

[636] 368 F.3d at 385, quoting Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810 (4th Cir. 1995).

[637] 305 F. Supp. 2d 1238 (M.D. Ala. 2004).

ceedings used to take his home for the widening of Highway 280 violated his Fifth and Fourteenth Amendment rights. The federal district court held that these claims were raised in state court, in a condemnation case and an eviction case, and such claims therefore could not, under Rooker-Feldman, be litigated again in federal court.[638]

But the plaintiff fared better in *Maldonado v. Harris*,[639] a case in which a landowner sought to erect a double-sided billboard on the roof of his building adjacent to U.S. Highway 101. Maldonado had been denied a permit to use his billboard for off-premises advertising by the California Department of Transportation (Caltrans) because the segment of Highway 101 in question had been designated a "landscaped freeway" where, under the California Outdoor Advertising Act,[640] off-premises advertising is prohibited. Despite denial, Moldanado persisted in using the billboard for off-premises advertising, and Caltrans brought a state nuisance action and secured a permanent injunction against him. He was twice found in contempt of court for violating the injunction. Nonetheless, the Ninth Circuit declined to bar his 1983 action under *Rooker-Feldman*, finding: "The legal wrong that Moldonado asserts in his action is not an erroneous decision by the state court in the nuisance suit brought against Moldonado by Caltrans, but the continued enforcement by Caltrans of a statute Moldonado asserts is unconstitutional."[641] Neither was the claim precluded under common law rules of preclusion:

> The primary right in the state nuisance action was not Moldonado's right to advertise on his billboard, but the right of the people of California to be free from obtrusive advertising displays along major highways.... On the other hand, the primary right involved in the instant action is…Moldonado's right to advertise freely on his property, a right that Moldonado claims is protected by the First Amendment. Because the primary rights involved in the two suits are different, the causes of action are also different, and the judgment against Moldonado in the nuisance action therefore does not bar any of his federal claims.[642]

J. PRIVILEGES AND IMMUNITIES

1. Hiring Preferences

Related to the Commerce Clause, and its protection of a national economic system, is the Privileges and Immunities Clause—"*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*"[643] Both Article IV, Section 2, and the Fourteenth Amendment[644] guarantee the citizens protection against state deprivation of their "privileges and immunities" of national citizenship by either the federal or state government, respectively.

In an early decision, a court noted that the Clause protects interests

> which are in their nature, fundamental; which belong, of right, to the citizens of all free governments.... [These may] be all comprehended under the following general heads: Protection by the government: the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may prescribe for the general good of the whole.[645]

It is the last phrase—"such restraints as the government may prescribe for the general good of the whole"—that allows states to impose regulation upon its citizens, so long as it not provide preferential treatment to in-state, as opposed to out-of-state, citizens, unless there is a "substantial reason" for the difference in treatment.

Application of the Privileges and Immunities Clause initially involves an inquiry into whether the discrimination against out-of-state residents is sufficiently "fundamental" to promotion of interstate harmony to fall within its purview.[646] The U.S. Supreme Court has held that "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."[647] For example, under the Privileges and Immunities Clause, the Supreme Court has struck down a state fee of $2,500 for nonresident commercial fisherman when residents were charged only $25.[648] The Court has also held that limiting bar admission to local residents violated the Clause.[649] But again, there must be discrimination against nonresidents to trigger the Clause.

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[638] 305 F. Supp. 2d at 1251.

[639] 370 F.3d 945 (9th Cir. 2004).

[640] CAL. BUS. & PROF. CODE §§ 5200–5486.

[641] 370 F.3d at 950.

[642] 370 F.3d at 952.

[643] U.S. CONST. art. IV, § 2, cl. 1.

[644] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 2.

[645] Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (CCED Pa. 1825).

[646] Baldwin v. Mont. Fish and Game Comm'n, 436 U.S. 371 at 387 (1978).

[647] United Bldg. & Constr. Trades Council v. Mayor, 465 U.S. 208 at 218 (1984).

[648] Toomer v. Witsell, 334 U.S. 385 (1948).

[649] Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985).

However, the Supreme Court has noted that the "privileges and immunities clause is not an absolute."[650] The Court has held, "Every inquiry under the Privileges and Immunities Clause 'must…be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.'"[651]

In *Heim v. McCall,*[652] the U.S. Supreme Court upheld preferences for New York residents included in construction contracts for New York City railways by the Board of Rapid Transit Railroad Commissioners under a New York statute providing that only U.S. citizens shall be employed on public works, and that preference shall be given to New York citizens. The court upheld the statute as not unconstitutional under the Privileges and Immunities Clause, or the Fourteenth Amendment's equal protection requirement.[653]

However, FHWA contract requirements prohibit all local hiring preferences.[654] As a consequence, state DOTs may not include in a Federal-aid contract any provisions that require a contractor to give any local preference in hiring.

2. The Right to Travel

Individual citizens have a constitutional right to travel.[655] Infringements upon that right must satisfy a compelling governmental interest.[656] But highway toll increases do not impermissibly burden that right.[657]

Though nowhere explicitly found in the Constitution, the right to travel is firmly embedded in constitutional jurisprudence,[658] and is assertable both against private and governmental infringements.[659] The right to travel has at least three components:

1. It protects the right of citizens of one state to enter and leave another state;[660]

2. It protects the right of citizens of one state to be treated as welcome visitors rather than unfriendly aliens when they are temporarily present in another state;[661] and

3. It protects the right of travelers who elect to become permanent residents of the second state to be treated like its other citizens.[662]

K. FREEDOM OF RELIGION

1. The Free Exercise Clause

The First Amendment provides, in part, *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."* This provision has two clauses: (1) a free exercise clause (to prevent persecution of religious beliefs), and (2) an establishment clause (to prevent government from establishing a religion or enshrining religious beliefs). Relatively few free religion cases have arisen in a transportation context.

The U.S. Supreme Court has analyzed free exercise cases under the rational basis test, under which a rationally-based neutral law of general application will not be deemed to violate the free exercise of religion although it incidentally burdens a particular religious belief or practice.[663] "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the

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[650] Toomer v. Witsell, 334 U.S. 385 at 396 (1948).

[651] United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208 at 222 (1984). Citing Toomer v. Witsell.

[652] 239 U.S. 175 (1915).

[653] In the earlier decision of Atkin v. Kansas, 191 U.S. 207 (1903) at 222, 223, the Supreme Court declared that "it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." *See also* White v. Mass. Council of Constr. Emplrs., 460 U.S. 204; 103 S. Ct. 1042; 75 L. Ed. 2d 1 (1983).

[654] 23 C.F.R. § 635.117(b) applies to all Federal-aid construction projects. It provides: "(b) No procedures or requirement shall be imposed by any State which will operate to discriminate against the employment of labor from any other State, possession or territory of the United States, in the construction of a Federal-aid project."

[655] *See, e.g.,* United States v. Guest, 383 U.S. 745 (1966).

[656] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[657] Wallach v. Brezenoff, 930 F.2d 1070 (3d Cir. 1991).

[658] United States v. Guest, 383 U.S. 745, 757 (1966).

[659] Shapiro v. Thompson, 394 U.S. 618 at 643 (1969).

[660] Edwards v. California, 314 U.S. 160 (1941) (state law prohibiting transportation of any indigent person in California held unconstitutional).

[661] This right is explicitly protected by art. IV, § 2 of the Constitution. *See* 526 U.S. 501.

[662] This right is explicitly protected by the opening words of the Fourteenth Amendment. The Supreme Court held that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. 36 (1873). For a more recent review of the parameters of this third prong of the right to travel, see Saenz v. Roe, 526 U.S. 489 at 500 (1999).

[663] Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[664]

In *Miller v. Reed*,[665] the Ninth Circuit addressed a claim by a motorist that the state's requirement that he reveal his social security number for purposes of drivers license renewal violated his deeply held religious beliefs. Though he belonged to no organized religion, he alleged that he held a long-standing personal theological belief that the "unique defining purpose of life is separate, individual existence," and that "the use of a single common identifier in multiple relationships represents the creation of an external analog of the individual, a surrogate shadow-identity…which is narrowed and limited by the perceptions and purposes of those using this analog."[666] Disclosing his social security number to the state would, according to his personal religion, be "tantamount to a sin."[667] The state would not renew his drivers license without the number.

The court concluded that the California Vehicle Code was valid as a neutral law of general applicability advancing a legitimate state interest in locating the whereabouts of errant parents for purposes of supplying child support, for collecting tax obligations and overdue and unpaid fines, penalties, assessments, bail, and parking penalties. Therefore, the court concluded, the requirement did not violate his right to the free exercise of religion.[668]

A number of First Amendment religion cases have arisen in the area of employment discrimination. Religious rights are not absolute, and must bend to reasonable government policies. The U.S. Supreme Court set the stage in *Goldman v. Weinberger,* where it concluded that the government's interest in uniformity and discipline legitimately justified a dress code, that it could prohibit an Orthodox Jew from wearing a yarmulke with his Air Force uniform, and that such a requirement did not infringe on his First Amendment free exercise rights.[669]

Similar to the holding in *Goldman,* a Federal District Court in *Kalsi v. New York City Transit Authority*[670] addressed a challenge to the requirement that New York subway inspectors wear hard hats to avoid the risk of head injury while working under the cars. A Sikh, whose religious beliefs required him to wear a turban at all times, was dismissed when he refused to wear the hard hat over his turban. The court found that the hard hat requirement was not pretextual, was grounded on legitimate safety concerns, and that his dismissal was not religiously motivated.

In the context of transit, in *In the Matter of New York City Transit Authority*, a bus driver, who was a Seventh Day Adventist, was dismissed after she refused to work sundown on Friday to sundown on Saturday. The court held that an employer need not make such accommodations when it would be prohibited by the nondiscriminatory provisions of its collective bargaining agreement.[671] Similarly, in *Mateen v. Connecticut Transit*,[672] an African American and Black Muslim transit bus driver unsuccessfully claimed racial and religious discrimination after he was fired for causing an accident that damaged his bus, and after numerous negative reports from several supervisors as to his abrasive and belligerent conduct.[673]

2. The Establishment Clause

The First Amendment's Establishment Clause provides that "Congress shall make no law respecting the establishment of religion."[674] It prevents a governmental unit from promoting or affiliating with any religious doctrine or organization.[675] However, a government action of some kind is required.[676] The U.S. Supreme Court has held that for a government action not to constitute an endorsement of religion: (1) the action must have a secular purpose; (2) the primary effect of the action must be neither to advance nor inhibit religion; and (3) the action must not foster excessive governmental entanglement with religion.[677]

In 1959, the city of Marshfield, Wisconsin, accepted a gift of a 15-ft tall white marble statue of Jesus Christ, arms open in prayer, from a local unit of the Knights of Columbus. The city placed it in a

[664] 494 U.S. at 879.

[665] 176 F.3d 1202 (9th Cir. 1999).

[666] 176 F.3d at 1204.

[667] *Id.*

[668] 176 F.3d at 1207.

[669] Goldman v. Weinberger, 475 U.S. 503 (1986).

[670] 62 F. Supp. 2d 745 (E.D.N.Y. 1998).

[671] 627 N.Y.S.2d 360 (N.Y.S. Ct. 1995).

[672] 550 F. Supp. at 52 (D. Conn. 1982).

[673] "A keen mind and manual dexterity are not the only criteria that management may utilize in determining a person's qualifications for employment. An ability to work well with others, patience, pleasantness, and self-control are permissible factors to be placed on the scale. In view of a bus operator's daily and extensive contact with the public, these personal characteristics are components for the successful performance of the job." 550 F. Supp. at 55 (D. Conn. 1982).

[674] U.S. CONST. amend. 1.

[675] County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989).

[676] Capitol Square Review Bd. v. Pinette, 515 U.S. 753, 779 (1995).

[677] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

public park facing Wisconsin Highway 13, the main thoroughfare in the city, clearly visible to travelers on the road. It stood on a base with 12-in block letters saying "Christ Guide Us On Our Way." Thirty-nine years later, a local resident objected to the presence of the statue on public property. When the city failed to move the statue onto private property, he filed suit. The city then sold the 0.15-acre portion of the park on which the statute rested to a newly formed citizens' association (the "Fund"). The plaintiff argued that the land sale was a sham transaction attempting to circumvent the "government action" requirement, and that the sale itself should be considered a "government action." He further argued that the sale did not end the government endorsement of Christian religion, because the proximity of the statue to the public park and the highway could still reasonably be perceived as government endorsement of religion.[678]

In *Freedom from Religion Foundation v. City of Marshfield*,[679] the Seventh Circuit concluded, "Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."[680] The court found no such extraordinary circumstances justifying disregarding the sale as a sham for purposes of endorsing religion, and that the city did not engage in religious endorsement by selling the property to a religious institution.[681]

However, the court found that the plot of land severed from the park was visually indistinguishable from the remaining land that constituted the public park, and would convey the impression that the statue was on city park property, and that the city endorsed its religious message, for "Fund land is virtually indistinguishable from City land, especially when viewed from Highway 13."[682] A governmental entity may not endorse religion in this way. As a remedy, the Seventh Circuit suggested that the city construct a gated fence or wall, accompanied by a clearly visible disclaimer, so that a reasonable person would not confuse the speech made by the Fund on its private property with an endorsement by the city.[683]

In 2005, in *Van Orden v. Perry*,[684] the U.S. Supreme Court addressed the Establishment Clause in the context of a monolith inscribed with the Ten Commandments on the grounds of the Texas State Capitol building. The Court noted that the fact that a historic display has religious content or a message consistent with religious doctrine does not, of itself, violate the Establishment Clause. Though the Court earlier found a state requirement that a copy of the Ten Commandments be placed in every school classroom violates the Establishment Clause, the placement of the Ten Commandments on the grounds of the State Capitol is far more passive, and therefore less objectionable.[685]

L. FREEDOM OF SPEECH

1. Employee Speech

The First Amendment provides that "Congress shall make no law…abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Though it explicitly prohibits congressional legislation abridging speech, it has been deemed broadly applicable to the states with the adoption of the Fourteenth Amendment. It applies to any form of state action, whether in the form of legislation, common law, or administrative law.

For a highway department or transit operator, freedom of speech issues arise in a variety of contexts, including:

1. When the employer attempts to restrict the speech of its employees;
2. When an employer retaliates against an employee for asserting his or her right to complain against employment conditions, or for otherwise speaking out on a matter of public concern;
3. When the transit provider seeks to restrict the speech of its patrons;
4. When the highway department or transit provider seeks to restrict advertising of other visual communications on the highways, vehicles, and facilities; and
5. When the governmental entity seeks to restrict the speech of members of the public who are not patrons, such as panhandlers and street musicians.[686]

The U.S. Supreme Court has held that the courts must balance the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer,

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[678] Freedom from Religion v. City of Marshfield, 203 F.3d 487, 489–91 (7th Cir. 2000).

[679] 203 F.3d 487 (7th Cir. 2000).

[680] 203 F.3d at 491.

[681] 203 F.3d at 493.

[682] 203 F.3d at 495.

[683] 203 F.3d at 497.

[684] 125 S. Ct. 2854 (2005).

[685] 125 S. Ct. at 2864.

[686] *See generally* NORMAN HERRING & LAURA D'AURI, RESTRICTIONS ON SPEECH AND EXPRESSIVE ACTIVITIES IN TRANSIT TERMINALS AND FACILITIES (TCRP Legal Research Digest No. 10, 1998).

in promoting the efficiency of the service it provides.[687] Even where the governmental purpose is legitimate, it cannot be pursued by overbroad means when more narrowly tailored alternatives exist.[688]

In *Scott v. Myers,* a transit operator attempted to prohibit uniformed employees from wearing buttons, badges, or other insignia except with permission. The Second Circuit held the restriction as too broad, and the justification as too weak, but noted that, "a properly drafted rule, narrowly tailored to apply only to uniformed employees in circumstances that place them into contact with the public, with proper justification in the record, would pass constitutional muster."[689]

In *Zalewska v. County of Sullivan, New York*,[690] the Second Circuit held that a female transit employee's First Amendment rights were not impinged by a dress code requiring that all employees wear pants.

In *Smith v. Arkansas State Highway Employees*,[691] the U.S. Supreme Court found no First Amendment violation in the refusal of the Arkansas State Highway Department to refuse to consider an employee grievance unless it had been filed by the union rather than directly by an employee. Said the court,

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.[692]

The role of the government as an employer is different from its role as a sovereign. As an employer, a governmental institution "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large."[693] However, a governmental institution may not discharge, or otherwise retaliate against, an employee on a basis that infringes on his or her constitutionally protected interests.[694] An employee of a public employer may not be discharged for the exercise of constitutionally protected speech.[695] Nor may an employer lawfully retaliate against an employee for the exercise of his or her free speech rights.[696]

Courts must be vigilant "to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees' speech."[697]

Claims brought under either the First Amendment's Free Speech Clause or Right to Petition Clause are governed by an interest balancing test, whereby the interests of the employee, as a citizen (in commenting on matters of public concern), are weighed against the interests of the government, as an employer (in promoting the efficiency of the workplace and its services). In such a case, the plaintiff must prove that the speech was a matter of public concern[698] (i.e., whether it may be "fairly characterized as constituting speech on a matter of public concern"),[699] and the employment retaliation was motivated by use of such speech.[700] Whether particular speech addresses a matter of public concern is determined by the content, form, and context of the statement.[701] The court examines the motive of the speaker to determine whether the speech was calculated to redress personal grievances (such as the employee's personal dissatisfaction with the conditions of employment), or whether the speech has a broader public purpose.[702]

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[687] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[688] NAACP v. Alabama, 377 U.S. 288, 307–08 (1964).

[689] Scott v. Myers, 191 F.3d 82, 86 (2d Cir. 1999).

[690] 316 F.3d 314 (2d Cir. 2003).

[691] 441 U.S. 463 (1979).

[692] 411 U.S. at 465 [citations omitted].

[693] United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995).

[694] Rankin v. McPherson, 483 U.S. 378 (1987).

[695] Rankin v. McPherson, 483 U.S. 378, 383 (1987); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 282–84 (1977).

[696] Connick v. Myers, 461 U.S. 138, 140 (1983) ("A public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.")

[697] 483 U.S. at 384.

[698] Connick v. Myers, 461 U.S. 146 (1983).

[699] *Id.*

[700] White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1059 (2d Cir. 1993).

[701] *Id.* at 147–48 (1983).

[702] Schlesinger v. N.Y. City Transit Auth., 2001 U.S. Dist. LEXIS 632 (S.D.N.Y. 2001) (The speech in question contained plaintiff's complaints about, among other things, inadequate job description, salary, and improper classification as an employee. The court found that the statements were general in nature and related to his own personal situation, and thus did not give rise to a claim under U.S. Const. amend. I.:

> Plaintiff's claim of retaliation is based on the following events: (1) plaintiff's October 25, 1999 memorandum to Gorman complaining of his inadequate job description and inadequate salary; (2) plaintiff's January 5, 2000 meeting with the IG, during which he complained of "fraud"; and (3) plaintiff's February 4, 2000 letter to Gorman com-

Speech addressing a purely private matter, such as an employee's dissatisfaction with the conditions of his or her employment, is not constitutionally protected.[703] However, even if the speech is a matter of public concern, the court must weigh the employee's interest in expression against the employer's interest in regulating it and, in particular, whether such regulation is necessary so that the government can maintain an efficient and effective workplace.[704]

In *Hall v. Missouri Highway & Transportation Commission*,[705] Thelma Hall sued her employer, the Missouri Highway and Transportation Commission (MHTC), on grounds that she was fired in retaliation for exercising her First Amendment rights by complaining of discrimination against her because of her age. The MHTC oversees the Missouri Department of Transportation (MoDOT). Hall alleged that younger women in her department were promoted over older women with seniority. The Eighth Circuit found that her complaints about age discrimination related to a matter of public concern.[706]

In response, her supervisor (Ron Hopkins) alleged that Hall's speech disrupted MoDOT's operations in the following ways: "He repeatedly told Hall that her behavior was inappropriate, he spoke with his supervisor, and he often modified his own habits to accommodate Hall."[707] The Eighth Circuit therefore applied the *Pickering* balancing test, which requires a weighing of the conflicting interests between the employee's exercise of speech and the employer's interest in regulating speech and arriving at "a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees."[708] The Eighth Circuit applies six factors to assess this balance:

> the need for harmony in the office; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.[709]

Reviewing the evidence, the court found that though Hall's complaints disrupted MoDOT, she had a strong constitutionally protected interest in speaking out about age discrimination, and accordingly, the *Pickering* balancing test tipped in her favor.[710]

The Massachusetts Turnpike Authority (MTA) establishes tolls for the Massachusetts Turnpike, the Boston Harbor tunnel crossings, and the Metropolitan Highway System. In *Mihos v. Swift*,[711] Christy Peter Mihos, appointed by a prior governor (Cellucci) to fill an unexpired term as a member of the MTA, was dismissed from office by a subsequent governor (Swift) on grounds he failed to approve a toll increase the new governor supported. Governor Swift concluded that "acts or omissions concerning [MTA's] finances…were fiscally irresponsible, resulting in adverse consequences of substantially decreasing projected revenues of the Authority, damaging the Authority's credit outlook, and creating financial instability."[712]

Jurisprudence in the First Circuit confers on members of a board a constitutionally protected right to vote their conscience and be free of political retaliation: "Voting by members of municipal boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the status of public officials' votes as constitutionally protected speech was established beyond peradventure of doubt…."[713] The court in *Mihos* found that Governor Swift violated a "clearly established" constitutional right to vote on public issues, and that termination of Ms. Mihos violated the First Amendment, for "an appointed official has a responsibility to act in the public interest, and deserves protection against retaliation for doing so."[714] However, as we shall see, this approach is not uni-

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> plaining of his and his co-workers' workload and of his erroneous classification and Hay Point rating. None of these statements addressed a matter of public concern. All of plaintiff's comments "were personal in nature and generally related to [his] own situation."

Plaintiff was not speaking as a citizen, but rather as an employee complaining of his own labor dispute. Even though plaintiff's complaints of his heavy workload also addressed the workload of his co-workers, such speech does not constitute a matter of public concern because it related primarily "to plaintiff's personal circumstance and was motivated purely by self-interest.") at *17 [citations omitted].

[703] Lewis v. Cowen, 165 F.3d 154 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999).

[704] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[705] 235 F.3d 1065 (8th Cir. 2000).

[706] 235 F.3d at 1067–68.

[707] 235 F.3d at 1068.

[708] Pickering v. Bd. of Educ., 391 U.S. 563 at 568 (1968).

[709] 235 F.3d at 1068.

[710] 235 F.3d at 1069.

[711] 2002 U.S. Dist. LEXIS 21513 (D. Mass. 2002).

[712] Levy v. the Acting Governor, 767 N.E.2d 66 at 72 (Mass. 2002) (In this case, Mihos was also a party plaintiff).

[713] Stella v. Kelly, 63 F.3d 71, 75 (1st Cir. 1975).

[714] 2002 U.S. Dist. LEXIS 21513, at 18–19.

versally taken. Many courts hold that, absent statutory protection for removal "with cause," a political and policy making appointee may be removed from office on the basis that his or her politics are contrary to the executive.

In *Vezzetti v. Pellegrini*,[715] Charles Vinzetti and David Stuart complained that they had been removed from office on the grounds of their political affiliation as Republicans by the Town Board of Orangetown, of which Democrats had achieved control. Vinzetti had been Highway Superintendent, and was replaced by a Democrat. The U.S. Supreme Court has observed that, for some positions, political affiliation is a legitimate qualification of office: "policy making and confidential employees probably could be dismissed on the basis of their political views…. [A] State demonstrates a compelling interest in infringing First Amendment rights only when it can show that 'party affiliation is an appropriate requirement for the effective performance of the public office involved.'"[716]

In *Vezzetti*, the Second Circuit identified the criteria to be used in determining whether the political dismissal exception should be applied, as whether the employee:

> (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has some contact with elected officials, and (8) is responsive to partisal politics and political leaders.[717]

Applying these criteria, the court found that Vezzetti presided over a large budget, managed and hired a large number of employees, consulted directly with elected officials on budgets and programs, developed public relations programs promoting highway programs, and frequently made public speeches. On the evidence, the court concluded that "Vezzetti held a job for which political affiliation is a valid consideration…. [T]hese elements are sufficient to place the Highway Superintendent within the category of policymaking positions for which party affiliation and a shared ideology may be an appropriate employment consideration."[718] Conversely, however, while a policymaker may be dismissed for political reasons, the court emphasized that the First Amendment is violated when an employee holding a nonpolicymaking job is dismissed from employment for political reasons.[719]

Similarly, in *Rash-Aldrich v. Ramirez,*[720] the Fifth Circuit held that where a city council member has been appointed to a board of an MPO, that council member may be removed from the board upon refusal to vote in accordance with the city's wishes,[721] and such removal does not violate the individual's First Amendment rights.

In *Huntsinger v. Board of Directors of the E-470 Public Highway Authority*,[722] Eva Hutsinger brought an action against Colorado's E-470 Public Highway Authority (which was responsible for the financing, construction, and operation of the E-470 highway, skirting the eastern suburbs of Denver) on grounds she was terminated from employment because of the exercise of her First Amendment rights. Ms. Hutsinger was a professionally licensed civil engineer who worked as a Special Projects Engineer at the Authority for a little more than 3 years prior to her termination. Her husband had worked for a prospective contractor of the Authority, and continued to hold a promissory note of nearly $300,000 from said contractor. Ms. Huntsinger was given a notice of termination of employment that referred to the "Conflict of Interest" provisions in the Authority's personnel policies. The Tenth Circuit agreed with the U.S. District Court that Ms. Huntsinger's speech was motivated primarily by personal interest, and that her complaint included no allegation of malfeasance or mismanagement on the part of the Authority that would warrant its First Amendment protection.[723]

In *Schlesinger v. New York City Transit Authority*,[724] Wilhelm Schlesinger sued the New York Transit Authority (NYTA) alleging he was retaliated against for exercising his First Amendment rights by increasing his workload without giving him a promotion or increasing his salary, giving him a negative performance evaluation, and charging him with disciplinary violations and seeking his suspension from work. The U.S. District Court held that none of Schlesinger's statements addressed a matter of public concern, and were instead personal in nature, relating to his own personal labor dispute.[725]

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[715] 22 F.3d 483 (2d Cir. 1994).

[716] Rutan v. Republican Party of Ill., 497 U.S. 62, 71 n.5 (1990).

[717] 22 F.3d at 486.

[718] *Id.*

[719] 22 F.3d at 486–87.

[720] 96 F.3d 117 (5th Cir. 1996).

[721] Federal regulations require that the MPO policy body must include within its voting members local elected officials; officials of agencies that administer or operate major modes of transport (e.g., transit operators, airports, rail operators); and state officials. 23 C.F.R. § 450.306(i).

[722] 35 Fed. Appx. 749 (10th Cir. 2002).

[723] 35 Fed. Appx. at 755, 757.

[724] 2001 U.S. Dist. LEXIS 632 (S.D.N.Y. 2001).

[725] 2001 U.S. Dist. LEXIS 632, at 17.

Similarly, in *Stein v. City of Rockland*,[726] the court found that the employee's speech criticizing the highway department, accusing the superintendent of "imperial management," and complaining to legislators of a "de facto" demotion, were personal employment issues, not matters of public concern, and therefore not constitutionally protected.

Since 1882, the Supreme Court has upheld the authority of the government to restrict the political speech of its employees.[727] Legislation such as the Hatch Act has been upheld on grounds that restrictions on the rights of public employees to engage in political activities fosters the legitimate governmental interest of: (1) protecting the public employees' job security; (2) eradicating corruption; (3) promoting governmental efficiency; and (4) encouraging impartiality, and the public's perception of impartiality, in governmental services.[728] These restrictions have been deemed legitimate whether imposed by federal, state, or local governments.[729]

In *Horstkoetter v. Dep't of Public Safety*,[730] two Oklahoma Highway Patrolmen complained about the disciplinary action threatened against them if they did not remove political signs placed in the yards of their homes by their spouses. The policy of the Oklahoma Highway Patrol prohibits its members from wearing political badges, buttons, or similar emblems, and displaying a partisan political sticker or sign on their vehicles or at their homes. The Tenth Circuit found that most states restrict the political activities of their highway patrolmen.[731] These restrictions served three legitimate governmental interests: (1) assuring prospective law enforcement officers they will not be obligated to publicly display political affiliation in assuring their retention and promotion; (2) promoting efficiency and harmony among law enforcement personnel; and (3) assuring the public that police services will be provided impartially, without political overtones.[732] The court found that these governmental interests outweighed the employees' First Amendment interests in the display of political signs on their real property; however, the court found that the policy could not be imposed upon patrolmen's spouses to prohibit erection of political signs on real property to which they held title.[733]

Stanek v. Department of Transportation[734] involved removal of Floyd Stanek, an FHWA highway engineer, on several grounds of misconduct, including his unauthorized use of a government word processor and disks for both personal correspondence and "whistleblowing" activities. Mr. Stanek had produced a paper, "The Paradox of Highway Technology," in which he criticized an FHWA-financed Transportation Research Board Strategic Transportation Research Study (STRS), and encouraged state officials to deliver to him their listings of highway research needs, which he would compile and deliver to various congressional committees. FHWA argued that it dismissed Mr. Stanek because he was attempting to conduct his own personal system for identifying and soliciting research needs in competition with FHWA, and in a conflict of interest between his official duties and his private advocacy.[735]

Though the information Mr. Stanek was disseminating was a matter of public concern, nevertheless the court found that "Common sense suggests that an agency cannot function correctly where an employee establishes an unauthorized quasi-official 'office' that directly competes in function with an existing government program."[736] Once a government employee, though addressing a matter of public interest, interferes with the agency's interest in maintaining a single coherent policy, the speech is unprotected. The court concluded that "the FHWA's interest in maintaining a coherent system of coordinating its research needs outweigh Stanek's interest in commenting publicly on STRS."[737]

2. Signage and Advertising Restrictions

Roadside signs can distract motorists, thereby posing traffic safety hazards. Visual clutter also poses problems of aesthetic blight. On occasion, governments have exercised their police powers to regulate signage. However, signs are also a medium of expression, and therefore potentially protected by the First Amendment. This section discusses the conflict between police powers and free speech in the context of signage.

The U.S. Supreme Court has had several opportunities to address the conflict between the exercise of local police powers and the First Amendment speech on the issue of public signage. In *Metromedia v. San Diego*,[738] the Court addressed a city ordinance, promulgated for purposes of traffic safety

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[726] 1997 U.S. Dist. LEXIS 13714 (S.D.N.Y. 1997).

[727] *Ex Parte Curtis,* 106 U.S. 371 (1882).

[728] *See* Horstkoetter v. Dep't of Public Safety, 159 F.3d 1265, 1272 (10th Cir. 1998), and cases cited therein.

[729] Broadrick v. Oklahoma, 413 U.S. 601, 606 (1973).

[730] 159 F.3d 1265 (10th Cir. 1998).

[731] 159 F.3d at 1272 n.2.

[732] 159 F.3d at 1273–74.

[733] 159 F.3d at 1276.

[734] 805 F.2d 1572 (Fed. Cir. 1986).

[735] 805 F.2d at 1574.

[736] 805 F.2d at 1579.

[737] *Id.*

[738] 453 U.S. 490 (1981).

and aesthetics, prohibiting commercial signage, except on-site, and all noncommercial signage. The Court found that the city's interest in traffic safety and aesthetics in avoiding visual clutter justified a restriction against off-site commercial billboards.[739] However, the portions of the ordinance that discriminated against content-based speech by permitting on-site commercial speech, but prohibiting on-site noncommercial speech, impermissibly offended the First Amendment.[740]

However, the views of the Supreme Court Justices in *Metromedia* were much fragmented. Seven Justices articulated a view that a complete prohibition of all off-premises commercial advertising would be constitutionally permissible. Five Justices concluded that the limited exception to the ordinance's prohibition against off-premises advertising was too insubstantial to constitute content-based discrimination.

In *Members of City Council of Los Angeles v. Taxpayers for Vincent*,[741] the U.S. Supreme Court upheld a Los Angeles ordinance prohibiting the posting of signs on public property (in this instance, political campaign signs on roadside utility pole wires) on grounds of avoiding visual clutter. The Court saw no problem in the ordinance's regulation of signage on public, but not private, property, finding that the "private citizen's interest in controlling the use of his own property justifies the disparate treatment."[742] Moreover, the challengers of the ordinance had "failed to demonstrate the existence of a traditional right of access respecting such items as utility poles…comparable to that recognized for public streets and parks."[743] Hence, utility poles were not a public forum. The Court concluded that the ordinance was content-neutral, justified on the basis of the city's legitimate interest in preserving aesthetics, narrowly tailored to advance that reasonable basis, and therefore, constitutional.

In order to minimize visual clutter, the City of Ladue prohibited all residential signs, except those falling within 1 of 10 specified exemptions. Margaret Gilleo filed an action alleging that the ordinance violated her First Amendment right of free speech by prohibiting her from displaying a sign stating "For Peace in the Gulf" at her home. In *City of Ladue v. Gilleo*,[744] the U.S. Supreme Court acknowledged that, though signs are a form of expression protected by the First Amendment, they nevertheless pose distinct problems that are subject to local police powers, for they obstruct views, distract motorists, and displace alternative uses for land. Hence governments legitimately may regulate the physical characteristics of signs.[745] However, the Court was troubled by the fact that the city foreclosed a unique and important means of communication (i.e., residential signage) to political, religious, and personal messages.[746] The court noted, "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."[747]

A California policy that allowed American flags hung from highway overpass fences but excluded other expressive banners was unreasonable; individuals who faced the risk of irreparable injury were entitled to a preliminary injunction against the policy. At issue in *Brown v. California Dep't of Transportation*[748] were flags and political signs draped from highway overpasses. Though Caltrans required a permit for permission to install highway signs (that were only available for signs designating highway turnoffs for special events, and even then, not from highway overpasses), the state ignored the requirement for U.S. flags draped from highway overpasses after the September 11, 2001 (9/11), aerial tragedy. Though flags were tolerated, political signs hung beside them (expressing "At What Cost?" and "Are you Buying this War?") were removed. Upon challenge of the discriminatory policy, Caltrans argued that the flag is viewpoint neutral. The Ninth Circuit disagreed: "The reason the events of September Eleventh evoked such a spontaneous proliferation of flags is precisely because of its message."[749] In issuing an injunction against the violation of the claimants' First Amendment rights, the Court passionately proclaimed: "In the wake of terror, the message expressed by flags flying on California's highways has never held more meaning. America, shielded by her very freedom, can stand strong against regimes that dictate their citizenry's expression only by embracing her own sustaining liberty."[750]

The strength of the right of the citizenry to free expression was also revealed in cases granting the right of the Klan to participate in highway beautification projects. The denial of the application of the

[739] 452 U.S. at 511–12.

[740] 453 U.S. at 525–27.

[741] 466 U.S. 789 (1984).

[742] 466 U.S. at 811.

[743] 466 U.S. at 814.

[744] 512 U.S. 43 (1994).

[745] 512 U.S. at 48.

[746] 512 U.S. at 54.

[747] 512 U.S. at 55.

[748] 321 F.3d 1217 (9th Cir. 2003).

[749] 321 F.3d at 1223.

[750] 321 F.3d at 1224.

Klan by the Missouri Highway and Transportation Commission to participate in the state's Adopt-A-Highway program (which was designed to reduce litter and improve highway beautification) was deemed unconstitutional in *Robb v. Hungerbeeler*.[751] The federal district court held that though neither the shoulders of the highways nor the Adopt-A-Highway program constituted a public forum,[752] the state could not rule the Klan ineligible because the Klan denied membership to individuals based on their race, color, or national origin, as that would violate the Klan's First Amendment freedom of association. In nonpublic fora, the state may restrict access only if the restriction is reasonable and viewpoint-neutral.[753] "The Klan's expressive speech of picking up trash along a highway right-of-way cannot be trumped because some people may disagree with its beliefs and advocacy…."[754] On appeal, the Eighth Circuit concurred, concluding that the highway department may not discriminate against the Klan because it discriminates against people on the basis of race or because it has a history of violence, for such a state action "unconstitutionally restricts its expressive and associational rights."[755]

To implement the HBA,[756] many states enacted statutes regulating highway billboards.[757] Many municipalities, too, have sought to regulate billboards. *Scadron v. City of Des Plaines*[758] involved application of a municipal ordinance that prohibited "advertising designed to be viewed from a limited access highway…[that would] constitute a hazard to the safe and efficient operation of vehicles upon a limited access highway, or creates a condition which endangers the safety of persons or property therefrom."[759] The city's Sign Code found that "a multiplicity of signs is distracting to motorists and a hazard to vehicular traffic," and that regulation was necessary to "(1) Limit distraction to motorists…(2) Control and abate the unsightly use of buildings and land…[and] (3) Preserve the beauty of the landscape and residential and commercial architecture."[760] Scadron was denied a permit by the City of Des Plaines to erect billboards with two sign faces measuring 20 ft by 60 ft on property abutting the entrance ramp to I-294. He claimed his First Amendment rights thereby had been violated.

The federal district court saw things differently, however, finding safety and aesthetic rationales sufficient to regulate the size and location of billboards:

> The City in this case has elected not to ban advertising signs altogether, but rather to restrict their size. This decision is directly related to safety and aesthetic goals; it is eminently reasonable for the City to determine that small signs do not pose the same traffic safety risks or aesthetic concerns as do large billboards. If, as Scadron alleges, the restrictions are so severe as to amount to a total ban, that ban is still valid under the [Supreme Court's] reasoning of *San Diego.* The Court holds that the size restrictions are valid as reasonable content-neutral restrictions.[761]
>
> Given the higher speeds of vehicles traveling on interstate highways, a city could reasonably conclude that special consideration should be given to minimization of distractions along such highways. Similarly, the substantial authority of governmental bodies to advance aesthetic interests makes this court loathe to second-guess inherently subjective aesthetic judgments of governmental bodies.[762]

The advertiser fared better in *Lamar Advertising Co. v. Township of Elmira.*[763] Lamar Advertising Company applied to the Michigan Department of Transportation (MDOT) and the Township of Elmira to erect a billboard on Michigan Highway 32. MDOT approved the application, but the township held the application in abeyance until it was able to promulgate a billboard ordinance, with which the application could not comply. Upon denial of his application, Lamar brought a § 1983 action against the township for violation of his First Amendment rights. The federal district court concluded that the application should have been reviewed under the law applicable at the time it was filed. The failure to process the application until the advertising ordinance was promulgated constituted an impermissible prior restraint on speech.[764]

In *Lehman v. City of Shaker Heights*,[765] the U.S. Supreme Court upheld an advertising ban in transit vehicles, observing

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[751] 281 F. Supp. 2d 989 (E.D. Mo. 2003), *aff'd* 370 F.3d 735 (8th Cir. 2004).

[752] *See also* State of Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995).

[753] 281 F. Supp. 2d at 1001 (citation omitted).

[754] 281 F. Supp. 2d at 1003.

[755] Robb v. Hungerbeeler, 370 F.3d 735, 745 (8th Cir. 2004). *See also* Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000).

[756] 23 U.S.C. § 131.

[757] Freedom of speech issues, and the distinction between commercial and other types of speech, are important for the billboard control provisions of the Highway Beautification Act. *See* the Supreme Court's decision in *City of Ladue*, 512 U.S. 43 (1994).

[758] 734 F. Supp. 1437 (N.D. Ill. 1990).

[759] 734 F. Supp. at 1439.

[760] *Id*. at n.4.

[761] 734 F. Supp. at 1447.

[762] 734 F. Supp. at 1448.

[763] 328 F. Supp. 2d 725 (E.D. Mich. 2004).

[764] 328 F. Supp. 2d at 735.

[765] 418 U.S. 298 (1974).

> In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.... The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.[766]

In *Children of the Rosary v. City of Phoenix*,[767] a city's ban on bus advertising of the sale of anti-abortion bumper stickers was upheld on grounds that advertising panels on a bus are nonpublic fora, for which the city is proprietor. The city may regulate the types of advertising sold if the advertising standards are reasonable and nondiscriminatory. The regulations constitute a reasonable effort to advance the city's interest in protecting revenue, and maintain neutrality on political and religious issues.[768]

However, a ban on political advertising in bus shelters was enjoined by a federal district court in *Klein v. Baise*.[769] Klein was prohibited from placing advertisement for his candidacy for city treasurer by a provision in the Illinois Highway Code providing that "no political advertising shall be placed on any shelter on any street or highway...."[770] The Court found an injunction warranted on five grounds:

1. *Irreparable injury to plaintiff:* "Klein's rights of free speech and of access to the electoral process are extremely important First Amendment rights, and even minimal periods of loss of such rights unquestionably constitute irreparable injury."
2. *Lack of an adequate remedy at law:* Damages would be difficult to calculate, and no amount of damages would be sufficient to compensate the plaintiff if he lost the election.
3. *Likelihood of success on the merits*: Plaintiff's likelihood of success is high. "Any absolute restriction on political advertising…is content-based in that it prohibits public discussion of an entire topic." Because the statute prohibits speech based on its content, it can be sustained "only if the government can show the regulation is a precisely drawn means of serving a compelling state interest."
4. *Balancing of harms:* No harm has been identified to a defendant if the preliminary injunction is issued.
5. *Public Interest*: No interest of any third party has been revealed that would be infringed by the issuance of the requested injunction.[771]

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[766] 418 U.S. at 302 and 304. However, there has been much academic criticism of *Lehman*, a 5-4 decision. For example, Professor William Lee wrote:

> The ban appeared to be facially neutral because it was directed at all candidates rather than those of one party. Yet the transit system advertisements were not of equal value to all candidates. Testimony in *Lehman* revealed that most of the transit system's riders were residents of the state assembly district Lehman sought to represent.... Thus, the ban's effects on Lehman were different than the effect on a candidate who needed to reach residents of a large area or who had greater financial resources. The plurality, however, failed to consider the possibility of the ban's disparate effects.

William Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression,* 54 GEO. WASH. L. REV. 757 at 775 (1986) [citations omitted]. *See also* Sidney Buchanan, *The Case of the Vanishing Public Forum,* 1991 U. ILL. L. REV. 949 (1991), and Matthew McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine,* 52 STAN. L. REV. 929 (2000).

> The candidate argued that the transit cars were public forums and that the city policy impermissibly discriminated on the basis of message content. A plurality of the Court, however, upheld the policy despite its subject matter categorization. Instead of applying either the stringent scrutiny applicable to content-based restrictions in public forums, or the intermediate scrutiny applicable to content-neutral, public forum time, place, and manner restrictions, the plurality simply determined that the transit cars were not public forums and then asked whether the challenged policy was "arbitrary, capricious, or invidious."

Barbara Gaal, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property,* 35 STAN. L. REV. 121, 128–29 (1982) [citations omitted]. For an argument that these restrictions are constitutionally impermissible, *see* Michael Garvey, *Next Stop Censorship: A Facial Challenge to the Metropolitan Transportation Authority's Newly Adopted Advertising Standards,* 72 ST. JOHN'S L. REV. 485 (1998). *See also* NORMAN HERRING & LAURA D'AURI, RESTRICTIONS ON SPEECH AND EXPRESSIVE ACTIVITIES IN TRANSIT TERMINALS AND FACILITIES (TCRP Legal Research Digest No. 10, 1998).

[767] 154 F.3d 972 (9th Cir. 1998), *cert. denied,* 526 U.S. 1131 (1999).

[768] *See generally* Herring & D'Auri, *supra* note 766. In Pub. Utilities Comm'n of the District of Columbia v. Pollak, 343 U.S. 451 (1952), the U.S. Supreme Court held that the broadcast of radio over a transit bus does not interfere with patrons' First Amendment rights.

[769] 708 F. Supp. 863 (N.D. Ill. 1989).

[770] ILL. REV. STAT. ch. 121, ¶ 9-112.3.

[771] Klein, 708 F. Supp. at 865–66.

3. Time, Manner, and Place Restrictions

A content-neutral limitation may lawfully restrict speech if it (1) is narrowly tailored to serve a substantial governmental interest; (2) reasonably regulates the time, manner, and place of speech; and (3) leaves open alternative channels for expression.[772]

Observing that a city ordinance that prohibited all First Amendment activity would be unconstitutional, the Ninth Circuit, in *Jews for Jesus, Inc. v. Board of Airport Commissioners,*[773] held that time, place, and manner restrictions must be evaluated to determine whether the banned expression is basically incompatible with the normal activity of a location at a particular time.[774] The extent to which the government may regulate speech depends on the nature of the property at issue.[775] With respect to fora that are traditionally public (e.g., sidewalks, streets, and parks) or intentionally designated for expression, the government may only impose a content-specific restriction if one is necessary to serve a compelling governmental interest, and it is narrowly tailored to serve that purpose.[776]

In *International Society of Krishna Consciousness v. Lee,*[777] the U.S. Supreme Court held that airport terminals are not public fora. In *Jacobsen v. Howard,*[778] the Eighth Circuit held that a state regulation that banned newspaper machines from rest stops constituted an unreasonable infringement of the newspaper's First Amendment rights. But in *Gannett Satellite Information Network v. Metropolitan Transportation Authority,*[779] the newspaper could not prevail on its claim "that the more expensive alternative distribution methods deprive it of its first amendment right to distribute papers."[780]

The U.S. Supreme Court also has placed a heavier burden of justification for bans against the solicitation of signatures in public places.[781] In *International Society of Krishna Consciousness v. Lee*,[782] the Court invalidated bans on leafleting, dismissing the danger to traffic congestion, and recognized it as a particularly unobtrusive form of expression; regulations limiting the distribution of literature and solicitation to the exterior of airport terminals must be reasonable. In *Schneider v. State*,[783] the Court held that littering is the fault of the litterbug, not the fault of the leafleteer.

In *Jews for Jesus v. Massachusetts Bay Transportation Authority*,[784] the First Circuit reviewed a transit agency ban of noncommercial expression from the paid areas of all its subway stations and from the free areas of 12 of its stations. The transit agency claimed that its ban on leafleting was necessary to protect the public safety, insisting that "leafleting threatens public safety by disrupting passenger flow and by creating litter." It further alleged that litter more adversely affects handicapped passengers and causes accidents and fires and other disruptions in service, and that leafleting encourages pickpocketing. The Court noted that the transit agency "deliberately has invited into the subway system a range of expressive activities that can produce problems similar to those it attributes to leafleting,"[785] including business flyers, wandering newspaper hawkers, and the sale of food and beverages in disposable containers. However, the transit authority may legitimately ban expressive activity during crowded peak hours when the dangers to the public are enhanced.[786]

In *Wright v. Chief of Transit Police*,[787] the Second Circuit struck down a transit agency's prohibition members of the Socialist Workers Party on selling newspapers in the subway by hand and trying to engage interested persons in conversations to persuade them to buy the newspapers, requiring the transit authority to devise a means more narrowly tailored to protect those legitimate objectives other than a complete ban.[788] But in upholding a restriction on leafleting on transit platforms, the federal district court in *Storti v. Southeastern Transp. Auth.*[789] held, "Because the platforms and paid areas are non-public fora, SEPTA may regulate and even entirely ban expression in them so long as the

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[772] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[773] 785 F.2d 791 (9th Cir. 1986).

[774] Grayned v. Rockford, 408 U.S. 104, 116 (1972).

[775] Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985).

[776] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[777] 505 U.S. 672 (1992).

[778] 109 F.3d 1268 (8th Cir. 1997).

[779] 745 F.2d 767 (2d Cir. 1984).

[780] *Id.* at 774. However, *Gannett* is no longer good law. *See* Cincinnati v. Discovery Network, 507 U.S. 410, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993); Jacobsen v. Howard, 109 F.3d 1268 (8th Cir. 1997); Jacobsen v. Howard, 335 F. Supp. 2d 1009 (D.S.D. 2004).

[781] Meyer v. Grant, 486 U.S. 414, 421 (1988).

[782] 505 U.S. 672 (1992).

[783] 308 U.S. 147, 162 (1939).

[784] 984 F.2d 1319 (1st Cir. 1993).

[785] 984 F.2d 1319, 1325 (1st Cir. 1993).

[786] *Id.*

[787] 558 F.2d 67 (2d Cir. 1977).

[788] 558 F.2d 67, 68 (2d Cir. 1977).

[789] 1999 U.S. Dist. LEXIS 14515 (E.D. Pa. 1999).

regulations are viewpoint-neutral and reasonable."[790]

In *Young v. New York City Transit Authority*,[791] the Second Circuit concluded that begging was not so identified with a particularized message as to bring it within the scope of protected speech under the First Amendment. Even assuming that begging possessed some characteristics of protected speech, the court held that the prohibition against begging satisfied First Amendment scrutiny because it met the standard for prohibition of expressive conduct and served legitimate governmental interests unrelated to the suppression of free expression. Moreover, the court found that the subway system was not a public forum. Concluding that begging was more conduct than speech, the court expressed "grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection."[792] The court noted that "The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment."[793] The purpose of the prohibition served legitimate public interests unrelated to the suppression of free speech, and was content neutral.[794]

Prior restraints on speech are scrutinized carefully by the courts. Determining that MTA advertising space was a public forum, the Second Circuit in *New York Magazine v. The Metropolitan Transportation Authority*[795] concluded that the refusal of MTA to run an advertisement critical of the mayor was an unconstitutional prior restraint of commercial speech.

M. SEARCHES AND SEIZURES

1. Highways and the Fourth Amendment

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…." Searches without consent or a valid search warrant, or without probable cause that a crime has been committed, usually are deemed unreasonable.[796] The enhanced security measures in the post 9/11 environment likely will generate more litigation over the propriety of government action in the search and seizure arena and test the full limits of the Fourth Amendment, as in certain contexts, searches for purposes of protecting national security will satisfy a compelling government interest.

The stop of a vehicle on the highway constitutes a Fourth Amendment seizure.[797] In the absence of individualized suspicion of wrongdoing, a search or seizure is ordinarily unreasonable.[798] However, where there is probable cause to believe a vehicle contains evidence of a crime, and it is impractical to secure a warrant, every part of the vehicle can be searched.[799] A dog sniff performed on a vehicle stopped for a traffic infraction does not rise to the level of a constitutionally cognizable infringement.[800] Moreover, driving in open view on a public highway creates no privacy protection, and observation or a photograph of the vehicle committing an unlawful act is not deemed a Fourth Amendment search.[801]

In *Delaware v. Prouse*,[802] the U.S. Supreme Court held unconstitutional a suspicionless, discretionary stop of a motorist for a spot check of his driver's license and registration. The Court was troubled by the officer's exercise of "standardless and unconstrained discretion."[803]

In *City of Indianapolis v. James Edmond*,[804] the city set up highway checkpoints at which vehicles

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[790] Storti v. Se. Transp. Auth., 1999 U.S. Dist. LEXIS 14515 at *25 (E.D. Pa. 1999).

[791] 903 F.2d 146 (2d Cir. 1990).

[792] 903 F.2d at 153.

[793] 903 F.2d at 154.

[794] William Mitchell II, *"Secondary Effects" Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling*, 24 U. BALT. L. REV. 291, 307 (1995); John Haggerty, *Begging and the Public Forum Doctrine in the First Amendment,* 34 B.C. L. REV. 1121, 1122 (1993).

[795] 136 F.3d 123 (2d Cir. 1998).

[796] For a review of exceptions to the warrant requirement, *see* RICHARD JONES, APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS (NCHRP Legal Research Digest No. 43, 2000).

[797] Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990). With respect to warrantless searches, *see* JONES, *supra* note 796.

[798] Chandler v. Miller, 520 U.S. 305, 308 (1997).

[799] JONES, *supra* note 796, at 5.

[800] Illinois v. Caballes, 543 U.S. 405; 125 S. Ct. 834 (2004).

[801] DANIEL GILBERT, NINA SINES & BRANDON BELL, PHOTOGRAPHIC TRAFFIC LAW ENFORCEMENT 9 (NCHRP Legal Research Digest No. 36, 1996). *See also* MARGARET HINES, JUDICIAL ENFORCEMENT OF VARIABLE SPEED LIMITS (NCHRP Legal Research Digest No. 47, 2002).

[802] 440 U.S. 648 (1979).

[803] 440 U.S. at 661.

[804] 531 U.S. 32 (2000).

were stopped, and their drivers were asked to produce their license and registration. The officers were issued elaborate written instructions to look for signs of impairment and to conduct an open-view examination from the outside of the vehicle. Meanwhile, drug-sniffing dogs were walked around the outside of the stopped vehicles. The city conducted six such roadblocks over a 2-month period, stopping 1,161 vehicles and arresting 104 motorists, of which 55 were drug-related.

Edmund was not a case in which the officers were acting under "standardless and unconstrained discretion," as in *Prouse.* Instead, the Court was troubled by what it regarded as the primary purpose of the searches—to find evidence of ordinary criminal wrongdoing. According to the Court, "We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing."[805] The Court emphasized that it declined "to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control."[806] According to the Court, the critical issue was the purpose of the highway roadblock, for "a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar."[807]

In *Edmund,* the City of Indianapolis justified its vehicle checkpoints on its interest in interdicting unlawful drugs. One wonders how the program would have fared had the city instead justified the program on its need to keep drug-impaired drivers off the highways to enhance safety.

Nonetheless, the Fourth Amendment does not compel government officials to treat an owner's car as his castle.[808] Absent individualized suspicion, the U.S. Supreme Court has upheld the constitutionality of highway search and seizure in three areas: (1) border patrol checkpoints; (2) sobriety checkpoints; and (3) information-seeking checkpoints. In *dictum,* the Court also has indicated that other situations would warrant a reasonable search and seizure, including (4) a roadblock designed to thwart an imminent terrorist attack; (5) a roadblock designed to catch a dangerous criminal likely to flee via a particular route;[809] (6) a roadblock for the purpose of verifying drivers' licenses and registrations;[810] and (7) searches at airports or government buildings.[811]

In *United States v. Martinez-Fuerte*,[812] the Supreme Court addressed Fourth Amendment challenges to stops at two permanent immigration checkpoints within 100 miles of the Mexican border. Emphasizing the difficulty of containing illegal immigration at the border and of guarding the border's entire length, the Court found the balance of interests tipped in the government's favor in policing the Nation's borders.[813] Hence the court upheld brief, suspicionless seizures of motorists whose purpose was to intercept illegal aliens.

Similarly, the Supreme Court upheld the constitutionality of sobriety checkpoints whose purpose was removal of drunk drivers from the road in *Michigan Dep't of State Police v. Sitz.*[814] The suspicionless stops of motorists were conducted so police could detect evidence of intoxication and remove intoxicated drivers from the road.[815] Suspicious motorists were asked to produce their license and registration, and, if it was thought necessary, were subjected to sobriety tests.[816] The governmental purpose of advancing highway safety by reducing the immediate hazard posed by drunk drivers and getting them off the road was deemed to be a sufficiently compelling state interest to warrant the intrusion.[817]

In *Illinois v. Lidster*,[818] the Supreme Court addressed the constitutionality of a highway checkpoint set up to obtain information concerning a hit-and-run accident occurring 1 week earlier at the same location. During the stop, an officer detected alcohol on the breath of a motorist. He was given a sobriety test, and then arrested. Pointing to the Court's decision in *Edmund*, the motorist challenged his arrest on Fourth Amendment grounds. Coming only 4 years after *Edmund* seemingly put the brakes on stops made without individualized suspicion, the Court felt compelled to distinguish *Edmund:*

> The checkpoint here differs significantly from that in *Edmund.* The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in

[805] 531 U.S. at 41.

[806] 531 U.S. at 44.

[807] 531 U.S. at 47.

[808] New York v. Class, 475 U.S. 106 (1986).

[809] City of Indianapolis v. James Edmond, 531 U.S. 32, 44 (2000).

[810] Delaware v. Prouse, 440 U.S. 648 (1979).

[811] 531 U.S. at 48–49.

[812] 428 U.S. 543 (1976).

[813] 428 U.S. at 561–66.

[814] 496 U.S. 444 (1990).

[815] 496 U.S. at 447–48.

[816] 496 U.S. at 447.

[817] 496 U.S. at 451.

[818] 540 U.S. 419 (2004).

> providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.[819]

Weighing and balancing the competing interests, the Court found the state interest in fostering "important criminal investigatory needs" outweighed the individual's inconvenience of "only a brief wait in line—a very few minutes at most."[820]

2. Drug and Alcohol Testing

Government drug testing of employees constitutes a search or seizure under the Fourth Amendment.[821] Collection and testing of urine[822] or blood pursuant to a government directive intrudes upon "an excretory function traditionally shielded by great privacy."[823] The testing of urine for drugs constitutes a search and, therefore, "must meet the reasonableness requirement of the Fourth Amendment."[824] Courts balance the intrusiveness of the test against the government's interest in testing.[825] Among the exceptions to the Fourth Amendment warrant requirement is the "administrative search exception," which upholds drug testing without individualized suspicion in highly regulated industries.[826]

Elaborate regulations have been promulgated by the U.S. DOT for random and incident-related drug and alcohol testing of employees engaged in safety-sensitive functions. They have been the subject of much litigation. In most instances, the courts have found the government's interest in protecting public safety compelling. For example, in *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority*,[827] the Third Circuit held that the government's interest in protecting the safety of large groups of people traveling by mass transit overrides the personal interest of transit employees against warrantless searches.[828]

In *Skinner v. Railway Labor Executives' Ass'n*,[829] the U.S. Supreme Court upheld the constitutionality of Federal Railroad Administration (FRA) regulations requiring blood and urine tests of railroad employees involved in certain train accidents and of employees who violate certain safety rules. The railroad employees' reasonable expectations of privacy were diminished by their participation in an industry pervasively regulated for safety, and the persons tested "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[830] The Court weighed the government-as-employer interest in stopping misuse of drugs by employees in safety-sensitive positions compelling against the intrusion upon personal privacy affected by the requirement of administering a urinalysis test.[831]

In the absence of individualized suspicion, the reasonableness of such a search depends on balancing the "special needs" of the government against the extent of the intrusiveness of the testing procedure.[832] Reasonableness is judged by balancing the search's intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. The factors to be considered include the nature of the privacy interest upon which the search intrudes, the character of the intrusion, the immediacy of the government concern, and the efficacy of the search for meeting it.[833]

Many cases have arisen in the transit context. The balancing test fell in the government's favor

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[819] 540 U.S. at 423.

[820] 540 U.S. at 427.

[821] Transport Workers' Union of Phila. v. Se. Pa. Transp. Auth., 863 F.2d 1110, 1115 (3d Cir. 1988).

[822] Urine specimen guidelines are published at www.dot.gov/ost/dapc.

[823] Vernonia Sch. District v. Acton, 515 U.S. 646, 658, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995). Transport Workers' Union of Phila. v. Se. Pa. Transp. Auth., 863 F.2d 1110, 1119 (3d Cir. 1988).

[824] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989); *see* Burka v. N.Y. City Transit Auth., 739 F. Supp. 814, 819 (S.D.N.Y. 1990). *See* Jill Dorancy-Williams, *The Difference Between Mine and Thine: The Constitutionality of Public Employee Drug Testing,* 28 N.M. L. REV. 441 (1998).

[825] Gonzalez v. Metro. Transp. Auth., 174 F.3d 1016 (9th Cir. 1999).

[826] Policeman's Benevolent Ass'n v. Township of Washington, 850 F.2d 133, 135 (3d Cir. 1988).

[827] 863 F.2d 1110 (3d Cir. 1998).

[828] Transport Workers' Union of Phila. v. Se. Pa. Transp. Auth., 863 F.2d 1110 (3d Cir. 1988).

[829] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989). *See* Dorancy-Williams, *supra* note 824, at 451.

[830] *Skinner*, 489 U.S. 602, at 628.

[831] *Skinner*, 489 U.S. at 614. *See also* Drake v. Delta Airlines, 923 F. Supp. 387, 396–97 (E.D.N.Y. 1996), *aff'd in relevant part*, Drake v. Delta Airlines, 147 F.3d 169, 170–71 (2d Cir. 1998). Beharry v. MTA, 1999 U.S. Dist. LEXIS 3157 (1999).

[832] Chandler v. Miller, 520 U.S. 305, 318, 137 L. Ed. 2d 513, 117 S. Ct. 1295 (1997). *See* Dorancy-Williams, *supra* note 824, at 451.

[833] Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995).

where a transit provider sought a urine sample from a safety-sensitive employee in *Beharry v. New York City Transit Authority*.[834] There, the federal district court held, "the Authority's request that Beharry provide a small urine sample within a two-hour period caused a minimal interference with Beharry's privacy rights, which must be outweighed by the Authority's concerns with protecting the safety of its employees and customers."[835] Similarly, the Sixth Circuit in *Holloman v. Greater Cleveland Regional Transit Authority*,[836] held that the transit authority had a compelling governmental interest in "protecting the safety of its passengers and the general public by ensuring that its drivers do not operate buses while under the influence of alcohol or drugs," and that this interest outweighed the employee's diminished expectations of privacy.[837] In *Amalgamated Transit Union v. Suscy,*[838] the Seventh Circuit held, "the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxicating or drug abuse."[839]

The Third Circuit in *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority,*[840] upheld the random testing of safety-sensitive transit employees where the transit authority adduced evidence of a significant drug problem. The random drug testing program was reasonable because "the plan contains sufficient safeguards, in the form of confidentiality, chain of custody, verification, and random selection procedures, to protect against abuse of discretion by implementing officials."[841]

But not all drug and alcohol testing has been upheld. For example, in *Gonzalez v. Metropolitan Transit Authority*,[842] the Ninth Circuit found the testing unconstitutional because it was unclear whether the employees would pose a substantial immediate threat to public safety if impaired by drugs or alcohol, whether the procedure for testing them would be reasonably effective for finding out if they are impaired, or whether the tests as performed constituted an undue invasion of their privacy. Similarly, in *Bolden v. Southeastern Pennsylvania Transportation Authority*,[843] compulsory, suspicionless, back-to-work testing of a maintenance custodian who tested positive for marijuana use was held to be a violation of the employee's constitutional rights. The employee was not a safety-sensitive employee likely to create any great risk of causing harm to others, and did not have diminished privacy expectations due to the pervasive government regulation.

N. EQUAL PROTECTION

1. Facial or "As Applied" Challenges

Ratified on July 9, 1868, the Fourteenth Amendment to the Constitution provides, *inter alia,* "No State shall make or enforce any law which shall…deny to any person within its jurisdiction the equal protection of the laws."[844] Further, "The Congress shall have power to enforce, by appropriate legislation, the provision of this article."[845]

The Fourteenth Amendment guarantees "a right to be free from invidious discrimination in statutory classifications and other governmental activity."[846] Essentially, all similarly situated people should be treated alike.[847] The Equal Protection Clause not only protects fundamental rights, and protects citizens against suspect classifications such as race, it also protects them from arbitrary and irrational state action.[848]

To establish a *prima facie* case of discrimination under the Equal Protection Clause, the plaintiff must demonstrate that he is a member of a protected class, that he is otherwise similarly situated to members of the unprotected class, that he was treated differently from members of the unprotected class, and that the defendant acted with discriminatory intent. If the plaintiff makes out a *prima facie* case of discrimination, the burden shifts to the government to articulate a legitimate

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[834] 1999 U.S. Dist. LEXIS 3157 (E.D.N.Y. 1999).

[835] *Id.* at 30.

[836] 1991 U.S. App. LEXIS 6904 (6th Cir. 1991).

[837] *Id.* at 2.

[838] 538 F.2d 1264 (7th Cir. 1976).

[839] Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976).

[840] 863 F.2d 1110 (3d Cir. 1988).

[841] 863 F.2d at 1121.

[842] 174 F.3d 1016 (9th Cir. 1999).

[843] 953 F.2d 807 (3d Cir. 1991).

[844] U.S. CONST. amend. XIV, § 1.

[845] U.S. CONST. amend. XIV, § 5.

[846] Harris v. McRae, 448 U.S. 297, 322 (1980).

[847] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[848] Hamlyn v. Rock Island County Metro. Mass Transit Dist., 986 F. Supp. 1126 (C.D. Ill. 1997) (transit authority's reduced fare program violates the Equal Protection Clause because it discriminates against passengers with AIDS). In *Hamlyn,* because of his AIDS affliction, plaintiff had difficulty walking more than one block. However, the reduced fare program established by the transit agency excluded persons whose sole disability was AIDS from eligibility. The court found that AIDS was a qualifying disability under the ADA and Rehabilitation Act, and that discrimination against persons who have AIDS violates the Fourteenth Amendment.

nondiscriminatory reason for taking the action alleged by the plaintiff to be discriminatory. If the defendant succeeds in meeting this burden, the burden shifts back to the plaintiff to demonstrate that the proffered reason is merely a pretext for discrimination.[849]

In a facial challenge, as opposed to an "as applied" challenge, of a governmental classification, the plaintiff must prove (1) that the state action, on its face, results in members of a certain group being treated differently from other individuals based on membership in the group;[850] and (2) if a cognizable class is treated differently, the distinction between the groups must be illegitimate.[851] If the classification is one enumerated in the Fourteenth Amendment (such as one based on race), it is a "suspect classification," entitled to heightened scrutiny. However, if the classification is not suspect, courts review state action under the "rational basis" test.[852] If the challenge to the state action is on an "as applied" rather than a "facial" basis, plaintiff must prove the presence of an unlawful intent to discriminate against him or her for an invalid reason.[853]

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.,*[854] the U.S. Supreme Court held that agency rules may establish a "discriminatory effect" basis upon compliance with Title VI of the Civil Rights Act of 1964,[855] even if absent such a rule "discriminatory intent" must be found. U.S. DOT rules adopt the discriminatory effect standard.[856] The Court established a five-part test to determine whether the government acted with the intent or purpose to racially discriminate:[857]

1. Whether the impact of the official action falls more heavily on one race than another and cannot be explained in any other way besides race;
2. The historical context of the decision;
3. The sequence of events immediately preceding the contested decision;
4. Deviations from normal decision making processes; and
5. The legislative and administrative history of the particular decision.[858]

2. Race

Clearly, the central purpose of the Fourteenth Amendment was to redress racial discrimination. Allegations of racial discrimination are subjected to strict scrutiny. To discriminate based on race, the government must demonstrate a compelling governmental interest.

In *Fullilove v. Klutznick*,[859] the U.S. Supreme Court upheld a federal statute requiring that 10 percent of certain federal grants be awarded to minority contractors against Equal Protection challenge. But in *City of Richmond v. J.A. Croson Co,*[860] the Supreme Court struck down the City of Richmond's ordinance that 30 percent of all construction contracts be given to minority-owned businesses, condemning the practice of relying on "a generalized assertion of past discrimination" to correct sweeping efforts to rectify past societal discrimination where no actual discrimination was identified.[861] In distinguishing the cases, the Court emphasized that the federal government has a specific constitutional mandate (under Section 5 of the Fourteenth Amendment) to enforce its dictates.[862] "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori,* the States and their political subdivisions are free to decide that such remedies are appropriate."[863] Because the Court could find no evidence of any identified discrimination in the Richmond construction injury, it found that the city failed to establish a compelling interest to distribute public construction contracts on the basis of race.[864] Professor Richard Primus notes that, beginning with *Croson*, "equal protection has become hostile to

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[849] McMillian v. Svetanoff, 878 F.2d 186, 189 (7th Cir. 1989).

[850] Jones v. Helms, 452 U.S. 412, 423–24 (1981).

[851] Plyler v. Doe, 457 U.S. 202, 217–18 (1981).

[852] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985).

[853] Snowden v. Hughes, 321 U.S. 1, 8 (1944).

[854] Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977) (holding that the denial of zoning for low-income housing that would benefit mostly minorities did not violate the Equal Protection Clause because plaintiffs failed to prove racial discrimination was the motivating factor for the zoning decision).

[855] 42 U.S.C. § 2000d.

[856] *See* 49 C.F.R. § 21.5(b).

[857] *Village of Arlington*, 429 U.S. at 252; Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9(1) J. ENVTL. L. & LITIG. 121, 125 (1994).

[858] Collin, *supra* note 857, at 121, 125.

[859] 448 U.S. 448 (1980).

[860] 488 U.S. 469 (1989).

[861] 488 U.S. at 498–501.

[862] 488 U.S. at 490.

[863] *Id.* "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id*. at 493.

[864] 488 U.S. at 505.

government action that aims to allocate goods among racial groups, even when intended to redress past discrimination."[865]

Since promulgation of the STAA of 1982,[866] federal highway statutes have required that at least 10 percent of federal construction funds be set aside for small businesses owned and controlled by "socially and economically disadvantaged individuals."[867] This program includes a race-based presumption to define the class of beneficiaries and allows the use of race-conscious remedial measures.

Adarand Constructors v. Pena[868] became the seminal case on minority set-asides in the context of highway construction. There, Adarand, a male Caucasian, was the low bidder for a subcontract, but the prime contractor instead awarded the subcontract to a bidder previously certified by the state DOT as a DBE. Adarand alleged violation of the Equal Protection Clause of the U.S. Constitution.[869] As it had in *Croson,* the U.S. Supreme Court subjected the DOT's use of race-based measures in its regulations to strict scrutiny analysis.[870] Significantly, the Court in *Adarand* applied strict scrutiny analysis to *federal* affirmative action programs that use racial or ethnic criteria as a basis for decision-making, a standard that had previously only been applied to state or local programs.[871] The Court held, "We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests."[872] Thus, all affirmative action programs—whether federal, state, or local—are now subjected to "strict scrutiny,"[873] and will pass constitutional muster only if they are narrowly tailored to serve a compelling government interest.[874] In analyzing such programs, among the salient questions to be addressed are:

1. Did the government entity give any consideration to the use of race-neutral means to increase minority participation in governmental contracting?
2. Is the program limited in time so that it will not last longer than the discriminatory effects it is designed to eliminate?

After *Adarand,* FHWA amended the relevant regulations to eliminate the offending provisions. After several remands and a rewriting of the U.S. DOT highway regulations, the aspirational goal of awarding 10.93 percent of design and construction contracts to DBEs was upheld.[875]

More recently, in a challenge against the implementation of the revised federal DBE program by MnDOT and NDOR, the Eighth Circuit reviewed TEA-21's earmark of 10 percent of federal highway funds for businesses owned by socially and economically disadvantaged individuals. In *Sherbrooke Turf Inc. v. Minnesota DOT,*[876] the court found that the FHWA's DBE set-aside program survived strict scrutiny as furthering a compelling interest, being narrowly tailored and applied, and placing an em-

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[865] Richard Primus, *Equal Protection and Disparate Impact: Round Three,* 117 HARV. L. REV. 493, 496 (2003):

> Since the Supreme Court's decisions in *Croson* and *Adarand,* all laws using express racial classifications have been subject to strict scrutiny and can be sustained only in exceptional circumstances. Strict scrutiny applies regardless of whether the classifications benefit or burden historically disadvantaged groups, or even if they impose no differential burden or benefit on different racial groups. Many critics have characterized this doctrine as normatively and analytically misguided. As a descriptive matter, however, classification has become central to equal protection doctrine.

Id. at 502-04 [citations omitted].

[866] Pub. L. No. 97-424.

[867] This phrase is defined in 15 U.S.C. § 637.

[868] 515 U.S. 200 (1995), *remanded* Adarand Constructors v. Pena, 965 F. Supp. 1556 (D. Colo. 1997), *vacated sub nom.* Adarand Constuctors v. Slater, 169 F.3d 1292 (10th Cir. 1999), *rev'd* Adarand Constructors v. Slater, 528 U.S. 216 (2000), *remanded* Adarand Constructors v. Slater, 228 F.3d 1147 (10th Cir. 2000), *amended sub nom.* Adarand Constructors v. Mineta, 121 S. Ct. 1401 (2001), *cert. granted*, Adarand Constructors v. Mineta, 121 S. Ct. 1598 (2001).

[869] U.S. CONST. amend. V.

[870] 515 U.S. at 237–39.

[871] SANDRA VAN DE WALLE, THE IMPACT OF CIVIL RIGHTS LEGISLATION UNDER TITLE VI AND RELATED LAWS ON TRANSIT DECISION MAKING (TCRP Legal Research Digest, 1997).

[872] 515 U.S. at 227; 115 S. Ct. at 2113.

[873] Under strict scrutiny, affirmative action programs pass constitutional muster if they are narrowly tailored to serve a compelling interest. *See* Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

[874] *See* Adarand Constructors v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). VAN DE WALLE, *supra* note 871.

[875] The history of the *Adarand* litigation is discussed in detail in Paul Stephen Dempsey, *Transit Law*, 5 SELECTED STUDIES 10-6 – 10-12. Since those cases are examined in detail there, they are discussed more succinctly here.

[876] 345 F.3d 964 (8th Cir. 2003).

phasis on race-neutral means to accomplish its goals.[877]

In *McNabola v. Chicago Transit Authority*,[878] a Chicago Transit Authority (CTA) per diem contract employee alleged that CTA dismissed him because he was white. McNabola demonstrated that he was similarly situated to other nonwhite per diem employees, and that he was treated differently because of his race and terminated with discriminatory intent. The CTA argued that it had terminated McNabola because of complaints from CTA employees about McNabola's examinations, unauthorized hospital visits, and the use of a CTA prescription pad for a private patient. McNabola presented contrary evidence suggesting that the proffered reasons were merely a pretext, and that he actually was terminated pursuant to CTA's custom of terminating white per diem employees and replacing them with African Americans. The Seventh Circuit concluded CTA had violated the Equal Protection Clause of the Constitution. Similarly, in *Schlesinger v. New York City Transit Authority*,[879] a federal district court upheld a *prima facie* claim of intentional discrimination based on "a widespread pattern of discrimination…against white managers and professionals and a pattern of favoritism on behalf of black professionals."[880]

Similarly, in *Malabed v. North Slope Borough*,[881] a federal district court concluded that a transit agency's employment preferences (in this case, favoring Native Americans) affecting fundamental rights or suspect classifications (such as race) could not withstand constitutional scrutiny without particularized findings logically related to the perceived evil sought to be remedied.[882]

3. Gender

Gender discrimination is subject to intermediate scrutiny. In order to discriminate based on gender, the government must show an important substantial interest. For example, Oklahoma forbade the sale of 3.2 percent beer to men under age 21 but permitted the sale of such beer to women over 18.[883] In *Craig v. Boren,*[884] the U.S. Supreme Court held that these gender-based differences must be invalidated, even though law favors women, because "the relationship between gender and traffic safety" is "too tenuous." Gender was not deemed a sufficiently accurate proxy for the regulation of drinking and driving. Essentially, the Court found the means to achieve the stated objective of enhancing traffic safety were not related adequately to that objective. In order to sustain gender-based discrimination, the state must prove that the discriminatory means employed were substantially related to the achievement of important governmental objectives.[885]

A county's requirement that all of its vehicle drivers wear pants was held not to have violated a female driver's rights of free speech, due process, or equal protection. Thus, in *Zalewska v. County of Sullivan, New York*,[886] the Second Circuit held that equal protection was not violated when a female transit bus driver was required to comply by a dress code requiring that all employees wear pants.

4. Sexual Orientation

To discriminate based on sexual orientation, there must be a conceivable rational relationship to the state interest. In *Romer v. Evans*,[887] the U.S. Supreme Court had occasion to review a referendum to deny homosexuals protection from discrimination. Colorado voters had amended the Colorado Constitution to prohibit any Colorado state and local government agency (such as the Colorado DOT) from protecting homosexuals against discrimination. The state constitutional amendment was held unconstitutional under the U.S. Constitution because it was deemed to be "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests."

5. Drug Usage

Concerns over safety have led transportation agencies to impose discriminatory restrictions on drug users in safety-sensitive positions. By and large, these safety restrictions have been upheld as constitutional. In *New York City Transit Authority v. Beazer*,[888] the U.S. Supreme Court upheld as constitutional the NYTA's policy of refusing employment to individuals in safety-sensitive positions

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[877] 345 F.3d at 974.

[878] 10 F.3d 501 (7th Cir. 1993).

[879] 2001 U.S. Dist. LEXIS 632 (S.D.N.Y. 2001).

[880] *Id.* at 33.

[881] 42 F. Supp. 2d 927 (D. Alaska 1999).

[882] 41 F. Supp. 2d at 941. The court in *Malabed* also relied on the nonconstitutional theory that the preference, adopted by North Slope Transit as an ordinance, violated a charter provision of North Slope Borough that barred discrimination based on national origin.

[883] 429 U.S. 190 (1976). However, the Supreme Court subsequently gave state prerogatives under the 21st amendment greater deference. *See* Bacchus Imports v. Dizs, 468 U.S. 263 (1984).

[884] 429 U.S. at 204.

[885] United States v. Virginia, 518 U.S. 515 (1996).

[886] 316 F.3d 314 (2d Cir. 2003).

[887] 517 U.S. 620 at 635 (1996).

[888] 440 U.S. 568 (1979).

who use methadone, concluding that the policy satisfied legitimate objectives of safety and efficiency.[889] The majority found that these goals were "significantly served by—even if they do not require—[the methadone] rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions."[890] Decisions of transit providers to dismiss or refuse to hire individuals on drugs do not violate the Equal Protection Clause of the Fourteenth Amendment.[891] The Court found that the uncertainties associated with the rehabilitation of heroin addicts precludes drawing a bright line at the point at which addiction ends; it is therefore neither unprincipled nor invidious for the employer to postpone eligibility for work until the methadone treatment is completed.[892]

In *Beazer,* the U.S. Supreme Court reaffirmed its distinction between invidious discrimination (which is a classification drawn "with an evil eye and an unequal hand" or motivated by "a feeling of antipathy" against a certain group), and discriminatory rules essential to secure general benefits. Here, the transit authority was motivated by its need to operate a safe and efficient transportation system rather than by any special animus against drug addicts.[893] It is not the role of the Court to second-guess the employer, for "No matter how unwise it may be for the TA to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision."[894]

6. Voting

In *Cunningham v. Seattle,*[895] a federal district court found that the organization of the governing transit agency violated the Equal Protection Clause of the U.S. Constitution and the "one person/one vote" doctrine of *Reynolds v. Sims*.[896] Because 24 of its 42 members were elected rather than appointed, and represented jurisdictions with differing populations, resulting in a disproportionate representation of voters, the organizational structure of the transit agency violated the equal protection rights of its constituents.

7. Environmental Justice

In *Labor/Community Strategy Center v. Los Angeles Metro. Transp. Auth.*,[897] the Ninth Circuit concluded that the authority violated a consent decree to purchase 248 additional buses to reduce transit overcrowding.[898] Yet, the environmental justice movement was dealt a strong blow in *Alexander v. Sandoval*,[899] a case in which a Mexican immigrant brought a class action lawsuit under Title VI challenging Alabama's English-only policy for administration of its driver's license tests.[900] Title VI, Section 2000(d) prohibits any program or activity that receives federal financial assistance from excluding participants based on race, color, or national origin.[901] The court held that private individuals could sue to enforce Section 2000(d) of Title VI, but that Section 2000(d) only prohibits intentional discrimination.[902] Because the English-only policy created a "disparate impact" based on national origin and race, and did not involve intentional discrimination, there is no private right of action to enforce regulations promulgated under Section 2000(d).[903]

O. CONCLUSION

Though the U.S. Constitution explicitly addresses transportation only briefly, we have seen that many of its provisions are implicated in the jurisdictional conflicts that inevitably arise between federal and state governments. Building, providing, subsidizing, and regulating transportation infrastructure is a major function of state and local governments, but one in which the federal government provides important funding and seeks to regulate and oversee as well. Federal spending and commerce power is vast, as is the ability of the federal government to preempt state action. In contrast, state police power has also been accorded

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[889] Allan Ides, *Realism, Rationality and Justice Byron White: Three Easy Cases*, 1994 BYU L. REV. 283, 286 (1994); David Hollar, *Physical Ability Tests and Title VII*, 67 U. CHI. L. REV. 777, 781 (2000).

[890] 440 U.S. at 587 n.31.

[891] N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

[892] 440 U.S. at 591–92.

[893] 440 U.S. at 593 n.40.

[894] 440 U.S. at 594.

[895] 751 F. Supp. 885 (W.D. Wash. 1990).

[896] 377 U.S. 533 (1964).

[897] 263 F.3d 1041 (9th Cir. 2001).

[898] *Id.*

[899] 532 U.S. 275 (2001).

[900] 532 U.S. at 276; 121 S. Ct. 1511, 1513 (2001); 42 U.S.C. §§ 2000(d)–2000(d)-1 (2000).

[901] 42 U.S.C. § 2000(d).

[902] 121 S. Ct. at 1513.

[903] 532 U.S. at 282; 121 S. Ct. at 1517, 1523. The Camden New Jersey Environmental Justice/Title VI cases that were directly affected by the Alexander v. Sandoval decision are discussed in S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001). For a review of the environmental justice issue, *see* Paul Stephen Dempsey, *Transit Law*, 5 SELECTED STUDIES 3-39 – 3-42.

wide berth. In recent decades, as the Rehnquist Court moved to expand state powers, more has been deemed to fall within the domain of state governments. Whether the Roberts Court will continue this jurisprudential trend remains to be seen.

The Constitution as battleground also emerges in the conflicts between governmental institutions and individual rights. Many of these conflicts are not unique to transportation agencies, yet a number of important cases have been decided in a transportation context.

As in all industries, it is difficult to predict how constitutional jurisprudence will evolve. What is clear, however, is that conflicts between governmental institutions in a federal system and conflicts between those institutions and individuals will continue to be an important focus for the courts, and the evolution of constitutional jurisprudence in this arena will continue to be of interest to transportation lawyers.