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THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

2008 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 26, 2008

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CONSTITUTION OF THE UNITED STATES

[P. 35, delete from penultimate line of fn.10:]

Connecticut, May 6, 1919;

[P. 35, add to end of fn.10:]

Although some sources (including the main volume of this book) state that Connecticut ratified the 18th Amendment on May 6, 1919 (after the date that three-fourths of the states had ratified it, and after the Acting Secretary of State, on January 28, 1919, had certified that the 18th Amendment had become valid; see 40 Stat. 1941-42 (1919)), the Journal of the Senate of the State of Connecticut, January Session, 1919, reports on May 6, 1919, at page 1191: "The committee of Conference, to whom was referred a resolution [Senate Joint Resolution No. 56] ratifying an Amendment to the Constitution concerning the Manufacture, Sale and Transportation of Intoxicating Liquors, reported that they had the same under consideration and cannot agree . . . ." The New York Times (Feb. 5, 1919) reported that, on Feb. 4, 1919, the Connecticut Senate voted against ratification by a vote of 20 to 14. A week later (Feb. 12, 1919), the New York Times reported that, on Feb. 11, 1919, the Connecticut House of Representatives voted in favor of ratification by a vote of 153 to 96.

[P. 36, n.11, add, in the appropriate places, the following states that ratified the 19th Amendment:]

Texas, June 28, 1919; Utah, October 2, 1919; Washington, March 22, 1920; Tennessee, August 18, 1920.

ARTICLE I

Section 2. House of Representatives

Clause 1. Congressional Districting

CONGRESSIONAL DISTRICTING

[P. 112, add to n.299:]

Vieth v. Jubelirer, 541 U.S. 267 (2004) (same); League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006). Additional discussion of this issue appears under Amendment 14, The New Equal Protection, Apportionment and Districting.

Section 7. Bills and Resolutions

Clause 3. Presentation of Resolutions

THE LEGISLATIVE PROCESS

Presentation of Resolutions

[Pp. 148-49, substitute for entire section:]

The purpose of clause 3, the Orders, Resolutions, and Votes Clause (ORV Clause), is not readily apparent. For years it was assumed that the Framers inserted the clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[1] Why a separate clause was needed for this purpose has not been explained. Recent scholarship presents a different possible explanation for the ORV Clause – that it was designed to authorize delegation of lawmaking power to a single House, subject to presentment, veto, and possible two-House veto override.[2] If construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments. At the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the clause had been interpreted over the years.

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[1] *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 301-302, 304-305; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 889, at 335 (1833).

[2] Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *was Rightly Decided, and Why* INS v. Chadha *was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005).

Briefly, it was shown that the word "necessary" in the clause had come to refer to the necessity for law-making; that is, any "order, resolution, or vote" must be submitted if it is to have the force of law. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the other House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[3]

Although the ORV Clause excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments, the practice and understanding, beginning with the Bill of Rights, have been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. *Hollingsworth v. Virginia*,[4] in which the Court rejected a challenge to the validity of the Eleventh Amendment based on the assertion that it had not been presented to the President, is usually cited for the proposition that presentation of constitutional amendment resolutions is not required.[5]

Section 8. Powers of Congress

Clause 1. Power to Tax and Spend

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

[P. 164, add to 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 under-

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[3] S. REP. NO. 1335, 54th Congress, 2d Sess.; 4 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3483 (1907).

[4] 3 U.S. (3 Dall.) 378 (1798).

[5] Although *Hollingsworth* did not necessarily so hold (*see* Tillman, *supra*), the Court has reaffirmed this interpretation. *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) (in *Hollingsworth* "this court settled that the submission of a constitutional amendment did not require the action of the President"); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth* the Court "held Presidential approval was unnecessary for a proposed constitutional amendment").

mined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."[6] 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."[7]

– 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, 541 U.S. 600 (2004).

[P. 166, add to n.608:]

Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (because Individuals with Disabilities Education Act, which was enacted pursuant to the Spending Clause, does not furnish clear notice to states that prevailing parents may recover fees for services rendered by experts in IDEA actions, it does not authorize recovery of such fees).

Clause 3. Commerce Power

POWER TO REGULATE COMMERCE

Definition of Terms

– Necessary and Proper Clause

[P. 175, add to n.665:]

Gonzales v. Raich, 545 U.S. 1 (2005).

[P. 175, add to text after n.665:]

In other cases, the clause may not have been directly cited, but the dictates of Chief Justice Marshall have been used to justify more expansive applications of the commerce power.[8]

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[6] Sabri v. United States, 541 U.S. 600, 605 (2004).
[7] 541 U.S. at 606.
[8] See, *e.g.*, United States v. Darby, 312 U.S. 100, 115-16 (1941).

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 "three broad categories of activity 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."[9]

[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).

[P. 218, add to text at end of section:]

Yet, the ultimate impact of these cases on Congress' power over commerce may be limited. In *Gonzales v. Raich*,[10] the Court reaffirmed an expansive application of *Wickard v. Filburn*, and signaled that its jurisprudence is unlikely to threaten the enforcement of broad regulatory schemes based on the Commerce Clause. In *Raich*, the Court considered whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances

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[9] 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."

[10] 545 U.S. 1 (2005).

Act (CSA).[11] The respondents argued that this class of activities should be considered as separate and distinct from the drug-trafficking that was the focus of the CSA, and that regulation of this limited non-commercial use of marijuana should be evaluated separately.

In *Raich*, the Court declined the invitation to apply *Lopez* and *Morrison* to select applications of a statute, holding that the Court would defer to Congress if there was a rational basis to believe that regulation of home-consumed marijuana would affect the market for marijuana generally. The Court found that there was a rational basis to believe that diversion of medicinal marijuana into the illegal market would depress the price on the latter market.[12] The Court also had little trouble finding that, even in application to medicinal marijuana, the CSA was an economic regulation. Noting that the definition of "economics" includes "the production, distribution, and consumption of commodities,"[13] the Court found that prohibiting the intrastate possession or manufacture of an article of commerce is a rational and commonly used means of regulating commerce in that product.

The Court's decision also contained an intertwined but potentially separate argument that Congress had ample authority under the Necessary and Proper Clause to regulate the intrastate manufacture and possession of controlled substances, because failure to regulate these activities would undercut the ability of the government to enforce the CSA generally.[14] The Court quoted language from *Lopez* that appears to authorize the regulation of such activities on the basis that they are an essential part of a regulatory scheme.[15] Justice Scalia, in concurrence, suggests that this latter category of activities could be regulated under the Necessary and Proper Clause regardless of whether the activity in question was economic or whether it substantially affected interstate commerce.[16]

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[11] 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq*.
[12] 545 U.S. at 19.
[13] 545 U.S. at 25, quoting Webster's Third New International Dictionary 720 (1966).
[14] 545 U.S. at 18, 22.
[15] 545 U.S. at 23-25.
[16] 545 U.S. at 34-35 (Scalia, J., concurring).

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

– Congressional Authorization of Impermissible State Action

[Pp. 228-229, substitute for second paragraph of section:]

The Court applied the "original package" doctrine to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce."[17] Although holding that a state was entitled to prohibit the manufacture and sale of intoxicants within its boundaries,[18] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Ry. Co.*,[19] that, so long as Congress remained silent in the matter, a state lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the importation of liquor from a sister state. This holding was soon followed by another to the effect that, so long as Congress remained silent, a state had no power to prevent the sale in the original package of liquors introduced from another state.[20] Congress soon attempted to overcome the effect of the latter decision by enacting the Wilson Act,[21] which empowered states to regulate imported liquor on the same terms as domestically produced liquor, but the Court interpreted the law narrowly as subjecting imported liquor to local authority only after its resale.[22] Congress did not fully nullify the *Bowman* case until 1913, when it enacted the Webb-Kenyon Act,[23] which clearly authorized states to regulate direct shipments for personal use.

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[17] The Court had developed the "original package" doctrine to restrict application of a state tax on imports from a foreign country in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827). Although Chief Justice Marshall had indicated in dictum in *Brown* that the same rule would apply to imports from sister states, the Court had refused to follow that dictum in *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869).

[18] Mugler v. Kansas, 123 U.S. 623 (1887). Relying on the distinction between manufacture and commerce, the Court soon applied this ruling to authorize states to prohibit manufacture of liquor for an out-of-state market. Kidd v. Pearson, 128 U.S. 1 (1888).

[19] 125 U.S. 465 (1888).

[20] Leisy v. Hardin, 135 U.S. 100 (1890).

[21] Ch. 728, 26 Stat. 313 (1890), upheld in *In re* Rahrer, 140 U.S. 545 (1891).

[22] Rhodes v. Iowa, 170 U.S. 412 (1898).

[23] Ch. 90, 37 Stat. 699 (1913), sustained in Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). *See also* Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964).

National Prohibition, imposed by the Eighteenth Amendment, temporarily mooted these conflicts, but they reemerged with repeal of Prohibition by the Twenty-first Amendment. Section 2 of the Twenty-first Amendment prohibits "the importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." Initially the Court interpreted this language to authorize states to discriminate against imported liquor in favor of that produced in-state, but the modern Court has rejected this interpretation, holding instead that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."[24]

[P. 231, add to n.954 after initial citation:]

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

– Taxation

[Pp. 241, add to text after n.1012:]

The broad inquiry subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state – that is, whether the state has given anything for which it can ask return."[25]

[Pp. 242, add to n.1019:]

See also Meadwestvaco Corp. v. Illinois Dept. of Revenue, 128 S. Ct. 1498, 1508 (2008) (the concept of "operational function," which the Court had introduced in prior cases, was "not intended to modify the unitary business principle by adding a new ground for apportionment").

[P. 246, add to n.1038:]

But see American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n, 545 U.S. 429 (2005), upholding imposition of a flat annual fee on all trucks engaged in intrastate hauling (including trucks engaged in interstate hauling that "top off" loads with intrastate pickups and deliveries) and concluding that levying the fee on a per-truck rather than per-mile basis was permissible in view of the objectives of defraying costs of administering various size, weight, safety, and insurance requirements.

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[24] Granholm v. Heald, 544 U.S. 460, 487 (2005). *See also* Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. The Beer Institute, 491 U.S. 324 (1989), and the analysis of section 2 under Discrimination Between Domestic and Imported Products.

[25] Meadwestvaco Corp. v. Illinois Dept. of Revenue, 128 S. Ct. 1498, 1505 (2008) (citations and internal quotation marks omitted).

– 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).

[P. 250, substitute for the sentence in the text that accompanies n.1056 and delete n.1056:]

In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[26] the Court declined to apply *Carbone* where haulers were required to bring waste to facilities owned and operated by a state-created public benefit corporation instead of to a *private* processing facility, as was the case in *Carbone*. The Court found this difference constitutionally significant because "[d]isposing of trash has been a traditional government activity for years, and laws that favor the government in such areas – but treat every private business, whether in-state or out-of-state, exactly the same – do not discriminate against interstate commerce for purposes of the Commerce Clause. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer . . . ."[27]

In *Department of Revenue of Kentucky v. Davis*,[28] the Court considered a challenge to the long-standing state practice of issuing bonds for public purposes while exempting interest on the

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[26] 127 S. Ct. 1786 (2007).

[27] 127 S. Ct. at 1790. The Commerce Clause test referred to is the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). "Under the *Pike* test, we will uphold a nondiscriminatory statute . . . 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Id. at 1797 (quoting *Pike*, 397 U.S. at 142). The fact that a state is seeking to protect itself from economic or other difficulties, is not, by itself, sufficient to justify barriers to interstate commerce. Edwards v. California, 314 U.S. 160 (1941) (striking down California effort to bar "Okies" – persons fleeing the Great Plains dust bowl during the Depression). *Cf.* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (without tying it to any particular provision of Constitution, Court finds a protected right of interstate movement). The right of travel is now an aspect of equal protection jurisprudence.

[28] 128 S. Ct. 1801 (2008).

bonds from state taxation.[29] In *Davis*, a challenge was brought against Kentucky for such a tax exemption because it applied only to government bonds that Kentucky issued, and not to government bonds issued by other states. The Court, however, recognizing the long pedigree of such taxation schemes, applied the logic of United Haulers Ass'n, Inc., noting that the issuance of debt securities to pay for public projects is a "quintessentially public function," and that Kentucky's differential tax scheme should not be treated like one that discriminated between privately issued bonds. In what may portend a significant change in dormant commerce clause doctrine, however, the Court declined to evaluate the governmental benefits of Kentucky's tax scheme versus the economic burdens it imposed, holding that, at least in this instance, the "Judicial Branch is not institutionally suited to draw reliable conclusions."

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.[30] The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[31]

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[29] This exemption from state taxes is also generally made available to bonds issued by local governmental entities within a state.

[30] Reliance could not be placed on Executive statements, the Court explained, because "the Constitution expressly grants Congress, not the President, the power to '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.

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

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

– The Standards Applied

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

Aetna Health, Inc. v. Davila, 542 U.S. 200 (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).

[P. 266, add footnote at end of second line of text on the page:]

For a more recent decision applying express preemption language to a variety of state common law claims, see *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (interpreting FIFRA, the federal law governing pesticides).

COMMERCE WITH INDIAN TRIBES

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

United States v. Lara, 541 U.S. 193, 200 (2004).

[P. 281, add to 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 non-member Indians, and the Court upheld congressional authority to do so in *United States v. Lara*, 541 U.S. 193 (2004).

Clause 8. Copyrights and Patents

Scope of the Power

[P. 312, substitute for sentence ending with n.1421:]

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.[32]

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

[P. 313, convert final sentence of paragraph to a separate paragraph and place it after the following new paragraph to be added at 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.[33] "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."[34] 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.[35] Congress may extend the duration of existing copyrights and patents, and in so doing may protect the rights of purchasers and assignees.[36]

Nature and Scope of the Right Secured

[P. 316, substitute for first paragraph of section:]

The leading case on the nature of the rights that Congress is authorized to "secure" under the Copyright and Patent Clause is *Wheaton v. Peters*.[37] Wheaton was the official reporter for the Supreme Court from 1816 to 1827, and Peters was his successor in that role. Wheaton charged Peters with having infringed his copyright in the twelve volumes of "Wheaton's Reports" by reprinting material from Wheaton's first volume in "a volume

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

[34] 537 U.S. at 204.

[35] 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. Although 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.

[36] 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).

[37] 33 U.S. (8 Pet.) 591 (1834).

called 'Condensed Reports of Cases in the Supreme Court of the United States'";[38] Wheaton based his claim on both common law and a 1790 act of Congress. On the statutory claim, the Court remanded to the trial court for a determination of whether Wheaton had complied with all the requirements of the act.[39] On the common law claim, the Court held for Peters, finding that, under common law, publication divests an author of copyright protection.[40] Wheaton argued that the Constitution should be held to protect his common law copyright, because "the word *secure* . . . clearly indicates an intention, not to originate a right, but to protect one already in existence."[41] The Court found, however, that "the word *secure,* as used in the constitution, could not mean the protection of an acknowledged legal right," but was used "in reference to a future right."[42] Thus, the exclusive right that the Constitution authorizes Congress to "secure" to authors and inventors owes its existence solely to acts of Congress that secure it, from which it follows that the rights granted by a patent or copyright are subject to such qualifications and limitations as Congress sees fit to impose.[43]

[P. 317, add to n.1448:]

Cf. Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd, 545 U.S. 913 (2005) (active encouragement of infringement by distribution of software for sharing of copyrighted music and video files can constitute infringement).

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[38] 33 U.S. (8 Pet.) at 595.

[39] 33 U.S. (8 Pet.) at 667.

[40] 33 U.S. (8 Pet.) at 657-58. The Court noted that the same principle applies to "an individual who has invented a most useful and valuable machine. . . . [I]t has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly." Id.

[41] 33 U.S. (8 Pet.) at 661; Holmes v. Hurst, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.

[42] 33 U.S. (8 Pet.) at 661.

[43] 33 U.S. (8 Pet.) at 662; Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815). A major limitation of copyright law is that "fair use" of a copyrighted work is not an infringement. Fair use can involve such things as quotation for the use of criticism and reproduction for classroom purposes, but it may not supersede the use of the original work. *See* Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985) (an unauthorized 300- to 400-word excerpt, published as a news "scoop" of the authorized prepublication excerpt of former President Ford's memoirs and substantially affecting the potential market for the authorized version, was not a fair use within the meaning of § 107 of the Copyright Act, 17 U.S.C. § 107). For fair use in the context of a song parody, *see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

Clauses 11, 12, 13, and 14. War; Military Establishment

CONSTITUTIONAL RIGHTS IN WARTIME

The Constitution at Home in Wartime

– Enemy Aliens

[P. 347, add to text at end of section:]

Because this use of military tribunals was sanctioned by Congress, the Court found it unnecessary to decide whether "the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity.'"[44]

Clause 18. 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*[45] 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, 541 U.S. 600 (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 to text after 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,[46]

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[44] Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006). *But see*, id. at 591 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need.").

[45] 17 U.S. (4 Wheat.) 316 (1819).

[46] Jinks v. Richland County, 538 U.S. 456 (2003).

Section 10 – Powers Denied to States

Clause 1. Making Treaties, Coining Money, *Ex Post Facto* Laws, Impairing Contracts

Ex Post Facto Laws

– Scope of the Provision

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

Distinguishing between civil and penal laws was at the heart of the Court's decision in *Smith v. Doe*[47] 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 is "the clearest proof" of punitive effect.[48] 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."[49] 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.[50] Nor is the act "excessive" in

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[47] 538 U.S. 84 (2003).

[48] 538 U.S. at 92.

[49] 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.

[50] 538 U.S. at 102.

relation to its regulatory purpose.[51] 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.[52]

– Changes in Punishment

[P. 383, 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.[53]

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 prosecution." Such a law, the Court ruled in *Stogner v. California*,[54] 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,[55] that required solitary confinement for prisoners previously sentenced to death,[56] and that

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[51] 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.

[52] 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.

[53] 3 U.S. (3 Dall.) 386, 389 (1798).

[54] 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).

[55] 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).

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

allowed a warden to fix, within limits of one week, and keep secret the time of execution.[57]

[57] *In Re* Medley, 134 U.S. 160, 171 (1890).

ARTICLE II

Section 1. The President

Clause 1. Powers and Term of the President.

NATURE AND SCOPE OF PRESIDENTIAL POWER

Executive Power: Theory of the Presidential Office

– The *Youngstown* Case

[P. 442, add to n.40:]

And, in *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Kennedy, in a concurring opinion joined by three other Justices, id. at 638.

Section 2. Powers and Duties of the President

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

COMMANDER-IN-CHIEF

The Cold War and After: Presidential Power to Use Troops Overseas Without Congressional Authorization

– The Power of Congress to Control the President's Discretion

[P. 474, substitute for the beginning of the sentence in text (up to "unless Congress") that follows n.175:]

If the President introduces troops in the first of these three situations, then he must terminate the use of troops within 60 days after his report was submitted or was required to be submitted to Congress,

[P. 475, add to text after n.181:]

By contrast, President George W. Bush sought a resolution from Congress in 2002 to approve the eventual invasion of Iraq before seeking a UN Security Council resolution, all the while denying that express authorization from Congress, or for that matter, the UN Security Council, was necessary to renew hostilities in Iraq. Prior to adjourning for its midterm elections, Congress passed the Authorization for Use of Military Force against

Iraq Resolution of 2002,[1] which it styled as "specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." On signing the measure, the President noted that he had sought "an additional resolution of support" from Congress, and expressed appreciation for receiving that support, but stated, "my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution."[2] In the Bush administration's view, the primary benefit of receiving authorization from Congress seems to have been the message of political unity it conveyed to the rest of the world rather than the fulfillment of any constitutional requirements.

Martial Law and Constitutional Limitations

– Articles of War: The Nazi Saboteurs

[P. 483, add to text at end of section:]

In any event, the Court rejected the jurisdictional challenge by one of the saboteurs on the basis of his claim to U.S. citizenship, finding U.S. citizenship wholly irrelevant to the determination of whether a wartime captive is an "enemy belligerent" within the meaning of the law of war.[3]

[P. 483, add new section after "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

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[1] P.L. 107-243; 116 Stat. 1498 (2002). The House approved the resolution by a vote of 296-133. The Senate passed the House version of H.J. Res. 114 by a vote of 77-23.

[2] *See* President's Statement on Signing H.J. Res. 114, Oct. 16, 2002, available at [http://usinfo.state.gov/dhr/Archive/2003/Oct/09-906028.html].

[3] *Ex parte* Quirin, 317 U.S. 1, 37-38 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."). *See also* Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.")

Military Force,[4] 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 military 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.[5] 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.[6]

In *Rasul v. Bush*,[7] 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 that denied *habeas corpus* petitions from German citizens who had been captured and tried overseas by United States military tribunals.[8] In *Rasul*, the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,[9] had not been afforded any form of tribunal, and were being held in a territory over which the United States exercised

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[4] Pub. L. 107-40, 115 Stat. 224 (2001).

[5] Hamdi v. Rumsfeld, 542 U.S. 507 (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 Ginsburg, 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*.

[6] 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. 542 U.S. at 533, 539.

[7] 542 U.S. 466 (2004).

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

[9] The petitioners were Australians and Kuwaitis.

exclusive jurisdiction and control.[10] In addition, the Court found that statutory grounds existed for the extension of *habeas corpus* to these prisoners.[11]

In response to *Rasul*, Congress amended the *habeas* statute to eliminate all federal *habeas* jurisdiction over detainees, whether its basis was statutory or constitutional.[12] This amendment was challenged in *Boumediene v. Bush*[13] as a violation of the Suspension Clause.[14] Although the historical record did not contain significant common-law applications of the writ to foreign nationals who were apprehended and detained overseas, the Court did not find this conclusive in evaluating whether *habeas* applied in this case.[15] Emphasizing a "functional" approach to the issue,[16] the Court considered (1) the citizenship and status of the detainee and the adequacy of the process through which the

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[10] Rasul v. Bush, 542 U.S. at 467.

[11] 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, 542 U.S. 426 (2004) (federal court's jurisdiction over Secretary of Defense Rumsfeld was not sufficient to satisfy the presence requirement under 28 U.S.C. § 2241). In *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the Court held that the federal *habeas* statute, 28 U.S.C. § 2241, applied to American citizens held by the Multinational Force-Iraq, an international coalition force operating in Iraq and composed of 26 different nations, including the United States. The Court concluded that the *habeas* statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition.

[12] Detainee Treatment Act of 2005, P.L. 109-148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay"). After the Court decided, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that this language of the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, the language was amended by the Military Commissions Act of 2006, P.L. 109-366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[13] 128 S. Ct. 2229 (2008).

[14] U.S. Const. Art. I, § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In *Boumediene*, the government argued only that the Suspension Clause did not apply to the detainees; it did not argue that Congress had acted to suspend *habeas*.

[15] "[G]iven the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on this point." 128 S. Ct. at 2251.

[16] 128 S. Ct. at 2258. "[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism." Id.

status determination was made; (2) the nature of the sites where apprehension and detention took place; and (3) any practical obstacles inherent in resolving the prisoner's entitlement to the writ. As in *Rasul*, the Court distinguished previous case law, noting that the instant detainees disputed their enemy status, that their ability to dispute their status had been limited, that they were held in a location (Guantanamo Bay, Cuba) under the *de facto* jurisdiction of the United States, and that complying with the demands of habeas petitions would not interfere with the government's military mission. Thus, the Court concluded that the Suspension Clause was in full effect regarding these detainees.

Clause 2. Treaties and Appointment of Officers

THE TREATY-MAKING POWER

Treaties as Law of the Land

[P. 494, n.271, add after "(1884)," before period in initial citation:]

(quoted with approval in Medellin v. Texas, 128 S. Ct. 1346, 1357, 1358-59 (2008))

[P. 494, add to text after n.271:]

The meaning of treaties, as of statutes, is determined by the courts. "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."[17] Yet, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement

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[17] Sanchez-Llamas v. Oregon, 548 U.S. 331, 353-54 (2006), quoting Marbury v. Madison, 5 U.S. (1 Cr.) 137, 177 (1803). In *Sanchez-Llamas*, two foreign nationals were arrested in the United States, and, in violation of Article 36 of the Vienna Convention on Consular Relations, their nations' consuls were not notified that they had been detained by authorities in a foreign country (the U.S.). The foreign nationals were convicted in Oregon and Virginia state courts, respectively, and cited the violations of Article 36 in challenging their convictions. The Court did not decide whether Article 36 grants rights that may be invoked by individuals in a judicial proceeding (four justices would have held that it did grant such rights). The reason that the Court did not decide whether Article 36 grants rights to defendants was that it held, by a 6-to-3 vote, that, even if Article 36 does grant rights, the defendants in the two cases before it were not entitled to relief on their claims. It found, specifically, that "suppression of evidence is [not] a proper remedy for a violation of Article 36," and that "an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial." Id. at 342.

is given great weight."[18] Decisions of the International Court of Justice (ICJ) interpreting treaties, however, have "*no binding force* except between the parties and in respect of that particular case."[19] ICJ decisions "are therefore entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court."[20]

Even when an ICJ decision has binding force as between the governments of two nations, it is not necessarily enforceable by the individuals affected. If, for example, the ICJ finds that the United States violated a particular defendant's rights under international law, and such a decision "constitutes an *international* law obligation on the part of the United States," it does not necessarily "constitute binding federal law enforceable in United States courts. . . . [W]hile treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms."[21] A memorandum from the President of the United States directing that the United States would "discharge its international obligations" under an ICJ decision interpreting a non-self-executing treaty, "by having State courts give effect to the decision," is not sufficient to make the decision binding on state courts, unless the President's action is authorized by Congress.[22]

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[18] Sanchez-Llamas v. Oregon, 548 U.S. at 355, quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[19] Sanchez-Llamas v. Oregon, 548 U.S. at 354, quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 933 (1945) (emphasis added by the Court).

[20] Sanchez-Llamas v. Oregon, 548 U.S. at 355, quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

[21] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008) (emphasis in the original, internal quotation marks omitted). As in the case of the foreign nationals in *Sanchez-Llamas*, Medellin's nation's consul had not been notified that he had been detained in the United States. Unlike the foreign nationals in *Sanchez-Llamas*, however, Medellin was named in an ICJ decision that found a violation of Article 36 of the Vienna Convention.

[22] Medellin v. Texas, 128 S. Ct. 1346, 1353 (2008). "[T]he non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts." Id. at 1371. The majority opinion in *Medellin* was written by Chief Justice Roberts. Justice Stevens, concurring, noted that, even though the ICJ decision "is not 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2," it constitutes an international law obligation not only on the part of the United States, but on the part of the State of Texas. Id. at 1374. This, of course, does not make it enforceable against Texas, but Justice Stevens found that "[t]he cost to Texas of complying with [the ICJ decision] would be minimal." Id. at 1375.

(continued...)

– When is a Treaty Self-Executing

[P. 501, at the end of the first sentence in the section, change period to a comma and insert:]

in which case they are enforceable only after the enactment of "legislation to carry them into effect."[23]

[P. 501, in the second sentence in the section, change "citizen" to "litigant"]

[P. 501, three lines from the bottom of the page, after "provision.", substitute for the rest of the paragraph and the first paragraph that begins on p. 502:]

A treaty will not be self-executing, however, "when the terms of the [treaty] stipulation import a contract – when either of the parties engages to perform a particular act. . . ." When this is the case, "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."[24]

Sometimes the nature of a treaty will determine whether it requires legislative execution or "conveys an intention that it be 'self-executing' and is ratified on these terms."[25] One authority states that whether a treaty is self-executing "depends upon whether the obligation is imposed on private individuals or on public authorities. . . ."

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[22] (...continued)

Justice Breyer, joined by Justices Souter and Ginsburg, dissented, writing that "the consent of the United States to the ICJ's jurisdiction[ ] bind[s] the courts no less than would 'an act of the [federal] legislature.'" Id. at 1376. The dissent believed that, to find treaties non-self-executing "can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones." Id. at 1381-82. Moreover, Justice Breyer wrote, the Court's decision "place[s] the fate of an international promise made by the United States in the hands of a single State. . . . And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause." Id. at 1384. On August 5, 2008, the U.S. Supreme Court denied Medellin a stay of execution, and Texas executed him on the same day.

[23] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[24] Foster v. Neilson, 27 U.S. (2 Pet.) at 314.

[25] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Ingartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The Domestic Obligation of Executive Agreements

[P. 527, substitute for first sentence of first full paragraph on the 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.[26] 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.

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

Belmont and *Pink* were reinforced in *American Insurance Association v. Garamendi*.[27] 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."[28] The preemptive reach of executive agreements stems from "the Constitution's allocation of the foreign relations power to the National Government."[29] 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.[30]

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[26] *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. G. HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW 426 (1944).

[27] 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.

[28] 539 U.S. at 416.

[29] 539 U.S. at 413.

[30] 539 U.S. at 420.

[P. 529, add new section after "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, the Supreme Court has held, is that some state laws impinging on foreign relations are invalid even in the absence of a relevant federal policy. 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."[31] A hundred 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."[32]

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

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[31] 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 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").

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

federal policy. In *Zschernig v. Miller*,[33] 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."[34] 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.[35] 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."[36]

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 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.[37] 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

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[33] 389 U.S. 429 (1968).

[34] 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.

[35] 389 U.S. at 440.

[36] 389 U.S. at 440, 441.

[37] *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).

applying *Zschernig*.[38] 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 the Court discussed *Zschernig* at some length, it saw no need to resolve issues relating to its scope.[39]

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[40] and grants of power.[41] 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 responsibility, "but in a way that affects foreign relations."[42] We must await further litigation to see whether the Court employs this distinction.[43]

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[38] 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).

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

[40] 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*, 75 NOTRE DAME L. REV. 341.

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

[42] 539 U.S. at 419 n.11.

[43] 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.34, at 164).

(continued...)

THE EXECUTIVE ESTABLISHMENT

Appointments and Congressional Regulation of Offices – Congressional Regulation of Conduct in Office

[P. 540, substitute for final paragraph of section:]

Until 1993, § 9(a) of the Hatch Act[44] prohibited any person in the executive branch, or any executive branch department or agency, except the President and the Vice President and certain "policy determining" officers, to "take an active part in political management or political campaigns," although employees had been permitted to "express their opinions on all political subjects and candidates." In *United Public Workers v. Mitchell*,[45] these provisions were upheld as "reasonable" against objections based on the First, Fifth, Ninth, and Tenth Amendments. The Hatch Act Reform Amendments of 1993, however, substantially liberalized the rules for political activities during off-duty hours for most executive branch employees, subject to certain limitations on off-duty hours activities and express prohibitions against on-the-job partisan political activities.[46]

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[43] (...continued)
But Justice Ginsburg also voiced more general misgivings about judges' becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, *supra* n.34, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[44] 53 Stat. 1147, 1148 (1939), then 5 U.S.C. § 7324(a). The 1940 law, § 12(a), 54 Stat. 767-768, applied the same broad ban to employees of federally funded state and local agencies, but this provision was amended in 1974 to restrict state and local government employees in only one respect: running for public office in partisan elections. Act of Oct. 15, 1974, P. L. 93-443, § 401(a), 88 Stat. 1290, 5 U.S.C. § 1502.

[45] 330 U.S. 75 (1947). *See also* Civil Serv. Corp. v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), in which the constitutional attack was renewed, in large part based on the Court's expanding free speech jurisprudence, but the act was again sustained. A "little Hatch Act" of a state, applying to its employees, was sustained in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[46] P. L. 103-94, § 2(a), 107 Stat. 1001 (1993), 5 U.S.C. §§ 7321-7326. Executive branch employees (except those appointed by the President, by and with the advice and consent of the Senate) who are listed in § 7323(b)(2), which generally include those employed by agencies involved in law enforcement or national security, remain under restrictions similar to the those in the old Hatch Act on taking an active part in political management or political campaigns.

The Presidential Aegis: Demands for Papers

– Private Access to Government Information

[P. 556, add to text at end of section:]

Reynolds dealt with an evidentiary privilege. There are other circumstances, however, in which cases must be "dismissed on the pleadings without ever reaching the question of evidence."[47] In holding that federal courts should refuse to entertain a breach of contract action seeking enforcement of an agreement to compensate someone who performed espionage services during the Civil War, the Court in *Totten v. United States* declared that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[48]

– Prosecutorial and Grand Jury Access to Presidential Documents

[P. 559, add to text 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.[49] Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon*,[50] and, in instructing the appeals court on how to proceed, emphasized the importance of confidentiality for advice tendered the President.[51]

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[47] *Reynolds*, 345 U.S. at 11, n.26.

[48] 92 U.S. 105, 107 (1875). *See also* Tenet v. Doe, 544 U.S. 1, 9 (2005) (reiterating and applying *Totten*'s "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden"). The Court in *Tenet* distinguished *Webster v. Doe* on the basis of "an obvious difference . . . between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy." Id. at 10.

[49] Cheney v. United States District Court, 542 U.S. 367 (2004).

[50] Although the information sought in *Nixon* was important to "the constitutional need for production of relevant 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.'" 542 U.S. at 383, 384.

[51] 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." 542 U.S. at 382. *But cf.* Clinton v. Jones, 520 U.S. 681, 702 (1997).

PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS: THE STEEL SEIZURE CASE

Power Denied by Congress

[P. 599, add to n.718:]

In *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006), Justice Kennedy, in a concurring opinion joined by three other Justices, endorsed "the three-part scheme used by Justice Jackson" as "[t]he proper framework for assessing whether Executive actions are authorized." The Court in this case found "that the military commission convened [by the President, in Guantanamo Bay, Cuba] to try Hamdan lacks power to proceed because its structure and procedures violate [the Uniform Code of Military Justice]." Id. at 567. Thus, as Justice Kennedy noted, "the President has acted in a field with a history of congressional participation and regulation." Id. at 638.

ARTICLE III

Section 1. Judicial Power, Courts, Judges

JUDICIAL POWER

Finality of Judgment as an Attribute of Judicial Power – Award of Execution

[P. 654, add to n.160:]

Wallace and *Haworth* were cited with approval in *Medimmune, Inc. v. Genetech, Inc.*, 127 S. Ct. 764, 771 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 767).

[P. 654, add new section after "Chief Justice Taney's formulation":]

Judicial Immunity from Suit

Under common law – the Supreme Court has not elevated judicial immunity from suit to a constitutional principle – judges "are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment, and removed from office. . . . But responsible they are not to private parties in civil actions for the judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly."[1] Three years later, the Court qualified this exception to judges' immunity: the phrase beginning "unless, perhaps," the Court wrote, was "not necessary to a correct statement of the law, and . . . judges . . . are not liable to civil actions for their judicial acts, even when such acts are in excess

[1] Randall v. Brigham, 74 U.S. 523, 537 (1869). Judicial immunity "is a general principle of the highest importance to the proper administration of justice . . . . Liability . . . would destroy that independence without which no judiciary can be either respectable or useful. . . . Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed." Bradley v. Fisher, 80 U.S. 335, 347 (1872).

of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter," with judges subject to liability only in the latter instance.[2]

In *Stump v. Sparkman*, the Court upheld the immunity of a judge who approved a petition from the mother of a 15-year-old girl to have the girl sterilized without her knowledge (she was told that she was to have her appendix removed).[3] In a 5-to-3 opinion, the Court found that there was not the "clear absence of all jurisdiction" that is required to hold a judge civilly liable. The judge had jurisdiction "in all cases at law and in equity whatsoever," except where exclusive jurisdiction is "conferred by law upon some other court, board, or officer," and no statute or case law prohibited the judge from considering a petition for sterilization.[4] The Court also rejected the argument that the judge's approving the petition had not constituted a "judicial act." The Court found "that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity. . . . Judge Stump performed the type of act normally performed only by judges and . . . he did so in his capacity as a [judge]."[5]

Although judges are generally immune from suits for damages, the Court has held that a judge may be enjoined from enforcing a court rule, such as a restriction on lawyer advertising

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[2] Bradley v. Fisher, 80 U.S. 335, 351 (1872). The Court offered a hypothetical example of the distinction. A judge of a probate court who held a criminal trial would act in clear absence of all jurisdiction over the subject matter, whereas a judge of a criminal court who held a criminal trial for an offense that was not illegal would act merely in excess of his jurisdiction. Id. at 352.

[3] 435 U.S. 349 (1978).

[4] 435 U.S. at 357, 358. The defendant was an Indiana state court judge, but the suit was in federal court under 42 U.S.C. § 1983. The Court noted that it had held in *Pierson v. Ray*, 386 U.S. 547 (1967), that there was no indication that, in enacting this statute, Congress had intended to abolish the principle of judicial immunity established in *Bradley v. Fisher*, *supra*.

[5] 435 U.S. at 362. Justice Stewart's dissent, joined by Justices Marshall and Powell, concluded that what Judge Stump did "was beyond the pale of anything that could sensibly be called a judicial act." Id. at 365. Indiana law, Justice Stewart wrote, provided for administrative proceedings for the sterilization of certain people who were institutionalized (which the girl in this case was not), and what Judge Stump did "was in no way an act 'normally performed by a judge.'" Id. at 367.

that violates the First Amendment.[6] Similarly, a state court magistrate may be enjoined from "imposing bail on persons arrested for nonjailable offenses under Virginia law and . . . incarcerating those persons if they could not meet the bail. . . ."[7] But what if the prevailing party, as it did in these two cases, seeks an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976?[8] The Court found that "Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards."[9] In fact, "Congress' intent could hardly be more plain. Judicial immunity is no bar to the award of attorney's fees under 42 U.S.C. § 1988."[10]

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* [retain 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,[11] as a means "to relieve detention by executive authorities without judicial trial."[12] Nowhere in the Constitution, however, is the power to issue the writ vested in the federal courts.

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[6] Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980).

[7] Pulliam v. Allen, 466 U.S. 522, 524-25 (1984).

[8] 42 U.S.C. § 1988(b). Under this statute, "suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself," and, therefore, the state must "bear the burden of the counsel fees award." Hutto v. Finney, 437 U.S. 678, 700 (1978).

[9] *Consumers Union*, 446 U.S. at 738-39. This is not the case, however, when judges are sued in their legislative capacity for having issued a rule. Id. at 734.

[10] *Pulliam*, 466 U.S. at 544. In 1996, Public Law 104-317, § 309, amended § 1988(b) to preclude the award of attorneys' fees in a suit against a judicial officer unless the officer's action "was clearly in excess of such officer's jurisdiction."

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

[12] INS v. St. Cyr, 533 U.S. 289, 301 (2001), as quoted in Rasul v. Bush, 542 U.S. 466, 474 (2004).

[P. 671, add to text at the end of the section:]

For practical purposes, the issue appears to have been resolved by *Boumediene v. Bush*,[13] where the Court held that Congress' attempt to eliminate all federal *habeas* jurisdiction over "enemy combatant" detainees held at Guantanamo Bay[14] violated the Suspension Clause. Although the Court did not explicitly identify whether the underlying right to *habeas* that was at issue arose from statute, common law, or the Constitution itself, it did decline to infer "too much" from the lack of historical examples of *habeas* being extended to enemy aliens held overseas.[15] In *Boumediene*, the Court instead emphasized a "functional" approach that considered the citizenship and status of the detainee, the adequacy of the process through which the status determination was made, the nature of the sites where apprehension and detention took place, and any practical obstacles inherent in resolving the prisoner's entitlement to the writ.[16]

In further determining that the procedures afforded to the detainees to challenge their detention in court were not adequate substitutes for *habeas*, the Court noted the heightened due process concerns when a detention is based principally on Executive Branch proceedings – here, Combatant Status Review Tribunals or (CSRTs) – rather than proceedings before a court of law.[17] The Court also expressed concern that the detentions had, in some cases, lasted as long as six years without significant

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[13] 128 S. Ct. 2229 (2008).

[14] In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court found that 28 U.S.C. § 2241, the federal *habeas* statute, applied to these detainees. Congress then removed all court jurisdiction over these detainees under the Detainee Treatment Act of 2005, P.L. 109-148, §1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay)." After the Court decided in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, it was amended by the Military Commissions Act of 2006, P.L. 109-366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[15] 128 S. Ct. at 2251.

[16] 128 S. Ct. at 2258, 2259.

[17] Under the Detainee Treatment Act, P.L. 109-148, Title X, Congress granted only a limited appeal right to determination made by the Executive Branch as to "(i) whether the status determination of [a] Combatant Status Review Tribunal . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C).

judicial oversight.[18] The Court further noted the limitations at the CSRT stage on a detainee's ability to find and present evi dence to challenge the government's case, the unavailability of assistance of counsel, the inability of a detainee to access certain classified government records which could contain critical allegations against him, and the admission of hearsay evidence. While reserving judgment as to whether the CSRT process itself comports with due process, the Court found that the appeals process for these decisions, assigned to the United States Court of Appeals for the District of Columbia, did not contain the means necessary to correct errors occurring in the CSRT process.[19]

– *Habeas Corpus*: The Process of the Writ

[P. 671, add to text after 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.[20]

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[18] 128 S. Ct. at 2263, 2275.

[19] The Court focused in particular on the inability of the reviewing court to admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding. The Court also listed other potential constitutional infirmities in the review process, including the absence of provisions empowering the D.C. Circuit to order release from detention, and not permitting petitioners to challenge the President's authority to detain them indefinitely.

[20] 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, 542 U.S. 466 (2004) (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, 542 U.S. 426 (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

JUDICIAL POWER AND JURISDICTION — CASES AND CONTROVERSIES

Substantial Interest: Standing

– Citizen Suits [change this heading to "Generalized or Widespread Injuries"]

[P. 688, add to n.346, before the period at the end of penultimate sentence:]

; Lance v. Coffman, 127 S. Ct. 1194, 1198 (2007) (per curiam)

[P. 688, add to text after n.346:]

Notwithstanding that a generalized injury that all citizens share is insufficient to confer standing, where a plaintiff alleges that the defendant's action injures him in "a concrete and personal way," "it does not matter how many [other] persons have [also] been injured. . . . Where a harm is concrete, though widely shared, the Court has found injury in fact."[21]

– Taxpayer Suits

[P. 688, add to n.348:]

In *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2559 (2007), the Court added that, "if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."

[P. 690, add to n.352:]

The Court again took this approach in *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553, 2569 (2007), finding that "*Flast* itself gave too little weight to [separation-of-powers] concerns."

[P. 690, substitute for the sentence in the text after n.352:]

The Court also refused to create an exception for Commerce

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[21] Massachusetts v. Environmental Protection Agency, 127 S. Ct. 1438, 1453, 1456 (2007) (internal quotation marks omitted). In this case, "EPA maintain[ed] that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle." The Court, however, found that "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'" Id. at 1453, 1455.

Clause violations to the general prohibition on taxpayer standing.[22]

Most recently, a Court plurality held that, even in Establishment Clause cases, there is no taxpayer standing where the expenditure of funds that is challenged was not specifically authorized by Congress, but came from general executive branch appropriations.[23] Where expenditures "were not expressly authorized or mandated by any specific congressional enactment," a lawsuit challenging them "is not directed at an exercise of congressional power and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'"[24]

[P. 690, add to n.353:]

In *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006), the Court held that a plaintiff's status as a *municipal* taxpayer does not give him standing to challenge a *state* tax credit.

[P. 690, substitute for final sentence of section:]

The taxpayer's action in *Doremus*, the Court wrote, "is not a direct dollars-and-cents injury but is a religious difference."[25] This rationale was similar to the spending program-regulatory program distinction of *Flast*. But, even a dollar-and-cents injury resulting from a state spending program will apparently not constitute a *direct* dollars-and-cents injury. The Court in

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[22] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347-49 (2006) (standing denied to taxpayer claim that state tax credit given to vehicle manufacturer violated the Commerce Clause).

[23] Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553, 2559 (2007). This decision does not affect Establishment Clause cases in which the plaintiff can allege a personal injury. A plaintiff who challenges a government display of a religious object, for example, need not sue as a taxpayer but may have standing "by alleging that he has undertaken a 'special burden' or has altered his behavior to avoid the object that gives him offense. . . . [I]t is enough for standing purposes that a plaintiff allege that he 'must come into direct and unwelcome contact with the religious display to participate fully as [a] citizen[ ] . . . and to fulfill . . . legal obligations.'" Books v. Elkhart County, 410 F.3d 857, 861 (7th Cir. 2005). In *Van Orden v. Perry*, 545 U.S. 677. 682 (2005), the Court, without mentioning standing, noted that the plaintiff "has encountered the Ten Commandments monument during his frequent visits to the [Texas State] Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building."

[24] 127 S. Ct. at 2568 (citations omitted). Justices Scalia and Thomas concurred in the judgment but would have overruled *Flast*. Justice Souter, joined by three other justices, dissented because he saw no logic in the distinction the plurality drew, as the plurality did not and could not have suggested that the taxpayers in *Hein* "have any less stake in the outcome than the taxpayers in *Flast*." Id. at 2584.

[25] 342 U.S. at 434.

Doremus wrote that a taxpayer challenging either a federal or a state statute "must be able to show not only that the statute is invalid but that he has sustained some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[26]

– Constitutional Standards: Injury in Fact, Causation, and Redressability

[P. 692, add to text after n.367:]

Citing this holding, and historical precedent, the Court upheld the standing of an assignee who had promised to remit the proceeds of the litigation to the assignor.[27] The Court noted that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians at litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; and so forth."[28]

[P. 693, add to n.370:]

But see, *Davis v. Federal Election Commission*, 128 S. Ct. 2759, 2769 (2008), in which the Court held that "the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." In this case, a statute provided that, if a political candidate declares that he will "self-finance," then his opponent, if he qualifies, may receive individual contributions beyond the normal limit. A self-financing candidate challenged the statute after he had declared himself to be self-financing, but before his opponent had qualified for the higher contribution limit; the Court found that the self-financing candidate faced "a realistic and impending threat of direct injury" adequate for standing.

– Standing to Assert the Constitutional Rights of Others

[P. 698, add to n.396:]

Caplin & Drysdale was distinguished in *Kowalski v. Tesmer*, 543 U.S. 123, 131 (2004), the Court finding that attorneys seeking to represent hypothetical indigent clients in challenging procedures for appointing appellate counsel had "no relationship at all" with such potential clients, let alone a "close" relationship.

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[26] 342 U.S. at 434, quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); quoted with approval in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006).

[27] Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S. Ct. 2531 (2008) (payphone operators had assigned claims against long-distance carriers to "aggregators" to sue on their behalf). Chief Justice Roberts, in a dissent joined by Justices Scalia, Thomas, and Alito, stated that the aggregators lacked standing because they "have nothing to gain from their lawsuit." Id. at 2549.

[28] 128 S. Ct. at 2543.

The Requirement of a Real Interest

– Declaratory Judgments

[P. 709, add to n.456:]

Wallace was cited with approval in *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 767).

[P. 709, add before the period at the end of n.458:]

(cited with approval in *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007))

– Retroactivity Versus Prospectivity

[P. 722, add before the period at the end of n.530:]

(cited with approval in *Whorton v. Bockting*, 127 S. Ct. 1173, 1180 (2007))

[P. 722, after the citation to *Penry* in n.533, change the period to a semicolon and add:]

Whorton v. Bockting, 127 S. Ct. 1173, 1181 (2007).

[P. 722, in line 12 of the text, after the period following "will not be applied," add a new footnote:]

The approach in state collateral review proceedings, however, may be different. The Court has indicated that the general rule regarding denial of retroactive application of "new rules" in federal collateral proceeding was principally based on an interpretation of federal statutory law. State collateral review of cases brought under state law may be more generous to the defendant. Danforth v. Minnesota, 128 S. Ct. 1029 (2008).

[P. 722, in line 12 of the text, after the period following "will not be applied," add to text:]

"A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[29]

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

For recent application of the principles, see *Schriro v. Summerlin*, 542 U.S. 348 (2004) (requirement that aggravating factors justifying death penalty be found by the jury was a new procedural rule that does not apply retroactively).

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[29] Whorton v. Bockting, 127 S. Ct. 1173, 1180 (2007).

Political Questions

– The Doctrine Reappears

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

But see Vieth v. Jubelirer, 541 U.S. 267 (2004) (no workable standard has been found for measuring burdens on representational rights imposed by political gerrymandering).

JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

Cases Arising Under the Constitution, Laws, and Treaties of the United States

– Federal Questions Resulting from Special Jurisdictional Grants

[P. 757, second paragraph of n.722, substitute for "hesitating" on line 4 through "house)" on line 8:]

refusing to apply *Bivens* when "any alternative, existing process for protecting the interest" that is threatened exists, or when "any special factors counselling hesitation" are present. Wilkie v. Robbins, 127 S. Ct. 2588, 2598 (2007). *See also* Chappell v. Wallace, 462 U.S. 296, 298 (1983); Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicki, 487 U.S. 412 (1988); FDIC v. Meyer, 510 U.S. 471 (1994); Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001).

Clause 2. Original and Appellate Jurisdiction

POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

The Theory Reconsidered

– Express Constitutional Restrictions on Congress

[P. 830, delete from "While some" in line 13 of the section, through the end of the section, and substitute the following, which corrects the statement in the main volume that the Portal-to-Portal Act was disapproved by the Court of Appeals:]

The United States Court of Appeals for the Second Circuit sustained the Act.[30] The court noted that the withdrawal of jurisdiction would be ineffective if the extinguishment of the

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[30] Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948). *See also* Seese v. Bethlehem Steel Co., 168 F.2d 58, 65 (4th Cir. 1948). For later dicta, *see* Johnson v. Robison, 415 U.S. 361, 366-67 (1974); Weinberger v. Salfi, 422 U.S. 749, 761-62 (1975); Territory of Guam v. Olsen, 431 U.S. 195, 201-02, 204 (1977); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988); *but see* id. at 611-15 (Justice Scalia dissenting). Note the relevance of *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

claims as a substantive matter were invalid. "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[31] The Court, however, found that the Portal-to-Portal Act "did not violate the Fifth Amendment in so far as it may have withdrawn from private individuals . . . any rights . . . which rested upon private contracts they had made. Nor is the Portal-to-Portal Act a violation of Article III of the Constitution or an encroachment upon the separate power of the judiciary."[32]

FEDERAL-STATE COURT RELATIONS

Conflicts of Jurisdiction: Rules of Accommodation

– Res Judicata

[P. 842, add to text at end of section:]

Closely related is the *Rooker-Feldman* doctrine, holding that federal subject-matter jurisdiction of federal district courts does not extend to review of state court judgments.[33] The Supreme Court, not federal district courts, has such appellate jurisdiction. The doctrine thus prevents losers in state court from obtaining district court review, but "does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions."[34]

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[31] 169 F.2d at 257.

[32] 169 F.2d at 261-62.

[33] The doctrine derives its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[34] Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005) (*Rooker-Feldman* has no application when federal court proceedings have been initiated prior to state court proceedings; preclusion law governs in that situation.)

Conflicts of Jurisdiction: Federal Court Interference with State Courts

– *Habeas Corpus*: Scope of the Writ

[P. 855, add to the end of n.1296:]

This sentence was quoted again in *Whorton v. Bockting*, 127 S. Ct. 1173, 1181 (2007).

[P. 858, add to n.1312:]

In *House v. Bell*, 547 U.S. 518, 554-55 (2006), the Court declined to resolve the issue that in *Herrera* it had assumed without deciding: that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *See* Amendment 8, Limitations on *Habeas Corpus* Review of Capital Sentences.

ARTICLE IV

Section 1. Full Faith and Credit

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

[P. 896, substitute for entire section:]

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 a 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

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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 no provision of the Constitution, including the Full Faith and Credit Clause, enabled a law exempting from taxation certain debts of the enacting state to prevent another state (the state in which the creditor resided) from taxing the debts. *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.

weighing the governmental interests of each jurisdiction.[4] That is, the 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

STATE CITIZENSHIP: 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 discrimi-

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[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, 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).

nates against out-of-state interests.[8]

[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).

ARTICLE V

AMENDMENT OF THE CONSTITUTION

Proposing a Constitutional Amendment

– Proposals by Congress

[P. 941, substitute for n.20:]

In *Hollingsworth v.Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Court rejected a challenge to the Eleventh Amendment based on the argument that it had not been submitted to the President for approval or veto. The Court' s brief opinion merely determined that the Eleventh Amendment was "constitutionally adopted." Id. at 382. Apparently during oral argument, Justice Chase opined that "[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution." Id. at 381. *See* Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *was Rightly Decided, and Why* INS v. Chadha *was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005), for extensive analysis of what *Hollingsworth*'s delphic pronouncement could mean. Whatever the Court decided in *Hollingsworth*, it has since treated the issue as settled. *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) (in *Hollingsworth*, "this court settled that the submission of a constitutional amendment did not require the action of the President"); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth*, "the Court held Presidential approval was unnecessary for a proposed constitutional amendment . . .").

FIRST AMENDMENT

RELIGION

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 School District v. Newdow, 542 U.S. 1 (2004).

– Religious Displays on Government Property

[P. 1058, add to text at end of section:]

Displays of the Ten Commandments on government property occasioned two decisions in 2005. As in *Allegheny County*, a closely divided Court determined that one display violated the Establishment Clause and one did not. And again, context and imputed purpose made the difference. The Court struck down display of the Ten Commandments in courthouses in two Kentucky counties,[1] but held that a display on the grounds of the Texas State Capitol was permissible.[2] The displays in the Kentucky courthouses originally "stood alone, not part of an arguably secular display."[3] Moreover, the history of the displays revealed "a predominantly religious purpose" that had not been eliminated by steps taken to give the appearance of secular objectives.[4]

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[1] McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

[2] Van Orden v. Perry, 545 U.S. 677 (2005).

[3] 545 U.S. at 868. The Court in its previous Ten Commandments case, *Stone v. Graham*, 449 U.S. 39, 41 (1980) (invalidating display in public school classrooms) had concluded that the Ten Commandments are "undeniably a sacred text," and the 2005 Court accepted that characterization. *McCreary*, 545 U.S. at 859.

[4] 545 U.S. at 881. An "indisputable" religious purpose was evident in the resolutions authorizing a second display, and the Court characterized statements of purpose accompanying authorization of the third displays as "only . . . a litigating position." 545 U.S. at 870, 871.

There was no opinion of the Court in *Van Orden*. Justice Breyer, the swing vote in the two cases,[5] distinguished the Texas Capitol grounds display from the Kentucky courthouse displays. In some contexts, the Ten Commandments can convey a moral and historical message as well as a religious one, the Justice explained. Although it was "a borderline case" turning on "a practical matter of degree," the capitol display served "a primarily nonreligious purpose."[6] The monument displaying the Ten Commandments was one of 17 monuments and 21 historical markers on the Capitol grounds; it was paid for by a private, civic, and primarily secular organization; and it had been in place, unchallenged, for 40 years. Under the circumstances, Justice Breyer thought it unlikely that the monument will be understood to represent an attempt by government to favor religion.[7]

FREE EXERCISE OF RELIGION

[P. 1060, add to text after n.234:]

"There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference."[8]

[P. 1061, add to n.236:]

Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding a provision of the Religious Land Use and Institutionalized Persons Act of 2000 that prohibits governments from imposing a "substantial burden on the religious exercise" of an institutionalized person unless the burden furthers a "compelling governmental interest").

[P. 1061, add to text at end of section:]

Government need not, however, offer the same accommodations to secular entities that it extends to religious practitioners in order to facilitate their religious exercise; "[r]eligious accommoda-

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[5] Only Justice Breyer voted to invalidate the courthouse displays and uphold the capitol grounds display. The other eight Justices were split evenly, four (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) voting to uphold both displays, and four (Justices Stevens, O'Connor, Souter, and Ginsburg) voting to invalidate both.

[6] 545 U.S. at 700, 704, 703.

[7] 545 U.S. at 702.

[8] Walz v. Tax Comm'n, 397 U.S. at 669. *See also* Locke v. Davey, 540 U.S. 712, 718 (2004); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

tions . . . need not 'come packaged with benefits to secular entities.'"[9]

"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.[10] 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.[11] 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.[12]

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 School District v. Newdow, 542 U.S. 1 (2004).

[P. 1075, substitute for final paragraph of section:]

Boerne did not close the books on *Smith*, however, or even on RFRA. Although *Boerne* held that RFRA was not a valid exercise of Fourteenth Amendment enforcement power as applied to restrict states, it remained an open issue whether RFRA may be applied to the federal government, and whether its requirements could be imposed pursuant to other powers. Several lower courts answered these questions affirmatively.[13]

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[9] Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (quoting Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987)).

[10] Locke v. Davey, 540 U.S. 712 (2004).

[11] 540 U.S. at 720-21. Excluding theology students but not students training for other professions was permissible, the Court explained, because "[t]raining 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 721.

[12] 540 U.S. at 720-21 (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)).

[13] *See*, *e.g.*, In re Young, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (RFRA is a valid exercise of Congress' bankruptcy powers as applied to insulate a debtor's church tithes from recovery by the bankruptcy trustee); O'Bryan v. Bureau of

(continued...)

Congress responded to *Boerne* by enacting a new law purporting to rest on its commerce and spending powers. The Religious Land Use and Institutionalized Persons Act (RLUIPA)[14] imposes the same strict scrutiny test struck down in *Boerne* but limits its application to certain land use regulations and to religious exercise by persons in state institutions.[15] In *Cutter v. Wilkinson*,[16] the Court upheld RLUIPA's prisoner provision against a facial challenge under the Establishment Clause, but it did not rule on congressional power to enact RLUIPA. The Court held that RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices."[17] Rather, the provision "fits within the corridor" between the Free Exercise and Establishment Clauses, and is "compatible with the [latter] because it alleviates exceptional government-created burdens on private religious exercise."[18]

FREEDOM OF EXPRESSION — SPEECH AND PRESS

The Doctrine of Prior Restraint

– Obscenity and Prior Restraint

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

City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 784 (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");

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[13] (...continued)
Prisons, 349 F.3d 399 (7th Cir. 2003) (RFRA may be applied to require the Bureau of Prisons to accommodate religious exercise by prisoners); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (RFRA applies to Bureau of Prisons).

[14] Pub. L. 106-274, 114 Stat. 804 (2000); 42 U.S.C. §§ 2000cc *et seq.*

[15] The Act requires that state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's exercise of religion be measured by a strict scrutiny test, and applies the same strict scrutiny test for any substantial burdens imposed on the exercise of religion by persons institutionalized in state or locally run prisons, mental hospitals, juvenile detention facilities, and nursing homes. Both provisions apply if the burden is imposed in a program that receives federal financial assistance, or if the burden or its removal would affect commerce.

[16] 544 U.S. 709 (2005).

[17] 544 U.S. at 714.

[18] 544 U.S. at 720.

Subsequent Punishment: Clear and Present Danger and Other Tests

[P. 1107, change heading to "Modern Tests and Standards: Vagueness, Overbreadth, Strict Scrutiny, Intermediate Scrutiny, 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 n.484:]

But see Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008) (facial challenge to burden on right of association rejected "where the statute has a 'plainly legitimate sweep'").

[P. 1108, substitute for rest of section after n.484:]

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)."[19]

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[19] 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 for being on the premises"). *Virginia v. Hicks* cited *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which, in the majority opinion 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, (continued...)

Out of a concern that is closely related to that behind 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."[20] Thus, the Court applies "strict scrutiny" to content-based regulations of fully protected speech; this means that it requires that such regulations "promote a compelling interest" and use "the least restrictive means to further the articulated interest."[21]

With respect to speech restrictions to which the Court does not apply strict scrutiny, the Court applies intermediate scrutiny; *i.e.*, scrutiny that is "midway between the 'strict scrutiny' demanded for content-based regulation of speech and the 'rational basis' standard that is applied – under the Equal Protection Clause – to government regulation of nonspeech activities."[22] Inter-mediate scrutiny requires that the governmental interest be "significant" or "substantial" or "important" (but not necessarily "compelling"), and it requires that the restriction be narrowly tailored (but not necessarily the least restrictive means to advance the governmental interest). Speech restrictions to which the Court does not apply strict scrutiny include those that are not content-based (time, place, or manner restrictions; incidental restrictions) and those that restrict categories of speech to which the Court accords less than full First Amendment protection (campaign contributions; commercial speech).[23] Note that time,

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[19] (...continued)
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).

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

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

[22] Madsen v. Women's Health Center, Inc., 512 U.S. 753, 790 (1994) (parentheses omitted). The Court, however, applied a rational basis standard to uphold a state statute that banned the sale of sexually explicit material to minors. Ginsberg v. New York, 390 U.S. 629, 641 (1968).

[23] *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 (continued...)

place, and manner restrictions, or incidental restrictions, may be content-based, but they will not receive strict scrutiny if they "are *justified* without reference to the content of the speech."[24] Examples are bans on nude dancing, and zoning restrictions on pornographic theaters or bookstores, both of which receive intermediate scrutiny on the ground that they are "aimed at combating crime and other negative secondary effects," and not at the content of speech.[25]

The Court uses tests closely related to one another in these instances in which it does not apply strict scrutiny. It has indicated 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,"[26] and that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context."[27]

In addition, the Supreme Court generally requires – even when applying less than strict scrutiny – 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

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[23] (...continued)
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 . . .") (internal quotation mark and citation omitted)). *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).

[24] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (emphasis in original).

[25] Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (upholding ban on nude dancing); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (upholding zoning of "adult motion picture theaters"). Zoning and nude dancing cases are discussed below under "Non-obscene But Sexually Explicit and Indecent Expression."

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

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

harms in a direct and material way."[28] The Court has held, however, that to sustain a statute denying minors access to sexually explicit material "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[29]

In certain other contexts, the Court has relied on "common sense" rather than requiring the government to demonstrate that a recited harm was real and not merely conjectural. For example, it held that a rule prohibiting high school coaches from recruiting middle school athletes did not violate the First Amendment, finding that it needed "no empirical data to credit [the] common-sense conclusion that hard-sell [speech] tactics directed at middle school students could lead to exploitation. . . ."[30] On the use of common sense in free speech cases, Justice Souter wrote: "It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established . . . . But we

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[28] Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (federal "must-carry" provisions, which require cable television systems to devote a portion of their channels to the transmission of local broadcast stations, upheld as a content-neutral, incidental restriction on speech, not subject to strict scrutiny). The Court has applied the same principle in weighing the constitutionality of two other speech restrictions to which it does not apply strict scrutiny: restrictions on commercial speech, Edenfield v. Fane, 507 U.S. 761, 770-771 (1993) ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real"), and restrictions on campaign contributions, Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden").

[29] Ginsberg v. New York, 390 U.S. 629, 641 (1968) (upholding ban on sale to minors of "girlie" magazines, and noting that, although "studies all agree that a causal link [between 'minors' reading and seeing sexual material' and an impairment in their 'ethical and moral development'] has not been demonstrated, they are equally agreed that a causal link has not been disproved either," id. at 641-42). In a case involving a federal statute that restricted "signal bleed" of sexually explicit programming on cable television, a federal district 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, a federal 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, "[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).

[30] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S. Ct. 2489, 2495-96 (2007).

must be careful about substituting common assumptions for evidence when the evidence is as readily available as public statistics and municipal property evaluations, lest we find out when the evidence is gathered that the assumptions are highly debatable."[31]

Freedom of Belief

– Flag Salute Cases

[P. 1111, change heading to "Flag Salutes and Other Compelled Speech"]

[P. 1111, add to n.501:]

The First Amendment is not violated when the government compels financial contributions to fund *government* speech, even if the contributions are raised through a targeted assessment rather than through general taxes. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).

[P. 1112, add to text at end of section:]

Other governmental efforts to compel speech have also been held by the Supreme Court to violate the First Amendment; these include a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,[32] a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their records,[33] an Ohio statute that prohibited the distribution of anonymous campaign literature,[34] and a Massachusetts statute that required private citizens who organized a parade to include among the marchers a group imparting a message – in this case support for gay rights – that the organizers did not wish to convey.[35]

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[31] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 459 (2002) (Souter, J., dissenting).

[32] Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988). In *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who has retained 85 percent of gross receipts from donors, but falsely represented that "a significant amount of each dollar donated would be paid over to" a charitable organization, could be sued for fraud.

[33] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), a Court plurality held that a state could not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees.

[34] McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

[35] Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557 (1995).

By contrast, the Supreme Court has found no First Amendment violation when government compels disclosures in commercial speech, or when it compels the labeling of foreign political propaganda. Regarding compelled disclosures in commercial speech, the Court held that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right."[36] Regarding compelled labeling of foreign political propaganda, the Court upheld a provision of the Foreign Agents Registration Act of 1938 that required that, when an agent of a foreign principal seeks to disseminate foreign "political propaganda," he must label such material with certain information, including his identity, the principal's identity, and the fact that he has registered with the Department of Justice. The Court found that "Congress did not prohibit, edit, or restrain the distribution of advocacy materials. . . . To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."[37]

Right of Association

[P. 1116, add before period at the end of n.530:]

, and see the comparison of *Ohralik* and *Bates* in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 127 S. Ct. 2489, 2494 (2007) ("solicitation ban was more akin to a conduct regulation than a speech restriction")

[P. 1120, substitute for n.556:]

530 U.S. at 653. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006), the Court held that the Solomon Amendment's forcing law schools to allow military recruiters on campus does not violate the schools' freedom of expressive association because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students – not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Rumsfeld* is discussed below under "Government and the Power of the Purse."

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[36] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985).
[37] Meese v. Keene, 481 U.S. 465, 480 (1987).

– Political Association

[P. 1121, add to n.561:]

California Democratic Party v. Jones, 530 U.S. 567, 577 (2000) (requirement of a "blanket" primary, in which all registered voters, regardless of political affiliation, may participate, unconstitutionally "forces political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."); Clingman v. Beaver, 544 U.S. 581 (2005) (Oklahoma statute that allowed only registered members of a political party, and registered independents, to vote in the party's primary does not violate freedom of association; Oklahoma's "semiclosed primary system" distinguished from Connecticut's closed primary that was struck down in *Tashjian*).

[P. 1121, add to text after n.561:]

If people have a First Amendment right to associate with others to form a political party, then it follows that "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform. These rights are circumscribed, however, when the State gives a party a role in the election process – as . . . by giving certain parties the right to have their candidates appear on the general-election ballot. Then, for example, the party's racially discriminatory action may become state action that violates the Fifteenth Amendment. And then also the State acquires a legitimate governmental interest in assuring the fairness of the party's nominating process, enabling it to prescribe what that process must be."[38]

A political party's First Amendment right to limit its membership as it wishes does not render invalid a state statute that allows a candidate to designate his party preference on a ballot, even when the candidate "is unaffiliated with, or even

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[38] New York State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 797-98 (2008) (citations omitted). In *Lopez Torres*, the Court upheld a state statute that required political parties to select judicial candidates at a convention of delegates chosen by party members in a primary election, rather than to select candidates in direct primary elections. The statute was challenged by party members who had not been selected and who claimed "that the convention process that follows the delegate election does not give them a realistic chance to secure the party's nomination." Id. at 799. The Court rejected their challenge, holding that, although a state may require "party-candidate selection through processes more favorable to insurgents, such as primaries," id. at 799, the Constitution does not demand that a state do so. "Party conventions, with their attendant 'smoke-filled rooms' and domination by party leaders, have long been an accepted manner of selecting party candidates." Id. at 799. The plaintiffs had an associational right to join the party but not to have a certain degree of influence in the party. Id. at 798.

repugnant to, the party" he designates.[39] This is because the statute in question "never refers to the candidates as nominees of any party, nor does it treat them as such"; it merely allows them to indicate their party preference.[40] The Court acknowledged that "it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties," but "whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot."[41] If the form of the ballot used in a particular election is such as to confuse voters, then an as-applied challenge to the statute may be appropriate, but a facial challenge, the Court held, is not.[42]

– Conflict Between Organization and Members

[P. 1125, add to text after n.583:]

In *Davenport v. Washington Education Ass'n*,[43] the Court noted that, although *Chicago Teachers Union v. Hudson* had "set forth various procedural requirements that public-sector unions collecting agency fees must observe in order to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes,"[44] it "never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require. To the contrary, we have described *Hudson* as 'outlin[ing] a *minimum* set of procedures by which a [public-sector] union in an agency-shop relationship could meet its

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[39] Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1189 (2008). This was a 7-to-2 decision written by Justice Thomas, with Justices Scalia and Kennedy dissenting.

[40] 128 S. Ct. at 1192.

[41] 128 S. Ct. at 1193. The Court saw "simply no basis to presume that a well-informed electorate will interpret a candidate's party preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." Id.

[42] A ballot could avoid confusion by, for example, "includ[ing] prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party." 128 S. Ct. at 1194. Justice Scalia, joined by Justice Kennedy in dissent, wrote that "[a]n individual's endorsement of a party shapes the voter's view of what the party stands for," and that it is "quite impossible for the ballot to satisfy a reasonable voter that the candidate is 'not associated' with the party for which he has expressed a preference." Id. at 1200.

[43] 127 S. Ct. 2372 (2007).

[44] 127 S. Ct. at 2377.

requirements under *Abood*."[45] Thus, the Court held in *Davenport* that the State of Washington could prohibit "expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents."[46] And, the Court added that "Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely."[47]

Particular Government Regulations That Restrict Expression – Government as Employer: Free Expression Generally

[P. 1148, add to text after n.699:]

In *City of San Diego v. Roe*,[48] the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating. The Court found that the officer's "expression does not qualify as a matter of public concern . . . and *Pickering* balancing does not come into play."[49] The Court also noted that the officer's speech, unlike federal employees' speech in *United States v. National Treasury Employees Union (NTEU)*,[50] was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and functions of his employer."[51] Therefore, the Court had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [*i.e.*, *Pickering* or *NTEU*]."[52] This leaves uncertain whether, had the officer's expression not been linked to his official status, the Court would have overruled his firing under *NTEU* or would have upheld it under *Pickering* on the ground that his expression was not a matter of public concern.

In *Garcetti v. Ceballos*, the Court cut back on First Amendment protection for government employees by holding that there

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[45] 127 S. Ct. at 2379 (citations omitted).
[46] 127 S. Ct. at 2378.
[47] 127 S. Ct. at 2378 (citations omitted).
[48] 543 U.S. 77 (2004) (per curiam).
[49] 543 U.S. at 84.
[50] 513 U.S. 454 (1995) (discussed under "Government as Employer: Political and Other Outside Activities," *supra*).
[51] 543 U.S. at 84.
[52] 543 U.S. at 80.

is no protection – *Pickering* balancing is not to be applied – "when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern.[53] In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and sued. The Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[54] The fact that the employee's speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to foreclose First Amendment protection.[55] Rather, the "controlling factor" was that his expressions were made pursuant to his duties."[56] Therefore, another employee in the office, with different duties, might have had a First Amendment right to utter the speech in question, and the deputy district attorney himself might have had a First Amendment right to communicate the information that he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

[P. 1149, add footnote after "restraint." on line 8:]

In *Connick*, the Court noted that it did not suggest "that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment." Rather, it was beyond First Amendment protection "absent the most unusual of circumstances." 461 U.S. at 147. In *Ceballos*, however, the Court, citing

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[53] 547 U.S. 410, 421 (2006).

[54] 547 U.S. at 421. However, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." Id. at 419. Such necessity, however, may be based on a "common-sense conclusion" rather than on "empirical data." Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S. Ct. 2489, 2495 (2007).

[55] The Court cited *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979), for these points. In *Givhan*, the Court had upheld the First Amendment right of a public school teacher to complain to the school principal about "employment policies and practices at [the] school which [she] conceived to be racially discriminatory in purpose or effect." Id. at 413. The difference between *Givhan* and *Ceballos* was apparently that Givhan's complaints were not made pursuant to her job duties, whereas Ceballos' were. Therefore, Givhan spoke as a citizen whereas Ceballos spoke as a government employee. See *Ceballos*, 547 U.S. at 420-21.

[56] 547 U.S. at 421.

Connick at 147, wrote that, if an employee did not speak as a citizen on a matter of public concern, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418.

– Government as Educator

[P. 1154, add to text after n.725:]

In *Morse v. Frederick*,[57] the Court held that a school could punish a pupil for displaying a banner that said, "BONG HiTS 4 JESUS," because these words could reasonably be interpreted as "promoting illegal drug use."[58] The Court indicated that it might have reached a different result if the banner had addressed the issue of "the criminalization of drug use or possession."[59] Justice Alito, joined by Justice Kennedy, wrote a concurring opinion stating that they had joined the majority opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction on speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[60] As *Morse v. Frederick* was a 5-to-4 decision, Justices Alito and Kennedy's votes were necessary for a majority and therefore should be read as limiting the majority opinion with respect to future cases.

– Government as Regulator of the Electoral Process: Elections

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

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 . . . ."[61] Yet "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs

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[57] 127 S. Ct. 2618 (2007).
[58] 127 S. Ct. at 2624.
[59] 127 S. Ct. at 2625.
[60] 127 S. Ct. at 2636.
[61] 424 U.S. at 22.

means closely drawn to avoid unnecessary abridgment of associational freedoms."[62]

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

[P. 1158, add to text after n.743:]

The government not only may not limit the amount that a candidate may spend out of his own resources, but, if a candidate spends more than a particular amount, the government may not penalize the candidate by authorizing the candidate's opponent to receive individual contributions at higher than the normal limit. In *Davis v. Federal Election Commission*, the Court struck down, as lacking a compelling governmental interest, a federal statute that provided that, if a "self-financing" candidate for the House of Representatives spends more than a specified amount, then his opponent may accept more individual contributions than otherwise permitted. The statute, the Court wrote, imposed "a special and potentially significant burden" on a candidate "who robustly exercises [his] First Amendment right."[63] Citing *Buckley*, the Court stated that a burden "on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption." This is because "reliance on personal funds *reduces* the threat of corruption, and therefore . . . discouraging the use of personal funds [ ] disserves the anticorruption interest."[64] Citing *Buckley* again, the Court added that the governmental interest in equalizing the financial resources of candidates does not provide a justification for restricting expenditures, and, in fact, to restrict expenditures "has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office. . . . Different candidates have differ-

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[62] 424 U.S. at 25 (internal quotation marks omitted).

[63] 128 S. Ct. 2759, 2771, 2772 (2008). The statute was § 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 109, 2 U.S.C. § 441a-1(a), which was part of the so-called "Millionaire's Amendment."

[64] 128 S. Ct. at 2773 (emphasis in original). Justice Stevens, in the part of his dissenting opinion joined by Justices Souter, Ginsburg, and Breyer, found that the Millionaire's Amendment does not cause self-funding candidates "any First Amendment injury whatsoever. The Millionaire's Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard. . . . Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles." Id. at 2780.

ent strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to the outcome of an election."[65]

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

In *FEC v. Beaumont*,[66] 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."[67] 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*,[68] 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,"[69] 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,"[70] and (2) the prohibition on corporations and labor unions' using funds in their treasuries to finance

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[65] 128 S. Ct. at 2773-74. The Court also struck down the disclosure requirements in § 319(b) of BCRA because they "were designed to implement the asymmetrical contribution limits provided for in § 319(a), and . . . § 319(a) violates the First Amendment." Id. at 2775.

[66] 539 U.S. 146 (2003).

[67] 539 U.S. at 157.

[68] 540 U.S. 93 (2003).

[69] 540 U.S. at 133.

[70] 540 U.S. at 123.

"electioneering communications,"[71] 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."[72]

As for the soft-money prohibition on national party committees, the Court applied "the less rigorous scrutiny applicable to contribution limits."[73] and found it "closely drawn to match a sufficiently important interest."[74] 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.'"[75]

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."[76] 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.[77] In response to the argument that the justifications for a ban on express advocacy did not apply to issue advocacy, the Court found that the "argument fails to the extent that the issue ads broadcast during the 30- and 60-day

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[71] 540 U.S. at 204.
[72] 540 U.S. at 190.
[73] 540 U.S. at 141.
[74] 540 U.S. at 136 (internal quotation marks omitted).
[75] 540 U.S. at 136.
[76] 540 U.S. at 205.
[77] 540 U.S. at 204.

periods preceding federal primary and general elections are the functional equivalent of express advocacy."[78]

The limitations on electioneering communication, however, soon faced renewed scrutiny by the Court. In *Wisconsin Right to Life, Inc. v. Federal Election Comm'n* (WRTL I),[79] the Court vacated a lower court decision that had denied plaintiffs the opportunity to bring an as-applied challenge to BCRA's regulation of electioneering communications. Subsequently, in *Federal Election Commission v. Wisconsin Right to Life* (WRTL II),[80] the Court considered what standard should be used for such a challenge. Chief Justice Roberts, in the controlling opinion,[81] rejected the suggestion that an issue ad broadcast during the specified periods before elections should be considered the "functional equivalent" of express advocacy if the "intent and effect" of the ad was to influence the voter's decision in an election.[82] Rather, Chief Justice Robert's opinion held that an issue ad is the functional equivalent of express advocacy only if the ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[83]

In *Randall v. Sorrell*, a plurality of the Court struck down a Vermont campaign finance statute's limitations on both expenditures and contributions.[84] As for the statute's expenditure limitations, the plurality found *Buckley* to control and saw no reason to overrule it and no adequate basis upon which to distinguish it. As for the statute's contribution limitations, the plural-

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[78] 540 U.S. at 206.

[79] 546 U.S. 410 (2006).

[80] 127 S. Ct. 2652 (2007).

[81] Only Justice Alito joined Parts III and IV of Chief Justice Robert's opinion, which addressed the issue of as-applied challenges to BCRA. Justices Scalia (joined by Kennedy and Thomas) concurred in the judgment, but would have overturned *McConnell* and struck down BCRA's limits on issue advocacy on its face.

[82] The suggestion was made that an "intent and effect" standard had been endorsed by the Court in *McConnell*, which stated that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. While acknowledging that an evaluation of the "intent and effect" had been relevant to the rejection of a facial challenge, Chief Justice Robert's opinion in WRTL II denied that such a standard had been endorsed for as-applied challenges. 127 S. Ct. at 2664-66.

[83] 127 S. Ct. at 2667.

[84] 548 U.S. 230 (2006). Justice Breyer wrote the plurality opinion, with only Chief Justice Roberts joining it in full. Justice Alito joined the opinion as to the contribution limitations but not as to the expenditure limitations. Justice Alito and three other Justices concurred in the judgment as to the limitations on both expenditures and contributions, and three Justices dissented.

ity, following *Buckley*, considered whether the "contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy'; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny."[85] The plurality found that they were.[86] Vermont's limit of $200 per gubernatorial election "(with significantly lower limits for contributions to candidates for State Senate and House of Representatives) . . . are well below the limits this Court upheld in *Buckley*," and "are the lowest in the Nation."[87] But the plurality struck down Vermont's contribution limits "based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections."[88]

– Government as Investigator: Reporter's Privilege

[P. 1165, substitute for n.783:]

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court's opinion. Justice Powell, despite having joined the majority opinion, also submitted a concurring opinion in which he suggested a privilege might be available if, in a particular case, "the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. Justice Stewart's dissenting opinion in *Branzburg* referred to Justice Powell's concurring opinion as "enigmatic." Id. at 725. Judge Tatel of the D.C. Circuit wrote, "Though providing the majority's essential fifth vote, he [Powell] wrote separately to outline a 'case-by-case' approach that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims." In re: Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

"[C]ourts in almost every circuit around the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context." Association of the Bar of the City of New York, The Federal Common Law of Journalists' Privilege: A Position Paper (2005) at 4-5 [http://www.abcny.org/pdf /report/White%20paper%20on%20reporters%20privilege.pdf] (citing examples).

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[85] 548 U.S. at 248 (citation omitted).

[86] Although, as here, limits on contributions may be so low as to violate the First Amendment, "there is no constitutional basis for attacking contribution limits on the ground that they are too high. Congress has no constitutional obligation to limit contributions at all . . . ." Davis v. Federal Election Commission, 128 S. Ct. 2759, 2771 (2008) (dictum).

[87] 548 U.S. at 249 (citation omitted). The plurality noted that, "in terms of real dollars (*i.e.*, adjusting for inflation)," they were lower still. Id. at 250.

[88] 548 U.S. at 253.

[P. 1165, substitute for paragraph in text that begins "The Court":]

The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[89] Although efforts in Congress have failed, 49 states have done so – 33 (plus the District of Columbia) by statute and 16 by court decision, with Wyoming the sole holdout.[90] As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[91] The federal courts have not resolved whether the common law provides a journalists' privilege.[92]

– 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.

[P. 1171: substitute in text for material between n.814 and n.817:]

Four factors "are relevant in determining the reasonableness of a regulation at issue."[93] "First, is there a valid, rational connection between the prison regulation and the legitimate governmental

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[89] 408 U.S. at 706.

[90] *E.g.*, Cal. Evid. Code § 1070; N.J. Rev. Stat. §§ 2A:84A-21, -21a, -29. The reported cases evince judicial hesitancy to give effect to these statutes. *See*, *e.g.*, Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976). The greatest difficulty these laws experience, however, is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See* Matter of Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom.* New York Times v. New Jersey, 439 U.S. 997 (1978). *See also*, New York Times v. Jascalevich, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id. at 886 (vacating stay).

[91] Rule 501 also provides that, in civil actions and proceedings brought in federal court under state law, the availability of a privilege shall be determined in accordance with state law.

[92] *See*, *e.g.*, In re: Grand Jury Subpoena. Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005 (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006) (U.S. Court of Appeals for the District of Columbia "is not of one mind on the existence of a common law privilege").

[93] 482 U.S. at 89.

interest put forward to justify it? Second, are there alternative means of exercising the right that remain open to prison inmates? Third, what impact will accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally? And, fourth, are ready alternatives for furthering the governmental interest available?"[94] Two years after *Turner v. Safley*, in *Thornburgh v. Abbott*, the Court restricted *Procunier v. Martinez* to the regulation of *outgoing* correspondence, finding that the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[95]

In *Beard v. Banks*, a plurality of the Supreme Court upheld "a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates."[96] These inmates were housed in Pennsylvania's Long Term Segregation Unit and one of the prison's penological rationales for its policy, which the plurality found to satisfy the four *Turner* factors, was to motivate better behavior on the part of the prisoners by providing them with an incentive to move back to the regular prison population.[97] Applying the four *Turner* factors to this rationale, the plurality found that (1) there was a logical connection between depriving inmates of newspapers and magazines and providing an incentive to improve behavior; (2) the Policy provided no alternatives to the deprivation of newspapers and magazines, but this was "not 'conclusive' of the reasonableness of the Policy"; (3) the impact of accommodating the asserted constitutional right would be negative; and (4) no alternative would "fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests."[98] The plurality believed that its "real task in this case is not balancing these

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[94] Beard v. Banks, 548 U.S. 521, 529 (2006) (citations and internal quotation marks omitted; this quotation quotes language from *Turner v. Safley*, 482 U.S. at 89-90).

[95] 490 U.S. 401, 411-14 (1989). *Thornburgh v. Abbott* noted that, if regulations deny prisoners publications on the basis of their content, but the grounds on which the regulations do so is content-neutral, *e.g.*, to protect prison security), then the regulations will be deemed neutral. Id. at 415-16.

[96] 548 U.S. 521, 524-25 (2006). This was a 4-2-2 decision, with Justice Alito, who had written the court of appeals decision, not participating.

[97] 548 U.S. at 531.

[98] 548 U.S. 531-32.

factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation" between the Policy and legitimate penological objections, as *Turner* requires.[99] The plurality concluded that he had. Justices Thomas and Scalia concurred in the result but would do away with *Turner* factors because they believe that "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivation – *provided only that those deprivations are consistent with the Eighth Amendment*."[100]

– 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, 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."[101] 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."[102] 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 condi-

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[99] 548 U.S. at 533.

[100] 548 U.S. at 537 (Thomas, J., concurring), quoting Overton v. Bazzetta, 539 U.S. at 139 (Thomas, J., concurring) (emphasis originally in *Overton*).

[101] 539 U.S. 194, 199 (2003).

[102] 539 U.S. at 211.

tions that their benefactors might attach to the use of donated funds or other assistance."[103]

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment, which provides that, in the Court's summary, "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[104] FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military's discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding. The Court concluded: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."[105] The Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must *do* – afford equal access to military recruiters – not what they may or may not *say*."[106] The law schools' conduct in barring military recruiters, the Court found, "is not inherently expressive," and, therefore, unlike flag burning, for example, is not "symbolic speech."[107] Applying the *O'Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly "promotes a substantial government interest that would be achieved less effectively absent the regulation."[108]

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[103] 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."

[104] 547 U.S. 47, 51 (2006).

[105] 547 U.S. at 60. The Court stated that Congress' authority to directly require campus access for military recruiters comes from its Article I, section 8, powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy. Id. at 58.

[106] 547 U.S. at 60.

[107] 547 U.S. at 64, 65.

[108] 547 U.S. at 67.

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government's message. As for compelling speech, law schools must "send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. . . . This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. . . . [It] is plainly incidental to the Solomon Amendment's regulation of conduct."[109] As for forcing one speaker to host or accommodate another, "[t]he compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[110] By contrast, the Court wrote, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[111] Finally, the Court found that the Solomon Amendment was not analogous to the New Jersey law that had required the Boy Scouts to accept a homosexual scoutmaster, and that the Supreme Court struck down as violating the Boy Scouts' "right of expressive association."[112] Recruiters, unlike the scoutmaster, are "outsiders who come onto campus for the limited purpose of trying to hire students – not to become members of the school's expressive association."[113]

Government Regulation of Communications Industries

– Commercial Speech

[P. 1179, add to text after n.856:]

Similarly, the Court upheld a rule prohibiting high school coaches from recruiting middle school athletes, finding that "the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader."[114]

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[109] 547 U.S. at 61, 62.
[110] 547 U.S. at 63.
[111] 547 U.S. at 65.
[112] 547 U.S. at 68, quoting Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).
[113] 547 U.S. at 69.
[114] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S. Ct. 2489, 2494-95 (2007).

[P. 1179, add to text after n.858:]

A ban on personal solicitation is "justified only in situations 'inherently conducive to overreaching and other forms of misconduct.'"[115]

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

In *Nike, Inc. v. Kasky*, 45 P.3d 243 (Cal. 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 certiorari, 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.

– Radio and Television

[P. 1192, delete final sentence in text and add new footnote at the end of what will become the final sentence in the text:]

438 U.S. at 750. Subsequently, the FCC began to apply its indecency standard to fleeting uses of expletives in non-sexual and non-excretory contexts. The U.S. Court of Appeals for the Second Circuit held, however, that, because "the FCC has failed to articulate a reasoned basis for this change in policy," the policy was arbitrary and capricious under the Administrative Procedure Act. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 447 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008). Having decided the case on statutory grounds, the court did not have to reach the constitutional question, but it added that it was "skeptical that the Commission can provide a reasonable explanation for its 'fleeting expletive' regime that would pass constitutional muster." Id. at 462. *See also* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008) (invalidating, on non-constitutional grounds, a fine against CBS for broadcasting Janet Jackson's exposure of her breast for nine-sixteenths of a second during a Super Bowl halftime show). Decisions regarding legislation to ban "indecent" expression in contexts other than broadcast and cable media are discussed below under "Non-obscene But Sexually Explicit and Indecent Expression."

Government Restraint of Content of Expression

– Group Libel, Hate Speech

[P. 1206, add to text 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

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[115] Edenfield v. Fane, 507 U.S. at 774, quoting In re R.M.J., 455 U.S. at 203, and quoted in Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S. Ct. 2489, 2494 (2007).

group of persons.[116] 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. . . ."[117]

– Child Pornography

[P. 1231, substitute for n.1142:]

535 U.S. at 255. Following *Ashcroft v. Free Speech Coalition*, Congress enacted the PROTECT Act, Pub. L. 108-21, 117 Stat. 650 (2003), which, despite the decision in that case, continued to prohibit computer-generated child pornography (but not other types of child pornography produced without an actual minor). 18 U.S.C. § 2256(8). In *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008), the Court, without addressing the PROTECT Act's new definition, cited *Ashcroft v. Free Speech Coalition* with approval.

[P. 1231, add to text after n.1142:]

In *United States v. Williams*,[118] the Supreme Court upheld a federal statute that prohibits knowingly advertising, promoting, presenting, distributing, or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe, that the material" is child pornography that is obscene or that depicts an actual minor (*i.e.*, is child pornography that is not constitutionally protected).[119] Under the provision, in other words, "an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute."[120] The Court found that these activities are not constitutionally protected because "[o]ffers to engage in illegal transactions [as opposed to abstract advocacy of illegality] are categorically excluded from First Amendment protection," even "when the offeror is mistaken about the factual predicate of

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[116] 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.

[117] 538 U.S. at 362-63.

[118] 128 S. Ct. 1830 (2008).

[119] 18 U.S.C. § 2252A(a)(3)(B).

[120] 128 S. Ct. at 1839.

his offer," such as when the child pornography that one offers to buy or sell does not exist or is constitutionally protected.[121]

– Non-obscene but Sexually Explicit and Indecent Expression

[P. 1234. add to text after 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."[122] Subsequently, the district court found COPA to violate the First Amendment and issued a permanent injunction against its enforcement.[123]

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 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

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[121] 128 S. Ct. at 1841, 1842, 1843. Justice Souter, in a dissenting opinion joined by Justice Ginsburg, agreed that "Congress may criminalize proposals unrelated to any extant image," but disagreed with respect to "proposals made with regard to specific, existing [constitutionally protected] representations." Id. at 1849. Justice Souter believed that, "if the Act stands when applied to identifiable, extant [constitutionally protected] pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally . . . ." Id. at 1854. Justice Scalia's opinion for the majority replied that this "is simply not true . . . . Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography. . . . There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts." Id. at 1844-45.

[122] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004). Justice Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" and "[i]t is always less restrictive to do *nothing* than to do *something*." Id. at 684. 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 669.

[123] American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

pornography, and to prevent minors from obtaining access to material that is harmful to them."[124] The plurality asked "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires."[125] 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.[126]

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."[127] 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."[128]

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."[129]

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[124] 539 U.S. 194, 199 (2003).

[125] 539 U.S. at 203.

[126] 539 U.S. at 205.

[127] 539 U.S. at 208.

[128] 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.

[129] 539 U.S. at 212.

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

– The Public Forum

[P. 1245, substitute for final paragraph of section:]

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."[130] 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."[131] 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.'"[132] 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."[133]

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

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[130] 539 U.S. 194, 205 (2003).
[131] 539 U.S. at 199.
[132] 539 U.S. at 206.
[133] 539 U.S. at 206 (citation omitted).

noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organi zation with a computer connected to the Internet can 'publish' information."[134]

– 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.

[134] 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). In *Putnam Pit*, the city denied a private Web site's request that the city's Web site establish a hyperlink to it, even though the city's Web site had established hyperlinks to other private Web sites. The court of appeals found that the city's Web site was a nonpublic forum, but that even nonpublic fora must be viewpoint neutral, so it remanded the case for trial on the question of whether the city's denial of a hyperlink had discriminated on the basis of viewpoint.

SECOND AMENDMENT

BEARING ARMS

In General

[P. 1275, add at the end of the section:]

It was not until 2008 that the Supreme Court definitively came down on the side of an "individual rights" theory. Relying on new scholarship regarding the origins of the Amendment,[1] the Court in *District of Columbia v. Heller*[2] confirmed what had been a growing consensus of legal scholars – that the rights of the Second Amendment adhered to individuals. The Court reached this conclusion after a textual analysis of the Amendment,[3] an examination of the historical use of prefatory phrases in statutes, and a detailed exploration of the 18th century meaning of phrases found in the Amendment. Although accepting that the historical and contemporaneous use of the phrase "keep and bear Arms" often arose in connection with military activities, the Court noted that its use was not limited to those contexts.[4] Further, the Court found that the phrase "well regulated Militia" referred not to formally organized state or federal militias, but to the pool of "able-bodied men" who were available for conscription.[5] Finally, the Court reviewed contemporaneous state constitutions, post-enactment commentary, and subsequent case law to conclude that the purpose of the right to keep and bear arms extended beyond the context of militia service to include self-defense.

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[1] E. Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); R. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004); E. Volokh, *"Necessary to the Security of a Free State,"* 83 NOTRE DAME L. REV. 1 (2007); *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEORGETOWN J. L. & PUB. POLICY (2008).

[2] 128 S. Ct. 2783 (2008).

[3] The "right of the people," for instance, was found in other places in the Constitution to speak to individual rights, not to collective rights (those that can only be exercised by participation in a corporate body). 128 S. Ct. at 2790-91.

[4] 128 S. Ct. at 2791-97.

[5] 128 S. Ct. at 2799-2800. Similarly, the phrase "security of a free state" was found to refer not to the defense of a particular state, but to the protection of the national polity. 128 S. Ct. at 2800-01.

Using this "individual rights theory," the Court struck down a District of Columbia law that banned virtually all handguns, and required that any other type of firearm in a home be dissembled or bound by a trigger lock at all times. The Court rejected the argument that handguns could be banned as long as other guns (such as long-guns) were available, noting that, for a variety of reasons, handguns are the "most popular weapon chosen by Americans for self-defense in the home."[6] Similarly, the requirement that all firearms be rendered inoperable at all times was found to limit the "core lawful purpose of self-defense." However, the Court specifically stated (albeit in *dicta*) that the Second Amendment did not limit prohibitions on the possession of firearms by felons and the mentally ill, penalties for carrying firearms in schools and government buildings, or laws regulating the sales of guns. The Court also noted that there was a historical tradition of prohibiting the carrying of "dangerous and unusual weapons" that would not be affected by its decision. The Court, however, declined to establish the standard by which future gun regulations would be evaluated.[7] And, more importantly, because the District of Columbia is a federal enclave, the Court did not have occasion to address whether it would reconsider its prior decisions that the Second Amendment does not apply to the states.

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[6] 128 S. Ct. at 2818.

[7] 128 S. Ct. at 2817 n.27 (discussing non-application of rational basis review). See id. at 2850-51 (Breyer, J., dissenting).

FOURTH AMENDMENT

SEARCH AND SEIZURE

History and Scope of the Amendment

– Scope of the Amendment

[P. 1285, add to n.22:]

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) (warrantless entry into a home when police have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury).

– The Interest Protected

[P. 1291, add to n.53 after citation to Steagald v. United States:]

Kirk v. Louisiana, 536 U.S. 635 (2002) (per curiam).

– Arrests and Other Detentions

[P. 1292, add to n.61 after citation to Terry v. Ohio:]

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

[P. 1293, add to n.61:]

Scott v. Harris, 127 S. Ct. 1769 (2007) (police officer's ramming fleeing motorist's car from behind in attempt to stop him).

[P. 1293, add new footnote after "person," in second line on page:]

The justification must be made to a neutral magistrate, not to the arrestee. There is no constitutional requirement that an officer inform an arrestee of the reason for his arrest. Devenpeck v. Alford, 543 U.S. 146, 155 (2004) (the offense for which there is probable cause to arrest need not be closely related to the offense stated by the officer at the time of arrest).

[P. 1293, add to n.62:]

Los Angeles County v. Rettele, 127 S. Ct. 1989 (2007) (where deputies executing a search warrant did not know that the house being searched had recently been sold, it was reasonable to hold new homeowners, who had been sleeping in the nude, at gunpoint for one to two minutes without allowing them to dress or cover themselves, even though the deputies knew that the homeowners were of a different race from the suspects named in the warrant).

[P. 1293, add to text at the end of the only full paragraph on the page:]

Even when an arrest for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was

based on probable cause.[1]

[P. 1294, add to n.69 after citation to Taylor v. Alabama:]

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

Searches and Seizures Pursuant to Warrant

– Probable Cause

[P. 1301, add to n.101:]

An "anticipatory" warrant does not violate the Fourth Amendment as long as there is probable cause to believe that the condition precedent to execution of the search warrant will occur and that, once it has occurred, "there is a fair probability that contraband or evidence of a crime will be found in a specified place." United States v. Grubbs, 547 U.S. 90, 95 (2006), quoting Illinois v. Gates, 462 U.S. 213, 238 (1983). "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place.'" 547 U.S. at 94.

– Particularity

[P. 1304, add to text at 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.[2]

– Execution of Warrants

[P. 1311, add to text after 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.[3]

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[1] Virginia v. Moore, 128 S. Ct. 1598 (2008).

[2] Groh v. Ramirez, 540 U.S. 551 (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). United States v. Grubbs, 547 U.S. 90, 97, 99 (2006) (because the language of the Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized[,]' . . . the Fourth Amendment does not require that the triggering condition for an anticipatory warrant be set forth in the warrant itself."

[3] United States v. Banks, 540 U.S. 31 (2003) (forced entry was permissible after officers executing a warrant to search for drugs knocked, announced "police search

(continued...)

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

But see Maryland v. Pringle, 540 U.S. 366 (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).

[P. 1312, add to n.175:]

In *Los Angeles County v. Rettele*, 127 S. Ct. 1989 (2007), the Court found no Fourth Amendment violation where deputies did not know that the suspects had sold the house that deputies had a warrant to search; deputies entered the house and found new owners, of a different race from the suspects, sleeping in the nude; and deputies held new owners at gunpoint for one to two minutes without allowing them to dress or cover themselves. As for the difference in race, the Court noted that, "[w]hen the deputies ordered [Caucasian] respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house." Id. at 1992. As for not allowing the new owners to dress or cover themselves, the Court quoted its statement in *Michigan v. Summers* that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." Id. at 1993 (quoting 452 U.S. at 702-03).

[P. 1312, add to text after n.175:]

For the same reasons, officers may use "reasonable force," including handcuffs, to effectuate a detention.[4]

Valid Searches and Seizures Without Warrants

– Detention Short of Arrest: Stop-and-Frisk

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

The Court provided a partial answer in 2004, when it upheld a state law that required a suspect to disclose his name in the course of a valid *Terry* stop.[5] Questions about a suspect's identity "are a routine and accepted part of many *Terry* stops," the Court explained.[6]

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

[P. 1318, add to n.208:]

See also United States v. Drayton, 536 U.S. 194 (2002), applying *Bostick* to uphold a bus search in which one officer stationed himself in the front of the bus and one in the rear, while a third officer worked his way from rear to front, questioning passengers individually. Under these circumstances, and following the arrest of his traveling companion, the

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[3] (...continued)
warrant," and waited 15-20 seconds with no response).

[4] Muehler v. Mena, 544 U.S. 93, 98-99 (2005) (also upholding questioning the handcuffed detainee about her immigration status).

[5] Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004).

[6] 542 U.S. at 186.

defendant had consented to the search of his person.

[P. 1319, add to n.213:]

Cf. Illinois v. Caballes, 543 U.S. 405 (2005) (a canine sniff around the perimeter of a car following a routine traffic stop does not offend the Fourth Amendment if the duration of the stop is justified by the traffic offense).

[P. 1319, add to text after n.216:]

The Court has even upheld a search incident to an illegal (albeit not unconstitutional) arrest.[7]

– Vehicular Searches

[P. 1324, add to n.244 after parenthetical that ends with "Mexican ancestry":]

But cf. United States v. Arvizu, 534 U.S. 266 (2002) (reasonable suspicion justified stop by border agents of vehicle traveling on unpaved backroads in an apparent effort to evade a border patrol checkpoint on the highway).

[P. 1324, add to text after n.245:]

If police stop a vehicle, then the vehicle's passengers as well as its driver are deemed to have been seized from the moment the car comes to a halt, and the passengers as well as the driver may challenge the constitutionality of the stop.[8]

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

See also United States v. Flores-Montano, 541 U.S. 149 (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 *Illinois v. Lidster*, 540 U.S. 419 (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.250:]

And, because there also is no legitimate privacy interest in possessing contraband, and because properly conducted canine sniffs are "generally likely, to reveal only the presence of contraband," police may conduct a canine sniff around the perimeter of a vehicle stopped for a traffic offense. Illinois v. Caballes, 543 U.S. 405, 409 (2005).

[P. 1325, add to n.252 after citation to New York v. Belton:]

Thornton v. United States, 541 U.S. 615 (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);

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[7] Virginia v. Moore, 128 S. Ct. 1598 (2008) (holding that, where an arrest for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was based on probable cause).

[8] Brendlin v. California, 127 S. Ct. 2400, 2410 (2007).

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

, or unless there is individualized suspicion of criminal activity by the passengers.[9]

– Consent Searches

[P. 1328, add to n. 271:]

United States v. Drayton, 536 U.S. 194, 207 (2002) (totality of circumstances indicated that bus passenger consented to search even though officer did not explicitly state that passenger was free to refuse permission).

[P. 1329, add to text at end of section:]

If, however, one occupant consents to a search of shared premises, but a physically present co-occupant expressly objects to the search, the search is unreasonable.[10]

– Border Searches

[P. 1330, add to n.283 after citation to United States v. Cortez:]

, and *United States v. Arvizu*, 534 U.S. 266 (2002)

– Prisons and Regulation of Probation

[P. 1333, change heading to "Prisons and Regulation of Probation and Parole"]

[P. 1334, add to text at end of section:]

A warrant is also not required if the purpose of a search of a probationer is investigate a crime rather than to supervise probation.[11]

"[O]n the 'continuum' of state-imposed punishments . . . ,

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[9] Maryland v. Pringle, 540 U.S. 366 (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).

[10] Georgia v. Randolph, 547 U.S. 103 (2006) (warrantless search of a defendant's residence based on his estranged wife's consent was unreasonable and invalid as applied to a physically present defendant who expressly refused to permit entry). The Court in *Randolph* admitted that it was "drawing a fine line," id. at 121, between situations where the defendant is present and expressly refuses consent, and that of *United States v. Matlock*, 415 U.S. 164, 171 (1974), and *Illinois v. Rodriguez*, 497 U.S. 177 (1990), where the defendants were nearby but were not asked for their permission. In a dissenting opinion, Chief Justice Roberts observed that the majority's ruling "provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room." Id. at 127.

[11] United States v. Knights, 534 U.S. 112 (2005) (probationary status informs both sides of the reasonableness balance).

parolees have [even] fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[12] The Fourth Amendment, therefore, is not violated by a warrantless search of a parolee that is predicated upon a parole condition to which a prisoner agreed to observe during the balance of his sentence.[13]

– Drug Testing

[P. 1336, add to text after n.322:]

Seven years later, the Court in *Board of Education v. Earls*[14] extended *Vernonia* to uphold a school system's drug testing of all junior high and high school students who participated in extracurricular activities. The lowered expectation of privacy that athletes have "was not essential" to the decision in *Vernonia*, Justice Thomas wrote for a 5-4 Court majority.[15] Rather, that decision "depended primarily upon the school's custodial responsibility and authority."[16] Another distinction was that, although there was some evidence of drug use among the district's students, there was no evidence of a significant problem, as there had been in *Vernonia*. Rather, the Court referred to "the nationwide epidemic of drug use," and stated that there is no "threshold level" of drug use that need be present.[17] Because the students subjected to testing in *Earls* had the choice of not participating in extra-curricular activities rather than submitting to drug testing, the case stops short of holding that public school authorities may test all junior and senior high school students for drugs. Thus, although the Court's rationale seems broad enough to permit across-the-board testing,[18] Justice Breyer's concurrence, emphasizing among other points that "the testing program avoids

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[12] Samson v. California, 547 U.S. 843, 850 (2006) (internal quotation marks altered).

[13] 547 U.S. at 852. The parole condition at issue in *Samson* required prisoners to "agree in writing to be subject to a search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Id. at 846, quoting Cal. Penal Code Ann. § 3067(a).

[14] 536 U.S. 822 (2002).

[15] 536 U.S. at 831.

[16] 536 U.S. at 831.

[17] 536 U.S. at 836.

[18] Drug testing was said to be a "reasonable" means of protecting the school board's "important interest in preventing and deterring drug use among its students," and the decision in *Vernonia* was said to depend "primarily upon the school's custodial responsibility and authority." 536 U.S. at 838, 831.

subjecting the entire school to testing,"[19] raises some doubt on this score. The Court also left another basis for limiting the ruling's sweep by asserting that "regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren."[20]

Enforcing the Fourth Amendment: The Exclusionary Rule

– Alternatives to the Exclusionary Rule

[P. 1344, add to the end of n.356, before the period:]

(cited with approval in *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007), in which a police officer's ramming a fleeing motorist's car from behind in an attempt to stop him was found reasonable)

[P. 1344, add to n.361 after citation to Saucier v. Katz:]

See also Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (because cases create a "hazy border between excessive and acceptable force," an officer's misunderstanding as to her authority to shoot a suspect attempting to flee in a vehicle was not unreasonable).

– Narrowing Application of the Exclusionary Rule

[P. 1354, add to text after n.409:]

In addition, a violation of the "knock-and-announce" procedure that police officers must follow to announce their presence before entering a residence with a lawful warrant[21] does not require suppression of the evidence gathered pursuant to the warrant.[22]

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[19] Concurring Justice Breyer pointed out that the testing program "preserves an option for a conscientious objector," who can pay a price of nonparticipation that is "serious, but less severe than expulsion." 536 U.S. at 841. Dissenting Justice Ginsburg pointed out that extracurricular activities are "part of the school's educational program" even though they are in a sense "voluntary." "Voluntary participation in athletics has a distinctly different dimension" because it "expose[s] students to physical risks that schools have a duty to mitigate." Id. at 845, 846.

[20] 536 U.S. at 831-32. The best the Court could do to support this statement was to assert that "some of these clubs and activities require occasional off-campus travel and communal undress," to point out that all extracurricular activities "have their own rules and requirements," and to quote from general language in *Vernonia*. Id. Dissenting Justice Ginsburg pointed out that these situations requiring a change of clothes on occasional out-of-town trips are "hardly equivalent to the routine communal undress associated with athletics." Id. at 848.

[21] The "knock and announce" requirement is codified at 18 U.S.C. § 3109, and the Court has held that the rule is also part of the Fourth Amendment reasonableness inquiry. Wilson v. Arkansas, 514 U.S. 927 (1995).

[22] Hudson v. Michigan, 547 U.S. 586 (2006). Writing for the majority, Justice Scalia explained that the exclusionary rule was inappropriate because the purpose of the knock-and-announce requirement was to protect human life, property, and the home-owner's privacy and dignity; the requirement has never protected an individual's interest in preventing seizure of evidence described in a warrant. Id. at 594. Furthermore, the Court believed that the "substantial social costs" of applying the exclusionary rule would

(continued...)

[22] (...continued)
outweigh the benefits of deterring knock-and-announce violations by applying it. Id. The Court also reasoned that other means of deterrence, such as civil remedies, were available and effective, and that police forces have become increasingly professional and respectful of constitutional rights in the past half-century. Id. at 599. Justice Kennedy wrote a concurring opinion emphasizing that "the continued operation of the exclusionary rule . . . is not in doubt." Id. at 603. In dissent, Justice Breyer asserted that the majority's decision "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection." Id. at 605.

FIFTH AMENDMENT

DOUBLE JEOPARDY

Development and Scope

[P. 1370, delete period in text before n.58 and add:]

, 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").

Reprosecution Following Acquittal

– Acquittal by the Trial Judge

[P. 1379, substitute for first paragraph of section:]

When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.[2] There is no possibility of retrial for the same offense.[3] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be

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[1] United States v. Lara, 541 U.S. 193 (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 non-member 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] United States v. Martin Linen Supply Co., 430 U.S. 564, 570-72 (1977); Sanabria v. United States, 437 U.S. 54, 63-65 (1978); Finch v. United States, 433 U.S. 676 (1977).

[3] In *Fong Foo v. United States*, 369 U.S. 141 (1962), the Court acknowledged that the trial judge's action in acquitting was "based upon an egregiously erroneous foundation," but it was nonetheless final and could not be reviewed. Id. at 143.

able to appeal or the judge may be able to reconsider.[4] The question is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[5] Thus, an appeal by the government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the government had not proved facts constituting the offense.[6] Even if, as happened in *Sanabria v. United States*,[7] the trial judge erroneously excludes evidence and then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.[8]

SELF-INCRIMINATION

Development and Scope

[P. 1396, change period in text before n.185 to comma and add in text after n.185:]

, and there can be no valid claim if there is no criminal prosecution.[9]

[P. 1399, add to n.203:]

See also Fry v. Pliler, 127 S. Ct. 2321, 2324 (2007) (the "substantial and injurious effect standard" is to be applied in federal *habeas* proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California*").

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[4] As a general rule a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. Smith v. Massachusetts, 543 U.S. 462 (2005) (Massachusetts had not done so, however, so the judge's midtrial acquittal on one of three counts became final for double jeopardy purposes when the prosecution rested its case).

[5] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[6] 430 U.S. at 570-76. *See also* United States v. Scott, 437 U.S. 82, 87-92 (1978); Smalis v. Pennsylvania, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

[7] 437 U.S. 54 (1978).

[8] *See also* Smith v. Massachusetts, 543 U.S. 462 (2005) (acquittal based on erroneous interpretation of precedent).

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

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

– Miranda v. Arizona

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

Yarborough v. Alvarado, 541 U.S. 652 (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).

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

Elstad was distinguished in *Missouri v. Seibert*, 542 U.S. 600 (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, substitute for clause in text containing n.367:]

On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[10]

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.[11]

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[10] United States v. Patane, 542 U.S. 630 (2004) (allowing introduction of a pistol, described as a "nontestimonial 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). Note too that confessions may be the poisonous fruit of other constitutional violations, such as illegal searches or arrests. *E.g.*, Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982).

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

[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 after n.444:]

In *Demore v. Kim*,[12] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of removability, the Court reaffirmed Congress' 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."[13]

– Judicial Review of Administrative or Military Proceedings

[P. 1446, add to text 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*.[14] During a military action in Afghanistan,[15] 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.[16] However, the Court ruled that the Government may not

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[12] 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.

[13] 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.

[14] 542 U.S. 507 (2004).

[15] 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.

[16] 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

(continued...)

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.[17]

NATIONAL EMINENT DOMAIN POWER

Public Use

[P. 1464, add new footnote on line 3 after "determination.":]

Kelo v. City of New London, 545 U.S. 469, 482 (2005). The taking need only be "rationally related to a conceivable public purpose." Id. at 490 (Justice Kennedy concurring).

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

Subsequently, the Court put forward an added indicium of "public use": whether the government purpose could be validly achieved by tax or user fee.[18]

[P. 1466, add new footnote at end of sentence beginning "For 'public use'":]

Most recently, the Court equated public use with "public purpose." Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[P. 1466, add to text at end of section:]

The expansive interpretation of public use in eminent domain cases may have reached its outer limit in *Kelo v. City of New London*.[19] There, a five-justice majority upheld as a public use the private-to-private transfer of land for purposes of economic development, at least in the context of a well-considered, areawide redevelopment plan adopted by a municipality to

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[16] (...continued)
power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

[17] 542 U.S. 533, 539 (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 Ginsburg, 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 553 (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 554 (dissenting).

[18] Brown v. Legal Found. of Washington, 538 U.S. 216, 232 (2003). *But see* id. at 242 n.2 (Justice Scalia dissenting).

[19] 545 U.S. 469 (2005).

invigorate a depressed economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed in *Berman* and *Midkiff*, and stressed the importance of judicial deference to the legislative judgment as to public needs. At the same time, the Court cautioned that private-to-private condemnations of individual properties, not part of an "integrated development plan . . . raise a suspicion that a private purpose [is] afoot."[20] A vigorous four-justice dissent countered that localities will always be able to manufacture a plausible public purpose, so that the majority opinion leaves the vast majority of private parcels subject to condemnation when a higher-valued use is desired.[21] Backing off from the Court's past endorsements in *Berman* and *Midkiff* of a public use/police power equation, the dissenters referred to the "errant language" of these decisions, which was "unnecessary" to their holdings.[22]

Just Compensation

[P. 1467, add to n.584 after first citation:]

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).

When Property is Taken

– Regulatory Takings

[P. 1483, substitute for n.683:]

Tahoe-Sierra, 535 U.S. at 323. *Tahoe-Sierra*'s sharp physical-regulatory dichotomy is hard to reconcile with dicta in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005), to the effect that the *Penn Central* regulatory takings test, like the physical occupations rule of *Loretto*, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

[Pp. 1485-86, substitute for paragraph that begins on page 1485 and for first paragraph that begins on page 1486:]

The first prong of the *Agins* test, asking whether land use controls "substantially advance legitimate governmental interests," has now been erased from takings jurisprudence, after a quarter-century run. The proper concern of regulatory takings

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[20] 545 U.S. at 487.

[21] Written by Justice O'Connor, and joined by Justices Scalia and Thomas, and Chief Justice Rehnquist.

[22] 545 U.S. at 501.

law, said *Lingle v. Chevron U.S.A. Inc.*,[23] is the magnitude, character, and distribution of the burdens that a regulation imposes on property rights. In "stark contrast," the "substantially advances" test addresses the means-end efficacy of a regulation, more in the nature of a due process inquiry.[24] As such, it is not a valid takings test.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. A two-part test has emerged. The first part debuted in *Nollan v. California Coastal Commission*,[25] and holds that in order not to be a taking, an exaction condition on a development permit approval (requiring, for example, that a portion of a tract to be subdivided be dedicated for public roads) must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise the condition is "an out-and-out plan of extortion."[26] The second part of the exaction-takings test, announced in *Dolan v. City of Tigard*,[27] specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by such conditions on the property owner, and the impact of the property owner's proposed development on the community – at least in the context of adjudicated (rather than legislated) conditions.

Nollan and *Dolan* occasioned considerable debate over the breadth of what became known as the "heightened scrutiny" test. The stakes were plainly high in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the

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[23] 544 U.S. 528 (2005).

[24] 544 U.S. at 542.

[25] 483 U.S. 825 (1987).

[26] 483 U.S. at 837. Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of" the social evil (*e.g.*, congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 485 U.S. at 20, 22.

[27] 512 U.S. 374 (1994).

government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[28] the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. Still unclear, however, is whether the Court meant to place outside *Dolan* exactions of a purely monetary nature, in contrast with the physically invasive dedication conditions involved in *Nollan* and *Dolan*.[29]

The announcement following *Penn Central* of the above *per se* rules in *Loretto* (physical occupations), *Agins* and *Lucas* (total elimination of economic use), and *Nollan*/*Dolan* (exaction conditions) prompted speculation that the Court was replacing its ad hoc *Penn Central* approach with a more categorical takings jurisprudence. Such speculation was put to rest, however, by three decisions from 2001 to 2005 expressing distaste for categorical regulatory takings analysis. These decisions endorse *Penn Central* as the dominant mode of analysis for inverse condemnation claims, confining the Court's *per se* rules to the "relatively narrow" physical occupation and total wipeout circumstances, and the "special context" of exactions.[30]

[P. 1490, add to text at end of section:]

The requirement that state remedies be exhausted before bringing a federal taking claim to federal court has occasioned countless dismissals of takings claims brought initially in federal court, while at the same time posing a bar under doctrines of preclusion to filing first in state court, per *Williamson County*, then relitigating in federal court. The effect in many cases is to keep federal takings claims out of federal court entirely – a consequence the plaintiffs' bar has long argued could not have been intended by the Court. In *San Remo Hotel, L.P. v. City and County of San Francisco*,[31] the Court unanimously declined to

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[28] 526 U.S. 687 (1999).

[29] A strong hint that monetary exactions are indeed outside *Nollan*/*Dolan* was provided in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005), explaining that these decisions were grounded on the doctrine of unconstitutional conditions as applied to *easement* conditions that would have been *per se physical* takings if condemned directly.

[30] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). The other two decisions are *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

[31] 545 U.S. 323 (2005).

create an exception to the federal full faith and credit statute[32] that would allow relitigation of federal takings claims in federal court. Nor, said the Court, may an *England* reservation of the federal taking claim in state court[33] be used to require a federal court to review the reserved claim, regardless of what issues the state court may have decided. While concurring in the judgment, four justices asserted that the state-exhaustion prong of *Williamson County* "may have been mistaken."[34]

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[32] 28 U.S.C. § 1738. The statute commands that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ." The statute has been held to encompass the doctrines of claim and issue preclusion.

[33] *See* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964).

[34] 545 U.S. at 348 (Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas).

SIXTH AMENDMENT

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

– The Attributes and Function of the Jury

[P. 1505, add to text at end of section:]

Subsequently, the Court held that, just as failing to prove materiality to the jury beyond a reasonable doubt can be harmless error, so can failing to prove a sentencing factor to the jury beyond a reasonable doubt. "Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes."[1]

– Criminal Proceedings to Which the Guarantee Applies

[P.1506, add to text at end of first full paragraph:]

The Court has consistently, held, however, that a jury is not required for purposes of determining whether a defendant is insane or mentally retarded and consequently not eligible for the death penalty.[2]

[P. 1506-1507, substitute for final 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.[3] Under this approach, the right to a jury extends to the finding of all facts establishing the elements

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[1] Washington v. Recuenco, 548 U.S. 212, 220 (2006). *Apprendi* is discussed in the next section.

[2] Ford v. Wainwright, 477 U.S. 399, 416-417 (1986); Atkins v. Virginia, 536 U.S. 304, 317 (2002); Schriro v. Smith, 546 U.S. 6, 7 (2005). *See* Eighth Amendment, "Limitations on Capital Punishment: Diminished Capacity," *infra.*

[3] In *Washington v. Recuenco*, however, the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element [of a crime] to the jury, is not structural error," entitling the defendant to automatic reversal, but can be harmless error. 548 U.S. 212, 222 (2006).

of a crime, but sentencing factors may be evaluated by a judge.[4] 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.[5]

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.[6] "The relevant inquiry is one not of form, but of effect."[7] 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."[8] The one exception the *Apprendi* Court recognized was for sentencing enhancements based on recidivism.[9] Subsequently, the Court refused to apply *Apprendi*'s

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[4] In *James v. United States*, 127 S. Ct. 1586 (2007), the Court found no Sixth Amendment issue raised when it considered "the *elements of the offense* . . . without inquiring into the specific conduct of this particular offender." Id. at 1594 (emphasis in original). The question before the Court was whether, under federal law, attempted burglary, as defined by Florida law, "presents a serious potential risk of physical injury to another" and therefore constitutes a "violent felony," subjecting the defendant to a longer sentence. Id. at 1591. In answering this question, the Court employed the "categorical approach" of looking only to the statutory definition and not considering the "particular facts disclosed by the record of conviction." Id. at 1593-94. Thus, "the Court [was] engaging in statutory interpretation, not judicial factfinding," and "[s]uch analysis raises no Sixth Amendment issue." Id. at 1600.

[5] 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."

[6] 530 U.S. 466, 490 (2000).

[7] 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).

[8] 530 U.S. at 490.

[9] 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 convictions even if the result is a significant increase in the maximum sentence available.

(continued...)

principles to judicial factfinding that supports imposition of mandatory minimum sentences.[10]

Apprendi's importance soon became evident as the Court applied its reasoning in other situations. In *Ring v. Arizona*,[11] the Court, overruling precedent,[12] 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.[13]

In *Blakely v. Washington*,[14] 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 pled guilty to an offense for which the "standard range" under the state's sentenc-

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[9] (...continued)
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).

[10] 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' 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.

[11] 536 U.S. 584 (2002).

[12] 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).

[13] "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.

[14] 542 U.S. 296 (2004).

ing law was 49 to 53 months, was sentenced to 90 months based on the 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*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[15]

In *United States v. Booker*,[16] the Court held that the same principles limit sentences that courts may impose under the federal Sentencing Guidelines. As the Court restated the principle in *Booker,* "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[17] Attempts to distinguish *Blakely* were rejected. Because the Sentencing Reform Act made application of the Guidelines "mandatory and binding on all judges,"[18] the Court concluded that the fact that the Guidelines were developed by the Sentencing Commission rather than by Congress "lacks constitutional significance.[19] The mandatory nature of the Guidelines was also important to the Court's formulation of a remedy.[20] Rather than engrafting a jury trial requirement onto the Sentencing Reform Act, the Court instead invalidated two of its provisions, one making application of the Guidelines mandatory, and one requiring *de novo* review for appeals of departures from the mandatory Guidelines, and held that the remainder of the Act

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[15] 542 U.S. at 303-304 (italics in original; citations omitted).

[16] 543 U.S. 220 (2005).

[17] 543 U.S. at 244.

[18] 543 U.S. at 233.

[19] 543 U.S. at 237. Relying on *Mistretta v. United States*, 488 U.S. 361 (1989), the Court also rejected a separation-of-powers argument. Id. at 754-55.

[20] There were two distinct opinions of the Court in *Booker*. The first, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg (the same Justices who comprised the five-Justice *Blakely* majority), applied *Blakely* to find a Sixth Amendment violation; the other, authored by Justice Breyer, and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg (the *Blakely* dissenters joined by Justice Ginsburg), set forth the remedy.

could remain intact.[21] As the Court explained, this remedy "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well."[22]

In *Cunningham v. California*,[23] the Court considered whether California's determinate state sentencing law, yet another style of legislative effort intended to regularize criminal sentencing, survived the *Booker-Blakely* line of cases. That law required that the trial judge in the case sentence the defendant to 12 years in prison unless the judge found one or more additional "circumstances in aggravation," in which case the sentence would be 16 years. Although such aggravating circumstances could include specific factual findings made by a judge under a "preponderance of the evidence" standard in apparent violation of *Booker* and *Blakely*, the court was also free to consider "additional criteria reasonably related to the decision being made."[24] The defendant argued that this latter provision of the Rule was consistent with a still-undeveloped holding by the Court in *Booker* that even the now-advisory federal sentencing guidelines would remain subject to appellate review to determine "reasonableness."[25] The Court rejected this argument, finding that the discretion afforded the trial court by the California law did not eliminate the unconstitutional requirement that the court make the factual findings that imposed a higher prison term.[26]

In *Rita v. United States*, the Court upheld the application, by federal courts of appeals, of the presumption "that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence."[27] Even if "the presumption increases the likelihood that the judge, not the jury,

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[21] 543 U.S. at 259. The Court substituted a "reasonableness" standard for the *de novo* review standard. Id. at 262.

[22] 543 U.S. at 245-246 (statutory citations omitted).

[23] 127 S. Ct. 856 (2007).

[24] 127 S. Ct. at 863, quoting California Rules 4.420(b), 4.408(a).

[25] In *Booker*, the Court substituted a "reasonableness" standard for the statutory *de novo* appellate review standard that it struck down. 543 U.S. at 262.

[26] "The reasonableness requirement that *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints." 127 S. Ct. at 870. The Court also rejected the argument that the discretion given to the judge made the California system "advisory" and thus consistent with the remedy established in *Booker*. Id.

[27] 127 S. Ct. 2456, 2459 (2007).

will find 'sentencing facts,'" the Court wrote, it "does not violate the Sixth Amendment. This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence. Nor do they prohibit the sentencing judge from taking account of the Sentencing Commission's factual findings or recommended sentences. See *Cunningham v. California* . . . . The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede). . . . A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the judge to impose that sentence. Still less does it *forbid* he sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone."[28]

In *United States v. Gall*,[29] the Court held that, "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard."[30] The Court rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range," and also rejected "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." These approaches,

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[28] 127 S. Ct. at 2465-66 (emphasis in original). The Court added: "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. . . . [A]ppellate courts may not presume that every variance from the advisory Guidelines is unreasonable. . . . Several courts of appeals have also rejected a presumption of unreasonableness. . . . However, a number of circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance. . . . We will consider that approach next Term in *United States v. Gall*, No. 06-7949." Id. at 2467.

[29] 128 S. Ct. 586 (2007) (upholding a sentence of probation where the Guidelines had recommended imprisonment).

[30] 128 S. Ct. at 591. "As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the 'starting point and the initial benchmark.'" Kimbrough v. United States, 128 S. Ct. 558 (2007) (upholding lower-than-Guidelines sentence for trafficker in crack cocaine, where sentence "is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses"). A district court judge may determine "that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Kimbrough*, 128 S. Ct. at 564.

the Court said, "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[31]

Impartial Jury

[P. 1511, add to text after n.110:]

In *Uttecht v. Brown*,[32] the Court summed up four principles that it derived from *Witherspoon* and *Witt* [cited in the main volume at n.105]: "First a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts."[33]

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[31] 128 S. Ct. at 595. Justice Alito, dissenting, wrote, "we should not forget [that] . . . *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury. . . . It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing. The yawning gap between the Sixth Amendment and the Court' opinion should be enough to show that the *Blakely-Booker* line of cases has gone astray." Id. at 605 (Alito, J., dissenting).

[32] 127 S. Ct. 2218 (2007).

[33] 127 S. Ct. at 2224 (citations omitted). Deference was the focus of *Uttecht v. Brown*, as the Court, by a 5-to-4 vote, reversed the Ninth Circuit and affirmed a death sentence, finding that the Ninth Circuit had neglected to accord the deference it owed to the trial court's finding that a juror was not substantially impaired. The Court concluded: "Courts reviewing claims of *Witherspoon-Witt* error . . . , especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." Id. at 2231. The reason that federal courts of appeals owe special deference when considering *habeas* petitions is that the Antiterrorism and Effective Death Penalty Act of 1996 "provide[s] additional, and binding, directions to accord deference." Id. at 2224. The dissent, written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, noted that the juror whose exclusion for cause was challenged had "repeatedly confirmed" that, despite his "general reservations" about the death penalty, he would be able to vote for it. Id. at 2240. Even under the standard of review imposed by the Antiterrorism and Effective

(continued...)

CONFRONTATION

[P. 1522, substitute for both paragraphs on page:]

In *Ohio v. Roberts*,[34] a Court majority adopted the reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[35] Over the course of 24 years, *Roberts* was applied, narrowed,[36] and finally overruled in *Crawford v. Washington*.[37] 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."[38] 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."[39] "Where testimonial

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[33] (...continued)
Death Penalty Act of 1996, "[w]hile such testimony might justify a peremptory challenge, until today not one of the many cases decided in the wake of *Witherspoon v. Illinois* has suggested that such a view would support a challenge for cause. . . . In its opinion, the Court blindly accepts the state court's conclusory statement that [the juror's] views would have 'substantially impaired' his ability to follow the court's instructions without examining what that term means in practice and under our precedents." Id. at 2240 (citation to *Witherspoon* omitted).

[34] 448 U.S. 56 (1980). The witness was absent from home and her parents testified they did not know where she was or how to get in touch with her. The state's sole effort to locate her was to deliver a series of subpoenas to her parents' home. Over the objection of three dissenters, the Court held this to be an adequate basis to demonstrate her unavailability. Id. at 74-77.

[35] "[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.

[36] 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), which held 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).

[37] 541 U.S. 36 (2004).

[38] 541 U.S. at 60-61.

[39] 541 U.S. at 63.

statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[40]

Crawford represented a decisive turning point by clearly stating the basic principles to be used in Confrontation Clause analysis. "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.[41] Under the Confrontation Clause, the only exceptions that the Court has acknowledged are the two that existed under common law at the time of the founding: "declarations made by a speaker who was both on the brink of death and aware that he was dying," and "statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[42] The second of these exceptions applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[43] Thus, in a trial for murder, the question arose whether statements made by the victim to a police officer three weeks before she was murdered, that the defendant had threatened her, could be admitted. The state court had admitted them on the basis that the defendant's having murdered the victim had made the victim unavailable to testify, but the Supreme Court reversed, holding that, unless the testimony had been confronted or fell within the dying declaration exception, it could not be admitted "on the basis of a prior *judicial* assessment that the defendant is guilty as charged," for to admit it on that basis it would "not sit well with the right to trial by jury."[44]

In *Davis v. Washington*,[45] the Court began to explore the parameters of *Crawford* by considering when a police interrogation is "testimonial"for purposes of the Confrontation Clause.

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[40] 541 U.S. at 68-69.

[41] 541 U.S. at 54, 59. Although the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it indicated 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. Id. at 68.

[42] Giles v. California, 128 S. Ct. 2678, 2682, 2683 (2008).

[43] 128 S. Ct. at 2683.

[44] 128 S. Ct. at 2686.

[45] 547 U.S. 813 (2006).

Davis involved a 911 call in which a women described being assaulted by a former boyfriend. A tape of that call was admitted as evidence of a felony violation of a domestic no-contact order, despite the fact that the women in question did not testify. Although again declining to establish all the parameters of when a response to police interrogation is testimonial, the Court held that statements to the police are nontestimonial when made under circumstances that "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[46] Statements made after such an emergency has ended, however, would be treated as testimonial and could not be introduced into evidence.[47]

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, 541 U.S. 77 (2004) (holding that warnings by trial judge detailing risks of waiving right to counsel are not constitutionally required before accepting guilty plea from uncounseled defendant).

– Protection of the Right to Retained Counsel

[P. 1531, add to text after n.229:]

Where the right to be assisted by counsel of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant.[48] Further, because such a denial is not a "trial error" (a constitutional error that occurs during presentation of a case to the jury), but a "structural defect" (a constitutional error that affects the framework of the trial),[49] the Court had held that the decision is not

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[46] 547 U.S. at 822.

[47] 547 U.S. at 828-29. Thus, where police responding to a domestic violence report interrogated a woman in the living room while her husband was being questioned in the kitchen, there was no present threat to the woman, so such information as was solicited was testimonial. Id. at 830 (facts of *Hammon v. Indiana*, considered together with *Davis*).

[48] United States v. Gonzalez-Lopez, 548 U.S. 140, 144-45 (2006).

[49] Arizona v. Fulminante, 499 U.S. 279, 307-310 (1991).

subject to a "harmless error" analysis.[50]

– Effective Assistance of Counsel

[P. 1535, add new footnote after "virtually unchallengeable," in sentence ending with n.252:]

Strickland, 466 U.S. at 690. *See also* Yarborough v. Gentry, 540 U.S. 1 (2003) (deference to attorney's choice of tactics for closing argument).

[P. 1535, substitute for n.252:]

Strickland, 466 U.S. at 691. *See also* Woodford v. Visciotti, 537 U.S. 19 (2002) (state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors). *See also* Schriro v. Landrigan, 127 S. Ct. 1933 (2007) (federal district court was within its discretion to conclude that attorney's failure to present mitigating evidence made no difference in sentencing). *But see* 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); and Rompilla v. Beard, 545 U.S. 374 (2005) (attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate).

[P. 1535, change period in text before n.252 to comma and add to text after n.252:]

and decisions selecting which issues to raise on appeal.[51]

[P. 1536, add to n.260:]

In *Wright v. Van Patten*, 128 S. Ct. 743 (2008) (per curiam), the Supreme Court noted that it has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that *Cronic* should apply. The fact that the Court has never ruled on the question means that "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law,'" and, as a consequence, under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), the defendant is not entitled to *habeas* relief. Id. at 748 (quoting *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006), as to which see "Limitations on *Habeas Corpus* Review of Capital Sentences" under Eighth Amendment).

[P. 1536, substitute for n.261:]

Cronic, 466 U.S. at 659 n.26.

[P. 1536, change the period in text before n.261 to a comma, and add after new comma:]

and consequently most claims of inadequate representation are to

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[50] *Gonzalez-Lopez*, 548 U.S. at 148-49. The Court noted that an important component of the finding that denial of the right to choose one's own counsel was a "structural defect" was the difficulty of assessing the effect of such denial on a trial's outcome. Id. at 149 n.4.

[51] There is no obligation to present on appeal all nonfrivolous issues requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983) (appointed counsel may exercise his professional judgment in determining which issues are best raised on appeal).

be measured by the *Strickland* standard.[52]

– Self-Representation

[P. 1536, add to n.262 after initial citation:]

An invitation to overrule *Faretta* because it leads to unfair trials was declined in *Indiana v. Edwards*, 128 S. Ct. 2379, 2388 (2008).

[P. 1536, add to n.262 before sentence beginning with "Related":]

The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 546 U.S. 9 (2005) (per curiam).

[P. 1537, add footnote at end of the sentence that ends on third line of the page:]

The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, 128 S. Ct. 2379 (2008). Mental competence to stand trial, however, is sufficient to ensure the right to waive the right to counsel in order to plead guilty. Godinez v. Moran, 509 U.S. 389, 398 (1993).

Right to Assistance of Counsel in Nontrial Situations

– Judicial Proceedings Before Trial

[P. 1537: insert at the beginning of the section:]

Even a preliminary hearing where no government prosecutor is present can trigger the right to counsel.[53] "[A] criminal defendant's defendant's initial appearance before a judicial officer, where he learns the charges against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment

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[52] *Strickland* and *Cronic* were decided the same day, and the Court's opinion in each cited the other. See *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 666 n.41. The *Cronic* presumption of prejudice may be appropriate when counsel's "overall performance" is brought into question, whereas *Strickland* is generally the appropriate test for "claims based on specified [counsel] errors." *Cronic*, 466 U.S. at 666 n.41. The narrow reach of *Cronic* has been illustrated by subsequent decisions. Not constituting *per se* ineffective assistance is a defense counsel's failure to file a notice of appeal, or in some circumstances even to consult with the defendant about an appeal. Roe v. Flores-Ortega, 528 U.S. 470 (2000). *But see* Lozada v. Deeds, 498 U.S. 430, 432 (1991) (per curiam). *See also* Florida v. Nixon, 543 U.S. 175 (2004) (no presumption of prejudice when a defendant has failed to consent to a tenable strategy counsel has adequately disclosed to and discussed with him). A standard somewhat different from *Cronic* and *Strickland* governs claims of attorney conflict of interest. See discussion of *Cuyler v. Sullivan* under "Protection of Right to Retained Counsel," *supra.*

[53] Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008) (right to appointed counsel attaches even if no public prosecutor, as distinct from a police officer, is aware of that initial proceeding or involved in its conduct).

right to counsel."[54] "Attachment," however, may signify "nothing more than the beginning of the defendant's prosecution [and] . . . not mark the beginning of a substantive entitlement to the assistance of counsel."[55] Thus, counsel need only be appointed "as far in advance of trial, and as far in advance of any pretrial 'critical stage,' as necessary to guarantee effective assistance at trial."[56]

– Custodial Interrogation

[P. 1539, add new footnote at end of paragraph continued from page 1538:]

The different issues in Fifth and Sixth Amendment cases were recently summarized in *Fellers v. United States*, 540 U.S. 519 (2004), holding that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

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[54] 128 S. Ct. at 2592.

[55] 128 S. Ct. at 2592 (Alito, J., concurring). Justice Alito's concurrence, joined by Chief Justice Roberts and Justice Scalia, was not necessary for the majority opinion in *Rothgery*, but the majority noted that it had not decided "whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this." Id.

[56] 128 S. Ct. at 2595 (Alito, J. concurring).

SEVENTH AMENDMENT

TRIAL BY JURY IN CIVIL CASES

Application of the Amendment

– Procedures Limiting Jury's Role

[P. 1557, add to text after n.61:]

> "In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment."[1] Thus, in order to screen out frivolous complaints or defenses, Congress "has power to prescribe what must be pleaded to state the claim, just as it has the power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of – including the pleading and proof requirements for . . . private actions."[2] A "heightened pleading rule simply 'prescribes the means of making an issue,' and . . . , when '[t]he issue [is] made as prescribed, the right of trial by jury accrues.'"[3]

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[1] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2512, n.8 (2007).

[2] 127 S. Ct. at 2512.

[3] 127 S. Ct. at 2512 (quoting Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902)).

EIGHTH AMENDMENT

CRUEL AND UNUSUAL PUNISHMENTS

Application and Scope

[P. 1572, add to text after n.53:]

In *Baze v. Rees*,[1] a Court plurality upheld capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and that severe pain will result. The plurality found that, although "subjecting individuals to a risk of future harm – not simply actually inflicting pain – can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'"[2] The presence of an "unnecessary" or "untoward" risk of harm that can be eliminated by adopting alternative procedures, the plurality found, is insufficient to render the three-drug protocol unconstitutional. Instead, for the protocol to be unconstitutional, an "alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[3]

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[1] 128 S. Ct. 1520 (2008).

[2] 128 S. Ct. at 1530-31. The plurality opinion was written by Chief Justice Roberts and joined by Justices Kennedy and Alito. There were five concurring opinions (one of them by Justice Alito) and a dissenting opinion by Justice Ginsburg, joined by Justice Souter.

[3] 128 S. Ct. at 1532. Justice Thomas, joined by Justice Scalia, would have found that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." Id. at 1556. Justice Ginsburg, joined by Justice Souter in dissent, would have found that a method of execution violates the Eighth Amendment if it "poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain." Id. at 1567. Justice Breyer agreed with the Eighth Amendment standard that Justice Ginsburg would have applied, but he concurred with the plurality because he could not find sufficient evidence that the three-drug protocol violated that standard. Id. at 1563. Thus, while Justices Scalia and Thomas' standard would result in Eighth Amendment violations in fewer situations than the plurality's would, Justices Ginsburg, Souter, and Breyer's standard would result in violations in more situations that the plurality's would. Justice Stevens remained neutral as to the appropriate standard. Although concluding

(continued...)

Capital Punishment

[P. 1574, delete closed parenthesis at the end of n.62 and add to n.62:]

and announcing that, "[f]rom this day forward, I no longer shall tinker with the machinery of death," id. at 1145). Justice Stevens has also concluded that the death penalty violates the Eighth Amendment, but, because of his wish "to respect precedents that remain a part of our law," does not constitute an automatic vote against challenged death sentences. Baze v. Rees, 128 S. Ct. 1520, 1552 (2008) (finding the death penalty to violate the Eighth Amendment but concurring with the Court plurality that Kentucky's lethal injection protocol does not violate the Eighth Amendment).

– General Validity and Guiding Principles

[P. 1576, n.74, insert after citation to Coker v. Georgia:]

Kennedy v. Louisiana, 128 S. Ct. 2461 (2008) (rape of an eight-year-old child);

[P. 1577, n.74, substitute for "18 U.S.C. § 1472":]

49 U.S.C. § 46502

[P. 1577, add to n.74:]

But the treason statute also constitutes a crime against the state, which may be significant. In *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008), in overturning a death sentence imposed for the rape of a child, the Court wrote, "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."

– Implementation of Procedural Requirements

[P. 1581, add to n.91:]

Bell v. Cone, 543 U.S. 447 (2005) (presumption that state supreme court applied a narrowing construction because it had done so numerous times).

[P. 1583, add to n.99:]

Although, under the Eighth and Fourteenth Amendments, the state must bear the burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality). *A fortiori*, a statute "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 548 U.S. 163, 173 (2006).

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[3] (...continued)

that capital punishment itself violates the Eighth Amendment, he found that, under existing precedents, "whether as interpreted by the Chief Justice or Justice Ginsburg," the petitioners failed to prove that the protocol violated the Eighth Amendment. Id. at 1552.

[P. 1585, insert before the final sentence (which begins "*But cf.*") of n.110 (which begins on p. 1584):]

Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007) (jury must be permitted to consider the defendant's evidence of childhood neglect and mental illness damage outside of the context of assessment of future dangerousness); Brewer v. Quarterman, 127 S. Ct. 1706 (2007) (same).

[P. 1585, add to n.114:]

Nor did a court offend the Constitution by instructing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime," without specifying that such circumstance need not be a circumstance *of the crime*, but could include "some likelihood of future good conduct." This was because the jurors had heard "extensive for ward-looking evidence," and it was improbable that they would believe themselves barred from considering it. Ayers v. Belmontes, 127 S. Ct. 469, 475, 476 (2006).

[P. 1586, add to text after paragraph carried over from page 1585:]

What is the effect on a death sentence if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor, to be weighed against mitigating factors, in determining whether a defendant who has been found eligible for the death penalty should receive it) is found invalid? In *Brown v. Sanders*, the Court announced "the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."[4]

[P. 1586, add to text after first full paragraph:]

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not

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[4] 546 U.S. 212, 220 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." Id. at 217. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." Id. Prior to *Brown v. Sanders*, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." Id.

present at the scene of the crime."[5] Although "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.[6] Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime," and "thereby attacks a previously determined matter in a proceeding [*i.e.*, sentencing] at which, in principle, that matter is not at issue."[7]

– Limitations on Capital Punishment: Proportionality

[P. 1587, insert new paragraph at the beginning of the section:]

The Court has also considered whether, based on the nature of the underlying offense (or, as explored in the next topic, the capacity of the defendant), the imposition of capital punishment may be inappropriate in particular cases. "[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail." The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[8] However, the "Court has . . . made it clear that '[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.'"[9]

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[5] 546 U.S. 517, 523 (2006).

[6] 546 U.S. at 524, 526 (Court's emphasis deleted in part).

[7] 546 U.S. at 526.

[8] Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008).

[9] 128 S. Ct. at 2675 (Alito, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 990 (1991)).

[P. 1588, substitute for the first word on the page ("The"):]

In *Kennedy v. Louisiana*,[10] the Court held that this was true even when the rape victim was a child.[11] In *Coker*, the

[P. 1588, add to text after n.131:]

In *Kennedy v. Louisiana*, the Court found that both "evolving standards of decency" and "a national consensus" preclude the death penalty for a person who rapes a child.[12]

–Limitations on Capital Punishment: Diminished Capacity

[P. 1590, add to text after n.138:]

In *Panetti v. Quarterman*,[13] the Court considered two of the issues raised, but not clearly answered, in *Ford*: what definition of insanity should be used in capital punishment cases, and what process must be afforded to the defendant to prove his incapacity. Although the court below had found that it was sufficient to establish competency that a defendant know that he is to be executed and the reason why, the Court in *Panetti* rejected these criteria, and sent the case back to the lower court for it to consider whether the defendant had a rational understanding of the reasons the state gave for an execution, and how that reflected on his competency.[14] The Court also found that the failure of the state to provide the defendant an adequate opportunity to

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[10] 128 S. Ct. 2641 (2008). Justice Kennedy's opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Scalia and Thomas joined.

[11] The Court noted, however, that "[o]ur concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." 128 S. Ct. at 2659.

[12] 128 S. Ct. 2641, 2649, 2653. The Court noted that, since *Gregg*, it had "spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure." Id. at 2661.

[13] 127 S. Ct. 2842 (2007).

[14] In *Panetti*, the defendant, despite apparent mental problems, was found to understand both his imminent execution and the fact that the State of Texas intended to execute him for having murdered his mother-in-law and father-in-law. It was argued, however, that defendant, suffering from delusions, believed that the stated reason for his execution was a "sham" and that the state wanted to execute him "to stop him from preaching."

respond to the findings of two court-appointed mental health experts violated due process.[15]

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

See also Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

[P. 1591, add to text after n.143:]

In *Atkins*, the Court wrote, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[16] In *Schriro v. Smith*, the Court again quoted this language, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim."[17] States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge."[18]

[P. 1591, substitute for first two sentences of first full paragraph:]

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme that permitted capital punishment to be imposed for crimes committed before age 16, but upheld other statutes authorizing capital punishment for crimes committed by 16- and 17-year-olds.

[P. 1591, substitute for rest of paragraph in text following n.148:]

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing the mentally retarded with what it saw as a lack of consensus regarding execution of juvenile offenders over age 15,[19] less than three years later the Court held that such a consensus had

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[15] 127 S. Ct. at 2858.
[16] 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright.
[17] 546 U.S. 6, 7 (2005) (per curiam).
[18] 546 U.S. at 7.
[19] 536 U.S. at 314, n.18.

developed. The Court's decision in *Roper v. Simmons*[20] drew parallels with *Atkins*. A consensus had developed, the Court held, against the execution of juveniles who were age 16 or 17 when they committed their crimes. Since *Stanford*, five states had eliminated authority for executing juveniles, and no states that formerly prohibited it had reinstated the authority. In all, 30 states prohibited execution of juveniles: 12 that prohibited the death penalty altogether, and 18 that excluded juveniles from its reach. This meant that 20 states did not prohibit execution of juveniles, but the Court noted that only five of these states had actually executed juveniles since *Stanford*, and only three had done so in the 10 years immediately preceding *Simmons*. Although the pace of change was slower than had been the case with execution of the mentally retarded, the consistent direction of change toward abolition was deemed more important.[21]

As in *Atkins*, the *Simmons* Court relied on its "own independent judgment" in addition to its finding of consensus among the states.[22] Three general differences between juveniles and adults make juveniles less morally culpable for their actions. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and ill-considered actions and decisions." Juveniles are also more susceptible than adults to "negative influences" and peer pres-

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[20] 543 U.S. 551 (2005). The case was decided by 5-4 vote. Justice Kennedy wrote the Court's opinion, and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor, who had joined the Court's 6-3 majority in *Atkins*, wrote a dissenting opinion, as did Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas.

[21] Dissenting in *Simmons*, Justice O'Connor disputed the consistency of the trend, pointing out that since *Stanford* two states had passed laws reaffirming the permissibility of executing 16- and 17-year-old offenders. 543 U.S. at 596.

[22] 543 U.S. at 564. The *Stanford* Court had been split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would have focused almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 492 U.S. at 377 ("A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."). The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 492 U.S. at 394-96. The *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play along with their analysis of consensus on the issue of executing the mentally retarded.

sure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed."[23] For these reasons, irresponsible conduct by juveniles is "not as morally reprehensible," they have "a greater claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed.[24] Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. The majority preferred a categorical rule over individualized assessment of each offender's maturity, explaining that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[25]

The *Simmons* Court found confirmation for its holding in "the overwhelming weight of international opinion against the juvenile death penalty."[26] Although "not controlling," the rejection of the juvenile death penalty by other nations and by international authorities was "instructive," as it had been in earlier cases, for Eighth Amendment interpretation.[27]

– Limitations on *Habeas Corpus* Review of Capital Sentences

[P. 1594, delete everything after the citation in n.161, and add a new footnote at end of the second sentence (which ends with "applies") of the paragraph in the text:]

The "new rule" limitation was suggested in a plurality opinion in *Teague*, and a Court majority in *Penry* and later cases adopted it. In *Danforth v. Minnesota*, 128 S. Ct. 1029, 1033 (2008), the Court held that *Teague* does not "constrain[ ] the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion."

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[23] 543 U.S. at 569, 570.

[24] 543 U.S. at 570.

[25] 543 U.S. at 572-573. Strongly disagreeing, Justice O'Connor wrote that "an especially depraved juvenile offender may . . . be just as culpable as many adult offenders considered bad enough to deserve the death penalty. . . . [E]specially for 17-year-olds . . . the relevant differences between 'adults' and 'juveniles' appear to be a matter of degree, rather than of kind." Id. at 600.

[26] 543 U.S. at 578 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," id. at 575).

[27] Citing as precedent Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (plurality opinion); *Atkins*, 536 U.S. at 317, n.21; Enmund v. Florida, 458 U.S. 782, 796-97, n.22 (1982); Thompson v. Oklahoma, 487 U.S. 815, 830-31 & n.31 (1988) (plurality opinion); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

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

In *Whorton v. Bockting*, 127 S. Ct. 1173, 1180 (2007), the Court stated that the two exceptions – the situations in which "[a] new rule applies retroactively in a collateral proceeding" – are when "(1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *See also* Saffle v. Parks, 494 U.S. 484, 494, 495 (1990). The second exception was at issue in *Sawyer v. Smith*, 497 U.S. 227 (1990), in which the Court held the exception inapplicable to the *Caldwell v. Mississippi* rule that the Eighth Amendment is violated by prosecutorial misstatements characterizing the jury's role in capital sentencing as merely recommendatory. It is "not enough," the Court in *Sawyer* explained, "that a new rule is aimed at improving the accuracy of a trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." Id. at 242.

[P. 1595, add to n.167:]

Accord, House v. Bell, 547 U.S. 518, 554-55 (2006) (defendant failed to meet *Herrera* standard but nevertheless put forward enough evidence of innocence to meet the less onerous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), which "held that prisoners asserting innocence as a gateway to [*habeas* relief for claims forfeited under state law] must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Id. at 2076-2077, quoting Schlup v. Delo, 513 U.S. at 327.) The Court here distinguished "freestanding" claims under *Herrera* from "gateway" claims under *Schlup*, the difference apparently being that success on a freestanding claim results in the overturning of a conviction, whereas success on a gateway claim results in a remand to the trial court to hear the claim. *See also* Article III, "*Habeas Corpus*: Scope of the Writ."

[P. 1596, add to text after n.172:]

Further, the "substantial and injurious effect standard" is to be applied in federal *habeas* proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California*. . . ."[28]

[P. 1596, add to text after n.176:]

In *Carey v. Musladin*,[29] Court noted that it had previously held that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes,"[30] but that it had never ruled on the effect on a defendant's fair trial rights of *spectator* conduct. In *Carey*, the spectator conduct that allegedly affected the defendant's right to a fair trial consisted of members of the victim's family wearing buttons with the victim's photograph. Given the lack of holdings from the Court on the question of

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[28] Fry v. Pliler, 127 S. Ct. 2321, 2324 (2007).
[29] 127 S. Ct. 649 (2006).
[30] Estelle v. Williams, 425 U.S. 501, 512 (1976).

spectator conduct, the Court in *Carey* found that "it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law" in denying the defendant relief.[31] Consequently, the Antiterrorism and Effective Death Penalty Act of 1996 precluded *habeas* relief. Similarly, because the Supreme Court has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that the *Cronic* standard for ineffective assistance of counsel should apply, the Court again could not say "that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[32]

Proportionality

[P. 1601, add to text 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.[33] 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 "rare case" of "gross disproportional[ity]."[34] 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,[35] and Justice Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle."[36] Not surprisingly, the Court also rejected a *habeas corpus* challenge to California's "three-strikes" law for

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[31] 127 S. Ct. at 654 (quoting from 28 U.S.C. § 2254(d)(1)).

[32] Wright v. Van Patten, 128 S. Ct. 743 (2008) (per curiam), quoting *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) (under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), defendant not entitled to *habeas* relief).

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

[34] 538 U.S. at 29-30.

[35] 538 U.S. at 31.

[36] 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).

failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."[37] 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."[38]

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").

[P. 1601, add to n.201:]

In *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam), the Court overturned a lower court's dismissal, on procedural grounds, of a prisoner's claim of having been denied medical treatment, with life-threatening consequences. Justice Thomas, however, dissented on the ground "that the Eighth Amendment's prohibition on cruel and unusual punishment historically concerned only injuries relating to a criminal sentence. . . . But even applying the Court's flawed Eighth Amendment jurisprudence, I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment." Id. at 2200-2201 (internal quotation marks omitted).

[P. 1602, add to n.204:]

In upholding capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and consequently result in severe pain, a Court plurality found that, although "subjecting individuals to a risk of future harm – not simply actually inflicting pain – can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Baze v. Rees, 128 S. Ct. 1520, 1530-31 (2008) (emphasis added by the Court). This case is also discussed, *supra*, under Eighth Amendment, "Application and Scope."

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[37] 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.

[38] 538 U.S. at 72.

TENTH AMENDMENT

RESERVED POWERS

Effect of Provision on Federal Powers

– Federal Regulations Affecting State Activities and Instrumentalities

[P. 1620, add to n.71:]

"If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . ." Id. at 156 (quoted with approval in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1573 (2007), which held that a national bank's state-chartered subsidiary real estate lending business is subject to federal, not state, law).

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]

The application of this last exception to the bankruptcy area has become less relevant, because even when a bankruptcy case is not focused on a particular *res*, the Court has held that a state's sovereign immunity is not infringed by being subject to an order of a bankruptcy court. "The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[2] Thus, where a federal law authorized a bankruptcy trustee to recover "preferential transfers" made to state educational institutions,[3] the court held that the sovereign immunity of the state was not infringed despite the fact that the issue was "ancillary" to a bankruptcy

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[1] *See* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446-48 (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).

[2] Central Virginia Community College v. Katz, 546 U.S. 356, 362-63 (2006).

[3] A "preferential transfer" was defined as the transfer of a property interest from an insolvent debtor to a creditor, which occurred on or within 90 days before the filing of a bankruptcy petition, and which exceeds what the creditor would have been entitled to receive under such bankruptcy filing. 11 U.S.C. § 547(b).

court's *in rem* jurisdiction.[4]

[P. 1639, add to n.80 after citation to Mt. Healthy City Bd. of Education v. Doyle:]

; Northern Insurance Company of New York v. Chatham County, 547 U.S. 189, 193 (2006)

– Congressional Withdrawal of Immunity

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

See also Frew v. Hawkins, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

Suits Against State Officials

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

In *Frew v. Hawkins*, 540 U.S. 431 (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 442.

[4] 546 U.S. at 373.

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, Substitute for portion of paragraph following n.552:]

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.

– Abortion

[P. 1778, add new footnote at the end of the final paragraph in the section:]

As to the question of whether an abortion statute that is unconstitutional in some instances should be struck down in application only or in its entirety, *see* Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (challenge to parental notification restrictions based on lack of emergency health exception remanded to determine legislative intent regarding severability of those applications).

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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*).

[P. 1778, add to text at end of section:]

Only seven years later, however, the Supreme Court decided *Gonzales v. Carhart*,[4] which, while not formally overruling *Stenberg*, appeared to signal a change in how it would analyze limitations on abortion procedures. Of perhaps the greatest significance is that *Gonzales* was the first case in which the Court upheld a statutory prohibition on a particular method of abortion. In *Gonzales*, the Court, by a 5-4 vote,[5] upheld a federal criminal statute that prohibited an overt act to "kill" a fetus where it had been intentionally "deliver[ed] . . . [so that] in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother."[6] The Court distinguished this federal statute from the Nebraska statute that it had struck down in *Stenberg*, holding that the federal statute applied only to the intentional performance of the less-common "intact dilation and excavation." The Court found that the federal statute was not unconstitutionally vague because it provided "anatomical landmarks" that provided doctors with a reasonable opportunity to know what conduct it prohibited.[7] Further, the scienter requirement (that delivery of the fetus to these landmarks before fetal demise be intentional) was found to alleviate vagueness concerns.[8]

In a departure from the reasoning of *Stenberg*, the Court held that the failure of the federal statute to provide a health exception[9] was justified by congressional findings that such a procedure was not necessary to protect the health of a mother. Noting that the Court has given "state and federal legislatures

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[4] 127 S. Ct. 1610 (2007).

[5] Justice Kennedy wrote the majority opinion, joined by Justices Roberts, Scalia, Thomas, and Alito, while Justice Ginsburg authored a dissenting opinion, which was joined by Justices Steven, Souter and Breyer. Justice Thomas also filed a concurring opinion, joined by Justice Scalia, calling for overruling *Casey* and *Roe*.

[6] 18 U.S.C. § 1531(b)(1)(A). The penalty imposed on a physician for a violation of the statute was fines and/or imprisonment for not more than 2 years. In addition, the physician could be subject to a civil suit by the father (or maternal grandparents, where the mother is a minor) for money damages for all injuries, psychological and physical, occasioned by the violation of this section, and statutory damages equal to three times the cost of the partial-birth abortion.

[7] 127 S. Ct. at 1627.

[8] 127 S. Ct. at 1629-31.

[9] As in *Stenberg*, the statute provided an exception for threats to the life of a woman.

wide discretion to pass legislation in areas where there is medical and scientific uncertainty," the Court held that, at least in the context of a facial challenge, such an exception was not needed where "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women."[10] The Court did, however, leave open the possibility that as-applied challenges could still be made in individual cases.[11]

As in *Stenberg*, the prohibition considered in *Gonzales* extended to the performance of an abortion before the fetus was viable, thus directly raising the question of whether the statute imposed an "undue burden" on the right to obtain an abortion. Unlike the statute in *Stenberg*, however, the ban in *Gonzales* was limited to the far less common "intact dilation and excavation" procedure, and consequently did not impose the same burden as the Nebraska statute. The Court also found that there was a "rational basis" for the limitation, including governmental interests in the expression of "respect for the dignity of human life," "protecting the integrity and ethics of the medical profession," and the creation of a "dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."[12]

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

[P. 1784, substitute for final sentence of paragraph carried over from p. 1783:]

Although *Bowers* has since been overruled by *Lawrence v. Texas*[13] based on precepts of personal autonomy, the latter case did not appear to signal the resurrection of the doctrine of protecting activities occurring in private places.

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[10] 127 S. Ct. at 1636. Arguably, this holding overruled *Stenberg* insofar as *Stenberg* had allowed a facial challenge to the failure of Nebraska to provide a health exception to its prohibition on intact dilation and excavation abortions. 530 U.S. at 929-38.

[11] 127 S. Ct. at 1639.

[12] 127 S. Ct. at 1633-34.

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

[P. 1784, substitute for second full paragraph and all remaining paragraphs within the topic:]

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*,[14] 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.[15] 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,*[16] where the Court by a

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[14] 431 U.S. 678 (1977).

[15] 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.

[16] 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,

(continued...)

5-4 vote roundly rejected the suggestion that the privacy cases protecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[17] 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."[18] 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.[19] 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."[20] 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.[21]

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[16] (...continued)
joined by Justices Brennan and Marshall, added a separate dissenting opinion.

[17] "[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.

[18] 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.

[19] 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.

[20] 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.

[21] 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
(continued...)

Yet, *Lawrence v. Texas*,[22] by overruling *Bowers*, brought the outer limits of noneconomic substantive due process into question by once again using 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."[23]

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,"[24] it also seems to reject reliance on historical notions of morality as guides to what personal relationships are to be protected.[25] 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.[26] Analysis of this question is hampered, however, because

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[21] (...continued)
"family, marriage, motherhood, procreation, and child rearing." 478 U.S. at 190. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[22] 539 U.S. 558 (2003).

[23] 539 U.S. at 567.

[24] 539 U.S. at 567.

[25] 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." 539 U.S. at 577-78, *citing* Bowers v. Hardwick, 478 U.S. at 216.

[26] 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 (continued...)

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,[27] little elucidates the answers.[28]

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: CIVIL

Generally

– The Requirements of Due Process

[P. 1796, add to text after n.697:]

This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available.[29]

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[26] (...continued)
barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

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

[28] In the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests – compelling interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is not its social significance, but 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 limitation has not been honored 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).

[29] Jones v. Flowers, 547 U.S. 220, 235 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have (continued...)

The Procedure Which is Due Process

– The Property Interest

[P. 1804, add to text after n.747:]

The further one gets from traditional precepts of property, the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*,[30] the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order obtained by an estranged wife against her husband, despite having probable cause to believe the order had been violated. While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently mandatory arrest statutes.[31] Finally, the Court even questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.[32]

– The Liberty Interest

[P. 1807, add new footnote 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."

[P. 1809, add to n.770:]

Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship").

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[29] (...continued)
taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.)

[30] 545 U.S. 748 (2005).

[31] 545 U.S. at 759. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. Such indeterminancy is not the "hallmark of a duty that is mandatory." Id. at 763.

[32] 545 U.S. at 764-65.

– When Process is Due

[P. 1815, add to text after 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*,[33] 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 a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

Jurisdiction

– Notice: Service of Process

[P. 1834, add to the beginning of n.903:]

Thus, in Jones v. Flowers, 547 U.S. 220 (2006), the Court held that, after a state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed," the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.

Power of the States to Regulate Procedure

– Costs, Damages, and Penalties

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

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (applying *BMW v. 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).

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[33] 538 U.S. 715 (2003).

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

In addition, the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . ."[34]

PROCEDURAL DUE PROCESS – CRIMINAL

The Elements of Due Process

– Fair Trial

[P. 1855, in n.1025, insert before period preceding penultimate sentence (which begins "Similarly"):]

; Middleton v. McNeil, 541 U.S. 43 (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)

[P. 1856, add to the end of n.1028:]

Carey v. Musladin, 127 S. Ct. 649 (2006) (effect on defendant's fair-trial rights of private-actor courtroom conduct – in this case, members of victim's family wearing buttons with the victim's photograph – has never been addressed by the Supreme Court and therefore 18 U.S.C. § 2254(d)(1) precludes *habeas* relief; see Amendment 8, Limitations on Habeas Corpus Review of Capital Sentences).

[P. 1856, add to text after n.1028:]

The use of visible physical restraints, such as shackles, leg irons or belly chains, in front of a jury, has been held to raise due process concerns. In *Deck v. Missouri*,[35] the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need."[36] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and "affronts the dignity and decorum of judicial proceedings."[37] Even where guilt has already been adjudicated, and a jury is considering the application of the death penalty, the latter two considerations would preclude the routine use of visible restraints. Only in

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[34] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007) (punitive damages award overturned because trial court had allowed jury to consider the effect of defendant's conduct on smokers who were not parties to the lawsuit).

[35] 544 U.S. 622 (2005).

[36] 544 U.S. at 626. In *Illinois v. Allen*, 397 U.S. 337, 344 (1970), the Court stated, in dictum, that "no person should be tried while shackled and gagged except as a last resort."

[37] 544 U.S. at 630, 631 (internal quotation marks omitted).

special circumstances, such as where a judge has made particu larized findings that security or flight risk requires it, can such restraints be used.

[P. 1856, add to n.1030, before period preceding final sentence:]

; Holmes v. South Carolina, 547 U.S. 319 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability)

– Prosecutorial Misconduct

[P. 1857, add to n.1037:]

Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (Court remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

[P. 1858, add new footnote after the words "prosecutor withheld it" four lines from bottom of page:]

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, 540 U.S. 668, 693 (2004).

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

Illinois v. Fisher, 540 U.S. 544 (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 text after n.1049:]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.' . . . '[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.'"[38]

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

See also Banks v. Dretke, 540 U.S. 668, 692-94 (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).

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[38] Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006) (per curiam), quoting Kyles v. Whitley, 514 U.S. 419, 438, 437 (1995).

– Proof, Burden of Proof, and Presumptions

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

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.

[P. 1862, add to n.1063:]

See also Dixon v. United States, 548 U.S. 1 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In *Dixon*, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a "willful" violation (having knowledge of the facts that constitute the offense) and the other requiring a "knowing" violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of *mens rea* (such as "malicious intent") might require that a prosecutor prove that a defendant's intent was without justification or excuse, the Court held that neither of the forms of *mens rea* at issue in *Dixon* contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process.

[P. 1862, add to text after n.1064:]

Despite the requirement that states prove each element of a criminal offense, criminal trials generally proceed with a presumption that the defendant is sane, and a defendant may be limited in the evidence that he may present to challenge this presumption. In *Clark v. Arizona*,[39] the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of *mens rea*, ruling that the use of such evidence could be limited to an insanity defense. In *Clark,* the Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to the controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.[40]

– The Problem of the Incompetent or Insane Defendant or Convict

[P. 1865, add to n.1076:]

The standard for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understand-

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[39] 548 U.S. 735 (2006).
[40] 548 U.S. at 770, 774.

ing – and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, *supra*.

[P. 1865, add to text after n.1078:]

Where a defendant is found competent to stand trial, a state appears to have significant discretion in how it takes account of mental illness or defect at the time of the offense in determining criminal responsibility.[41] The Court has identified several tests that are used by states in varying combinations to address the issue: the M'Naghten test (cognitive incapacity or moral incapacity),[42] volitional incapacity,[43] and the irresistible-impulse test.[44] "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[45]

[P. 1866, add to text after n.1085:]

The Court, however, left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[46]

In *Atkins v. Virginia*, the Court held that the Eighth Amendment also prohibits the state from executing a person who is mentally retarded, and added, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the

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[41] Clark v. Arizona, 548 U.S. 735 (2006).

[42] *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), states that "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722.

[43] *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible").

[44] *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife – if the killing was the product of mental disease in him – he is not guilty; he is innocent – as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance").

[45] *Clark*, 548 U.S. 752. In *Clark*, the Court considered an Arizona statute, based on the *M'Naghten* case, that was amended to eliminate the defense of cognitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. Id. at 753.

[46] 477 U.S. at 416-17.

task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[47]

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*,[48] 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*,[49] 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.[50] 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.

– Guilty Pleas

[P. 1868, substitute for final sentence of n.1092:]

However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

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[47] 536 U.S. at 317 (citation omitted) (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)). The Court quoted this language again in *Schriro v. Smith*, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." 546 U.S. 6, 7 (2005) (per curiam). States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge." *Id.*

[48] 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).

[49] 539 U.S. 166 (2003).

[50] 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.

– Rights of Prisoners

[P. 1874, add to n.1132:]

There was some question as to the standard to be applied to racial discrimination in prisons after *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In *Johnson v. California*, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509-13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment).

[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).

[P. 1875, add new footnote to end of fifth sentence of 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. 539 U.S. at 135.

[P. 1877, add new paragraph to text after n.1148, consisting of the following sentence followed by the material through n.1149:]

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[51]

EQUAL PROTECTION OF THE LAWS

Scope and Application

– 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).

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[51] Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship"). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 219-20.

Equal Protection: Judging Classifications by Law

– Traditional Standards: Restrained Review

[P. 1906, in fifth line of section, substitute for the period after "well":]

, including so-called "class-of-one" challenges.[52]

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 before period at end of n.1391:]

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

EQUAL PROTECTION AND RACE

Juries

[P. 1958, add new footnote at end of first sentence of second full paragraph:]

476 U.S. 79, 96 (1986). Establishing a *prima facie* case can be done through a "wide variety of evidence, so long as the sum of proffered facts gives rise to an inference of discriminatory purpose." Id. at 93-94. A state, however, cannot require that a defendant prove a *prima facie* case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

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[52] The Supreme Court has recognized successful equal protection claims brought by a class-of-one, where a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for that difference. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (village's demand for an easement as a condition of connecting the plaintiff's property to the municipal water supply was irrational and wholly arbitrary). However, the class-of-one theory, which applies with respect to legislative and regulatory action, does not apply in the public employment context. Engquist v. Oregon Department of Agriculture, 128 S. Ct. 2146, 2149 (2008) (allegation that plaintiff was fired not because she was a member of an identified class but simply for "arbitrary, vindictive, and malicious reasons" does not state an equal protection claim). In *Engquist*, the Court noted that "the government as employer indeed has far broader powers than does the government as sovereign," id. at 2151 (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994)), and that it is a "common-sense realization" that government offices could not function if every employment decision became a constitutional matter. Id. at 2151, 2156.

[P. 1958, add to text after n.1594:]

In fact, "[a]lthough the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[53] Such a rebuttal having been offered, "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'"[54] "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous," but, on more than one occasion, the Supreme Court has reversed trial courts' findings of no discriminatory intent.[55]

Permissible Remedial Utilization of Racial Classifications

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

By applying strict scrutiny, the Court was in essence

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[53] Rice v. Collins, 546 U.S. 333, 338 (2006) (citation omitted). The holding of the case was that, in a *habeas corpus* action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." Id. at 337-38. Justice Breyer, joined by Justice Souter, concurred but suggested "that legal life without peremptories is no longer unthinkable" and "that we should reconsider *Batson*'s test and the peremptory challenge system as a whole." Id. at 344.

[54] Rice v. Collins, 546 U.S. at 338 (citations omitted). "[O]nce it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. . . . [Nevertheless,] a peremptory strike shown to have been motivated in substantial part by a discriminatory intent could not be sustained based on any lesser showing by the prosecution." Snyder v. Louisiana,128 S. Ct. 1203, 1212 (2008) (citation omitted).

[55] Snyder v. Louisiana, 128 S. Ct. 1203, 1207 (2008) (Supreme Court found prosecution's race-neutral explanation for its peremptory challenge of a black juror to be implausible, and found explanation's "implausibility . . . reinforced by prosecution's acceptance of white jurors" whom prosecution could have challenged for the same reason that it claimed to have challenged the black juror, id. at 1211). In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Court found discrimination in the use of peremptory strikes based on numerous factors, including the high ratio of minorities struck from the venire panel (of 20 blacks, nine were excused for cause and ten were peremptorily struck). Other factors the Court considered were the fact that the race-neutral reasons given for the peremptory strikes of black panelists "appeared equally on point as to some white jurors who served," id. at 241; the prosecution used "jury shuffling" (rearranging the order of panel members to be seated and questioned) twice when blacks were at the front of the line; the prosecutor asked different questions of black and white panel members; and there was evidence of a long-standing policy of excluding blacks from juries.

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*[56] and *Gratz v. Bollinger*.[57]

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.[58]

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."[59] 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

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[56] 539 U.S. 306 (2003).
[57] 539 U.S. 244 (2003).
[58] 539 U.S. at 323-26.
[59] 539 U.S. at 335.

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 certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[60]

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,"[61] 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.[62]

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be

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[60] 539 U.S. at 272-73.
[61] 438 U.S. at 317.
[62] 438 U.S. at 284-85.

constitutionally achieved after *Grutter* and *Gratz*, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[63] the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be "de facto" racial imbalance in the schools, used "racial tiebreakers" to determine school assignments.[64] As in *Bakke*, numerous opinions by a fractured Court[65] led to an uncertain resolution of the issue.

In an opinion by Chief Justice Roberts, a majority of the Court in *Parents Involved in Community Schools* agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in *Grutter*, but rather focused primarily on racial considerations.[66] Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating "de facto" racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Kennedy, while finding that the school plans at issue were unconstitutional because they were not

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[63] 127 S. Ct. 2738 (2007). Another case involving racial diversity in public schools, *Meredith v. Jefferson County Board of Education*, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.

[64] In Seattle, students could choose among 10 high schools in the school district, but, if an oversubscribed school was not within 10 percentage points of the district's overall white/nonwhite racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In Jefferson County, assignments and transfers were limited when such action would cause a school's black enrollment to fall below 15 percent or exceed 50 percent. Id. at 2749.

[65] Chief Judge Robert's opinion, joined fully by Justices Scalia, Thomas and Alito, announced the judgment of the Court, while Justice Kennedy, who joined portions of the Chief Justice's opinion, filed an opinion concurring in part and concurring in the judgment. Justice Thomas filed a concurring opinion, while Justice Stevens and Justice Breyer (joined by Justice Steven, Souter and Ginsburg) authored dissents.

[66] 127 S. Ct. at 2753-54. The Court also noted that, in *Grutter*, the Court had relied upon "considerations unique to institutions of higher education." Id. at 2574 (finding that, as stated in *Grutter*, 539 U.S. at 329, because of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

narrowly tailored,[67] suggested in separate concurrence that relieving "racial isolation" could be a compelling governmental interest. The Justice even envisioned the use of plans based on individual racial classifications "as a last resort" if other means failed.[68] As Justice Kennedy's concurrence appears to represent a narrower basis for the judgment of the Court than does Justice Robert's opinion, it appears to represent, for the moment, the controlling opinion for the lower courts.[69]

THE NEW EQUAL PROTECTION

Fundamental Interests: The Political Process

– Voter Qualifications

[P. 1997, add a new footnote at the end of the first paragraph of the section:]

See also Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2007) (per curiam) (vacating an injunction against "requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day," id. at 6, but expressing no opinion on the constitutionality of the requirement).

[P. 1998, add to text after n.1776:]

By contrast, the Court upheld a statute that required voters to present a government-issued photo identification in order to vote, as the state had not "required voters to pay a tax or a fee to obtain a new photo identification." The Court added that, although obtaining a government-issued photo identification is an "inconvenience" to voters, it "surely does not qualify as a substantial burden."[70]

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[67] In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Kennedy focused on a lack of clarity in the administration and application of Kentucky's plan and the use of the "crude racial categories" of "white" and "non-white" (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790-91.

[68] 127 S. Ct. at 2760-61. Some other means suggested by Justice Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawing of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

[69] Marks v. United States, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.").

[70] Crawford v. Marion County Election Board, 128 S. Ct. 1610, 1621 (2008) (plurality). See Fourteenth Amendment, "Voting," *infra.*

– Apportionment and Districting

[P. 2012, add to text after n.1841:]

In the following years, however, litigants seeking to apply *Davis* against alleged partisan gerrymandering were generally unsuccessful. Then, when the Supreme Court revisited the issue in 2004, it all but closed the door on such challenges. In *Vieth v. Jubelirer*,[71] a four-Justice plurality would have overturned *Davis v. Bandemer*'s holding that challenges to political gerrymandering are justiciable, but five Justices disagreed. The plurality argued that partisan considerations are an intrinsic part of establishing districts,[72] that no judicially discernable or manageable standards exist to evaluate unlawful partisan gerrymandering,[73] and that the power to address the issue of political gerrymandering resides in Congress.[74]

Of the five Justices who believed that challenges to political gerrymandering are justiciable, four dissented, but Justice Kennedy concurred with the four-Justice plurality's holding, thereby upholding Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. Justice Kennedy agreed that the lack" of any agreed upon model of fair and effective representation" or "substantive principles of fairness in districting" left the Court with "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."[75] But, though he concurred in the holding, Justice Kennedy held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale were found" to evaluate partisan redistricting. *Davis v. Bandemer* was thus preserved.[76]

In *League of United Latin American Citizens v. Perry*, a

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[71] 541 U.S. 267 (2004).

[72] 541 U.S. at 285-86.

[73] 541 U.S. at 281-90.

[74] 541 U.S. at 271 (noting that Article I, § 4 provides that Congress may alter state laws regarding the manner of holding elections for Senators and Representatives).

[75] 541 U.S. at 307-08 (Justice Kennedy, concurring).

[76] 541 U.S. at 306 (Justice Kennedy, concurring). Although Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposed 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.

widely splintered Supreme Court plurality largely upheld a Texas congressional redistricting plan that the state legislature had drawn mid-decade, seemingly with the sole purpose of achieving a Republican congressional majority.[77] The plurality did not revisit the justiciability question, but examined "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[78] The plurality was "skeptical . . . of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." For one thing, although "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, . . . partisan aims did not guide every line it drew."[79] Apart from that, the "sole-motivation theory" fails to show what is necessary to identify an unconstitutional act of partisan gerrymandering: "a burden, as measured by a reliable standard, on the complainants' representational rights."[80] Moreover, "[t]he sole-intent standard . . . is no more compelling when it is linked to . . . mid-decennial legislation. . . . [T]here is nothing inherently suspect about a legislature's decision to replace a mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders."[81] The plurality also found "that mid-decade redistricting for exclusively partisan purposes" did not in this case "violate[ ] the one-person, one-vote requirement."[82] Because ordinary mid-decade districting plans do not necessarily violate the one-person, one-vote requirement, the only thing out of the ordinary with respect to the Texas plan was that it was motivated solely by partisan considerations, and the plurality had already rejected the sole-motivation theory.[83] *League of United Latin American Citizens v. Perry* thus left earlier Court precedent essentially unchanged. Claims of unconstitutional partisan

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[77] 548 U.S. 399, 417 (2006). The design of one congressional district was held to violate the Voting Rights Act because it diluted the voting power of Latinos. Id. at 423-443.

[78] 548 U.S. at 414.

[79] 548 U.S. at 418, 417.

[80] 548 U.S. at 418.

[81] 548 U.S. at 419.

[82] 548 U.S. at 420-21.

[83] 548 U.S. at 422.

gerrymandering are justiciable, but a reliable measure of what constitutes unconstitutional partisan gerrymandering remains to be found.

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

– Voting

[P. 2028, add to text after n.1917:]

In *Crawford v. Marion County Election Board*,[84] however, a Court plurality held that a state may require citizens to present a government-issued photo identification in order to vote. Although Justice Stevens' plurality opinion acknowledged "the burden imposed on voters who cannot afford . . . a birth certificate" (but added that it was "not possible to quantify . . . the magnitude of the burden on this narrow class of voters"), it noted that the state had not "required voters to pay a tax or a fee to obtain a new photo identification," and that "the photo-identification cards issued by Indiana's BMV are also free."[85] Justice Stevens also noted that a burden on voting rights, "[h]owever slight . . . must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation,'[86] and he found three state interests that were sufficiently weighty: election modernization (*i.e.*, complying with federal statutes that require or permit the use of state motor vehicle driver's license applications to serve various purposes connected with voter registration), deterring and detecting voter fraud, and safeguarding voter confidence. Justice Stevens' opinion, therefore, rejected a facial challenge to the statute,[87] finding that, even though it was "fair to infer that partisan considerations may have played a significant role in the decision to enact" the statute, the statute was "supported by valid neutral justifications."[88] Justice Scalia, in his concurring opinion,

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[84] 128 S. Ct. 1610 (2008). Justice Stevens' plurality opinion was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia wrote a concurring opinion that was joined by Justices Thomas and Alito, and Justices Souter, Ginsburg, and Breyer dissented.

[85] 128 S. Ct. at 1622, 1621.

[86] 128 S. Ct. at 1616.

[87] "A facial challenge must fail where the statute has a plainly legitimate sweep." 128 S. Ct. at 1623 (internal quotation marks omitted).

[88] 128 S. Ct. at 1624. "[A]ll of the Republicans in the [Indiana] General Assembly voted in favor of [the statute] and the Democrats were unanimous in opposing it." Id. at

(continued...)

would not only have upheld the statute on its face, but would have ruled out as-applied challenges as well, on the ground that "[t]he Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation," and, "without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional."[89] Justice Souter, in his dissenting opinion, found the statute unconstitutional because "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. . . . The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old."[90]

Section 5. Enforcement

Generally

[P. 2037, delete sole full paragraph (to be inserted in next section)]

State Action

[P. 2041, in text after n.1978, insert sole full paragraph deleted from p. 2037]

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*,[91] 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

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[88] (...continued)
1623.

[89] 128 S. Ct. at 1625, 1626.

[90] 128 S. Ct. at 1627, 1643 (citations omitted).

[91] 538 U.S. 721 (2003).

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[92] . . . it was easier for Congress to show a pattern of state constitutional violations."[93] 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*[94] 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,[95] but since disability is not a suspect class, the application of Title II against states would seem suspect under the reasoning of *Garrett*.[96] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be

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[92] 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).

[93] 538 U.S. at 736.

[94] 541 U.S. 509 (2004).

[95] 42 U.S.C. § 12132.

[96] 531 U.S. 356 (2001).

a fundamental right subject to heightened scrutiny under the Due Process Clause.[97]

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."[98] 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.[99] 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.[100]

Congress' authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,[101] a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the state of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were based on conduct that independently violated the provisions of the Fourteenth Amendment, they could

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[97] *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).

[98] 541 U.S. at 531, 524.

[99] 541 U.S. at 541-542 (Rehnquist, C.J., dissenting).

[100] 541 U.S. at 524-525. 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 542-43. 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*, 429 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).

[101] 546 U.S. 151 (2006).

be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.[102]

[102] "While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." 546 U.S. at 158 (citations omitted).

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

[This entry should follow # 135 in the main volume:]

Act of Oct. 27, 1986 (Pub. L. 99-570, § 1366), 100 Stat. 3207-35, 18 U.S.C. § 981(a)(1).

Statute requiring full civil forfeiture of money transported out of the United States without amounts in excess of $10,000 being reported violates the Excessive Fines Clause of the Eighth Amendment when $357,144 was required to be forfeited.

United States v. Bajakajian, 524 U.S. 321 (1998).
Justices concurring: Thomas, Stevens, Souter, Ginsburg, Breyer.
Justices dissenting: Kennedy, Rehnquist, C.J., O'Connor, Scalia.

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, 540 U.S. 93 (2003).

160. Act of April 30, 2003, Pub. L. 108-21, §§ 401(a)(1), 401(d)(2),117 Stat. 667, 670; 18 U.S.C. §§ 3553(b)(1), 3742(e).

Two provisions of the Sentencing Reform Act, one that makes the Guidelines mandatory, and one that sets forth standards governing appeals of departures from the mandatory Guidelines, are invalidated. The Sixth Amendment right to jury trial limits sentence enhancements that courts may impose pursuant to the Guidelines.

United States v. Booker, 543 U.S. 220 (2005).
Justices concurring: Breyer, O'Connor, Kennedy, Ginsburg, and Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Scalia, and Thomas.

161. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, § 203; 2 U.S.C. § 441b(b)(2).

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court held that § 203 was not facially overbroad, and, in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410 (2006), it held that it had not purported to resolved future as-applied challenges. Now it holds that § 203 is unconstitutional as applied to issue ads that mention a candidate for federal office, when such ads are not the "functional equivalent" of express advocacy for or against the candidate.

Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007).
Justices concurring: Roberts, C.J., Alito, Scalia, Kennedy, and Thomas.
Justices dissenting: Souter, Stevens, Ginsburg, and Breyer.

162. Act of March 27, 2002, the Bipartisan Campaign Reform Act 2002, Pub. L. 107-155, § 319(a) and (b); 2 U.S.C. § 441a-1(a) and (b).

A subsection of BCRA providing that, if a "self-financing" candidate for the House of Representatives spends more than a specified amount, then his opponent may accept more contributions than otherwise permitted, violates the First Amendment. A subsection with disclosure requirements designed to implement the asymmetrical contribution limits also violates the First Amendment.

Davis v. Federal Election Commission, 128 S. Ct. 2759 (2008).
Justices concurring: Alito, Roberts, C.J., Scalia, Kennedy, and Thomas.
Justices dissenting (except as to standing and mootness): Stevens, Souter, Ginsburg, and Breyer.

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 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*, 542 U.S. 296 (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.

940. *Granholm v. Heald*, 544 U.S. 460 (2005).

Michigan and New York laws that allow in-state wineries to

sell wine directly to consumers but prohibit or discourage out-of-state wineries from doing so discriminate against interstate commerce in violation of the Commerce Clause, and are not authorized by the Twenty-first Amendment.

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

941. *Halbert v. Michigan*, 545 U.S. 605 (2005).

A Michigan statute making appointment of appellate counsel discretionary with the court for indigent criminal defendants who plead nolo contendere or guilty is unconstitutional to the extent that it deprives indigents of the right to the appointment of counsel to seek "first-tier review" in the Michigan Court of Appeals.

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

942. *Roper v. Simmons*, 543 U.S. 551 (2005).

Missouri's law setting the minimum age at 16 for persons eligible for the death penalty violates the Eighth Amendment's ban on cruel and unusual punishment as applied to persons who were under 18 at the time they committed their offense.

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, and Breyer.
Justices dissenting: O'Connor, Scalia, Thomas, and Rehnquist.

943. *Jones v. Flowers*, 547 U.S. 220 (2006).

Arkansas statute violated due process when interpreted not to require the Arkansas Commissioner of State Lands to take additional reasonable steps to notify a property owner of intent to sell the property to satisfy a tax delinquency, after the initial notice was returned by the Post Office unclaimed.

Justices concurring: Roberts, C.J., Stevens, Souter, Ginsburg, and Breyer.
Justices dissenting: Thomas, Scalia, Kennedy.

944. *Randall v. Sorrell*, 548 U.S. 230 (2006).

Vermont campaign finance statute's limitations on both expenditures and contributions violated freedom of speech.

Justices concurring: Breyer, Roberts, C.J., Alito, Kennedy, Thomas, Scalia.
Justices dissenting: Stevens, Souter, Ginsburg.

945. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1659 (2007).

Texas capital sentencing statute impermissibly prevented

sentencing "jurors from giving meaningful consideration to constitutionally relevant mitigating evidence."

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito.

946. *Brewer v. Quarterman*, 127 S. Ct. 1706, 1709 (2007).

"Texas capital sentencing statute impermissibly prevented sentencing jury from giving meaningful consideration to constitutionally relevant mitigating evidence."

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito.

947. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2641 (2008)

Louisiana's statute that permits the death penalty for rape of a child under 12 is unconstitutional because the Eighth Amendment bars "the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim."

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.
Justices dissenting: Alito, Roberts, C.J., Scalia, Thomas.

948. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

A District of Columbia statute that banned virtually all handguns, and required that any other type of firearm in the home be dissembled or bound by a trigger lock at all times violates the Second Amendment, which the Court held to protect individuals' right to bear arms.

Justices concurring: Scalia, Roberts, C.J., Kennedy, Thomas, Alito.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

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 Rehnquist, C.J.

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

227. *Aetna Health Inc. v. Davila*, 542 U.S. 200 (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."

228. *Gonzales v. Raich*, 545 U.S. 1 (2005).

California law allowing use of marijuana for medical purposes is preempted by the Controlled Substances Act's categorical prohibition of the manufacture and possession of marijuana.

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

Justices dissenting: O'Connor, Thomas, Rehnquist, C.J.

229. *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006).

Arkansas statute that imposes lien on tort settlements in an amount equal to Medicaid costs, even when Medicaid costs exceed the portion of the settlement that represents medical costs, is preempted by the Federal Medicaid law insofar as the Arkansas statute applies to amounts other than medical costs.

230. *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

Part III of the opinion found a Texas redistricting statute to violate the federal Voting Rights Act because it diluted the voting power of Latinos.

Justices concurring in Part III: Kennedy, Stevens, Souter, Ginsburg, Breyer.

Justice dissenting from Part III: Roberts, C.J., Alito, Scalia, Thomas.

231. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007).

A national bank's state-chartered subsidiary real estate lending business is subject to federal, not state, law.

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

Justices dissenting: Stevens, Roberts, C.J., Scalia.

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, 541 U.S. 36 (2004).	Ohio v. Roberts, 448 U.S. 56 (1980).
226. Roper v. Simmons, 543 U.S. 551 (2005).	Stanford v. Kentucky, 492 U.S. 361 (1989).
227. Central Virginia Community College v. Katz, 546 U.S. 356 (2006).	Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989).
228. Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).	School Comm. of Boston v. Bd. of Education, 389 U.S. 572 (1968).
229. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).	Stenberg v. Carhart, 530 U.S. 914 (2000).

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