Low & Jeffries' Federal Courts and the Law of Federal-State Relations

Tenth Edition

Curtis A. Bradley
Tara Leigh Grove
John C. Jeffries, Jr.
Peter W. Low

2025 Supplement

The Tenth Edition of the Casebook went to press in May 2022. This Supplement covers subsequent decisions, up through the end of the Supreme Court's 2024-25 Term. It also addresses recent scholarship.

We will continue in future years, as we have each year in the past, to keep the book up to date on an annual basis.

CAB
TLG
JCJ Jr.
PWL

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INTRODUCTION

JUDICIAL REVIEW AND THE FEDERAL COURT SYSTEM

Page 14, add before the last sentence of Note 7:

See also Duncan Hosie, Stealth Reversals, 58 U.C. Davis L. Rev. 1323 (2025); Bill Watson, Obstructing Precedent, 119 Nw. U. L. Rev. 259 (2024).

Page 14, add at the end of Note 7:

For an account of the rules that the Supreme Court uses to regulate itself (including the doctrine of stare decisis) and an argument that these self-regulatory rules are shifting and breaking down, see Lisa Schultz Bressman, The Rise and Fall of the Self-Regulatory Court, 101 Tex. L. Rev. 1 (2022). For other recent examinations of the Supreme Court's approach to stare decisis, see Richard M. Re, Personal Precedent at the Supreme Court, 136 Harv. L. Rev. 824 (2023); Nina Varsava, Precedent, Reliance, and *Dobbs*, 136 Harv. L. Rev. 1845 (2023). For discussion of how lower federal courts do and should respond when the Supreme Court starts disfavoring (but not overruling) a precedent, see Curtis Bradley and Tara Leigh Grove, Disfavored Supreme Court Precedent in the Lower Federal Courts, 111 Va. L. Rev. (forthcoming 2025). For additional discussion of vertical stare decisis, see, for example, Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817 (1994); Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651 (1995); and Richard M. Re, Narrowing Supreme Court Precedent from Below, 104 Geo. L.J. 921 (2016).

Page 15, add at the end of Note 8:

For a comprehensive account of the federal court system and a description of the various kinds of general and specialized courts within that system, see Laura K. Donohue and Jeremy McCabe, Federal Courts: Article I, II, III, and IV Adjudication, 71 Cath. U. L. Rev. 543 (2022).

CHAPTER I

CONGRESSIONAL CONTROL OF THE FEDERAL COURTS

SECTION 1. POWER TO LIMIT FEDERAL COURT JURISDICTION

Page 46, add after the first full paragraph of Note 9:

Many observers have also expressed concerns about the Supreme Court's use of its "emergency docket" or "shadow docket." These terms refer to Court decisions that do not receive full briefing and argument and are disposed of summarily, often without written opinion. Such orders include a range of Court actions, such as denials of certiorari, summary reversals, granting or denying applications for a stay of a lower court decision, and addressing requests for injunctive relief. Although no one doubts that the Supreme Court must issue emergency orders in some cases, critics argue that the Court has increasingly used its shadow docket to make consequential decisions in highly salient cases, including those involving immigration, religion, abortion, and voting rights. Critics contend that such major decisions should not be issued through truncated procedures. Critics also worry about the uncertain precedential status of the Court's summary orders, and the lack of transparency, because there is generally no reasoned opinion or disclosure of how each Justice voted.

The Supreme Court's use of these emergency orders gained renewed attention in the 2024-25 Term. Upon assuming office in January 2025, President Trump initiated a series of controversial executive actions, many of which were quickly challenged in court. Federal district courts issued injunctions against prominent executive actions in cases involving, for example, the President's authority to remove foreign nationals under the Alien Enemies Act, the President's authority to restrict birthright citizenship (for children born in the United States to parents who were not themselves U.S. citizens or lawful permanent residents), and the President's power to remove heads of independent agencies without cause (despite statutory provisions permitting only for-cause removal).

The federal government sought prompt (emergency) relief from the Supreme Court, with mixed success. The Court permitted on a temporary basis the President's removal of top officials in two independent agencies: the National Labor Relations Board and the Merit Systems Protection Board. But the Court temporarily paused the removal of certain Venezuelan foreign nationals under the Alien Enemies Act and directed the government to facilitate the return of Kilmar Abrego Garcia, who had been mistakenly sent to an El Salvadorian prison. In the birthright citizenship case, the Supreme Court left in place the district court injunctions—and thus temporarily prevented the executive order on birthright

citizenship from going into effect. That case was then scheduled for oral argument—not on the merits, but rather to consider the scope of the federal courts' power to issue what the Court called "universal" injunctions. See Trump v. CASA, Inc., 606 U.S. __, 145 S.Ct. __ (2025), discussed later in this Supplement in an addition to page 604 of the casebook.

The Supreme Court has not adopted a consistent approach to its use of the emergency docket. But cases in this procedural posture will likely continue to be a significant part of the Court's workload, at least for the foreseeable future. The use of the shadow docket in the habeas context is discussed in Chapter X, Section 1, of the casebook.

Page 46, add after the first citation in the final paragraph of Note 9:

David R. Dow and Sanat Mehta, Does Eliminating Life Tenure for Article III Judges Require a Constitutional Amendment?, 16 Duke J. Const. L & Pub. Pol'y 89 (2021); Daniel Epps & Alan M. Trammell, The False Promise of Jurisdiction Stripping, 123 Colum. L. Rev. 2077 (2023);

Page 46, add before the final sentence of the final paragraph of Note 9:

; Amy L. Stein, Administrative Forum Shopping, 93 Fordham L. Rev. 1697 (2025).

Page 46, add at the end of Note 9:

For commentary on the shadow docket, see Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023); William Baude, Foreword: The Supreme Court's Shadow Docket, 9 NYU J.L. & Liberty 1 (2015); Lisa Schultz Bressman, The Rise and Fall of the Self-Regulatory Court, 101 Tex. L. Rev. 1 (2022); Bert I. Huang, The Foreshadow Docket, 124 Colum. L. Rev. 851 (2023) (book review); Stephen I. Vladeck, Putting the "Shadow Docket" in Perspective, 17 Harv. L. & Pol'y Rev. 289 (2023); Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123 (2019); Edward L. Pickupa and Hannah L. Templin, Emergency-Docket Experiments, 98 Notre Dame L. Rev. Reflection 1 (2023); Richard J. Pierce, Jr., The Supreme Court Should Eliminate Its Lawless Shadow Docket, 74 Admin. L. Rev. 1 (2022); Michael E. Solimine, Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket, 98 Ind. L.J. Supplement 37 (2023). For an introduction to a Symposium on this topic in the Nevada Law Journal, see Leslie C. Griffin, The Shadow Docket: A Symposium, 23 Nev. L.J. 669 (2023). The articles in the Symposium are: Nicholas D. Conway and Yana Gagloeva, Out Of The Shadows: What Social Science Tells Us About the Shadow Docket, 23 Nev. L.J. 673 (2023); Caroline Fredrickson, Will American Democracy Last in Light of the Shadow Docket?, 23 Nev. L.J. 727 (2023); Rachael Houston, Does Anybody Really Know What Time It Is?: How the US Supreme Court Defines "Time" Using the *Purcell* Principle, 23 Nev. L.J. 769 (2023); Jenny-Brooke Condon, The Capital Shadow Docket and the Death of Judicial Restraint, 23 Nev. L.J. 809 (2023); Benjamin H. Barton, Why Are These Justices Using the Shadow Docket More Than Past Justices?, 23 Nev. L.J. 845 (2023); Andrew J. Wistrich, Secret

Shoals of the Shadow Docket, 23 Nev. L.J. 863 (2023); Sarah Voehl, Illuminating The Shadow Docket: On the Increasing Impacts of This Evolving Judicial Procedure, 23 Nev. L.J. 945 (2023).

SECTION 2. POWER TO REGULATE RULES OF DECISION AND JUDGMENTS

Page 74, add at the end of Note 4:

For an important account of the history surrounding *Klein*, see Helen Hershkoff and Fred Smith, Jr., Reconstructing *Klein*, 90 U. Chi. L. Rev. 2101 (2023). The authors argue that past scholarship has overlooked the "racialized origin" of the case. The federal government confiscated property from former confederates (such as the property at issue in *Klein*) as part of its effort to distribute property to formerly enslaved individuals who had been emancipated. President Andrew Johnson then pardoned the former confederates in an apparent attempt to thwart such efforts—and to restore not only the confederates' property but also their political power in the South. The authors "emphasize that [they] are not arguing a counterfactual: that a different result in *Klein w*ould have significantly affected land distribution in the South, or that regulating the president's clemency policy would alone have been sufficient to establish a multiracial political power base in the post-Civil War South." But they do criticize how "racial politics were erased from academic discussions of *Klein*, and the decision's racialized context disappeared from legal analysis."

Page 76, add a footnote a at the end of the next to last paragraph in Note 7:

[a] The Supreme Court has repeatedly held that the catchall provision in Rule 60(b)(6), which allows reopening a judgment for "any other reason that justifies relief," is limited to "extraordinary circumstances." For a recent decision emphasizing this limitation, see Blom Bank SAL v. Honickman, 605 U.S. __, 145 S.Ct. 1612 (2025).

SECTION 4. STATUTORY FEDERAL QUESTION JURISDICTION

Page 109, add a footnote d at the end of the second paragraph of Note 4:

[d] In Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. __, 145 S.Ct. 41 (2025), the Supreme Court held that if a plaintiff removes a case to federal court on the basis of federal question jurisdiction and then amends the complaint to delete the federal-law claims, leaving only state-law claims, the federal court loses supplemental jurisdiction over the state-law claims and the case must be remanded to state court. In a unanimous opinion by Justice Kagan, the Court emphasized that "federal courts are courts of limited jurisdiction: When they do not have (or no longer have) authorization to resolve a suit, they must hand it over."

SECTION 5. POWER TO CREATE NON-ARTICLE III COURTS

Page 198, add a new Note after Note 3:

4. THE SEVENTH AMENDMENT AS A LIMITATION: *SEC V. JARKESY*

The Supreme Court made clear in Securities and Exchange Commission v. Jarkesy, 603 U.S. __, 144 S.Ct. 2117 (2024), that the Seventh Amendment imposes an important limitation on the use of non-Article III adjudication. In that case, the Securities and Exchange Commission (SEC) initiated an enforcement action against an individual and a

company for alleged securities fraud, seeking civil penalties. Pursuant to the Dodd-Frank Act, passed in 2010, the SEC had the choice of bringing such an action in federal court or before an administrative law judge within the SEC, and it chose the latter. Unlike in federal court, juries are not available in these administrative proceedings.

In a 6-3 decision, the Court held that the Seventh Amendment required a jury trial for this action. In an opinion by Chief Justice Roberts, the Court first explained that the Seventh Amendment, which says that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," was implicated. "The SEC's antifraud provisions replicate common law fraud," said the Court, "and it is well established that common law claims must be heard by a jury." Relying on Granfinanciera, S. A. v. Nordberg, 492 U.S. 33 (1989) (discussed at pages 176-77 of the casebook), the Court also explained that the Seventh Amendment applies to a statutory claim if the claim is "legal in nature." That was true here, the Court concluded, in large part because the SEC was seeking monetary civil penalties, a type of remedy that the Court said historically could be enforced only in courts of law. The Court also emphasized the "close relationship between federal securities fraud and common law fraud."

Next, the Court concluded that the case did not fall within the "public rights" exception to Article III adjudication, reasoning that "the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury." Those areas, the Court noted, have included revenue collection, immigration, imposition of tariffs, relations with Indian tribes, the administration of public lands, the granting of public benefits, and patent rights. Acknowledging that the Court's "opinions governing the public rights exception have not always spoken in precise terms," the Court did not attempt to provide a definitive account. But it emphasized that the presumption is in favor of Article III adjudication for matters falling with the federal judicial power and that the public rights exception does not extend to common law claims. The present case, the Court said, "is a common law suit in all but name. And such suits typically must be adjudicated in Article III courts." The Court also noted that it had found the Seventh Amendment implicated in *Granfinaciera*, which involved a statutory fraud claim (by a bankruptcy trustee), and it said that "the principles in that case largely resolve this one."

The Court distinguished an earlier decision, Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977). In that case, the Court unanimously had held that it did not violate the Seventh Amendment for Congress to permit an agency to seek civil penalties in an administrative proceeding for violations of a federal statute governing workplace safety. That decision was distinguishable, said the Court in *Jarkesy*, because, unlike in this case, the statute there "did not borrow its cause of action from the common law." The Court also said that, after *Atlas Roofing*, it had clarified in Tull v. United States, 481 U.S. 412 (1987), that "the Seventh Amendment does apply to novel statutory

regimes, so long as the claims are akin to common law claims." In a footnote, the Court also observed that *Atlas Roofing* "represents a departure from our legal traditions."

Justice Gorsuch, in addition to joining the majority opinion, wrote a separate concurrence, which was joined by Justice Thomas. Gorsuch expressed the view that several constitutional provisions—the Seventh Amendment, Article III, and the Due Process Clause—work together to support the Court's conclusion. He also reasoned that "traditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree," something that he said did not exist here.

In a lengthy dissent joined by Justices Kagan and Jackson, Justice Sotomayor noted that Congress had "enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations," and she suggested that the Court's decision would lead to chaos. She also argued that the decision was a sharp departure from precedent, which she said had allowed Congress "broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries." In fact, she contended that "in every case [before this one] where the Government has acted in its sovereign capacity to enforce a new statutory obligation through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III." She also, not surprisingly, emphasized the Court's decision in *Atlas Roofing*.

What are the implications of this decision for agency enforcement of regulatory statutes? How easy will it be for agencies (or lower court judges) to know whether civil penalties are "akin to common law claims"? For additional discussion of Seventh Amendment issues implicated by agency adjudication, see Richard Lorren Jolly, The Administrative State's Jury Problem, 98 Wash. L. Rev. 1187 (2023).

Page 209, add to the list of articles at the beginning of the first paragraph of Note 7:

Richard H. Fallon Jr., Non-Article III Federal Tribunals: An Essay on the Relation Between Theory and Practice, 99 Notre Dame L. Rev. 1691 (2024);

Page 210, add at the end of Note 7:

For an argument that, "properly understood, most administrative adjudication is fully consistent with separation of powers formalism because it involves the execution of the law by officials within the executive branch," see Robert L. Glicksman and Richard E. Levy, The New Separation of Powers Formalism in Administrative Adjudication, 90 Geo. Wash. L. Rev. 1088, 1096 (2022). For an account of the types of cases that can validly be subject to non-Article III adjudication, based on the distinction between public and private rights, see John M. Golden and Thomas H. Lee, Congressional Power, Public Rights, and Non-Article III Adjudication, 98 Notre Dame L. Rev. 1113 (2023). For additional discussion of these issues, see John M. Golden and Thomas H. Lee, Article III, the Bill of Rights, and

Administrative Adjudication, 92 Fordham L. Rev. 397 (2023). Finally, for an argument that the whole attempt to distinguish among non-Article III courts should be abandoned in favor of a renewed commitment to due process in adjudication, see Martin H. Redish and Austin Piatt, Cutting the Gordian Knot: Legislative Courts and Due Process, 99 Ind. L.J. 675 (2024).

CHAPTER II

JUSTICIABILITY

SECTION 1. ARTICLE III STANDING

Page 237, add at the end of Note 2:

The Supreme Court seemed likely to revisit tester standing in Acheson Hotels, LLC v. Laufer, 601 U.S. __, 144 S.Ct. 18 (2023). The case involved a self-described "tester," who monitored hotel websites for compliance with the Americans with Disabilities Act and its implementing regulations. By the time this case reached the Supreme Court, the plaintiff had sued over six hundred hotels that failed to state on their websites whether they had rooms accessible to the disabled. And she had "singlehandedly generated a circuit split" on standing, with some courts of appeals finding that she could bring these lawsuits, and other courts finding a lack of concrete injury, given that the plaintiff did not herself plan to stay at the hotels that she sued. The Court, however, ultimately did not reach the standing issue. While the case was pending at the Supreme Court, the plaintiff voluntarily dismissed the lawsuit against Acheson Hotels. In an opinion by Justice Barrett, the Court dismissed the case as moot.

Justice Thomas concurred in the judgment, insisting that the Court should have reached the standing issue and found no standing. He argued that, because the plaintiff "disclaimed any intent to visit the hotel," she "cast[] herself in the role of a private attorney general, surfing the web to ensure hotels' compliance" with federal law. Notably, Justice Thomas did not ask the Court to reconsider *Havens Realty* but instead asserted that this case was distinguishable, because the plaintiff here did not rely on a statute that created a "right to information." Although the Court did not resolve the issue in *Laufer*, given *Clapper*, *FEC v. Cruz*, and other recent cases on concrete injury, the scope of tester standing seems to be very much an open question.

Page 237, add a new Note after Note 2:

2A. CHALLENGES BY UNREGULATED PARTIES: *FDA V. ALLIANCE FOR HIPPOCRATIC MEDICINE*

In Food and Drug Administration v. Alliance for Hippocratic Medicine, 602 U.S. __, 144 S.Ct. 1540 (2024), four pro-life medical associations and several individual doctors

challenged regulations by the Food and Drug Administration (FDA) that had loosened restrictions on the use of mifepristone, an abortion drug. They filed suit in the Northern District of Texas before a judge known to have strong anti-abortion convictions, arguing that the regulations were adopted in violation of the Administrative Procedure Act. The doctors claimed that greater use of the drug would likely cause some pregnant women to suffer medical complications requiring emergency care, and that the doctors might end up having to treat the women and help facilitate their abortions, which would violate their consciences. They also expressed concern that having to treat women with complications from use of the drug would divert their time and resources away from treating other patients and might also increase their exposure to liability and insurance costs. The plaintiff medical associations alleged that they were injured because the FDA's actions had caused them to spend resources—both to conduct their own studies of the risks of mifepristone and to oppose the FDA's actions. The District Court enjoined the FDA's approval of mifepristone, and the Fifth Circuit largely affirmed.

In a unanimous opinion by Justice Kavanaugh, the Supreme Court reversed. While an injury to conscience can constitute an Article III injury, reasoned the Court, there was no showing that the doctors would in fact be required to treat women suffering from complications associated with the drug. The Court noted that federal law contains broad conscience protections for doctors that would allow them to decline to treat any mifepristone-related complications: "Federal law fully protects doctors against being required to provide abortions or other medical treatment against their consciences—and therefore breaks any chain of causation between [the] FDA's relaxed regulation of mifepristone and any asserted conscience injuries to the doctors." In a footnote, the Court noted that the doctors had also suggested that they were distressed by others' use of mifepristone, but the Court said that "this Court has long made clear that distress at or disagreement with the activities of others is not a basis under Article III for a plaintiff to bring a federal lawsuit challenging the legality of a government regulation allowing those activities."

As for the other possible injuries alleged by the doctors, such as diversion of their time, the Court said that these injuries were too speculative:

> The doctors have not offered evidence tending to suggest that [the] FDA's deregulatory actions have both caused an increase in the number of pregnant women seeking treatment from the plaintiff doctors *and* caused a resulting diversion of the doctors' time and resources from other patients. Moreover, the doctors have not identified any instances in the past where they have been sued or required to pay higher insurance costs because they have treated pregnant women suffering mifepristone complications. Nor have the plaintiffs offered any persuasive evidence or reason to believe that the future will be different.

Making a more general point, the Court said that it is—and should be—more difficult for plaintiffs to establish standing to challenge regulatory actions if they are not themselves

being regulated. The Court emphasized that "the plaintiffs do not prescribe or use mifepristone" and that the FDA "is not requiring them to do or refrain from doing anything." "Under Article III of the Constitution," said the Court, "a plaintiff's desire to make a drug less available *for others* does not establish standing to sue." The Court also rejected the idea that it should develop a special doctrine of "doctor standing." "Allowing doctors or other healthcare providers to challenge general safety regulations as unlawfully lax," said the Court, "would be an unprecedented and limitless approach and would allow doctors to sue in federal court to challenge almost any policy affecting public health."

As for the standing of the plaintiff associations, the Court noted that it allows associations to sue for injuries that they have sustained, but it said that associations cannot manufacture standing merely by spending money to advocate against a certain policy: "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." Otherwise, "all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies." The Court distinguished *Havens Realty* as involving a situation in which the racial steering practices in question directly impaired the plaintiff's housing counseling services. The Court also observed that "*Havens* was an unusual case, and this Court has been careful not to extend the *Havens* holding beyond its context."

Finally, the Court rejected the argument that it should allow standing in this case because otherwise there might not be anyone who could sue. The Court said that it was not clear that no one else could sue, and that, in any event, "this Court has long rejected that kind of 'if not us, who?' argument as a basis for standing."

Although Justice Thomas joined the Court's opinion, he wrote separately to question the Court's general allowance of associational standing, which he said "raises constitutional concerns by relaxing both the injury and redressability requirements for Article III standing."

The use of abortion drugs is a very charged issue politically, and yet the Court was unanimous with respect to the issue of standing. What does this unanimity suggest?

Page 238, add a footnote a at the end of Note 3:

[a] In Diamond Alternative Energy v. Environmental Protection Agency, 606 U.S. __, 145 S.Ct. __ (2025), the Supreme Court concluded that producers of gasoline and other liquid fuels had standing to challenge regulations that required automobile manufacturers to produce more electric vehicles. The D.C. Circuit had held that the redressability requirement for standing was not met because the fuel producers had not shown that automakers would respond to an invalidation of the regulations by producing fewer electric vehicles and more gasoline-powered vehicles. In an opinion by Justice Kavanaugh, the Supreme Court reversed, reasoning that "commonsense economic realities" indicated that the production of gasoline-powered vehicles would be affected by whether the regulations were upheld. It was sufficient to establish redressability, said the Court, that the plaintiffs "'show a predictable chain of events' that would likely result from judicial relief and redress the plaintiff's injury." In dissent, Justice Jackson compared the Court's willingness to accept "commonsense" in its allowance of standing here with the more demanding approach taken in some earlier cases, including *Allen v. Wright* and *Clapper v. Amnesty International*. She denied arguing that these

decisions were wrongly decided, insisting that she was "simply observing that the Court seems inconsistent in its willingness to premise redressability on commonsense inferences about third-party behavior."

Page 238, add new Notes after Note 3:

3A. *HAALAND V. BRACKEEN*

The Supreme Court also relied on the redressability requirement in Haaland v. Brackeen, 599 U.S. __, 143 S.Ct. 1609 (2023). The case involved a constitutional challenge to the Indian Child Welfare Act (ICWA), which aims to ensure that Native American children are placed with Native American families in foster care and custody cases. The suit was brought in part by non-Native Americans who sought to adopt Native American children. They claimed that "ICWA injures them by placing them on '[un]equal footing' with Indian parents who seek to adopt or foster an Indian child," because "[u]nder ICWA's hierarchy of preferences, non-Indian parents are generally last in line for potential placements."

In an opinion by Justice Barrett, the Court held that the individual plaintiffs lacked standing to challenge ICWA on equal protection grounds. The Court focused on redressability, reasoning that the present lawsuit against the federal government would do nothing to redress the plaintiffs' asserted injury, because "state courts apply the placement preferences, and state agencies carry out the court-ordered placements." Justice Barrett's opinion continued: "The state officials who implement ICWA are 'not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.'" It did not matter, the Court emphasized, that the state officials might be influenced by a federal judicial opinion invaliding ICWA on equal protection grounds: "It is a federal court's judgment, not its opinion, that remedies an injury. . . . The individual petitioners can hope for nothing more than an opinion, so they cannot satisfy Article III." The Court added, however, that the plaintiffs could still "challenge ICWA's constitutionality in state court."

What explains the Court's focus on redressability? Was there really "no reason" to expect that the state courts and agencies would feel obliged to follow an equal protection ruling by a federal court? Is the Court suggesting that redressability is satisfied only when a court's judgment will run against the relevant actor? Consider the perspective of state officials charged with implementing a federal statute: If a federal court declared the statute unconstitutional, wouldn't those state officials be disinclined to implement the statute going forward (even if they were not parties to the lawsuit)? Such obedience would seem particularly likely if the finding of unconstitutionality were affirmed by the Supreme Court. Given modern views about judicial supremacy (see the Note on *Marbury v. Madison* and Judicial Review in the Introduction to the casebook), doesn't the Court have good reason to assume in its standing analysis that non-parties will comply with its rulings about the law? At a minimum, the redressability issue seems a good deal more nuanced than the Court acknowledged.

In any event, does the Court's analysis suggest that the plaintiffs may later mount an equal protection challenge to ICWA in federal court, as long as the named defendants include state officials? Not necessarily: The federal government argued that some challengers lacked standing because their asserted injury was "speculative," given that they relied on possible future attempts "to foster or adopt Indian children." Other claims, the government asserted, were moot because the families had managed to adopt Native American child after filing suit. The Court disposed of the equal protection challenge in a way that applied to all of the individual plaintiffs, without getting into these additional issues. Nevertheless, this case, particularly when considered alongside *Uzuegbunam*, suggests that the Court has breathed new life into the redressability prong of the standing analysis.

3B. REDRESSABILITY IN DEATH PENALTY LITIGATION

A pair of recent cases raised the unusual question whether a person under sentence of death had standing to raise due process challenges to restrictions on the availability of DNA evidence that, at least allegedly, might prove exculpatory. In Reed v. Goertz, 598 U.S. 230 (2023), the Court held that the prisoner did have standing to challenge a prosecutor's refusal to allow DNA testing, even though it was not clear that a ruling in the prisoner's favor could cause the prosecutor to turn over the evidence. Redressability was nonetheless satisfied because a favorable ruling would overturn one ground supporting the prosecutor's decision. Justices Thomas, Alito, and Gorsuch dissented.

Two years later a very similar case arose from the same jurisdiction. In Gutierrez v. Saenz, 606 U.S. ___, 145 S.Ct. ___ (2025), the Fifth Circuit again found that the plaintiff lacked standing, chiefly because the lower courts had ruled that Texas law would allow new evidence only to dispute guilt or innocence, not the sentence of death. The Supreme Court followed *Reed* in ruling, again, that eliminating one rationale for denying DNA testing sufficed for redressability, even if other reasons remained: "That a prosecutor might eventually find another reason . . . to deny a prisoner's request for DNA testing does not vitiate his standing to argue that the cited reasons violated his rights under the Due Process Clause." The same three Justices dissented again, claiming that the factual differences made the cases distinguishable.

Page 240, add a new Note after Note 5:

5A. *MURTHY V. MISSOURI*

The reasoning of *Lyons* was followed and perhaps expanded in Murthy v. Missouri, 603 U.S. __, 144 S.Ct. 1972 (2024). Plaintiffs tried to enjoin government officials from pressuring social media platforms (notably Facebook) into deleting or moderating their posts. The most plausible plaintiff was Jill Hines, co-director of "Health Freedom Louisiana," which advocated against COVID-19 mask and vaccine requirements. As the dissent pointed out, there was ample evidence that White House and CDC officials had complained to Facebook about her posts and urged the company to take action. There was also evidence

that Facebook did restrict her messages. The Court nonetheless found that Hines lacked standing. As explained by Justice Barrett, one problem was that Hines (and the other plaintiffs) sought only prospective relief. Therefore, past injuries were relevant only for their "predictive value" of future harm. Here the predictive value was not great, because even though it was clear that government defendants "played a role in at least some of the platforms' moderation choices," plaintiffs could not show *specific* links between government communications and platform moderations. Moreover, there was no evidence of an ongoing pressure campaign, which made it "entirely speculative" whether future moderation decisions would be attributable to government defendants. It was true, the Court conceded, that the government-influenced suppression policies remained in effect, but the platforms remained free to enforce or not to enforce those policies. The fact that the plaintiffs were trying to enjoin government agencies and officials to prevent restrictions by someone other than the defendants—what the Court called the "one-step-removed" nature of the alleged injuries—added a further complexity. Justice Alito, joined by Justices Thomas and Gorsuch, dissented, arguing that the record at least supported Hines' standing to sue. They contended that Facebook's current policies were affected by the past government pressure and that if the government were ordered not to pressure Facebook, Hines would be less likely to be injured going forward.

Whether *Murthy* goes further than *Lyons* is a matter of debate. Certainly, plaintiff Hines made a better showing than the plaintiff in *Lyons* of the probability of future harm. But the causal link between action by the defendants and any future harm was more speculative. Perhaps not coincidentally, the Court's ruling on standing allowed it to avoid the important First Amendment question whether the government is barred from lobbying or pressuring private parties about protected expression. That question will surely return, perhaps in a suit for damages, which might avoid the standing problems that the Court found fatal in *Murthy* (but could run into other barriers, such as official immunity).

Page 240, add at the end of Note 6:

For additional discussion of this topic, see James E. Pfander, Cases Without Controversies: Uncontested Adjudication in Article III Courts (2021); Robert J. Pushaw, Jr., "Originalist" Justices and the Myth that Article III "Cases" Always Require Adversarial Disputes, 37 Const'l Commentary 259 (2022) (reviewing Pfander's book). For an argument that Congress can authorize federal courts to resolve interagency disputes even if the disputes do not qualify as Article III cases or controversies, because resolving the disputes does not involve an exercise of the judicial power, see Adam Crews, Interagency Litigation Outside Article III, 55 Conn. L. Rev. 319 (2023).

Page 241, add to the list in the last paragraph of Note 7:

Rachel Bayefsky, Public-Law Litigation at a Crossroads: Article III Standing and "Tester" Plaintiffs, 99 N.Y.U. L. Rev. 128 (2024); F. Andrew Hessick and Sarah A. Benecky, Standing and Criminal Law, 49 B.Y.U. L. Rev. 961 (2024);

Page 242, add to the citations at the end of Note 7:

Michael L. Wells, *Uzuegbunam v. Preczewski*, Nominal Damages, and the Roberts Stratagem, 56 Ga. L. Rev. 1127 (2022)

Page 242, add at the end of Note 7:

For an argument that standing doctrine should be applied less strictly in suits between private parties than in suits seeking equitable relief against the government, because the former do not implicate the same separation of powers concerns that are implicated by the latter, see Thomas P. Schmidt, Standing Between Private Parties, 2024 Wisc. L. Rev. 1.

Finally, in recent years a controversy has arisen over whether Article III requires only one plaintiff with standing to sue for the remedy sought or whether it requires each plaintiff to show standing in every case. The difference can matter in cases involving states or public interest organizations as plaintiffs. They may solidify their standing by bringing in an affected individual for whom injury and causation can readily be shown. The traditional rule allowing such litigation to go forward is ably defended in Riley T. Keenan, Minimal Justiciability, 109 Minn. L. Rev. 1653 (2025), which also provides, at 1656 n.4, an account of those who have attacked the traditional rule for facilitating litigation broader than the constitutional basis for it. These include Aaron-Andrew P. Bruhl, One Good Plaintiff is Not Enough, 67 Duke L.J. 481 (2017); William Baude and Samuel L. Bray, Proper Parties, Proper Relief, 137 Harv. L. Rev. 153, 171 (2023); Howard M. Wasserman, Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication, 23 Lewis & Clark L. Rev. 1077, 1096-97 (2020); Michael T. Morley, Disaggregating Nationwide Injunctions, 71 Ala. L. Rev. 1, 61 (2019). For an earlier defense of the traditional practice, see Joan Steinman, The Effects of Class Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be—Part 1: Justiciability and Jurisdiction (Original and Appellate), 42 U.C.L.A. L. Rev. 717, 728-31 (1995).

SECTION 2. STATUTORY STANDING

Page 254, add a new Note after Note 2:

2A. PROCEDURAL RIGHTS

Congress often seeks to control agency behavior by imposing procedural, rather than substantive, requirements. In *Lujan*, for example, the Endangered Species Act required federal agencies to consult with the Secretary of the Interior before taking any action that might adversely impact endangered species. It can be very difficult for plaintiffs to show, however, that following mandated procedures would have changed the outcome. This difficulty would seem to be a problem for plaintiffs seeking to meet the traceability and redressability requirements for standing. But, as acknowledged in footnote 7 in *Lujan*, the Supreme Court has long relaxed these requirements in suits seeking to vindicate procedural rights. As the Court also noted in *Lujan*, however, this "procedural standing" doctrine does not remove the need for the plaintiff to show an injury, and the violation of a procedure,

without more, is not viewed as a sufficient injury for purposes of standing. The *Lujan* plaintiffs thus still had to show that they had a concrete and particularized interest in the endangered species threatened by the construction projects that the government was helping to fund.

The Supreme Court recently confirmed this point about injury in Dep't of Education v. Brown, 600 U.S. __, 143 S.Ct. 2343 (2023). The case concerned a plan by the Secretary of Education to discharge billions of dollars in student loan debt, based on authority allegedly provided by the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The amount of relief under the plan depended on various factors, including the borrower's income and the type of loan the borrower held. Two borrowers who did not qualify for maximum debt relief under the plan sued the Department of Education, arguing that the Secretary had promulgated the plan without following statutorily-required procedures concerning negotiated rulemaking and notice and comment. In addition to claiming procedural violations, the borrowers claimed that the Secretary lacked authority under the HEROES Act to issue *any* broad-based loan forgiveness. They expressed the hope that, if they prevailed in their suit, the Secretary would shift to relying on *another* statute—the Higher Education Act of 1965 (HEA)—that allegedly provided sufficient authority for such a plan, and that in the process of doing so he might be convinced to adopt a plan that would be more generous to them.

In holding that the suit should be dismissed for lack of standing, the Court, in a unanimous opinion by Justice Alito, first explained that the plaintiffs had not shown a sufficient injury:

> They claim they are injured because the Government has not adopted a lawful benefits program under which they would qualify for assistance. But the same could be said of anyone who might benefit from a benefits program that the Government has not chosen to adopt. It is difficult to see how such an injury could be particular (since all people suffer it) or concrete (since an as-yet-uncreated benefits plan is necessarily "'abstract'" and not "'real'").

But the Court said that "the deficiencies of [the plaintiffs'] claim are clearest with respect to traceability." While it is true, the Court acknowledged, that "in procedural-standing cases, we tolerate uncertainty over whether observing certain procedures would have led to (caused) a different substantive outcome," here the uncertainty extended to whether a different substantive outcome might or might not have been adopted in different circumstances. In light of this uncertainty, the Court concluded that the plaintiffs had failed to meet the traceability requirement:

> [T]he Department's decision to give *other* people relief under a *different* statutory scheme did not *cause* [the plaintiffs] not to obtain the benefits they want. The cause of their supposed injury is far more pedestrian than that: The Department has simply *chosen* not to give them the relief they want.

A different way of framing this point is as follows: Someone injured by the outcome of an administrative action can sue to challenge the action based on the violation of a procedural right, without having to show that the violation caused the outcome. But here the purported injury to the plaintiffs—not receiving the maximum debt relief—was not even traceable to the administrative action itself, given their contention that it should not have produced *any* debt relief. Consider also the potential implications of the plaintiffs' position on standing for other cases: it might mean that the legality of any government benefit could be challenged by anyone who might receive benefits if the plan were invalidated and refashioned, a proposition that could open up a vast amount of litigation. These features of the case probably explain why the decision was unanimous.[b]

Putting aside the unusual nature of the plaintiffs' claim in the student loans case, why is it that the traceability and redressability requirements are relaxed in cases asserting violations of procedural rights? Does this mean that these requirements (unlike the injury requirement) are prudential rather than mandated by Article III? For additional discussion of the procedural standing doctrine, see, for example, Evan Tsen Lee and Josephine Mason Ellis, The Standing Doctrine's Dirty Little Secret, 107 Nw. U. L. Rev. 169 (2012), and Richard J. Pierce, Jr., Making Sense of Procedural Injury, 62 Admin. L. Rev. 1 (2010).

Page 259, add at the end of Note 4:

For an argument that Justice Thomas's position is difficult to justify on originalist grounds, see Owen B. Smitherman, History, Public Rights, and Article III Standing, 47 Harv. J.L. Pub. Pol'y 169 (2024).

Page 262, add a footnote c at the end of Note 5:

[c] For historical criticism of the reasoning of *TransUnion*, see James E. Pfander, Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World, 92 Fordham L. Rev. 469 (2023). Pfander argues that private enforcement of public norms, which the *TransUnion* Court saw as an innovation of the 1970s, in fact dates back to the earliest days of the Republic.

Page 265, add at the end of Note 8:

For a wide-ranging discussion of how courts after *TransUnion* should apply standing doctrine to injuries that involve a mere probability of harm, see Curtis A. Bradley and Ernest A. Young, Standing and Probabilistic Injury, 122 Mich. L. Rev. 1557 (2024). For a recent commentary on the requirement of injury in fact in statutory standing cases, see Elizabeth Earle Beske, Charting a Course Past *Spokeo* and *TransUnion*, 29 Geo. Mason L. Rev. 729 (2022). See also Jonathan R. Siegel, The New Standing Problem and Its Legislative Solution, 109 Iowa L. Rev. 299 (2023) (arguing that "the qui tam mechanism should

[b] In a companion case, Biden v. Nebraska, 600 U.S. __, 143 S.Ct. 2355 (2023), the Court held (in a suit brought by, among others, the state of Missouri) that the debt-relief plan was not authorized by the HEROES Act and thus was invalid. President Biden quickly announced that his administration planned to develop a new plan for debt relief under the HEA.

solve the standing problem posed by cases such as *TransUnion*. If Congress desired to restore the ability of plaintiffs to seek statutory damages even if they have not suffered the kind of injury that the Supreme Court would recognize as sufficient to permit them to do so, Congress could accomplish this goal by providing that a defendant who violated the [relevant statute] would owe a civil penalty to the United States that could be collected by a relator in a qui tam action."). For a critique of the ability of organizations to sue based on injury to their members, see Michael T. Morley and F. Andrew Hessick, Against Associational Standing, 91 U. Chi. L. Rev. 1539 (2024).

Page 280, add a new Note after Note 8:

8A. QUI TAM ACTIONS

Federal law has long allowed certain "qui tam" actions—that is, suits in which private parties (referred to as "relators") are allowed to vindicate the interests of the government. For example, the False Claims Act, 31 U.S.C. §§ 3729-3733, which dates back to the Civil War, allows private parties to bring claims against other private parties for defrauding the government. These actions are brought "in the name of the government." If the action leads to a recovery, the relator may receive up to 30 per cent of the total award. The statute imposes a number of restrictions on these actions. The suit must be filed under seal and a copy of the complaint must be given to the government, which can elect to intervene and conduct the action. Even if the government elects not to intervene initially, it can do so later in the litigation if it shows good cause. Once brought, the action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."

The Supreme Court rejected an Article III challenge to this scheme in Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000). In that case, an individual sued a state agency under the False Claims Act for allegedly submitting fraudulent claims to the Environmental Protection Agency in connection with federal grant programs. In an opinion by Justice Scalia, the Court held that the suit was consistent with the Article III requirements for standing. To be sure, said the Court, the mere possibility of obtaining a bounty is not by itself sufficient for standing, because "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." But the Court concluded that a relator can be considered an assignee of the government's claim, and assignees have long been assumed to have standing. This conclusion was confirmed, said the Court, "by the long tradition of *qui tam* actions in England and the American colonies." There was no dissent on this issue. (The majority proceeded to conclude that the qui tam provision in the statute did not contain a clear statement authorizing a damages action against a state or state agency and thus was barred by state sovereign immunity.)

Several Supreme Court Justices have recently raised questions about whether the qui tam device is consistent with *Article II* of the Constitution, which vests the executive power in the President and sets forth requirements for the appointment of federal officers. See United States ex rel. Polansky v. Executive Health Resources, Inc., 599 U.S. __, 143 S.Ct. 1720 (2023) (concurrence by Justices Kavanaugh and Barrett and dissent by Justice Thomas). For an argument that "just as Congress has power to confer Article III standing on uninjured *qui tam* informers, Congress also has power to authorize statutory damage claims such as those rejected in *TransUnion*," see Randy Beck, *TransUnion*, *Vermont Agency*, and Statutory Damages Under Article III, 77 Fla. L. Rev. 161, 165-66 (2025).

SECTION 4. LEGISLATIVE AND STATE GOVERNMENTAL STANDING

Page 299, add a new Note after Note 6:

6A. *RECENT DEVELOPMENTS IN STATE STANDING*

The plot continues to thicken with respect to state standing. In the 2022 Term, the Supreme Court issued three decisions that pointed in different directions.

In Haaland v. Brackeen, 599 U.S. __, 143 S.Ct. 1609 (2023), the Court rejected Texas's effort to challenge the Indian Child Welfare Act (ICWA) on equal protection and nondelegation grounds. The equal protection claim alleged that, in foster care and adoption proceedings for Native American children, ICWA impermissibly gives a preference to Native American over non-Native American families. The state also claimed that a provision of the statute impermissibly delegates to Native American tribes the power to adjust those placement preferences.

In an opinion by Justice Barrett, the Court held that the state lacked standing to raise these claims. The Court noted that the state "has no equal protection rights of its own, and it cannot assert equal protection claims on behalf of its citizens because '[a] State does not have standing as parens patriae to bring an action against the Federal Government.'" The Court thus reaffirmed the longstanding rule that states cannot sue the United States as the representative of private citizens to enforce their federal rights. The Court added: "Because Texas is not injured by the placement preferences, neither would it be injured by a tribal resolution that altered those preferences." Accordingly, the state lacked standing to bring the nondelegation claim as well.

The Court also seemingly put some boundaries around the standing-through-inseverability theory advanced by some Justices in *California v. Texas*. In *Haaland*, Texas argued that it suffered a "direct pocketbook injury associated with the costs of keeping records, providing notice in involuntary proceedings, and producing expert testimony before moving a child to foster care or terminating parental rights." But relying on Justice Breyer's opinion for the Court in *California v. Texas*, the *Haaland* Court pointed out that "these alleged costs are not 'fairly traceable' to the placement preferences, which 'operate independently' of the provisions Texas identifies." Justice Barrett's opinion continued: "The

provisions do not rise or fall together; proving that the placement preferences are unconstitutional 'would not show that enforcement of any of these other provisions violates the Constitution.'"

By contrast, in Biden v. Nebraska, 600 U.S. __, 143 S.Ct. 2355 (2023), the Court upheld state standing in a closely-watched challenge to the Biden Administration's student loan forgiveness plan. In the wake of the COVID-19 pandemic, the Secretary of Education opted to forgive up to $10,000 or $20,000 in loans for qualifying borrowers, relying on the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). Several states challenged this loan forgiveness plan, arguing that it was not authorized by the HEROES Act.

In an opinion by Chief Justice Roberts, the Court held that at least Missouri had standing to bring the suit. The Court found that the loan forgiveness plan harmed the Missouri Higher Education Loan Authority (MOHELA), a nonprofit corporation created by the state to service federal loans. The Court explained that "MOHELA receives an administrative fee for each of the five million federal accounts it services," and "[u]nder the Secretary's plan, roughly half of all federal borrowers would have their loans completely discharged. MOHELA could no longer service those closed accounts, costing it, by Missouri's estimate, $44 million a year in fees that it otherwise would have earned under its contract with the Department of Education." Accordingly, MOHELA suffered an "injury in fact directly traceable to the Secretary's plan." The Court further found that under state law, "MOHELA is a 'public instrumentality' of the State," such that "[t]he plan's harm to MOHELA is also a harm to Missouri." The majority opinion then went on to hold that the loan forgiveness plan exceeded the Secretary's statutory authority.

In a dissent joined by Justices Sotomayor and Jackson, Justice Kagan argued that none of the plaintiff states had standing to challenge the student loan forgiveness plan. Justice Kagan strongly disputed the Court's reading of Missouri state law—that MOHELA was an arm of the state—while agreeing that MOHELA itself would have standing to challenge the plan. Justice Kagan insisted that all the states, including Missouri, filed suit because they thought "the Secretary's loan cancellation plan makes for terrible, inequitable, wasteful policy." But she argued: "We do not allow plaintiffs to bring suit just because they oppose a policy. . . . In giving those States a forum—in adjudicating their complaint—the Court forgets its proper role." On the merits, the dissent argued that the student loan forgiveness plan was authorized by the HEROES Act.

To complicate the story further, the Court again denied state standing in United States v. Texas, 599 U.S. __, 143 S.Ct. 1964 (2023), which involved the executive branch's implementation of federal immigration law. Texas and Louisiana challenged the Biden Administration's immigration enforcement guidelines, which "prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently." The states argued

that the relevant statutes require the federal government to arrest more undocumented immigrants pending removal. The states claimed that the federal government's "failure to comply with those statutory mandates imposes costs on the States," because the states "must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government."

In an opinion by Justice Kavanaugh, the Court rejected what it characterized as the states' request that "the Federal Judiciary . . . order the Executive Branch to alter its arrest policy so as to make more arrests." The Court found that the states' alleged injury—incurring "additional costs because the Federal Government is not arresting more noncitizens"—was not judicially cognizable, because it did not accord with history or tradition. The Court declared: "The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions."

"On the contrary," the Court continued, "[we have] previously ruled that a plaintiff lacks standing to bring such a suit." The Court relied heavily on Linda R.S. v. Richard D., 410 U.S. 614 (1973), where the Court rejected a lawsuit brought by a mother, challenging on equal protection grounds a state policy that declined to criminally prosecute for failure to pay child support parents of children born out of wedlock. The Court emphasized a statement from *Linda R.S.* that "in 'American jurisprudence at least,' a party 'lacks a judicially cognizable interest in the prosecution . . . of another.'"[e] The Court stated its "Article III holding in *Linda R.S.* applies to challenges to the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute."

The Court added that the denial of standing in such cases made sense, given that "lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law." Indeed, in the immigration context, "the Executive's enforcement discretion implicates not only 'normal domestic law enforcement priorities' but also 'foreign-policy objectives.'" Moreover, "courts generally lack meaningful standards for assessing the propriety" of the federal government's arrest and prosecution choices, especially where (as here) the federal government simply lacks the resources to arrest every undocumented immigrant. Nevertheless, the Court did not rule out the possibility of standing in at least some cases challenging executive enforcement policies.

Concurring in the judgment, and joined by Justices Thomas and Barrett, Justice Gorsuch argued that the problem was redressability, rather than lack of injury. Justice Gorsuch's opinion asserted that a federal statute—8 U.S.C. § 1252(f)(1)—denies lower federal court "jurisdiction or authority to enjoin or restrain the operation of" certain immigration laws, including those at issue in this case. Nor could a district court avoid this limitation

[e] Notably, the quote from *Linda R.S.* referred to a private plaintiff: "[I]n American jurisprudence at least, a *private citizen* lacks a judicially cognizable interest in the prosecution or nonprosecution of another." (Emphasis added.)

by simply "vacating" the executive's policy, on the assumption that federal officials would "alter their arrest and prosecution priorities in light of a judicial opinion reasoning that the Guidelines are unlawful." Relying on the Court's analysis in *Haaland v. Brackeen* as to private party standing (discussed in Chapter I, Section 1, Note 3A of this Supplement), Justice Gorsuch's opinion declared: "'It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability.'"[f] Justice Barrett filed a separate concurrence, joined by Justice Gorsuch, that took issue with the Court's reliance on *Linda R.S.* That case, Justice Barrett argued, was principally about redressability as well: "[T]he prospect that prosecution would lead to child-support payments could, 'at best, be termed only speculative.'"

Justice Alito alone dissented, contending that at least Texas had incurred financial costs due to the enforcement policy. The dissenting opinion further argued (in response to Justice Gorsuch's concurrence) that this injury was redressable, because federal executive officials would obey a judicial decision invalidating the policy, with or without an injunction. Moreover, Justice Alito asserted, the Supreme Court itself still had the authority to issue an injunction.

One notable aspect of the Court's analysis in *United States v. Texas* is that it did not treat the states as special plaintiffs. Justice Kavanaugh's opinion for the Court dropped a footnote, observing that the states had sought to rely on *Massachusetts v. EPA* but finding that case distinguishable:

> As part of their argument for standing, the States also point to Massachusetts v. EPA, 549 U.S. 497 (2007). Putting aside any disagreements that some may have with *Massachusetts v. EPA*, that decision does not control this case. The issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion.

The Court's reference to "disagreements that some may have with *Massachusetts v. EPA*" raises questions about the continuing force of that decision. Justice Gorsuch's concurrence, joined by Justices Thomas and Barrett, was more explicit:

> In *Massachusetts v. EPA*, the Court . . . thought the State's claim of standing deserved "special solicitude." I have doubts about that move. Before *Massachusetts v. EPA*, the notion that States enjoy relaxed standing rules "ha[d] no basis in our jurisprudence." Nor has "special solicitude" played a meaningful role in this Court's decisions in the years since. Even so, it's hard not to wonder why the Court says nothing about "special solicitude" in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.

[f] Justice Gorsuch's opinion went on to raise questions about nationwide injunctions, a topic discussed in Chapter V, Section 3 of the casebook.

This discussion led Justice Alito's dissenting opinion to wonder whether *Massachusetts v. EPA* was still good law:

> The obvious parallel to the case before us is *Massachusetts v. EPA* . . . . In that prior case, Massachusetts challenged the Environmental Protection Agency's failure to use its civil enforcement powers to regulate greenhouse gas emissions that allegedly injured the Commonwealth. . . . Proclaiming that Massachusetts' standing claim was entitled to "special solicitude," the Court held that the Commonwealth had standing. . . .
>
> Despite the clear parallel with this case and the States' heavy reliance on *Massachusetts* throughout their briefing, the majority can only spare a passing footnote for that important precedent. It first declines to say *Massachusetts* was correctly decided and references the "disagreements that some may have" with that decision. But it then concludes that Massachusetts "does not control" since the decision itself refers to "'key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action'"….
>
> So rather than answering questions about this case, the majority's footnote on *Massachusetts* raises more questions about *Massachusetts* itself—most importantly, has this monumental decision been quietly interred?

What should future litigants and lower federal courts make of all this? State plaintiffs have since 2007 increasingly relied on *Massachusetts v. EPA* to attempt to bring lawsuits against the federal government. Without directly calling into question the notion that states have "special solicitude" in the standing analysis, the Supreme Court in each of these recent cases seemed to treat states like any other plaintiff. Indeed, none of the Justices in *Haaland v. Brackeen* or *Biden v. Nebraska* even invoked the concept of "special solicitude," and the Court upheld state standing on a very narrow ground in the student loan case (a ground that turned on state law and thus may not be easily replicated in future litigation). Meanwhile, three Justices in *United States v. Texas* signaled that they "have doubts" about the concept of "special solicitude" for state plaintiffs.

Will these recent decisions stem the attempts by states to sue the federal government? Or will state plaintiffs continue to sue—with the blessing of lower federal courts—unless and until the Supreme Court more definitively puts the breaks on the concept of "special solicitude"?

Page 300, add at the end of the first paragraph of Note 7:

For criticism of *Raines* as unnecessarily broad and a wide-ranging review of separation-of-powers litigation and the advantages in some contexts of allowing institutional stakeholders rather than affected individuals to bring such claims, see Elizabeth Earle Beske, Litigating the Separation of Powers, 73 Ala. L. Rev. 823 (2022). For an argument that the

federal courts should address more interbranch disputes, using traditional equitable principles, see Jonathan David Shaub, Interbranch Equity, 25 J. Const. L. 780 (2023).

Page 300, add after the first sentence of the third full paragraph of Note 7:

See also William Baude and Samuel L. Bray, Proper Parties, Proper Relief, 137 Harv. L. Rev. 153 (2023) (urging the Court to be more skeptical of state suits against the federal government).

Page 300, add at the end of the second sentence of the third full paragraph of Note 7:

; see also Jed Handelsman Shugerman, *Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine, 2023 Cato Sup. Ct. Rev. 209.

Page 300, add at the end of the third full paragraph of Note 7:

For a different perspective on these issues, see Joshua Perry, What Happened to Traceability?, 137 Harv. L. Rev. F. 317 (2024) (doubting that *Massachusetts v. EPA* led to the rise in state lawsuits). For more on state standing, see Jacob Hamburger, State Standing After *United States v. Texas*, 66 B.C. L. Rev. 1 (2025) (exploring the proper scope of state standing in the immigration context); Ann Woolhandler and Julia D. Mahoney, State Standing After *Biden v. Nebraska*, 2023 Sup. Ct. Rev. 303 (advocating limits on state standing).

Page 300, add to the end of the final paragraph of Note 7:

For an argument that federal appellate courts have not, in practice, granted states the "special solicitude" that some commentators presume, see Katherine Mims Crocker, Not-So-Special Solicitude, 109 Minn. L. Rev. 815, 821 (2024) (asserting that the "special solicitude" concept "appears to have affected the outcome in few if any cases").

Page 300, add at the end of Note 7:

For an exploration of the Supreme Court's approach to state standing in its original jurisdiction cases, see Heather Elliott, Original Discrimination: How the Supreme Court Disadvantages Plaintiff States, 108 Iowa L. Rev. 175 (2022) (arguing that "[t]he Court's discretionary control of its original docket systematically disadvantages plaintiff states" by, for example, requiring them to make a heightened showing of "substantial" injury).

SECTION 5. RIPENESS AND MOOTNESS

Page 318, add at the end of Note 2:

FBI v. Fikre, 601 U.S. __, 144 S.Ct. 771 (2024), offers another application of these principles. The plaintiff, a U.S. citizen, challenged on federal constitutional grounds his placement on the federal government's No Fly List. He alleged that, when he traveled to Sudan, FBI agents informed him that he was on the list, questioned him about the Portland, Oregon mosque where he worshipped, and threatened to keep him on the list if he refused

their request to serve as an informant against his fellow worshippers. After the lawsuit was filed, the government removed the plaintiff from the list and stated that it would not put him back on it "based on currently available information." The government argued, on this basis, that the case was moot.

In an opinion by Justice Gorsuch, the Court unanimously held that the case was not moot. The Court underscored that a defendant, including a government defendant, has a "formidable burden" to show that its challenged conduct cannot "reasonably be expected to recur." "Were the rule more forgiving," the Court admonished, "a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat this cycle as necessary until it achieves all of its allegedly unlawful ends." The Court found that the government had failed to meet its burden. "[T]he government's sparse declaration" that it would not place the plaintiff back on the No Fly List "based on currently available information" "falls short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past."

Page 323, add a new Note after Note 6:

7. *MOORE V. HARPER*

A complicated issue of mootness arose in Moore v. Harper, 600 U.S. __, 143 S.Ct. 2065 (2023), a case concerning the constitutionality of state court review of partisan gerrymandering of electoral districts. In 2021, the North Carolina legislature passed a law approving new districting maps for use in elections, including for elections to the U.S. House of Representatives. Various groups and individuals challenged the maps, arguing that they constituted improper partisan gerrymandering in violation of the state constitution. The North Carolina Supreme Court, in a decision referred to as *Harper I*, held that this dispute did not present a nonjusticiable political question under North Carolina law,[a] and it agreed with the plaintiffs that the maps violated the state constitution. It therefore enjoined the use of those maps and remanded the case to the state trial court to oversee the drawing of new maps. The state legislature quickly adopted a remedial districting plan, but the trial court rejected that plan and adopted interim district maps that had been developed by Special Masters appointed by the court.

Members of the state legislature, who were defendants in the case, then sought U.S. Supreme Court review. In challenging the holding in *Harper I*, they relied on the Elections Clause of the U.S. Constitution, which states in relevant part that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*." (Emphasis added.) The legislators claimed that, as a result

[a] As discussed in Chapter II, Section 6 of the casebook, the Supreme Court had held in Rucho v. Common Cause, 588 U.S. __, 139 S.Ct. 2484 (2019), that a *federal* constitutional challenge to partisan gerrymandering presents a political question that is not justiciable in the federal courts. The North Carolina Supreme Court reasoned that "simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts."

of this Clause, state constitutions cannot limit the authority of state legislatures to determine electoral districts—a claim known as the "Independent State Legislature Theory." After the U.S. Supreme Court agreed to hear the case, the North Carolina Supreme Court issued a decision, in a case referred to as *Harper II*, agreeing with the trial court that the legislature's proposed remedial plan did not meet the requirements in *Harper I*. But the North Carolina Supreme Court (after a change in membership) subsequently granted rehearing in those proceedings, and then proceeded to "overrule" *Harper I*, holding, in *Harper III*, that partisan gerrymandering claims are not justiciable under North Carolina law after all. On this basis, the court dismissed the plaintiffs' claims with prejudice.

Justice Thomas concluded that these developments made the appeal to the U.S. Supreme Court moot:

> *Harper I* has been overruled, and plaintiffs-respondents' claims for relief have been dismissed on adequate and independent state-law grounds. As a result, petitioners' alternative Elections Clause defense to those claims no longer requires decision; the merits of that defense simply have no bearing on the judgment between the parties in this action. That is the definition of mootness for an issue.
>
> It follows that no live controversy remains before this Court. For any case or controversy to exist here, petitioners must be injured by the judgment below, and we must be able to redress that injury by acting upon that judgment. But petitioners are not injured by the judgment of *Harper I* at all, nor could we redress any injury to petitioners by doing anything to it. Whether we accept or reject petitioners' Elections Clause defense, plaintiffs-respondents' claims remain dismissed. As far as this case is concerned, there simply is nothing this Court could decide that could make any difference to who wins or what happens next in any lower court.

But Thomas (who was joined in his mootness analysis by Justices Gorsuch and Alito) was in dissent. A majority of the Court, in an opinion by Chief Justice Roberts, concluded that there was still a live controversy:

> The plaintiffs here sought to enjoin the use of the 2021 plans enacted by the legislative defendants. *Harper I* granted that relief, and in doing so rejected the Elections Clause defense at issue before us. Prior to both the appeal and rehearing proceedings in *Harper II*, the North Carolina Supreme Court had already entered the judgment and issued the mandate in *Harper I*. And the time during which the defendants could seek re-hearing as to that judgment had long since passed. Recognizing this reality, the legislative defendants did not ask the North Carolina Supreme Court to disturb the judgment in *Harper I* as part of the rehearing proceedings. They instead acknowledged that they would remain bound by *Harper I*'s decision enjoining the use of the 2021 plans.
>
> The North Carolina Supreme Court "overruled" *Harper I*, thereby granting the specific relief requested by the legislative defendants. As a result, partisan

gerrymandering claims are no longer justiciable under the State's Constitution. But although the defendants may now draw new congressional maps, they agree that the North Carolina Supreme Court overruled only the "*reasoning* of *Harper I*" and did not "disturb . . . its judgment nor . . . alter the presently operative statutes of North Carolina." Second Supp. Letter Brief for Petitioners 3. In other words, although partisan gerrymandering claims are no longer viable under the North Carolina Constitution, the North Carolina Supreme Court has done nothing to alter the effect of the judgment in *Harper I* enjoining the use of the 2021 maps. As a result, the legislative defendants' path to complete relief runs through this Court.

Were we to reverse the judgment in *Harper I*—a step not taken by the North Carolina Supreme Court—the 2021 plans enacted by the legislative defendants would again take effect. The parties accordingly continue to have a "personal stake in the ultimate disposition of the lawsuit." Chafin v. Chafin, 568 U.S. 165, 172 (2013) (internal quotation marks omitted).

A North Carolina statute with specific application to this proceeding confirms that the controversy before us remains live. Under state law, if "the United States Supreme Court . . . reverses" the decision in *Harper I*, the 2021 maps will again become "effective." 2022 N.C. Sess. Laws p. 10, § 2. We have previously found such trigger provisions—in North Carolina, no less—sufficient to avoid mootness under Article III. See Hunt v. Cromartie, 526 U.S. 541, 546 n. 1 (1999) ("Because the State's 1998 law provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court . . . this case is not moot.").[b]

The Court proceeded to reject the Independent State Legislature Theory, holding that "[s]tate courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause." As a result, it affirmed the judgment of the North Carolina Supreme Court in *Harper I*.

Justice Thomas responded to the majority's mootness analysis as follows:

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[b] The Court also held that the judgment in *Harper I* was sufficiently final to satisfy 28 U.S.C. § 1257, which limits Supreme Court review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." As discussed in Chapter VI, Section 3 of the casebook, the Supreme Court has interpreted this limitation flexibly to allow for Supreme Court review under various circumstances in which state proceedings are still ongoing, including in "cases . . . in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." Relying on this proposition, the Court reasoned: "By striking down the 2021 congressional plans enacted by the General Assembly, *Harper I* 'finally decided' the 'federal issue' whether the Elections Clause insulates state legislatures from review by state courts for compliance with state law. That issue both has survived and requires decision because subsequent proceedings have neither altered *Harper I*'s analysis of the federal issue nor negated the effect of its judgment striking down the 2021 plans." Justice Thomas disputed this conclusion for the same reasons that he disputed the majority's holding about mootness.—[Footnote by eds.]

[The Court] relies extensively on petitioners' "representations" that they "remain bound by the judgment in *Harper I*." But, of course, parties' mere representations that they are injured never carry their "burden of *demonstrating* that they have standing" in this Court. TransUnion LLC v. Ramirez, 594 U.S. __, __, 141 S.Ct. 2190, 2207 (2021) (emphasis added). . . .

. . . But the error that actually drives the majority's conclusion is much deeper. The majority evidently thinks that when *Harper I* held the 2021 Act unconstitutional, it entered a "judgment" affecting the 2021 Act *as a statute*, independent of its application to the legal rights of the litigants in this case. And the majority thinks that to reverse *Harper I*'s "judgment" would "negate the force of its order striking down" the Act, thus "alter[ing] the presently operative statutes of North Carolina." But, of course, the judicial power does not "operate on legal rules in the abstract"; it operates on the rights and liabilities of contending parties with adverse legal interests. California v. Texas, 593 U.S. __, __, 141 S.Ct. 2104, 2115 (2021) (internal quotation marks omitted). The majority's reasoning cannot be squared with the judicial power vested by the Constitution, the case-or-controversy requirement, or the nature of judicial review. . . .

How could petitioners still be injured, and what more could this Court possibly do for them? The majority suggests that the interlocutory injunction issued in *Harper I* still harms petitioners, but that idea is untenable. To start, the majority overlooks that the injunction only ran against the conduct of defendants-respondents—the state officials who actually implement election laws—not petitioners as legislators. Next, the majority fails to consider what it would mean if the injunction is still binding: that defendants-respondents are liable to "be held in contempt and put in jail" if they ever implement the 2021 Act, Richmond Cty. Bd. of Ed. v. Cowell, 254 N.C. App. 422, 426, 803 S.E. 2d 27, 30-31 (2017), even though *Harper III* dismissed this suit's challenge to the Act as "beyond the reach of [North Carolina's] courts." That idea defies both common sense and civil procedure. A court simply does not go on enforcing an interlocutory injunction—and imposing contempt sanctions for disobedience—after reaching a final judgment dismissing every relevant claim for relief. . . .

[T]o the extent the trigger provision [in the 2022 North Carolina statute] adds anything to the majority's analysis, it only underscores the absence of a justiciable case or controversy. A state legislature is free to condition the effectiveness of a change in state law on external events, including this Court's actions in cases properly before it. But, as should be obvious, such a trigger provision cannot be the entire basis of an Article III case or controversy. Where, as here, the Court cannot affect the adjudicated rights and liabilities of the parties in the case below, a state legislature cannot manufacture a justiciable controversy by providing that state law will change in some way depending on how this Court answers a moot question.

That would simply be a roundabout way of asking this Court to render an advisory opinion.

Who has the better of the argument? In concluding that the case was not moot, might the Court have been influenced by its perception of the importance of resolving the merits of the Elections Clause issue? Did it matter that the alleged mootness occurred after the Supreme Court had granted review?

SECTION 6. THE POLITICAL QUESTION DOCTRINE

Page 341, add at the end of Note 1:

For a historical account of how the political question doctrine "emerged in part to allow the political branches, rather than the courts, to make determinations about this country's—and other countries'—rights and responsibilities under international law," see Curtis A. Bradley, The Political Question Doctrine and International Law, 91 Geo. Wash. L. Rev. 1555 (2023).

Page 363, add at the end of footnote a:

The North Carolina Supreme Court affirmed this rejection of the political question doctrine in Harper v. Hall, 868 S.E.2d 499 (N.C. Sup. Ct. 2022), noting that "simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts." But, after a change in membership, the North Carolina Supreme Court overruled its earlier decision and held that a state constitutional challenge to partisan gerrymandering presents a nonjusticiable political question. See Harper v. Hall, 886 S.E.2d 393 (N.C. Sup. Ct. 2023). The court relied heavily on the U.S. Supreme Court's reasoning in *Rucho*, calling it "insightful and persuasive," without purporting to be bound by it.

Page 364, add at the end of Note 2:

Most assessments of the political question doctrine have focused only on the Supreme Court. For a study that finds that the doctrine has a more vibrant life in the lower courts than in the Supreme Court, see Curtis A. Bradley and Eric A. Posner, The Real Political Question Doctrine, 75 Stan. L. Rev. 1031 (2023). Based on a quantitative and qualitative analysis of lower court decisions since *Baker v. Carr*, the authors find that the lower courts regularly apply the doctrine, especially in the foreign affairs context; that they take into account prudential considerations; and that they often apply the doctrine in non-constitutional cases (that is, cases involving claims brought under federal statutes, state law, or international law). The authors conclude that the doctrine is "a screening mechanism that the lower courts use to take account of limits on their institutional capacity" and that the Supreme Court has less need for the doctrine because of its discretionary certiorari jurisdiction and its greater institutional authority. The authors also contend that "the political question doctrine does not typically have the effect of permanently disallowing adjudication of an issue. Instead, declarations by the courts that an issue is political simply mean that the courts will not exercise their own judgment until the legal materials become clearer, something that can typically be accomplished by Congress through statute." For recent discussions of related issues, see Z. Payvand Ahdout, Separation-of-Powers Avoidance,

132 Yale L.J. 2360, 2363 (2023) (describing how "courts deploy avoidance techniques to prevent or allay clashes with coordinate branches"); Thomas P. Schmidt, Judicial Minimalism in the Lower Courts, 108 Va. L. Rev. 829, 832 (2022) (contending that "the institutional situation of lower courts makes judicial minimalism in most of its forms a particularly compelling model for a lower court judge"). For a more general defense of "judicial institutionalism"—that is, actions by the federal courts that are designed to promote the judiciary's long-term interests, especially with respect to legitimacy and efficient administration—see Rachel Bayefsky, Judicial Institutionalism, 109 Cornell L. Rev. 1297 (2024).

CHAPTER III

ADDITIONAL PROBLEMS IN JUSTICIABILITY

SECTION 2. STANDING TO APPEAL

Page 413, add a new Note after Note 1:

1A. *WEST VIRGINIA V. EPA*

Standing-to-appeal issues are not limited to constitutional cases in which the Executive Branch declines to defend a law. These issues can also arise in statutory interpretation and administrative law, as illustrated by West Virginia v. EPA, 597 U.S. __, 142 S.Ct. 2587 (2022). That case involved the Environmental Protection Agency's authority under the Clean Air Act to regulate carbon dioxide emissions from power plants.

The case has a complex procedural history. In 2015, under the Obama administration, the EPA adopted the Clean Power Plan, which sought to reduce emissions by, for example, requiring plants to rely less on electricity and instead to use natural gas, wind, or solar sources. But the Plan was put on hold in litigation and never went into effect. Then under the Trump administration, the EPA reconsidered the Clean Power Plan and formally repealed it in 2019. Several states filed petitions for review in the D.C. Circuit Court of Appeals to challenge that repeal, while other states intervened to defend the Trump EPA's decision. The D.C. Circuit vacated the repeal after finding that it was based on a mistaken reading of the Clean Air Act and remanded to the agency for further consideration. Soon thereafter, President Biden took office. Under the Biden administration, the EPA asked the D.C. Circuit to stay its mandate in the case, so that the Clean Power Plan would not go back into effect, explaining that the EPA was considering a new rule entirely. The D.C. Circuit granted that request. The states that had intervened to defend the Trump administration's repeal of the Clean Power Plan then sought further review in the Supreme Court. The federal government responded in part that the states lacked standing to appeal, because there was no existing federal regulation—and thus nothing that could injure the states.

In an opinion by Chief Justice Roberts, the Supreme Court held that the states had standing to appeal. The Court stated that standing to appeal requires an injury "'fairly traceable to the *judgment below*.'" The Court reasoned that the intervening states were so injured, because the D.C. Circuit's decision vacating the Trump administration's repeal of the Clean Power Plan "purports to bring the Clean Power Plan back into legal effect. Thus, to the extent the Clean Power Plan harms the states, the D.C. Circuit's judgment inflicts the same injury." There was "'little question,'" the Court stated, that the Obama-era Plan "does injure the States, since they are 'the object of' its requirement that they more stringently regulate power plant emissions within their borders."

In response to the government's argument that the Biden administration's decision not to reinstate the Clean Power Plan—and instead to craft a new rule—had eliminated any possible injury to the states, the Court stated that the argument was one about mootness, not standing. The government, asserted the Court, was arguing that an exception to mootness applied: voluntary cessation. Thus, said the Court, the government's "mootness argument boils down to its representation that EPA has no intention of enforcing the Clean Power Plan prior to promulgating" a new rule. But the Court found that the government could not satisfy the heavy burden of proving that it was "'absolutely clear'" that the wrong would not recur. The government could always change its position and (relying on the D.C. Circuit decision) start enforcing the Clean Power Plan. After finding the case to be justiciable, the Court held on the merits that the EPA had exceeded its authority in crafting the Clean Power Plan.

Justice Kagan (joined by Justices Breyer and Sotomayor) wrote a vigorous dissent on the merits but said very little about justiciability. Instead, the dissent suggested that the Court should have exercised its *discretion* not to review the lower court decision. "[T]he Court's docket is discretionary," Justice Kagan emphasized, "and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. . . . But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change."

Why did no Justice conclude that the states lacked Article III standing to appeal in *West Virginia v. EPA*, when the Clean Power Plan was never in effect, and the current presidential administration had issued no rule? Was there a pressing need for Supreme Court review of the agency's authority? The Justices in the majority seemed to think so. But that does not explain why the dissenting opinion largely conceded that the Court had Article III jurisdiction over the case. Could the case be explained as one (akin to *Massachusetts v. EPA*) in which the states were granted "special solicitude" in the standing analysis—here, on appeal?

CHAPTER IV

CHOICE OF LAW IN THE FEDERAL SYSTEM

SECTION 1. STATE LAW IN FEDERAL COURT

Page 468, add a footnote c at the end of Note 6:

[c] For a contrasting view, see Tyler B. Lindley, Interpretive Lawmaking, 111 Va. L. Rev. 253 (2025) ("judges, especially originalist judges, should seriously confront the fact that, as an original matter, the Constitution granted judges no lawmaking power"; a "return to the original understanding of the judicial power[, for example,] would cast doubt on the judicial practices of interstitial lawmaking").

Page 470, add at the end of Note 8:

Finally, for a provocative short essay focused on the interactions between *Erie* and the modern Supreme Court's turns toward originalism and history, see Jack Goldsmith, *Erie* and Contemporary Federal Courts Doctrine, 17 Harv. J. Law & Pub. Policy Per Curiam (Spring 2023). Goldsmith describes *Erie* as "among the most dramatically anti-originalist opinions in Supreme Court history. The Framers assumed, and the Supreme Court for a very long time believed (and held), that federal courts can and should apply what came to be known as 'general common law' . . . . [T]here is no doubt that the conception of law that *Erie* said did not 'exist' did in fact exist at the founding and for a long time thereafter."

Goldsmith then discusses how the Court has come to conclude that the elimination of general common law in *Erie* "means that it should defer to Congress in the creation, or not, of new federal law and new federal causes of action." In other contexts such as standing, however, he notes that the Court has "come to view the common law as the touchstone." He contends that "the Court's turn toward history and the common law to inform the contemporary meaning of Article III cannot work without consideration of the non-originalist impact of the non-originalist decision in *Erie*—a requirement that poses a serious challenge to the originalist project across many federal courts doctrines."

Page 482, add at the end of the second full paragraph of Note 8:

For additional discussion of this topic, see Aaron-Andrew P. Bruhl, Interpreting State Statutes in Federal Court, 98 Notre Dame L. Rev. 61 (2022) (arguing that federal courts should apply state interpretive methods when interpreting state statutes, unless such an approach would undermine federal interests); Nina Varsava, Stare Decisis and Intersystemic Adjudication, 97 Notre Dame L. Rev. 1207 (2022) (arguing that the extent to which judges should apply interpretive methods from other jurisdictions, such as another jurisdiction's approach to stare decisis, depends in part on one's theory of law).

Page 482, add after the third full paragraph of Note 8:

On the subject of contractual forum selection clauses, see John F. Coyle and F. Andrew Hessick, *Erie* and Forum Selection Clauses, 2024 U. Ill. L. Rev. 777 (2024), and Patrick Woolley, *Erie* and the Enforceability of Forum Selection Clauses, 74 Am. U. L. Rev. 759 (2025). Coyle and Hessick argue that "[f]ederal courts should apply state law to determine whether a forum selection clause is enforceable." Woolley argues "for a two-part answer." "State law should govern whenever a party seeks a § 1404(a) transfer of venue within the federal judicial system" and "federal common law properly governs contractual validity when a party seeks a forum non conveniens dismissal on the ground that the federal judicial system as a whole is an inappropriate forum."

SECTION 2. FEDERAL LAW IN STATE COURT

Page 518, add a new Note after Note 4:

4A. *WILLIAMS V. REED*

In Williams v. Reed, 604 U.S. __, 145 S.Ct. 465 (2025), the Court again disallowed a state law restriction on hearing a federal claim in state court. In that case, twenty-one unemployed workers in Alabama had applied for unemployment benefits under Alabama law. They subsequently brought a § 1983 suit in state court against the Alabama Secretary of Labor, claiming that the state had unlawfully delayed processing their benefits claims, in violation of their federal due process rights. For relief, they sought an order directing the Secretary to process their claims more quickly. The Alabama Supreme Court rejected their § 1983 claim on the ground that, under Alabama law, the plaintiffs were required to first exhaust the claims process and receive a final decision before bringing challenges against the process.

The U.S. Supreme Court reversed in a 5-4 decision. In an opinion by Justice Kavanaugh, the Court described the state law restriction as creating a "catch-22": "Because the claimants cannot sue until they complete the administrative process, they can *never* sue under § 1983 to obtain an order expediting the administrative process." In effect, reasoned the Court, this meant that the state law restriction immunized state officials from the claim of unlawful delay. Under precedents such as *Haywood*, *Howlett*, and *Felder*, however, the Court said that states may not create immunities to federal law claims. The Court further reasoned that it did not matter that the exhaustion requirement was considered by the state to be jurisdictional: "[T]his Court's precedents have not treated the jurisdictional label of state rules as dispositive when state rules functionally immunize defendants from a class of § 1983 claims in state court."

Justice Thomas dissented and was joined in part by Justices Alito, Gorsuch, and Barrett. Writing first for himself, Thomas argued that as a matter of "first principles" a state should have plenary authority to decide when to give its courts jurisdiction over federal claims. In the portion of his dissent that was joined by the other Justices, Thomas claimed that, in any event, the state exhaustion requirement was permissible under the

Court's precedents. He reasoned that the requirement neither discriminated against federal claims nor was contrary to federal policy, and that "[t]here is no credible argument that Alabama adopted its exhaustion requirement *in order* to defeat challenges to the exhaustion process itself." Thomas further claimed that "[n]othing in *Haywood* suggests that a state rule could be impermissible just because it has the incidental effect of disallowing certain federal claims."

SECTION 3. SUPREME COURT REVIEW OF STATE COURT DECISIONS

Page 541, add a new Note after Note 4:

5. *MOORE V. HARPER*

Article I, Section 4 of the Constitution provides, in what is known as the Elections Clause, that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*." (Emphasis added.) In Moore v. Harper, 600 U.S. __, 143 S.Ct. 2065 (2023), the Supreme Court held, in an opinion by Chief Justice Roberts, that this provision does not preclude state courts from reviewing whether the legislature has complied with state law in regulating elections. (In that case, the North Carolina Supreme Court had held that the state legislature had engaged in improper partisan gerrymandering when drawing electoral districts, in violation of the state constitution.) But the Court made clear that "state courts do not have free rein." "As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law," the Court explained, "we have an obligation to ensure that state court interpretations of that law do not evade federal law." After reviewing a number of its past decisions, including *Indiana ex rel. Anderson v. Brand* and *Bush v. Gore*, the Court observed:

> Running through each of these examples is the concern that state courts might read state law in such a manner as to circumvent federal constitutional provisions. Therefore, although mindful of the general rule of accepting state court interpretations of state law, we have tempered such deference when required by our duty to safeguard limits imposed by the Federal Constitution.
>
> We do not adopt [here a particular] test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific. We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.

Justice Kavanaugh concurred, emphasizing that "a state court's interpretation of state law in a case implicating the Elections Clause is subject to federal court review." Justices Thomas, Alito, and Gorsuch dissented on other grounds.

CHAPTER V

THE POWER OF FEDERAL COURTS TO CREATE FEDERAL LAW

SECTION 1. FEDERAL COMMON LAW

Page 604, add at the end of Note 7:

For an argument that courts make law in a variety of ways, and that this is normatively desirable, see F. Andrew Hessick, Saying What the Law Should Be, 48 B.Y.U. L. Rev. 777 (2022). For an argument that, as a matter of originalism, "federal courts have no power to make common law" and "can only find it," see Micah S. Quigley, Article III Lawmaking, 30 Geo. Mason L. Rev. 279 (2022).

Page 604, add the following Note at the end of Section 1 (and delete Note 6: Nationwide Injunctions on pp. 663-65):

NOTE ON UNIVERSAL INJUNCTIONS

In recent years, there has been much discussion of the propriety of "nationwide" or "universal" federal court injunctions that have the effect of halting executive branch programs or activities throughout the country. When issued in cases that have not been certified as class actions, these injunctions affect government interactions with many individuals who are not before the court.

For example, in 2015, a federal district court in Texas issued a nationwide injunction against President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program that would have given certain undocumented immigrants an exemption from deportation and access to a renewable work permit. In 2017, several federal district courts issued nationwide injunctions against President Trump's "travel ban" orders that were designed to restrict the ability of individuals from certain countries to enter the United States. In 2021, during the COVID-19 pandemic, some district courts issued nationwide injunctions to block vaccine mandates imposed by the Biden administration. In 2022 and 2023, federal courts also enjoined Biden administration rules granting relief to federal student loan borrowers and seeking to increase access to mifepristone (a drug used in medication abortion). After President Trump took office again in 2025, federal district courts issued nationwide injunctions against various executive actions, including the President's efforts to remove foreign nationals under the Alien Enemies Act and to dismiss large numbers of the federal workforce.

Critics contend that nationwide or universal injunctions exceed the Article III judicial power (by enabling courts to issue remedies that extend beyond the case or controversy before the court), give individual district court judges too much authority to affect national policy, lead to forum shopping by plaintiffs, unduly politicize the judiciary, and prevent the useful percolation of issues among the circuits prior to potential Supreme Court review. They also contend that such injunctions are a modern phenomenon that is inconsistent with

historical understandings of the proper scope of equitable relief. See, for example, Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417 (2017).

Defenders of district court discretion to issue such injunctions contend that they are sometimes needed either to provide a plaintiff with complete relief, because the rights being asserted are not divisible, or to avoid undue confusion in the implementation of federal programs. Such injunctions are also claimed to promote rule-of-law values by ensuring that individuals who are in similar situations are treated the same by the government as those before the court. See, for example, Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065 (2018). Some commentators have also defended these injunctions from a historical perspective. See, for example, Mila Sohoni, The Lost History of the "Universal" Injunction, 133 Harv. L. Rev. 920 (2020).

As the controversy over nationwide injunctions has increased, there have been suggestions that Congress should address the phenomenon through legislation. Some proposals envision that Congress might use its authority to regulate federal jurisdiction to simply disallow courts from issuing nationwide injunctions. Other proposals envision more structural reforms, such as the creation of three-judge district courts to decide on the injunctions, with direct appeals to the Supreme Court, similar to what was in place from 1910–1976 to address injunctive challenges to state laws. None of the legislative proposals has been enacted.

In Trump v. CASA, Inc., 606 U.S. __, 145 S.Ct. __ (2025), the Supreme Court took up the question of federal court authority to issue nationwide injunctions. The case arose out of President Trump's executive order on birthright citizenship. The Fourteenth Amendment of the U.S. Constitution directs that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." On January 20, 2025, President Trump issued an executive order stating that persons born in the United States are not "subject to the jurisdiction" of the United States—and thus not guaranteed citizenship—if their biological mother was either not lawfully present in the United States or had only temporary lawful status (such as through a student visa), and their biological father was not a U.S. citizen or a lawful permanent resident.

Several individuals, organizations, and states brought suit, challenging the executive order as inconsistent with the Fourteenth Amendment. Three federal district courts found the executive order likely unlawful and issued nationwide preliminary injunctions to block its implementation. The federal government sought emergency relief in the Supreme Court—not on the merits, but rather on the question of federal court authority to grant nationwide relief. The Supreme Court declined to stay the lower court decisions, and thus temporarily left in place the injunctions against the executive order. The Court then scheduled the case for oral argument.

In an opinion by Justice Barrett, the Supreme Court held that Congress in the Judiciary Act of 1789 had not given the federal courts the authority to issue nationwide or universal injunctions. Although the 1789 Act, which set up the federal courts, authorized equitable remedies, the Court explained, it allowed only remedies that were "'traditionally accorded by courts of equity' at our country's inception." To fall within this authorization, "[a] modern device need not have an exact historical match, but . . . it must have a founding-era antecedent." The Court found that "[n]othing like a universal injunction was available at the founding, or for that matter, for more than a century thereafter. Thus, under the Judiciary Act, federal courts lack authority to issue them."

The Court rejected the argument that the "bill of peace," a form of litigation used in British courts, was analogous. In contrast to a universal injunction, the bill of peace applied to a smaller, and more cohesive, group and bound all affected members to the judgment. The bill of peace, the Court stated, was more analogous to a modern-day class action. The Court expressed concern that allowing universal injunctions could serve as an end-run around the procedures for class certification under Federal Rule of Civil Procedure 23. "Why bother with a Rule 23 class action," the Court queried, "when the quick fix of a universal injunction is on the table?"

The Court emphasized that its decision helps to reinforce limits on the federal judicial power. "[F]ederal courts do not exercise general oversight of the Executive Branch; they resolve cases and controversies consistent with the authority Congress has given them. When a court concludes that the Executive Branch has acted unlawfully, the answer is not for the court to exceed its power, too."

The Court made clear, however, that federal courts do have the power to award "complete relief" to the parties, including in cases against executive officials. To accomplish that goal, the Court acknowledged that it is sometimes necessary to issue a decree that applies to persons not before the court. For example, as the Court observed in a footnote, there may be some "injuries for which it is all but impossible for courts to craft relief that is complete *and* benefits only the named plaintiffs," as in cases involving disputes over the shape of electoral districts. The Court declined to decide what might constitute "complete relief" in the context of the President's executive order on birthright citizenship, particularly as to the state plaintiffs, leaving that question to the lower courts on remand.

Several separate opinions addressed issues left open by the majority opinion. In one concurrence, Justice Thomas, joined by Justice Gorsuch, admonished lower courts to be cautious in determining what remedy would afford the parties "complete relief," asserting that "[m]any plaintiffs argue that only sweeping relief can redress their injuries." Entertaining such a request, Justice Thomas warned, would "risk replicating the problems of universal injunctions under the guise of granting complete relief." In another concurrence, Justice Alito, joined by Justice Thomas, noted that the practical impact of the Court's decision would depend on both whether states were allowed to have third-party standing, and how lower courts applied the requirements for class certification. Justice Kavanaugh's

concurrence focused on the Supreme Court's emergency docket, suggesting that the Court should continue to issue such decisions to "help provide clarity and uniformity as to the interim legal status of major new federal statutes, rules, and executive orders."[a]

Dissenting, Justice Sotomayor, joined by Justices Kagan and Jackson, argued both that the executive order was clearly unconstitutional and that federal district courts had sufficient power to enjoin it nationwide. Justice Sotomayor argued in part that the bill of peace offered a sufficient historical precedent for the universal injunction. But in any event, she contended that it was unnecessary to have a precise historical match: "Historical analogues are no doubt instructive and provide important guidance, but requiring an exact historical match for every equitable remedy defies equity's purpose." "Adaptability," Justice Sotomayor emphasized, "has always been a hallmark of equity, especially with regard to the scope of its remedies." Justice Sotomayor added: "[T]he majority fundamentally misunderstands the nature of equity by freezing in amber the precise remedies available at the time of the Judiciary Act."

Justice Sotomayor's dissent also expressed concern about the practical implications of the Court's decision. "No right is safe in the new legal regime the Court creates. Today, the threat is to birthright citizenship. Tomorrow, a different administration may try to seize firearms from law-abiding citizens or prevent people of certain faiths from gathering to worship. The majority holds that, absent cumbersome class-action litigation, courts cannot completely enjoin even such plainly unlawful policies unless doing so is necessary to afford the formal parties complete relief." In a separate dissent, Justice Jackson warned: "The Court's decision to permit the Executive to violate the Constitution with respect to anyone who has not yet sued is an existential threat to the rule of law."

The Supreme Court's opinion in *Trump v. CASA* is notable in part for the questions that the Court declined to reach. The Court did not, for example, address whether nationwide remedies are consistent with Article III; the Court found only that they had not been authorized by Congress. The Court also declined to address whether the Administrative Procedure Act, which allows federal courts to vacate federal administrative action, might permit something akin to a universal remedy. Finally, the Court declined to consider the circumstances under which plaintiff states may have third-party standing to assert individuals' constitutional rights. This issue will likely be important in future litigation, because the Court indicated both that federal court injunctions should be no "broader than necessary to provide complete relief to each plaintiff with standing to sue" and that broader remedies may be needed to provide plaintiff states with "complete relief." (The issue of state standing is discussed in the casebook in Chapter II, Section 4.)

For additional discussion of nationwide injunctions, see Spencer E. Amdur & David Hausman, Nationwide Injunctions and Nationwide Harm, 131 Harv. L. Rev. F. 49 (2017);

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[a] This Supplement discusses the Supreme Court's emergency docket (also known as the shadow docket) in Chapter I, Section 1.

Zachary D. Clopton, National Injunctions and Preclusion, 118 Mich. L. Rev. 1 (2019); Bradford Mank & Michael E. Solimine, State Standing and National Injunctions, 94 Notre Dame L. Rev. 1955 (2019); Michael T. Morley, Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts, 97 B.U. L. Rev. 615 (2017); Jonathan Remy Nash, State Standing for Nationwide Injunctions Against the Federal Government, 94 Notre Dame L. Rev. 1985 (2019); Alan M. Trammell, Demystifying Nationwide Injunctions, 98 Tex. L. Rev. 67 (2019); Zayn Siddique, Nationwide Injunctions, 117 Colum. L. Rev. 2095 (2017); Howard M. Wasserman, Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication, 23 Lewis & Clark L. Rev. 1077 (2020).

For articles in a symposium issue on nationwide injunctions, see Charlton C. Copeland, Seeing Beyond Courts: The Political Context of the Nationwide Injunction, 91 U. Colo. L. Rev. 789 (2020); David Hausman, When Congress Requires Nationwide Injunctions, 91 U. Colo. L. Rev. 835 (2020); Suzette Malveaux, National Injunctions: What Does the Future Hold?, 91 U. Colo. L. Rev. 779 (2020); Portia Pedro, Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions," 91 U. Colo. L. Rev. 847 (2020); David Rendleman, Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity, 91 U. Colo. L. Rev. 887 (2020); Alan M. Trammell, The Constitutionality of Nationwide Injunctions, 91 U. Colo. L. Rev. 977 (2020); Howard M. Wasserman, Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent, 91 U. Colo. L. Rev. 999 (2020).

SECTION 2. IMPLIED RIGHTS OF ACTION TO ENFORCE FEDERAL STATUTES

Page 630, add to the list in the second paragraph of Note 4:

Elizabeth Earle Beske, The Court and the Private Plaintiff, 58 Wake Forest L. Rev. 1 (2023) (criticizing the Court's "disdain for private lawsuits");

SECTION 3. RIGHTS OF ACTION TO ENFORCE CONSTITUTIONAL RIGHTS

Page 645, add a new Note after Note 4:

4A. *EGBERT V. BOULE*

In Egbert v. Boule, 596 U.S. __, 142 S.Ct. 1793 (2022), the Court once again declined to allow claims under *Bivens*. In that case, a U.S. border patrol agent, Erik Egbert, allegedly assaulted a U.S. citizen, Robert Boule, during an investigation on the U.S. side of the U.S.-Canada border. After Boule filed a grievance, Egbert then allegedly retaliated by, among other things, having the IRS conduct an audit of Boule's taxes. The Ninth Circuit held that Boule could seek damages under *Bivens* for claims of both unreasonable use of force in violation of the Fourth Amendment and unlawful retaliation in violation of the First Amendment, but the Supreme Court reversed.

In an opinion by Justice Thomas, the Court explained that the two steps of analysis it now uses to determine whether to allow a *Bivens* claim "often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." The Court stated more generally that "our cases have made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts."

With respect to Boule's Fourth Amendment claim, the Court viewed border security as a "new context," and it reasoned that "Congress is better positioned to create remedies in the border security context, and the Government already has provided alternative remedies that protect plaintiffs like Boule." Even though the case did not involve a cross-border shooting, the Court saw Hernandez v. Mesa, 589 U.S. __, 140 S.Ct. 735 (2020) (noted in the casebook at page 659), as controlling, stating that "a *Bivens* cause of action may not lie where, as here, national security is at issue." The Court also noted that the Border Patrol has an administrative process for investigating grievances concerning the conduct of its officers, and that Boule had been able to use this process. "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence," the Court reasoned, "the courts cannot second guess that calibration by superimposing a *Bivens* remedy."

Finally, the Court declined to recognize a *Bivens* claim for retaliation in violation of the First Amendment, noting, among other things, that this could lead to harassing litigation against federal officers that would undermine their ability to perform their duties. Boule had argued that his claim was similar to the discrimination claim that the Court had allowed in *Davis v. Passman*, in that it, too, required an evaluation of an official's motives, but the Court noted that "*Passman* carries little weight because it predates our current approach to implied causes of action and diverges from the prevailing framework" in several respects.

Justice Gorsuch concurred in the judgment but argued that the Court should "take the next step and acknowledge explicitly what the Court leaves barely implicit," which is that legislative authorization is required for constitutional damages claims. "To create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation," he reasoned. In addition, he noted that the facts of this case were close to the facts of *Bivens* and that "if the costs and benefits do not justify a new *Bivens* action on facts so analogous to *Bivens* itself, it's hard to see how they ever could."

Justice Sotomayor dissented in part and was joined by Justices Breyer and Kagan. She agreed that Boule should not be able to pursue his First Amendment retaliation claim because it would "raise[] line-drawing concerns similar to those this Court identified in *Wilkie*." But she argued that his Fourth Amendment claim did not involve a new context: "That it was a [Border Patrol] agent rather than a Federal Bureau of Narcotics agent who unlawfully entered Boule's property and used constitutionally excessive force against him

plainly is not the sort of 'meaningful' distinction that our new-context inquiry is designed to weed out." Nor did she see any special factors counseling hesitation, noting among other things that, unlike in *Hernandez v. Mesa*, the conduct here occurred entirely on the U.S. side of the border and was directed against a U.S. citizen. She also resisted the contention that the government had offered an adequate alternative remedy, pointing out that "complainants in Boule's position have no right to participate in the proceedings or to seek judicial review of any determination." Finally, she expressed concern about the practical consequences of the Court's holding: "Absent intervention by Congress, [Border Patrol] agents are now absolutely immunized from liability in any *Bivens* action for damages, no matter how egregious the misconduct or resultant injury."[a]

Page 655, add a footnote a at the end of Note 1 and re-letter the remaining footnotes:

[a] As for the takings claim specifically at issue in *Wilkie*: The Supreme Court has not resolved whether a plaintiff may have a cause of action arising directly under the Takings Clause, in the absence of another available remedy. See DeVillier v. Texas, 601 U.S. __, 144 S.Ct. 938 (2024) (declining to decide the issue, given that the plaintiffs in the case had a cause of action under state law). For more on *DeVillier*, see Ann Woolhandler, Julia D. Mahoney, and Michael G. Collins, Takings and Implied Causes of Action, 2024 Cato Sup. Ct. Rev. 249.

SECTION 4. CUSTOMARY INTERNATIONAL LAW AND THE ALIEN TORT STATUTE

Page 725, add at the end of Note 5:

For an assessment after *Nestle* of "what the ATS has achieved, where it has fallen short," and "the range of options for human rights victims seeking justice," see Christopher Ewell, Oona A. Hathaway, and Ellen Nohle, Has the Alien Tort Statute Made a Difference? A Historical, Empirical, and Normative Assessment, 107 Cornell L. Rev. 1205 (2022).

CHAPTER VI

ADDITIONAL PROBLEMS OF FEDERAL JURISDICTION AND CHOICE OF LAW

SECTION 1. DIVERSITY JURISDICTION

Page 733, add at the end of Note 4:

Support for this conclusion can be found in Scott DeVito, On the Death of Diversity Jurisdiction: An Empirical Study Establishing That Diversity Jurisdiction Is No Longer Justified, 55 Ind. L. Rev. 233 (2022). DeVito reports the results of an empirical study

[a] For a post-*Egbert* argument that the contraction of *Bivens* remedies calls for restoration of pre-existing common-law officer suits, see James E. Pfander and Rex N. Alley, Federal Tort Liability After *Egbert v. Boule*: The Case for Restoring the Officer Suit at Common Law, 138 Harv. L. Rev. 985 (2025). For a response, see E. Garrett West, Tort Stories After *Bivens*, 138 Harv. L. Rev. F. 89 (2025).

"demonstrating that geographic bias is no longer an issue," thereby eliminating "the very reason for the existence of federal diversity jurisdiction" and providing "a strong basis for Congress to either modify [it] or abolish [it]." See also Scott DeVito, The Federal Courts Are Not Bias Free Zones: An Argument for Eliminating Diversity Jurisdiction, 84 U. Pitt. L Rev. 873, 897 (2023): "Eliminating diversity jurisdiction for . . . ["standard state law actions"] would save billions of dollars, ensure those most familiar with state law decide state law-based cases, strengthen the idea of national unity, limit one way in which rich and sophisticated litigants game the system to the detriment of the poor or unsophisticated litigants, and would reduce friction between state and federal courts."

Another dimension of the debate focuses on the use of diversity jurisdiction by in-state plaintiffs. See Scott Dodson, Why Do In-State Plaintiffs Invoke Diversity Jurisdiction?, 49 Law & Soc. Inquiry 1283 (2024). Dodson notes that the American Law Institute called for eliminating the ability of in-state plaintiffs to invoke diversity jurisdiction in 1969, an initiative that was endorsed by the Judicial Conference of the United States in 1976 and by a Federal Courts Study Committee in 1990. The "idea has continued to be on the table ever since," he says, but nothing has happened. Dodson reports that more than 50 per cent of diversity cases are filed by in-state plaintiffs. Drawing on docket data and a survey he sent to more than 1200 attorneys who represented in-state plaintiffs in diversity cases, he concludes that the cases fall roughly into three categories:

> The first category is composed of tort cases, filed by individual plaintiffs against corporate defendants, that are eligible for consolidation with an existing federal multi-district litigation. The second category is composed of in-state corporate plaintiffs represented by attorneys who tend to represent defendants in federal court and who invoke diversity jurisdiction primarily based on perceptions of advantages of federal procedure, efficiencies and conveniences of federal practice, and superior quality of federal court. The third category is composed of instate plaintiffs represented by attorneys who tend to represent plaintiffs in state court and who invoke diversity jurisdiction to preempt the defendant's likely removal of the case.

Page 733, add a footnote a at the end of the first paragraph in Note 1:

[a] Mark Moller, Complete Diversity: The Origin Story, 76 Fla. L. Rev. 1221 (2024), begins with the observation that "federal jurisdiction mavens have condemned the complete diversity rule as a Marshall invention 'out of whole cloth.' " Not so, Moller argues: "The complete diversity rule turns out to be a straightforward application of an ancient canon of construction" that makes it compatible "with important strands of textualism. . . . *Strawbridge*, it follows, is a canon-based decision that deserves textualists' respect."

Page 737, add a footnote c after the first sentence in Note 2(iii):

[c] It is argued in Mark Moller and Lawrence B. Solum, Corporations and the Original Meaning of "Citizens" in Article III, 72 Hastings L.J. 169 (2020), that

> in 1787 the word "citizen" referred only to natural persons and therefore . . . corporations cannot be considered "citizens" within the original public meaning of Article III. As a consequence, insofar as Congress purports to confer constitutional citizenship on corporations, Section 1332(c) is unconstitutional from an originalist perspective.

See also Mark Moller and Lawrence B. Solum, The Article III "Party" and the Originalist Case Against Corporate Diversity Jurisdiction, 64 Wm. & Mary L. Rev. 1345 (2023).

Page 763, add at the end of the second paragraph of Note 6:

For more recent discussion of what was historically called ancillary jurisdiction and calling for a return to a more discretionary and less literal approach, see James E. Pfander and Peter C. Douglas, Law, Equity, and Supplemental Jurisdiction, 97 Notre Dame L. Rev. 2115 (2022).

SECTION 3. FINALITY AND APPELLATE REVIEW

Page 791, add at the end of footnote c in Note 1:

Tejas N. Narechania, Which Splits?—Certiorari in Conflicts Cases, 113 Calif. L. Rev. 487 (2025), notes that the Court is increasingly likely to allow circuit splits to "languish for longer." The article examines the patterns underlying the Court's present practices and proposes:

> a more reasoned and binding common law of certiorari from the Supreme Court. And given that the Court's conflicts docket seems less political than its important-questions dockets, we might require that the Court hear more conflicts cases. Both our democracy and the Court itself are better served by an agenda that is focused on resolving splits over questions of statutory interpretation than by one that attempts to make and remake our constitutional order.

Page 792, add at the end of footnote f in Note 1:

For a fascinating historical survey and critique of the Supreme Court's practice of crafting the questions that it considers when it grants certiorari, see Benjamin B. Johnson, The Origins of Supreme Court Question Selection, 122 Colum. L. Rev. 793, 801 (2022) ("The modern Court has effectively abandoned the traditional judicial role of deciding cases in favor of targeting preselected questions."). For a critical analysis of the Court's recent tendency to decide cases at an early stage, without full vetting in the lower courts (by, for example, granting certiorari before judgment, addressing the merits in dealing with applications for emergency relief, and addressing the merits in appeals from the grant or denial of a preliminary injunction), see Stephen I. Vladeck, A Court of First View, 138 Harv. L. Rev. 533 (2024).

Page 838, add a footnote g at the end of Note 9 and re-letter remaining footnotes:

[g] In Shoop v. Twyford, 596 U.S. __, 142 S.Ct. 2037 (2022), a district court relied on the All Writs Act, 28 U.S.C. § 1651, to order the state of Ohio to transport a prisoner to a hospital for medical testing, the results of which the prisoner hoped to have the court consider as a basis for habeas corpus relief. A Court of Appeals affirmed the order, but the Supreme Court reversed, concluding that the order was not "necessary or appropriate in aid of" the District Court's jurisdiction, as required by the All Writs Act. The Court observed in a footnote that it, and the Court of Appeals, had jurisdiction to review the District Court's order under the collateral order doctrine, noting that an order to transport a prisoner outside the prison's walls "creates public safety risks and burdens on the State that cannot be remedied after final judgment." Justice Breyer, in a dissent joined by Justices Sotomayor and Kagan, disagreed, arguing that the transportation order was analogous to a discovery order, which would not normally qualify for immediate appeal. Justice Gorsuch separately dissented to argue that the Supreme Court should have dismissed the appeal as improvidently granted because, in his view, hearing it would require extending the collateral order doctrine.

CHAPTER VII

43 U.S.C. § 1983

SECTION 2. OFFICIAL IMMUNITIES

Page 874, add at the end of Note 5(i):

For another critique of *Mitchell v. Forsyth*, see Bryan Lammon, Reforming Qualified-Immunity Appeals, 87 Mo. L. Rev. 1137 (2022) (arguing that the Court should overrule *Mitchell* and allow any special rules for appeal of the qualified immunity defense to be controlled by statute or federal rule).

Page 876, add a new Note after Note 6:

6A. PRESIDENTIAL IMMUNITY FROM CRIMINAL PROSECUTION: *TRUMP V. UNITED STATES*

The Court addressed the immunity of presidents from criminal prosecution in Trump v. United States, 603 U.S. __, 144 S.Ct. 2312 (2024). The case concerned the effort by a Special Counsel (appointed by the Attorney General) to prosecute Donald Trump for various actions relating to his alleged effort to overturn the results of the 2020 presidential election.

As the Court summarized it, Trump was alleged to have engaged in five types of actions:

> First, he and his co-conspirators "used knowingly false claims of election fraud to get state legislators and election officials to . . . change electoral votes for [Trump's] opponent, Joseph R. Biden, Jr., to electoral votes for [Trump]." Second, Trump and his co-conspirators "organized fraudulent slates of electors in seven targeted states" and "caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6." Third, Trump and his co-conspirators attempted to use the Justice Department "to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome." Fourth, Trump and his co-conspirators attempted to persuade "the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." And when that failed, on the morning of January 6, they "repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding." Fifth, when "a large and angry crowd . . . violently attacked the

> Capitol and halted the proceeding," Trump and his co-conspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification."

The D.C. Circuit had held that Trump was not entitled to any immunity from the criminal charges stemming from these allegations.

In an opinion by Chief Justice Roberts, the Court reversed and remanded. The Court first held that presidents are entitled to absolute immunity for exercises of their "core constitutional powers," which the Court described as "conduct within [the President's] exclusive sphere of constitutional authority." "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." That authority includes, for example, the issuance of pardons, the removal of executive officers, and the recognition of foreign governments. Because Congress lacks the constitutional authority to restrict such actions, "[i]t follows," said the Court, "that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions."

Next, the Court held that a president is entitled to at least presumptive immunity from prosecution for other acts "within the outer perimeter of his official responsibility." Such presumptive immunity is needed, reasoned the Court, in order "to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution." The presumptive immunity means that, "[a]t a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'" (quoting Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982)). The Court did not decide whether this immunity is merely presumptive or absolute, saying that it did not need to resolve that question at this stage of the proceedings. But it did acknowledge that "[t]he reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority . . . do not extend to conduct in areas where his authority is shared with Congress."

Finally, the Court held that presidents are not entitled to immunity from prosecution for their unofficial acts, citing, among other things, Clinton v. Jones, 520 U.S. 681 (1997). The Court did not offer a definitive account of the difference between official and unofficial acts for this purpose but did offer two points of general guidance. First, the Court said that "[i]n dividing official from unofficial conduct, courts may not inquire into the President's motives" because "[s]uch an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect." Second, the Court said that conduct is not unofficial "merely because it violates a generally

applicable law" because "[o]therwise, Presidents would be subject to trial on 'every allegation that an action was unlawful,' depriving immunity of its intended effect." (quoting *Fitzgerald*, 457 U.S. at 756).

Applying those principles to the present case, the Court held that Trump could not be prosecuted for his alleged conduct involving discussions with Justice Department officials, including allegations that he asked them to investigate alleged election fraud and to contact state officials and repeatedly threatened to remove the Acting Attorney General for resisting such requests. The Court reasoned that investigative and prosecutorial actions, as well as the removal of executive officers, fall withing the President's exclusive authority and thus are protected by absolute immunity. As for the allegation that Trump attempted to get the Vice President to use his ceremonial role in the January 6 certification of electoral votes to alter the election results, the Court remanded to the district court for a determination of whether a prosecution of such alleged conduct "would pose any dangers of intrusion on the authority and functions of the Executive Branch," which is the determination that would be required to rebut what is at least presumptive immunity for such official conduct.

Other allegations against Trump concerned interactions with various persons outside the executive branch, including state election officials. The Court remanded to the district court for a determination of whether such alleged conduct was official or unofficial. The Court also remanded for an official-versus-unofficial determination concerning Trump's conduct on January 6, including his Tweets to the public and his statements to his crowd of supporters in Washington. On the one hand, it noted that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities," while also noting that "[t]here may . . . be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader."

Finally, the Court said that the government should not be allowed to introduce any evidence against Trump concerning conduct for which he is entitled to immunity, even for the purpose of supporting other charges. The Court reasoned that, "Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted." But the Court did say that "the prosecutor may point to the public record to show the fact that the President performed the official act."

Justice Thomas joined the majority opinion in full but also wrote a concurrence to question the constitutionality of the Special Counsel's appointment. Justice Barrett concurred in part, agreeing with most of the majority opinion but arguing that the President should not have absolute immunity for official acts that are not within the scope of the President's exclusive authority. Instead, she said that whether such presidential conduct can be prosecuted should involve a two-step inquiry: first, determine whether the criminal statute reaches the President's official conduct, and, second, if so, the prosecution may

proceed only if applying it in the circumstances poses no danger of intrusion on the authority and functions of the Executive Branch. She also argued that a president should be entitled to interlocutory review of this determination. Finally, she expressed the view in a footnote that "the President's alleged attempt to organize alternative slates of electors . . . . is private and therefore not entitled to protection."

Justice Sotomayor dissented and was joined by Justices Kagan and Jackson. Sotomayor argued that the Court's allowance of broad presidential immunity had no support in the constitutional text. She also contended that historical evidence "reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law." Longstanding practice also suggested, she argued, that there was an "understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts." Sotomayor further criticized the majority's test for presumptive immunity, noting that "[i]t is hard to imagine a criminal prosecution for a President's official acts that would pose *no dangers* of intrusion on Presidential authority in the majority's eyes." (Emphasis added.) She also worried that what the majority had said about the divide between official and unofficial acts will mean that "the category of Presidential action that can be deemed 'unofficial' is destined to be vanishingly small." Sotomayor distinguished *Fitzgerald* as involving a civil case, noting that criminal cases have robust procedural safeguards not found in civil suits and that there is a greater public interest in federal criminal prosecutions. Finally, she argued that the majority was construing the category of absolute immunity for acts falling within the President's exclusive authority too broadly.

Justice Jackson wrote an additional dissent complaining that the majority had effectively placed the President above the law. She also criticized the lack of clarity in the majority's analysis: "[U]nder the majority's new paradigm, whether the President will be exempt from legal liability for murder, assault, theft, fraud, or any other reprehensible and outlawed criminal act will turn on whether he committed that act in his official capacity, such that the answer to the immunity question will always and inevitably be: It depends." In part because of this lack of clarity, she contended that the majority was encouraging presidential law-breaking.

Why did the majority decline to resolve whether there is absolute immunity for official acts that do not fall within the President's exclusive authority? In any event, will the rebuttable presumption that the majority outlines end up being close to absolute immunity? Under the majority's reasoning, at least unofficial conduct by a president is subject to criminal prosecution, but what sort of conduct under its analysis is likely to be deemed unofficial? For some of the initial commentary on the decision, see Saikrishna Bangalore Prakash, The Fearless Executive, Crime, and the Separation of Powers, 111 Va. L. Rev. 1 (2025); Shalev Gad Roisman, Trump v. United States and the Separation of Powers, 173 U. Pa. L. Rev. Online 33 (2025); and Keith E. Whittington, Presidential Immunity, 2023-2024 Cato Sup. Ct. Rev. 283.

Page 877, add after the first sentence of the third full paragraph of Note 7:

Another nuanced defense of qualified immunity as a way of protecting fair notice principles can be found in Nathan S. Chapman, Fair Notice, the Rule of Law, and Reforming Qualified Immunity, 75 Fla. L. Rev. 1 (2023).

Page 877, add at the end of Note 7:

Qualified immunity continues to inspire a good deal of commentary. For recent contributions, see David D. Coyle, Getting It Right: Whether to Overturn Qualified Immunity, 17 Duke J. Const. L. & Pub. Pol'y 283 (2022); Katherine Mims Crocker, Qualified Immunity, Sovereign Immunity, and Systemic Reform, 71 Duke L.J. 1701 (2022); Adam A. Davidson, Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity, 99 Wash. U.L. Rev. 1459 (2022); Aaron L. Nielson and Christopher J. Walker, Qualified Immunity's 51 Imperfect Solutions, 17 Duke J. Const. L. & Pub. Pol'y 321 (2022); Teressa Ravenell, Unincorporating Qualified Immunity, 53 Loy. U. Chi. L.J. 381 (2022); Alexander A. Reinert, Asymmetric Review of Qualified Immunity Appeals, 20 J. Empirical Legal Stud. 4 (2023). For an argument that qualified immunity is at odds with the text of § 1983, as originally enacted, see Alexander A. Reinert, Qualified Immunity's Flawed Foundation, 111 Calif. L. Rev. 201 (2023). Gregory Sisk, How Qualified Immunity Condones Rogue Behavior by Government Officers, 19 U. St. Thomas L. J. 364 (2023), argues that federal qualified immunity should be defeasible when the defendant officer violates state law. Anne E. Ralph, Qualified Immunity, Legal Narrative, and the Denial of Knowledge, 65 B.C. L. Rev. 1317 (2024), argues that qualified immunity excludes plaintiffs' stories and deprives courts of the narratives needed to formulate the law.

Page 884, add at the end of Note 1:

For an analysis of how lower courts could respond to *Taylor v. Riojas*, see Jennifer E. Laurin, Reading *Taylor*'s Tea Leaves: The Future of Qualified Immunity, 17 Duke J. Const. L. & Pub. Pol'y 241 (2022).

Page 884, add at the end of the second paragraph of Note 2:

For an analysis of the impact of *Graham v. Collins* in § 1983 litigation, see Osagie K. Obasogie and Zachary Newman, Colorblind Constitutional Torts, 95 S. Cal. L. Rev. 1137 (2022).

Page 902, add at the end of Note 7:

For articles arguing that reforming the law surrounding § 1983 will not be sufficient to deter police violence and other misconduct, see Derecka Purnell, The Cost of Doing Business, 112 Cal. L. Rev. 1107 (2024); Joanna C. Schwartz, An Even Better Way, 112 Cal. L. Rev. 1083 (2024). See also Fred O. Smith, Jr., Civil Justice and Abolition: An Exercise in

Dialectic, 112 Cal. L. Rev. 1057 (2024) (exploring, via a dialogic format, debates between those who would reform the law surrounding § 1983 to ensure better accountability of law enforcement institutions and officials, and those who would prefer to completely overhaul the criminal justice system).

SECTION 3. GOVERNMENTAL LIABILITY

Page 958, add at the end of Note 5:

For statistical analysis showing that claims of municipal liability for police misconduct are more likely to be dismissed than claims against the individual officers, even though only the latter enjoy qualified immunity, see Joanna C. Schwartz, Municipal Immunity, 109 Va. L. Rev. 1181 (2023). The difficulty of imposing municipal liability under § 1983 has led one expert in the field to advocate pursuing claims of negligent hiring, negligent supervision, poor training, and the like under state tort law. See Nancy Leong, Constitutional Accountability Through State Tort Law, 2023 Wisc. L. Rev. 1707. She suggests that the failure to raise state law claims in such cases is a "missed opportunity" for civil rights plaintiffs. See also Nancy Leong and Allyson Harris, Failure to Supervise as Municipal Custom, 2025 Wis. L. Rev. 261, 264 (arguing, based on a survey of federal appellate cases from 1980 to 2023, that failure-to-supervise claims against municipalities, while challenging, are "winnable").

SECTION 4. FOR WHAT WRONGS?

Page 1025, change last sentence of Note 6 to read:

"Justice Stevens concurred in the judgment but dissented as to the approach."

Page 1025, add two new Notes after Note 6:

6A. SECTION 1983 AND THE ENFORCEMENT OF "PROPHYLACTIC" CONSTITUTIONAL RULES: *VEGA V. TEKOH*

It has long been assumed that constitutional rights are presumptively enforceable under § 1983. Accordingly, tests such as that in *Gonzaga v. Doe* restrict only the enforcement of non-constitutional rights. But a recent decision casts doubt on that assumption. In Vega v. Tekoh, 597 U.S. __, 142 S.Ct. 2095 (2022), the Supreme Court held that violations of Miranda v. Arizona, 384 U.S. 436 (1966), are not enforceable under § 1983. Speaking through Justice Alito, the Court acknowledged that *Miranda* is a constitutional rule that cannot be overridden by Congress. But the Court described *Miranda* as a *prophylactic* rule that extends beyond the requirements of the Fifth Amendment, such that "a violation of *Miranda* . . . does not constitute 'the deprivation of [a] right . . . secured by the Constitution'" under § 1983. In the Court's view, *Miranda* could still be among the *other* "laws" protected under § 1983. But even if *Miranda* were such a "law," it would be enforceable "only where its benefits outweigh its costs." The Court found that the costs of a § 1983

remedy for *Miranda*—such as relitigation of an issue already considered by a state criminal court, and the possibility of friction between the state and federal courts—would outweigh the benefits. Accordingly, the Court held that *Miranda* may be enforced only by excluding evidence in a criminal trial, not via a § 1983 action.

More broadly, the Court in a footnote questioned whether *any* constitutional rule deemed "prophylactic" should be enforceable under § 1983. Referring to the test governing the enforcement of statutory rights, the Court doubted that "a prophylactic rule crafted by the Judiciary to protect a constitutional right . . . is always cognizable under § 1983," given that federal statutory rights are not always cognizable. "There is no sound reason," the Court suggested, "to give [a] preferred status to such prophylactic rules." Indeed, "[i]t could be argued that a judicially created prophylactic rule cannot be the basis for a § 1983 suit." The Court stated, however, that it "need not decide that question," given that even "assuming that such rules can provide the basis for a § 1983 claim," the Court would have to consider "whether the benefits of allowing such a claim outweigh the costs." And here, as noted, that cost-benefit analysis led the Court to reject a § 1983 remedy for *Miranda*.

In a dissent joined by Justices Breyer and Sotomayor, Justice Kagan declared that "[t]oday, the Court strips individuals of the ability to seek a remedy for violations of the right recognized in *Miranda*. . . . The majority here, as elsewhere, injures the right by denying the remedy."

It is unclear whether *Vega* will prove to be a *Miranda*-specific decision or a broader limitation on the use of § 1983 for any constitutional rule deemed "prophylactic."

6B. *Health and Hospital Corporation v. Talevski*

The Supreme Court reaffirmed the use of § 1983 to enforce federal statutory rights in Health and Hospital Corporation of Marion County v. Talevski, 599 U.S. __, 143 S.Ct. 1444 (2023). The plaintiff, a nursing home resident, sought to enforce the Federal Nursing Home Reform Act, which prohibits nursing homes from using unnecessary physical or chemical restraints, and requires them to follow certain procedures before transferring or discharging residents. In an opinion by Justice Jackson, the Court upheld the statutory claim.

At the outset, the Court reaffirmed *Maine v. Thiboutot*'s holding that the term "laws" in § 1983 can encompass any rights-conferring federal statute. That is true, the Court emphasized, even with respect to statutes, such as the Act here, that were enacted pursuant to Congress's spending power. "'Laws' means 'laws' no less today than in the 1870s . . . . Consequently, . . . § 1983 can presumptively be used to enforce unambiguously conferred federal individual rights."

The Court then went on to consider whether the Federal Nursing Home Reform Act did in fact create statutory rights enforceable under § 1983. The Court noted that its precedents, and particularly *Gonzaga v. Doe*, create a "stringent standard," requiring that

"[s]tatutory provisions must *unambiguously* confer individual federal rights." Nevertheless, applying the *Gonzaga* framework, the Court held that the Act satisfied that "demanding bar."

First, the Court determined that the statutory provisions at issue contained sufficient rights-creating language. Justice Jackson's opinion explained: "The unnecessary-restraint provision requires nursing homes to "protect and promote … *[t]he right* to be free from … any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat *the resident's* medical symptoms." The Court described the "predischarge-notice provision" as "more of the same. Nestled in a paragraph concerning 'transfer and discharge *rights*,'" that provision instructs nursing homes that they "'must not transfer or discharge [a] *resident*'" unless certain conditions are met, including advance notice to the resident and a family member. This focus on individual rights, the Court emphasized, stood "in stark contrast to the statutory provisions that failed *Gonzaga*'s test in *Gonzaga* itself." The provisions here "satisfy *Gonzaga*'s stringent standard, and the rights they recognize are presumptively enforceable under § 1983."

Second, the Court found that "the statute lacks any indicia of congressional intent to preclude § 1983 enforcement." In contrast to the statutes at issue in prior cases, such as *Rancho Palos Verdes*, the Federal Nursing Home Reform Act does not require plaintiffs to comply with specific procedures or exhaust certain remedies before filing suit. Indeed, the Act here does not contain "a private judicial right of action, a private federal administrative remedy," or any other congressional designed remedy that might be in tension with § 1983 lawsuits. The Court concluded that there is "nothing in the [Federal Nursing Home Reform Act] that even hints at Congress's intent" to preclude a § 1983 remedy. On the contrary, the Act provides that its remedial provisions are "'*in addition to* those otherwise available under State or Federal law and shall not be construed as limiting such other remedies.'"

Dissenting, Justice Alito (joined by Justice Thomas) argued that the Federal Nursing Home Reform Act did not withstand the *Gonzaga* test. Although he concluded that the Act contained sufficient rights-conferring language to satisfy the first part of the test, he asserted that the Act's remedial scheme precluded a § 1983 remedy. Because the federal government could withdraw funds from noncompliant nursing homes, and states were empowered to provide additional remedies and investigate complaints by residents, "the Act precludes enforcement under § 1983." In a separate dissent, Justice Thomas (writing only for himself) argued that statutes enacted pursuant to Congress's spending power do not qualify as "laws" enforceable under § 1983.

Talevski is noteworthy in at least two respects. First, the Court by a large majority reaffirmed that *any* statutory right might be enforceable under § 1983—and upheld such a statutory claim. Given the Court's seeming hostility in recent years to statutory claims brought under § 1983 (and even, as *Vega* illustrates, to some constitutional claims), that is an important and perhaps surprising result. But, second, the Court also unanimously

reaffirmed that the "stringent" test from *Gonzaga v. Doe* governs the enforceability of statutes under § 1983. It is not clear how many other federal statutes contain sufficient rights-creating language to satisfy that "demanding bar." Notably, in a concurrence joined by Chief Justice Roberts, Justice Barrett emphasized that the "bar is high" for determining whether a statute unambiguously confers individual rights, and "although the [Act here] clears it, many federal statutes will not."

The Supreme Court's subsequent decision in Medina v. Planned Parenthood South Atlantic, 606 U.S. __, 145 S.Ct. __ (2025), underscored the stringency of the *Gonzaga v. Doe* test. When South Carolina decided to exclude Planned Parenthood from its list of Medicaid providers (because the organization separately offered abortion services), Planned Parenthood and one of its patients brought suit under § 1983, alleging that the State violated the Medicaid Act, which states in relevant part that "any individual eligible for medical assistance . . . may obtain such assistance from any [provider] qualified to perform the service . . . who undertakes to provide" the service. In an opinion by Justice Gorsuch, the Court first emphasized that legislation enacted pursuant to the spending power "cannot provide the basis for a §1983 enforcement suit unless Congress 'speaks with a clear voice, and manifests an unambiguous intent to confer individual rights.'" The Court then held that, in contrast to *Talevski*, the statutory text at issue in *Medina* did not contain the "clear and unambiguous 'rights-creating language'" needed for enforcement under § 1983. Justice Jackson dissented, joined by Justices Sotomayor and Kagan, arguing that the statute's focus on the benefited "individual" was sufficient under the Court's precedents to confer on Medicaid recipients an enforceable "right to choose their own doctors." In a separate concurrence, Justice Thomas raised questions about much of the Supreme Court's § 1983 jurisprudence, including with respect to the enforcement of federal statutes, and urged the Court "in appropriate cases [to] revisit the proper bounds of § 1983."

CHAPTER VIII

ABSTENTION

SECTION 2. *YOUNGER* ABSTENTION

Page 1052, substitute for the last two sentences of Note 9:

For more recent commentary on *Younger* and its progeny, see James E. Pfander and Nassim Nazemi, The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap, 92 Tex. L. Rev. 1, 59–67 (2013); Maggie Gardner, Abstention at the Border, 105 Va. L. Rev. 63 (2019); Anne Rachel Traum, Distributed Federalism: The Transformation of *Younger*, 106 Cornell L. Rev. 1759 (2021). See also Fred O. Smith, Jr., Abstention in the

Time of Ferguson, 131 Harv. L. Rev. 2283 (2018), which argues for a *Younger* exception in cases where there "are structural or systemic constitutional flaws built into a state's procedural apparatus."

See also John Harland Giammatteo, The New Comity Abstention, 111 Calif. L. Rev. 1705 (2023), which observes that in the past 10 years, lower federal courts have developed "a new abstention doctrine, unmoored from precedent." As he describes it:

> This new form of abstention requires federal courts to abstain from hearing litigation challenging state court procedures or granting remedies that would affect state court proceedings. According to these circuits, abstention is required in these cases because of comity, i.e., an equal respect for state institutions, and "Our Federalism," which requires properly balancing state and federal institutions and interests in a federal system. However, even as they invoke the words of *Younger v. Harris,* these circuits generally acknowledge that their opinions are not controlled by *Younger* and instead turn to the Supreme Court's alternative holding in [O'Shea v. Littleton, 414 U.S. 488, 500-02 (1974)].[e] The courts chart a new form of abstention, adopting an expansive logic which, if strictly enforced, would result in a categorical abdication from any challenge that could implicate a state court or its procedure.

Page 1052, add at the end of Note 9:

For additional discussion by the same author, see Fred O. Smith, Jr., Abstaining Equitably, 97 Notre Dame L. Rev. 2095 (2022), which examines lower court decisions applying *Younger* broadly and calls for renewed attention to limiting doctrines that "ensure that *Younger* remains a doctrine of equitable restraint, instead of inequitable abdication."

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[e] *O'Shea v. Littleton* was a ripeness decision considered in Note 7 of the Notes on Ripeness in Chapter II, Section 5, Subsection A, above. Giammatteo described "the alternative holding" of *O'Shea* as follows:

> Even if there were a justiciable controversy, the Court reasoned, equitable restraint would be required because "[w]hat they seek is an injunction aimed at controlling or preventing the occurrence of specific events in the course of future state criminal trials." The Court expressed concern that any injunction would allow criminal defendants to seek compliance with the injunction in federal court while their proceedings were pending in state court. This, according to the majority, was "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent." Federal courts would have to maintain "continuous supervision" and a "form of monitoring of the operation of state court functions." Federalism, and in particular federalism's animating concern of comity, would not permit "such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings." Abstention might be appropriate in those settings.

SECTION 3. *PULLMAN* ABSTENTION

Page 1088, add at the end of Note 6:

For its history, see William S. Dodge, Maggie Gardner, and Christopher A. Whytock, The Many State Doctrines of Forum Non Conveniens, 72 Duke L.J. 1163 (2023).

CHAPTER IX

STATE SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT

SECTION 1. NATURE OF THE LIMITATION

Page 1152, add at the end of the seventh full paragraph of Note 2:

For an approach that has some overlap with the diversity interpretation, see Alexander Schultz, Sovereign Immunity and the Two Tiers of Article III, 29 Geo. Mason L. Rev. 287 (2021) (arguing that "where Article III extends the 'judicial Power' to 'all Cases,' States are not, as a constitutional matter, immune from compulsory suit, whereas in second-tier 'Controversies,' they are, but only to the same extent that States held this privilege under the antecedent law of sovereign immunity").

Page 1156, add a new Note after Note 2:

2A. COMMENTARY ON LIMITATIONS ON *EX PARTE YOUNG*

The Supreme Court's decision in *Whole Woman's Health v. Jackson* has provoked much comment, both from the academy and in the popular press. Prominent among them are Richard H. Fallon, Jr., Constitutional Remedies: In One Era and Out the Other, 136 Harv. L. Rev. 1300 (2023), and Jon D. Michaels and Daivd L. Noll, Vigilante Federalism, 108 Corn. L. Rev. 1187 (2023). For a historical review of prior attempts (many of them successful) to authorize private suppression of constitutional rights, see Aziz Z. Huq, The Private Suppression of Constitutional Rights,101 Tex. L. Rev. 1259 (2023). Finally, for an effort to disaggregate constitutional rights in terms of appropriate remedies, see Katherine Mims Crocker, Constitutional Rights and Remedial Consistency, 110 Va. L. Rev. 521 (2024).

Page 1156, add two new Notes after Note 3:

4. *PENNHURST STATE SCHOOL AND HOSPITAL V. HALDERMAN*

The Supreme Court has held that the *Ex parte Young* limitation on state sovereign immunity applies only to suits brought under federal law, not state law. In Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), the Court considered a suit for injunctive relief brought against state officials who were involved in operating a Pennsylvania institution for individuals with mental disabilities, the conditions at which were alleged to violate a Pennsylvania statute. The Court held (in a 5-4 decision) that the suit should be viewed as one against the state and hence barred by state sovereign immunity. In an opinion authored by Justice Powell, the Court reasoned that the *Ex parte Young* limitation is designed to "promote the supremacy of federal law" and that "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." Justice Stevens argued in dissent that the logic of *Ex parte Young*—that "unlawful acts of an officer should not be attributed to the sovereign"—applied to suits brought under state as well as federal law.

5. *EX PARTE YOUNG* SCHOLARSHIP

As mentioned in the previous note, *Ex parte Young* has come to stand for the proposition that a cause of action to enjoin state officials from violating the Constitution exists independent of statutory authorization. Whether, how, and why this should be true have become matters of interesting scholarly debate.

Owen W. Gallogly, Equity's Constitutional Source, 132 Yale L.J. 1213 (2023), argues that the source of equity powers is Article III, Section 2, which provides that the "judicial Power of the United States shall extend to all Cases, in Law and Equity, arising under this Constitution." This reading grounds equity power in the Constitution itself, though not as an immutable judicial power. It is, rather, a "default rule," giving federal courts the power to afford, and incrementally to develop, traditional forms of equitable relief, unless and until Congress says otherwise. This argument prompted a response from Carlos Manuel Vazquez, who agrees with the availability of equity power but doubts that it should be attributed to Article III. Rather, he argues, it should be considered part of a general constitutional default rule of judicial power to provide remedies, whether equitable or legal, unless constrained by statute. Carlos Manuel Vazquez, The Constitution as a Source of Remedial Law, 132 Yale L.J. Forum 1062 (2023). The practical differences between these conceptualizations may not be great.

Different in analysis, though perhaps broadly similar in application, is John Harrison, Federal Judicial Power and Federal Equity without Federal Equity Powers, 97 Notre Dame L. Rev. 1911 (2022). Harrison identifies the law of equitable remedies as a body of legal norms that are external to the courts in the same way as statutes or the law of contracts. In his view, "Article III did not enact equity any more than it enacted the common law." The

law of equitable remedies presumptively could be changed by statute but would otherwise remain within the authority of the courts to apply and develop. Congress's power over remedy, however, may not be unlimited. Harrison starts with the widely accepted proposition that the Constitution at least requires that a constitutional right can be used defensively—that is, that an unconstitutional rule will not be given effect in an enforcement proceeding. He then identifies as the crucial question "whether the *Ex parte Young*-type anticipatory proceeding is always an additional remedy that goes beyond the Constitution's requirements or is sometimes constitutionally mandatory." The argument that it might be mandatory rests on the idea that *some* effective remedy is constitutionally required and that in some circumstances that might be a pre-enforcement injunction. That was the question raised but not resolved in Whole Woman's Health v. Jackson, 595 U.S. __, 142 S.Ct. 522 (2021), discussed in Note 2 above.

The same question prompted Michael T. Morley to explore a variety of ways in which *Ex parte Young*'s promise of pre-enforcement relief could be preserved even when, as in Texas, a statute is structured to allow only private enforcement. Michael T. Morley, Constitutional Tolling and Preenforcement Challenges to Private Rights of Action, 97 Notre Dame L. Rev. 1825 (2022). Most efficacious would be a federal statute allowing such litigation. Alternatives, each involving doctrinal complexity, would be expanding *Ex parte Young* to allow suit against a designated state official as a stand-in for the state and adopting a "constitutional tolling" idea that would allow defendants possessing a reasonable constitutional defense to escape liability when no pre-enforcement challenge was available.

For consideration of these issues in a wide-ranging review of constitutional remedies, with particular emphasis on *Whole Woman's Health* and its implications, see Richard H. Fallon, Jr., Constitutional Remedies: In One Era and Out the Other, 136 Harv. L. Rev. 1300 (2023). For discussion of how use of the common law "writ of prohibition" might be a way of challenging unconventional enforcement regimes like the one in *Whole Woman's Health*, see James E. Pfander, Judicial Review of Unconventional Enforcement Regimes, 102 Tex. L. Rev. 769 (2024).

On a different topic, Samuel L. Bray and Paul B. Miller in Getting Into Equity, 97 Notre Dame L. Rev. 1763 (2022), argue that it is historically inaccurate to think of *Ex parte Young* as recognizing an equitable "cause of action." They say that the concept is foreign to equity and that what is central to "getting into equity" is not a legal right but a grievance. This argument was then used in Ernest A. Young, Standing, Equity, and Injury in Fact, 97 Notre Dame L. Rev. 1885 (2022), to argue that the centrality of grievance, as distinct from legal claim, supports the requirement of "injury in fact" in the modern law of standing.

Other recent articles on federal equity power include the following: Rachel Bayefsky, Administrative Stays: Power and Procedure, 97 Notre Dame L. Rev. 1941 (2022), considers the proper scope of the equitable power to grant interim relief in the form of a stay pending appeal. Mila Sohoni, Equity and the Sovereign, 97 Notre Dame L. Rev. 2019

(2022), draws attention to the complexities, both theoretical and precedential, of applying equity to the United States as sovereign. In some circumstances, courts show a special solicitude for the sovereign, while in others the sovereign is treated less generously than a private plaintiff. The origins and scope of the power of the United States to sue for equitable relief without statutory authority are examined in Aditya Bamzai and Samuel L. Bray, *Debs* and the Federal Equity Jurisdiction, 98 Notre Dame L. Rev. 699 (2022). For other work in this area, see Richard Murphy, A Zone for Nonstatutory Review of Constitutional Claims, 84 Ohio St. L.J. 303 (2023) (arguing that "courts should expressly adopt an APA-style zone test for the purpose of determining the availability of a nonstatutory cause of action for injunctive relief for constitutional claims").

For articles focusing on the role of the legislature in enforcing constitutional rights, see Edward A. Hartnett, Legislative Calibration of Constitutional Remedies, 128 Penn St. L. Rev. 165 (2023); Henry Rose, The Demise of the *Bivens* Remedy is Rendering Enforcement of Federal Constitutional Rights Inequitable But Congress Can Fix It, 42 No. Ill. L. Rev. 229 (2022); and Henry Rose, A Federal Legislative Proposal to Address the Demise of the *Bivens* Remedy, 49 J. of Legislation 376 (2023). Finally, in Resolving Equity's *Erie* Problem, 56 Ariz. St. L. J. 289 (2023), Andrea Olson argues that the origins, and therefore the limits, of federal equity power are jurisdictional in nature. It follows that limitations could be cured by legislation and that state courts might retain under state law the authority to act beyond the traditional limitations on federal equitable relief.

SECTION 2. CONSENT AND CONGRESSIONAL ABROGATION

Page 1222, add three new Notes after Note 7:

7A. EMINENT DOMAIN: *PENNEAST PIPELINE CO., LLC V. NEW JERSEY*

In PennEast Pipeline Co., LLC v. New Jersey, 594 U.S. __, 141 S.Ct. 2244 (2021), the Court, in a 5-4 decision, held that the federal government could authorize private parties to sue states to condemn state-owned property for the purposes of eminent domain. In that case, Congress in the National Gas Act had allowed gas pipeline companies to be given the authority to condemn necessary rights-of-way in which states had an interest. The Court concluded, in an opinion by Chief Justice Roberts, that state sovereign immunity was not a barrier to these eminent domain actions.

The Court began by noting that the federal government had throughout history exercised an eminent domain authority, and that it had often delegated this authority to private parties. It also noted that prior precedent had established that the federal eminent domain power extended to state-owned land. With this historical backdrop in mind, the Court distinguished between congressional *abrogations* of state sovereign immunity and *implicit waivers* by the states of their sovereign immunity as part of the constitutional plan: "[C]ongressional abrogation is not the only means of subjecting States to suit. . . . States can also be sued if they have consented to suit in the plan of the Convention." Such implicit consent

is why, the Court explained, states are subject to bankruptcy suits, suits by other states, and suits by the federal government. The same is true, said the Court, of eminent domain proceedings: "the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees." The Court described the federal eminent domain authority as "complete in itself" and thus as leaving no immunity to the states that needs to be further waived or abrogated.

Justice Barrett dissented and was joined by Justices Thomas, Kagan, and Gorsuch. She argued that the National Gas Act was based on Congress's Commerce Clause authority, and that it was settled that this authority does not give Congress the ability to abrogate state sovereign immunity. In addition, she contended that history did not support the Court's holding, noting that

> the question before us is not whether Congress can authorize a private party to exercise the right of eminent domain against another private party, which is the proposition this history supports. Nor is it whether Congress can authorize a private entity to take state property through means other than a condemnation suit. The question is whether Congress can authorize a private party to bring a condemnation suit against a State. And on that score, the Court comes up dry.

Justice Gorsuch wrote a separate dissent, joined by Justice Thomas, in which he argued that there is a difference between the structural principle of state sovereign immunity, which applies in both federal and state courts but is waivable, and Eleventh Amendment immunity, which applies only in federal courts but is non-waivable. He contended that this case fell within the scope of Eleventh Amendment immunity because it was a suit in law or equity brought by a non-citizen against a state.

7B. WAR POWERS: *TORRES V. TEXAS DEPT. OF PUBLIC SAFETY*

After *Katz*, the Court had suggested that bankruptcy might be the only basis in Article I of the Constitution for congressional authorization of suits by private parties against non-consenting states. *PennEast* potentially qualified that suggestion to the extent that, as the dissent there argued, the federal eminent domain power emanates from Article I. In any event, the Court made clear in Torres v. Texas Dept. of Public Safety, 597 U.S. __, 142 S.Ct. 2455 (2022), that there is at least one other Article I basis for authorizing suits against non-consenting states: Congress's war powers.

Torres concerned the constitutionality of the Uniformed Services Employment and Reemployment Rights Act, which gives veterans returning from deployment the right to reclaim their prior jobs with state employers and authorizes suit if those employers refuse to accommodate them. The Act had initially authorized suit in federal court, but after *Seminole Tribe* it was amended to allow for suit in state court. (This was before the Court held in *Alden v. Maine* that state sovereign immunity also applies in state courts.)

In a 5-4 decision, the Court in *Torres* held that state sovereign immunity is not a defense to suits brought under this statute. Speaking through Justice Breyer, the Court relied heavily on the analysis in *PennEast*. Quoting from that decision, the Court said: "The Constitution's text, its history, and this Court's precedents show that 'when the States entered the federal system, they renounced their right' to interfere with national policy in this area." The Court emphasized that Article I of the Constitution conveys broad war powers on the national government and also disallows states from engaging in various war-related activities. It also observed that "Congress has, since the founding era, directed raising and maintaining the national military, including at the expense of state sovereignty." And it claimed that "an unbroken line of precedents supports the same conclusion: Congress may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces." It cited, for example, Tarble's Case, 80 U.S. (13 Wall.) 397 (1872), in which the Court had held that states could not exercise habeas jurisdiction over federal prisoners (in that case, a deserted soldier), and Selective Draft Law Cases, 245 U.S. 366, 381 (1918), in which the Court had dismissed federalism objections in upholding the federal government's authority to impose a military draft. For these reasons, said the Court, "Congress' power to build and maintain a national military is," to use the phrase invoked in *PennEast*, "complete in itself."

Justice Kagan concurred to argue that, while "our sovereign immunity decisions have not followed a straight line," the decision here was consistent with the Court's analysis in *PennEast* (from which she had dissented).

Justice Thomas dissented and was joined by Justices Alito, Gorsuch, and Barrett. He began by noting that "the line between 'plan-of-the-Convention waiver' and 'congressional abrogation' is a murky one." He then argued that "*Alden* already answered the question presented and held that the States did not surrender their state-court immunity when ratifying Article I of the Constitution." In addition, Thomas noted that, unlike this case, *Katz* and *PennEast* involved congressional authorizations of suit in *federal* rather than state court. He then reviewed the textual, historical, and structural materials relied upon by the majority and said that they merely showed that the federal government had broad war powers authority, not that the states had waived their immunity in this context. Thomas further disputed the Court's "complete in itself" test, noting that, by "saddling 'completeness' with more analytical weight than it can bear, the Court has devised a method that has the certainty and objectivity of a Rorschach test." Finally, he claimed that, "[t]o the extent that the Court's new 'complete in itself' standard has any definable contours, it is inconsistent with our modern sovereign immunity doctrine and, in particular, *Seminole Tribe*."

Is the Court's distinction between waivers of sovereign immunity implicit in the constitutional plan and congressional abrogation of immunity using authority delegated in the Constitution persuasive? Why doesn't the Constitution's delegation of authority to Congress to regulate interstate commerce also reflect an implicit waiver of state sovereign immunity? Is the Court in *Katz*, *PennEast*, and *Torres* in effect balancing what it perceives to be the interests of the national government in being able to regulate in a particular area

against the interests of the states in having immunity? How determinate is the Court's "complete in itself" test? For an argument that this line of cases is "incompatible with the original public meaning of the Constitution," see Anthony J. Bellia Jr. and Bradford R. Clark, State Sovereign Immunity and the New Purposivism, 65 Wm. & Mary L. Rev. 485, 489 (2024). For an effort to take stock of the state sovereign immunity regime resulting from *Seminole Tribe*, including recent limitations, see Ernest A. Young, State Sovereign Immunity After the Revolution, 102 Tex. L. Rev. 697 (2024).

7C. WHAT COUNTS AS A CLEAR STATEMENT?: *LAC DU FLAMBEAU BAND V. COUGHLIN*

The Court considered what qualifies as a clear statement of congressional intent to abrogate sovereign immunity in Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. __, 143 S.Ct. 1689 (2023). The question was whether the Bankruptcy Code overrides the immunity of federally recognized Indian tribes. The Court emphasized that it would not find such abrogation unless Congress "has conveyed its intent to abrogate in unequivocal terms. That is a high bar."

Yet in an opinion by Justice Jackson, the Court found that "high bar" to be satisfied. The Bankruptcy Code abrogates sovereign immunity as to a "governmental unit," a term that "means United States; State; Commonwealth; District; Territory; municipality; … or other foreign or domestic government." The Court held that a federally recognized tribe qualifies as such a "governmental unit" subject to suit in bankruptcy proceedings. "[T]he Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity. Federally recognized tribes undeniably fit that description; therefore, the Code's abrogation provision plainly applies to them as well." Justice Gorsuch alone dissented, arguing that a statute should not be construed to abrogate tribal sovereign immunity unless it expressly mentions "Indian tribes."

Is *Lac du Flambeau* consistent with *Sossamon v. Texas*? Does it suggest that the clear statement test for congressional abrogation may be more lenient than the test for waivers of immunity in exchange for federal funds? Or are the clear statement requirements perhaps less demanding in an area such as bankruptcy (and now eminent domain and war powers), where the Court has recognized Congress's authority to abrogate immunity?

Page 1263, add a footnote a at the end of Note 4:

[a] Although not involving a remedy in state court, consider Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC, 602 U.S. __, 144 S.Ct. 1588 (2024). There, the Supreme Court held that the remedy for unconstitutionally disparate bankruptcy fees, which had been authorized by a federal statute, was simply parity in the fees going forward, not a refund of the higher fees that had been paid. In an opinion by Justice Jackson, the Court reasoned that where, as here, a constitutional injury stems from a federal legislative program, the touchstone for discerning the proper remedy is legislative intent. With that in mind, the Court noted that the disparity in fees had been small and short-lived, and it reasoned that Congress would have wanted only prospective parity as a remedy under such circumstances. By contrast, the Court said that requiring refunds "would require us to undercut congressional intent and transform, by judicial fiat, a program that Congress designed to be self-funding into an estimated $326 million bill for

taxpayers." Justice Gorsuch, joined by Justices Thomas and Barrett, argued that a refund is a traditional remedy for unlawfully imposed fees.

CHAPTER X

HABEAS CORPUS

SECTION 1. REVIEW OF STATE COURT DECISIONS ON THE MERITS

Page 1267, add a footnote at the end of the second sentence of the second paragraph of Note 3:

[d] Relief under § 2255(a) is available in cases where a federal prisoner claims a right to release on the ground that "the *sentence* was imposed in violation of the Constitution or laws" of the United States. (Emphasis added.) Section 2255(e) provides that federal prisoners must resort to relief under § 2255 instead of habeas corpus "unless it . . . appears that the remedy . . . is inadequate or ineffective to test the legality of his *detention*." (Emphasis added.) When, then, might habeas be available to a federal prisoner?

This question was addressed in Jones v. Hendrix, 599 U.S. __, 143 S.Ct. 1857 (2023). "Traditionally," the Court said, habeas is still available for "unusual circumstances in which it is impossible or impracticable for a prisoner to seek relief from the sentencing court." There have been cases, for example, when conviction occurred in a specialized court that had been dissolved prior to a prisoner seeking collateral relief. Other examples could occur when the prisoner is attacking the "detention" rather than the "sentence," as where prison conditions, denial of parole, or the denial of good time credits are challenged.

Jones v. Hendrix itself involved a complex procedural situation that is dealt with in the Notes on Relief After Post-Conviction Reinterpretation of Federal Criminal Statutes in Section 4 of this Chapter. The result of that decision is that, in not uncommon situations like the one before the Court, neither § 2255 nor habeas corpus is available even though the federal statute on which a conviction was based is reinterpreted, the new interpretation is made retroactive to prior convictions, and the petitioner would be innocent under the new interpretation.

Page 1290, add a Note 3(iii):

(iii) *Andrew v. White*

Andrew was convicted of murdering her husband and sentenced to death. Extensive details were introduced at her trial about her sex life and her failings as a mother and wife. The State admitted that much of this evidence was irrelevant. Andrew sought federal habeas on the ground that the evidence was so prejudicial that it violated the Due Process Clause.

In Andrew v. White, 604 U.S. __, 145 S.Ct. 75 (2025), a shadow docket case, the Court said at the outset of its per curiam opinion:

> The Court of Appeals rejected that claim because, it thought, no holding of this Court established a general rule that the erroneous admission of prejudicial evidence could violate due process. That was wrong. By the time of Andrew's trial, this Court had made clear that when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the

> Fourteenth Amendment provides a mechanism for relief." Payne v. Tennessee, 501 U.S. 808, 825 (1991).

The Supreme Court noted that the Circuit Court had acknowledged that *Payne*

> said that the Due Process Clause "provides a mechanism for relief" when the introduction of unduly prejudicial evidence "renders [a] trial fundamentally unfair." 501 U.S. at 825. According to the majority, however, that had been a "pronouncement," not a "holding," of this Court. It therefore concluded Andrew had failed to identify "clearly established federal law governing her claim," as required under . . . [AEDPA]. As a result, the [Court of Appeals] declined to consider whether the [state court] unreasonably applied *Payne*, i.e., whether a fairminded jurist could hold that the admission of irrelevant evidence about Andrew's demeanor as a woman was not so prejudicial as to deprive her of a fundamentally fair trial.

The Supreme Court's response started with the proposition that the "legal principle on which Andrew relies, that the Due Process Clause can in certain cases protect against the introduction of unduly prejudicial evidence at a criminal trial, was . . . indispensable to the decision in *Payne*." It was therefore "a holding of this Court for purposes of AEDPA."

It then continued by responding to Justice Thomas's dissent and describing the required further proceedings:

> The dissent maintains that a reasonable jurist could agree with the Tenth Circuit's understanding of our precedent. That assertion conflates the deference federal habeas courts must extend to a state court's "application of" this Court's precedent with the federal courts' independent obligation to first identify the relevant "clearly established Federal law." 28 U. S. C. § 2254(d)(1); Lockyer v. Andrade, 538 U. S. 63, 71 (2003) (identifying clearly established law "[a]s a threshold matter"). A legal principle is clearly established for purposes of AEDPA if it is a holding of this Court. This Court has no occasion to defer to other federal courts' erroneous interpretations of its own precedent. Nor is such double deference necessary to prevent expansion of federal habeas relief to those who rely on "debatable" interpretations or extensions of our holdings. [Quoting the Thomas dissent.] Andrew does not rely on an interpretation or extension of this Court's cases but on a principle this Court itself has relied on over the course of decades.
>
> Because the Tenth Circuit nonetheless held that no relevant clearly established law existed (a ruling this Court reviews de novo) it never considered whether the state court's application of that law was reasonable. On remand, the Court of Appeals should conduct that inquiry in the first instance. Specifically, the question now is whether a fair-minded jurist reviewing this record could disagree with Andrew that the trial court's mistaken admission of irrelevant evidence was so

"unduly prejudicial" as to render her trial "fundamentally unfair." *Payne*, 501 U.S. at 825.

Justice Alito wrote a short concurrence in the judgment in which he agreed with the Court's statement of the holding of *Payne* and said that "I express no view" on whether its standard of review could be met on remand. Joined by Justice Gorsuch, Justice Thomas dissented. He disagreed that the *Payne* statement was a "holding" and said that "worst of all," the Court "redefines 'clearly established' law to include debatable interpretations of our precedent."

Page 1291, add at the end of Note 4:

Is *Andrew* an important qualification of the AEDPA standard of review? If so, is it surprising or inappropriate that it came in a shadow docket case? And is it surprising or inappropriate that the Circuit Court, not the District Court, was directed to apply the *Payne* standard to determine whether Due Process was violated?

Page 1298, add to the list of citations in the last paragraph of Note 8:

Brandon L. Garrett and Kaitlin Phillips, AEDPA Repeal, 107 Cornell L. Rev. 1739 (2022) (advancing detailed and complex legislative proposals designed "to restore habeas corpus to its pre-AEDPA and pre-Rehnquist court state, in which a federal court can review claims and reach their merits");

Page 1299, add at the end of Note 8:

A different line of attack on AEDPA deference to state-court decisions can be found in Anthony G. Amsterdam and James S. Liebman, *Loper Bright* and the Great Writ, 56 Colum. Human Rights L. Rev. 54 (2025). The abstract describes their thesis:

> *Chevron* deference is dead. The Court's forty-year, seventy-decision experiment with Article-III-court deference to "reasonable" agency interpretations of ambiguous federal statutes failed, killed in part by concern that it unduly curbed the "judicial Power" to enforce the rule of law in the face of politics, partisanship, and mission-driven agency decision-making.
>
> "AEDPA deference" lives. The Court's twenty-five-year, seventy-two decision experiment with Article-III-court deference to "reasonable" state-court interpretations of the Constitution under the 1996 Antiterrorism and Effective Death Penalty Act continues to relegate criminal defendants to prison or death, notwithstanding federal habeas judges' independent judgment that the state courts have misread or misapplied the federal Constitution in adjudicating these defendants' claims.

> How can this be? Only if state judges have more authority to make *constitutional* law by which federal judges may be bound than federal agencies have to make *sub-constitutional* law by which federal judges may be bound.
>
> This is obviously wrong. Federal agencies are creatures of Congress to which it may appropriately delegate some of its power to make the law that federal courts then are duty-bound to apply. Neither Congress nor any other authority save the American people by amendment may delegate the making of constitutional law.

Among other things, Amsterdam and Liebman elaborate by tracking the reasoning of the majority and concurring opinions in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024), and applying them to AEDPA. They also analogize the situation to United States v. Klein, 80 U.S. 128 (1871) ("There, Congress did everything it could—belts, suspenders, and garter—to restrain the Court from applying the whole constitutional law to decide the whole constitutional case. That statute alone matches AEDPA deference in its brazen affront to Article III and the Supremacy Clause.") (*Klein* is discussed in Notes 3 and 4 of the Notes on Congressional Regulation of Federal Rules of Decision and Judgments in Section 2 of Chapter I).

SECTION 2. RETROACTIVE APPLICATION OF NEW CONSTITUTIONAL RIGHTS

Page 1325, add a footnote at the end of Note 2:

[a] As fully developed in Chapter VII, 42 U.S.C. § 1983 provides a remedy in law or equity against persons who deny constitutional rights while acting under color of state or local government authority. As elaborated in Section 7 of this Chapter, the Court held in Preiser v. Rodriguez, 411 U.S. 475 (1973), that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Relief under § 1983 is not available in such a case.

Dev P. Ranjan, Note, Collateral Effects of Habeas Retrogression, 109 Va. L. Rev. 1491 (2023), conducts what is in effect a thought experiment. If the Gorsuch position in *Edwards* were to become law, what effect might it have on the availability of relief under § 1983 in cases that were formally limited exclusively to habeas corpus? The answer, Ranjan suggests, is that the rationale of *Preiser* would be undermined by the Gorsuch position in *Edwards*, and § 1983 should therefore become available to provide relief in certain categories of current habeas cases. Ranjan speculates:

> [W]hile res judicata principles would bar a significant portion of § 1983 suits that might be allowed by habeas corpus, many would still survive. Meanwhile, many suits that would be barred by limitations on successive habeas petitions would be allowed to proceed if brought under § 1983. Finally, prisoners proceeding through § 1983 would not be required to exhaust state remedies and would have some attorney's fees available if they prevailed. On balance, prisoners would likely be better off with § 1983 than they would have been with habeas corpus.

Two important categories of cases that would survive for litigation under § 1983, he guesses, would be "*Brady* violations and claims of ineffective assistance of counsel."

This line of speculation leads Ranjan to conclude that the Gorsuch position is "ultimately misguided." Surely Congress would not have intended that Twentieth Century limitations it has enacted to confine the availability of habeas corpus—AEDPA and the exhaustion requirement, for example—could be set aside by resort to the early history of habeas corpus and the general language of a statute enacted in 1871: "such a fundamental rewriting of federal habeas relief" should only be accomplished by legislation.

Page 1327, add at the end of Note 6:

William M.M. Kamin, The Great Writ of Popular Sovereignty, 77 Stan. L. Rev. 297 (2025) (arguing that a different conception of the nature of the writ of habeas corpus would allow distinguishing between constitutional errors that deprive a convicting court of "jurisdiction" and those that do not); Lee Kovarsky, Habeas Myths, Past and Present, 101 Tex. L. Rev. Online 57 (2022) ("There is decisional authority consistent with the limited habeas power that Gorsuch prefers. But that authority coexists with abundant authority inconsistent with the limit, and the full sweep of the precedent discloses a historical trajectory that undermines the Gorsuch narrative."); Micha S. Quigley, What Is Habeas?, 173 U. Pa. L. Rev. 453 (2025) (examination of "statutory law" as a way of shedding light on constitutional errors that deprive a convicting court of "jurisdiction").[a]

[a] In Jones v. Hendrix, 599 U.S. __, 143 S.Ct. 1857 (2023), the Court (in an opinion by Justice Thomas over dissents by Justice Sotomayor (joined by Justice Kagan) and Justice Jackson), relied on the historical limitation of habeas corpus to jurisdictional errors in rejecting an argument seeking habeas corpus relief. "At the founding," the Court said, "a sentence after conviction 'by a court of competent jurisdiction' was 'in *itself* sufficient cause' for a prisoner's continued detention." Justice Jackson responded, citing the Kovarsky and Siegel articles, that the Court's argument was "based on faulty history."

Jones v. Hendrix is considered further in the Notes on Relief After Post-Conviction Reinterpretation of Federal Criminal Statutes in Section 4 of this Chapter.

Page 1360, add two new Notes after Note 2:

2A. ADEQUACY OF PROCEDURAL GROUNDS: *CRUZ V. ARIZONA*

The adequate-and-independent-state-ground (AISG) doctrine has heretofore operated as a bar to Supreme Court review of a federal question that a state court declined to hear based on a state procedural default. The Supreme Court may not consider the federal question, the reasoning goes, if the state procedural barrier is both adequate and independent to sustain the state court's decision. If the Court finds the ground either inadequate or not independent, it typically upholds its jurisdiction and proceeds to a decision on the merits of the federal question.

Cruz v. Arizona, 598 U.S. __, 143 S.Ct. 650 (2023), presents an interesting twist on this normal operation of the rule. The case arose in a state collateral proceeding that was authorized, Cruz claimed, by an Arizona rule of criminal procedure (Rule 32.1(g)) permitting a successive petition for collateral review if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." The "significant change in the law" on which Cruz relied was an intervening United States Supreme Court decision. But the Arizona Supreme Court held that the intervening decision did not qualify as "a significant change in the law," and that therefore "Cruz is not entitled to relief under Rule 32.1(g)." After granting certiorari, the United States Supreme Court held that the state court's reasoning was "inadequate" because it was an "entirely new" interpretation of the Rule and was "in conflict with prior

Arizona case law" and "the opposite of firmly established and regularly followed" state law.

But the Court did not then proceed to resolve the merits of the underlying question of federal law. It had limited its grant of certiorari to the AISG question. Having resolved that question by holding the state ground inadequate, it concluded:

> In exceptional cases where a state-court judgment rests on a novel and unforeseeable state-court procedural decision lacking fair or substantial support in prior state law, that decision is not adequate to preclude review of a federal question. The Arizona Supreme Court applied Rule 32.1(g) in a manner that abruptly departed from and directly conflicted with its prior interpretations of that Rule. Accordingly, the judgment of the Supreme Court of Arizona is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

To understand the Court's decision, some background is necessary.

(i) Simmons v. South Carolina and Lynch v. Arizona

Cruz was convicted in 2005 for the murder of a police officer and sentenced to death in an Arizona state court. "At trial," Justice Sotomayor's opinion for the Court in *Cruz* recited, "Cruz repeatedly sought to inform the jury of his parole ineligibility." The trial judge refused. Instead, the Court noted, "the judge instructed the jury that Cruz was eligible for three penalties: (1) 'Death by lethal injection'; (2) 'Life imprisonment with no possibility of parole or release from imprisonment on any basis'; and (3) 'Life imprisonment with a possibility of parole or release from imprisonment' after 25 years." "The reference to parole," the Court added, "was plainly wrong." Arizona had abolished parole for all felonies committed after 1993. The only relief from a life sentence was executive clemency, and by statute that was available only after an offender sentenced to life had been imprisoned for 25 years. Parole, in Arizona, was not a possibility.

Well before Cruz's trial, the Supreme Court had held in Simmons v. South Carolina, 512 U.S. 154, 178 (1994) (O'Connor, J. concurring):[g]

> Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.

[g] *Simmons* was decided by a fractured Court. Joined by Justices Stevens, Souter, and Ginsburg, Justice Blackmun wrote for a plurality. Justice Souter filed a concurring opinion in which Justice Stevens joined. Justice Ginsburg also wrote a concurring opinion. Justice O'Connor wrote the controlling opinion, a concurrence in the judgment in which Chief Justice Rehnquist and Justice Kennedy joined. Joined by Justice Thomas, Justice Scalia dissented.

Both the Arizona trial court and the Arizona Supreme Court on appeal held that *Simmons* did not require that the Cruz jury be informed that he would not be eligible for parole if sentenced to life imprisonment. The United States Supreme Court denied certiorari.

The Arizona courts continued in numerous other situations after the Cruz conviction to refuse to apply *Simmons* in Arizona criminal trials. Their rationale for doing so was rejected in Lynch v. Arizona, 578 U.S. 613 (2016) (per curiam):[h]

> The Arizona Supreme Court thought Arizona's sentencing law sufficiently different from the others this Court had considered that *Simmons* did not apply. It relied on the fact that, under state law, Lynch could have received a life sentence that would have made him eligible for "release" after 25 years. But under state law, the only kind of release for which Lynch would have been eligible—as the State does not contest—is executive clemency. And *Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility.

The state had also argued that the possibility of future legislative reform should serve to distinguish *Simmons*. But this argument, the Court responded, would completely undermine the *Simmons* holding. Future legislative reform is always a theoretical possibility. The law at the time of trial should control.

(ii) The Majority in Cruz

After the decision in *Lynch*, Cruz filed a second petition for state post-conviction relief under Arizona's Rule 32.1(g).[i] The *Lynch* decision, he argued, provided "a significant change in the law" that "would probably overturn [his] sentence." Not so, the Arizona Supreme Court responded:

> We hold that, because *Lynch* was based on precedent well established at the time the defendant was convicted and sentenced, it was not a significant change in the law for purposes of permitting relief pursuant to Rule 32.1(g). . . . [T]he law relied upon by the Supreme Court in *Lynch*—*Simmons*—was clearly established at the time of Cruz's trial, sentencing, and direct appeal, despite the misapplication of that law by Arizona courts. Consequently, *Lynch* does not represent a significant change in the law . . . Rule 32.1(g) requires a significant change in the law, whether state or federal—not a significant change in the *application* of the law . . . .[j]

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[h] This was a summary per curiam disposition in which Justice Thomas, joined by Justice Alito, dissented.

[i] His first petition is not relevant here.

[j] See Ruth Marcus, The Justices Halt an Execution—And Reveal Themselves in the Process, Washington Post, February 24, 2023:

> [H]ere is where, as Justice Elena Kagan observed at oral argument, his predicament became one that "Kafka would have loved."

Because of this conclusion, the Arizona Supreme Court did not reach two additional arguments made by the state: that *Lynch* did not apply retroactively and that applying it would not (as required by the Rule) probably overturn Cruz's death sentence.[k]

The United States Supreme Court noted in its recitation of the factual background that after the jury sentenced Cruz to death:

> Three jurors, unprompted by Cruz, issued a press release the next day. The jurors explained that this had been a "gut-wrenching decision" and that "[t]here was not one person on the jury who did not cry." They reported that they would rather have voted for life without the possibility of parole, but that they were not given that option. A fourth juror later stated in a declaration: "If I could have voted for a life sentence without parole, I would have voted for that option."

The Court then reviewed the AISG doctrine, engaged in a detailed review of Arizona precedent, and concluded:

> Before *Lynch*, Arizona courts held that capital defendants were not entitled to inform the jury of their parole ineligibility. After *Lynch*, Arizona courts recognize that capital defendants have a due process right to provide the jury with that information when future dangerousness is at issue. It is hard to imagine a clearer break from the past. . . . As the Arizona Supreme Court has repeatedly interpreted [Rule 32.1(g)], *Lynch* should qualify because it overruled binding Arizona precedent, creating a clear break from the past in Arizona courts. The Arizona Supreme Court's contrary decision was unprecedented and unforeseeable. Only violations of state rules that are "'firmly established and regularly followed' . . . will be adequate to foreclose review of a federal claim." Lee v. Kemna, 534 U.S. 362, 376 (2002). That standard is not met here.

(iii) The Dissent in Cruz

Joined by Justices Thomas, Alito, and Gorsuch, Justice Barrett dissented. She analyzed the same Arizona precedents, and concluded:

> [T]he Arizona Supreme Court did not contradict its own settled law. Instead, it confronted a new question and gave an answer reasonably consistent with its

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Cruz relied on a provision of Arizona law that allows new challenges when "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence."

Sounds like a winning argument, right? Not in Arizona. Having found in 2008 that *Simmons* didn't cover Cruz's case, the Arizona Supreme Court now switched gears and asserted exactly the opposite: that *Simmons* had applied all along. That meant the high court's 2016 ruling in *Lynch* "was not a significant change in the law," only "a significant change in the application of the law." Translation: tough luck.—[Footnote by eds.]

[k] See State v. Cruz, 251 Ariz. 203, 207-08, 487 P.2d 991, 995-96 (2021).

> precedent. . . . Cruz's case . . . raised a question of first impression: whether a "significant change" occurs when an intervening decision reaffirms existing law, but rectifies an erroneous application of that law. . . .
>
> The Court makes a case for why the Arizona Supreme Court's interpretation of its own precedent is wrong. If I were on the Arizona Supreme Court, I might agree. But that call is not within our bailiwick. Our job is to determine whether the Arizona Supreme Court's decision is defensible, and we owe the utmost deference to the state court in making that judgment. Cases of inadequacy are extremely rare, and this is not one.

(iv) Questions and Comments

On its own terms, the debate between the majority and the dissent in *Cruz* turns on a careful analysis of prior Arizona cases that need not, indeed cannot, be resolved here. The significance of the case for present purposes lies elsewhere—in the relationship between the United States Supreme Court and state courts that are engaged in state post-conviction proceedings. Both of the opinions in *Cruz* spoke only to the application of the AISG doctrine. Neither addressed what it might mean for future state post-conviction proceedings.

The Court appears to be telling the states that if they are going to entertain federal constitutional questions in state collateral proceedings, they must apply their procedural law in a fair and straightforward manner that will be open to review for adequacy on certiorari. It observed in a footnote that it did not need to reach "Cruz's additional arguments that the decision below reflects an attitude of hostility toward [*Simmons* and *Lynch*] and impermissibly discriminates against federal law by nullifying Cruz's rights under *Simmons*." Would this have been a more straightforward basis for its decision? What would the remedy have been if it had followed this path? Do the Court's actual grounds for decision amount to much the same thing?

At the end of the day, what is the significance of the Court's decision to limit its consideration to the AISG issue and then remand the case to the state courts for further proceedings? Would the Arizona Supreme Court remain free to conclude once again that the requirements of Rule 32.1(g) were not met? Consider the following comments in Will Baude, *Cruz v. Arizona*'s Very Odd Jurisdictional Holding, The Volokh Conspiracy, https://reason.com/volokh/2023/03/19/cruz-v-arizonas-very-odd-jurisdictional-holding/:

> I am not sure how to think about what happened here. Here are three possibilities:
>
> 1, This is just a goof. The Supreme Court forgot how the AISG doctrine works, and will be quite surprised to learn that the Arizona Supreme Court can report back on remand that nothing has changed.
>
> 2, The Supreme Court is just giving a non-binding hint to the Arizona Supreme Court that it would like it to change its mind. Perhaps the Court knows that its

> AISG holding has not really changed anything Arizona is supposed to do, but figures a round of vacate and remand might lead to a different result.
>
> 3, The Supreme Court has subtly shifted (or plans to shift) the nature of the [AISG doctrine] from a rule about *federal* review into some kind of constitutional *constraint* on state courts. This is closer to how the parties briefed the case, and could draw some support from the Supreme Court's earlier decision in *Montgomery v. Louisiana*. But I suspect that the majority backed away from this kind of holding quite deliberately—perhaps as the price of a join or two. If I'm right about that suspicion, though, I still cannot tell if it backed away into option 1 or option 2.

What did the Court have in mind? Is the combination of *Montgomery* and *Cruz* significant? Have the obligations of state courts in state post-conviction proceedings been changed as a result of these two decisions? "It remains to be seen," concludes Taylor A. R. Meehan, Postconviction Remedies, Retroactivity, and *Montgomery v. Louisiana*'s Other New Rule, 88 Mo. L. Rev. 1077 (2023), "whether *Montgomery*'s innovation is here to stay."

2B. Postscript on *Cruz v. Arizona*: Federal Habeas

How does federal habeas corpus fit into the *Cruz* picture? Justice Barrett discussed a parallel between the Arizona court's procedural holding and an analogous procedural holding that could occur in a federal habeas proceeding. She then added in a footnote that "[t]his hypothetical is inapposite to Cruz's pending federal habeas action, which appears to be a timely, initial federal filing." Should pursuit of that avenue of relief have been required, rather than bending the AISG doctrine to a new purpose?

Cruz did in fact raise a version of his *Simmons* claim in the federal habeas petition adverted to by Justice Barrett. This description of the trial proceedings by the Supreme Court in *Cruz* will put in context the federal habeas court's disposition:

> At trial, Cruz repeatedly sought to inform the jury of his parole ineligibility. Citing *Simmons*, Cruz expressed concern that unless he had "the opportunity to present the mitigating factor that he will not be released from prison," jurors would be left to "speculate" about Arizona's capital sentencing scheme and whether it allows for parole. The trial court "conclude[d] that *Simmons* is distinguishable" and did not act on Cruz's concern.
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> Cruz also informed the trial court of his intent to call as a witness the chairman of the Arizona Board of Executive Clemency to testify that the board no longer had authority to parole any capital defendants. In response, the State sought to prevent Cruz from offering evidence as to "the prospects of parole for an inmate sentenced to life imprisonment." The trial court precluded the testimony.

In Cruz v. Ryan, 2018 WL 1524026 (D. Ariz. Mar. 28, 2018), the case referred to and cited by Justice Barrett in her footnote, the federal habeas trial judge addressed the claim

that the preclusion of mitigation testimony by the Chairman of the Board of Executive Clemency was a deprivation of "fair sentencing in violation of the Eighth Amendment." After extended consideration, the court rejected the claim. It then continued:

> In addition to precluding [the Board Chairman's] testimony, the trial court also rejected defense counsel's request that, prior to the jury's decision in the penalty phase, the trial court should decide and inform the jury whether the court would elect a life, or natural life, sentence in the event death was not imposed by the jury, because "nothing has been presented to suggest that the defendant would not be eligible for release if a life sentence was imposed." Petitioner argued on direct appeal that this was a due process violation under the Supreme Court's holding in Simmons v. South Carolina, 512 U.S. 154 (1994). Petitioner did not raise this due process argument in his federal habeas petition, but even if he had, this case is distinguishable from *Simmons*: Petitioner's future dangerousness was never put at issue by the State,[17] and Petitioner never requested to inform the jury, through instructions or argument, that, under state law, he was ineligible for parole.[l]

These comments on *Simmons* and the import of footnote 17 in particular, if accurate and supported by the record, would mean that Cruz's *Simmons* claim has no merit. The *Simmons* holding was clearly limited to situations "[w]here the State puts the defendant's future dangerousness in issue."

Cruz v. Ryan was decided in March of 2018. Certiorari was granted in *Cruz v. Arizona* four years later, in March of 2022. At the very least, the habeas court's comments in *Cruz v. Ryan* establish that the Supreme Court could not have resolved the *Simmons* claim on the merits without a careful review of the trial record, a task for which it is not well-suited and which it would not be inclined to undertake.[m] Moreover, this was the only issue before the Court. The underlying federal question presented in *Cruz* did not raise an important

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[17] Petitioner alleged as a mitigating factor the lack of propensity for future violence. The State did not contest this factor.

[l] The habeas court did, however, hold "an evidentiary hearing on [a claim in] Cruz's habeas petition, alleging ineffective assistance of counsel at sentencing." In Cruz v. Shinn, 2021 WL 1222168 (D. Ariz. Mar. 31, 2021), the court denied the claim but granted a certificate of appealability. The Respondent's Brief in *Cruz* noted that the appeal had been stayed pending the outcome in *Cruz* at the Supreme Court.—[Footnote by eds.]

[m] On the future dangerousness point, the Petitioner's Brief in *Cruz* said: "The State placed his future dangerousness at issue . . . ." Respondent's Brief replied categorically that "the State did not place Cruz's future dangerousness at issue . . . ." The Petitioner's Reply Brief answered: "Cruz's future dangerousness was at issue." Only careful parsing of the record, plus most likely an analysis of what it takes to "place" a contention "at issue" under Arizona law, can resolve this conflict. Note that the Court was well aware of this debate at the certiorari stage. The certiorari papers engaged in the same debate between the parties on this issue that were reflected in the briefs.

In addition, the habeas court's statement that "[p]etitioner never requested to inform the jury, through instructions or argument, that, under state law, he was ineligible for parole" is curious. The Supreme Court said that Cruz "repeatedly sought to inform the jury of his parole ineligibility," a conclusion that appears to be supported by repeated references to the record in Cruz's brief before the Supreme Court. Again, this debate reenforces the point that resolution of Cruz's *Simmons* claim on the merits would require careful examination of the trial court record.

legal issue that required Supreme Court attention. One could argue that *Simmons* should be extended to other capital case situations. But that would raise an entirely new set of issues, Cruz did not raise them, and it is long past the time when he could do so.

Might all this explain why the Court limited the grant of certiorari to the AISG claim? And might it reinforce the implication that *Cruz* was intended to send a message to state courts engaged in state post-conviction proceedings?

On a completely different point, how might the *Simmons* comments in *Cruz v. Ryan* affect the Arizona Supreme Court's decision on remand? Perhaps they point to a path to rejection of Cruz's claim on the merits. But to follow this path, the court might have to apply Rule 32.1(g) to get there (or at least peek around it), a resolution that might well affect a host of other cases.

Finally, recall that the trial judge affirmatively misinformed the jury about Cruz's parole eligibility if sentenced to life imprisonment. This error seems especially significant given the post-trial juror comments. Is it relevant at this stage of the proceedings?

SECTION 3. PROCEDURAL FORECLOSURE

Page 1406, add two new Notes after Note 3:

3A. SEQUEL: BARRY LEE JONES RELEASED

As reported by the New York Times,[b] following the decision in *Shinn v. Ramirez* the lawyers for Barry Lee Jones "entered mediation with prosecutors, who agreed … that [his] conviction should be overturned and that he should plead guilty to a lesser charge."[c] At a hearing on June 16, 2023, in an Arizona Superior Court, Jones's death sentence was vacated, the original charges against him were dismissed, he pleaded guilty to second-degree murder for failing to seek medical assistance for his girlfriend's daughter, he was sentenced to 25 years for that offense, and he was released because he had already served 28 years.

The Times reported that the prosecutors based their decision on a careful examination of the transcript of the federal court habeas proceeding referred to in *Shinn v. Ramirez*. Jones's trial attorney, that hearing revealed, had failed to uncover medical evidence which showed that the fatal injury could not have occurred on the day the state contended that Jones assaulted the victim. "The idea that Mr. Jones had committed the fatal injury," said the country attorney for the office that prosecuted Jones, "the evidence was no longer there. . . . The original theory of the state was flawed."[d]

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[b] See Michael Levenson, Arizona Man is Freed After 28 Years on Death Row, N.Y. Times, June 16, 2023.

[c] The Washington Post reported that the state Attorney General's Office also participated in the review of Jones's conviction. See Kim Bellware, Man is Freed After Nearly 28 Years on Death Row in Arizona, Washington Post, June 17, 2023.

[d] The Court's statement in *Shinn v. Ramirez* that, on May 1, 1994, Jones repeatedly beat the victim, sexually assaulted her, and committed the fatal blow was consistent with the state's theory of the case, the evidence presented

What, if anything, does this outcome suggest about the Supreme Court's decision in *Shinn v. Ramirez*?

3B. IMPLICATIONS OF *SHINN V. RAMIREZ*

Lee Kovarsky, The New Negative Habeas Equity, 137 Harv. L. Rev. 2222 (2024), describes the evolution of judicial limitations on habeas corpus relief in three steps. First, the Court developed doctrines that were later incorporated into the habeas statutes. The exhaustion requirement and restrictions on successive petitions are examples. Second, the Court developed constraints that operate alongside current statutory requirements. Examples are procedural default and harmless error rules and barriers to retroactivity. Kovarsky calls these limitations "negative habeas equity," i.e., "equity-like discretion to *limit* habeas relief." The third step is new:

> Over the last several terms, . . . the Supreme Court has advanced a much more ambitious theory of negative habeas equity . . . . That version asserts more than *Supreme Court* power to formulate judge-made limits on the habeas remedy—it also asserts discretionary authority for *lower courts* to reject relief to which claimants are otherwise entitled. As [*Shinn v.*] *Ramirez* puts it: "[E]ven if a prisoner overcomes all [the limits imposed by statute and announced by the Supreme Court], he is never entitled to habeas relief. He must still 'persuade a federal habeas court that law and justice require [it].'"

Kovarsky foresees numerous contexts in which this new power might be exercised by lower courts. "Freewheeling habeas remediation would chew at the least popular constitutional rights: the Sixth Amendment right to counsel, due process rights against prosecutorial misconduct, and the right to suppress tainted confessions, to name just a few." This

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at the trial, and the resulting jury verdict. As Justice Sotomayor's opinion reveals, however, the federal habeas proceeding pointed to the uninvestigated potential of an entirely different story. See Jones v. Ryan, 327 F. Supp. 3d 1157 (D. Ariz. 2018). See also Jones v. Shinn, 943 F.3d 1211 (9th Cir. 2019); Jones v. Shinn, 971 F.3d 1133 (9th Cir. 2020).

In a lengthy and meticulous opinion following a seven-day hearing, the district court found that there was significant medical evidence available at the time to indicate that *all* of the victim's injuries occurred before the May 1 timeline on which the state's case was based. The evidence at the hearing showed, for example, that the victim "might have experienced sexual trauma before living with [Jones], or at least before May 1." Several doctors agreed that "it is not possible" that the fatal injury "occurred on the afternoon of May 1" because it would have taken "at least 48 hours" for the injury to develop to the point that caused her death.

The habeas court also concluded that "[t]he possibility that others harmed [the victim] also supported the necessity of investigating the medical timeline from injuries to death." The court identified numerous others who could have been responsible for the victim's injuries. Some may have been caused by the mother, and there was evidence that the mother was concerned about sexual abuse because it had been reported to her that family members had seen the victim "sleeping 'with a bunch of drunk men' at the house and 'things like that that went on all the time.'" Other possible suspects included the victim's older brother and a former boyfriend of the mother.

The court concluded that "trial counsel's investigative failure was due to inattention and neglect, and not the result of strategic judgment. . . . The only explanation [he] offered for his limited investigation is . . . [that] he possibly just assumed Petitioner was guilty based on the State's version of the case."

view of habeas remedies, he argues, is "of surpassing doctrinal importance, and . . . would work a habeas revolution."

For him "the most troubling" possibility is reflected in what he calls "the trial balloon" in Crawford v. Cain, 68 F.4th 273 (5th Cir. 2023). That court denied Crawford's habeas claims of ineffective assistance of counsel based on AEDPA but added that "[m]oreover" recent Supreme Court decisions "direct us to refocus our attention in AEDPA cases." This led it to the conclusion that "[l]aw and justice do not require habeas relief—and hence a federal court can exercise its discretion not to grant it—when the prisoner is factually guilty." It found that "Crawford has not made a colorable claim of factual innocence." He was "unquestionably" guilty: "AEDPA and 'law and justice' both require denying his request for federal habeas relief."[e]

The *Crawford* panel relied on dicta in Brown v. Davenport, 596 U.S. __, 142 S.Ct. 1510 (2022), and *Shinn* as its authority for this conclusion. As Kovarsky describes it, "the modern story starts with" comments in the Gorsuch concurring opinion in *Edwards v. Vannoy*:

> The statute provides that "writs of habeas corpus *may* be granted"—not that they *must* be granted. 28 U.S.C. § 2241(a) (emphasis added); see also § 2243. The law thus invests federal courts with equitable discretion to decide whether to issue the writ or to provide a remedy. Withrow v. Williams, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part).[f]

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[e] This decision was vacated and a rehearing by the Fifth Circuit en banc was granted in Crawford v. Cain, 72 F.4th 109 (5th Cir. 2023). Kovarsky notes several other indications that such a rule may be gaining traction in lower courts.

In Kovarsky's opinion:

> If embraced broadly and natural inferences followed, the innocence rule would be the most important change to habeas law since AEDPA. It would also be the most important decisional move since 1953, when the Supreme Court decided *Brown v. Allen*.

He spends a major part of his article relying on history, text, and precedent to reject this particular application of the "new" habeas negative equity.

[f] Gorsuch dropped a footnote at this point in which he said:

> That is how this Court reads nearly identical text in the Declaratory Judgment Act (DJA). Because the DJA says federal courts "'*may* declare the rights and other legal relations of any interested party,'" district courts "possess discretion" to award declaratory relief.

As for the function of "may" in § 2241(a) and the Gorsuch citation to the Scalia *Withrow* opinion, Kovarsky observes:

> [T]he "may" simply acknowledges statutory contingencies upon which the remedy depends; it does not enact free-floating judicial discretion to deny relief. In fact, it never seems to have even occurred to a Supreme Court Justice to *make* this argument until 1993, some forty-five years after Congress inserted the pertinent language into the statute.

The Gorsuch opinion for the Court in *Davenport* picked up the theme:

> [The original habeas] statutes used permissive rather than mandatory language; federal courts had the "power to" grant writs of habeas corpus in certain circumstances. That same structure lives on in contemporary statutes, which provide that federal courts "may" grant habeas relief "as law and justice require." 28 U.S.C. §§ 2241, 2243. . . .
>
> . . . While AEDPA announced certain new conditions to relief, it did not guarantee relief upon their satisfaction. Instead, Congress left intact the equitable discretion traditionally invested in federal courts by preexisting habeas statutes. So even a petitioner who prevails under AEDPA must still today persuade a federal habeas court that "law and justice require" relief. § 2243.[g]

And *Shinn* completed the circle:

> [W]e have recognized that federal habeas review cannot serve as "a substitute for ordinary error correction through appeal." Harrington v. Richter, 562 U.S. 86, 102-03 (2011). The writ of habeas corpus is an "extraordinary remedy" that guards only against "extreme malfunctions in the state criminal justice systems." Id. at 102. To ensure that federal habeas corpus retains its narrow role, AEDPA imposes several limits on habeas relief, and we have prescribed several more. And even if a prisoner overcomes all of these limits, he is never entitled to habeas relief. He must still "persuade a federal habeas court that law and justice require [it]." Brown v. Davenport, 596 U.S. __, __, 142 S.Ct. 1510, 1524 (2022).

Kovarsky argues that "[t]he vision of negative habeas equity appearing in *Davenport* and *Ramirez* is dicta, so there remains an opportunity for the Supreme Court to course correct." The conclusion he defends in detail is that it cannot be derived from a proper interpretation of § 2241(a) or § 2243, and that it has no precedential support:

> The full view of . . . precedent, combined with a more thoroughgoing inquiry into statutory text, reveals an exceedingly thin legal justification for negative habeas equity. To the extent that there is controlling precedent that anchors negative equity to the habeas statute, it has *never* been the version propounded in the last several Supreme Court terms. If there is a credible argument that free-floating discretion to deny relief sprung from §§ 2241 and 2243, then one would expect

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He adds in a footnote that "Justice Scalia's *Withrow* opinion doesn't cite to anything for this textual argument (other than the statute itself), and I've seen no pre-*Withrow* version of it."

[g] As to the meaning of the "law and justice" language of § 2243, Kovarsky says:

> Section 2243's reference to "law and justice" does not mean that federal district courts have freestanding discretion to deny relief. Instead, it reserves habeas power to order efficacious remedies.

someone to have made it carefully and at length before 2022. Yet no such form of that argument exists.

What should be made of the Court's language in *Davenport* and *Shinn*? Should habeas relief be discretionary even in cases where all of the other barriers to habeas relief can be overcome? If so, under what circumstances?

SECTION 4. CLAIMS OF INNOCENCE

Page 1434, add new Notes before Section 5:

NOTES ON RELIEF AFTER POST-CONVICTION REINTERPRETATION OF FEDERAL CRIMINAL STATUTES

1. *DAVIS V. UNITED STATES*

Recall that Congress enacted 28 U.S.C. § 2255 in 1948 as an alternative to habeas corpus for federal prisoners, essentially to change the venue for collateral attacks on federal convictions. See Note 3 in the Introductory Notes on the History of Habeas Corpus in Section 1 of this Chapter. Subsection (a) of § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

In Davis v. United States, 417 U.S. 333 (1974), the petitioner had been convicted for refusing induction into the military after he was classified as eligible for service by his draft board. The facts and relevant regulatory background are complicated, and not relevant here. Suffice it to say that after his conviction and loss on direct appeal, the federal court of appeals for the region in which he was convicted reinterpreted the applicable regulations in a manner that, he contended, would invalidate his conviction if applied to his case. He filed a § 2255 motion for collateral relief to advance that contention.

The Solicitor General argued that § 2255 relief was not available "because the petitioner's claim is not 'of constitutional dimension.'" The Court responded first that the text of § 2255 provided "scant support" for this position because its wording applied to violations of "the Constitution or laws" of the United States. In dissent, Justice Rehnquist carefully examined the full text of the statute and concluded that the Solicitor General was right. But the Court's examination of the text and legislative history resulted in its conclusion "that the text of the statute cannot sustain the Government's position that only claims 'of constitutional dimension' are cognizable under § 2255."

The Court read its prior cases to be consistent with this conclusion, and continued:

> [T]he fact that a contention is grounded not in the Constitution, but in the "laws of the United States" would not preclude its assertion in a § 2255 proceeding. This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In Hill v. United States, 368 U.S. 424, 429 (1962), for example, we held that that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present(s) exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." The Court did not suggest that any line could be drawn on the basis of whether the claim had its source in the Constitution or in the "laws of the United States."
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> In this case, the petitioner's contention is that the [intervening appeals court decision] establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255. Therefore, although we express no view on the merits of the petitioner's claim, we hold that the issue he raises is cognizable in a § 2255 proceeding.[a]

2. *JONES V. HENDRIX*

The petitioner in Jones v. Hendrix, 599 U.S. __, 143 S.Ct. 1857 (2023), was convicted in 2000 on two counts of possession of a firearm by a felon and one count of making false statements to acquire a firearm. He was sentenced to imprisonment for slightly over 27 years. He obtained no relief on direct appeal but filed a timely § 2255 motion the result of which was that one of his concurrent sentences for the possession offenses was vacated. The overall length of his sentence was otherwise undisturbed.

Years later, in Rehaif v. United States, 588 U.S. __, 139 S.Ct. 2191 (2019), the Supreme Court held that the statute under which Jones was convicted required proof that the defendant "knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." The appeals court precedent under which Jones had been convicted

[a] The Court remanded the case to the Court of Appeals so that it could examine the merits of the petitioner's claim. Justice Powell concurred in the conclusion that § 2255 relief was available in such a case, but wrote separately to dissent from the remand. He thought the Court should have examined the merits of the claim, did so himself, and concluded that the claim lacked merit. As noted in the text above, Justice Rehnquist argued in his dissent that § 2255 relief should not be available in such a case.—[Footnote by eds.]

and which had provided the basis for the denial of his direct appeal was contrary to the holding in *Rahaif*.

Jones faced a quandary if he wanted to seek relief based on *Rehaif*. It was clear enough that such a decision was retroactive and therefore applicable to his case. But § 2255, the normal form of collateral relief for federal prisoners, contained AEDPA provisions that seemed to foreclose that avenue. Since Jones's claim would be based on a new *statutory* interpretation rather than "newly discovered evidence" or a "new rule of *constitutional* law" (emphasis added), § 2255 relief would appear to have been foreclosed under subsection (h) of that statute.[b]

But there was another potential option. By the terms of § 2255(e), habeas corpus is unavailable to federal prisoners "unless it . . . appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."[c] Jones sought to take advantage of this exception by filing for relief under the general habeas corpus statute, § 2241, in the district where he was confined.

The lower courts denied relief and the Supreme Court granted certiorari based on a conflict in the Circuits. The Solicitor General's brief advocated what the Court called a "novel" position:

> Federal prisoners have . . . long been able to collaterally attack their convictions based on a purely *statutory* claim that a decision from this Court has changed the interpretation of a federal criminal law so as to make clear that their conduct was noncriminal. Before AEDPA, such a claim could be vindicated even in a second or subsequent collateral attack if a prisoner could show his actual innocence under the corrected construction of the statute. After AEDPA, such claims cannot be asserted in a second or subsequent Section 2255 motion. But they remain cognizable through the saving clause, because AEDPA modified neither the saving clause itself nor the relevant habeas principles to which it refers. And any doubt

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[b] The full text of § 2255(h) provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

[c] The full text of § 2255(e) provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

> on that question is resolved by this Court's repeated instruction that Congress must speak clearly to restrict the availability of habeas relief—a principle that has special force here, where the relevant class of claims is limited to those brought by people who can show that they have been imprisoned for conduct that is not a crime.

The Solicitor General continued, however, to argue:

> But few prisoners asserting *Rehaif* claims will be able to make the demanding threshold showing of actual innocence, which requires a prisoner to demonstrate that no reasonable juror would have found him guilty under the narrowed definition of the crime. And petitioner plainly cannot make that showing here. He was convicted of 11 felonies, spent more than a year in prison on several of them, and in fact admitted on the stand that he knew that he was not supposed to have a gun.

(i) The Majority Opinion

In an opinion by Justice Thomas, the Court rejected the Solicitor General's position on the availability of such a claim under § 2241.[d] It began by assigning a purpose to what it called the "saving" clause. The saving clause clearly applies, the Court said, when a federal prisoner seeks to attack not the "sentence" being served but the conditions of "detention," for example, by objecting to prison conditions, denial of parole, or revocation of good-time credits. And it had been applied by lower courts in cases where a conviction was obtained by a specialized court that was no longer in existence.

It then noted that numerous lower courts had held that habeas was available under § 2241 for an issue like the one advanced by Jones.[e] Not so, the Court said:

> We now hold that the saving clause does not authorize such an end-run around AEDPA. In § 2255(h), Congress enumerated two—and only two—conditions in which a second or successive § 2255 motion may proceed. Because § 2255 is the ordinary vehicle for a collateral attack on a federal sentence, the straightforward negative inference from § 2255(h) is that a second or successive collateral attack on a federal sentence is not authorized unless one of those two conditions is satisfied. . . . Even more directly, § 2255(h)(2)'s authorization of a successive collateral attack based on new rules "of *constitutional* law" implies that Congress did not authorize successive collateral attacks based on new rules of *nonconstitutional* law. Had Congress wished to omit the word "constitutional," it easily could have done so.

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[d] The Court had appointed an amicus to argue in support of the opinions below.

[e] The Court cited decisions in eight different circuits that had adopted such a rule. The Court cited one case to the contrary: "Prost v. Anderson, 636 F.3d 578, 584–95 (CA10 2011) (Gorsuch, J.) (holding that § 2255(e) does not permit recourse to § 2241 in these circumstances)."

The saving clause does not undermine this strong negative inference. Basic principles of statutory interpretation require that we construe the saving clause and § 2255(h) in harmony, not set them at cross-purposes. That task is not difficult given the distinct concerns of the two provisions. Subsection (h) presumes—as part of its background—that federal prisoners' collateral attacks on their sentences are governed by § 2255, and it proceeds to specify when a *second or successive* collateral attack is permitted. The saving clause has nothing to say about that question. Rather, like subsection (e) generally, it addresses the antecedent question of the relationship between §§ 2241 and 2255.

After AEDPA, as before it, the saving clause preserves recourse to § 2241 in cases where unusual circumstances make it impossible or impracticable to seek relief in the sentencing court, as well as for challenges to detention other than collateral attacks on a sentence. Because AEDPA did not alter the text of § 2255(e), there is little reason to think that it altered the pre-existing division of labor between §§ 2241 and 2255. AEDPA's new restrictions on § 2255, therefore, are best understood as just that—restrictions on § 2255—not as expansions of § 2241's applicability.

Any other reading would make AEDPA curiously self-defeating. It would mean that, by expressly excluding second or successive § 2255 motions based on nonconstitutional legal developments, Congress accomplished nothing in terms of actually limiting such claims. Instead, it would have merely rerouted them from one remedial vehicle and venue to another. Stranger still, Congress would have provided "a *superior* remedy" for the very nonconstitutional claims it chose not to include in § 2255(h). After escaping § 2255 through the saving clause, nonconstitutional claims would no longer be subject to AEDPA's other express procedural restrictions: the 1-year limitations period, see § 2255(f), and the requirement that a prisoner obtain a certificate of appealability before appealing an adverse decision in the District Court, see § 2253(c)(1). We generally "resist attributing to Congress an intention to render a statute so internally inconsistent." Greenlaw v. United States, 554 U.S. 237, 251 (2008).

That resistance is particularly acute here, where allowing nonconstitutional claims to proceed under § 2241 would mean "resurrecting the very problems § 2255 was supposed to put to rest." Wright v. Spaulding, 939 F.3d 695, 707 (CA6 2019) (Thapar, J., concurring). Section 2255 owes its existence to Congress' pragmatic judgment that the sentencing court, not the District Court for the district of confinement, is the best venue for a federal prisoner's collateral attack on his sentence. Channeling a particular class of second or successive attacks back into § 2241 would mean once again "[c]oncentrat[ing] 'an inordinate number of habeas corpus actions' in districts with large prison populations" and requiring District Courts "to review each other's proceedings—often without access to the witnesses,

the sources of evidence, or other local information that may be critical." Id. at 707–08. "The illogical results of applying such an interpretation . . . argue strongly against the conclusion that Congress intended these results." Western Air Lines, Inc. v. Board of Equalization of S.D., 480 U.S. 123, 133 (1987).

Here, as often is the case, the best interpretation is the straightforward one. Section 2255(h) specifies the two limited conditions in which Congress has permitted federal prisoners to bring second or successive collateral attacks on their sentences. The inability of a prisoner with a statutory claim to satisfy those conditions does not mean that he can bring his claim in a habeas petition under the saving clause. It means that he cannot bring it at all. Congress has chosen finality over error correction in his case.

The Court then turned to the arguments made by Jones and the Solicitor General. As to the Solicitor General's position, it said that "the narrow base on which the Government's . . . theory ultimately turns out to rest is its assertion that § 2255(h) is simply *not clear enough* to support the inference that Congress entirely closed the door on pure statutory claims not brought in a federal prisoner's initial § 2255 motion." It responded:

That assertion is unpersuasive for the reasons we have already explained: § 2255(h) specifies the two circumstances in which a second or successive collateral attack on a federal sentence is available, and those circumstances do not include an intervening change in statutory interpretation.

The Government asserts that we require "the clearest command" before construing AEDPA to "close [the] courthouse doors" on "a strong equitable claim" for relief. Holland v. Florida, 560 U.S. 631, 646, 649 (2010). The only two cases the Government relies on for its clear-statement rule do not sweep as broadly as it suggests. In *Holland*, we applied the general presumption of equitable tolling to AEDPA's 1-year statute of limitations for state prisoners' habeas claims. Afterward, in McQuiggin v. Perkins, 569 U.S. 383 (2013), we held that "a convincing showing of actual innocence" could enable a prisoner to evade AEDPA's statute of limitations entirely.

Undoubtedly, *McQuiggin*'s assertion of equitable authority to override clear statutory text was a bold one. But even taking *Holland* and *McQuiggin* for all they are worth, there is a significant difference between reading equitable exceptions into a statute of limitations, on the one hand, and demanding a clear statement before foreclosing workarounds to AEDPA's second-or-successive restrictions, on the other. Statutes of limitations merely govern the *timeframe* for bringing a claim. AEDPA's second-or-successive restrictions, by contrast, "constitute a modified res judicata rule," Felker v. Turpin, 518 U.S. 651, 664 (1996), and thus embody Congress' judgment regarding the central policy question of postconviction remedies—the appropriate balance between finality and error correction. Insisting on a

heightened standard of clarity in this context would effectively mean adopting a presumption against finality as a substantive value. We decline to do so. "[T]he United States has an interest in the finality of sentences imposed by its own courts," Johnson v. United States, 544 U.S. 295, 309 (2005), and how to balance that interest against error correction is a "judgmen[t] about the proper scope of the writ" that is "'normally for Congress to make.'" *Felker*, 518 U.S. at 664.

Accepting the Government's proposal to apply a clear-statement rule would be particularly anomalous in light of the precise question this case presents. . . . [T]here is no historical or constitutional norm of permitting one convicted of a crime by a court of competent jurisdiction to collaterally attack his sentence based on an alleged error of substantive statutory law. . . . [T]here is nothing fundamentally surprising about Congress declining to make such errors remediable in a *second or successive* collateral attack.

(ii) The Sotomayor Dissent

Joined by Justice Kagan, Justice Sotomayor wrote a brief dissent. She agreed with the Solicitor General's view about the relationship of § 2255(h) to § 2241:

[T]oday's decision yields disturbing results. A prisoner who is actually innocent, imprisoned for conduct that Congress did not criminalize, is forever barred by § 2255(h) from raising that claim, merely because he previously sought postconviction relief. It does not matter that an intervening decision of this Court confirms his innocence. By challenging his conviction once before, he forfeited his freedom. . . .

[C]onsider a prisoner who, having already filed a motion for postconviction relief, discovers that a new decision of this Court establishes that his statute of conviction did not cover his conduct. He is out of luck under § 2255, because § 2255(h) will bar his claim. But that claim is cognizable at habeas, where we have long held that federal prisoners can collaterally attack their convictions in successive petitions if they can make a colorable showing that they are innocent under an intervening decision of statutory construction. See Davis v. United States, 417 U.S. 333, 344-47 (1974); McCleskey v. Zant, 499 U.S. 467, 493-95 (1991). Congress did not abrogate that principle in § 2255(h). Thus, we have precisely the kind of mismatch the saving clause was designed to address.

In this case, the petitioner says he is that prisoner, with that mismatch. But the Court of Appeals never considered that question, laboring under a mistaken view of the saving clause that, like the majority's, assigns it almost no role. Accordingly, we would remand for the lower courts to consider the petitioner's claim under the proper framework.

(iii) The Jackson Dissent

Justice Jackson's 39-page dissent started by reviewing the text, history, and intended scope of the saving clause. She argued that it was the intent of Congress that § 2255 would establish a remedy "identical in scope" to federal habeas. The saving clause was designed "to preserve from inadvertent extinguishment postconviction claims that would have been previously cognizable for federal prisoners but cannot be brought by operation of § 2255." When Congress passed AEDPA, she argued, it reenacted the saving clause, with the result that it "operates to (among other things) ensure that § 2255—or the AEDPA amendments—did not, through inapt language, substantively alter the scope of available postconviction relief for federal prisoners." The overriding purpose, she argued, is at least to provide petitioners with one meaningful opportunity to raise meritorious claims.[f]

As an alternative, Justice Jackson advanced an elaborate argument that § 2255 itself should be interpreted to permit relief in the Jones situation. In the course of that discussion, she said:

> The practical consequences that inure from the majority's reading . . . undercut substantially the negative inference upon which the majority relies. . . . [I]ts interpretation of § 2255 produces bizarre outcomes.
>
> First, there is the quirky procedural anomaly that arises due to the fact that statutory innocence claims are fully authorized in the postconviction review context. This Court's recognition that a statute covers a narrower scope of criminal conduct than was previously acknowledged falls within the narrow subset of criminal law decisions that are fully retroactive, meaning that a federal prisoner can rely upon that new determination whether his case is still on direct review or not. But reading § 2255(h) to bar a successive petition raising legal innocence would mean that most prisoners who would (remarkably) be eligible for such retroactive relief would turn out to have no mechanism for actually requesting it. A strange practical conundrum, to say the least.
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> Inferring that § 2255(h) bars legal innocence claims when brought in a successive petition also produces stunningly disparate results that bear no relationship to Congress's purported finality goals. Consider two individuals who have been convicted of the same federal crime—perhaps two codefendants who were tried and sentenced together. Both complete their direct appeals, but only one files a § 2255 motion within AEDPA's statute of limitations, while the other one decides not to or misses the deadline. If § 2255(h) bars a successive petition raising a legal innocence claim, then when *Rehaif* is handed down—altering the elements of the crime of conviction such that *both* prisoners have a colorable claim of legal innocence—

[f] Justice Jackson added in an early footnote: "I take no position as to whether Jones's legal innocence claim is actually meritorious. This case is about whether § 2255 should be interpreted to prevent him from bringing the claim to a court in the first place."

> only the one who did not previously file a § 2255 petition can raise this retroactive statutory innocence claim.
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> Reference to Congress's interest in "finality" cannot explain this odd unequal treatment. Under the Court's interpretation, a prisoner whose conviction became final *30 years ago* can assert a *Rehaif* claim if he never previously filed a § 2255 motion, whereas someone whose conviction became final *2* years ago cannot if he has already had a § 2255 petition adjudicated.
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> Interpreting § 2255(h) as completely foreclosing successive petitions bringing statutory innocence claims also places prisoners in an untenable catch-22 that cannot be what any rational Congress actually intended. Consider what has happened in this very case. Per AEDPA's statute of limitations, Jones had to file his first § 2255 petition within one year of his conviction becoming final. § 2255(f). He did so, and that petition was *successful*; the Eighth Circuit found that Jones had received ineffective assistance of counsel. In the majority's view, by seeking to vindicate his Sixth Amendment rights in this way, Jones has forfeited, forever and for all time, his right to rely on any new retroactive Supreme Court opinion that suggests he is incarcerated for noncriminal behavior. There is no indication that Congress meant for Jones and other prisoners in his position to have to *choose* between pursing an ineffective-assistance-of counsel claim and a claim of legal innocence.

Justice Jackson also took on the Court for its failure to read the "clear statement" requirement as an impediment to narrowing the reach of collateral relief in this context. And she argued that the canon of constitutional avoidance suggests that the Court was in error. There are Eighth Amendment and Suspension Clause implications, she contended, to denying relief in cases where actual innocence is at stake. She preceded that discussion with her conclusion:

> The majority's bottom line, reading "the interplay" between § 2255(h) and § 2255(e) is that a person in prison for noncriminal conduct cannot ask a federal court to review the legality of his detention if he has previously filed a § 2255 petition. This position is stunning in a country where liberty is a constitutional guarantee and the courts are supposed to be dispensing justice.

She then ended with this:

> I conclude with an observation. Today's ruling follows a recent series of troubling AEDPA interpretations.[26] All of these opinions have now collectively

[26] See, e.g., Shoop v. Twyford, 596 U.S. __, 142 S.Ct. 2037 (2022) (restricting the ability of federal courts to use the All Writs Act in AEDPA cases); Shinn v. Martinez Ramirez, 596 U.S. __, 142 S.Ct. 1718 (2022) (holding that, although ineffective assistance of postconviction counsel can be cause to excuse a procedural default of a trial-ineffective-assistance-of-counsel claim, a federal court cannot gather evidence to establish postconviction counsel's ineffectiveness); Brown v. Davenport, 596 U.S. __, 142 S.Ct. 1510 (2022) (holding that a state prisoner who shows that a

managed to transform a statute that Congress designed to provide for a rational and orderly process of federal postconviction judicial review into an aimless and chaotic exercise in futility. The route to obtaining collateral relief is presently replete with imagined artificial barriers, arbitrary dead ends, and traps for the unwary. And today's turn makes the journey palpably absurd: It begins with the Supreme Court's (rare) announcement that a certain claim for release exists and is retroactively available to incarcerated individuals on collateral review, and ends with the realization that only an arbitrarily determined sliver of eligible prisoners (those who have not had the temerity to file a prior motion) are actually in a position to even ask a court to consider whether any such relief might be provided.

It is quite clear that the Court's rulings in this area of the law reflect a general ethos that convicted prisoners should not be permitted to file § 2255 motions or obtain postconviction relief at all. But what matters is what *Congress* wants with respect to the operation of the statutory provisions it enacts. And, as I have shown, Congress's aim in crafting § 2255 was to permit convicted prisoners to file postconviction motions asserting claims for collateral relief in a manner that also curbs abusive filings. Congress did not speak—one way or the other—as to what should happen if a prisoner who has previously filed a § 2255 motion gets a new claim of legal innocence due to an intervening change in the law.

Given Congress's silence on this matter, in my view, there is simply no justification for drawing a negative inference that Congress meant for § 2255 to operate in a manner that is patently inconsistent with the reasons it passed that statute . . . . [W]e should honor Congress's clear interest in preserving a prisoner's ability to have one meaningful opportunity to have all of his claims presented to a court . . . .

. . . Nothing in the text of § 2255, background principles concerning habeas relief, or AEDPA's enactment history compels (or even supports) the conclusion that Congress intended to completely foreclose claims like Jones's. And it is especially perverse to read the statute to lead to that result when doing so gives rise to legally dissonant, arbitrary, and untenable outcomes. So, the majority's "straightforward" determination that this statute *does* preclude a prisoner in Jones's position from filing a successive petition to assert a legal innocence claim (which it reaches by refusing to follow the procedural norm that would have correctly framed the issue as a matter of congressional intent relative to clear-statement principles) appears to stem from the Court's own views concerning finality, not the will of Congress.

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trial error prejudiced him under this Court's federal-habeas harmless-error standard must also run an AEDPA-derived gauntlet before receiving habeas relief); Edwards v. Vannoy, 593 U.S. __, 141 S.Ct. 1547 (2021) (eliminating, without any party requesting it, the ability of prisoners to argue that a new rule of criminal procedure announced by this Court should be fully retroactive as a "watershed" rule).

3. QUESTIONS AND COMMENTS

Once a criminal trial is completed and appeals have been exhausted, the then current interpretation of the applicable criminal statute presumably has been properly applied and is correct as of that date. The defendant committed the crime as it was then understood. Why should it matter if the statute is reinterpreted later to contain different elements than the ones proved at the trial? The defendant was convicted under the interpretation of the statute that prevailed at the time of conviction. Should that be enough to confirm guilt and justify incarceration?

The Supreme Court has never adopted this position. Reinterpretations of criminal statutes have always been applicable to previous convictions that are inconsistent with the new interpretation.[g] The entire Court in both *Davis v. United States* and *Jones v. Hendrix* assumed as much. It would seem to follow, moreover, that if such reinterpretations are applicable retroactively, there should be a corresponding remedy. Retroactive application would be meaningless if it could not be enforced.

Note in this connection that there is nothing in the text of § 2255 that speaks one way or the other to this question. It does, to be sure, permit challenges to a sentence based on a violation of "laws," but the Court seems clearly correct that § 2255 should not be interpreted to permit endless re-doing of direct appeals that raise any and all questions of "law" that were involved in a federal trial. There needs to be some finality filter (and the Court, basically, needs to develop that filter on its own) to weed out those issues that cannot repeatedly be redone once direct appeals have been exhausted. Is "'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances'" an appropriate finality filter?[h] Is it clear that the *Davis* Court was right to say that the *Jones* claim should pass through that filter?

Assume for the moment that *Davis* is right—that reinterpretations of a federal criminal statute should be applied to previously incarcerated individuals and that it is inequitable and unjust to keep them in prison if what they did would no longer be a crime. Section 2255 should therefore be available to provide relief in such a case. If that conclusion is correct, how can the result in *Jones v. Hendrix* also be right? Why should it matter that the

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[g] For an example, see *Bousley v. United States*, discussed in Note 3(i) of the Notes on the *Teague* Substantive Exception in Section 2 of this Chapter.

[h] The Court in *Davis* derived this standard from Hill v. United States, 368 U.S. 424 (1962). As in § 2255, the authorization for federal habeas corpus in § 2241 applies to persons whose custody is "in violation of the Constitution or laws . . . of the United States." This is the language on which Jones based his petition for relief. Presumably the *Hill* standard would have been applicable in his case too.

It is rare that a *state* prisoner will rely on a federal *law* to seek habeas relief rather than the federal Constitution. For an example, see Reed v. Farley, 512 U.S. 339 (1994). The Court in that case adopted the *Hill* standard as the measure for which violations of federal law could afford relief to a state prisoner.

prisoner has challenged the conviction once before on other grounds? Is the only answer that, read literally, this is what the language of the statute requires?

The Court had previously allowed principles of equity and justice to override a literal reading of AEDPA's statutory text. It did so, as the *Jones* Court recognized, in *McQuiggin v. Perkins*. In *McQuiggin*, the *Jones* Court said, "we held that 'a convincing showing of actual innocence' could enable a prisoner to evade AEDPA's statute of limitations entirely." Is the Court's rejection of a similar approach in *Jones* persuasive?[i] Or are the dissenters right that the intersection of § 2241 and § 2255 could easily be interpreted (and should be) to permit claims like the one advanced by Jones?

In the end, the Court's answer seems to be that "Congress did it, so we have no choice" (Recall its conclusion: "Congress has chosen finality over error correction.") Is this right? Or is Justice Jackson right when she says that the Court's decision "appears to stem from the Court's own views concerning finality, not the will of Congress."

SECTION 5. EXHAUSTION OF STATE REMEDIES AND SUCCESSIVE HABEAS PETITIONS

Page 1439, add at the end of Note 5:

The Court held in Rivers v. Guerrero, 605 U.S. __, 145 S.Ct 1634 (2025), that the limitations of § 2244(b) are triggered when the district court enters a final judgment on the initial habeas petition. A second petition filed thereafter is subject to these limitations even if that judgment is on appeal. The Court also said that:

> These rules apply to second-in-time habeas filings even if the filing is not styled as a § 2254 habeas application by the filer—so long as the document is a § 2254 petition in substance. For example, a self-styled "motion" that "seeks to add a new ground for relief " or "attacks the federal court's previous resolution of a claim on the merits" can be construed as a second or successive petition and forced to face the gauntlet of § 2244(b), no matter how it is labeled.

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[i] Or it may be that the Court simply disagrees with *McQuiggin*. The majority opinion in *McQuiggin* was written by Justice Ginsburg, and joined by Justices Kennedy, Breyer, Sotomayor, and Kagan. Justice Scalia dissented, joined by Chief Justice Roberts and Justices Thomas and Alito. The Scalia dissent began:

> The gaping hole in today's opinion for the Court is its failure to answer the crucial question upon which all else depends: What is the source of the Court's power to fashion what it concedes is an "exception" to [the] clear statutory command?
>
> That question is unanswered because there is no answer. This Court has no such power, and not one of the cases cited by the opinion says otherwise. The Constitution vests legislative power only in Congress, which never enacted the exception the Court creates today. That inconvenient truth resolves this case.

Section 6 of this Chapter deals with Additional AEDPA Issues. *McQuiggin* is the subject of Note 5 of the Notes on the AEDPA Statute of Limitations in that Section.

SECTION 6. ADDITIONAL AEDPA ISSUES

Page 1453, add at the end of Note 5:

An unusual sequel to *Pinholster* occurred in Thornell v. Jones, 602 U.S. __, 144 S.Ct. 1302 (2024). The underlying crimes were described in Jones v. Ryan, 52 F.4th 1104, 1109 (9th Cir. 2022), the Ninth Circuit opinion under review in *Thornell*:

> On March 26, 1992, . . . Jones and his friend Robert Weaver spent the day drinking and using crystal methamphetamine in Weaver's garage. At some point, a fight broke out, and evidence at trial indicated that Jones hit Weaver over the head multiple times with a wooden baseball bat, killing him. Jones then went inside the house where he encountered Weaver's grandmother, Katherine Gumina. Jones struck Gumina in the head with the bat and knocked her to the ground. Jones then made his way to a bedroom where he found Tisha Weaver, Weaver's seven-year-old daughter, hiding under the bed. Evidence showed that Jones hit Tisha in the head with the bat, and either strangled her or suffocated her with a pillow.

Jones was charged with murdering Robert and Tisha and with the attempted murder of the grandmother. Upon conviction, he was sentenced to death.[b]

A procedural nightmare followed, eventually resulting in a Ninth Circuit decision granting relief to Jones based on inadequate assistance of counsel at his sentencing hearing. Jones v. Ryan, 583 F.3d 626 (9th Cir. 2009). That decision had reversed the denial of relief by the District Court after it had admitted new mitigation evidence in a habeas hearing. The Supreme Court summarily reversed in Ryan v. Jones, 563 U.S. 932 (2011), "for further consideration in light of *Cullen v. Pinholster*."

The Ninth Circuit then remanded to the District Court, which again denied relief. This was followed by the Ninth Circuit decision granting relief that was before the Court in *Thornell*. The court examined the aggravating and mitigating sentencing factors advanced at trial and in the habeas hearing, and concluded that inadequate assistance of counsel had indeed occurred. On the *Pinholster* problem, it held:

> Pursuant to *Pinholster*, our § 2254(d) analysis is limited to the facts in the state court record. However, in narrow circumstances, when we review a claim de novo,[c] and when a petitioner satisfied the standard for an evidentiary hearing in

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[b] The grandmother died before the trial, but the charges were not amended to include her murder.

[c] The Ninth Circuit noted that, in order to establish an ineffective assistance of counsel claim, Strickland v. Washington, 466 U.S. 668 (1984), required proof both that counsel's performance was deficient and that the defendant was prejudiced. Then it held:

> If the state court had reached the question of *Strickland* prejudice, we would be required to afford the decision deference under AEDPA. However, because the state court reached only the deficient performance prong of Jones's [inadequate assistance of counsel] claims, we review only that prong under § 2254(d), and we review the prejudice prong of his claims de novo.

> federal district court pursuant to § 2254(e)(2) by exercising diligence in pursuing his claims in state court, we may consider the evidence developed in federal court.

On these two points—the justification for admitting new evidence in a habeas hearing and the de novo review of the prejudice issue—the Supreme Court said in a footnote that it would not decide whether these conclusions were correct because "Arizona does not challenge either determination."

What it did then, however, was unusual. It began by describing the standard that *Strickland* required for relief:

> When an ineffective-assistance-of-counsel claim is based on counsel's performance at the sentencing phase of a capital case, a defendant is prejudiced only if "there is a reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result." *Pinholster*, 563 U.S. at 189. This standard does not require a defendant to show that it is more likely than not that adequate representation would have led to a better result, but "[t]he difference" should matter "only in the rarest case." *Strickland*, 466 U.S. at 697. To determine whether a prisoner satisfies this standard, a court must "consider the totality of the evidence before the judge or jury"—both mitigating and aggravating. Id. at 695.

It then said:

> With the proper understanding of *Strickland* in mind, we turn to the prejudice issue in this case. Most of the mitigating evidence Jones presented at the federal evidentiary hearing was not new, and what was new would not carry much weight in Arizona courts. Conversely, the aggravating factors present here are extremely weighty. As a result, there is no reasonable probability that the evidence on which Jones relies would have altered the outcome at sentencing.

And after a detailed review of the aggravating and mitigating evidence, it concluded:

> When a capital defendant claims that he was prejudiced at sentencing because counsel failed to present available mitigating evidence, a court must decide whether it is reasonably likely that the additional evidence would have avoided a death sentence. This analysis requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors. The Ninth Circuit did not heed that instruction; rather, it downplayed the serious aggravating factors present here and overstated the strength of mitigating evidence that differed very little from the evidence presented at sentencing. Had the Ninth Circuit engaged in the analysis required by *Strickland*, it would have had no choice but to affirm the decision of the District Court denying habeas relief. We therefore

reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Thornell v. Jones was a 6-3 decision, with Justice Alito writing for the Court. Joined by Justice Kagan, Justice Sotomayor dissented. She agreed that the Ninth Circuit had "all but ignored the strong aggravating circumstances in this case" and had therefore erred. But:

> The majority unnecessarily goes further and engages in the reweighing itself. The record in this case is complex, contested, and thousands of pages long. In light of this "extensive record" and "intricate procedural history, . . . this is not an appropriate case to reach and settle [a] fact-sensitive issue." CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 435 (2016). That is particularly true when, as here, the majority in the first instance parses a complex record containing contested medical diagnoses and disputed allegations of abuse and trauma.
>
> "It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." Ibid.; see also Cutter v. Wilkinson, 544 U.S. 709, 718, n.7 (2005) ("[W]e are a court of review, not first view"). Because I would vacate the judgment below and remand for the Ninth Circuit to consider the full record in the first instance, I respectfully dissent.

Justice Jackson also dissented. She agreed with Justice Sotomayor that "we are not the right tribunal to parse the extensive factual record in this case in the first instance." She thought, however, that "the majority's real critique does not appear to relate to the Ninth Circuit's methodology" but rather "it merely takes issue with the weight that the Ninth Circuit assigned to each of the relevant facts." She thought that the Court made "many mistakes of its own, including misreading the Ninth Circuit's opinion." And she analogized the Ninth Circuit's reasoning to several Supreme Court opinions with similar reasoning. "We can hardly fault the Ninth Circuit for using the same approach that this Court itself has previously used."

In the end, one can only judge the correctness of the Court's evaluation of the aggravating and mitigating factors in *Thornell* by careful examination of the Ninth Circuit decision and the details of the extensive record compiled in 32 years of litigation. That, of course, is far beyond anything that could be attempted here. More fundamentally, however, what is the answer to Justice Sotomayor? What might the Court's justification be for undertaking the evaluation itself? Are such tasks rightfully part of the Court's function?

SECTION 7. RELATION OF § 1983 TO HABEAS CORPUS

Page 1479, add a new Note after Note 7:

8. CHALLENGES TO METHODS OF EXECUTION

The Supreme Court has addressed the relationship between § 1983 and habeas corpus in a series of cases involving challenges to methods of execution.

(i) Nelson v. Campbell

The first was Nelson v. Campbell, 541 U.S. 637 (2004). Nelson claimed in a § 1983 proceeding that his veins were severely compromised due to years of drug abuse and that the "cut down" procedure that Alabama would use to prepare him for a lethal injection would constitute cruel and unusual punishment under the Eighth Amendment. The prison warden had informed Nelson on a Friday that

> prison personnel would . . . make a 2–inch incision in petitioner's arm or leg; the procedure would take place one hour before the scheduled execution; and only local anesthesia would be used. There was no assurance that a physician would perform or even be present for the procedure.

On the following Monday, three days before the scheduled execution, Nelson filed his § 1983 suit, seeking an injunction against use of the cut-down, a temporary stay of execution, an order requiring a copy of the protocol to be used to gain access to his veins, and an order directing the prison officials to consult with medical experts and promulgate a protocol that conformed to contemporary standards of medical care. The complaint attached an affidavit from a medical professional stating that the proposed cut-down procedure was a

> dangerous and antiquated medical procedure to be performed only by a trained physician in a clinical environment with the patient under deep sedation. In light of safer and less invasive contemporary means of venous access, [the medical expert] concluded that "there is no comprehensible reason for the State of Alabama to be planning to employ the cut-down procedure to obtain intravenous access, unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be."

The District Court dismissed the complaint on the ground that it was the equivalent of a second or successive habeas petition unauthorized by AEDPA. The Eleventh Circuit agreed, but the Supreme Court—in a unanimous opinion by Justice O'Connor—reversed. The Court's decision was narrow:

> We have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution—e.g., lethal injection or electrocution—fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the "conditions" nor the "fact or duration" label is particularly apt. A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself—by simply altering its method of execution, the State can go forward with the sentence. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the

> fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion.
>
> We need not reach here the difficult question of how to categorize method-of-execution claims generally. Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. . . . We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

(ii) Nance v. Ward

Subsequent decisions established that suits challenging a method of execution could sometimes be brought under § 1983, but as the Court said in Bucklew v. Precythe, 587 U.S. __, 139 S.Ct. 1112 (2019), "[t]his Court has yet to hold that a State's method of execution qualifies as cruel and unusual . . . ." Justice Gorsuch's opinion for the Court summarized the Court's approach:

> [A]ccepting the possibility that a State might try to carry out an execution in an impermissibly cruel and unusual manner, how can a court determine when a State has crossed the line? The Chief Justice's opinion in Baze v. Rees, 553 U.S. 35 (2008), which a majority of the Court held to be controlling in Glossip v. Gross, 576 U.S. 863 (2015), supplies critical guidance. It teaches that where . . . the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.

Nance v. Ward, 597 U.S. __, 142 S.Ct. 2214 (2022), presented the Court with a twist on these requirements:

> This case concerns the procedural vehicle appropriate for a prisoner's method-of-execution claim. We have held that such a claim can go forward under 42 U.S.C. § 1983, rather than in habeas, when the alternative method proposed is already authorized under state law. Here, the prisoner has identified an alternative method that is not so authorized. The question presented is whether § 1983 is still a proper vehicle. We hold that it is.

Lethal injection was the only method of execution authorized in Georgia. Nance claimed that his veins were severely compromised, and that they are "likely to 'blow'

during the execution, 'leading to the leakage of the lethal injection drug into the surrounding tissue' and thereby causing 'intense pain and burning.'" In addition, he asserted that "his longtime use of a prescription drug for back pain creates a risk that the sedative used in the State's lethal injection protocol will fail to 'render him unconscious and insensate.'" He proposed a firing squad as an alternative method of execution. The problem was that firing squads were not a permissible method of execution under Georgia law.

The District Court dismissed Nance's § 1983 suit as untimely. The Eleventh Circuit held that since Georgia law did not permit the alternative method of execution advanced by Nance, his claim amounted to an argument that he could not be executed. This meant, under *Preiser*, that that he was challenging the death sentence itself, and that habeas was his only remedy. Habeas was foreclosed because this was a "second or successive" habeas petition unauthorized by AEDPA.

Justice Kagan's opinion for the Court disagreed:

> [The prisoner] must make the case that the State really can put him to death, though in a different way than it plans. The substance of the claim . . . thus points toward § 1983. The prisoner is not challenging the death sentence itself; he is taking the validity of that sentence as a given. And he is providing the State with a veritable blueprint for carrying the death sentence out. If the inmate obtains his requested relief, it is because he has persuaded a court that the State could readily use his proposal to execute him. The court's order therefore does not, as required for habeas, "*necessarily* prevent" the State from carrying out its execution. Nelson v. Campbell, 541 U.S. 637, 647 (2004) (emphasis in original). Rather, the order gives the State a pathway forward.
>
> That remains true, we hold today, even if the alternative route necessitates a change in state law. Nance's requested relief still places his execution in Georgia's control. Assuming it wants to carry out the death sentence, the State can enact legislation approving what a court has found to be a fairly easy-to-employ method of execution. To be sure, amending a statute may require some more time and effort than changing an agency protocol . . . . [But] the "incidental delay" involved in changing a procedure—which even when uncodified may take some real work—is not relevant to the vehicle question. Instead, that inquiry . . . focuses on whether the requested relief would "necessarily" invalidate, or foreclose the State from implementing, the death sentence. And anyway, Georgia has given us no reason to think that the amendment process would be a substantial impediment. The State has legislated changes to its execution method several times before. . . . That Nance's claim would require such action does not turn it from one contesting a method of execution into one disputing the underlying death sentence.
>
> . . . One of the "main aims" of § 1983 is to "override"—and thus compel change of—state laws when necessary to vindicate federal constitutional rights. Or

said otherwise, the ordinary and expected outcome of many a meritorious § 1983 suit is to declare unenforceable (whether on its face or as applied) a state statute as currently written. And in turn, the unsurprising effect of such a judgment may be to send state legislators back to the drawing board. A prisoner no less than any other § 1983 litigant, can bring a suit of that ilk—can seek relief that would preclude a State from achieving some result unless and until it amends a statute.

And indeed, courts not uncommonly entertain prisoner suits under § 1983 that may, if successful, require changing state law. As noted earlier, the classic prisoner § 1983 suit is one challenging prison conditions—say, overcrowding or inadequate medical care. Those suits can be brought under § 1983 because—just like this one—they attack not the validity of a conviction or sentence, but only a way of implementing the sentence. (They concern, in other words, how the prescribed incarceration is being carried out.) And the suits do not get diverted into habeas if, as sometimes is true, a judgment for the inmate would require a new statutory appropriation for the prison—to hire more doctors, for example. . . .

Under the contrary approach, the federal vehicle for bringing a federal claim—and with that, the viability of the claim—would depend on the vagaries of state law. Consider how Nance's own method-of-execution claim would fare in different States. In Georgia (and any other State with lethal injection as the sole authorized method), he would have to bring his claim in a habeas petition. But in some other States primarily using lethal injection, he could file a § 1983 suit—because their statutes include back-up plans for when a court holds injection unconstitutional. Oklahoma's statute, for example, provides in that event for several alternative methods, including a firing squad. And Alabama's statute, in addition to listing alternatives, provides for execution "by any constitutional method." . . . It would be strange to read such state-by-state discrepancies into our understanding of how § 1983 and the habeas statute apply to federal constitutional claims. And that is especially so because the use of those vehicles can lead to different outcomes: An inmate in one State could end up getting his requested relief, while a similarly situated inmate in another would have his suit thrown out. We cannot agree with the dissent that such a disparity would be "unremarkable." Its acceptance would mean that the Eighth Amendment is enforceable in federal court in one State, but not in another. Again, this case tells the tale: Having reconstrued Nance's complaint as a habeas petition, the court below dismissed it as second or successive—a bar existing in habeas alone.

But this did not necessarily mean that Nance would prevail even if he could establish that the State's proposed method of execution would "cruelly superadd[] pain to the death sentence." The Court noted that, given the posture of the case, there were still a number of procedural hurdles that lay ahead:

> In recognizing that § 1983 is a good vehicle for a claim like Nance's, we do not for a moment countenance "last-minute" claims relied on to forestall an execution. "Courts should police carefully against attempts to use [method-of-execution] challenges as tools to interpose unjustified delay." *Bucklew*, 587 U.S. at __, 139 S.Ct. at 1112. In deciding whether to grant a stay of execution, courts must consider whether such a challenge "could have been brought earlier" or otherwise reflects a prisoner's "attempt at manipulation." Id. And outside the stay context, courts have a variety of tools—including the "substantive [and] procedural limitations" that the Prison Litigation Reform Act imposes—to streamline § 1983 actions and protect "the timely enforcement of a sentence." *Nelson*, 541 U.S. at 650. Finally, all § 1983 suits must be brought within a State's statute of limitations for personal-injury actions. Here, the District Court held Nance's suit untimely under that limitations period. The Eleventh Circuit did not review that holding because it instead reconstrued the action as a habeas petition. Now that we have held that reconstruction unjustified, the court on remand can address the timeliness question, as well as any others that remain.

Joined by Justices Thomas, Alito, and Gorsuch, Justice Barrett dissented. Basically, she adopted the Eleventh Circuit's disposition:

> In my view, the consequence of the relief that a prisoner seeks depends on state law *as it currently exists*. And under existing state law, there is no question that Nance's challenge necessarily implies the invalidity of his lethal injection sentence: He seeks to prevent the State from executing him in the only way it lawfully can. . . . An inmate can use § 1983 actions to challenge many, if not most, aspects of prison administration. But when a challenge would prevent a State from enforcing a conviction or sentence, the more rigorous, federalism-protective requirements of habeas apply. The Court finds a way around those requirements with a theory at odds with the very federalism interests they are designed to protect: that an injunction barring the State from enforcing a sentence according to state law does not really bar the State from enforcing the sentence because the State can pass a new law.
>
> Unlike the Court, I would take state law as we find it in determining whether a suit sounds in habeas or § 1983. The Court worries that this approach would make the appropriate federal vehicle "depend on the vagaries of state law." Some States, like Georgia, provide for a single method of execution by statute; other States, like Alabama, allow for more flexibility. So if state law determined the vehicle, an inmate in Georgia would have to challenge the lethal injection method in habeas, while an inmate in Alabama could use § 1983. But that does not illustrate "the vagaries of state law"; it is an unremarkable consequence of federalism. States make different choices in exercising their power to define punishment, and the law has long recognized a sovereign's interest in mandating a particular form

of capital punishment. Habeas is appropriate in Georgia because under Georgia law, to enjoin execution by lethal injection is to enjoin enforcement of the sentence itself. In Alabama, enjoining execution by lethal injection does not have the same effect. The two sovereigns have made different choices about how to define punishment, and federal law is designed to respect the choice of each.