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THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

2004 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 2004

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ARTICLE I

Article I, § 8, cl. 1. Power to Tax and Spend

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

[Add new paragraph at end of section:]

As with its other powers, Congress may enact legislation "necessary and proper" to effectuate its purposes in taxing and spending. In upholding a law making it a crime to bribe state and local officials who administer programs that receive federal funds, the Court declared that Congress has authority "to see to it that taxpayer dollars . . . are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."[1] Congress' failure to require proof of a direct connection between the bribery and the federal funds was permissible, the Court concluded, because "corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value."[2]

—Conditional Grants in Aid

[P. 165, add to n.603:]

This is not to say that Congress may police the effectiveness of its spending only by means of attaching conditions to grants; Congress may also rely on criminal sanctions to penalize graft and corruption that may impede its purposes in spending programs. Sabri v. United States, 124 S. Ct. 1941 (2004).

Article I, § 8, cl. 3. Commerce Power

POWER TO REGULATE COMMERCE

The Commerce Clause as a Source of National Police Power

—Is There an Intrastate Barrier to Congress' Commerce Power?

[P. 212, substitute for second paragraph of section:]

Congress' commerce power has been characterized as having three, or sometimes four, very interrelated principles of decision, some old, some of recent vintage. The Court in 1995 described

[1] Sabri v. United States, 124 S. Ct. 1941, 1946 (2004).
[2] 124 S. Ct. at 1946.

"three broad categories of activities that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[3]

[P. 217, add to n.883:]

Lopez did not "purport to announce a new rule governing Congress' Commerce Clause power over concededly economic activity." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003).

The Commerce Clause as a Restraint on State Powers

—Congressional Authorization of Impermissible State Action

[P. 231, add to n.957 after initial cite:]

See also Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003) (authorization of state laws regulating milk solids does not authorize milk pricing and pooling laws).

State Taxation and Regulation: The Modern Law

—Regulation

[P. 249, add to n.1051:]

But cf. Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644 (2003) (state prescription drug program providing rebates to participating companies does not regulate prices of out-of-state transactions and does not favor in-state over out-of-state companies).

Foreign Commerce and State Powers

[P. 256, substitute for last two sentences of first full paragraph:]

The tax, it was found, did not impair federal uniformity or prevent the Federal Government from speaking with one voice in international trade, in view of the fact that Congress had rejected proposals that would have preempted California's practice.[4] The result

[3] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted). Illustrative of the power to legislate to protect the channels and instrumentalities of interstate commerce is Pierce County v. Guillen, 537 U.S. 129, 147 (2003), in which the Court upheld a prohibition on the use in state or federal court proceedings of highway data required to be collected by states on the basis that "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts [by states] to collect the relevant information."

[4] Reliance could not be placed on Executive statements, the Court explained, since "the Constitution expressly grants Congress, not the President, the power to

of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[5]

Concurrent Federal and State Jurisdiction

—The Standards Applied

[P. 262, add to end of n.1109:]

Aetna Health, Inc. v. Davila, 124 S. Ct. 2488 (2004) (suit brought against HMO under state health care liability act for failure to exercise ordinary care when denying benefits is preempted).

[P. 265, add to n.1118:]

But cf. Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (interpreting preemption language and saving clause in Federal Boat Safety Act as not precluding a state common law tort action).

COMMERCE WITH INDIAN TRIBES

[P. 278, add to end of n.1189:]

United States v. Lara, 124 S. Ct. 1628, 1633 (2004).

[P. 281, add to end of n.1206:]

Congress may also remove restrictions on tribal sovereignty. The Court has held that, absent authority from federal statute or treaty, tribes possess no criminal authority over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court also held, in Duro v. Reina, 495 U.S. 676 (1990), that a tribe has no criminal jurisdiction over non-tribal Indians who commit crimes on the reservation; jurisdiction over members rests on consent of the self-governed, and absence of consent defeats jurisdiction. Congress, however, quickly enacted a statute recognizing inherent authority of tribal governments to exercise criminal jurisdiction over nonmember Indians, and the Court upheld congressional authority to do so in United States v. Lara, 124 S. Ct. 1628 (2004).

'regulate Commerce with foreign Nations.'" 512 U.S. at 329. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." Id. at 330. Dissenting Justice Scalia noted that, although the Court's ruling correctly restored preemptive power to Congress, "it permits the authority to be exercised by silence." Id. at 332.

[5] *The Supreme Court, Leading Cases, 1993 Term,* 108 HARV. L. REV. 139, 139–49 (1993).

Clause 8. Copyrights and Patents

COPYRIGHTS AND PATENTS

Origins and Scope of the Power

[P. 312, delete sentence ending with n.1421 and substitute the following:]

These English statutes curtailed the royal prerogative in the creation and bestowal of monopolistic privileges, and the Copyright and Patent Clause similarly curtails congressional power with regard both to subject matter and to the purpose and duration of the rights granted.[6]

[P. 313, delete final sentence of paragraph]

[P. 313, add new paragraph to end of section:]

The constitutional limits, however, do not prevent the Court from being highly deferential to congressional exercise of its power. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," the Court has said.[7] "Satisfied" in *Eldred v. Ashcroft* that the Copyright Term Extension Act did not violate the "limited times" prescription, the Court saw the only remaining question as whether the enactment was "a rational exercise of the legislative authority conferred by the Copyright Clause."[8] The Act, the Court concluded, "reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain." Moreover, the limitation on the duration of copyrights and patents is largely unenforceable. The protection period may extend well beyond the life of the author or inventor.[9] Congress may extend the duration of existing copyrights and patents, and in so doing may protect the rights of purchasers and assignees.[10]

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[6] Graham v. John Deere Co., 383 U.S. 1, 5, 9 (1966).

[7] Eldred v. Ashcroft, 537 U.S. 186, 205 (2003) (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984)).

[8] 537 U.S. at 204.

[9] The Court in *Eldred* upheld extension of the term of existing copyrights from life of the author plus 50 years to life of the author plus 70 years. While the more general issue was not raised, the Court opined that this length of time, extendable by Congress, was "clearly" not a regime of "perpetual" copyrights. The only two dissenting Justices, Stevens and Breyer, challenged this assertion.

[10] Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815); Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 548 (1852); Bloomer v. Millinger, 68 U.S. (1 Wall.) 340, 350 (1864); Eunson v. Dodge, 85 U.S. (18 Wall.) 414, 416 (1873).

Clause 18. Necessary and Proper Clause

NECESSARY AND PROPER CLAUSE

Scope of Incidental Powers

[P. 357, substitute for first sentence of section:]

The Necessary and Proper Clause, sometimes called the "coefficient" or "elastic" clause, is an enlargement, not a constriction, of the powers expressly granted to Congress. Chief Justice Marshall's classic opinion in McCulloch v. Maryland[11] set the standard in words that reverberate to this day.

Operation of Clause

[P. 358, add to n.1734:]

Congress may also legislate to protect its spending power. Sabri v. United States, 124 S. Ct. 1941 (2004) (upholding imposition of criminal penalties for bribery of state and local officials administering programs receiving federal funds).

—Courts and Judicial Proceedings

[P. 361, add clause following n.1759:]

may require the tolling of a state statute of limitations while a state cause of action that is supplemental to a federal claim is pending in federal court,[12]

Section 10—Powers Denied to States

Clause 1.

EX POST FACTO LAWS

—Scope of the Provision

[P. 382, add to text following n.1912:]

Distinguishing between civil and penal laws was at the heart of the Court's decision in *Smith v. Doe*[13] upholding application of Alaska's "Megan's Law" to sex offenders who were convicted before the law's enactment. The Alaska law requires released sex offenders to register with local police and also provides for public notification via the Internet. The Court accords "considerable deference" to legislative intent; if the legislature's purpose was to enact a civil regulatory scheme, then the law can be ex post facto only if there

[11] 17 U.S. (4 Wheat.) 316 (1819).
[12] Jinks v. Richland County, 538 U.S. 456 (2003).
[13] 538 U.S. 84 (2003).

is "the clearest proof" of punitive effect.[14] Here, the Court determined, the legislative intent was civil and non-punitive—to promote public safety by "protecting the public from sex offenders." The Court then identified several "useful guideposts" to aid analysis of whether a law intended to be non-punitive nonetheless has punitive effect. Registration and public notification of sex offenders are of recent origin, and are not viewed as a "traditional means of punishment." [15] The Act does not subject the registrants to an "affirmative disability or restraint"; there is no physical restraint or occupational disbarment, and there is no restraint or supervision of living conditions, as there can be under conditions of probation. The fact that the law might deter future crimes does not make it punitive. All that is required, the Court explained, is a rational connection to a non-punitive purpose, and the statute need not be narrowly tailored to that end.[16] Nor is the act "excessive" in relation to its regulatory purpose.[17] Rather, "the means chosen are 'reasonable' in light of the [state's] non-punitive objective" of promoting public safety by giving its citizens information about former sex offenders, who, as a group, have an alarmingly high rate of recidivism.[18]

—Changes in Punishment

[P. 383, add as substitute for first sentence of section:]

Justice Chase in *Calder v. Bull* gave an alternative description of the four categories of *ex post facto* laws, two of which related to punishment. One such category was laws that inflict punishment "where the party was not, by law, liable to any punishment"; the other was laws that inflict greater punishment than was authorized when the crime was committed.[19]

Illustrative of the first of these punishment categories is "a law enacted after expiration of a previously applicable statute of limitations period [as] applied to revive a previously time-barred prosecu-

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[14] 538 U.S. at 92.

[15] The law's requirements do not closely resemble punishments of public disgrace imposed in colonial times; the stigma of Megan's Law results not from public shaming but from the dissemination of information about a criminal record, most of which is already public. 538 U.S. at 98.

[16] 538 U.S. at 102.

[17] Excessiveness was alleged to stem both from the law's duration (15 years of notification by those convicted of less serious offenses; lifetime registration by serious offenders) and in terms of the widespread (Internet) distribution of the information.

[18] 538 U.S. at 105. Unlike involuntary civil commitment, where the "magnitude of restraint [makes] individual assessment appropriate," the state may make "reasonable categorical judgments," and need not provide individualized determinations of dangerousness. Id. at 103.

[19] 3 U.S. (3 Dall.) 386, 389 (1798).

tion." Such a law, the Court ruled in *Stogner v. California*,[20] is prohibited as *ex post facto*. Courts that had upheld extension of *unexpired* statutes of limitation had been careful to distinguish situations in which the limitations periods have expired. The Court viewed revival of criminal liability after the law had granted a person "effective amnesty" as being "unfair" in the sense addressed by the Ex Post Facto Clause.

Illustrative of the second punishment category are statutes that changed an indeterminate sentence law to require a judge to impose the maximum sentence,[21] that required solitary confinement for prisoners previously sentenced to death,[22] and that allowed a warden to fix, within limits of one week, and keep secret the time of execution.[23]

[20] 539 U.S. 607, 632–33 (2003) (invalidating application of California's law to revive child abuse charges 22 years after the limitations period had run for the alleged crimes).

[21] Lindsey v. Washington, 301 U.S. 397 (1937). But note the limitation of *Lindsey* in Dobbert v. Florida, 432 U.S. 282, 298–301 (1977).

[22] Holden v. Minnesota, 137 U.S. 483, 491 (1890).

[23] Medley, Petitioner, 134 U.S. 160, 171 (1890).

ARTICLE II

Section 2. Powers and Duties of the President

Clause 1. Commander-in-Chiefship; Presidential Advisers; Pardons

COMMANDER-IN-CHIEF

[P. 483, add new section following "Articles of War: World War II Crimes":]

—Articles of War: Response to the Attacks of September 11, 2001

In response to the September 11, 2001 terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the Authorization for Use of Military Force,[1] which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." During a miliary action in Afghanistan pursuant to this authorization, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hostilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statutory grounds.[2] However, the Court did find that the Government may not detain the petitioner indefinitely for purposes of interrogation, without giving him the opportunity to offer evidence that he is not an enemy combatant.[3]

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[1] Pub. L. 107–40, 115 Stat. 224 (2001).

[2] Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). There was no opinion of the Court. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer, avoided ruling on the Executive Branch argument that such detentions could be authorized by its Article II powers alone, and relied instead on the "Authorization for Use of Military Force" passed by Congress. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, although his dissenting opinion found that such detentions were authorized by Article II. Justice Souter, joined by Justice Ginsberg, rejected the argument that the Congress had authorized such detentions, while Justice Scalia, joined with Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of habeas corpus.

[3] At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney. 124 S. Ct. at 2648, 2652 (2004).

In *Rasul v. Bush,*[4] the Court rejected an Executive Branch argument that foreign prisoners being held at Guantanamo Bay, Cuba were outside of federal court jurisdiction. The Court distinguished earlier case law arising during World War II which denied habeas corpus petitions from German citizens who had been captured and tried overseas by United States military tribunals.[5] In *Rasul,* the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,[6] had not been afforded any form of tribunal, and were being held in a territory over which the United States exercised exclusive jurisdiction and control.[7] In addition, the Court found that statutory grounds existed for the extension of habeas corpus to these prisoners.[8]

Clause 2. Treaties and Appointment of Officers

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The Domestic Obligation of Executive Agreements

[P. 527, substitute for first sentence of first full paragraph on page:]

Initially, it was the view of most judges and scholars that executive agreements based solely on presidential power did not become the "law of the land" pursuant to the Supremacy Clause because such agreements are not "treaties" ratified by the Senate.[9] The Supreme Court, however, found another basis for holding state laws to be preempted by executive agreements, ultimately relying on the Constitution's vesting of foreign relations power in the national government.

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[4] 124 S. Ct. 2686 (2004).

[5] Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[6] The petitioners were Australians and Kuwaitis.

[7] 124 S. Ct. at 2983 (2004).

[8] The Court found that 28 U.S.C. § 2241, which had previously been construed to require the presence of a petitioner in a district court's jurisdiction, was now satisfied by the presence of a jailor-custodian. *See* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973). Another "enemy combatant" case, this one involving an American citizen arrested on American soil, was remanded after the Court found that a federal court's habeas jurisdiction under 28 U.S.C. § 2241 was limited to jurisdiction over the immediate custodian of a petitioner. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (federal court's jurisdiction over Secretary of Defense Rumsfeld was not sufficient to satisfy the presence requirement under 28 U.S.C. § 2241).

[9] E.g., United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. WILLOUGHBY, supra, at 589. The State Department held the same view. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 426 (1944).

[P. 529, substitute for last paragraph of section:]

Belmont and *Pink* were reinforced in *American Insurance Association v. Garamendi.*[10] In holding that California's Holocaust Victim Insurance Relief Act was preempted as interfering with the Federal Government's conduct of foreign relations, as expressed in executive agreements, the Court reiterated that "valid executive agreements are fit to preempt state law, just as treaties are."[11] The preemptive reach of executive agreements stems from "the Constitution's allocation of the foreign relations power to the National Government."[12] Because there was a "clear conflict" between the California law and policies adopted through the valid exercise of federal executive authority (settlement of Holocaust-era insurance claims being "well within the Executive's responsibility for foreign affairs"), the state law was preempted.[13]

[P. 529, add new section following "The Domestic Obligation of Executive Agreements":]

State Laws Affecting Foreign Relations—Dormant Federal Power and Preemption

If the foreign relations power is truly an exclusive federal power, with no role for the states, a logical consequence is that some state laws impinging on foreign relations are invalid even in the absence of already-established federal policy. The Supreme Court has so stated and so held. There is, in effect, a "dormant" foreign relations power. The scope of this power remains undefined, however, and its constitutional basis is debated by scholars.

The exclusive nature of the federal foreign relations power has long been asserted by the Supreme Court. In 1840, for example, the Court declared that "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities."[14] A hundred

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[10] 539 U.S. 396 (2003). The Court's opinion in Dames & Moore v. Regan, 453 U.S. 654 (1981), was rich in learning on many topics involving executive agreements, but the preemptive force of agreements resting solely on presidential power was not at issue, the Court concluding that Congress had either authorized various presidential actions or had long acquiesced in others.

[11] 539 U.S. at 416.

[12] 539 U.S. at 413.

[13] 539 U.S. at 420.

[14] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–76 (1840). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("The external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear"); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we

years later the Court remained emphatic about federal exclusivity. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." [15]

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the nation's foreign policy interests in the absence of an established federal policy. In *Zschernig v. Miller,*[16] the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien's country, and that the alien heir would be allowed to receive payments from the Oregon estate "without confiscation." [17] Although a Justice Department *amicus* brief asserted that application of the Oregon law in this one case would not cause any "undu[e] interfer[ence] with the United States' conduct of foreign relations," the Court saw a "persistent and subtle" effect on international relations stemming from the "notorious" practice of state probate courts in denying payments to persons from Communist countries.[18] Regulation of descent and distribution of estates is an area traditionally regulated by states, but such "state regulations must give way if they impair the effective exercise of the Nation's foreign policy." If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints "must be provided by the Federal Government." [19]

Zschernig lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power

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are but one people, one nation, one power"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

[15] United States v. Pink, 315 U.S. 203, 233–34 (1942). Chief Justice Stone and Justice Roberts dissented.

[16] 389 U.S. 429 (1968).

[17] In Clark v. Allen, 331 U.S. 503 (1947), the Court had upheld a simple reciprocity requirement that did not have the additional requirement relating to confiscation.

[18] 389 U.S. at 440.

[19] 389 U.S. at 440, 441.

to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign governments or to curtail trade with out-of-favor countries.[20] In 1999 the Court struck down Massachusetts' Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding applying *Zschernig*.[21] Similarly, in 2003 the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although it discussed *Zschernig* at some length, saw no need to resolve issues relating to its scope.[22]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemption not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[23] and grants of power.[24] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice Souter suggested for the Court in *Garamendi*, field preemption may be appropriate if a state legislates "simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional re-

[20] *See, e.g.,* Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism,* 75 NOTRE DAME L. REV. 341 (1999); Carlos Manuel Vazquez, *Whither* Zschernig? 46 VILL. L. REV. 1259 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism,* 83 VA. L. REV. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism,* 70 U. COLO. L. REV. 1223 (1999). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 149–69 (2d ed. 1996).

[21] Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 n.8 (1999). For the appeals court's application of *Zschernig, see* National Foreign Trade Council v. Natsios, 181 F.3d 38, 49–61 (1st Cir. 1999).

[22] American Insurance Association v. Garamendi, 539 U.S. at 419 & n.11 (2003).

[23] It is contended, for example, that Article I, § 10's specific prohibitions against states engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, supra n.20.

[24] Arguably, part of the "executive power" vested in the President by Art. II, § 1 is a power to conduct foreign relations.

sponsibility, "but in a way that affects foreign relations."[25] We must await further litigation to see whether the Court employs this distinction.[26]

THE EXECUTIVE ESTABLISHMENT

The Presidential Aegis: Demands for Papers

—Prosecutorial and Grand Jury Access to Presidential Documents

[P. 559, add new paragraph at end of section:]

Public disclosure was at issue in 2004 when the Court weighed a claim of executive privilege asserted as a bar to discovery orders for information disclosing the identities of individuals who served on an energy task force chaired by the Vice President.[27] Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon,*[28] and, in instructing the appeals court on how to proceed, emphasized the importance of confidentiality for advice tendered the President.[29]

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[25] 539 U.S. at 419 n.11.

[26] Justice Ginsburg's dissent in *Garamendi*, joined by the other three dissenters, suggested limiting *Zschernig* in a manner generally consistent with Justice Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting HENKIN, supra n.20, at 164). But Justice Ginsburg also voiced more general misgivings with judges becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, supra n.20, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[27] Cheney v. United States District Court, 124 S. Ct. 2576 (2004).

[28] While the information sought in *Nixon* was important to "the constitutional need for production of evidence in a criminal proceeding," the suit against the Vice President was civil, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" 124 S. Ct. at 2580, 2589.

[29] The Court recognized "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." 124 S. Ct. at 2580. *But cf.* Clinton v. Jones, 520 U.S. 681, 702 (1997).

ARTICLE III

Section 1. Judicial Power, Courts, Judges

ANCILLARY POWERS OF FEDERAL COURTS

Power to Issue Writs: the Act of 1789

—Habeas Corpus: Congressional and Judicial Control

[P. 669, substitute for first sentence of section:]

The writ of habeas corpus [text n.241] has a special status because its suspension is forbidden, except in narrow circumstances, by Article I, § 9, cl. 2. The writ also has a venerable common law tradition, long antedating its recognition in the Judiciary Act of 1789,[1] as a means of "reliev[ing] detention by executive authorities without judicial trial."[2] Nowhere in the Constitution, however, is the power to issue the writ vested in the federal courts.

—Habeas Corpus: The Process of the Writ

[P. 671, add to text following n.254:]

The writ acts upon the custodian, not the prisoner, so the issue under the jurisdictional statute is whether the custodian is within the district court's jurisdiction.[3]

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[1] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82.

[2] INS v. St. Cyr, 533 U.S. 289, 301 (2001), *as quoted in* Rasul v. Bush, 124 S. Ct. 2686, 2692 (2004).

[3] Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494–95 (1973) (issue is whether "the custodian can be reached by service of process"). *See also* Rasul v. Bush, 124 S. Ct. 2686 (federal district court for District of Columbia had jurisdiction of habeas petitions from prisoners held at U.S. Naval base at Guantanamo Bay, Cuba); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (federal district court in New York lacks jurisdiction over prisoner being held in a naval brig in Charleston, South Carolina; the commander of the brig, not the Secretary of Defense, is the immediate custodian and proper respondent).

Section 2. Judicial Power and Jurisdiction

Clause 1. Cases and Controversies; Grants of Jurisdiction

CASES AND CONTROVERSIES

The Requirement of a Real Interest

—Retroactivity Versus Prospectivity

[P. 722, add to n.534:]

For recent application of the principles, see Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (requirement that aggravating factors justifying death penalty be found by the jury was a new procedural rule that does not apply retroactively).

Political Questions

—The Doctrine Reappears

[P. 734, add to n.605:]

But see Vieth v. Jubelirer, 124 S. Ct. 1769 (2004) (no workable standard has been found for measuring burdens on representational rights imposed by political gerrymandering).

ARTICLE IV

Section 1. Full Faith and Credit

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

[P. 896, replace text of entire section with the following:]

Although the language of section one suggests that the same respect should be accorded to "public acts" that is accorded to "judicial proceedings" ("full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"), and the Court has occasionally relied on this parity of treatment,[1] the Court has usually differentiated "the credit owed to laws (legislative measures and common law) and to judgments."[2] The current understanding is that the Full Faith and Credit Clause is "exacting" with respect to final judgments of courts, but "is less demanding with respect to choice of laws."[3]

The Court has explained that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit Clause and thus compelling courts of each State to subordinate their own statutes to those of others, but by weighing the governmental interests of each jurisdiction.[4] That is, the

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[1] *See* Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (statutes); and Smithsonian Institution v. St. John, 214 U.S. 19 (1909) (state constitutional provision).

[2] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998), *quoted in* Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003). Justice Nelson in the *Dred Scott* case drew an analogy to international law, concluding that states, as well as nations, judge for themselves the rules governing property and persons within their territories. Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857). "One State cannot exempt property from taxation in another," the Court concluded in Bonaparte v. Tax Court, 104 U.S. 592 (1882), holding that a law exempting from taxation certain bonds of the enacting State did not operate extraterritorially by virtue of the full faith and credit clause. *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589–96 (1839); Kryger v. Wilson, 242 U.S. 171 (1916); and Bond v. Hume, 243 U.S. 15 (1917).

[3] Baker v. General Motors Corp., 522 U.S. at 232.

[4] Alaska Packers Ass'n. v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932). When, in a state court, the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the full faith and credit clause. *See also* Western Life Indemnity Co. v. Rupp,

Full Faith and Credit Clause, in its design to transform the States from independent sovereigns into a single unified Nation, directs that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty. But because the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.[5] In order for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.[6] Once that threshold is met, the Court will not weigh the competing interests. "[T]he question of which sovereign interest should be deemed more weighty is not one that can be easily answered," the Court explained, "declin[ing] to embark on the constitutional course of balancing coordinate States' competing interests to resolve conflicts of laws under the Full Faith and Credit Clause."[7]

Section 2. Interstate Comity

Clause 1. State Citizenship: Privileges and Immunities

PRIVILEGES AND IMMUNITIES

Origin and Purpose

[P. 912, add to text at end of section:]

A violation can occur whether or not a statute explicitly discriminates against out-of-state interests.[8]

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235 U.S. 261 (1914), citing Glenn v. Garth, 147 U.S. 360 (1893), Lloyd v. Matthews, 155 U.S. 222, 227 (1894); Banholzer v. New York Life Ins. Co., 178 U.S. 402 (1900); Allen v. Alleghany Co., 196 U.S. 458, 465 (1905); Texas & N.O.R.R. v. Miller, 221 U.S. 408 (1911); National Mut. B. & L. Ass'n v. Brahan, 193 U.S. 635 (1904); Johnson v. New York Life Ins. Co., 187 U.S. 491, 495 (1903); Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co. 243 U.S. 93 (1917).

[5] E.g., Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[6] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

[7] Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 498, 499 (2003).

[8] "[A]bsence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a] claim." Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 67 (2003).

FIRST AMENDMENT

ESTABLISHMENT OF RELIGION

Governmental Encouragement of Religion in Public Schools: Prayers and Bible Readings

[P. 1047, add to n.163:]

An opportunity to flesh out this distinction was lost when the Court dismissed for lack of standing an Establishment Clause challenge to public school recitation of the Pledge of Allegiance with the words "under God." Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

FREE EXERCISE OF RELIGION

[P. 1061, add new paragraph at end of section:]

"Play in the joints" can work both ways, the Court ruled in upholding a state's exclusion of theology students from a college scholarship program.[1] Although the state could have included theology students in its scholarship program without offending the Establishment Clause, its choice not to fund religious training did not offend the Free Exercise Clause even though that choice singled out theology students for exclusion.[2] Refusal to fund religious training, the Court observed, was "far milder" than restrictions on religious practices that have been held to offend the Free Exercise Clause.[3]

Free Exercise Exemption from General Governmental Requirements

[P. 1066, add to n.264:]

In 2004, the Court rejected for lack of standing an Establishment Clause challenge to recitation of the Pledge of Allegiance in public schools. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

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[1] Locke v. Davy, 124 S. Ct. 1307 (2004).

[2] 124 S. Ct. at 1312–13. Excluding theology students but not students training for other professions was permissible, the Court explained, because "training someone to lead a congregation is an essentially religious endeavor," and the Constitution's special treatment of religion finds "no counterpart with respect to other callings or professions." Id. at 1313.

[3] 124 S. Ct. at 1312 (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law aimed at restricting ritual of a single religious group); McDaniel v. Paty, 435 U.S. 618 (1978) (law denying ministers the right to serve as delegates to a constitutional convention); and Sherbert v. Verner, 374 U.S. 398 (1963) (among the cases prohibiting denial of benefits to Sabbatarians)).

FREEDOM OF EXPRESSION—SPEECH AND PRESS

The Doctrine of Prior Restraint

—Obscenity and Prior Restraint

[P. 1090, add to n.394 cite to Fort Wayne Books:]

City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219, 2226 (2004) ("Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria . . . and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type");

Subsequent Punishment: Clear and Present Danger and Other Tests

—Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, Narrow Tailoring, and Effectiveness of Speech Restrictions

[P. 1108, add to text immediately before comma preceding n.481:]

and indecency

[P. 1108, add to n.481:]

Reno v. ACLU, 521 U.S. 844, 870–874 (1997). In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court held that a "decency" criterion for the awarding of grants, which "in a criminal statute or regulatory scheme . . . could raise substantial vagueness concerns," was not unconstitutionally vague in the context of a condition on public subsidy for speech.

[P. 1108, add to text following n.484, and replace remainder of section:]

But, even in a First Amendment situation, the Court has written, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do now swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation. . .. Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[4]

[4] Virginia v. Hicks, 539 U.S. 113, 119–20, 124 (2003) (italics in original; citations omitted) (upholding, as not addressed to speech, an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose

Closely related at least to the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to do so, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort."[5] Thus, when the Court applies "strict scrutiny" to a content-based regulation of fully protected speech, it requires that the regulation be "the least restrictive means to further the articulated interest."[6] Similarly, the Court requires "narrow tailoring" even of restrictions to which it does not apply strict scrutiny. Thus, in the case of restrictions that are not content-based (time, place, or manner restrictions; incidental restrictions); or in the case of restrictions of speech to which the Court accords less than full First Amendment protection (campaign contributions and other freedoms of association; commercial speech), though the Court does not require that the government use the least restrictive means available to accomplish its end, it does require that the regulation not restrict speech unreasonably.[7] The Court uses tests closely related to one another in these instances in which it does not apply strict scrutiny. It has indicated

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for being on the premises"). *Virginia v. Hicks* cited Broadrick v. Oklahoma, 413 U.S. 601 (1973), which, in the opinion of the Court and in Justice Brennan's dissent, id. at 621, contains extensive discussion of the overbreadth doctrine. Other restrictive decisions are Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974); Parker v. Levy, 417 U.S. 733, 757–61 (1974); and New York v. Ferber, 458 U.S. 747, 766–74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, 815–18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932–34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633–39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport); Reno v. ACLU, 521 U.S. 844, 874–879 (1997) (statute banning "indecent" material on the Internet).

[5] Thompson v. Western States Medical Center, 535 U.S. 357, 373 (2002).

[6] Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

[7] E.g., Frisby v. Schultz, 487 U.S. 474, 481 (1988) (time, place, and manner restriction upheld as "narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication"); Ward v. Rock Against Racism, 491 U.S. 781, 798–799 (1989) (incidental restriction upheld as "promot[ing] a substantial governmental interest that would be achieved less effectively absent the regulation"); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (campaign contribution ceiling "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedom"); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (commercial speech restrictions need not be "absolutely the least severe that will achieve the desired end," but must exhibit "a 'fit between the legislature's ends and the means chosen to accomplish those ends,'—a fit that is not necessarily perfect, but reasonable . . ."). But see Thompson v. Western States Medical Center, 535 U.S. 357, 371 (2002) (commercial speech restriction struck down as "more extensive than necessary to serve" the government's interests).

that the test for determining the constitutionality of an incidental restriction on speech "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," [8] and that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context." [9]

Also, except apparently when the government seeks to deny minors access to sexually explicit material, the Supreme Court, even when applying less than strict scrutiny, requires that, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." [10]

Particular Government Regulations That Restrict Expression

—Government as Regulator of the Electoral Process: Elections

[P. 1156, add to text following first full paragraph on page, and change beginning of second paragraph:]

The Court in *Buckley* recognized that political contributions "serve[ ] to affiliate a person with a candidate" and "enable[ ] like-minded persons to pool their resources in furtherance of common political goals." Contribution ceilings, therefore, "limit one important means of associating with a candidate or committee. . . ." [11] Yet "[e]ven a significant interference with protected rights of polit-

[8] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[9] United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

[10] Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (incidental restriction on speech). The Court has applied the same principle with respect to commercial speech restrictions (Edenfield v. Fane, 507 U.S. 761, 770–771 (1993)), and campaign contribution restrictions (Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000)). With respect to denying minors' access to sexually explicit material, one court wrote: "We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved." Playboy Entertainment Group, Inc. v. U.S., 30 F. Supp. 2d 702, 716 (D. Del. 1998), *aff'd,* 529 U.S. 803 (2000). In a case upholding a statute that, to shield minors from "indecent" material, limited the hours that such material may be broadcast on radio and television, the court of appeals wrote, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material. . . ." Action for Children's Television v. FCC, 58 F.3d 654, 662 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1043 (1996). A dissenting opinion complained that "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained." Id. at 671 (Edwards, C.J., dissenting).

[11] 424 U.S. at 22.

ical association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." [12]

Applying this standard, the *Buckley* Court sustained the contribution limitation as imposing . . . .

[P. 1162, add to text at end of section:]

In *FEC v. Beaumont,* [13] the Court held that the federal law that bars corporations from contributing directly to candidates for federal office may constitutionally be applied to nonprofit advocacy corporations. Corporations may make such contributions only through PACs, and the Court in *Beaumont* wrote that, in *National Right to Work,* it had "specifically rejected the argument . . . that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations." [14] Though nonprofit advocacy corporations, the Court held in *Massachusetts Citizens for Life,* have a First Amendment right to make independent expenditures, the same is not true for direct contributions to candidates.

In *McConnell v. Federal Election Commission,* [15] the Court upheld against facial constitutional challenges key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). A majority opinion coauthored by Justices Stevens and O'Connor upheld two major provisions of BCRA: (1) the prohibition on "national party committees and their agents from soliciting, receiving, directing, or spending any soft money," [16] which is money donated for the purpose of influencing state or local elections, or for "mixed-purpose activities—including get-out-the-vote drives and generic party advertising," [17] and (2) the prohibition on corporations and labor unions' using funds in their treasuries to finance "electioneering communications," [18] which BCRA defines as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal Office," made within 60 days before a general election or 30 days before a primary election. Electioneering communications thus include both "express advocacy and so-called issue advocacy." [19]

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[12] 424 U.S. at 25 (internal quotation marks omitted).
[13] 539 U.S. 146 (2003).
[14] 539 U.S. at 157.
[15] 540 U.S. 93 (2003).
[16] 540 U.S. at 133.
[17] 540 U.S. at 123.
[18] 540 U.S. at 204.
[19] 540 U.S. at 190.

As for the soft-money prohibition on national party committees, the Court applied "the less rigorous scrutiny applicable to contribution limits."[20] and found it "closely drawn to match a sufficiently important interest."[21] The Court's decision to use less rigorous scrutiny, it wrote, "reflects more than the limited burdens they [*i.e.,* the contribution restrictions] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"[22]

As for the prohibition on corporations and labor unions' using their general treasury funds to finance electioneering communications, the Court applied strict scrutiny, but found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideals."[23] These corrosive and distorting effects result both from express advocacy and from so-called issue advocacy. The Court also noted that, because corporations and unions "remain free to organize and administer segregated funds, or PACs," for electioneering communications, the provision was not a complete ban on expression.[24]

—Government as Administrator of Prisons

[P. 1171, add to n.814:]

In *Overton v. Bazzetta,* 539 U.S. 126 (2003), the Court applied *Turner* to uphold various restrictions on visitation by children and by former inmates, and on all visitation except attorneys and members of the clergy for inmates with two or more substance-abuse violations; an inmate subject to the latter restriction could apply for reinstatement of visitation privileges after two years. "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." Id. at 137.

—Government and Power of the Purse

[P. 1176, add to text at end of section:]

In *United States v. American Library Association, Inc.,* a four-justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it,

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[20] 540 U.S. at 141.
[21] 540 U.S. at 136 (internal quotation marks omitted).
[22] 540 U.S. at 136.
[23] 540 U.S. at 205.
[24] 540 U.S. at 204.

provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." [25] The plurality considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance by requiring public libraries (public schools were not involved in the case) to limit their freedom of speech if they accept federal funds. The plurality, citing *Rust v. Sullivan,* found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized." [26] The plurality distinguished *Legal Services Corporation v. Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys "that pits them *against* the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance." [27]

Government Regulation of Communications Industries

—Commercial Speech

[P. 1179, add to n.862:]

In *Nike, Inc. v. Kasky,* 45 P.3d 243 (2002), *cert. dismissed,* 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certioriari, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike's statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed "'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions." Id. at 657 (Stevens, J., concurring). Nike subsequently settled the suit.

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[25] 539 U.S. 194, 199 (2003).

[26] 539 U.S. at 211.

[27] 539 U.S. at 213 (emphasis in original). Other grounds for the plurality decision are discussed under "Non-obscene But Sexually Explicit and Indecent Expression" and "Internet as Public Forum."

Government Restraint of Content of Expression

—Group Libel, Hate Speech

[P. 1206, add new paragraph at end of section:]

In *Virginia v. Black,* the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of persons.[28] Such a prohibition does not discriminate on the basis of a defendant's beliefs—"as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . .. The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ."[29]

—Non-obscene but Sexually Explicit and Indecent Expression

[P. 1234, add to text following n.1254:]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source."[30]

In *United States v. American Library Association,* a four-justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides

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[28] 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. 538 U.S. at 365–66.

[29] 538 U.S. at 362–63.

[30] Ashcroft v. ACLU, 124 S. Ct. 2783, 2792 (2004). Justice Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" (id. at 2801) and "[i]t is always less restrictive to do *nothing* than to do *something*." Id. at 2802. In addition, Breyer asserted, "filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision." Id. The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." Id. at 2793.

that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[31] The plurality asked "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires."[32] Does CIPA, in other words, effectively violate library *patrons'* rights? The plurality concluded that it does not, after finding that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," and that it therefore would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[33]

The plurality acknowledged "the tendency of filtering software to 'overblock'—that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block."[34] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[35]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance—in other words, does it violate public *libraries'* rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so."[36]

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[31] 539 U.S. 194, 199 (2003).

[32] 539 U.S. at 203.

[33] 539 U.S. at 205.

[34] 539 U.S. at 208.

[35] 539 U.S. at 209. Justice Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case." Id. at 215. Justice Souter, dissenting, noted that "the statute says only that a library 'may' unblock, not that it must." Id. at 233.

[36] 539 U.S. at 212.

Speech Plus—The Constitutional Law of Leafleting, Picketing, and Demonstrating

—The Public Forum

[P. 1245, replace section's final paragraph with:]

In *United States v. American Library Association, Inc.,* a four-justice plurality of the Supreme Court found that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[37] The plurality therefore did not apply "strict scrutiny" in upholding the Children's Internet Protection Act, which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[38] The plurality found that Internet access in public libraries is not a "traditional" public forum because "[w]e have 'rejected the view that traditional public forum status extends beyond its historical confines.'"[39] And Internet access at public libraries is not a "designated" public forum because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[40]

Nevertheless, although Internet access in public libraries is not a public forum, and particular Web sites, like particular newspapers, would not constitute public fora, the Internet as a whole might be viewed as a public forum, despite its lack of a historic tradition. The Supreme Court has not explicitly held that the Internet as a whole is a public forum, but, in *Reno v. ACLU,* which struck down the Communications Decency Act's prohibition of "indecent" material on the Internet, the Court noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers,

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[37] 539 U.S. 194, 205 (2003).

[38] 539 U.S. at 199.

[39] 539 U.S. at 206.

[40] 539 U.S. at 206 (citation omitted).

and buyers. Any person or organization with a computer connected to the Internet can 'publish' information."[41]

—Door-to-Door Solicitation

[P. 1262, add to n.1312:]

In Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600 (2003), the Court held unanimously that the First Amendment does not prevent a state from bringing fraud actions against charitable solicitors who falsely represent that a "significant" amount of each dollar donated would be used for charitable purposes.

[41] A federal court of appeals wrote: "Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. *Compare Forbes,* 523 U.S. at 679 ("reject[ing] the view that traditional public forum status extends beyond its historic confines" [to a public television station]) *with Reno v. ACLU,* 521 U.S. 844, 851–53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web)." Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternate citations to *Forbes* and *Reno* omitted).

FOURTH AMENDMENT

SEARCH AND SEIZURE

History and Scope of the Amendment

—Arrests and Other Detentions

[P. 1292, add to n.61 following cite to Terry v. Ohio:]

Kaupp v. Texas, 538 U.S. 626 (2003).

[P. 1294, add to n.69 following cite to Taylor v. Alabama:]

Kaupp v. Texas, 538 U.S. 626 (2003).

Searches and Seizures Pursuant to Warrant

—Particularity

[P. 1304, add to end of section:]

The purpose of the particularity requirement extends beyond prevention of general searches; it also assures the person whose property is being searched of the lawful authority of the executing officer and of the limits of his power to search. It follows, therefore, that the warrant itself must describe with particularity the items to be seized, or that such itemization must appear in documents incorporated by reference in the warrant and actually shown to the person whose property is to be searched.[1]

—Execution of Warrants

[P. 1311, add to text following n.168:]

Similarly, if officers choose to knock and announce before searching for drugs, circumstances may justify forced entry if there is not a prompt response.[2]

[P. 1312, add to n.173:]

But see Maryland v. Pringle, 124 S. Ct. 795 (2003) (distinguishing *Ybarra* on basis that passengers in car often have "common enterprise," and noting that the tip in *Di Re* implicated only the driver).

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[1] Groh v. Ramirez, 124 S. Ct. 1284 (2004) (a search based on a warrant that did not describe the items to be seized was "plainly invalid"; particularity contained in supporting documents not cross-referenced by the warrant and not accompanying the warrant is insufficient).

[2] United States v. Banks, 124 S. Ct. 521 (2003) (forced entry was permissible after officers executing a warrant to search for drugs knocked, announced "police search warrant," and waited 15–20 seconds with no response).

Valid Searches and Seizures Without Warrants

—Detention Short of Arrest: Stop-and-Frisk

[P. 1315, add to text following first sentence of paragraph that begins on page, and begin new paragraph with second sentence, as indicated:]

A partial answer was provided in 2004, the Court upholding a state law that required a suspect to disclose his name in the course of a valid *Terry* stop.[3] Questions about a suspect's identity "are a routine and accepted part of many *Terry* stops," the Court explained.[4]

After *Terry,* the standard for stops . . ..

—Vehicular Searches

[P. 1325, add to n.247:]

See also United States v. Flores-Montano, 124 S. Ct. 1582 (2004) (upholding a search at the border involving disassembly of a vehicle's fuel tank).

[P. 1325, add to n.248:]

Edmond was distinguished in llinois v. Lidster, 124 S. Ct. 885 (2004), upholding use of a checkpoint to ask motorists for help in solving a recent hit-and-run accident that had resulted in death. The public interest in solving the crime was deemed "grave," while the interference with personal liberty was deemed minimal.

[P. 1325, add to n.252 following cite to New York v. Belton:]

Thornton v. United States, 124 S. Ct. 2127 (2004) (the *Belton* rule applies regardless of whether the arrestee exited the car at the officer's direction, or whether he did so prior to confrontation);

[P. 1326, add to end of sentence containing n.258:]

, or unless there is individualized suspicion of criminal activity by the passengers.[5]

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[3] Hiibel v. Sixth Judicial Dist. Ct., 124 S. Ct. 2451 (2004).

[4] 124 S. Ct. at 2458.

[5] Maryland v. Pringle, 124 S. Ct. 795 (2003) (probable cause to arrest passengers based on officers finding $783 in glove compartment and cocaine hidden beneath back seat armrest, and on driver and passengers all denying ownership of the cocaine).

FIFTH AMENDMENT

DOUBLE JEOPARDY

Development and Scope

[P. 1370, add to end of sentence containing n.58:]

, and to permit a federal prosecution after a conviction in an Indian tribal court for an offense stemming from the same conduct.[1]

Reprosecution Following Conviction

—Sentence Increases

[P. 1385, add to n.134:]

But see Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (state may seek the death penalty in a retrial when defendant appealed following discharge of the sentencing jury under a statute authorizing discharge based on the court's "opinion that further deliberation would not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment").

SELF-INCRIMINATION

Development and Scope

[P. 1396, add to text following n.185:]

, and there can be no valid claim if there is no criminal prosecution.[2]

Confessions: Police Interrogation, Due Process, and Self-Incrimination

—Miranda v. Arizona

[P. 1425, add to n.340:]

Yarborough v. Alvarado, 124 S. Ct. 2140 (2004) (state court determination that teenager brought to police station by his parents was not "in custody" was not "unreasonable" for purposes of federal habeas review).

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[1] United States v. Lara, 124 S. Ct. 1628 (2004) (federal prosecution for assaulting a federal officer after tribal conviction for "violence to a policeman"). The Court concluded that Congress has power to recognize tribal sovereignty to prosecute nonmember Indians, that Congress had done so, and that consequently the tribal prosecution was an exercise of tribal sovereignty, not an exercise of delegated federal power on which a finding of double jeopardy could be based.

[2] Chavez v. Martinez, 538 U.S. 760 (2003) (rejecting damages claim brought by suspect interrogated in hospital but not prosecuted).

[P. 1429, add to n.363:]

Elstad was distinguished in Missouri v. Seibert, 124 S. Ct. 2601 (2004), however, when the failure to warn prior to the initial questioning was a deliberate attempt to circumvent Miranda by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

[P. 1429, add to n.365:]

See also Harrison v. United States, 392 U.S. 219 (1968) (rejecting as tainted the prosecution's use at the second trial of defendant's testimony at his first trial rebutting confessions obtained in violation of McNabb-Mallory).

[P. 1429, eliminate clause containing n.367 and substitute the following:]

On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[3]

DUE PROCESS

Procedural Due Process

—Aliens: Entry and Deportation

[P. 1443, add as first sentence of section:]

The Court has frequently said that Congress exercises "sovereign" or "plenary" power over the substance of immigration law, and this power is at its greatest when it comes to exclusion of aliens.[4]

[P. 1444, add as first sentence of only paragraph beginning on page:]

Procedural due process rights are more in evidence when it comes to deportation or other proceedings brought against aliens already within the country.

[P. 1445, add to text following n.444:]

In *Demore v. Kim,*[5] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of remov-

[3] United States v. Patane, 124 S. Ct. 2601 (2004) (allowing introduction of a pistol, described as a "nontestimonial physical fruit[ ]" of an unwarned statement). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (upholding use of a witness revealed by defendant's statement elicited without proper *Miranda* warning).

[4] *See* discussion under Art. I, § 8, cl. 4, The Power of Congress to Exclude Aliens.

[5] 538 U.S. 510 (2003). The goal of detention in *Zadvydas* had been found to be "no longer practically attainable," and detention therefore "no longer [bore] a reasonable relation to the purpose for which the individual was committed." 538 U.S. at 527.

ability, the Court reaffirmed Congress's broad powers over aliens. "[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." [6]

—Judicial Review of Administrative or Military Proceedings

[P. 1446, add new paragraph after only full paragraph on page:]

Failure of the Executive Branch to provide for any type of proceeding for prisoners alleged to be "enemy combatants," whether in a military tribunal or a federal court, was at issue in *Hamdi v. Rumsfeld.*[7] During a military action in Afghanistan,[8] a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had authority to detain Hamdi as an "enemy combatant," and to deny him meaningful access to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.[9] However, the Court ruled that the Government may not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney.[10]

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[6] 538 U.S. at 528. There was disagreement among the Justices as to whether existing procedures afforded the alien an opportunity for individualized determination of danger to society and risk of flight.

[7] 124 S. Ct. 2633 (2004).

[8] In response to the September 11, 2001, terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force, Pub. L. 107–40, 115 Stat. 224 (2001), which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

[9] There was no opinion of the Court in *Hamdi.* Rather, a plurality opinion, authored by Justice O'Connor (joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer) relied on the statutory "Authorization for Use of Military Force" to support the detention. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

[10] 124 S. Ct. at 2648, 2652 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice Souter, joined by Justice Ginsberg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. Id. at 2660 (concurring in part, dissenting in part, and concurring in judgement). Justice Scalia, joined by Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of habeas corpus, and thus would have required a criminal prosecution of the petitioner. Id. at 2660–61 (dissenting).

NATIONAL EMINENT DOMAIN POWER

Public Use

[P. 1465, add to text following n.575:]

Most recently, the Court put forward an added indicium of "public use": whether the government purpose could be validly achieved by tax or user fee.[11]

Just Compensation

[P. 1467, add to n.584 following first cite:]

The owner's loss, not the taker's gain, is the measure of such compensation. Brown v. Legal Found. of Washington, 538 U.S. 216, 236 (2003).

[11] Brown v. Legal Found. of Washington, 538 U.S. 216, 232 (2003). *But see* id. at 1422 n.2 (Justice Scalia dissenting).

SIXTH AMENDMENT

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

—Criminal Proceedings to Which the Guarantee Applies

[P. 1506–1507, substitute for last two paragraphs of section:]

Within the context of a criminal trial, what factual issues are submitted to the jury has traditionally been determined by whether the fact to be established is an element of a crime or instead is a sentencing factor. Under this approach, the right to a jury extends to the finding of all facts establishing the elements of a crime, and sentencing factors may be evaluated by a judge. Evaluating the issue primarily under the Fourteenth Amendment's Due Process Clause, the Court initially deferred to Congress and the states on this issue, allowing them broad leeway in determining which facts are elements of a crime and which are sentencing factors.[1]

Breaking with this tradition, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[2] "The relevant inquiry is one not of form, but of effect."[3] Apprendi had been convicted of a crime punishable by imprisonment for no more than ten years, but had been sentenced to 12 years based on a judge's findings, by a preponderance of the evidence, that enhancement grounds existed under the state's hate crimes law. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum," the Court concluded, "must be submitted to a jury, and proved beyond a reasonable doubt."[4] The one exception the *Apprendi* Court recognized was for sentencing enhancements based on recidivism.[5] Subsequently, the Court refused

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[1] For instance, the Court held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). After resolving the issue under the Due Process Clause, the Court dismissed the Sixth Amendment jury trial claim as "merit[ing] little discussion." Id. at 93. For more on the due process issue, see the discussion in the main text under "Proof, Burden of Proof, and Presumptions."

[2] 530 U.S. 466, 490 (2000).

[3] 530 U.S. at 494. "[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id. at 495 (internal quotation omitted).

[4] 530 U.S. at 490.

[5] 530 U.S. at 490. Enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, and a judge may find the existence of previous valid

to apply *Apprendi's* principles to judicial factfinding that supports imposition of mandatory minimum sentences.[6]

Apprendi's importance soon became evident as the Court applied its reasoning in other situations. In *Ring v. Arizona,*[7] the Court, overruling precedent,[8] applied *Apprendi* to invalidate an Arizona law that authorized imposition of the death penalty only if the judge made a factual determination as to the existence of any of several aggravating factors. Although Arizona required that the judge's findings as to aggravating factors be made beyond a reasonable doubt, and not merely by a preponderance of the evidence, the Court ruled that those findings must be made by a jury.[9]

In *Blakely v. Washington,*[10] the Court sent shockwaves through federal as well as state sentencing systems when it applied *Apprendi* to invalidate a sentence imposed under Washington State's sentencing statute. Blakely, who plead guilty to an offense for which the "standard range" under the state's sentencing law was 49 to 53 months, was sentenced to 90 months based on the

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convictions even if the result is a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States is subject to a maximum sentence of two years, but upon proof of a felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has the burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[6] Prior to its decision in *Apprendi,* the Court had held that factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi, McMillan* was subsequently reaffirmed in Harris v. United States, 536 U.S. 545, 568–69 (2002). Five Justices in *Harris* thought that factfinding required for imposition of mandatory minimums fell within *Apprendi's* reasoning, but one of the five, Justice Breyer, concurred in the judgment on practical grounds despite his recognition that *McMillan* was not "easily" distinguishable "in terms of logic." 536 U.S. at 569. Justice Thomas's dissenting opinion, id. at 572, joined by Justices Stevens, Souter, and Ginsburg, elaborated on the logical inconsistency, and suggested that the Court's deference to Congress' choice to treat mandatory minimums as sentencing factors made avoidance of *Apprendi* a matter of "clever statutory drafting." Id. at 579.

[7] 536 U.S. 584 (2002).

[8] Walton v. Arizona, 497 U.S. 639 (1990). The Court's decision in *Ring* also appears to overrule a number of previous decisions on the same issue, such as Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638, 640–41 (1989) (*per curiam*), and undercuts the reasoning of another. *See* Clemons v. Mississippi, 494 U.S. 738 (1990) (appellate court may reweigh aggravating and mitigating factors and uphold imposition of death penalty even though jury relied on an invalid aggravating factor).

[9] "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609. The Court rejected Arizona's request that it recognize an exception for capital sentencing in order not to interfere with elaborate sentencing procedures designed to comply with the Eighth Amendment. Id. at 605–07.

[10] 124 S. Ct. 2531 (2004).

judge's determination—not derived from facts admitted in the guilty plea—that the offense had been committed with "deliberate cruelty," a basis for an "upward departure" under the statute. The 90–month sentence was thus within a statutory maximum, but the Court made "clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*" *i.e.,* "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." [11] This approach brings into question sentencing under other states' laws and in addition under the federal Sentencing Guidelines. *Blakely* is already generating litigation, and may also prompt legislative responses.[12] Much will depend upon whether the Court, in applying *Blakely,* attempts to limit its reach.[13]

CONFRONTATION

[P. 1522, substitute for both paragraphs on page (entire content of page):]

In Ohio v. Roberts, a Court majority adopted the reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[14] *Roberts* was applied and narrowed over the course of 24 years,[15] and then overruled in

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[11] 124 S. Ct. at 2537 (emphasis original).

[12] *Blakely*-related developments may be followed at *http//sentencing.typepad.com* (November 2004).

[13] The Court has agreed to review two decisions raising issues under the Sentencing Guidelines. United States v. Booker, 375 F.3d 508 (7th Cir. 2004), and United States v. Fanfan, 2004 WL 1723113 (D. Me. 2004). The cases, 04–104 and 04–105, respectively, were argued on October 4, 2004.

[14] 448 U.S. 56 (1980). "[O]nce a witness is shown to be unavailable . . ., the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" 448 U.S. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)). The Court indicated that reliability could be inferred without more if the evidence falls within a firmly rooted hearsay exception.

[15] Applying *Roberts,* the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986). *Roberts* was narrowed in United States v. Inadi, 475 U.S. 387 (1986), holding that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. *See also* White v. Illinois, 502 U.S. 346, 357 (1992) (holding admissible "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment"); and Idaho v. Wright, 497 U.S. 805, 822–23 (1990) (insufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a "residual" hearsay exception rather than under a firmly rooted exception).

Crawford v. Washington.[16] The Court in *Crawford* rejected reliance on "particularized guarantees of trustworthiness" as inconsistent with the requirements of the Confrontation Clause. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[17] Reliability is an "amorphous" concept that is "manipulable," and the *Roberts* test had been applied "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[18] "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[19]

Crawford represents a decisive turning point for Confrontation Clause analysis. The basic principles are now clearly stated. "Testimonial evidence" may be admitted against a criminal defendant only if the declarant is available for cross-examination at trial, or, if the declarant is unavailable even though the government has made reasonable efforts to procure his presence, the defendant has had a prior opportunity to cross-examine as to the content of the statement.[20] The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" The Court indicated, however, that the term covers "at a minimum" prior testimony at a preliminary hearing, at a former trial, or before a grand jury, and statements made during police interrogation.[21]

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel at Trial

—Johnson v. Zerbst

[P. 1528, add to n.208:]

A waiver must be knowing, voluntary, and intelligent, but need not be based on a full and complete understanding of all of the consequences. Iowa v. Tovar, 124 S. Ct. 1379 (2004) (holding not constitutionally required warnings detailing how an attorney could help inform the decision whether to plead guilty).

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[16] 124 S. Ct. 1354 (2004).

[17] 124 S. Ct. at 1370.

[18] 124 S. Ct. at 1371.

[19] 124 S. Ct. at 1374.

[20] The *Roberts* Court had stated a two-part test, the first a "necessity" rule under which the prosecution must produce or demonstrate unavailability of the declarant despite reasonable, good-faith efforts to produce the declarant at trial (448 U.S. at 65, 74), and the second part turning on the reliability of a hearsay statement by an unavailable witness. *Crawford* overruled *Roberts* only with respect to reliability, and left the unavailability test intact.

[21] 124 S. Ct. at 1374.

—Effective Assistance of Counsel

[P. 1535, add to n.252 following initial cite:]

Compare Wiggins v. Smith, 539 U.S. 510 (2003) (attorney's failure to pursue defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable) *with* Woodford v. Visciotti, 537 U.S. 19 (2003) (state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors).

[P. 1535, add to end of n.252:]

Yarborough v. Gentry, 124 S. Ct. 1 (2003) (deference to attorney's choice of tactics for closing argument).

Right to Assistance of Counsel in Nontrial Situations

—Custodial Interrogation

[P. 1539, add note at end of paragraph continued from p. 1538:]

The different issues in Fifth and Sixth Amendment cases were recently summarized in Fellers v. United States, 124 S. Ct. 1019 (2004), holding that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

EIGHTH AMENDMENT

CRUEL AND UNUSUAL PUNISHMENTS

Capital Punishment

—Limitations on Capital Punishment: Diminished Capacity

[P. 1590, add to n.139:]

See also Tennard v. Dretke, 124 S. Ct. 2562 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

—Limitations on Habeas Corpus Review of Capital Sentences

[P. 1594, remove last sentence from n.161, and add new note at end of 2d sentence of paragraph:]

The "new rule" limitation was suggested in a plurality opinion in *Teague.* A Court majority in *Penry* and later cases has adopted it. "*Teague* by its terms applies only to procedural rules." Bousley v. United States, 523 U.S. 614, 620 (1998). "New substantive rules generally apply retroactively." This is so because new substantive rules "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him." Schriro v. Summerlin, 124 S. Ct. 2519, 2522 (2004) (citation and internal quotation omitted) (decision in *Ring v. Arizona,* holding that jury not judge must decide existence of aggravating factors on which imposition of death sentence may be based, was a procedural, not a substantive rule).

[P. 1594, add to n.162 following initial citation:]

The first exception parallels the standard for substantive rules. The second exception, for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," Saffle v. Parks, 494 U.S. 484, 495 (1990), was at issue in Sawyer v. Smith. . . .

Proportionality

[P. 1601, add new paragraph at end of section:]

Twelve years after *Harmelin* the Court still could not reach a consensus on rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to sentence a repeat felon to 25 years to life imprisonment for stealing three golf clubs valued at $399 apiece.[1] A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record,"and hence was not the

[1] Ewing v. California, 538 U.S. 11 (2003).

"rare case" of "gross disproportional[ity]."[2] The other two Justices voting in the majority were Justice Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[3] and Justice Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle."[4] Not surprisingly, the Court also rejected a habeas corpus challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."[5] Justice O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow."[6]

Prisons and Punishment

[P. 1601, add to n.200:]

See also Overton v. Bazzetta, 539 U.S. 126 (2003) (rejecting a challenge to a two-year withdrawal of visitation as punishment for prisoners who commit multiple substance abuse violations, characterizing the practice as "not a dramatic departure from accepted standards for conditions of confinement," but indicating that a permanent ban "would present different considerations").

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[2] 538 U.S. at 29–30.

[3] 538 U.S. at 31.

[4] 538 U.S. at 32. The dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the *Solem v. Helm* test would have been more appropriate for a recidivism case. *See* 538 U.S. at 32, n.1 (opinion of Justice Stevens).

[5] Lockyer v. Andrade, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive 25–year-to-life sentences on a 37–year-old convicted of two petty thefts with a prior conviction.

[6] 538 U.S. at 72.

ELEVENTH AMENDMENT

STATE SOVEREIGN IMMUNITY

Suits Against States

[P. 1636, add to text at end of section:]

In some of these cases, the state's immunity is either waived or abrogated by Congress. In other cases, the 11th Amendment does not apply because the procedural posture is such that the Court does not view the suit as being against a state. As discussed below, this latter doctrine is most often seen in suits to enjoin state officials. However, it has also been invoked in bankruptcy and admiralty cases, where the *res,* or property in dispute, is in fact the legal target of a dispute.[1]

—Congressional Withdrawal of Immunity

[P. 1639, add to n.85:]

See also Frey v. Hawkins, 124 S. Ct. 899 (2004) (upholding enforcement of consent decree).

Suits Against State Officials

[P. 1648, add new note at end of first paragraph:]

In Frey v. Hawkins, 124 S. Ct. 899 (2004), Texas, which was under a consent decree regarding its state Medicaid program, attempted to extend the reasoning of *Pennhurst,* arguing that unless an actual violation of federal law had been found by a court, such court would be without jurisdiction to enforce such decree. The Court, in a unanimous opinion, declined to so extend the 11th Amendment, noting, among other things, that the principles of federalism were served by giving state officials the latitude and discretion to enter into enforceable consent decrees. *Id.* at 906.

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[1] *See* Tennessee Student Assistance Corp. v. Hood, 124 S. Ct. 1905, 1910–13 (2004) (exercise of bankruptcy court's *in rem* jurisdiction over a debtor's estate to discharge a debt owed to a State does not infringe the State's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507–08 (1998) (despite state claims to title of a ship-wrecked vessel, the Eleventh Amendment does not bar federal court *in rem* admiralty jurisdiction where the *res* is not in the possession of the sovereign).

FOURTEENTH AMENDMENT

SECTION 1. RIGHTS GUARANTEED

DUE PROCESS OF LAW

Definitions

—Liberty

[P. 1682, add to n.57:]

But see Chavez v. Martinez, 538 U.S. 760 (2003) (case remanded to federal circuit court to determine whether coercive questioning of severely injured suspect gave rise to a compensable violation of due process).

Fundamental Rights (Noneconomic Substantive Due Process)

—Development of the Right of Privacy

[P. 1767, delete rest of paragraph after n.552, and add the following:]

However, in *Bowers v. Hardwick,*[1] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types of intimate activities engaged in by married as well as unmarried couples.[2] Then, in *Lawrence v. Texas,*[3] the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

—Privacy After Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?

[P. 1784, delete last sentence of paragraph carried over from p. 1783, and add the following:]

Although *Bowers* has since been overruled by *Lawrence v. Texas*[4] based on precepts of personal autonomy, the latter case did not ap-

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[1] 478 U.S. 186 (1986).

[2] The Court upheld the statute only as applied to the plaintiff, who was a homosexual, 478 U.S. at 188 (1986), and thus rejected an argument that there is a "fundamental right of homosexuals to engage in acts of consensual sodomy." Id. at 192–93. In a dissent, Justice Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court—whether there is a general right to privacy and autonomy in matters of sexual intimacy. Id. at 199–203 (Justice Blackmun dissenting, joined by Justices Brennan, Marshall and Stevens).

[3] 539 U.S. 558 (2003) (overruling *Bowers*).

[4] 539 U.S. 558 (2003).

pear to signal the resurrection of the doctrine of protecting activities occurring in private places.

[P. 1784, delete second full paragraph, and all remaining paragraphs within the topic, and add the following:]

Despite the limiting language of *Roe,* the concept of privacy still retains sufficient strength to occasion major constitutional decisions. For instance, in the 1977 case of *Carey v. Population Services International,*[5] recognition of the "constitutional protection of individual autonomy in matters of childbearing" led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[6] The Court significantly extended the *Griswold-Baird* line of cases so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to protect only that interest or interests.

For a time, the limits of the privacy doctrine were contained by the 1986 case of *Bowers v. Hardwick,*[7] where the Court by a 5–4 vote roundly rejected the suggestion that the privacy cases pro-

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[5] 431 U.S. 678 (1977).

[6] 431 U.S. at 684–91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 703. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

The limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the State. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity. Id. at 691–99. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

[7] 478 U.S. 186 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.

tecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[8] and also rejected the more comprehensive claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[9] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practice.[10] The privacy of the home does not protect all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults."[11] Interestingly, Justice Blackmun, in dissent, was most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[12]

Yet, the case of *Lawrence v. Texas,*[13] by overruling *Bowers,* has brought the outer limits of noneconomic substantive due process

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[8] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." 478 U.S. at 190–91.

[9] Justice White's opinion for the Court in *Hardwick* sounded the same opposition to "announcing rights not readily identifiable in the Constitution's text" that underlay his dissents in the abortion cases. 478 U.S. at 191. The Court concluded that there was no "fundamental right [of] homosexuals to engage in acts of consensual sodomy" because homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." 478 U.S. at 191–92.

[10] 478 U.S. at 191–92. Chief Justice Burger's brief concurring opinion amplified this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

[11] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195– 96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217–18) suggested that these crimes are readily distinguishable.

[12] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See id.* at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomous acts by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219. Justice Blackmun would instead have addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. 478 U.S. at 204–06. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to "family, marriage, motherhood, procreation, and child rearing." 478 U.S. at 190. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[13] 539 U.S. 558 (2003).

into question by once again utilizing the language of "privacy" rights. Citing the line of personal autonomy cases starting with *Griswold,* the Court found that sodomy laws directed at homosexuals "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . .. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." [14]

Although it quarreled with the Court's finding in *Bowers v. Hardwick* that the proscription against homosexual behavior had "ancient roots," the *Lawrence* Court did not attempt to establish that such behavior was in fact historically condoned. This raises the question as to what limiting principles are available in evaluating future arguments based on personal autonomy. While the Court does seem to recognize that a State may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects," [15] it also seems to reject reliance on historical notions of morality as guides to what personal relationships are to be protected.[16] Thus, the parameters for regulation of sexual conduct remain unclear.

For instance, the extent to which the government may regulate the sexual activities of minors has not been established.[17] Analysis of this question is hampered, however, because the Court has still not explained what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships. The Court's observation in *Roe v. Wade* "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[18] little elucidates the answers.[19]

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[14] Id. at 567.

[15] Id.

[16] The Court noted with approval Justice Stevens' dissenting opinion in *Bowers v. Hardwick* stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." Id. at 577–78, *citing* Bowers v. Hardwick, 478 U.S. at 216.

[17] The Court reserved this question in *Carey,* 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

[18] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey,* 431 U.S. at 684–85.

[19] In the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests—compelling interest justification by holding that

Despite the Court's decision in *Lawrence,* there is a question as to whether the development of noneconomic substantive due process will proceed under an expansive right of "privacy" or under the more limited "liberty" set out in *Roe.* There still appears to be a tendency to designate a right or interest as a right of privacy when the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is also now accepted as a "liberty" protected under the due process clauses, however, the analytical significance of denominating the particular right or interest as an element of privacy seems open to question.

PROCEDURAL DUE PROCESS

The Procedure which is Due Process

—The Liberty Interest

[P. 1807, add new note to end of second paragraph]

In Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 6–7 (2003), holding that the state's posting on the Internet of accurate information regarding convicted sex offenders did not violate their due process rights, the Court stated that *Paul v. Davis* "held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."

—When Process is Due

[P. 1815, add new paragraph to text after paragraph ending with n.801:]

A delay in processing a claim for recovery of money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David,*[20] a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected—the temporary loss of the use of the money—could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30–day delay was unlikely to create

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the "key" to discovering whether an interest or a relationship is a "fundamental"one is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this restriction is not holding with respect to equal protection analysis or due process analysis can be easily discerned. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).

[20] 538 U.S. 715 (2003).

a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

Power of the States to Regulate Procedure

—Costs, Damages, and Penalties

[P. 1838, add to n.932 after the cite to BMW v. Gore:]

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (applying *Gore* guideposts to hold that a $145 million judgment for refusing to settle an insurance claim was excessive, in part because it included consideration of conduct occurring in other states as well as conduct bearing no relation to the plaintiffs' harm).

[P. 1838, add to n.933:]

The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424 (2003).

PROCEDURAL DUE PROCESS: CRIMINAL

The Elements of Due Process

—Fair Trial

[P. 1855, add to n.1025 after the cite to Rose v. Clark:]

Middleton v. McNeil,124 S. Ct. 1830 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear.)

—Prosecutorial Misconduct

[P. 1858, add new note following the words "prosecutor withheld it" in the third sentence of the first full paragraph:]

It should be noted that a statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283–84 (1999); Banks v. Dretke, 124 S. Ct. 1256, 1273 (2004).

[P. 1859, add to n.1044:]

Illinois v. Fisher, 124 S. Ct. 1200 (2004) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

[P. 1859, add to n.1049:]

See also Banks v. Dretke, 124 S. Ct. 1256, 1273 (2004) (failure of prosecution to correct perjured statement that witness had not been coached and to disclose that separate witness was a paid government informant established prejudice for purposes of habeas corpus review).

—Proof, Burden of Proof, and Presumptions

[P. 1861, add note following the words "constitute the crime charged" in the first sentence of the first full paragraph:]

Bunkley v. Florida, 538 U.S. 835 (2003); Fiore v. White, 528 U.S. 23 (1999). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case those convictions would violate due process.

—The Problem of the Incompetent or Insane Defendant of Convict

[P. 1866, add to text at end of section:]

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper,*[21] the Court had found that an individual has a significant "liberty interest" in avoiding the unwanted administration of antipsychotic drugs. In *Sell v. United States,*[22] the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is important in a particular case.[23] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

—Rights of Prisoners

[P. 1875, add to n.1136:]

See Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over whom a prisoner's parental rights have been terminated, and all regular visitation for a period following a prisoner's violation of substance abuse rules).

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[21] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

[22] 539 U.S. 166 (2003).

[23] For instance, if the defendant is likely to remain civilly committed absent medication, this would diminish the government's interest in prosecution. 539 U.S. at 180.

[P. 1875, add note to the end of the fifth sentence of the first full paragraph:]

For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. Overton v. Bazzetta, 539 U.S. 126, 135 (2003).

EQUAL PROTECTION OF LAWS

Scope and Applicaton

—State Action

[P. 1893, add to n.1223:]

But see City of Cuyahoga Falls v. Buckeye Community Hope Found., 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).

TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWERS

Taxation

—Classification for Purposes of Taxation

[P. 1923, add to n.1390 after the paragraph on "Electricity":]

Gambling: slot machines on excursion river boats are taxed at a maximum rate of 20 percent, while slot machines at a racetrack are taxed at a maximum rate of 36 percent. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

[P. 1924, add to n.1391:]

Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

Equal Protection and Race

—Permissible Remedial Utilization of Racial Classifications

[P. 1970, add to text at end of section:]

By applying strict scrutiny, the Court was in essence affirming Justice Powell's individual opinion in *Bakke,* which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether the Court would endorse Justice Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the

Court essentially reaffirmed Justice Powell's line of reasoning in the cases of *Grutter v. Bollinger*[24] and *Gratz v. Bollinger.*[25]

In *Grutter,* the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in his file (*e.g.,* grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (*e.g.,* strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." While the policy did not limit diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[26]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who otherwise might not have been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[27] As the University did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the University's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.

The law school's admission policy, however, can be contrasted with the University's undergraduate admission policy. In *Gratz,* the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the Law School. Applicants with scores over 100 were usually admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was the fact that an applicant was entitled to 20 points based solely upon membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of

[24] 539 U.S. 306 (2003).
[25] 539 U.S. 244 (2003).
[26] 539 U.S. at 323–26.
[27] 539 U.S. at 335.

certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[28]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Powell's opinion in *Bakke.* While Justice Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file," [29] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz,* the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an underrepresented minority group, the policy effectively admitted every qualified minority applicant. While acknowledging that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve the University's asserted compelling interest in diversity.[30]

THE NEW EQUAL PROTECTION

Fundamental Interests: The Political Process

—Apportionment and Districting

[P. 2012, add the following paragraph after the paragraph ending at n.1841:]

In the following years, however, litigants seeking to apply *Davis* against alleged partisan gerrymandering were unsuccessful. And when the Supreme Court revisited the issue in 2004, it practically closed the door entirely on such challenges. In *Vieth v. Jubelirer,*[31] the Court upheld Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. A four-Justice plurality[32] would have held the issue nonjusticiable, arguing that partisan considerations are an intrinsic part of establishing districts,[33] that no judicially discernable or manageable standards exist to evaluate unlawful partisan gerrymandering,[34] and that the power to address the issue of political gerrymandering

[28] 539 U.S. at 272–73.
[29] 438 U.S. at 317.
[30] 438 U.S. at 284–85.
[31] 124 S. Ct. 1769 (2004).
[32] The plurality opinion was written by Justice Scalia, and joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas.
[33] 124 S. Ct. at 1781.
[34] 124 S. Ct. at 1778–84.

resides in Congress.[35] Justice Kennedy, while concurring in the judgment, held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale" is identified in the future to evaluate partisan redistricting.[36]

SECTION 5. ENFORCEMENT

Congressional Definition of Fourteenth Amendment Rights

[P. 2047, add to text at end of section:]

The Court's most recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when the class being discriminated against is protected by heightened scrutiny of the government's action. In *Nevada Department of Human Resources v. Hibbs,*[37] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees can take up to twelve weeks of unpaid leave to care for a close relative with a serious health condition. Noting that the Fourteenth Amendment could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than men were provided paternity leave. Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel,* which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test[38] . . . it was easier for Congress

[35] 124 S. Ct. at 1775 (noting that Article I, § 4 authorizes Congress to make or alter regulations of the manner of holding elections for Senators and Representatives).

[36] 124 S. Ct. at 1793 (Justice Kennedy, concurring). While Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposes on representational rights or to confine judicial intervention once a violation has been established, he held out the possibility that such a standard may emerge, based on either equal protection or First Amendment principles.

[37] 538 U.S. 721 (2003).

[38] Statutory classifications that distinguish between males and females are subject to heightened scrutiny, Craig v. Boren, 429 U.S. 190, 197–199 (1976); they must be substantially related to the achievement of important governmental objectives. United States v. Virginia, 518 U.S. 515, 533 (1996).

to show a pattern of state constitutional violations."[39] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the gender stereotype.

Applying the same approach, the Court in *Tennessee v. Lane*[40] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act (ADA) provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[41] but since disability is not a suspect class, the application of Title II against states would seem suspect under the reasoning of *Garrett.*[42] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[43] Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a congruent and proportional response to a congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[44] However, as pointed out by both the majority and by Justice Rehnquist in dissent, the deprivations relied upon by the majority were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.[45] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage and voting, and on limitations of access to public services beyond the use of courts.[46]

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[39] 538 U.S. at 736.

[40] 124 S. Ct. 1978 (2004).

[41] 42 U.S.C. § 12132.

[42] 531 U.S. 356 (2001).

[43] *See, e.g.,* Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

[44] 124 S. Ct. at 1989.

[45] 124 S. Ct. at 1999.

[46] 124 S. Ct. at 1989–90. Justice Rehnquist, in dissent, disputed Congress' reliance on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. Id. at 1999–2000. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, Mt. Healthy City Bd. of Educ. v. Doyle, U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as South Carolina v. Katzenbach, 383 U.S. 301, 312–15 (1966).

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

159. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, §§ 213, 318; 2 U.S.C. §§ 315(d)(4), 441k.

Section 213 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 (FECA) to require political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, is unconstitutional because it burdens parties' right to make unlimited independent expenditures. Section 318 of BCRA, which amended FECA to prohibit persons "17 years old or younger" from contributing to candidates or political parties, is invalid as violating the First Amendment rights of minors.

McConnell v. FEC, 124 S. Ct. 619 (2003).

STATE CONSTITUTIONAL OR STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW

I. STATE LAWS HELD UNCONSTITUTIONAL

936. *Stogner v. California,* 539 U.S. 607 (2003).

A California statute that permits resurrection of an otherwise time-barred criminal prosecution for sexual abuse of a child, and that was itself enacted after the pre-existing limitations period had expired for the crimes at issue, violates the Ex Post Facto Clause of Art. I, § 10, cl. 1.

Justices concurring: Breyer, Stevens, O'Connor, Souter, Ginsburg.

Justices dissenting: Kennedy, Scalia, Thomas, Rehnquist., C.J.

937. *Virginia v. Black,* 538 U.S. 343 (2003).

The *prima facie* evidence provision of Virginia's cross-burning statute, stating that a cross burning "shall be *prima facie* evidence of an intent to intimidate," is unconstitutional.

Justices concurring: O'Connor, Stevens, Breyer, Rehnquist, C.J.

Justices concurring specially: Souter, Kennedy, Ginsburg.

Justices dissenting: Scalia, Thomas.

938. *Lawrence v. Texas,* 539 U.S. 558 (2003).

A Texas statute making it a crime for two people of the same sex to engage in sodomy violates the Due Process Clause of the Fourteenth Amendment. The right to liberty protected by the Due Process Clause includes the right of two adults, "with full and mutual consent from each other, [to] engag[e] in sexual practices common to a homosexual lifestyle."

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.

Justice concurring specially: O'Connor.

Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

939. *Blakely v. Washington,* 124 S. Ct. 2531 (2004).

Washington State's sentencing law, which allows a judge to impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence," is inconsistent with the Sixth Amendment right to trial by jury.

Justices concurring: Scalia, Stevens, Souter, Thomas, and Ginsburg.

Justices dissenting: O'Connor, Breyer, Kennedy, Rehnquist, C.J.

III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

225. *Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1 (2003).

Alabama's usury statute is preempted by sections 85 and 86 of the National Bank Act as applied to interest rates charged by national banks.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, and Rehnquist, C.J.

Justices dissenting: Scalia and Thomas.

226. *American Ins. Ass'n v. Garamendi,* 539 U.S. 396 (2003).

California's Holocaust Victim Insurance Relief Act, which requires any insurance company doing business in the state to disclose information about policies it or "related" companies sold in Europe between 1920 and 1945, is preempted as interfering with the Federal Government's conduct of foreign relations.

Justices concurring: Souter, O'Connor, Kennedy, Breyer, and Chief Justice Rehnquist.

Justices dissenting: Ginsburg, Stevens, Scalia, and Thomas.

227. *Aetna Health Inc. v. Davila,* 124 S. Ct. 2488 (2004).

Suits brought in state court alleging that HMOs violated their duty under the Texas Health Care Liability Act "to exercise ordinary care when making health care treatment decisions" are preempted by ERISA § 502(a), which authorizes suit "to recover benefits due [a participant] under the terms of his plan."

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

	Overruling Case	*Overruled Case(s)*
221.	*Lapides v. Board of Regents,* 535 U.S. 613 (2002).	*Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459 (1945).
222.	*Atkins v. Virginia,* 536 U.S. 304 (2002).	*Penry v. Lynaugh,* 492 U.S. 302 (1989).
223.	*Ring v. Arizona,* 536 U.S. 584 (2002).	*Walton v. Arizona,* 497 U.S. 639 (1990).
224.	*Lawrence v. Texas,* 539 U.S. 558 (2003).	*Bowers v. Hardwick,* 478 U.S. 186 (1986).
225.	*Crawford v. Washington,* 124 S. Ct. 1354 (2004).	*Ohio v. Roberts,* 448 U.S. 56 (1980).

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