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THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

1986 SUPPLEMENT

ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JULY 7, 1986

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JOHNNY H. KILLIAN
GEORGE A. COSTELLO
EDITORS

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AMENDMENTS PENDING BEFORE THE STATES

Proposed Amendment XXVII

[P. 47]

The proposed amendment relating to representation in Congress for the District of Columbia failed of ratification, 16 States having ratified as of the 1985 expiration date for the ratification period. In addition to the 10 States previously listed, they were: Maine, February 16, 1983; West Virginia, February 23, 1983; Rhode Island, May 14, 1983; Iowa, January 19, 1984; Louisiana, June 24, 1984; and Delaware, June 28, 1984.

ARTICLE I

[P. 69, add new section preceding "Delegation":]

LEGISLATIVE POWER: SEPARATION OF POWERS LIMITATIONS

In two recent cases the Court has applied relatively strict separation of powers constraints while invalidating congressional action. As Chief Justice Burger's opinion for the Court explained in *Immigration and Naturalization Service* v. *Chadha*, "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . must be resisted. Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable." [1] Similar analysis underlay the Court's 1986 decision in *Bowsher* v. *Synar*.[2]

The Court in *Chadha* articulated a working definition of legislative power. Invalidated in *Chadha* was a one-House congressional veto provision found to violate both the bicameralism and presentment precedures mandated by Article I. The provision in question authorized either House to veto the Attorney General's decision to suspend deportation of an alien. In determining that passage of the one House veto constituted an exercise of legislative power subject to the bicameralism and presentment requirements, the Court set forth the test. "Whether actions taken by either House are, in law and in fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' [T]he action taken here . . . was essentially legislative," the Court concluded, because "it had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." [3]

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[1] 462 U.S. 919, 951 (1983). Chief Justice Burger's opinion of the Court was joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor. Justice Powell concurred separately, asserting that Congress had violated separation of powers principles by assuming a judicial function in determining that a particular individual should be deported. Justices White and Rehnquist dissented.

[2] 478 U.S. —, 92 L.Ed.2d 583 (1986). As in *Chadha*, the Court's opinion was written by Chief Justice Burger, and was joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor; Justice Powell concurred in a separate opinion; and Justices White and Rehnquist dissented.

[3] 462 U.S. at 952.

Implicit in the Court's *Chadha* analysis was the suggestion that Congress had also overstepped its bounds by interfering with the execution of the laws. Congressional disagreement with the Attorney General's decision on deportation involved "determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." [4] This suggestion was articulated directly in *Bowsher* v. *Synar*. "[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." [5] In *Synar* the Court ruled that the "Gramm-Rudman-Hollings" Deficit Control Act [6] had invalidly vested executive power in the Comptroller General, an officer removable only by Congress. "By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function." [7]

Justice White's dissent in *Chadha* asserted that the Court's invalidation of the congressional veto had swept away "an important if not indispensable political invention that [inter alia] assures the accountability of independent regulatory agencies." [8] The Court did not disagree, but observed that "convenience and efficiency" must be subordinated to constitutional requirements.[9] And, while it is perhaps an exaggeration to say that Congress has only one way to implement its policies following a delegation to an administrative agency (Justice White pointed to several less direct alternatives, e.g. oversight hearings and investigations),[10] absence of the legislative veto undoubtedly makes congressional control of executive action more challenging.

CONGRESSIONAL DISTRICTING

[P. 105, add new note following section's penultimate sentence:

Reaffirming that there is no *de minimus* population variance, the Court in *Karcher* v. *Daggett*, 462 U.S. 725 (1983), ruled that population variations were not

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[4] 462 U.S. at 954–55.

[5] 92 L.Ed.2d at 601.

[6] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub.L. 99–177, 99 Stat. 1038.

[7] 92 L.Ed.2d at 601.

[8] 462 U.S. at 972.

[9] 462 U.S. at 944–45.

[10] 462 U.S. at 973, n.30.

per se valid simply because they were smaller than the estimated census undercount for a district. Moreover, the Court saw no reason to abandon strict mathematical equality as the guide for congressional districting; given rapid advances in computer technology it is now "relatively simple to draw contiguous districts of equal population and at the same time . . . further whatever secondary goals the State has." *Id.*, at 733.

THE LEGISLATIVE PROCESS

Presentation of Resolutions

[P. 139, at end of Section, add:]

In *Immigration and Naturalization Service v. Chadha*,[11] the Court held a one-House congressional veto to be unconstitutional as violating both the bicameralism principles reflected in Art. I, §§ 1 and 7, and in the presentment provisions of Art. I, § 7, cl. 2 and 3. The provision in question was section 244(c)(2) of the Immigration and Nationality Act, which authorized either House of Congress by resolution to veto the decision of the Attorney General to allow a particular deportable alien to remain in the country. The Court's analysis of the presentment issue makes clear, however, that two-House veto provisions and committee veto provisions suffer the same constitutional infirmity.[12] In the words of dissenting Justice White, the Court in *Chadha* "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.' " [13]

In determining that veto of the Attorney General's decision on suspension of deportation was a legislative action requiring presentment to the President for approval or veto, the Court set forth the general standard. "Whether actions taken by either House are, in law and in fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' [T]he action taken here . . . was essentially legislative," the Court concluded, because "it had the purpose and effect of altering the legal

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[11] 462 U.S. 919 (1983).

[12] Shortly after deciding *Chadha*, the Court removed any doubts on this score with summary affirmance of an appeals court's invalidation of a two-House veto in *Consumers Union* v. *FTC*, 691 F.2d 575 (D.C. Cir. 1982), aff'd sub nom. *Process Gas Consumers Group* v. *Consumer Energy Council*, 463 U.S. 1216 (1983).

[13] 462 U.S. at 967. Chief Justice Burger wrote the opinion of the Court in *Chadha*, joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor. Justice Powell concurred separately, asserting that Congress had violated separation of powers principles by assuming a judicial function in determining that a particular individual should be deported. Justice Powell therefore found it unnecessary to express his view on "the broader question of whether legislative vetoes are invalid under the Presentment Clauses." Justices White and Rehnquist dissented.

rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." [14]

The other major component of the Court's reasoning in *Chadha* stemmed from its reading of the Constitution as making only "explicit and unambiguous" exceptions to the bicameralism and presentment requirements. Thus the House alone was given power of impeachment, and the Senate alone was given power to convict upon impeachment, to advise and consent to executive appointments, and to advise and consent to treaties; similarly, the Congress may propose a constitutional amendment without the President's approval, and each House is given autonomy over certain "internal matters," e.g., judging the qualifications of its members. By implication then, exercises of legislative power not falling within any of these "narrow, explicit, and separately justified" exceptions must conform to the prescribed procedures: "passage by a majority of both Houses and presentment to the President." [15]

The breadth of the Court's ruling in *Chadha* was evidenced in its 1986 decision in *Bowsher* v. *Synar*.[16] Among the rationales for holding the Deficit Control Act unconstitutional was the Court's assertion that Congress had, in effect, retained control over executive action in a manner resembling a congressional veto. "[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." [17] Congress had offended this principle by retaining removal authority over the Comptroller General, charged with executing important aspects of the Budget Act.

POWER TO TAX AND SPEND

Kinds of Taxes Permitted

— Uniformity Requirement

[P. 144, in text following N. 7, add:]

Even the geographical limitation is a loose one. In *United States* v. *Ptasynski* [18] the Court upheld an exemption from the

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[14] 462 U.S. at 952 (citation omitted).

[15] 462 U.S. at 955–56.

[16] 478 U.S. —, 92 L.Ed.2d 583 (1986).

[17] 92 L.Ed.2d at 601. This position was developed at greater length in the concurring opinion of Justice Stevens, id. at 603.

[18] 462 U.S. 74 (1983).

crude oil windfall profit tax of "Alaskan oil," defined geographically to include oil produced in Alaska (or elsewhere) north of the Arctic Circle. What is prohibited, the Court indicated, is favoritism to particular states in the absence of other valid bases of classification. Because Congress could have achieved the same result through a classification tailored to the "disproportionate costs and difficulties . . . associated with extracting oil from this region," [19] the fact that Congress described the exemption in geographic terms does not invalidate it.

Spending for the General Welfare

— Conditional Grants-in-Aid

[P. 151, in text following N. 23, add:]

Also, Congress may provide for recovery from States of funds misused in violation of valid conditions attached to voluntary receipt.[20]

In exercise of the spending power, Congress may refuse to subsidize exercise of First Amendment rights, but it may not deny benefits solely on the basis of exercise of these rights. The distinction between these two closely related principles seems to hinge on the severity of the restriction placed on exercise of First Amendment rights. In *Regan* v. *Taxation With Representation*,[21] the Court held that Congress could constitutionally limit tax-exempt status under § 501(c)(3) of the Internal Revenue Code to charitable organizations that do not engage in lobbying. "Congress has merely refused to pay for the lobbying out of public moneys," the Court concluded.[22] The effect of the ruling on the organization's lobbying activities was minimal, however, since it could continue to receive tax-deductible contributions by creating a separate tax-exempt affiliate to conduct the lobbying. In *FCC* v. *League of Women Voters*,[23] on the other hand, the Court held that the First Amendment rights of public broadcasting stations were abridged by a prohibition on all editorializing by any recipient of public funds. There was no alternative means, as there had been in *Taxation With Representation*, by which the stations could continue to receive public funding and

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[19] Id., at 85.

[20] *Bell* v. *New Jersey*, 461 U.S. 773 (1983); *Bennett* v. *Kentucky Dep't of Education*, 470 U.S. 656 (1985). See also *Bennett* v. *New Jersey*, 470 U.S. 632 (1985) (subsequent relaxation of grant conditions, not made retroactive by Congress, will not be applied retroactively by Court to excuse the State's noncompliance).

[21] 461 U.S. 540 (1983).

[22] 461 U.S. at 545.

[23] 468 U.S. 364 (1984).

create an affiliate to engage in the prohibited speech. The Court rejected dissenting Justice Rehnquist's argument that the general principles of *Taxation With Representation* and *Oklahoma* v. *Civil Service Comm'n* should be controlling.[24]

POWER TO REGULATE COMMERCE

Purposes Served by the Grant

[P. 153, add in text as second sentence of first paragraph:]

"The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body." [25]

Definition of Terms

[P. 156, add to end of N. 23:]

EEOC v. *Wyoming*, 460 U.S. 226 (1983).

[P. 156, add concluding paragraph to section:]

The Court overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Auth.*,[26] again a 5 to 4 resolution of the issue, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection. Justice Blackmun's opinion for the Court in *Garcia* concluded that the Court in 1976 had "tried to repair what did not need repair." [27] The principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment or in the Clause itself, but in the structure of the Federal Government and in the political processes. "[W]e have no license to employ free-standing conceptions of state sovereignty when measuring congressional authority under the Commerce Clause." [28] While continuing to recognize that "Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits." [29] Moreover, the *National League of*

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[24] 468 U.S. at 399–401, & 401 n.27.

[25] *White* v. *Massachusetts Council of Construction Employers*, 460 U.S. 204, 213 (1983).

[26] 469 U.S. 528 (1985).

[27] Id., at 557.

[28] Id., at 550.

[29] Id., at 556.

Cities test for "traditional governmental function" had proven "unworkable [and] also inconsistent with established principles of federalism." [30] Lower courts and the Supreme Court itself had been unable to articulate "an organizing principle" or test for "traditional governmental functions." Regardless of whether a strictly historical test or some other test for "integral" or "necessary" governmental functions had been tried, Justice Blackmun explained, the "fundamental problem" is that any such test subverts the federal system by "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." "States must be equally free [from such judicial second-guessing] to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else . . . deems state involvement to be." [31]

In sum, the Court in *Garcia* seems to have said that most but not necessarily all federal-state disputes over Commerce Clause power are to be considered political questions. What it will take to so threaten the "special and specific position" that states occupy in the constitutional system as to require judicial rather than political resolution must await subsequent cases.

Congressional Regulation of Waterways

[P. 168, add to N. 25:]

See also *United States* v. *Riverside Bayview Homes*, 474 U.S. —, 88 L.Ed.2d 419 (1985), where congressional power to regulate "wetlands" was assumed, and the only questions involved statutory construction and Fifth Amendment taking.

Judicial Formulas

[P. 203, add as note at end of second sentence of section:]

For a recent holding that "direct" state regulation of interstate commerce is invalid, see *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. —, 90 L.Ed.2d 552 (1986).

[P. 203, add new paragraph following N. 2:]

The general principles have recently been restated by the Court.[32] "This Court has adopted what amounts to a two-tiered ap-

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[30] Id., at 531.

[31] Id., at 546. By implication, limitations on state experimentation resulting from commerce power exercise do not pose the same difficulties.

[32] *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. —, 90 L.Ed.2d 552, 559–60 (1986).

proach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.[33] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.[34] We have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." [35]

Insurance

[P. 243, add to N. 16:]

See also *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 878 (1985) (holding discriminatory tax invalid under equal protection, and explaining that such favoring of domestic industry "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent").

[P. 243, at end of section add new paragraph:]

While Congress may authorize states to burden interstate commerce in ways that would otherwise be impermissible,[36] congressional intent to do so "must be unmistakably clear." [37] Thus, the fact that federal statutes and regulations had restricted commerce in timber harvested from national forest lands in Alaska was "insufficient indicium" that Congress intended to authorize the State to apply a similar policy for timber harvested from state lands. The rule requiring clear congressional approval for state burdens on commerce was said to be necessary in order to strengthen the likelihood that decisions favoring one section of the country over another are in fact "collective decisions" made by Congress rather

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[33] Citing: *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640–43 (1982) (plurality opinion).

[34] Citing *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

[35] Citing *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 440–41 (1978).

[36] "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985) (interpreting the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. (1842(d), permitting regional interstate bank acquisitions expressly approved by the state in which the acquired bank is located).

[37] *South Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 90 (1984).

than unilateral decisions imposed on unrepresented out-of-state interests by individual states.[38] The same rule is required when the issue is not exemption from Commerce Clause scrutiny, but rather a lower standard of review. "An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny." [39]

[P. 244, add to N. 7:]

Container Corp. of America v. *Franchise Tax Bd.*, 463 U.S. 159 (1983); *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. —, 91 L.Ed.2d 1 (1986) (presumptive federal policy of uniformity is belied by absence of preemptive language in 70 bilateral agreements).

[P. 245, in text following N. 8, add:]

Also required is an appropriate definition of the scope of the business operation, sometimes a difficult task, given the complexity of modern corporations and their frequent diversification and control of subsidiaries. The rule is that there must be "some bond of ownership or control uniting the purported 'unitary business' [and that] the out-of-state activities of the purported 'unitary business' [must] be related in some way to the in-state activities." [40]

[P. 245, add to N. 12:]

Container Corp. v. *Franchise Tax Bd.*, 463 U.S. 159 (1983) (upholding use of the "three factor" apportionment formula, based on the percentages of a unitary business' total payroll, property, and sales, that are located in the state).

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[38] Id., at 92. Earlier cases had required express statutory sanction of state burdens on interstate commerce, but under circumstances arguably less suggestive of congressional approval. See, e.g., *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 958–60 (1982) (congressional deferral to state water law in 37 statutes and numerous interstate compacts does not indicate congressional sanction for *invalid* state laws imposing a burden on commerce); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982) (disclaimer in Federal Power Act of intent to deprive a state of "lawful authority" over interstate transmissions held not to evince a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause").

[39] *Maine* v. *Taylor*, 477 U.S. —, 91 L.Ed.2d 110, 121 (1986) (holding that the Lacey Act's reinforcement of state bans on importation of fish and wildlife neither authorizes state laws otherwise invalid under the commerce clause nor shifts analysis from the presumptively invalid category of outright discrimination against commerce to the *Pike* v. *Bruce Church* balancing standard for state laws that burden commerce only incidentally).

[40] *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159, 166 (1983), citing *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 316–17 (1982).

[P. 246, add to N.14 following first citation:]

Westinghouse Elec. Corp. v. *Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984).

[P. 246, add to text following N. 14:]

The test is not actual discriminatory impact on the taxpayer, dependent upon the overall effect in the context of the tax scheme of the taxpayer's home state, but rather whether the tax, if applied by every jurisdiction, would discriminate against interstate commerce.[41]

State Conservation and Embargo Measures

[P. 273, add to text following first full sentence on page:]

The Court did find a legitimate local interest supporting an outright ban on importation of live bait in a case where the state was able to establish that imported bait may carry parasites inimical to state fish populations, and that no less discriminatory regulation was possible because adequate inspection and testing techniques for the parasites had not yet been devised.[42]

The State Proprietary Activity Exception

[P. 276, in text following N. 24, add:]

Similarly, the Court has held that a city may favor its own residents in the award of construction projects paid for with city funds, since the city is acting as a market participant.[43]

State Laws Regulating Alcoholic Beverages

[P. 278, add to text at end of section:]

The Court has made clear, however, that the Twenty-first Amendment does not completely insulate state regulation of alcoholic beverages from Commerce Clause restraint. "State laws that

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[41] *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984).

[42] *Maine* v. *Taylor*, 477 U.S. —, 91 L.Ed.2d 110 (1986).

[43] *White* v. *Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983). Moreover, through exercise of the spending power, Congress may "permit the type of parochial favoritism" that would otherwise run afoul of the Commerce Clause; the city's use of federal funds to favor city residents was held to have been affirmatively sanctioned by the funding statute. Id., at 213. For a case in which the Court had difficulty in applying the market participant exception (there was no opinion of the Court on the issue), see *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82 (1984) (Alaska requirement that timber harvested from state-owned lands be processed in Alaska before being shipped outside state violates Commerce Clause).

constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." [44] Thus exemption of locally-distilled products from an excise tax on wholesale liquor sales is an invalid discrimination in favor of local products,[45] and a state "affirmation law" prohibiting wholesalers from charging lower prices on out-of-state sales than those already approved for in-state sales is invalid as a direct regulation of interstate commerce.[46]

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

[P. 286, add new paragraph in text following N. 14:]

The vast quantity and broad sweep of federal law, both statutory and regulatory, assures that numerous preemption issues will arise, and the Court decided a number of preemption cases during its 1982 to 1985 terms. The Court considered both express and implied preemption, and in the latter category decided cases in both major subdivisions of analysis: whether the federal occupation of a field of regulation is so pervasive as to oust any state regulation, and whether state regulation actually conflicts with the federal law or with effectuation of the congressional purpose. For the most part the Court did not plow new ground, but rather applied settled preemption principles; in these cases the Court's task was to interpret and apply the relevant statutes to ascertain the intended scope of preemption. The only major addition to (or at least new application of) preemption principles related to the standard for determining whether federal regulations preempt state law.

The increasing frequency with which Congress attempts to spell out the extent of preemption led to several decisions interpreting preemptive language. Here the Court was determining the applicability of principles restated in *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977): had Congress expressed a clear intent to preempt state law under the circumstances of the case? A prohibition on state taxes on carriage of air passengers "or on the gross receipts derived therefrom" was held to preempt a state tax on airlines, described by the state as a personal property tax, but based on a percentage of the airline's gross income; "the manner in which the state legislature has described and categorized [the tax]

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[44] *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984).

[45] Id.

[46] *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. —, 90 L.Ed. 2d 552 (1986).

cannot mask the fact that the purpose and effect of the provision are to impose a levy upon the gross receipts of airlines." [47] Express disclaimers of preemptive intent and express limitations on preemptive reach can also be given effect once interpreted and applied. Hence, a broad ERISA preemption of any state laws which "relate to" employee benefit plans is ameliorated by a proviso that the preemption provision is not to be construed to "modify" or "impair" any other federal law,[48] and by an exception for state laws regulating insurance.[49] Similarly, Congress may affirmatively authorize state regulation that would otherwise be invalid under the Commerce Clause.[50]

The Court reaffirmed that federal regulations as well as federal statutes may preempt state law, but indicated that a more rigorous test may govern at least one aspect of preemption by regulation. As long as the federal agency is acting within the scope of its delegated authority,[51] its regulations may explicitly preempt state law.[52] However, the Court has suggested that there must be express preemption or direct conflict with federal regulations before it will hold state law to be preempted; the comprehensiveness of federal regulations may be insufficient basis for a finding of preemption. "We are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Con-

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[47] *Aloha Airlines* v. *Director of Taxation*, 464 U.S. 7, 1314 (1983). For another instance of express preemption, see *Exxon Corp.* v. *Hunt*, 475 U.S. —, 89 L.Ed.2d 364 (1986) (§ 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act preempts special state taxes for state superfunds used to pay response costs and other claims compensable under the federal law).

[48] *Shaw* v. *Delta Air Lines*, 463 U.S. 85 (1983) (no preemption of provisions of state human rights law prohibiting pregnancy discrimination in plans subject to ERISA coverage, since state human rights law plays a significant role in enforcement of Title VII of the Civil Rights Act).

[49] *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985).

[50] *Northeast Bancorp* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985) (upholding the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the state in which the acquired bank is located).

[51] *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. —, 90 L.Ed.2d 369 (1986). Communication Act's denial of jurisdiction to the FCC "with respect to . . . intrastate communication service" prevents FCC from applying its depreciation rules to state regulation of telephone equipment used in both interstate and intrastate commerce. "[A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." 90 L.Ed.2d at 385.

[52] *Capital Cities Cable* v. *Crisp*, 467 U.S. 691 (1984), following *Fidelity Federal Savings and Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982): FCC regulations have explicity preempted state regulation of "signal carriage," and this comprehends commercial advertising (here the state banned advertising of alcohol) carried on cable TV.

gress. To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule . . . would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." [53]

The Court remains willing to hold that Congress has by statute so comprehensively occupied a field as to leave no room for state regulation, and the fact that Congress has done so by conferring broad jurisdiction on an administrative agency apparently does not restrict operation of the principle.[54] Also, the fact that Congress has partially "deregulated" a subject by constricting agency jurisdiction does not necessarily open the field for state regulation, since Congress can occupy a field by opting for market regulation over any governmental regulation.[55] On occasion, however, the Court has narrowly defined the field of exclusive federal regulation and has thereby upheld state regulation. For example, the Atomic Energy Act's preemption of the safety aspects of nuclear power was held not to invalidate a state law conditioning construction of nuclear power plants on a finding by a state agency that adequate storage and disposal facilities are available to treat nuclear waste, since "economic" regulation of power generation has traditionally been left to the states—an arrangement maintained by the Act—and since the state law could be justified as an economic rather than a safety regulation.[56]

Several cases called for application of the *Hines* v. *Davidowitz* test of whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [57] A State law recognizing the validity of an unrecorded,

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[53] *Hillsborough County* v. *Automated Medical Laboratories*, 471 U.S. 707, 717 (1985).

[54] In *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 184 (1983), the Court held that a State prohibition on pass-through of a severance tax on oil and gas conflicted with FERC authority under the Natural Gas Act because it "represented an attempt to legislate in a field that Congress has chosen to occupy"—"the field of wholesale sales of natural gas in interstate commerce."

[55] *Transcontinental Gas Pipe Line Corp.* v. *Mississippi Oil and Gas Board*, 474 U.S. —, 88 L.Ed.2d 732 (1986).

[56] *Pacific Gas & Elec. Co.* v. *Energy Resources Conserv. and Dev. Comm'n*, 461 U.S. 190 (1983). Neither does the same reservation of exclusive authority to regulate nuclear safety preempt imposition of punitive damages under state tort law, even if based upon a jury's conclusion that a nuclear licensee failed to follow adequate safety precautions. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984).

[57] 312 U.S. 52, 67 (1941).

oral sale of an aircraft was held preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid, since the congressional purpose evidenced in the legislative history was to make information about an aircraft's title readily available by requiring that all transfers be documented and recorded.[58] Also, a State law making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by nonmember producers was held to counter a strong federal policy protecting the right of farmers to join or not join such associations.[59] On the other hand, the effect on federal policy was not strong enough to warrant a holding of preemption when a state authorized condemnation of abandoned railroad policy after conclusion of an ICC proceeding permitting abandonment, although the railroad's opportunity costs in the property had been considered in the decision on abandonment.[60] Where there is "tension" between two policies embodied in the same federal act, however, a state law fully consistent with one of these policies but at odds with the other will not be held to be preempted as frustrating overall congressional policy.[61]

Federal Versus State Labor Laws

[P. 287, add to N. 18:]

State limitations on holding union office have recently been upheld, the Court ruling that *Hill's* premise that the NLRA grants an unqualified right to select union officials has been removed by amendments prohibiting some convicted criminals from holding union office. Partly because the federal disqualification standard was itself dependent upon application of state law, the Court ruled that more stringent state disqualification provisions, also aimed at individuals who had been involved in racketeering and other criminal conduct, were not inconsistent with the federal law. *Brown* v. *Hotel Employees*, 468 U.S. 491 (1984).

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[58] *Philco Aviation* v. *Shacket*, 462 U.S. 406 (1983).

[59] *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461 (1984) (interpreting the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 et seq.). For similar rulings, see *Nantahala Power and Light Co.* v. *Thornburg*, 476 U.S. —, 90 L.Ed.2d 943 (1986) (state allocation of costs for purposes of setting retail electricity rates, by disallowing costs permitted by FERC in setting wholesale rates, frustrates federal regulation by possibly preventing the utility from recovering in its sales the costs of paying the FERC-approved wholesale rate); *Capital Cities Cable* v. *Crisp*, 467 U.S. 691 (1984) (state ban on cable TV advertising frustrates federal policy in the Copyright Revision Act of 1976 by which cable operators pay a royalty fee for the right to retransmit distant broadcast signals upon agreement not to delete commercials).

[60] *Hayfield Northern R. Co.* v. *Chicago & N. W. Transp. Co.*, 467 U.S. 622 (1984).

[61] *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984).

[P. 288, add to N. 3:]

Similarly, states may not supplement Board enforcement by debarring from state contracts persons or firms that have violated the NLRA. *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U.S. —, 89 L. Ed. 2d 223 (1986).

[P. 288, in text following N. 3, add:]

Section 7's protection of associational rights is not so strong, however, as to outweigh the Social Security Act's policy permitting states to determine whether to award unemployment benefits to persons voluntarily unemployed as the result of a labor dispute.[62]

[P. 289, add to N. 7:]

State court action by a supervisor alleging union interference with his contractual relationship with his employer is preempted by the NLRA. *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669 (1983) (applying *Iron Workers* v. *Perko*).

[P. 290, add to N. 13:]

State court action for misrepresentation and breach of contract, brought by replacement workers promised permanent employment when hired during a strike, was not preempted by the NLRA. The action for breach of contract by replacement workers having no remedies under the NLRA is deeply rooted in local law and of only peripheral concern under the Act. *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983) (following *Linn* v. *Plant Guard Workers* and *Farmer* v. *Carpenters*). Similarly, an action in state court against a union for misrepresentation in promising assistance if an employee were discharged for union-related activity is not preempted where the union failed to establish an arguable case that the individual was an employee within the meaning of the NLRA rather than an unprotected supervisor. *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. —, 90 L. Ed. 2d 389 (1986). Where state law regulates conduct that is actually protected by the NLRA, however, this line of cases in inapplicable. *Brown* v. *Hotel Employees*, 468 U.S. 491, 503 (1984).

[P. 292, in text following N. 20 add:]

A state tort action as an alternative to a § 301 arbitration or enforcement action is preempted if it is substantially dependent upon analysis of the terms of a collective bargaining agreement.[63]

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[62] *New York Telephone Co.* v. *New York Labor Dept.*, 440 U.S. 519 (1979); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977); *Baker* v. *General Motors Corp.*, 478 U.S. —, 92 L.Ed.2d 504 (1986).

[63] *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985). A state damage action for the bad-faith handling of an insurance claim under a disability plan that was part of a collective bargaining agreement was preempted because it involved interpretation of that agreement, and because state enforcement would frustrate the policies of § 301 favoring uniform federal law interpretation of collective bargaining agreements and favoring arbitration as a predicate to adjudication.

[P. 292, add to N. 21, following citation to *Machinists*:]

Golden Gate Transit Corp. v. *City of Los Angeles*, 475 U.S. —, 89 L. Ed. 2d. 616 (1986) (City may not condition taxicab franchise on settlement of strike by set date, since this intrudes into the collective bargaining process protected by the NLRA).

[P. 292, in text following N. 21 add:]

However, the NLRA is concerned primarily "with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," so states are free to impose minimum labor standards.[64]

COMMERCE WITH INDIAN TRIBES

[P. 292, add to N. 1:]

This special fiduciary responsibility can also be created by statute. See, e.g., *United States* v. *Mitchell*, 463 U.S. 206 (1983) (statutes giving the Secretary of the Interior full responsibility to manage Indian forest lands and sell timber for the benefit of Indian owners create a trust relationship under which the tribe or individual may sue the trustee for damages).

[P. 293, add to N. 6:]

New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) (state regulation of on-reservation hunting and fishing by non-members of the tribe is preempted because it would undermine tribal control over reservation lands and resources, and because it would "threaten Congress' overriding objective of encouraging tribal self-government and economic development").

[P. 293, add to text following N. 6:]

A corollary is that preemption will not be applied strictly to prevent states from aiding Indians.[65] However, the protective rule is inapplicable to state regulation of liquor transactions, where there has been no tradition of tribal sovereignty.[66]

[P. 293, add to N. 8:]

Montana v. *Blackfeet Tribe*, 471 U.S. 759 (1985) (State may not tax tribe's royalty interest from lease of reservation minerals).

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[64] *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985) (upholding a state requirement that health care plans, including those resulting from collective bargaining, provide minimum benefits for mental health care).

[65] *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138 (1984), upholding state court jurisdiction to hear claims of Indians against non-Indians involving transaction that occurred in Indian country. However, attempts by states to retrocede jurisdiction favorable to Indians may be held to be preempted. See *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. —, 90 L.Ed. 2d 881 (1986).

[66] *Rice* v. *Rehner*, 463 U.S. 713 (1983).

[P. 294, add to N. 12:]

The extent of civil jurisdiction over non-Indians requires close examination of the relevant statutes and treaties. *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985).

[P. 294, add new note at end of sentence preceding N. 14 quotation:]

See, e.g., *Oregon Dep't of Fish and Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985) (cession of aboriginal title resulted in loss of hunting and fishing rights in lands not retained in reservation).

[P. 294, add to N. 14:]

Escondido Mut. Water Co. v. *La Jolla Band*, 466 U.S. 765, 787 n.30 (1984).

[P. 294, add to text following N. 14:]

In a case of major import for the settlement of Indian land claims, the Court ruled in *County of Oneida* v. *Oneida Indian Nation* [67] that an Indian tribe may obtain damages for wrongful possession of land conveyed in 1795 without the federal approval then required by the Nonintercourse Act.[68] The Nonintercourse Acts reflected the accepted principle that extinguishment of Indian title requires the consent of the United States, and left intact a tribe's common law remedies to protect possesory rights. The Court reiterated the accepted rule that enactments are construed liberally in favor of Indians, and that Congress may abrogate Indian treaty rights or extinguish aboriginal land title only if it does so clearly and unambiguously. Consequently, federal approval of land conveyance treaties containing references to earlier conveyances that had violated the Nonintercourse Acts did not constitute ratification of the invalid conveyances.[69] Similarly, the Court refused to apply the general rule for borrowing a state statute of limitations for the federal common law action, and rejected the dissent's view that, given "the extraordinary passage of time," the doctrine of laches should have been applied to bar the claim.[70]

[P. 294, add to N. 17:]

There must be "substantial and compelling evidence of a congressional intention to diminish Indian lands" before the Court will hold that a statute has removed lands from a reservation. *Solem* v. *Bartlett*, 465 U.S. 463, 472 (1984).

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[67] 470 U.S. 226 (1985).

[68] 1 Stat. 379 (1793).

[69] 470 U.S. at 246–48.

[70] 470 U.S. at 255, 257 (Stevens, J.).

BANKRUPTCY

Constitutional Status of State Insolvency Laws: Preemption

[P. 315, add to text following N. 8:]

A state court injunction ordering a defendant to clean up a waste disposal site has been held to be a "liability on a claim" subject to discharge under the Bankruptcy Code, after the state had appointed a receiver to take charge of the defendant's property and comply with the injunction.[71]

COPYRIGHTS AND PATENTS

Nature and Scope of the Right Secured

[P. 328, add to N. 2:]

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 citation for the use of criticism, and reproduction for classroom purposes, but may not supersede the use of the original work. See *Harper & Row, Publishers* v. *Nation Enterprises*, 471 U.S. 539 (1985), holding that 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 section 107 of the Copyright Act, 17 U.S.C. § 107.

[P. 328, add new paragraph in text following N. 2:]

The Court's "reluctance to expand [copyright] protections . . . without explicit legislative guidance" controlled its decision in *Sony Corp.* v. *Universal City Studios*,[72] in which the Court held that the manufacture and sale of video tape (or cassette) recorders for home use does not constitute "contributory" infringement of the copyright in television programs. Copyright protection, the Court reiterated, is "wholly statutory," and courts should be "circumspect" in extending protections to new technology. The Court refused to hold that contributory infringement could occur simply by supplying the device with which someone else could infringe, especially in view of the fact that VCRs are capable of substantial noninfringing "fair use," e.g., time-shifting of television viewing.

[P. 328, add to N. 3:]

Sony Corp. v. *Universal City Studios*, 464 U.S. 417 (1984).

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[71] *Ohio* v. *Kovacs*, 469 U.S. 274 (1985).

[72] 464 U.S. 417, 431 (1984).

THE POWER TO RAISE AND MAINTAIN ARMED FORCES

Conscription

[P. 342, add to N. 17:]

See also *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), upholding denial of federal financial assistance under Title IV of the Higher Education Act to young men who fail to register for the draft.

Care of the Armed Forces

[P. 343, add to text following N. 8:]

The Court, citing the unique military disciplinary structure as well as the expansive deference to congressional control, has refused to recognize a constitutional tort action brought by enlisted men charging racial discrimination by their superiors in duty assignments and performance evaluations.[73]

OBLIGATION OF CONTRACTS

Evaluation of the Clause Today

[P. 429, add to N. 28:]

In *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), the Court emphasized the first and relied on all but the third of these tests in upholding a prohibition on pass-through of an oil and gas severance tax.

IMPORTS AND EXPORTS

Property Taxes

[P. 432, add to N. 21 following first sentence:]

The Court's 1945 decision in *Hooven & Allison* was expressly overruled in *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), involving the same tax and the same parties.

INTERSTATE COMPACTS

Legal Effect

[P. 438, add to text at end of section:]

Mere existence of an interstate compact governing allocation of river water does not necessarily oust the Supreme Court of its original jurisdiction to resolve controversies over apportionment of interstate streams, especially where the compact makes no provision for resolving impasse. In exercise of its jurisdiction, however,

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[73] *Chappell* v. *Wallace*, 462 U.S. 296 (1983).

the Court will not rewrite the compact by ordering appointment of a third voting commissioner to serve as a tie-breaker; rather, the Court will attempt to apply the compact to the extent that its provisions govern the controversy.[74]

[74] *Texas* v. *New Mexico*, 462 U.S. 554 (1983).

ARTICLE II

NATURE AND SCOPE OF PRESIDENTIAL POWER

[P. 452, add new section preceding "TENURE":]

Executive Power: Separation of Powers Protections

In two recent cases the Court has applied separation of powers principles to invalidate what it perceived to be congressional usurpation of executive power. In striking down the congressional veto as circumventing Article I's bicameralism and presentment requirements attending exercise of legislative power, the Court also suggested in *Immigration and Naturalization Service* v. *Chadha*[1] that the particular provision in question, involving veto of the Attorney General's decision to suspend deportation of an alien, in effect allowed Congress impermissible participation in execution of the laws.[2] And in *Bowsher* v. *Synar*,[3] the Court held that Congress had invalidly vested executive functions in a legislative branch official. Underlying both decisions was the premise, stated by Chief Justice Burger's opinion of the Court in *Chadha*, that "the powers delegated to the three Branches are functionally identifiable," distinct, and definable.[4]

At issue in *Synar* were the responsibilities vested in the Comptroller General by the "Gramm-Rudman-Hollings" Deficit Control Act,[5] which set maximum deficit amounts for federal spending for fiscal years 1986 through 1991, and which directed across-the-board cuts in spending when projected deficits would exceed the target deficits. The Comptroller was to prepare a report for each fiscal year containing detailed estimates of projected federal revenues and expenditures, and specifying the reductions, if any, necessary to meet the statutory target. The President was required to implement the reductions specified in the Comptroller's report. The Court viewed these functions of the Comptroller "as plainly entail-

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[1] 462 U.S. 919 (1983).

[2] Although Chief Justice Burger's opinion of the Court described the veto decision as legislative in character it also seemingly alluded to the executive nature of the decision to countermand the Attorney General's application of delegated power to a particular individual. "Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way. . . . Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 462 U.S. at 954–55.

[3] 478 U.S. —, 92 L.Ed.2d 583 (1986).

[4] 462 U.S. at 951.

[5] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99–177, 99 Stat. 1038.

ing execution of the law in constitutional terms. Interpreting a law . . . to implement the legislative mandate is the very essence of 'execution' of the law," especially where "exercise [of] judgment" is called for, and where the President is required to implement the interpretation.[6] Because Congress by earlier enactment had retained authority to remove the Comptroller General from office, the Court held, executive powers may not be delegated to him. "By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function." [7]

The Court in *Chadha* and *Synar* ignored or rejected assertions that its formalistic approach to separation of powers may bring into question the validity of delegations of legislative authority to the modern administrative state, sometimes called the "fourth branch." As Justice White asserted in dissent in *Chadha*, "by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments. . . . There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term." [8] Moreover, Justice White noted, "rules and adjudications by the agencies meet the Court's own definition of legislative action." [9] Justice Stevens, concurring in *Synar*, sounded the same chord in suggesting that the Court's holding should not depend on classification of "chameleon-like" powers as executive, legislative, or judicial.[10] The Court answered these assertions on two levels: that the bicameral protection "is not necessary" when legislative power has been delegated to another branch confined to implementing statutory standards set by Congress, and that "the Constitution does not so require." [11] In the same context, the Court acknowledged without disapproval that it had described some agency action as resembling lawmaking.[12] Thus perhaps *Chadha* should not be read as requiring that all "legislative power" as the Court defined it must be exercised by Congress, and perhaps *Synar* should not be read as requiring that all "executive power" as the Court defined it must be exercised by the executive. A more limited reading is that when Congress elects to exercise legislative power itself rather than delegate it, it must

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[6] 92 L.Ed.2d at 600.
[7] 92 L.Ed.2d at 601.
[8] 462 U.S. at 985–86.
[9] 462 U.S. at 989.
[10] 92 L.Ed.2d at 603, 611.
[11] 462 U.S. at 953 n.16.
[12] Id.

follow the prescribed bicameralism and presentment procedures, and when Congress elects to delegate legislative power or assign executive functions to the executive branch, it may not control exercise of those functions by itself exercising removal (or appointment) powers.

The Removal Power

[P. 552, in text following N. 17, add:]

The Bowsher v. Synar Case.—Approaching the removal power from the other end, the Court in *Bowsher* v. *Synar* [13] held that where Congress had retained removal power over an official, it could not vest him with exercise of executive power. The Court in *Synar* invalidated provisions of the 1985 "Gramm-Rudman-Hollings" Deficit Control Act [14] vesting in the Comptroller General authority to prepare a detailed report on projected federal revenues and expenditures, and to determine mandatory across-the-board cuts in federal expenditures necessary to reduce the projected budget deficit to statutory targets. By 1921 statute, the Comptroller General was removable by joint resolution for, inter alia, "inefficiency," "neglect of duty," or "malfeasance." "These terms are very broad," the Court noted, and "could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." Consequently, the Court determined, "the removal powers over the Comptroller General's office dictate that he will be subservient to Congress." [15] Relying heavily on *Myers*, the Court concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." [16]

While relying on *Myers*, the Court did not return to the *Myers* position that persons exercising executive powers must be removable *at will* by the President. The Court also cited *Humphrey's Executor* with approval while distinguishing it in another context. The jist of *Synar* is thus procedural: Congress may not involve itself directly in the removal of an official exercising executive power, but it can by legislation restrict the bases on which the President may remove most executive officers.[17] Presumably, then,

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[13] 478 U.S. —, 92 L.Ed.2d 583 (1986).

[14] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99–177, 99 Stat. 1038.

[15] 92 L.Ed.2d at 598, 599.

[16] 92 L.Ed.2d at 596.

[17] Justice White's dissent in *Synar* elaborated on this point. See 92 L.Ed.2d at 617, 618.

there would have been no constitutional infirmity had the Comptroller General been removable by the President on the same grounds specified in the 1921 law.

Because the Deficit Control Act contained contingency procedures for implementing the budget cuts in the event that the primary mechanism was invalidated, the Court rejected the assertion that it should invalidate the 1921 removal provision rather than the Deficit Act's vesting of executive power in the Comptroller General.[18] In dictum, the Court voiced hesitancy at tampering with the removal power, and thereby perhaps "significantly alter[ing] the Comptroller General's office, possibly by making him subservient to the Executive Branch," and perhaps also frustrating congressional intent that "the wide array of other tasks and duties . . . assigned . . . in other statutes" be carried out by an officer under its control.[19]

Private Access to Government Information

[P. 554, add to N. 6:]

FTC v. *Grolier, Inc.*, 462 U.S. 19 (1983) (attorney work product); *Central Intelligence Agency* v. *Sims*, 471 U.S. 159 (1985) (matters specifically exempted by statute).

THE CONDUCT OF FOREIGN RELATIONS

Congressional Implementation of Presidential Policies

[P. 569, add to N. 10:]

Regan v. *Wald*, 468 U.S. 222 (1984).

Recent Statements of the Political Question Doctrine

[P. 573, add to N. 21:]

For example, a case involving "a purely legal question of statutory interpretation" is not a political question simply because the issues have significant political and foreign relations overtones. *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S.—, 106 S. Ct. 2860, 2866 (1986) (Fishermen's Protective Act does not completely remove Secretary of Commerce's discretion in certifying that foreign nationals are "diminishing the effectiveness of" an international agreement by taking whales in violation of quotas set pursuant to the agreement).

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[18] This view formed the basis of Justice Blackmun's dissent in *Synar*. See 92 L.Ed.2d at 628.

[19] 92 L.Ed.2d at 601–02.

PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

The President's Subordinates

[P. 601, add to N. 25:]

See *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), extending qualified immunity to the Attorney General for authorizing a warrantless wiretap in a case involving domestic national security. Although the Court later held that such warrantless wiretaps violate the Fourth Amendment, at the time of the Attorney General's authorization this interpretation was not "clearly established," and the *Harlow* immunity protects officials exercising discretion on such open questions.

ARTICLE III

Legislative Courts

Review of Legislative Courts by Supreme Court

[P. 625, add to N. 13:]

D.C. Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) (state or D.C. court's promulgation of rules governing admission to bar are administrative and not judicial in character, and review on constitutional grounds may be had in federal district court).

[P. 625, add to N. 14:]

D.C. Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) (final order denying waiver of rules governing individual's bar admission is judicial in nature and reviewable only in the Supreme Court under 28 U.S.C. § 1257).

The "Public Rights" Distinction

[P. 626, add at end of section:]

In two recent cases the Court has continued to reject the public rights/private rights distinction as "a bright line test," and has instead focused on "substance"—i.e., on the extent to which the particular grant of jurisdiction to an Article I court threatens judicial integrity and separation of powers principles.[1] Nonetheless, the Court has indicated that the distinction may be an appropriate starting point for analysis. Thus, the fact that private rights traditionally at the core of Article III jurisdiction are at stake leads the Court to "searching" inquiry as to whether Congress is encroaching inordinately on judicial functions, while the concern is not so great where "public" rights are involved.[2]

Bankruptcy Courts

[P. 631, add at end of section:]

The Court's two recent decisions involving legislative courts suggest that the majority may now be closer to the balancing approach of the *Marathon* dissenters than to the position of the *Mar-*

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[1] *Thomas* v. *Union Carbide Agric. Products Co.*, 473 U.S. 568 (1985); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. —, 92 L.Ed.2d 675 (1986).

[2] "In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects as quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas* v. *Union Carbide Agric. Products Co.*, 473 U.S. 568, 589 (1985), quoting *Northern Pipeline*, 458 U.S. at 68 (plurality opinion).

athon plurality that Congress may confer judicial power on legislative courts in only very limited circumstances. In *Thomas* v. *Union Carbide Agric. Products Co.*,[3] the Court upheld a provision of the pesticide law requiring binding arbitration, with limited judicial review, of compensation due one registrant by another for mandatory sharing of registration information. And in *Commodity Futures Trading Comm'n* v. *Schor*,[4] the Court upheld conferral on the agency of authority, in a reparations adjudication under the Act, to also adjudicate "counterclaims" arising out of the same transaction. Neither the fact that the pesticide case involved a dispute between two private parties nor the fact that the CFTC was empowered to decide claims traditionally adjudicated under state law proved decisive to the Court's analysis.

In rejecting a "formalistic" approach and analyzing the "substance" of the provision at issue in *Union Carbide*, Justice O'Connor's opinion for the Court pointed to several considerations.[5] The right to compensation was not a purely private right, but "bears many of the characteristics of a 'public' right," since Congress was "authoriz[ing] an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program." [6] Also important was not "unduly constrict[ing] Congress in its ability to take needed and innovative action pursuant to its Article I powers; [7] arbitration was "a pragmatic solution to [a] difficult problem." The limited nature of judicial review was seen as a plus in the sense that "no unwilling defendant is subjected to judicial enforcement power"; on the other hand, availability of limited judicial review of the arbitrator's findings and determination for fraud, misconduct, or misrepresentation, and for due process violations, preserved the "'appropriate exercise of the judicial function." [8] Thus, the Court concluded, Congress in exercise of Article I powers "may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." [9]

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[3] 473 U.S. 568 (1985).

[4] 478 U.S. —, 92 L.Ed.2d 675 (1986).

[5] Contrast the Court's approach to Article III separation of powers issues with the more rigid approach enunciated in *INS* v. *Chadha* and *Bowsher* v. *Synar*, involving congressional incursions on executive power.

[6] 473 U.S. at 589.

[7] *CFTC* v. *Schor*, 92 L.Ed.2d at 693, summarizing the *Thomas* rule.

[8] 473 U.S. at 591, 592.

[9] 473 U.S. at 594.

In *Schor*, the Court described Art. III, § 1 as serving a dual purpose: to protect the role of an independent judiciary, and to safeguard the right of litigants to have claims decided by judges free from potential domination by the other branches of government. A litigant's Article III right is not absolute, the Court determined, but may be waived. This the litigant had done by objecting to the administrative law judge's jurisdiction only after adverse rulings on the merits. The threat to institutional integrity was "weighed" by reference to "a number of factors." The conferral on the CFTC of pendent jurisdiction over common law counterclaims was seen as more narrowly confined than was the grant to bankruptcy courts at issue in *Marathon*, and as more closely resembling the "model" approved in *Crowell* v. *Benson*. The CFTC's jurisdiction, unlike that of bankruptcy courts, was said to be confined to "a particularized area of the law"; the agency's orders were enforceable only by order of a district court,[10] and reviewable under a less deferential standard, with legal rulings being subject to *de novo* review; and the agency was not empowered, as had been the bankruptcy courts, to exercize "all ordinary powers of district courts."

ANCILLARY POWERS OF FEDERAL COURTS

Power to Issue Writs: The Act of 1789

[P. 649, line 4, add new note at end of paragraph:]

This proposition was recently asserted by the Court in *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. —, 88 L.Ed.2d 189 (1985), holding that a federal district court lacked authority to order U.S. marshals to transport state prisoners, such authority not being granted by the relevant statutes.

— Habeas Corpus: Scope of the Writ

[P. 652, add new note following next-to-last sentence on page:]

28 U.S.C. § 2254(d) establishes a presumption of correctness, subject to exceptions, for state court determinations of factual issues evidenced by "reliable and adequate written indicia." See *Marshall* v. *Lonberger*, 459 U.S. 422 (1983).

[P. 657, add to N. 2:]

The rules applicable to procedural defaults at trial also apply to defaults on appeal: a defendant must bear the risk of attorney error on appeal not amounting to ineffective assistance of counsel unless "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray* v. *Carrier*, 477 U.S. —, 91 L.Ed.2d 397, 408 (1986). See also *Smith* v. *Murray*, 477 U.S.

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[10] *Cf. Union Carbide, supra*, 473 U.S. at 591 (fact that "FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement" cited as lessening danger of encroachment on "Article III judicial powers").

—, 91 L.Ed.2d 434 (1986) (deliberate, tactical decision to abandon on appeal an issue raised by objection at trial was inadequate cause).

[P. 657, add to text following N. 2:]

The Court has now found good cause to exist when an attorney failed to raise what at the time would have been a "novel" constitutional issue,[11] and when an attorney's representation was so poor as to deprive the defendant of effective assistance of counsel.[12]

[P. 657, add to N. 4:]

See also the opinion of Justice Powell, joined by Chief Justice Burger and by Justices Rehnquist and O'Connor, suggesting that habeas relief to *re*litigate constitutional claims should not be available to prisoners "whose guilt is conceded or plain." *Kuhlman* v. *Wilson*, 477 U.S. —, 91 L.Ed.2d 364, 380 (1986).

The Rule-Making Power and Powers Over Process

— Limitations

[P. 663, add to N. 11:]

An appeals court's supervisory rule making appeal contingent upon a litigant's having filed with the district court timely objections to a master's report promotes the orderly administration of justice and does not deny to the litigant any Article III or due process right to have his claims litigated by an Article III judge. *Thomas* v. *Arn*, 474 U.S. —, 88 L.Ed.2d 435 (1985).

Appointment of Referees, Masters, and Special Aids

[P. 665, add to end of section:]

As long as the district court "has jurisdiction over [a] case at all times . . ., retain[ing] full authority to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment," there is no Article III requirement that the court sua sponte review a magistrate's findings; the Federal Magistrate's

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[11] In *Reed* v. *Ross*, 468 U.S. 1, 16 (1984), the Court held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures."

[12] In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court established a two-part test for collateral relief based on ineffective assistance: was the assistance reasonable, taking into account all of the circumstances of the case and according the attorney a high degree of deference, and was the defendant actually prejudiced by the deficiencies. The Court applied this test in several 1986 decisions, holding that the incompetency prong of the test had been met by an attorney's failure to conduct pretrial discovery and his resulting failure to file a motion to suppress evidence, *Kimmelman* v. *Morrison*, 477 U.S. —, 91 L.Ed.2d 305 (1986); but that a tactical decision not to appeal an issue reserved by objection at trial fell far short of meeting the "rigorous standard." *Smith* v. *Murray*, 477 U.S. —, 91 L.Ed.2d 434 (1986).

Act's provision of de novo review for a party filing written objection to a magistrate's findings suffices for constitutional purposes.[13]

JUDICIAL POWER AND JURISDICTION—CASES AND CONTROVERSIES

Substantial Interest: Standing

— Constitutional Standards: Injury in Fact and Causation

[P. 677, add to N. 25:]

Heckler v. *Mathews*, 465 U.S. 728 (1984) (denial of equal treatment in conferral of benefits may be redressed by withdrawal of benefits to favored class, hence member of disfavored class may secure relief in the form of equal treatment even if extension of benefits is precluded by statute's severability clause). However, standing to assert such noneconomic stigmatic injury is available only to those personally denied equal treatment by the challenged policy. *Allen* v. *Wright*, 468 U.S. 737 (1984) (challenge by parents of minority schoolchildren to allegedly lax administration of IRS policy denying tax benefits to racially discriminatory private schools).

[P. 678, add to N. 4:]

City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) (victim of police chokehold seeking injunctive relief unable to show sufficient likelihood of recurrence).

[P. 678, add to N. 5:]

In *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), the Court applied this principle on a remedy-by-remedy basis, holding that a plaintiff who clearly had standing to seek damages for injuries sustained as a result of a police chokehold did not have standing to seek injunctive relief against continuation of police policy authorizing use of chokeholds in situations not endangering arresting officers.

[P. 678, add to N. 6:]

Similarly, the link between fully integrated public schools and allegedly lax administration of tax policy denying benefits to discriminatory private schools was deemed too tenuous, dependent as it is upon decisions by private school administrators and parents of children attending such schools. *Allen* v. *Wright*, 468 U.S. 737 (1984).

— Standing to Assert the Constitutional Rights of Others

[P. 680, add to N. 16:]

Conversely, one sued in his official capacity as a member of a governmental board has no individual right to appeal from a holding that the board chose not to appeal, absent unusual circumstances such as a unanimous consent requirement for such board appeals. *Bender* v. *Williamsport Area School Dist.*, 475 U.S. —, 89 L.Ed.2d 501 (1986).

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[13] *Thomas* v. *Arn*, 474 U.S. —, 88 L.Ed.2d 435, (1985) (also upholding a supervisory rule making appeal from the district court's judgment contingent upon timely objection to the magistrates's findings).

[P. 682, add to N. 25:]

But see *Secretary of State* v. *J.H. Munson Co.*, 467 U.S. 947 (1984) (one establishing injury in fact but whose First Amendment rights are not violated may challenge statute as overly broad without showing that persons whose rights are affected cannot bring a lawsuit: purpose of the rule is to benefit society by preventing the statute from "chilling the rights of other parties not before the court").

The Requirement of a Real Interest

— Mootness

[P. 700, add to N. 10:]

But in *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983), the Court found no "exceptional circumstances" justifying application of the capable-of-repetition rule, pointing out that the plaintiff in that case had not made a "reasonable showing" that he personally would again be the victim of police illegality.

Political Questions

[P. 707, add to N. 25:]

See also *First Nat'l City Bank* v. *Banco Para el Comercio de Cuba*, 462 U.S. 611 (1983) (courts may disregard the separate status of foreign corporate entities where effect would be to immunize foreign state from counterclaim).

JUDICIAL REVIEW

Limitations on the Exercise of Judicial Review

— Stare Decisis

[P. 725, add to text following N. 25:]

The Court has continued to adhere to a stricter rule of *stare decisis* for statutory interpretation, on the theory that " 'it is more important that the applicable rule of law be settled than that it be settled right . . ., provided correction can be had by legislation.' " [14]

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[14] *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. —, 90 L.Ed.2d 413 (1986), quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

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

— When a Case Arises Under

[P. 728, add to N. 16:]

For the current approach, see *Merrill Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. —, 92 L.Ed.2d 650 (1986), holding that a state negligence law claim based on a rebuttable presumption of negligence for violation of a federal regulatory statute does not arise under federal law for purposes of 28 U.S.C. § 1331 when the federal statute at issue creates no federal cause of action, express or implied.

[P. 730, add new paragraph following N. 19:]

In an opinion for a unanimous Court, Chief Justice Burger has indicated that "Art. III 'arising under' jurisdiction is broader than federal question jurisdiction under [28 U.S.C.] § 1331." [15] In that case the Court held that Congress in exercise of its Article I power to regulate foreign commerce may, within the bounds of Article III, define exceptions to the sovereign immunity of foreign states and thereby confer jurisdiction on federal courts to decide cases falling within the exceptions.[16]

— Federal Questions Resulting From Special Jurisdictional Grants

[P. 732, add to N. 17 following *City of Milwaukee* Citation:]

Cf. County of Oneida v. *Oneida Indian Nation*, 470 U.S. 226, 236–40 (1985) (Nonintercourse Acts did not preempt common law actions Indian tribes may have had to enforce aboriginal land rights); and *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985) (question whether an Indian tribe retains civil jurisdiction over non-Indian property owner must be answered by reference to federal law, and hence "arises under" for purposes of § 1331).

— Civil Rights Act Jurisdiction

[P. 733, add to N. 19:]

Compensatory damages must be based on injury to the plaintiff, and not on any abstract valuation of constitutional rights. *Memphis Community School Dist.* v. *Stachura*, 477 U.S. —, 91 L.Ed.2d 249 (1986).

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[15] *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).

[16] The Court distinguished cases holding that a mere jurisdictional grant statute may not constitute the federal law for "arising under" purposes. 461 U.S. at 495–96 (distinguishing *Mossman* v. *Higginson*, 4 Dall. 12 (1800); and *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443 (1852)).

[P. 733, add to N. 21:]

Note as well that, although res judicata and collateral estoppel apply generally in § 1983 actions to bar relitigation of issues decided in state courts (*Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U.S. 75 (1984)), the Court has held that a guilty plea to a criminal offense, unaccompanied by Fourth Amendment challenge to admissibility of evidence, does not estop a § 1983 damage action based on an invalid search and seizure. *Haring* v. *Prosise*, 462 U.S. 306 (1983).

[P. 734, add to N. 23:]

Also, the Court has recently held that punitive damages are awardable under § 1983 in an action against an individual. *Smith* v. *Wade*, 461 U.S. 30 (1983).

[P. 734, add to N. 25:]

Also, state officials sued in their individual capacities are entitled to qualified immunity from damages as long as their actions are not deemed to have been unreasonable as violative of clearly established federal statutory or constitutional rights, *Davis* v. *Scherer*, 468 U.S. 183 (1984). Cf. *Tower* v. *Glover*, 467 U.S. 914 (1984) (no qualified immunity for public defenders who conspire with state officials to deprive persons of rights); and *Pulliam* v. *Allen*, 466 U.S. 522 (1984) (common law judicial immunity bars neither a § 1983 injunction action nor recovery of attorneys fees in such an action). However, actions against individuals found to have been acting in their official capacities will be deemed to be actions against the official state or subdivision entity represented. *Brandon* v. *Holt*, 469 U.S. 464 (1985). As for what actions may be attributed to official policy or practice, see *Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985) (single use of excessive force by police officer may not be), and *Pembauer* v. *City of Cincinnati*, 475 U.S. —, 89 L.Ed.2d 452 (1986) (county prosecutor's instruction to deputy sheriffs to "go and get" witnesses may be).

[P. 734, add to text following N. 1:]

Generally, it is state and not federal law that is applied to fill gaps in § 1983's coverage.[17]

[P. 734, add new section following "Civil Rights Act Jurisdiction":]

Limitation: State Sovereign Immunity

The Court's recent interpretations of the Eleventh Amendment and of the underlying principle of state sovereign immunity said to be reflected by the Amendment pose a significant limitation on general federal question jurisdiction. As the Court has put it, the Eleventh Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." [18] While Congress may ab-

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[17] In such circumstances, 42 U.S.C. § 1988 calls for application of "the common law, as modified . . . so far as [it] is not inconsistent with the Constitution and laws of the United States." See, e.g., *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983) (tolling of statute of limitations is governed by state law). But see *Wilson* v. *Garcia*, 471 U.S. 261 (1985) (federal law governs the characterization of § 1983 claims as personal injury actions for statute of limitations purposes).

[18] *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 98 (1984).

rogate state sovereign immunity, at least in the civil rights area,[19] it may do so "only by making its intention unmistakably clear in the language of the statute." [20] Therefore, general language creating a cause of action against "any recipient" of federal assistance does not suffice to subject state recipients to suit, because "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." [21] Moreover, while States may waive sovereign immunity, this too must be "unequivocally expressed," [22] the Court now requiring not only a general waiver, but in addition an expression of "intention [by the State] to subject itself to suit in *federal court*." [23] Under this latter rule, states which have totally abolished sovereign immunity for purposes of state law actions might still be extended immunity in federal court.[24]

— Pendent Jurisdiction

[P. 735, line 4, add note following "state law.":]

The strong interest of the Federal Arbitration Act in ensuring judicial enforcement of private agreements to arbitrate overrides the interest in judicial economy and the avoidance of bifurcated proceedings. See *Moses H. Cone Hosp.* v. *Mercury Constr. Corp.,* 460 U.S. 1 (1983); and *Dean Witter Reynolds Inc.* v. *Byrd,* 470 U.S. 213 (1985).

Cases of Admiralty and Maritime Jurisdiction

— Admiralty and Maritime Cases

[P. 746, add to text following N. 10:]

The Court has now expressed a willingness to "recogniz[e] products liability, including strict liability, as part of the general maritime law." [25]

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[19] See *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 456 (1976). This limitation was repeated in dictum in *Pennhurst State School & Hosp.* v. *Halderman,* 465 U.S. 89, 99 (1984); and in *Atascadero State Hosp.* v. *Scanlon,* 473 U.S. 234 (1985).

[20] *Atascadero State Hosp.* v *Scanlon,* 473 U.S. 234, 242 (1985).

[21] Id., at 246.

[22] *Pennhurst State School & Hosp.* v. *Halderman,* 465 U.S. 89, 99 (1983).

[23] *Atascadero State Hosp.* v. *Scanlon,* 473 U.S. 234, 241 (1985) (emphasis original).

[24] See Justice Brennan's dissenting opinion in *Scanlon,* 473 U.S. at 253 n.5. Note, however, that no such unequivocal waiver for state court actions was at issue, the Court characterizing the California provision as "simply authoriz[ing] the Legislature to waive the State's sovereign immunity." 473 U.S. at 241.

[25] *East River Steamship Corp.* v. *Transamerica Delaval,* 476 U.S. —, 90 L.Ed.2d 865 (1986) (holding, however, that there is no products liability action in admiralty for purely economic injury to the product itself, unaccompanied by personal injury, and that such actions instead should be based on the contract law of warranty).

— Admiralty and Federalism

[P. 753, add to N. 6:]

In *Director, Office of Workers' Compensation Programs* v. *Perini,* 459 U.S. 297 (1983), the Court held that the 1972 amendments had not affected traditional coverage, so that there is no requirement that a barge employee injured upon the navigable waters establish that the employment had a direct or substantial relation to navigation or commerce.

[P. 754, add to N. 17:]

However, the Court held in *Offshore Logistics, Inc.* v. *Tallentire,* 477 U.S. —, 91 L.Ed.2d 174 (1986), that the Death on the High Seas Act is the exclusive wrongful death remedy in the case of OCS platform workers killed in a helicopter crash 35 miles off shore en route to shore from the platform.

Cases to Which the United States Is a Party

— Immunity of the United States From Suit

[P. 759, add to N. 21:]

Waivers from immunity must be express. See *Library of Congress* v. *Shaw,* 478 U.S. —, 92 L.Ed.2d 250 (1986), holding that Civil Rights Act's provision that "the United states shall be liable for costs the same as a private person" was insufficient to waive the immunity from awards of interest.

[P. 760, add to N. 24:]

See also *Block* v. *North Dakota,* 461 U.S. 273 (1983) (the rule that conditions on congressional waivers of sovereign immunity must be strictly construed takes precedence over conflicting rule that applicability of statute of limitations to State must be express).

Suits Between Two or More States

— Boundary Disputes

[P. 765, add to N. 6:]

For recent boundary cases, see e.g. *United States* v. *Maine (Rhode Island and New York Boundary Case),* 469 U.S. 504 (1985), holding that Long Island is an extension of the mainland and that Long Island Sound and part of Block Island Sound form a juridical bay constituting internal waters subject to state jurisdiction, but that Block Island is too far seaward to be part of the closing line of the bay; *United States* v. *Louisiana (Alabama and Mississippi Boundary Case),* 470 U.S. 93 (1985), holding that Mississippi Sound is a "historic bay" constituting inland waters; and *United States* v. *Maine,* 475 U.S. 89 (1986), holding that Nantucket Sound is not a historic bay, there being no evidence of "ancient title," and that consequently the entire sound is not within the inland waters of the State.

— Modern Types of Suits Between States

[P. 766, add to N. 10:]

While the Court ordinarily retains jurisdiction in these cases to modify decrees on the basis of changed circumstances and equitable principles, the strong interest in finality of judgment prevents relitigation of factual determinations. *Arizona* v. *California,* 460 U.S. 605 (1983). See also *Nevada* v. *United States,* 463 U.S. 110 (1983) (res judicata prevents Federal Government and Indian tribe from relitigating allocation of river water established in an earlier case in which the Government represented both tribal interests and interests of reclamation project landowners). Nor will the Court exercise its equitable powers in a manner inconsistent with a congressionally approved interstate compact governing water allocation. *Texas* v. *New Mexico,* 462 U.S. 554 (1983).

[P. 766, add to text following N. 10:]

The Court has indicated that similar equitable apportionment principles may be applied to protect a State's interest in anadromous fish.[26]

Controversies Between a State . . . and Foreign States

[P. 786, add to 2d N. 4:]

The Supreme Court reversed, *Verlinden B.V.* v. *Central Bank of Nigeria,* 461 U.S. 480 (1983), holding that Congress in the exercise of its foreign commerce power could define the extent of foreign sovereign immunity and at the same time, without violating Article III, vest federal courts with jurisdiction to decide cases arising under exceptions to that immunity spelled out in the Act.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT

[P. 791, add to N. 16:]

For an example of the Court's willingness to exercise its original jurisdiction in the absence of other avenues of redress for a State, see *South Carolina* v. *Regan,* 465 U.S. 367 (1984) (anti-injunction provision of Internal Revenue Code interpreted as barring injunction of tax assessments and collections only where aggrieved parties may later challenge the validity of the tax in a refund action).

FEDERAL-STATE COURT RELATIONS

Conflicts of Jurisdiction: Rules of Accommodation

— Abstention

[P. 809, add to N. 3 after *Colorado River*:]

Arizona v. *San Carlos Apache Tribe,* 463 U.S. 545 (1983).

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[26] *Idaho ex rel. Evans* v. *Oregon,* 462 U.S. 1017 (1983).

[P. 809, add to end of N. 3:]

Cf. Moses H. Cone Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) (no such exceptional circumstances present, and fact that federal law governed the case militated against stay of federal court proceeding).

— Anti-Injunction Statute

[P. 812, add to N. 25:]

D.C. Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) (final order denying waiver of rules governing individual's bar admission is judicial in nature; promulgation of the bar rules is not).

— Res Judicata

[P. 813, add to N. 4:]

The *Allen* holding has been extended to § 1983 claims which could have been, but were not, raised in the state court action. *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U.S. 75 (1984).

[P. 813, add to N. 5:]

The "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283, permitting a district court to stay state court proceedings in order to "protect or effectuate its judgments," operates only prior to state court judgment on the res judicata effect of a prior federal court judgment; full faith and credit must be extended to state court decisions on the merits of res judicata. *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. —, 88 L.Ed.2d 877 (1986). Also, § 1738 requires initial reference to state preclusion law even if the federal law claim is within the exclusive jurisdiction of the federal courts. *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

[P. 813, add to N. 6:]

Although § 1738 applies only to the preclusive effect of state court proceedings, under appropriate circumstances preclusive effect may also be given to unreviewed adjudicatory factfinding by state administrative agencies. *University of Tennessee* v. *Elliott*, 478 U.S. —, 92 L.Ed.2d 635 (1986).

ARTICLE IV

PRIVILEGES AND IMMUNITIES

Citizens of Each State

[P. 873, add to text following N. 15:]

While the clause "was intended to create a national economic union," it protects noneconomic interests as well.[1]

[P. 874, add new paragraph at end of section:]

A discrimination in favor of residents of a municipality implicates the clause even though the disfavored class consists of in-state as well as out-of-state residents. The Court determined in *United Building & Construction Trades Council* v. *Mayor of Camden* [2] that the clause is not to be read so literally as to exclude municipal residency classifications from its coverage. To rule otherwise, the Court concluded, would permit states to exclude out-of-state residents from benefits through the simple expediency of delegating the authority to political subdivisions. Moreover, in-state residents, unlike out-of-state residents, "at least have a chance to remedy at the polls any discrimination against them." [3]

[P. 877, add to text following N. 13:]

Employment on public contracts may also be considered a fundamental activity protected by the Clause,[4] as may the right to practice law.[5]

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[1] *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985) (the right to practice law is an important economic interest but is also important for vindication of federal rights asserted in locally unpopular causes).

[2] 465 U.S. 208 (1984).

[3] 465 U.S. at 217. Justice Blackmun, the lone dissenter, thought the Clause should be limited to its literal meaning: "a State may not discriminate between its own residents and residents of other States on the basis of state citizenship." Id., at 223, 224.

[4] *United Building & Construction Trades Council* v. *Mayor of Camden*, 465 U.S. 208 (1984). Thus Commerce Clause analysis, including the market regulator/market participant distinction, is not controlling. "It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce." Id., at 220.

[5] *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985). This is both because "the practice of law is important to the national economy," and because out-of-state lawyers can perform functions, e.g. representing "persons who raise unpopular federal claims," important to the national union of states. Id., at 281. On the other hand, lawyers are not "officers" of the state in any political sense justifying a restriction to residents. Id., at 283.

[P. 877, add to N. 14:]

In *United Building & Construction Trades Council* v. *Mayor of Camden*, 465 U.S. 208 (1984), the Court remanded for consideration under this test of whether the municipality could adequately justify its requirement that at least 40% of contractors on city construction projects be city residents. See also *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985) (State had not justified exclusion of residents from practice of law).

ARTICLE VI

NATIONAL SUPREMACY

Supremacy Clause Versus the Tenth Amendment

[P. 925, add new paragraph at end of section:]

The Court overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Auth.*,[1] and seemingly returned to the conception of federal supremacy embodied in *Wirtz* and *Fry*. For the most part, the Court indicated, states must seek protection from the impact of federal regulation in the political processes, and not in any limitations built in to the commerce power. Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren." [2] State autonomy is both limited and protected by the terms of the Constitution itself, hence—ordinarily, at least—exercise of Congress' enumerated powers is not to be limited by "*a priori* definitions of state sovereignty." [3] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." [4] There are direct limitations in Art. I, § 10, and "Section 8 . . . works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation." [5] On the other hand, the principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment, in the Commerce Clause itself, or in "judicially created limitations on federal power," but in the structure of the Federal Government and in the political processes. [6] "[T]he funda-

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[1] 469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection. Justice Blackmun's opinion of the Court was joined by Justices Brennan, White, Marshall, and Stevens. Writing in dissent were Justices Powell (joined by Chief Justice Burger and by Justices Rehnquist and O'Connor), O'Connor (joined by Justices Powell and Rehnquist), and Rehnquist.

[2] 469 U.S. at 557.

[3] 469 U.S. at 548.

[4] 469 U.S. at 549.

[5] 469 U.S. at 548.

[6] "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Feder-

mental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result." [7] While continuing to recognize that 'Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits." [8] Thus, arguably, the Court has not totally abandoned the *National League of Cities* premise that there are limits on the extent to which federal regulation may burden states as states. Rather, it has stipulated that any such limits on exercise of federal power must be premised on a failure of the political processes to protect state interests, and "must be tailored to compensate for [such] failings . . . rather than to dictate a 'sacred province of state autonomy.'" [9]

The Doctrine of Federal Exemption From State Taxation

— Applicability of Doctrine to Federal Securities

[P. 929, add to N. 13:]

See also *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855 (1983) (State property tax on bank shares, computed on the basis of a bank's net assets without any deduction for value of United States obligations held by the bank, conflicts with Rev. Stat. § 3701 (31 U.S.C. § 3124); and *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983) (State tax on net earnings of banks, applied to interest earned on obligations of the United States, violates 31 U.S.C. § 3124; the tax is not excused as "nondiscriminatory," since interest earned on state obligations is excepted). *Cf. First National Bank* v. *Bartow County Bd. of Tax Assessors*, 470 U.S. 583 (1985) (§ 3124 provides an exemption no broader than that which the Constitution requires; State property tax on bank shares may include a pro rata method for allocating a fair share of federal government obligations to bank liabilities).

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al Government itself." 469 U.S. at 550. The Court cited as prime examples the role of states in selecting the President, and the equal representation of states in the Senate. Id., at 551.

[7] 469 U.S. at 554.

[8] 469 U.S. at 556.

[9] Id., at 554.

FIRST AMENDMENT

RELIGION

Court Tests Applied to Legislation Affecting Religion

[P. 966, add to N. 14:]

Similar observations were repeated by the Chief Justice in his opinion for the Court in *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (the metaphor is not "wholly accurate"; the Constitution does not "require complete separation of church and state [but] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

[P. 967, add to N. 21:]

And note that the tests were not applied at all in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), in which the Court relied instead on historical evidence suggesting that legislative prayers were not considered by the framers of the First Amendment to offend the Establishment Clause.

Establishment of Religion

Financial Assistance to Church-Related Institutions

[P. 974, add to end of N. 17:]

But see *Mueller* v. *Allen*, 463 U.S. 388 (1983), in which the views of the first group noted above controlled.

[P. 976, add new paragraph following N. 2:]

The Court in two 1986 cases again struck down programs of public subsidy of instructional services provided on the premises of sectarian schools, and relied on the effects test as well as the entanglement test. In *Grand Rapids School District* v. *Ball*,[1] the Court invalidated two programs conducted in leased private school classrooms, one taught during the regular school day by public school teachers,[2] and the other taught after regular school hours by part-time "public" teachers otherwise employed as fulltime teachers by the sectarian school.[3] Both programs, the Court held, had the effect of promoting religion in three distinct ways. The teachers might be influenced by the"pervasively sectarian nature" of the environment and might "subtly or overtly indoctrinate the

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[1] 473 U.S. 373 (1985).

[2] The vote on this "Shared Time" program was 5–4, the opinion of the Court by Justice Brennan being joined by Justices Marshall, Blackmun, Powell, and Stevens. The Chief Justice, and Justices White, Rehnquist, and O'Connor dissented.

[3] The vote on this "Community Education" program was 7–2, Chief Justice Burger and Justice O'Connor concurring with the "Shared Time" majority.

students in particular religious tenets at public expense"; use of the parochial school classrooms "threatens to convey a message of state support for religion" through "the symbolic union of government and religion in one sectarian enterprise"; and "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." [4] In *Aguilar* v. *Felton*,[5] the Court invalidated a program under which public school employees provided instructional services on parochial school premises to educationally deprived children. The program differed from those at issue in *Grand Rapids* because the classes were closely monitored for religious content. This "pervasive monitoring" did not save the program, however, because, by requiring close cooperation and day-to-day contact between public and secular authorities, the monitoring "infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." [6]

[P. 977, add to N. 7:]

The *Allen* presumption of neutrality was extended to other situations in *Mueller* v. *Allen*, 463 U.S. 388 (1983), upholding tax deductions for tuition and other school expenses; Justice Rehnquist wrote the Court's opinion, joined by Chief Justice Burger, and by Justices White, Powell, and O'Connor. The *Wolman* view of *Allen* as an exception to be narrowly limited was repeated in Justice Marshall's dissent in *Mueller*, joined by Justices Brennan, Blackmun, and Stevens.

[P. 979, add to N. 13:]

But *Cf. Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (due to Free Exercise Clause, Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions").

[P. 979, add new paragraph to text following N. 14:]

The *Nyquist* holding was substantially undermined in *Mueller* v. *Allen*.[7] In *Mueller* the Court upheld a Minnesota deduction from state income tax available to parents of elementary and secondary school children for expenses incurred in providing tuition, transportation, textbooks, and various other school supplies. Because the Minnesota deduction was available to parents of public and private schoolchildren alike, the Court termed it "vitally different from the scheme struck down in *Nyquist*," and more similar to the benefits

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[4] 473 U.S. at 397.

[5] 473 U.S. 402 (1985). This was another 5–4 decision, with Justice Brennan's opinion of the Court being joined by Justices Marshall, Blackmun, Powell, and Stevens, and with Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissenting.

[6] 473 U.S. at 413.

[7] 463 U.S. 388 (1983).

upheld in *Everson* and *Allen* as available to *all* schoolchildren.[8] The Court declined to look behind the "facial neutrality" of the law and consider empirical evidence of its actual impact, citing a need for "certainty" and the lack of "principled standards" by which to evaluate such evidence." [9] However, "[m]ore fundamental" to the Court's refusal to consider the alleged disproportionate benefits to parents of parochial schools was the assertion that, "whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits . . . provided to the State and all taxpayers by parents sending their children to parochial schools." [10] Thus *Mueller* seemingly stands for the proposition that state subsidies of tuition expenses at sectarian schools are permissible if contained in a facially neutral scheme providing benefits, at least nominally, to parents of public and private schoolchildren alike.[11]

A second factor important in *Mueller*, present but not controlling in *Nyquist*, was that the financial aid was provided to the parents of schoolchildren rather than to the school, and thus in the Court's view was "attenuated" rather than direct. The Court noted that, with the exception of *Nyquist*, "all . . . of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves." [12]

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[8] 463 U.S. at 398.

[9] 463 U.S. at 401. Justice Marshall's dissenting opinion, joined by Justices Brennan, Blackmun, and Stevens, argued that the tuition component of the deduction, unavailable to parents of most public schoolchildren, was by far the most significant, and that the deduction as a whole "was little more than a subsidy of tuition masquerading as a subsidy of general educational expenses." 463 U.S. at 408–09. *Cf. Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985), where the Court emphasized that 40 of 41 nonpublic schools at which publicly funded programs operated were sectarian in nature; and *Widmar* v. *Vincent*, 454 U.S. 263, 275 (1981), holding that a college's open forum policy had no primary effect of advancing religion "[a]t least in the absence of evidence that religious groups will dominate [the] forum." The new facial neutrality shield may therefore be limited in operation to cases of indirect aid.

[10] 463 U.S. at 402.

[11] See also *Witters* v. *Washington Dept. of Services for the Blind*, 474 U.S. —, 88 L.Ed.2d 846 (1986), in which the Court held that provision of vocational assistance for the blind to a student who used the aid for tuition at a sectarian college did not have a primary effect of advancing religion. Without citing *Mueller*, the Court relied on the fact that the aid is paid directly to the student for use at the institution of his or her choice, so that religious institutions received aid "only as a result of the genuinely independent and private choices of aid recipients," and on the additional fact that there was nothing in the record to indicate that "any significant portion of the aid" from the program as a whole would go to religious education. 88 L.Ed.2d at 854, 855.

[12] 463 U.S. at 399.

[P. 981, add to N. 22:]

In *Witters* v. *Washington Dept. of Services for the Blind*, 474 U.S. —, 88 L.Ed.2d 846 (1986), the Court upheld use of a vocational rehabilitation scholarship at a religious college, emphasizing that the religious institution received the public money as a result of the "genuinely independent and private choices of the aid recipients," and not as the result of any decision by the State to sponsor or subsidize religion.

[P. 989, add two new sections at end of Establishment Clause:]

Religion in Governmental Observances

The practice of opening legislative sessions with prayers by paid chaplains was upheld in *Marsh* v. *Chambers*,[13] a case involving prayers in the Nebraska Legislature. The Court relied almost entirely on historical practice. Congress had paid a chaplain and opened sessions with prayers for almost 200 years; the fact that Congress had continued the practice after considering constitutional objections in the Court's view strengthened rather than weakened the historical argument. Similarly, the practice was well rooted in Nebraska and in most other states. Most importantly, the First Amendment had been drafted in the First Congress with an awareness of the chaplaincy practice, and this practice was not prohibited or discontinued. The Court did not address the lower court's findings,[14] amplified in Justice Brennan's dissent, that each aspect of the Establishment Clause tripartite test had been violated. Instead of constituting an application of the tests, therefore, *Marsh* can be read as representing an exception to their application.[15]

A different form of governmentally sanctioned religious observance was subjected to the three-part test in *Lynch* v. *Donnelly*,[16] in which the Court upheld inclusion of a Nativity scene (creche) in a city's Christmas display. To begin with, however, Chief Justice Burger's opinion for the Court expanded on the religious heritage theme exemplified by *Marsh*; other evidence that "[w]e are a religious people whose institutions presuppose a Supreme Being" [17]

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[13] 463 U.S. 783 (1983). *Marsh* was a 6–3 decision, with Chief Justice Burger's opinion for the Court being joined by Justices White, Blackmun, Powell, Rehnquist, and O'Connor, and with Justices Brennan, Marshall, and Stevens dissenting.

[14] *Chambers* v. *Marsh*, 675 F.2d 228 (8th Cir. 1982).

[15] School prayer cases were distinguished on the basis that legislators, as adults, are presumably less subject than are schoolchildren to religious indoctrination and peer pressure, 463 U.S. at 792, but there was no discussion of the tests per se.

[16] 465 U.S. 668 (1984). *Lynch* was a 54 decision, with Justice Blackmun, who voted with the majority in *Marsh* joining the *Marsh* dissenters in this case. Again, Chief Justice Burger wrote the opinion of the Court, joined by the other majority Jusitces, and again Justice Brennan worte a dissent, joined by the other dissenters. A concurring opinion was added by Justice O'Connor, and a dissenting opinion was added by Justice Blackmun.

[17] 465 U.S. at 675, quoting *Zorach* v. *Clausen*, 343 U.S. 306, 313 (1952).

was supplied by reference to the national motto "In God We Trust," the affirmation "one nation under God" in the pledge of allegiance, and the recognition of both Thanksgiving and Christmas as national holidays. Against that background, the Court then determined that the city's inclusion of the creche in its Christmas display had a legitimate secular purpose in recognizing "the historical origins of this traditional event long [celebrated] as a National Holiday," [18] and that its primary effect was not to advance religion. The benefit to religion was called "indirect, remote, and incidental," and in any event no greater than the benefit resulting from other actions that had been found to be permissible, e.g. the provision of transportation and textbooks to parochial school students, various assistance to church-supported colleges, Sunday closing laws, and legislative prayers.[19] The Court also reversed the lower court's finding of entanglement based only on "political divisiveness." [20] The future import of the Court's emphasis on the nation's religious heritage is unclear, due to the 5–4 vote and the fact that Justice O'Connor, although she joined in the Court's opinion, in her own concurring opinion expanded on the reasons why the Christmas display might validly be considered not to have the purpose or effect of endorsing religion.[21]

Miscellaneous

In *Larkin* v. *Grendel's Den*,[22] the Court had occasion to hold that the Establishment Clause is violated by a delegation of governmental decisionmaking to churches. At issue was a state statute permitting any church or school to block issuance of a liquor license to any establishment located within 500 feet of the church or school. While the statute had a permissible secular purpose of protecting churches and schools from the disruptions often associated with liquor establishments, the Court indicated that these purposes could be accomplished by other means, e.g. an outright ban on liquor outlets within a prescribed distance, or the vesting of discretionary authority in a governmental decisionmaker required to

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[18] 465 U.S. at 680.

[19] 465 U.S. at 681–82. Note that, while the extent of benefit to religion was an important factor in earlier cases, it was usually balanced against the secular effect of the same practice rather than the religious effects of other practices.

[20] 465 U.S. at 683–84.

[21] The Court in its 1984 term had the opportunity to apply *Lynch* to a situation in which a city-sponsored Nativity scene was not part of a larger Christmas display, but merely affirmed by equally divided vote (Justice Powell not participating) the lower court's decision upholding the display on the basis of *Lynch* and *Widmar* v. *Vincent. Board of Trustees of the Village of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985), aff'g 739 F.2d 716 (2d Cir. 1984).

[22] 459 U.S. 116 (1982).

consider the views of affected parties. However, the conferral of a veto authority on churches had a primary effect of advancing religion both because the delegation was standardless (thereby permitting a church to exercise the power to promote parochial interests), and because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some." [23] Moreover, the Court determined, because the veto "enmeshes churches in the processes of government," it represented an entanglement offensive to the "core rationale underlying the Establishment Clause"—"[to prevent] 'a fusion of governmental and religious functions.' " [24]

Governmental Encouragement in Schools: Prayers

[P. 985, add new paragraphs at end of section:]

In *Wallace* v. *Jaffree*,[25] the Court held invalid an Alabama statute authorizing a 1-minute period of silence in all public schools "for meditation or prayer." Because the only evidence in the record indicated that the words "or prayer" had been added to the existing statute by amendment for the sole purpose of returning voluntary prayer to the public schools, the Court found that the first prong of the tripartite test had been violated, i.e. that the statute was invalid as being entirely motivated by a purpose of advancing religion. The Court characterized the legislative intent to return prayer to the public schools as "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday," [26] and both Justices Powell and O'Connor in concurring opinions suggested that other state statutes authorizing moments of silence might pass constitutional muster.[27]

The Court, relying mainly on historical practice, has held that the opening of a state legislative session with a prayer by a state-paid chaplain does not offend the Establishment Clause, distin-

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[23] 459 U.S. at 125–26. But *cf. Marsh* v. *Chambers*, 463 U.S. 783 (1983), involving no explicit consideration of the possible symbolic implication of opening legislative sessions with prayers by paid chaplains.

[24] 459 U.S. at 126–27, quoting *Abington*, 374 U.S. 203, 222.

[25] 472 U.S. 38 (1985).

[26] 472 U.S. at 59.

[27] Justice O'Connor's concurring opinion is notable for its effort to synthesize and refine the Court's Establishment and Free Exercise tests (*see also* the Justice's concurring opinion in *Lynch* v. *Donnelly*), and Justice Rehnquist's dissent for its effort to redirect Establishment Clause analysis by abandoning the tripartite test, discarding any requirement that government be neutral between religion and "irreligion," and confining the scope to a prohibition on establishing a national church or otherwise favoring one religious group over another.

guishing *Abington* on the basis that state legislators, as adults, are "presumably not readily susceptible to 'religious indoctrination' or 'peer pressure.' " [28]

Sunday Closing Laws

[P. 988, add to text following N. 24:]

A state statute mandating that employers honor the Sabbath day of the employee's choice was held invalid as having the primary effect of promoting religion by weighting the employee's Sabbath choice over all other interests.[29]

Free Exercise of Religion

Exemption from General Governmental Requirements

[P. 998, add new paragraphs following N. 21:]

"A compelling governmental interest" was found to outweigh free exercise interests in *Bob Jones Univ.* v. *United States*,[30] in which the Court upheld the I.R.S.'s denial of tax exemptions to church run colleges whose racially discriminatory admissions policies derived from religious beliefs. The Federal Government's "fundamental, overriding interest in eradicating racial discrimination in education"—found to be encompassed in common law standards of "charity" underlying conferral of the tax exemption on "charitable" institutions—"substantially outweighs" the burden on free exercise. Nor could the schools' free exercise interests be accommodated by less restrictive means.[31] On the other hand, no compelling governmental interest need be shown if the asserted burden on free exercise is found by the Court to be negligible or illusory.[32]

The Court has held the *Sherbert* test to be wholly inapplicable in the context of military rules and regulations, where First Amendment review "is far more deferential than . . . review of similar laws or regulations designed for civilian society." [33] Thus

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[28] *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983).

[29] *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985).

[30] 461 U.S. 574 (1983).

[31] 461 U.S. at 604.

[32] *Tony and Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290 (1985) (the Court failing to perceive how application of minimum wage and overtime requirements would burden free exercise rights of employees of a religious foundation, there being no assertion that the *amount* of compensation was a matter of religious import).

[33] *Goldman* v. *Weinberger*, 475 U.S. —, 89 L.Ed.2d 478, 484 (1986).

the Court did not question the decision of military authorities to apply uniform dress code standards to prohibit the wearing of a yarmulke by an officer compelled by his Orthodox Jewish religious beliefs to wear the yarmulke.

FREEDOM OF EXPRESSION—SPEECH AND PRESS

The Doctrine of Prior Restraint

Injunctions and the Press in Fair Trial Cases

[P. 1012, add to text following N. 20:]

On a different level, however, are orders restraining the press as a party to litigation in the dissemination of information obtained through pretrial discovery. In *Seattle Times Co.* v. *Rhinehart*,[34] the Court determined that such orders protecting parties from abuses of discovery require "no heightened First Amendment scrutiny." [35]

Subsequent Punishment: Clear and Present Danger and Other Tests

— Of Other Tests and Standards:

[P. 1030, add to end of N. 17:]

Secretary of State of Maryland v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984).

Right of Association

[P. 1039, add to N. 17:]

These cases do not, however, stand for the proposition that individuals are always entitled to representation of counsel in administrative proceedings. See *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (upholding limitation to $10 of fee that may be paid attorney in representing veteran's death or disability claims before VA).

[P. 1039, add to N. 18:]

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984).

[P. 1039, add new paragraph at end of section:]

In *Roberts* v. *United States Jaycees*,[36] the Court explored the extent to which associational rights may be burdened by govern-

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[34] 467 U.S. 20 (1984).

[35] 467 U.S. at 36. The decision was unanimous, all other Justices joining Justice Powell's opinion for the Court, but with Justices Brennan and Marshall noting additionally that under the facts of the case important interests in privacy and religious freedom were being protected. Id., at 37, 38.

[36] 468 U.S. 609 (1984).

mental regulation, and upheld application of the Minnesota Human Rights Act to prohibit the United States Jaycees from excluding women from full membership. Both the Jaycees' nearly indiscriminate membership requirements and the State's compelling interest in prohibiting discrimination against women were important to the Court's analysis. On the one hand, the Court found, "the local chapters of the Jaycees are large and basically unselective groups," age and sex being the only established membership criteria in organizations otherwise entirely open to public participation. The Jaycees, therefore, "lack the distinctive characteristics [e.g. small size, identifiable purpose, selectivity in membership, perhaps seclusion from the public eye] that might afford constitutional protection to the decision of its members to exclude women." [37] Some amount of First Amendment protection was still due; the group and its members had taken public positions on a number of issues, and had engaged in "a variety of civic, charitable, lobbying, fundraising and other activities worthy of constitutional protection." However, the Court could find "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." [38] Moreover, the State had a "compelling interest to prevent . . . acts of invidious discrimination in the distribution of publically available goods, services, and other advantages." [39] Because of the near-public nature of the Jaycees—the Court likening the situation to a large business attempting to discriminate in hiring or in selection of customers—*Roberts* may be limited in application, and should not be read as governing membership discrimination by private social clubs.

[P. 1040, add to N. 23:]

Storer v. *Brown* was distinguished in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), holding invalid a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot; state interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters.

[P. 1044, add to text following N. 14:]

The Court has now indicated, however, that a proportionate refund is inadequate because "even then the union obtains an in-

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[37] 468 U.S. at 621.
[38] 468 U.S. at 626-27.
[39] 468 U.S. at 628.

voluntary loan for purposes to which the employee objects," [40] and that an advance reduction of dues does not correct the problem unless accompanied by sufficient information with which employees may guage the propriety of the union's fee.[41] Moreover, the union procedure must also "provide for a reasonably prompt decision by an impartial decisionmaker." [42]

Maintenance of National Security and the First Amendment

— Interference With War Effort

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

Similarly, the Court upheld a "passive enforcement" policy singling out for prosecution for failure to register for the draft those young men who notified authorities of an intention not to register for the draft and those reported by others.[43]

Government as Employer: Political Activities

[P. 1062, add new paragraph to end of section:]

In *Bush* v. *Lucas* [44] the Court held that the civil service laws and regulations are sufficiently "elaborate [and] comprehensive" so as to afford federal employees adequate remedy for deprivation of First Amendment rights as a result of disciplinary actions by supervisors, and that therefore there is no need to create an additional judicial remedy for the constitutional violation.

Government as Employer: Free Expression Generally

[P. 1064, add to N. 21:]

Contrast Connick v. *Myers*, 461 U.S. 138 (1983), where *Pickering* was distinguished on the basis that the employee, an assistant district attorney, worked in an environment where a close personal relationship involving loyalty and harmony were important; "[w]hen close working relationships are essential to fulfilling public

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[40] *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984).

[41] *Chicago Teachers Union* v. *Hudson*, 475 U.S. —, 89 L.Ed.2d 232 (1986).

[42] 89 L.Ed.2d at 249.

[43] *Wayte* v. *United States*, 470 U.S. 598 (1985). The incidental restriction on First Amendment rights to speak out against the draft was no greater than necessary to further the government's interests in "prosecutorial efficiency," obtaining sufficient proof prior to prosecution, and promoting general deterrence (or not appearing to condone open defiance of the law). See also *United States* v. *Albertini*, 472 U.S. 675 (1985) (order banning civilian from entering military base valid as applied to attendance at base open house by person previously convicted of destroying military property).

[44] 462 U.S. 367 (1983).

responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.*, at 151–52.

[P. 1065, add to text following N. 22:]

Pickering was distinguished in *Connick* v. *Myers*,[45] involving what the Court characterized as an employee grievance rather than an effort to inform the public on a matter of public interest. The employee, an assistant district attorney involved in a dispute with her supervisor over transfer to a different section, was fired for insubordination after she had circulated a questionnaire among her peers soliciting views on matters relating to employee morale. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." [46]

[P. 1066, add to N. 5:]

See also *Minnesota State Bd. for Community Colleges* v. *Knight*, 465 U.S. 271 (1984) (public employees not members of union have no First Amendment right to meet separately with public employers compelled by state law to "meet and confer" with exclusive bargaining representative).

Government as Educator

[P. 1067, add to N. 11:]

However, offensive "indecent" speech in the context of a high school assembly is punishable by school authorities. See *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. —, 92 L.Ed.2d (1986) (upholding 2-day suspension, and withdrawal of privilege of speaking at graduation, for student who used sophomoric sexual metaphor in speech given to school assembly).

Government as Regulator of the Electoral Process

[P. 1072, add to N. 3:]

When the validity of this provision, 26 U.S.C. § 9012(f), was again before the Court in 1985, the Court invalidated it by vote of 7–2. *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985). In an opinion by Justice Rehnquist, the Court determined that the governmental interest in preventing corruption or the appearance of corruption was insufficient justification for restricting the First Amendment rights of committees interested in making independent expenditures on behalf of a candidate, since "the absence of prearrangement and coordination under-

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[45] 461 U.S. 138 (1983).

[46] 461 U.S. at 146. *Connick* was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that information concerning morale at an important government office is a matter of public concern, and that the Court extended too much deference to the employer's judgment as to disruptive effect.

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mines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Id., at 498.

[P. 1072, add new paragraph following N. 5:]

Although the Court in *Buckley* upheld the Act's reporting and disclosure requirements, it indicated that under some circumstances the First Amendment might require exemption for minor parties able to show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." [47] This standard was applied both to disclosure of contributors' names and to disclosure of recipients of campaign expenditures in *Brown* v. *Socialist Workers '74 Campaign Committee*,[48] in which the Court held that the minor party had established the requisite showing of likely reprisals through proof of past governmental and private hostility and harassment. Disclosure of recipients of campaign expenditures, the Court reasoned, could not only dissuade supporters and workers who might receive reimbursement for expenses, but could also dissuade various entities from performing routine commercial services for the party and thereby "cripple a minor party's ability to operate effectively." [49]

Government and the Conduct of Trials

[P. 1078, add to N. 9:]

See also *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984) (press, as party to action, restrained from publishing information obtained through discovery).

[P. 1079, add to N. 13:]

The emphasis on experience and history was repeated by the Chief Justice in his opinion for the Court in *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. —, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*).

[P. 1080, add new paragraph to end of section:]

The Court has now had the opportunity to apply and extend *Richmond Newspapers* in several more areas, striking down state efforts to exclude the public from voir dire proceedings, from a suppression hearing, and from a preliminary hearing. The Court determined in *Press-Enterprise I* [50] that historically voir dire had been

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[47] 424 U.S. at 74.
[48] 459 U.S. 87 (1982).
[49] 459 U.S. at 97–98.
[50] *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984).

open to the public, and that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." [51] No such findings had been made by the state court, which had ordered closed, in the interest of protecting the privacy interests of some prospective jurors, 41 of the 44 days of voir dire in a rape-murder case. The trial court also had not considered the possibility of less restrictive alternatives, e.g. *in camera* consideration of jurors' requests for protection from publicity. In *Waller* v. *Georgia*,[52] the Court held that "under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press Enterprise*," and noted that the need for openness at suppression hearings "may be particularly strong" due to the fact that the conduct of police and prosecutor is often at issue.[53] And in *Press Enterprise II*,[54] the Court held that there is a similar First Amendment right of the public to access to most criminal proceedings (here a preliminary hearing) even when the accused requests that the proceedings be closed. Thus, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights." [55] Openness of preliminary hearings was deemed important because, under California law, the hearings can be "the final and most important step in the criminal proceeding" and therefore may be " 'the sole occasion for public observation of the criminal justice system,' " and also because the safeguard of a jury is unavailable at preliminary hearings.[56]

Governmental Regulation of Communications Industries

— Commercial Speech

[P. 1086, add to N. 12:]

The distinction between in-person and other attorney advertising was continued in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) ("print advertising

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[51] 464 U.S. at 510.
[52] 467 U.S. 39 (1984).
[53] 467 U.S. at 47.
[54] *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. —, 92 L.Ed.2d 1 (1986).
[55] 92 L.Ed.2d at 13–14.
[56] 92 L.Ed.2d at 12–13 (quoting *Richmond Newspapers*).

. . . in most cases . . . will lack the coercive force of the personal presence of the trained advocate").

[P. 1086, add to N. 14:]

However, the linking of a product to matters of public debate does not thereby entitle an ad to the increased protection afforded noncommercial speech. *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

[P. 1087, add to N. 17:]

In *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court deemed insubstantial a governmental interest in protecting postal patrons from offensive but not obscene materials. For deferential treatment of the governmental interest, see *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. —, 92 L.Ed.2d 266 (1986) (Puerto Rico's "substantial" interest in discouraging casino gambling by residents justifies ban on ads aimed at residents even though residents may legally engage in casino gambling, and ads aimed at tourists are permitted).

[P. 1087, add to N. 18 following *Virginia Bd.* cite:]

And see *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), where the Court held that the governmental interest in not interfering with parental efforts at controlling children's access to birth control information could not justify a ban on commercial mailings about birth control products; "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." Id., at 74.

[P. 1087, add to N. 20:]

Requirements that advertisers disclose more information than they otherwise choose to are upheld "as long as [they] are reasonably related to the State's interest in preventing deception of consumers," the Court explaining that "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right" requiring strict scrutiny of the disclosure requirement. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 & n.14 (1985) (upholding requirement that attorney's contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs).

[P. 1088, add to text following N. 23:]

Whether government may ban all commercial advertising of a service or product that is legal to sell is a matter of current debate. In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*,[57] the Court upheld a Puerto Rico ban on advertising of

[57] 478 U.S. —, 92 L.Ed.2d 266 (1986). The Court's opinion by Justice Rehnquist distinguished earlier cases (*Carey* and *Bigelow*) invalidating bans on advertisements of contraceptives and abortion services because there "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited." Casino gambling, on the other hand, is not such protected conduct, and the Court announced a potentially sweeping principle that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 92 L.Ed.2d at 283. For discussion of the case, see P. Kurland, "*Posadas de Puerto Rico* v. *Tourism Company:* " 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,' " 1986 Sup. Ct. Rev. 1.

casino gambling aimed at residents, who nonetheless were not prohibited from engaging in casino gambling. The advertising ban was far from complete, however, since ads aimed at the lucrative tourist trade were still permitted.

— Taxation

[P. 1088, add to N. 2:]

Grosjean was distinguished on this basis in *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

[P. 1088, add to text following N. 4:]

The Court has elaborated on the governing principles, indicating that any tax singling out the press for differential treatment is highly suspect, and creates a heavy burden of justification on the state.[58] This is so, the Court concluded, because such "a powerful weapon" to single out a small group carries with it a lessened political constraint than do those measures affecting a broader based constituency, and because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression." [59] The state's interest in raising revenue is not sufficient justification for differential treatment of the press. Moreover, the Court refused to adopt a rule permitting analysis of the "effective burden" imposed by a differential tax; even if the current effective tax burden could be measured and upheld, the threat of increasing the burden on the press might have "censorial effects," and "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." [60]

— Radio and Television

[P. 1091, add new paragraph to text following N. 16:]

In *FCC* v. *League of Women Voters*,[61] the Court took the same general approach to governmental regulation of public broadcast-

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[58] *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

[59] 460 U.S. at 585.

[60] 460 U.S. at 588, 589.

[61] 468 U.S. 364 (1984), holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended. The decision was 5–4, with Justice Brennan's opinion for the Court being joined by Justices Marshall, Blackmun, Powell, and O'Connor, and with Justices White, Rehnquist (joined by Chief Justice Burger and by Justice White), and Stevens filing dissenting opinions.

ing, but struck down a total ban on editorializing by stations receiving public funding. In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts, but indicated that broadcasters are entitled to greater protection than may have been suggested by *Red Lion*. "[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. . . . [T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest." [62] However, the earlier cases were distinguished. "[I]n sharp contrast to the restrictions upheld in *Red Lion* or in [*CBS* v. *FCC*], which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner." [63] The ban on all editorializing was deemed too severe and restrictive a means of accomplishing the governmental purposes—protecting public broadcasting stations from being coerced, through threat or fear of withdrawal of public funding, into becoming "vehicles for governmental propagandizing," and also keeping the stations "from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints." [64] Expression of editorial opinion was described as a "form of speech . . . that lies at the heart of First Amendment protection," [65] and the ban was said to be "defined solely on the basis of . . . content," the assumption being that editorial speech is speech directed at "controversial issues of public importance." [66] Moreover, the ban on editorializing was both overinclusive, applying to commentary on local issues of no likely interest to Congress, and underinclusive, not applying at all to expression of controversial opinion in the context of regular programming. Therefore, the Court concluded, the restriction was not narrowly enough tailored to fulfill the government's purposes.

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[62] 468 U.S. at 380. The Court rejected the suggestion that only a "compelling" rather than "substantial" governmental interest can justify restrictions.

[63] 468 U.S. at 385.

[64] 468 U.S. at 384–85. Dissenting Justice Stevens thought that the ban on editorializing served an important purpose of "maintaining government neutrality in the free marketplace of ideas." Id., at 409.

[65] 468 U.S. at 381.

[66] 468 U.S. at 383.

[P. 1093, add new paragraph at end of section:]

The Court has ruled that cable television "implicates First Amendment interests," since a franchisee communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering, but has left for future decision how these interests are to be balanced against a community's interests in limiting franchises and preserving utility space." [67]

Governmentally Compelled Right of Reply

[P. 1094, add to N. 3:]

The Court has also held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. While a plurality opinion adhered to by four Justices relied heavily on *Tornillo*, there was not a Court majority consensus as to rationale. *Pacific Gas & Elec.* v. *Public Utilities Comm'n*, 475 U.S. 1 (1986).

Government Restraint of Content of Expression

[P. 1095, add to N. 3:]

Regan v. *Time, Inc.*, 468 U.S. 641 (1984).

— Defamation

[P. 1102, add to N. 13:]

The same standard applies for defamation contained in petitions to the government, the Court having rejected the argument that the petition clause requires absolute immunity. *McDonald* v. *Smith*, 472 U.S. 479 (1985).

[P. 1107, add new paragraph following line 6:]

The Court has elaborated on the principles governing defamation actions brought by private figures. First, when a private plaintiff sues a media defendant for publication of information that is a matter of public concern—the *Gertz* situation, in other words—the burden is on the plaintiff to establish the falsity of the information. Thus, the Court held in *Philadelphia Newspapers* v. *Hepps*,[68] the common law rule that defamatory statements are presumptively false must give way to the First Amendment interest that true speech on matters of public concern not be inhibited. This means, as the dissenters pointed out, that a *Gertz* plaintiff must establish

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[67] *City of Los Angeles* v. *Preferred Communications*, 476 U.S. —, 90 L.Ed.2d 480 (1986).

[68] 475 U.S. —, 89 L.Ed.2d 783 (1986). Justice O'Connor's opinion of the Court was joined by Justices Brennan, Marshall, Blackmun, and Powell; Justice Stevens' dissent was joined by Chief Justice Burger and by Justices White and Rehnquist.

falsity in addition to establishing some degreee of fault (e.g. negligence).[69] On the other hand, the Court held in *Dun & Bradstreet* v. *Greenmoss Builders* that the *Gertz* standard limiting award of presumed and punitive damages applies only in cases involving matters of public concern, and that the sale of credit reporting information to subscribers is not such a matter of public concern.[70] What significance, if any, is to be attributed to the fact that a media defendant rather than a private defendant has been sued is left unclear. The plurality in *Dun & Bradstreet* declined to follow the lower court's rationale that *Gertz* protections are unavailable to nonmedia defendants, and a majority of Justices were in agreement on that point.[71] But in *Philadelphia Newspapers*, the Court expressly reserved the issue of "what standards would apply if the plaintiff sues a nonmedia defendant." [72]

[P. 1107, add to N. 12:]

A corollary is that the issue on motion for summary judgment in a *New York Times* case is whether the evidence is such that a reasonable jury might find that actual malice has been shown with convincing clarity. *Anderson* v. *Liberty Lobby*, 477 U.S. —, 91 L.Ed.2d 202 (1986).

[P. 1107, add to text following N. 12:]

Moreover, the Court has held, a *Gertz* plaintiff has the burden of proving the actual falsity of the defamatory publication.[73]

[P. 1108, add to N. 15:]

Bose Corp. v. *Consumers Union of United States*, 466 U.S. 485 (1984), holding that the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) must be subordinated to this constitutional principle.

— Obscenity

[P. 1121, add new paragraph to end of section:]

In its lone decision in the obscenity area during the 1982–1985 terms, the Court held that facial invalidation is an inappropriate

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[69] 89 L.Ed.2d at 795 (Stevens, J., dissenting).

[70] 472 U.S. 749 (1985). Justice Powell wrote a plurality opinion joined by Justices Rehnquist and O'Connor, and Chief Justice Burger and Justice White, both of whom had dissented in *Gertz*, added brief concurring opinions agreeing that the *Gertz* standard should not apply to credit reporting. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that *Gertz* had not been limited to matters of public concern, and should not be extended to do so.

[71] 472 U.S. at 753 (plurality); id. at 773 (Justice White), id. at 781–84 (dissent).

[72] 89 L.Ed.2d at 794 n.4. Justice Brennan added a brief concurring opinion expressing his view that such a distinction is untenable. Id., at 795.

[73] *Philadelphia Newspapers* v. *Hepps*, 475 U.S. —, 89 L.Ed.2d 783 (1986) (leaving open the issue of what "quantity" or standard of proof must be met).

remedy when an obscenity statute's unconstitutionality can be cured by excision of one word that the lower court had interpreted as proscribing appeal to "normal, healthy sexual desires." [74]

— Nonobscene But Sexually Explicit and Indecent Expression

[P. 1122, add to N. 9:]

Young was followed in *City of Renton* v. *Playtime Theatres*, 475 U.S. 41 (1986), upholding a city ordinance prohibiting location of adult theaters within 1,000 feet of residential areas, churches, or parks, and within one mile of any school. Rejecting the claim that the ordinance regulated content of speech, the Court indicated that such time, place and manner regulations are valid if "designed to serve a substantial governmental interest" and if "allow[ing] for reasonable alternative avenues of communication." *Id.*, at 39. The city had a substantial interest in regulating the "undesirable secondary effects" of such businesses. And, while the suitability for adult theaters of the remaining 520 acres within the city was disputed, the Court held that the theaters "must fend for themselves in the real estate market," and are entitled only to "a reasonable opportunity to open and operate." Id., at 42.

[P. 1122, add to text following N. 9:]

Similarly, an adult bookstore is subject to closure as a public nuisance if it is being used as a place for prostitution and illegal sexual activities, since the closure "was directed at unlawful conduct having nothing to do with books or other expressive activity." [75]

Speech Plus

— Public Forum

[P. 1125, add to N. 11:]

A restriction on carrying signs or placards on the grounds of the Supreme Court is unconstitutional as applied to the public sidewalks surrounding the Court, since it does not sufficiently further the governmental purposes of protecting the building and grounds, maintaining proper order, or insulating the judicial decisionmaking process from lobbying. *United States* v. *Grace*, 461 U.S. 171 (1983).

[P. 1126, add new paragraph following line 7:]

The Court has defined three different categories of public property for public forum analysis. First, there is the public forum, places such as streets and parks which have traditionally been used for public assembly and debate, where the government may not prohibit all communicative activity and must justify content-neutral time, place, and manner restrictions as narrowly tailored to serve some legitimate interest. Government may also open property for communicative activity, and thereby create a public forum.

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[74] *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985).
[75] *Arcara* v. *Cloud Books*, 478 U.S. —, 92 L.Ed.2d 568 (1986).

Such a forum may be limited—hence the expression "limited public forum"—for "use by certain groups, e.g. *Widmar* v. *Vincent* (student groups), or for discussion of certain subjects, e.g. *City of Madison Joint School District* v. *Wisconsin PERC* (school board business)," [76] but within the framework of such legitimate limitations discrimination based on content must be justified by compelling governmental interests.[77] Thirdly, government "may reserve a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." [78] The distinction between the second and third categories can therefore be of crucial importance, since speakers may be excluded from the second category only for a "compelling" governmental interest, while exclusion from the third category need only be "reasonable." Yet, distinguishing between the two categories creates no small difficulty, as evidenced by recent case law.

The Court has held that a school system did not create a limited public forum by opening an interschool mail system to use by selected civic groups "that engage in activities of interest and educational relevance to students," and that, in any event, if a limited public forum had thereby been created a teachers union rivaling the exclusive bargaining representative could still be excluded as not being "of a similar character" to the civic groups.[79] Less problematic was the Court's conclusion that utility poles and other municipal property did not constitute a public forum for the posting of signs.[80] More problematic was the Court's conclusion that the Combined Federal Campaign, the Federal Government's forum for coordinated charitable solicitation of federal employees, is not a limited public forum. Exclusion of various advocacy groups from participation in the Campaign was upheld as furthering "reasonable" governmental interests in offering a forum to "traditional health and welfare charities," avoiding the appearance of governmental favoritism of particular groups or viewpoints, and avoiding disrup-

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[76] *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

[77] 460 U.S. at 46.

[78] Id.

[79] *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). This was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and by Justices Blackmun, Rehnquist, and O'Connor, and with Justice Brennan's dissent being joined by Justices Marshall, Powell, and Stevens.

[80] *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding an outright ban on use of utility poles for signs). The Court noted that "it is of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum." Id., at 815 n.32.

tion of the federal workplace by controversy.[81] The Court pinpointed the government's intention as the key to whether a public forum has been created: "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." [82] Thus, apparently, the government has wide discretion in maintaining the nonpublic character of its forums, and may regulate in ways that would be impermissible were it to designate a limited public forum.

[P. 1126, add to N. 19:]

Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984).

[P. 1126, add to N. 23:]

These principles apply only to the traditional public forum and to the governmentally created "limited public forum." Government may, without creating a limited public forum, place "reasonable" restrictions on access to nonpublic areas. See, e.g. *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983) (use of school mail system); and *Cornelius* v. *NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985) (charitable solicitation of federal employees at workplace).

[P. 1127, add to N. 1:]

The military may ban a civilian, previously convicted of destroying government property, from reentering a military base, and may apply the ban to prohibit the civilian from reentering the base for purposes of peaceful demonstration during an Armed Forces Day "open house." *United States* v. *Albertini*, 472 U.S. 675 (1985).

— Quasi-Public Places

[P. 1130, add to N. 12:]

But *cf. Pacific Gas & Elec.* v. *Public Utilities Comm'n*, 475 U.S. 1 (1986), holding that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees, a majority of Justices distinguishing *PruneYard* as not involving such forced association with others' beliefs.

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[81] *Cornelius* v. *NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985). Precedential value of *Cornelius* may be subject to question, since it was decided by 4–3 vote, the nonparticipating Justices (Marshall and Powell) having dissented in *Perry*. Justice O'Connor wrote the opinion of the Court, joined by Chief Justice Burger and by Justices White and Rehnquist. Justice Blackmun, joined by Justice Brennan dissented, and Justice Stevens dissented separately.

[82] 87 L.Ed.2d at 580. See also Justice Blackmun's criticism of "the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers." Id., at 587.

— Leafleting, Handbilling, and the Like

[P. 1138, add to end of section:]

The handbilling cases were distinguished in *City Council* v. *Taxpayers for Vincent*,[83] in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. While a city's concern over visual blight could be addressed by an anti-littering ordinance not restricting the expressive activity of distributing handbills, in the case of posting signs "it is the medium of expression itself" that creates the visual blight. Hence, a prohibition on posting signs, unlike a prohibition on distributing handbills, is narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose.[84]

— The Problem of "Symbolic Speech"

[P. 1140, add to N. 17:]

On a different footing is expressive conduct in a place where such conduct is prohibited for reasons other than suppressing speech. See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984).

[P. 1140, add to text following N. 19:]

The Court has suggested that this standard is virtually identical to that applied to time, place, or manner restrictions on expression.[85]

Rights of Assembly and Petition

[P. 1145, add to N. 16:]

For another holding that the right to petition is not absolute, see *McDonald* v. *Smith*, 472 U.S. 479 (1985) (the fact that defamatory statements were made in the context of a petition to government does not provide absolute immunity for a defendant to a libel action).

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[83] 466 U.S. 789 (1984).

[84] Justice Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.

[85] *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298 & n.8 (1984) (upholding Park Service restriction on overnight sleeping as applied to demonstrators wishing to call attention to the plight of the homeless).

FOURTH AMENDMENT

History and Scope of the Amendment

— The Interest Protected

[P. 1162, add to N. 15:]

Maryland v. *Macon*, 472 U.S. 463 (1985) (no legitimate expectation of privacy in denying to undercover officers allegedly obscene materials offered to public in bookstore).

[P. 1163, add to N. 17:]

Hudson v. *Thomas*, 468 U.S. 517 (1984) (prison cell); *Illinois* v. *Andreas*, 463 U.S. 765 (1983) (shipping container opened and inspected by customs agents and resealed and delivered to the addressee).

[P. 1164, add to N. 23:]

There is also a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel. *California* v. *Carney*, 471 U.S. 386 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not adapted for immediate vehicular use).

— Arrests and Other Detentions

[P. 1164, add to N. 4:]

Hayes v. *Florida*, 470 U.S. 811 (1985) (officers went to suspect's home and took him to police station for fingerprinting).

[P. 1166, add to N. 10:]

And see *Hayes* v. *Florida*, 470 U.S. 811, 815 (1985), suggesting in dictum that a "narrowly circumscribed procedure for fingerprinting detentions on less than probable cause" may be permissible.

— Searches and Inspections in Noncriminal Cases

[P. 1169, add to N. 24:]

But *cf. Michigan* v. *Clifford*, 464 U.S. 287 (1984) (no such justification for search of private residence begun at 1:30 p.m. when fire had been extinguished at 7 a.m.).

[P. 1169, add to text following N. 24:]

No such requirements limit searches of prison cells by prison administrators, the Court having held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." [1] Thus, prison administra-

[1] *Hudson* v. *Thomas*, 468 U.S. 517, 526 (1984).

tors may conduct random "shakedown" searches of inmates' cells without the need to adopt any established practice or plan, and inmates must look to the Eighth Amendment or to state tort law for redress against harassment, malicious property destruction, and the like.

Searches and Seizures Pursuant to Warrant

— Probable Cause

[P. 1174, add new paragraph at end of section:]

The Court has now expressly abandoned the two-part *Aguilar-Spinelli* test and returned to the "totality of the circumstances" approach to evaluate probable cause based on an informant's tip.[2] The main defect of the two-part test, Justice Rehnquist concluded for the Court, was in treating an informant's reliability and his basis for knowledge as independent requirements. Instead, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." [3] In evaluating probable cause, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." [4]

Without further changing the probable cause standard, the Court in *United States* v. *Leon* [5] announced a rule severely limiting the principal remedy for issuance of an invalid warrant. Because "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," and because the Court could perceive "no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate," [6] most evidence seized pursuant to an invalid warrant is nonetheless admissible. In effect, evidence is to be excluded only if "the executing officers cannot reasonably presume it to be valid." This is the case only if the issuing magistrate or judge "was misled by information

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[2] *Illinois* v. *Gates*, 462 U.S. 213 (1983) (Justice Rehnquist's opinion of the Court was joined by Chief Justice Burger and by Justices Blackmun, Powell, and O'Connor. Justices Brennan, Marshall, and Stevens dissented.

[3] 462 U.S. at 213.

[4] 462 U.S. at 238.

[5] 468 U.S. 897 (1984).

[6] 468 U.S. at 916.

in an affidavit that the affiant knew was false or should have known was false except for his reckless disregard of the truth," if the affidavit was " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,' " if the warrant itself was "facially deficient" (e.g., lacking in particularity), or if "the issuing magistrate wholly abandoned his judicial role." [7]

— First Amendment Bearing on Probable Cause and Particularity

[P. 1176, add to N. 4:]

These special constraints are inapplicable when obscene materials are purchased, and there is consequently no Fourth Amendment search or seizure. *Maryland* v. *Macon*, 472 U.S. 463 (1985).

[P. 1176, add to N. 5:]

But *cf. New York* v. *P.J. Video, Inc.*, 475 U.S. —, 89 L.Ed.2d 871, 880 n. 6 (1986), rejecting the defendant's assertion, based on *Heller*, that only a single copy rather than all copies of allegedly obscene movies should have been seized pursuant to warrant.

[P. 1176, add to text following N. 5:]

The Court has determined in *New York* v. *P.J. Video, Inc.* [8] that no higher standard of probable cause is required in order to obtain a warrant to seize materials protected by the First Amendment. "Our reference in *Roaden* to a 'higher hurdle . . . of reasonableness' was not intended to establish a 'higher' standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the 'exigency' exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate who has 'focus[ed] searchingly on the question of obscenity.' " [9]

— Property Subject to Seizure

[P. 1178, add to text following N. 19:]

However, some medically assisted bodily intrusions have been held impermissible, e.g., forcible administration of an emetic to induce vomiting,[10] and surgery under general anesthetic to remove

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[7] 468 U.S. at 897. The internal quotation is from *Brown* v. *Illinois*, 422 U.S. 590, 610–11 (1975); the reference to a magistrate abandoning his judicial role was illustrated by reference to *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979) (see main text, p. 1171 n. 6).

[8] 475 U.S. —, 89 L.Ed.2d 871 (1986).

[9] 89 L.Ed.2d at 880 n. 6.

[10] *Rochin* v. *California*, 342 U.S. 165 (1952).

a bullet lodged in a suspect's chest.[11] Factors to be weighed in determining which medical tests and procedures are reasonable include the extent to which the procedure threatens the individual's safety or health, "the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and the importance of the evidence to the prosecution's case.[12]

Valid Searches and Seizures Without Warrants

— Detention Short of Arrest: Stop and Frisk

[P. 1184, add to N. 16:]

United States v. *Hensley*, 469 U.S. 221 (1985) (reasonable suspicion to stop a motorist may be based on a "wanted flyer" as long as issuance of the flyer has been based on reasonable suspicion).

[P. 1185, add new paragraphs at end of section:]

A *Terry* search need not be limited to a stop and frisk of the person, but may extend as well to a protective search of the passenger compartment of a car if an officer possesses "a reasonable belief, based on specific and articulable facts . . . that the suspect is dangerous and . . . may gain immediate control of weapons." [13]

How lengthy a *Terry* detention may be varies with the circumstances. In approving a 20-minute detention of a driver made necessary by the driver's own evasion of drug agents and a state police decision to hold the driver until the agents could arrive on the scene, the Court indicated that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." [14]

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[11] *Winston* v. *Lee*, 470 U.S. 753 (1985).

[12] *Winston* v. *Lee*, 470 U.S. 753, 761-63 (1985). Chief Justice Burger concurred on the basis of his reading of the Court's opinion "as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally." Id., at 767. *Cf. United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985).

[13] *Michigan* v. *Long*, 463 U.S. 1032 (1983) (suspect appeared to be under the influence of drugs, officer spied hunting knife exposed on floor of front seat and searched remainder of passenger compartment).

[14] *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985). A more relaxed standard has been applied to detention of travelers at the border, the Court testing the reasonableness in terms of "the period of time necessary to either verify or dispel the suspicion." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 544 (1985) (approving warrantless detention for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

The Court has now elaborated on the principles governing detention of luggage at airports in order to detect the presence of drugs, indicating that the *Terry* "limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause." [15] The general rule is that "when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* . . . would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." [16] Seizure of luggage for an expeditious "canine sniff" by a dog trained to detect narcotics can satisfy this test even though seizure of luggage is in effect detention of the traveler, since the procedure results in "limited disclosure," impinges only slightly on a traveler's privacy interest in the contents of personal luggage, and does not constitute a search within the meaning of the Fourth Amendment.[17] By contrast, taking a suspect to an interrogation room on grounds short of probable cause, retaining his air ticket, and retrieving his luggage without his permission taints consent given under such circumstances to open the luggage, since by then the detention had exceeded the bounds of a permissible *Terry* investigative stop and amounted to an invalid arrest.[18] The same requirements for brevity of detention and limited scope of investigation are apparently inapplicable to border searches of international travelers, the Court having approved a 24 hour detention of a traveler suspected of smuggling drugs in her alimentary canal.[19]

— Search Incident to Arrest

[P. 1187, add to text following sentence containing N. 7:]

But in spite of the holding in *Chadwick*, police may in the course of jailing an arrested suspect conduct an inventory search of the individual's personal effects, including the contents of a shoulder bag.[20]

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[15] *United States* v. *Place*, 462 U.S. 696, 709 (1983).

[16] Id., at 706.

[17] 462 U.S. at 707. However, the search in *Place* was not expeditious, and hence exceeded Fourth Amendment bounds, when agents took 90 minutes to transport luggage to another airport for administration of the canine sniff.

[18] *Florida* v. *Royer*, 460 U.S. 491 (1983). On this much the plurality opinion of Justice White (id., at 503), joined by three other Justices, and the concurring opinion of Justice Brennan (id., at 509) were in agreement.

[19] *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985).

[20] *Illinois* v. *LaFayette*, 462 U.S. 640 (1983) (inventory search) (following *South Dakota* v. *Opperman*, 428 U.S. 364 (1976)).

— Vehicular Searches

[P. 1188, add to text following N. 15:]

While motor homes do serve as residences and as repositories for personal effects, and while their contents are often shielded from public view, the Court has extended the automobile exception to them as well, holding that there is a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel, hence "readily mobile." [21]

[P. 1189, add to text following N. 17:]

Once they have stopped a vehicle, police may also, based on articulable facts warranting a reasonable belief that weapons may be present, conduct a *Terry*-type protective search of those portions of the passenger compartment in which a weapon could be placed or hidden.[22] And, in the absence of such reasonable suspicion as to weapons, police may seize contraband and suspicious items "in plain view" inside the passenger compartment.[23]

[P. 1190, add to N. 24:]

A *Ross* search of a container found in an automobile need not occur soon after its seizure. *United States* v. *Johns*, 469 U.S. 478 (1985) (three-day time lapse).

[P. 1190, add new section before Consent Searches:]

— Vessel Searches

Not only is the warrant requirement inapplicable to brief stops of vessels, but also none of the safeguards applicable to stops of automobiles on less than probable cause are necessary predicates to stops of vessels. In *United States* v. *Villamonte-Marquez*,[24] the

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[21] *California* v. *Carney*, 471 U.S. 386, 393 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not "readily mobile").

[22] *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) (holding that contraband found in the course of such a search is admissible).

[23] *Texas* v. *Brown*, 460 U.S. 730 (1983). Similarly, since there is no reasonable privacy interest in the vehicle identification number, required by law to be placed on the dashboard so as to be visible through the windshield, police may reach into the passenger compartment to remove items obscuring the number and may seize items in plain view while doing so. *New York* v. *Class*, 475 U.S. 106 (1986).

[24] 462 U.S. 579 (1983). The opinion of the Court, written by Justice Rehnquist, was joined by Chief Justice Burger and by Justices White, Blackmun, Powell, and O'Connor. Justice Brennan's dissent was joined by Justice Marshall and, on mootness but not on the merits, by Justice Stevens.

Court upheld a random stop and boarding of a vessel by customs agents, lacking any suspicion of wrongdoing, for purpose of inspecting documentation. The boarding was authorized by statute derived from an act of the First Congress,[25] and hence had "an impressive historical pedigree" carrying with it a presumption of constitutionality. Moreover, "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" justify application of a less restrictive rule for vessel searches. The reason why random stops of vehicles have been held impermissible under the Fourth Amendment, the Court explained, is that stops at fixed checkpoints or roadblocks are both feasible and less subject to abuse of discretion by authorities. "But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do." [26] Because there is a "substantial" governmental interest in enforcing documentation laws, "especially in waters where the need to deter or apprehend smugglers is great," the Court found the "limited" but not "minimal" intrusion occasioned by boarding for documentation inspection to be reasonable.[27] Dissenting Justice Brennan argued that the Court for the first time was approving "a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any limitations whatever on the officers' discretion or any safeguards against abuse." [28]

— Consent Searches

[P. 1190, add to N. 5:]

United States v. *Karo*, 468 U.S. 705 (1984) (installation of beeper with consent of informer who sold container with beeper to suspect is permissible with prior judicial approval, but use of beeper to monitor private residence is not).

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[25] 19 U.S.C. § 1581(a), derived from § 31 of the Act of Aug. 4, 1790, 1 Stat. 164.

[26] 462 U.S. at 589. Justice Brennan's dissent argued that a fixed checkpoint was feasible in this case, involving a ship channel in an inland waterway. Id., at 608 n. 10. The fact that the Court's rationale was geared to the difficulties of law enforcement in the open seas suggests a reluctance to make exceptions to the general rule. Note as well the Court's later reference to this case as among those "reflect[ing] longstanding concern for the protection of the integrity of the border." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

[27] 462 U.S. at 593.

[28] 462 U.S. at 598. Justice Brennan contended that all previous cases had required some "discretion-limiting" feature such as a requirement of probable cause, reasonable suspicion, fixed checkpoints instead of roving patrols, and limitation of border searches to border areas, and that these principles set forth in *Delaware* v. *Prouse* (*supra* p. 1189, n. 17) should govern. Id., at 599, 601.

— Border Searches

[P. 1191, add to text following N. 9:]

Prolonged detention of travelers beyond the routine customs search and inspection may be justified by the *Terry* standard: reasonable suspicion having a particularized and objective basis.[29] However, *Terry* protections as to the length and intrusiveness of the search do not apply.[30]

[P. 1192, add to text following N. 13:]

Once a shipping container has been opened by customs agents in a lawful border search, no protectable privacy interest is created by its resealing and delivery under police surveillance.[31]

— Open Fields

[P. 1192, add at end of section:]

The Court, invoking *Hester*'s reliance on the literal wording of the Fourth Amendment and distinguishing *Katz*, has now ruled that the open fields exception applies to fields that are fenced and posted. "[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." [32] And in the area immediately surrounding the home there is no reasonable expectation of privacy from naked-eye inspection from navigable airspace even when the owner has gone to the extreme of erecting a 10-foot high fence in order to screen the area from ground-level view.[33] Aerial photography of commercial facilities secured from ground-level public view is permissible, the Court finding such spaces more analogous to open fields than to the curtilage of a dwelling.[34]

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[29] *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985) (approving warrantless detention incommunicado for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

[30] Id. Traveler suspected of alimentary canal drug smuggling was strip searched, and then given choice between abdominal x-ray or monitored bowel movement. Because the suspect chose the latter option, the court disavowed decision as to "what level of suspicion, if any, is required for . . . strip, body cavity, or involuntary x-ray searches." Id., at 541 n. 4.

[31] *Illinois* v. *Andreas*, 463 U.S. 765 (1983).

[32] *Oliver* v. *United States*, 466 U.S. 170, 178 (1984) (approving warrantless intrusion past no trespassing signs and around locked gate, to view field not visible from outside property).

[33] *California* v. *Ciraolo*, 476 U.S. —, 90 L.Ed.2d 210 (1986).

[34] *Dow Chemical Co.* v. *United States*, 476 U.S. —, 90 L.Ed.2d 226 (1986) (suggesting that aerial photography of the curtilage would be impermissible).

— "Plain View"

[P. 1192, add to N. 16:]

Texas v. *Brown*, 460 U.S. 730 (1983) (contraband on car seat in plain view of officer who had stopped car and asked for driver's license); *New York* v. *Class*, 475 U.S. 106 (1986) (evidence seen while looking for vehicle identification number).

[P. 1193, add to text following N. 17:]

The Court has analogized from the plain view doctrine to hold that once officers have lawfully observed contraband, "the owner's privacy interest in that item is lost," and officers may reseal a container, trace its path through a controlled delivery, and seize and reopen the container without a warrant.[35]

[P. 1193, add new section preceding "Electronic Surveillance":]

— Public Schools

In *New Jersey* v. *T.L.O.*,[36] the Court set forth the principles governing searches by public school authorities. The Fourth Amendment applies to searches conducted by public school officials because "school officials act as representatives of the State, not merely as surrogates for the parents." [37] However, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." [38] Neither the warrant requirement nor the probable cause standard is appropriate, the court ruled. Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities.[39] A search must be reasonable at its inception, i.e., there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." [40] School searches must also be reasonably

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[35] *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983) (locker customs agents had opened, and which was subsequently traced). Accord, *United States* v. *Jacobsen*, 466 U.S. 109 (1984) (inspection of package opened by private freight carrier who notified drug agents).

[36] 469 U.S. 325 (1985).

[37] 469 U.S. at 336 (1984).

[38] 469 U.S. at 340.

[39] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." Id., at n. 9.

[40] 469 U.S. at 342.

related in scope to the circumstances justifying the interference, and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." [41] In applying these rules, the Court upheld as reasonable the search of a student's purse to determine whether the student, accused of violating a school rule by smoking in the lavatory, possessed cigarettes. The search for cigarettes uncovered evidence of drug activity held admissible in a prosecution under the juvenile laws.

Electronic Surveillance and the Fourth Amendment

— The *Berger* and *Katz* Cases

[P. 1197, add to N. 18:]

Two "beeper" decisions support the general applicability of the warrant requirement if electronic surveillance will impair legitimate privacy interests. Compare *United States* v. *Knotts*, 460 U.S. 276 (1983) (no Fourth Amendment violation in relying on a beeper, installed without warrant, to aid in monitoring progress of a car on the public roads, since there is no legitimate expectation of privacy in destination of travel on the public roads), with *United States* v. *Karo*, 468 U.S. 705 (1984) (beeper installed without a warrant may not be used to obtain information as to the continuing presence of an item within a private residence).

Enforcing the Fourth Amendment: The Exclusionary Rule

— The Critics of the Exclusionary Rule

[P. 1209, add to N. 1:]

In *Segura* v. *United States*, 468 U.S. 796 (1984), evidence seized pursuant to warrant obtained after an illegal entry was admitted because there had been an independent basis for issuance of a warrant. See also *United States* v. *Karo*, 468 U.S. 705 (1984) (excluding consideration of tainted evidence, there was sufficient untainted evidence in affidavit to justify finding of probable cause and issuance of search warrant).

[P. 1210, add to N. 4:]

Similarly, the rule is inapplicable in civil proceedings for deportation of aliens. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984).

[P. 1210, add at end of section:]

A "good faith" exception to the exclusionary rule has now been adopted by the Court. In *United States* v. *Leon*,[42] the Court created an exception for evidence obtained as a result of officers' objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate. It is unclear from the Court's analysis whether a majority of the Justices would also sup-

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[41] Id.

[42] 468 U.S. 897 (1984).

port a good-faith exception for evidence seized without a warrant.[43] Justice White's opinion for the Court [44] could find little benefit in applying the exclusionary rule where there has been good-faith reliance on an invalid warrant. Thus, there was nothing to offset the "substantial social costs exacted by the [rule]." [45] "The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," and in any event the Court considered it unlikely that the rule could have much deterrent effect on the actions of truly neutral magistrates.[46] Moreover, the Court thought that the rule should not be applied "to deter objectively reasonable law enforcement activity," and that "[p]enalizing the officer for the magistrate's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations." [47] The Court also suggested some circumstances in which courts would be unable to find that officers' reliance on a warrant was objectively reasonable: if the officers have been "dishonest or reckless in preparing their affidavit," if it should have been obvious that the magistrate had "wholly abandoned" his neutral role, or if the warrant was obviously deficient on its face (e.g., lacking in particularity). The Court applied the *Leon* standard in *Massachusetts* v. *Sheppard*,[48] holding that an officer possessed an objectively reasonable belief that he had a valid warrant after he had pointed out to the magistrate that he had not used the standard form, and the magistrate had indicated that the necessary changes had been incorporated in the issued warrant.

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[43] The whole thrust of analysis dealt with reasonableness of reliance on a warrant. The Court several times, however, used language broad enough to apply to warrantless searches as well. See, e.g., 468 U.S. at 909 (quoting Justice White's concurrence in *Illinois* v. *Gates*): "the balancing approach that has evolved . . . 'forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment"; and Id., at 919: "[the rule] cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."

[44] The opinion was joined by Chief Justice Burger, and by Justices Blackmun, Powell, Rehnquist, and O'Connor. Justice Blackmun also added a separate concurring opinion. Dissents were filed by Justice Brennan, joined by Justice Marshall, and by Justice Stevens.

[45] 468 U.S. at 907.

[46] 468 U.S. at 916–17.

[47] 468 U.S. at 919, 921.

[48] 468 U.S. 981 (1984).

FIFTH AMENDMENT

INDICTMENT BY GRAND JURY

[P. 1220, add to N. 4:]

Ex parte Bain was overruled in *United States* v. *Miller*, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible.

[P. 1220, add to text following N. 4:]

While additions to offenses alleged in an indictment are prohibited, the Court has now ruled that it is permissible "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it," as, e.g., a lesser included offense.[1]

DOUBLE JEOPARDY

Development and Scope

[P. 1224, add to text following N. 18:]

The dual sovereignty doctrine has now been applied to permit successive prosecutions by two states for the same conduct.[2]

[P. 1224, add to N. 19:]

In determining whether a forfeiture proceeding is remedial or punitive, congressional preference for a civil sanction will be overridden only by "the clearest proof" to the contrary. *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

Reprosecution Following Acquittal

— Acquittal by the Trial Judge

[P. 1233, add to N. 13:]

Smalis v. *Pennsylvania*, 476 U.S. —, 90 L.Ed.2d 116 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

Reprosecution Following Conviction

— Reprosecution After Reversal on Defendant's Appeal

[P. 1237, add to N. 9:]

But cf. Morris v. *Mathews*, 475 U.S. —, 89 L.Ed.2d 187 (1986): inadequate showing of prejudice resulting from reducing jeopardy-barred conviction for aggravated

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[1] *United States* v. *Miller*, 471 U.S. 130, 144 (1985).

[2] *Heath* v. *Alabama*, 474 U.S. —, 88 L.Ed.2d 387 (1985) (defendant crossed state line in course of kidnap murder, was prosecuted for murder in both states).

murder to non-jeopardy-barred conviction for first degree murder; "to prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." Id. at 197.

[P. 1237, add to N. 11:]

Burks was distinguished in *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984), holding that a defendant who had elected to undergo a bench trial with no appellate review but with right of trial de novo before a jury (and with appellate review available) could not bar trial de novo and reverse his bench trial conviction by asserting that the conviction had been based on insufficient evidence. The two-tiered system in effect gave the defendant two chances at acquittal; under those circumstances jeopardy was not terminated by completion of the first entirely optional stage.

— Sentence Increases

[P. 1238, add to N. 17:]

Bullington was followed in *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), also involving a separate sentencing proceeding in which a life imprisonment sentence amounted to an acquittal on imposition of the death penalty. *Rumsey* was decided by 7–2 vote, with only Justices White and Rehnquist dissenting.

"For the Same Offence"

— Legislative Discretion as to Multiple Sentences

[P. 1239, add to text following N. 3:]

The Court has now indicated that "[w]here a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial." [3]

[P. 1240, add to N. 4:]

See also *Garrett* v. *United States*, 471 U.S. 773 (1985), holding that there was clear congressional intent in the framework of the statute and in legislative history that "continuing criminal enterprise" be a separate offense under the Comprehensive Drug Abuse Prevention and Control Act of 1970.

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[3] *Missouri* v. *Hunter*, 459 U.S. 359 (1983) (separate offenses of "first degree robbery," defined to include robbery under threat of violence, and "armed criminal action"). Only Justice Marshall, joined by Justice Stevens, dissented, arguing that the legislature should not be totally free to prescribe multiple punishment for the same conduct, and that the same rules should govern multiple prosecutions and multiple punishments.

— Successive Prosecutions for "the Same Offense"

[P. 1241, add to N. 14:]

And see *Ohio* v. *Johnson*, 467 U.S. 493 (1984) (trial court's acceptance of guilty plea to lesser included offense and dismissal of remaining charges over prosecution's objections does not bar subsequent prosecution on those "remaining" counts).

SELF-INCRIMINATION

Development and Scope

[P. 1246, add to N. 15:]

And *cf. United States* v. *Rylander*, 460 U.S. 752 (1983) (witness who had failed to appeal production order and thus had burden in contempt proceeding to show inability to then produce records could not rely on privilege to shift this evidentiary burden).

[P. 1246, add to text following N. 16:]

Conversely, there is no valid claim on the ground that the information sought can be used in proceedings which are not criminal in nature.[4]

[P. 1247, add to N. 18:]

In *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the Court indicated as well that a State may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and may also give the suspect a choice about whether to submit but use his refusal to submit to the test as evidence against him. The Court rested its evidentiary ruling on absence of coercion, preferring not to apply the sometimes difficult distinction between testimonial and physical evidence.

[P. 1247, add to N. 19:]

In *United States* v. *Doe*, 465 U.S. 605 (1984), the Court distinguished *Fisher*, upholding lower courts' findings that the act of producing tax records implicates the privilege because it would compel admission that the records exist, that they were in the taxpayer's possession, and that they are authentic.

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[4] *Allen* v. *Illinois*, 478 U.S. —, 92 L.Ed.2d 296 (1986) (declaration that person is "sexually dangerous" under Illinois law is not a criminal proceeding); *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7 (1984) (revocation of probation is not a criminal proceeding, hence "there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings"). In *Murphy*, the Court went on to explain that "a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake' . . . and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer . . . ." Id.

[P. 1247, add to N. 20:]

See also *South Dakota* v. *Neville*, 459 U.S. 553 (1983) (no compulsion in introducing evidence of suspect's refusal to submit to blood alcohol test, since state could have forced suspect to take test and need not have offered him a choice); *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) (no coercion in requirement that applicants for federal financial assistance for higher education reveal whether they have registered for draft).

[P. 1248, add to N. 25:]

Carter v. *Kentucky* was applied in *James* v. *Kentucky*, 466 U.S. 341 (1983) (request for jury "admonition" sufficient to invoke right to "instruction").

[P. 1248, add to text following sentence containing N. 25:]

Prosecutors' comments violating the *Griffin* rule can nonetheless constitute harmless error.[5]

[P. 1248, add to N. 1:]

The same principles apply to bar a prosecutor's use of *Miranda* silence as evidence of an arrestee's sanity. *Wainwright* v. *Greenfield*, 474 U.S. —, 88 L.Ed.2d 623 (1986).

The Power to Compel Testimony and Disclosure

— Immunity

[P. 1254, add to N. 18:]

Justice Department officials have the authority under the Act to decide whether to seek immunity, and courts will not apply "constructive" use immunity absent compliance with the statute's procedures. *United States* v. *Doe*, 465 U.S. 605 (1984).

[P. 1255, add to N. 21:]

Because use immunity is limited, a witness granted use immunity for grand jury testimony may validly invoke his Fifth Amendment privilege in a civil deposition proceeding when asked whether he had "so testified" previously, the deposition testimony not being covered by the earlier immunity. *Pillsbury Co.* v. *Conboy*, 459 U.S. 248 (1983).

Confessions

— Miranda v. Arizona

[P. 1274, add to N. 23:]

See also *Minnesota* v. *Murphy*, 465 U.S. 420 (1984) (required reporting to probationary officer is not custodial situation).

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[5] *Chapman* v. *California*, 386 U.S. 18 (1967); *United States* v. *Hasting*, 461 U.S. 499 (1983).

[P. 1274, add to N. 25:]

Berkemer v. *McCarty*, 468 U.S. 420, 440 (1984) (roadside questioning of motorist stopped for traffic violation is not custodial interrogation until his "freedom of action is curtailed to a 'degree associated with formal arrest' ").

[P. 1276, add to N. 11:]

In *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983), the Court held, albeit without a majority of Justices in complete agreement as to rationale, that an accused who had initiated further conversations with police had knowingly and intelligently waived his right to have counsel present. The Court has held that *Edwards* should not be applied retroactively, *Solem* v. *Stumes*, 465 U.S. 638 (1984), but that *Edwards* does apply to cases pending on appeal at the time it was decided. *Shea* v. *Louisiana*, 470 U.S. 51 (1985).

[P. 1276, add to N. 12:]

Also, waivers signed by the accused following *Miranda* warnings are not vitiated by police having kept from the accused information that an attorney had been retained for him by a relative. *Moran* v. *Burbine*, 475 U.S. —, 89 L.Ed.2d 410 (1986).

[P. 1277, add to N. 18:]

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the Court held that a confession following a *Miranda* warning is not necessarily tainted by an earlier confession obtained without a warning, as long as the earlier confession had been voluntary. And see *Moran* v. *Burbine*, 475 U.S. —, 89 L.Ed.2d 410 (1986) (signed waivers following *Miranda* warnings not vitiated by police having kept from suspect information that attorney had been retained for him by relative).

[P. 1278, add to text at end of section:]

The Court has created a "public safety" exception to the *Miranda* warning requirement, but has refused to create another exception for misdemeanors and lesser offenses. In *New York* v. *Quarles*,[6] the Court held admissible a recently apprehended suspect's response in a public supermarket to the arresting officer's demand to know the location of a gun that the officer had reason to believe the suspect had just discarded or hidden in the supermarket. The Court, in an opinion by Justice Rehnquist,[7] declined to place officers in the "untenable position" of having to make instant decisions as to whether to proceed with *Miranda* warnings and thereby increase the risk to themselves or to the public or whether to dispense with the warnings and run the risk that resulting evidence will be excluded at trial. While acknowledging that the exception itself will "lessen the desirable clarity of the

[6] 467 U.S. 649 (1984).

[7] The Court's opinion was joined by Chief Justice Burger and by Justices White, Blackmun, and Powell. Justice O'Connor would have ruled inadmissible the suspect's response, but not the gun retrieved as a result of the response, and Justices Marshall, Brennan, and Stevens dissented.

rule," the Court predicted that confusion would be slight: "[w]e think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." [8] No such compelling justification was offered for a *Miranda* exception for lesser offenses, however, and protecting the rule's "simplicity and clarity" counseled against creating one.[9] "[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." [10]

DUE PROCESS

Substantive Due Process

— Discrimination

[P. 1297, add to N. 11 following *Richardson* v. *Belcher* citation:]

Lyng v. *Castillo*, 477 U.S. —, 106 S. Ct. 2727 (1986) (Food Stamp Act limitation of benefits to households of related persons who prepare meals together).

[P. 1297, add to N. 13:]

Wayte v. *United States*, 470 U.S. 598 (1985) (selective prosecution of persons who turned themselves in or were reported by others as having failed to register for the draft does not deny equal protection, there being no showing that these men were selected for prosecution because of their protest activities).

— Retroactive Taxes

[P. 1303, add to N. 13:]

Untermyer was distinguished in *United States* v. *Hemme*, 476 U.S. —, 90 L.Ed.2d 538 (1986), upholding retroactive application of unified estate and gift taxation to a taxpayer as to whom the overall impact was minimal and not oppressive.

— Deprivation of Property: Retroactive Legislation

[P. 1303, add to end of first paragraph in section:]

The Court has applied *Turner Elkhorn* in upholding retroactive application of pension plan termination provisions to cover the period of congressional consideration, declaring that the test for retroactive application of legislation adjusting economic burdens is merely whether "the retroactive application . . . is itself justified by a rational legislative purpose." [11]

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[8] 467 U.S. at 658–59.
[9] *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984).
[10] 468 U.S. at 434.
[11] *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

[P. 1304, add to N. 23:]

A different situation is presented where Congress has reserved the right to amend an agreement. *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. —, 91 L.Ed.2d 35 (1986) (amendment of social security act to prevent termination by state when termination notice already filed).

NATIONAL EMINENT DOMAIN POWER

Public Use

[P. 1310, add to N. 4:]

And see *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

[P. 1313, add to text at end of section:]

Berman was applied in *Hawaii Housing Auth.* v. *Midkiff*,[12] upholding the Hawaii Land Reform Act as a "rational" effort to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly." Direct transfer of land from lessors to lessees was permissible, the Court held, there being no requirement "that government possess and use property at some point during a taking." [13] "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," the Court concluded.[14]

Just Compensation

[P. 1314, add to N. 6:]

Fair market value does not include the cost of "substitute" facilities. *United States* v. *50 Acres of Land*, 469 U.S. 24 (1984).

— Interest

[P. 1315, add to N. 13:]

Kirby Forest Industries v. *United States*, 467 U.S. 1 (1984) (no interest due in straight condemnation action for period between filing of notice of *lis pendens* and date of taking).

[P. 1315, add to N. 14:]

Kirby Forest Industries v. *United States*, 467 U.S. 1 (1984) (substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment).

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[12] 467 U.S. 229, 243 (1984).

[13] 467 U.S. at 243.

[14] 467 U.S. at 240. *See also Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a "conceivable public character").

— Rights for Which Compensation Must Be Paid

[P. 1317, add to text following N. 25:]

Trade secrets protected under state law are intangible property protected by the Taking Clause.[15] However, there was no property in a state's right to withdraw from the social security program when Congress had expressly reserved the right to amend the law and the agreement with the state.[16]

When Property Is Taken

— Police Power vs. Eminent Domain Power

[P. 1326, add to N. 12:]

See also *United States* v. *Riverside Bayview Homes*, 474 U.S. —, 88 L.Ed.2d 419 (1985) (permit requirement for filling wetlands is not a taking).

[P. 1327, add to N. 18:]

United States v. *Locke*, 471 U.S. 84 (1984) (reasonable regulation of recordation of mining claim is not a taking).

[P. 1327, add new paragraph to text following N. 18:]

In the 1982–1985 terms the Court twice relied on the concept of "distinct (or "reasonable") investment-backed expectations" first introduced in *Penn Central*. In *Ruckelshaus* v. *Monsanto Co.*,[17] the Court used the concept to determine whether a taking had occurred by the government's disclosure of trade secret information submitted with applications for pesticide registrations. Disclosure of data that had been submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and thus "formed the basis of a reasonable investment-backed expectation," would have destroyed the property value of the trade secret and constituted a taking.[18] Following 1978 amendments setting forth conditions of data disclosure, however, applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality.[19] Rely-

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[15] *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984).

[16] *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. —, 91 L.Ed.2d 35 (1986).

[17] 467 U.S. 986 (1984).

[18] 467 U.S. at 1011.

[19] 467 U.S. at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against "unauthorized" disclosure. Id., 1008–10.

ing less heavily on the concept but rejecting an assertion that reasonable investment backed-expectations had been upset, the Court in *Connolly* v. *Pension Benefit Guaranty Corp.*,[20] upheld retroactive imposition of liability for pension plan withdrawal on the basis that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits.

[P. 1328, add to text at end of section:]

The issue of what remedy is appropriate for temporary regulatory takings remains unsettled, and the Court's holdings in cases seeking to raise the issue place considerable obstacles in the paths of future litigants challenging regulatory restrictions on land use. Such taking claims may easily be considered premature. In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*,[21] the landowner had failed to seek a variance following a planning commission's rejection of a subdivision plat, and had failed to pursue state inverse condemnation procedures. Similarly, in *MacDonald, Sommer & Frates* v. *County of Yolo*,[22] the landowner had failed to obtain a "final and authoritative determination of the type and intensity of development legally permitted on the . . . property." As the Court explained, "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." [23]

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[20] 475 U.S. —, 89 L.Ed.2d 166 (1986).

[21] 473 U.S. 172 (1985).

[22] 477 U.S. —, 91 L.Ed.2d 285 (1986).

[23] 91 L.Ed.2d at 294.

SIXTH AMENDMENT

Right to a Speedy and Public Trial

— Speedy Trial

[P. 1333, add to N. 6:]

Marion and *MacDonald* were applied in *United States* v. *Loud Hawk*, 474 U.S. —, 88 L.Ed.2d 640 (1986), holding the speedy trial guarantee inapplicable to the period during which the government appealed dismissal of an indictment, since during that time the suspect had not been subject to bail or otherwise restrained.

[P. 1335, add to text following N. 16:]

Delays caused by the prosecution's interlocutory appeal will be judged by the *Barker* factors, of which the second—the reason for the appeal—is the most important.[1]

— Public Trial

[P. 1337, add to text following N. 6:]

The Court has borrowed from First Amendment cases in protecting the right to a public trial. Closure of trials or pretrial proceedings over the objection of the accused may be justified only if the state can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[2] In *Waller* v. *Georgia,*[3] the Court held that an accused's Sixth Amendment rights had been violated by closure of all 7 days of a suppression hearing in order to protect persons whose phone conversations had been taped, when less than 2 and 1/2 hours of the hearing had been devoted to playing the tapes. The need for openness at suppression hearings "may be particularly strong," the Court indicated, due to the fact that the conduct of police and prosecutor is often at issue.[4] However, an ac-

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[1] *United States* v. *Loud Hawk*, 474 U.S. —, 88 L.Ed.2d 640 (1986) (no denial of speedy trial, since prosecution's position on appeal was strong, and there was no showing of bad faith or dilatory purpose). If the interlocutory appeal is taken by the defendant, he must "bear the heavy burden of showing an unreasonable delay caused by the prosecution [or] wholly unjustifiable delay by the appellate court" in order to win dismissal on speedy trial grounds. 88 L.Ed.2d at 655.

[2] *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*).

[3] 467 U.S. 39 (1984).

[4] *Waller* v. *Georgia*, 467 U.S. 39, 47 (1984) (indicating that the *Press-Enterprise I* standard governs such 6th Amendment cases).

cused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." [5]

Right to Trial by Impartial Jury

— Impartial Jury

[P. 1344, add to text following N. 5:]

The requirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves.[6]

[P. 1345, add to N. 11:]

Patton v. *Yount*, 467 U.S. 1025 (1984).

[P. 1346, add to text following N. 18:]

The proper standard for exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " [7] Thus the juror need not indicate that he would "automatically" vote against the death penalty, and his "bias [need not] be proved with 'unmistakable clarity.' " [8] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial.[9] It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this, concluding that "it is simply not pos-

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[5] *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. —, 92 L.Ed.2d 1, 13–14 (1986) (*Press-Enterprise II*).

[6] *Lockhart* v. *McCree*, 476 U.S. —, 90 L.Ed.2d 137 (1986). "We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." 90 L.Ed.2d at 147–48.

[7] *Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985), quoting *Adams* v. *Texas*, 448 U.S. 38, 45 (1980).

[8] *Wainwright* v. *Witt*, 469 U.S. at 424. Accord, *Darden* v. *Wainwright*, 477 U.S. —, 91 L.Ed.2d 144 (1986) (appropriateness of exclusion should be determined by context, including excluded juror's understanding based on previous questioning of other jurors).

[9] *Lockhart* v. *McCree*, 476 U.S. —, 90 L.Ed.2d 137 (1986).

sible to define jury impartiality . . . by reference to some hypothetical mix of individual viewpoints." [10] Moreover, the state has "an entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a] case," and need not select separate panels and duplicate evidence for the two distinct but interrelated functions.[11]

[P. 1347, add to text following N. 22:]

An exception is made for capital trials, where the risk of racial prejudice "is especially serious in light of the complete finality of the death penalty." A defendant accused of an interracial capital offense is entitled to have prospective jurors informed of the victim's race and questioned as to racial bias.[12]

Confrontation

[P. 1352, add to text following N. 15:]

The Court continues to view as "presumptively unreliable accomplices' confessions that incriminate defendants." [13]

[P. 1353, add to N. 16:]

See also *United States* v. *Inadi*, 475 U.S. —, 89 L.Ed.2d 390 (1986).

[P. 1355, add to N. 23:]

The fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability under *Roberts*, since the confessions diverged on the critical issues of the respective roles of the two defendants. *Lee* v. *Illinois*, 476 U.S. —, 90 L.Ed.2d 514 (1986).

[P. 1355, add to text following N. 23:]

Roberts was narrowed in *United States* v. *Inadi*,[14] holding that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. The latter—at least those "made while the conspiracy is in progress"—have "independent evidentiary significance of [their] own"; hence in-court testimony is not a valid substitute.[15]

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[10] 90 L.Ed.2d at 154.

[11] 90 L.Ed.2d at 152.

[12] *Turner* v. *Murray*, 476 U.S. —, 90 L.Ed.2d 27 (1986). The quote is from a section of Justice White's opinion not adopted as opinion of the Court. 90 L.Ed.2d at 36.

[13] *Lee* v. *Illinois*, 476 U.S. —, 90 L.Ed.2d 514, 526 (1986).

[14] 475 U.S. —, 89 L.Ed.2d 390 (1986).

[15] 89 L.Ed.2d at 398.

The Clause protects defendants against use of substantive evidence against them, but does not bar rebuttal of the defendant's own testimony.[16]

Assistance of Counsel

— Effective Assistance of Counsel

[P. 1364, add new paragraph to end of section:]

In *Strickland* v. *Washington*,[17] the Court articulated the test for ineffective assistance of counsel in criminal trials or in capital sentencing proceedings.[18] There are two components to the test: deficient attorney performance and prejudice to the defense so serious as to bring the outcome of the proceeding into question. Although the gauge of effective attorney performance is an objective standard of reasonableness, the Court concluded that "[j]udicial scrutiny of counsel's performance must be highly deferential." Strategic choices made after thorough investigation of relevant law and facts are "virtually unchallengeable," as are "reasonable" decisions making investigation unnecessary.[19] In order to establish prejudice resulting from attorney error, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [20] In *Strickland*, neither part of the test was satisfied. The attorney's decision to forego character and psychological evidence in the capital sentencing proceeding in order to avoid evidence of the defendant's criminal history was deemed "the result of reasonable professional judgment," and prejudice could not be shown because "the overwhelming aggravating

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[16] *Tennessee* v. *Street*, 471 U.S. 409 (1985) (use of accomplice's confession to support officer's rebuttal of defendant's testimony as to circumstances of his own confession; presence of officer assured right of cross-examination).

[17] 466 U.S. 668 (1984).

[18] *Strickland* involved capital sentencing, and the Court left open the issue of what standards might apply in ordinary sentencing, where there is generally far more discretion than in capital sentencing or in the guilt/innocence phase of a capital trial. 466 U.S. at 686.

[19] 466 U.S. at 689–91. The obligation is to stay within the wide range of legitimate, lawful, professional conduct; there is no obligation to assist the defendant in presenting perjured testimony. *Nix* v. *Whiteside*, 475 U.S. —, 89 L.Ed.2d 123 (1986). Also, "effective" assistance of counsel does not guarantee the accused a "meaningful relationship" of "rapport" with his attorney such that he is entitled to a continuance in order to change attorneys during a trial. *Morris* v. *Slappy*, 461 U.S. 1 (1983). See also *Jones* v. *Barnes*, 463 U.S. 745 (1983) (no obligation to present on appeal all nonfrivolous issues requested by defendant; appointed counsel may exercise his professional judgment in determining which issues are best raised on appeal).

[20] 466 U.S. at 694.

factors" outweighed whatever evidence of good character could have been presented.[21] In *Hill* v. *Lockhart*,[22] the Court applied the *Strickland* test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty.

There are times when prejudice may be presumed, i.e. there can be "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." [23] These situations include actual or constructive denial of counsel, and denial of such basics as the right to effective cross-examination. However, "[a]part from circumstances of that magnitude . . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice]." [24]

— Self-Representation

[P. 1364, add to end of section:]

The essential elements of self-representation were spelled out in *McKaskle* v. *Wiggins*,[25] a case involving the self-represented defendant's rights vis-a-vis "standby counsel" appointed by the trial court. The "core of the *Faretta* right" is that the defendant "is entitled to preserve actual control over the case he chooses to present to the jury," and consequently, standby counsel's participation "should not be allowed to destroy the jury's perception that the defendant is representing himself." [26] Participation of standby counsel even in the jury's presence and over the defendant's objection does not violate the defendant's Sixth Amendment rights when serving the basic purpose of aiding the defendant in complying with routine courtroom procedures and protocols and thereby relieving the trial judge of these tasks.[27]

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[21] 466 U.S. at 699. Accord, *Darden* v. *Wainwright*, 477 U.S. —, 91 L.Ed.2d 144 (1986) (decision not to introduce mitigating evidence).

[22] 474 U.S. —, 88 L.Ed.2d 203 (1985).

[23] *United States* v. *Cronic*, 466 U.S. 648, 658 (1984).

[24] 466 U.S. at 659 n.26 (finding no inherently prejudicial circumstances in appointment of real estate attorney with no criminal law experience to defend mail fraud "check kiting" charges with approximately one month's preparation time).

[25] 465 U.S. 168 (1984).

[26] 465 U.S. at 178.

[27] 465 U.S. at 184.

— Right to Assistance of Counsel in Nontrial Situations

[P. 1369, add to N. 25:]

Similarly, there is no right to counsel for prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes. *United States* v. *Gouveia*, 467 U.S. 180 (1984).

[P. 1369, add to N. 1:]

United States v. *Gouveia*, 467 U.S. 180 (1984) (Sixth Amendment attaches as of arraignment).

[P. 1370, add new paragraph to text at end of section:]

The Court has extended the *Edwards* v. *Arizona* [28] rule protecting in-custody requests for counsel to post-arraignment situations where the right derives from the Sixth Amendment rather than the Fifth. Thus, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." [29] The Court concluded that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." [30] The remedy for violation of this rule is exclusion from evidence of statements so obtained.[31] And, while the basis for the Sixth Amendment exclusionary rule—to protect the right to a fair trial—differs from that of the Fourth Amendment rule—to deter illegal police conduct—exceptions to the Fourth Amendment's exclusionary rule can apply as well to the Sixth. In *Nix* v. *Williams*,[32] the Court held the "inevitable discovery" exception applicable to defeat exclusion of evidence obtained as a result of an interrogation violating the accused's Sixth Amendment rights. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." [33]

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[28] 451 U.S. 477 (1981).

[29] *Michigan* v. *Jackson*, 475 U.S. —, 89 L.Ed.2d 631, 642 (1986).

[30] 89 L.Ed.2d at 639.

[31] See *Michigan* v. *Jackson*, 475 U.S. —, 89 L.Ed.2d 631 (1986).

[32] 467 U.S. 431 (1984).

[33] 467 U.S. at 446.

EIGHTH AMENDMENT

Excessive Bail

[P. 1394, add to N. 22:]

In *Schall* v. *Martin*, 467 U.S. 253 (1984), the Court tested and upheld under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles.

Cruel and Unusual Punishments

— Capital Punishment

[P. 1397, add to N. 16 following *Adams* v. *Texas* citation:]

Wainwright v. *Witt*, 469 U.S. 412 (1985); *Lockhart* v. *McCree*, 476 U.S. —, 90 L.Ed.2d 137 (1986).

[P. 1402, add to N. 7:]

If actual sentencing authority is conferred on the trial judge, however, it is not unconstitutional for a statute to require a jury to return a death "sentence" upon convicting for specified crimes. *Baldwin* v. *Alabama*, 472 U.S. 372 (1985) (mandatory jury death sentence saved by requirement that trial judge independently weigh aggravating and mitigating factors and determine sentence).

[P. 1402, add to N. 9:]

The issue was decided in *Spaziano* v. *Florida*, 468 U.S. 447 (1984), upholding a provision under which the judge can override a jury's advisory life imprisonment sentence and impose the death sentence. "[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." Id., at 462–63.

[P. 1403, add to N. 11:]

A further protection against jury bias was added by the Court's holding in *Turner* v. *Murray*, 476 U.S. —, 90 L.Ed.2d 27, 37 (1986): "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."

[P. 1403, add to N. 12:]

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid, *Zant* v. *Stephens*, 462 U.S. 862 (1983), or on a trial judge's consideration of improper aggravating circumstances. *Barclay* v. *Florida*, 463 U.S. 954 (1983). In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment to be present, and in the former evidence relating to the invalid factor was nonetheless admissible. The Court has now held that there is no constitutional requirement that state appellate courts determine whether death sentences are proportionate with sentences imposed on others convicted of the same crime. *Pulley* v. *Harris*, 465 U.S. 37 (1984). *Gregg*, *Profitt*, and *Jurek* did not require such comparative proportionality review, the Court noted, but

merely suggest that proportionality review may be one means by which a state may "safeguard against arbitrarily imposed death sentences." 465 U.S. at 50.

[P. 1403, add to N. 13 following *Jurek* v. *Texas* citation:]

Testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. *Barefoot* v. *Estelle*, 463 U.S. 880 (1983).

[P. 1403, add to end of N. 13:]

No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute of limitations for those lesser offenses. *Spaziano* v. *Florida*, 468 U.S. 447 (1984). A state may not sanction prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. Compare *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) with *California* v. *Ramos*, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole).

[P. 1404, add to N. 15:]

Accord: *Skipper* v. *South Carolina*, 476 U.S. —, 90 L.Ed.2d 1 (1986) (exclusion of mitigating "good character" evidence).

[P. 1404, add to N. 16:]

As illustrative of the general observation in the text, see *Zant* v. *Stephens*, 462 U.S. 862, 878–79 (1983): statutory aggravating circumstances serve a narrowing purpose by "circumscrib[ing] the class of persons eligible for the death penalty," but as long as the defendant falls within the statutory class, the jury's consideration need not be so limited, but may include "an individualized determination on the basis of the character of the individual and the circumstances of the crime."

[P. 1405, add to N. 22:]

Accord: *Cabana* v. *Bullock*, 474 U.S. —, 88 L.Ed.2d 704 (1986) (also holding that proper remedy in habeas case is to remand for state court determination as to whether *Enmund* findings have been made).

[P. 1405, add new paragraph to text following N. 23:]

The Court has held that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding satisfying the minimum requirements of due process.[1] The Court noted that execution of the

[1] *Ford* v. *Wainwright*, 477 U.S. —, 91 L.Ed.2d 335 (1986). There was an opinion of the Court only on the first issue, that the Eighth Amendment creates a right not to be executed while insane. Justice Marshall's opinion to that effect was joined by Justices Brennan, Blackmun, Stevens, and Powell. The Court's opinion did not attempt to define insanity; Justice Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." 91 L.Ed.2d at 354.

insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and continues to be so viewed today. And, while no states purport to permit the execution of the insane, a number, including Florida, leave the determination to the governor. Florida's procedures, the Court held, fell short of due process because the decision was vested in the governor, and because the defendant was given no opportunity to be heard, the governor's decision being based on reports of three state-appointed psychiatrists.[2]

— Proportionality

[P. 1407, add to N. 10:]

In *Solem* v. *Helm*, 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case, the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes had been influenced by his alcohol use, was "unlikely to advance the goals of our criminal justice system in any substantial way."

[P. 1409, add to end of section:]

Rummel was distinguished in *Solem* v. *Helm*,[3] the Court stating unequivocally that the cruel and unusual punishments clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences." [4] Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money.[5] The difference was that Helm's sentence of life imprison-

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[2] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 91 L.Ed.2d at 348. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." *Id.*, at 357. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[3] 463 U.S. 277 (1983). The case, as *Rummel*, was decided by 5–4 vote, with the *Rummel* dissenters, joined by Justice Blackmun from the *Rummel* majority, composing the majority, and with Justice O'Connor taking Justice Stewart's place in opposition to holding the sentence invalid. Justice Powell wrote the opinion of the Court in *Helm*, and Chief Justice Burger wrote the dissent.

[4] 463 U.S. at 284, 288.

[5] The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as "relatively minor." 463 U.S. at 296–97.

ment without possibility of parole was viewed as "far more severe than the life sentence we described in *Rummel*." [6] Rummel, the Court pointed out, had been eligible for parole after 12 years' imprisonment, while Helm had only the possibility of executive clemency, characterized by the Court as "nothing more than a hope for 'an *ad hoc* exercise of clemency.' " [7] In *Helm* the Court also spelled out the "objective criteria" by which proportionality issues should be judged: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." [8] Measured by these criteria Helm's sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnapping, and arson. In only one other state could he have received so harsh a sentence, and in no other state was it mandated.[9]

— Prisons and Punishment

[P. 1410, add to N. 18:]

But cf. Whitley v. *Albers*, 475 U.S. —, 89 L.Ed.2d 251 (1986) (arguably excessive force in suppressing prison uprising not cruel and unusual punishment).

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[6] 463 U.S. at 297.

[7] 463 U.S. at 303.

[8] 463 U.S. at 292.

[9] For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homosexual conduct, see Justice Powell's concurring opinion in *Bowers* v. *Hardwick*, 106 S. Ct. 2841.

TENTH AMENDMENT

[P. 1423, add to N. 17:]

EEOC v. *Wyoming*, 460 U.S. 226 (1983). The Court distinguished *National League of Cities*, holding that application of the Age Discrimination in Employment Act to state fish and game wardens did not directly impair the state's ability to structure integral operations in areas of traditional governmental functions, since the state remained free to assess each warden's fitness on an individualized basis and retire those found unfit for the job.

[P. 1423, add new paragraph following N. 19:]

The Court overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Auth.*[1] Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren," and that the Court in 1976 had "tried to repair what did not need repair."[2] With only passing reference to the Tenth Amendment the Court nonetheless clearly reverted to the Madisonian view of the Amendment reflected in *Unites States* v. *Darby*.[3] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[4] The principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment or in the Commerce Clause itself, but in the structure of the Federal Government and in the political processes.[5] "Freestanding conceptions of state sovereignty" such as the *National League of Cities* test subvert the federal system by "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[6] While continuing to recognize that "Con-

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[1] 469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection.

[2] Id., at 557.

[3] 312 U.S. 100, 124 (1941), *supra* p. 1417; Madison's views were quoted by the Court in *Garcia*, 469 U.S. at 549.

[4] 469 U.S. at 549.

[5] "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited the role of states in selecting the President, and the equal representation of states in the Senate. Id., at 551.

[6] 469 U.S. at 550, 546.

gress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits." [7]

In sum, the Court in *Garcia* seems to have said that most but not necessarily all disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions. What it will take for legislation to so threaten the "special and specific position" that states occupy in the constitutional system as to require judicial rather than political resolution must await subsequent cases.

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[7] 469 U.S. at 556.

ELEVENTH AMENDMENT

The Nature of the States' Immunity

[P. 1434, add to text following N. 11:]

The Court has recently declared that "the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III," but almost in the same breath has acknowledged that "[a] sovereign's immunity may be waived." [1]

Suits Against States

— Consent to Suit and Waiver

[P. 1437, add to text following N. 5:]

A state's waiver of sovereign immunity must now be "unequivocally expressed," [2] the Court requiring not only a general waiver, but also an expression of "intention [by the State] to subject itself to suit in *federal court*." [3] Thus, states which have totally abolished sovereign immunity for purposes of state law actions might still be extended immunity in federal court absent express waiver for purposes of federal court actions.[4]

Congressional Withdrawal of Immunity

[P. 1439, add to text following N. 18:]

The rule now is that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute" itself.[5] General language subjecting to suit in federal court "any recipient of Federal assistance" under the Rehabilitation Act was deemed insufficient to satisfy this test, not because of any question about whether states are "recipients" within the meaning of the provision, but because "given their constitutional role, the States are not like any other class of recipients of federal aid." [6]

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[1] *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 98, 99 (1984).

[2] Id., at 99.

[3] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985) (emphasis original).

[4] See Justice Brennan's dissenting opinion in *Scanlon*, 473 U.S. at 253 n. 5. The sweep of the Court's ruling is not completely clear, since the Court characterized the provision at issue as "simply authoriz[ing] the legislature to waive the State's sovereign immunity." 473 U.S. at 241. Thus the Court did not have before it "an unequivocal waiver" lacking only in specific reference to federal court actions.

[5] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985).

[6] 473 U.S. at 246 (interpreting § 505 of the Rehabilitation Act, 29 U.S.C. § 794a).

Suits Against State Officials

[P. 1447, add to N. 11:]

But *cf. Green* v. *Mansour*, 474 U.S. —, 88 L.Ed.2d 371 (1985). "Notice relief" permitted under *Quern* v. *Jordan* is consistent with the Eleventh Amendment only insofar as it is ancillary to valid prospective relief designed to prevent ongoing violations of federal law. Thus, where Congress has changed the AFDC law and the State is complying with the new law, an order to state officials to notify claimants that past payments may have been inadequate conflicts with the Eleventh Amendment.

[P. 1447, add to text following N. 14:]

The Court also applied *Edelman* in *Papasan* v. *Allain*,[7] holding that a claim against a state for payments representing a continuing obligation to meet trust responsibilities stemming from a 19th century grant of public lands for benefit of education of the Chickasaw Indian Nation is barred by the Eleventh Amendment as indistinguishable from an action for past loss of trust corpus, but that an Equal Protection claim for present unequal distribution of school land funds is the type of ongoing violation for which the Eleventh Amendment does not bar redress.

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[7] 478 U.S. —, 92 L.Ed.2d 209 (1986).

FOURTEENTH AMENDMENT

DUE PROCESS OF LAW

Substantive Due Process and Noneconomic Liberty

[P. 1574, add to N. 8:]

But *cf. Bowers* v. *Hardwick*, 478 U.S. —, 92 L.Ed.2d 140 (1986) (no protected right to engage in homosexual sodomy in privacy of home).

[P. 1576, add new paragraph at end of section:]

Substantive due process analysis was utilized by the Court in *Regents of the University of Michigan* v. *Ewing*,[1] in which the Court "assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment" in a state university, but held that the student had not been arbitrarily dismissed. A high degree of deference should be accorded to academic decisions, the Court concluded. The limited constitutional right is violated only by a showing that dismissal resulted from "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." [2]

— Abortion

[P. 1579, add to N. 8:]

In two 1983 cases the Court applied the *Bellotti* v. *Baird* standard for determining whether judicial substitutes for parental consent requirements permit a pregnant minor to demonstrate that she is sufficiently mature to make her own decision on abortion. Compare *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (no opportunity for case-by-case determinations); with *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983) (adequate individualized consideration).

[P. 1580, add new paragraph to text following N. 10:]

The Court, reaffirming *Roe* v. *Wade*,[3] has continued to apply its principles to a variety of state statutes attempting to regulate

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[1] 474 U.S. —, 88 L.Ed.2d 523 (1985). The Court's decision was unanimous, although concurring Justice Powell thought the reliance on substantive due process unnecessary because procedural due process could protect a statutory right to continued enrollment.

[2] 88 L.Ed.2d at 532.

[3] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 419–20 (1983). In refusing to overrule *Roe* v. *Wade*, the Court merely cited the principle of *stare decisis*. Justice Powell's opinion of the Court was joined by Chief Justice Burger, and by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, joined by Justices White and Rehnquist, dissented, voicing disagreement with

the circumstances of abortions. These have included requirements for hospital-only abortions, licensing of clinics, parental consent,[4] informed consent, waiting periods prior to abortions, pathology reports, and presence of a second physician. A requirement that all abortions performed after the first trimester be performed in a hospital is unconstitutional as imposing "a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and [at least during the first few weeks of the second trimester] safe abortion procedure." [5] While the state's interest in regulating health during the second trimester is legitimate, the state must nonetheless make a "reasonable" effort to confine its regulation to effectuating its legitimate purpose and may not indiscriminately rely on the trimester categorization.[6] A state may, however, require that abortions be performed in hospitals *or* licensed outpatient clinics, as long as licensing standards do not "depart from accepted medical practice." [7] Various "informed consent" requirements were struck down as intruding upon the discretion of the physician, and as being aimed at discouraging abortions rather than at informing the pregnant woman's decision; [8] while the state has a legitimate interest in ensuring that the woman's consent is informed, it may not demand of the physician "a recitation of an inflexible list of information" unrelated to the particular patient's health, and, for that matter, may not demand that the physician rather than some other qualified person render the coun-

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the trimester approach and suggesting instead that throughout pregnancy the test should be the same: whether state regulation constitutes "unduly burdensome interference with [a woman's] freedom to decide whether to terminate her pregnancy." 462 U.S. at 452, 461. In the 1986 case of *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. —, 90 L.Ed.2d 779 (1986), Justice White, joined by Justice Rehnquist, advocated overruling of *Roe* v. *Wade*, Chief Justice Burger thought *Roe* v. *Wade* had been extended to the point where it should be reexamined, and Justice O'Connor repeated misgivings expressed in her *Akron* dissent.

[4] See addition to P. 1579 n. 8 *supra*.

[5] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 438 (1983); Accord: *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983). The Court in *Akron* relied on evidence that "dilation and evacuation" (D&E) abortions performed in clinics cost less than half as much as hospital abortions, and that common use of the D&E procedure had "increased dramatically" the safety of second trimester abortions in the 10 years since *Roe* v. *Wade*. 462 U.S. at 435–36.

[6] Justice O'Connor suggested in dissent that the *Roe* trimester framework "is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception." 462 U.S. at 458.

[7] *Simopoulos* v. *Virginia*, 462 U.S. 506, 516 (1983).

[8] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 444–45 (1983); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. —, 90 L.Ed.2d 779 (1986).

seling.[9] Similarly, a state may not require a 24-hour waiting period following a woman's written, informed consent.[10] On the other hand, the Court upheld a requirement that tissue removed in clinic abortions be submitted to a pathologist for examination, since the same requirements were imposed for in-hospital abortions and for almost all other in-hospital surgery.[11] Also, the Court upheld a requirement that a second physician be present at abortions performed after viability in order to assist in saving the life of the fetus.[12]

— Privacy: Its Constitutional Dimension

[P. 1586, add to text following N. 10:]

Stanley was further distinguished in *Bowers* v. *Hardwick* as being "firmly grounded in the First Amendment." [13] Thus, the Court held in *Bowers*, there is no protected right to engage in homosexual sodomy in the privacy of the home, *Stanley* not implicitly creating protection for "voluntary sexual conduct [in the home] between consenting adults." [14]

[P. 1588, add to text following N. 15:]

In *Bowers* v. *Hardwick*,[15] the Court by 5–4 vote roundly rejected the suggestion that the privacy cases protecting "family, mar-

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[9] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 448–49 (1983).

[10] Id., at 450–51.

[11] *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 486–90 (1983).

[12] Id., at 482–86, 505. The decision on this issue was decided by vote of 5–4 without an opinion of the Court. Justice Powell, joined by Chief Justice Burger, viewed the measure as reasonably furthering the state's interest in protecting the lives of viable fetuses; concurring Justice O'Connor, joined by Justices White and Rehnquist, expressed the view that this state interest is extant throughout pregnancy. Id., at 505. Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, viewed the measure as superfluous and therefore burdensome in those cases in which an abortion method chosen to protect the mother would preclude survival of the fetus.

[13] 478 U.S. —, 92 L.Ed.2d 140, 149 (1986).

[14] 92 L.Ed. 2d at 149. Dissenting Justice Blackmun challenged the Court's characterization of *Stanley*, suggesting that it had rested as much on the Fourth as on the First Amendment, and that "the right of an individual to conduct intimate relationships in . . . his or her own home [is] at the heart of the Constitution's protection of privacy." Id., at 156–57.

[15] 478 U.S. —, 92 L.Ed.2d 140 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.

riage, or procreation" extend any protection for private consensual homosexual sodomy,[16] and also rejected the more comprehensive claim that the cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription." [17] Moreover, the Court refused to create any such fundamental right. 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.[18] In addition, the Court concluded that rationales relied upon in the earlier privacy cases do not support "a fundamental right to homosexuals to engage in acts of consensual sodomy." [19] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibit the practices.[20] The privacy of the home does not immunize all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults." [21] Justice Blackmun's dissent was critical of the Court's phrasing of the issue as one of homosexual sodomy,[22] and asserted that the basic issue was the 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

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[16] "[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." 92 L.Ed.2d at 146.

[17] 92 L.Ed.2d at 146. The Court asserted that *Carey* v. *Population Services International,* 431 U.S. 678, 694 n.17 (1977), which had reserved decision on the issue, had established that the privacy right "did not reach so far."

[18] Id., at 146.

[19] In the Court's view, 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." Id., at 146–47.

[20] Id. Chief Justice Burger's brief concurring opinion amplified on this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id., at 150. 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.

[21] 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." Id., at 149. Dissenting Justices Blackmun (id., at 158 n.4) and Stevens (id., at 163) suggested that these crimes are readily distinguishable.

[22] Id., at 151. 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 144 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 164.

principle of individual autonomy and choice in matters of sexual intimacy.[23]

— Family Relationships

[P. 1589, add to N. 20:]

Continuing the limitation of the right of privacy to family-related activities is *Bowers* v. *Hardwick*, 478 U.S. —, 92 L.Ed.2d 140 (1986).

— Liberty Interests of Retarded and Handicapped: Commitment and Treatment

[P. 1591, add to N. 11:]

See also *Allen* v. *Illinois*, 478 U.S. —, 92 L.Ed.2d 296, 307 (1986) (dictum that person civilly committed as "sexually dangerous person" might be entitled to protection under the self-incrimination clause if he could show that his confinement "is essentially identical to that imposed upon felons with no need for psychiatric care").

PROCEDURAL DUE PROCESS: CIVIL

Power of the States to Regulate Procedure

— Costs, Damages, and Penalties

[P. 1598, add to text following N. 17:]

Congress may severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal.[24]

Jurisdiction

— Suability of Foreign Corporations

[P. 1610, add to first group of citations in N. 13:]

Helicopteros Nacionales de Colombia v. *Hall*, 466 U.S. 408 (1984).

[P. 1615, add new paragraph to end of section:]

The Court has applied *International Shoe* principles in several more situations. Circulation of a magazine in the forum state is an adequate basis for jurisdiction over the corporate magazine publisher in a libel action; the fact that the plaintiff has no contact with the forum state is not dispositive since the inquiry focuses on the

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[23] Id., at 157.

[24] *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (limitation of attorneys' fees to $10 in veterans benefit proceedings does not violate claimants' due process rights absent a showing of probability of error in the proceedings that presence of attorneys would sharply diminish).

relations among the defendant, the forum, and the litigation.[25] On the other hand, damage done to the plaintiff's reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction that would otherwise be absent.[26] While there is no *per se* rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party's forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation's home state where the overall circumstances (contract terms themselves, course of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor's home state.[27]

— Notice: Service of Process

[P. 1622, add to text following N. 22:]

In a class action, due process is satisfied by notification by mail of out-of-state class members, with opportunity to "opt out" but with no requirement that inclusion in the class be contingent upon affirmative response.[28]

The Procedure Which Is Due Process

— When Is Process Due

[P. 1636, add to N. 14 following *Arnett* cite:]

Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985).

[P. 1638, add to text at end of sentence containing N. 22:]

Parratt v. *Taylor* has been partially overruled, the Court now holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." [29] Hence, there is no requirement for

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[25] *Keeton* v. *Hustler Magazine*, 465 U.S. 770 (1984) (holding as well that the forum state may apply "single publication rule" making defendant liable for nationwide damages).

[26] *Calder* v. *Jones*, 465 U.S. 783 (1984) (jurisdiction over reporter and editor responsible for defamatory article which they knew would be circulated in subject's home state).

[27] *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985). *But cf. Helicopteros Nacionales de Colombia* v. *Hall*, 466 U.S. 408 (1984) (purchases and training within state, both unrelated to cause of action, are insufficient to justify general *in personam* jurisdiction).

[28] *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

[29] *Daniels* v. *Williams*, 474 U.S. —, 88 L.Ed.2d 662, 666 (1986) (involving negligent acts by prison officials).

procedural due process stemming from such negligent acts and no resulting basis for suit under 42 U.S.C. § 1983 for deprivation of rights deriving from the Constitution.

PROCEDURAL DUE PROCESS: CRIMINAL

Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine

[P. 1647, add to N. 11:]

And see *Kolender* v. *Lawson*, 461 U.S. 352 (1983) (requirement that person detained in valid *Terry* stop provide "credible and reliable" identification is facially void as encouraging arbitrary enforcement).

Fair Trial

[P. 1652, add to N. 13:]

Bias or prejudice of an appellate judge can also deprive a litigant of due process. *Aetna Life Ins. Co.* v. *LaVoie*, 475 U.S. —, 89 L.Ed.2d 823 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).

[P. 1654, add to N. 20:]

But cf. *Holbrook* v. *Flynn*, 475 U.S. —, 89 L.Ed.2d 525 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation).

[P. 1654, add to N. 21:]

Crane v. *Kentucky*, 476 U.S. —, 90 L.Ed.2d 636 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession).

[P. 1654, add to N. 22:]

For other cases applying *Sandstrom*, see *Francis* v. *Franklin*, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase *Sandstrom* error in earlier part of charge); *Rose* v. *Clark*, 478 U.S. —, 92 L.Ed.2d 460 (1986) (*Sandstrom* error can under some circumstances constitute harmless error under principles of *Chapman* v. *California*, 386 U.S. 18 (1967)). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. *United States* v. *Young*, 470 U.S. 1 (1985).

Guilty Pleas

[P. 1656, add to N. 6:]

Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second less attractive offer has no right to enforcement of the first agreement. *Mabry* v. *Johnson*, 467 U.S. 504 (1984).

Prosecutorial Misconduct

[P. 1659, add to N. 19:]

Similarly, there is no obligation that law enforcement officials preserve breath samples which have been utilized in a breathanalysis test; the *Agurs* materiality standard is met only by evidence which "possess[es] an exculpatory value . . . apparent before [it] was destroyed, and also [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California* v. *Trombetta*, 467 U.S. 479, 489 (1984).

[P. 1659, add to N. 21:]

Accord: *Thigpen* v. *Roberts*, 468 U.S. 27 (1984).

Proof, Burden of Proof, and Presumptions

[P. 1662, add to text following N. 9:]

Also formalistic is the distinction between elements of the crime and sentencing factors; a state may treat as a sentencing consideration provable by a preponderance of the evidence the fact that defendant "visibly possessed a firearm" during commission of the offense.[30]

Sentencing

[P. 1666, add to N. 1:]

An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. *Wasman* v. *United States*, 468 U.S. 559 (1984).

[P. 1666, add to N. 2:]

The *Pearce* presumption that an increased, judge-imposed second sentence represents vindictiveness also is inapplicable if the second trial came about because the trial judge herself concluded a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. *Texas* v. *McCullough*, 475 U.S. —, 89 L.Ed.2d 104 (1986).

The Problem of the Incompetent or Insane Defendant or Convict

[P. 1666, add to N. 4:]

An indigent who makes a preliminary showing that his sanity at the time of his offense will be a substantial factor in his trial is entitled to a court-appointed psychiatrist to assist in presenting the defense.[31]

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[30] *McMillan* v. *Pennsylvania*, 477 U.S. —, 91 L.Ed.2d 67 (1986) (the finding increased the minimum sentence that could be imposed but did not affect the maximum sentence).

[31] *Ake* v. *Oklahoma*, 470 U.S. 68 (1985).

[P. 1667, add to text following N. 7:]

The Court held in *Ford* v. *Wainwright* that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding satisfying the minimum requirements of due process.[32] Those minimum standards are not met when the decision on sanity is left to the unfettered discretion of the governor; rather, due process requires the opportunity to be heard before an impartial officer or board.[33]

Commitment to a mental hospital of a criminal defendant acquitted by reason of insanity does not offend due process, and the period of confinement may extend beyond the period for which the person could have been sentenced if convicted.[34] The purpose of the confinement is not punishment, but treatment, and the Court explained that the length of a possible criminal sentence "therefore is irrelevant to the purposes of . . . commitment." [35] Thus, the insanity acquittee may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to himself or society." [36]

Rights of Prisoners

[P. 1671, add to end of paragraph continued from preceding page:]

Fourth Amendment protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions," hence a prisoner has no reasonable expectation of privacy in his prison cell protecting him from "shakedown" searches de-

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[32] 477 U.S. —, 91 L.Ed.2d 335 (1986).

[33] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 91 L.Ed.2d at 348. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id., at 357. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[34] *Jones* v. *United States*, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere idiosyncratic behavior.

[35] 463 U.S. at 368.

[36] 463 U.S. at 370.

signed to root out weapons, drugs, and other contraband.[37] Avenues of redress "for calculated harassment unrelated to prison needs" are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment or in state tort law.[38] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[39] Due process is not implicated at all by negligent deprivation of life, liberty, or property by prison officials.[40]

[P. 1671, add to text following third sentence of second full paragraph:]

However, reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court.[41]

[P. 1672, add to text following N. 11:]

Revocation of good time credits must be supported by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[42]

[P. 1672, add to text following N. 12:]

The same principles govern interstate prison transfers. *Olim* v. *Wakinekona*, 461 U.S. 238 (1983).

Probation and Parole

[P. 1674, add to text following N. 20:]

Ordinarily the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,[43] but a sentencing court must consider such alternatives if the probation violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.[44]

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[37] *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984); *Block* v. *Rutherford*, 468 U.S. 576 (1984) (holding also that prison security needs support a rule prohibiting pretrial detainees contact visits with spouses, children, relatives, and friends).

[38] *Hudson* v. *Palmer*, 468 U.S. 517, 530 (1984).

[39] Id., at 533 (holding that state tort law provided adequate postdeprivation remedies).

[40] *Daniels* v. *Williams*, 474 U.S. —, 88 L.Ed.2d 662 (1986); *Davidson* v. *Cannon*, 474 U.S. —, 88 L.Ed.2d 677 (1986).

[41] *Ponte* v. Real, 471 U.S. 491 (1985).

[42] *Superintendent* v. *Hill*, 472 U.S. 445, 454, 457 (1985).

[43] *Black* v. *Romano*, 471 U.S. 606 (1985).

[44] *Bearden* v. Georgia, 461 U.S. 660, 672 (1983).

The Problem of the Juvenile Offender

[P. 1678, add to text at end of section:]

The Court ruled in *Schall* v. *Martin*[45] that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, when the terms of confinement serve those legitimate purposes and are nonpunitive, and when procedures provide sufficient protection against erroneous and unnecessary detentions. A statute authorizing pretrial detention of accused juvenile delinquents on a finding of "serious risk" that the juvenile would commit crimes prior to trial, providing for expedited hearings (the maximum possible detention was 17 days), and guaranteeing a formal, adversarial probable cause hearing within that period, was found to satisfy these requirements.

EQUAL PROTECTION OF THE LAWS

Equal Protection: Judging Classifications by Law

— The Traditional Standard: Restrained Review

[P. 1700, add to list of cites in N. 22:]

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432 (1985) (rejecting various justifications offered for exclusion of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses were permitted).

— The New Standards: Active Review

[P. 1705, add to N. 20:]

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (holding that a lower court "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

[P. 1705, add to text following N. 20:]

While resisting creation of new suspect or "quasi-suspect" classifications, however, the Court may nonetheless apply the *Royster Guano* rather than the *Lindsley* standard of rationality.[46]

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[45] 467 U.S. 253 (1984).

[46] *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985); see main text, pp. 1698–1702.

Testing Facially Neutral Classifications Which Impact on Minorities

[P. 1708, add to N. 2:]

The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. *Wayte* v. *United States*, 470 U.S. 598 (1985) (no discriminatory purpose shown). And see *Bazemore* v. *Friday*, 478 U.S. —, 92 L.Ed.2d 315 (1986) (existence of single-race, state-sponsored 4H Clubs is permissible, given wholly voluntary nature of membership).

[P. 1709, add to N. 8:]

Hunter v. *Underwood*, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor whites would also be disenfranchised thereby).

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

Taxation

— Classification for Purpose of Taxation

[P. 1714, add to N. 5 under "Gasoline":]

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

— Foreign Corporations

[P. 1716, change heading to "Foreign Corporations and Nonresidents":]

[P. 1717, add to N. 25:]

This decision was described as "an anachronism" in *Western & Southern Life Ins. Co.* v. *State Bd. Of Equalization*, 451 U.S. 648, 667 (1981), the Court reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose.

[P. 1717, add to text at end of section:]

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co.* v. *Ward*,[47] the Court concluded that taxation favoring

[47] 470 U.S. 869, 878 (1985). The vote was 5–4, with Justice Powell's opinion for the Court being joined by Chief Justice Burger and by Justices White, Blackmun, and Stevens. Justice O'Connor's dissent was joined by Justices Brennan, Marshall, and Rehnquist.

domestic over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Rejecting the assertion that it was merely imposing "Commerce Clause rhetoric in equal protection clothing," the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.[48] However, the Court's holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.[49]

Also invalidated under equal protection analysis as not promoting a legitimate state purpose was a discrimination between residents and nonresidents in application of a use-tax credit for automobile sales taxes paid to another state.[50] Out-of-state residents who purchased and registered cars in another state before becoming residents were denied the credit, which was available for instate residents who purchased cars out-of-state and registered them in-state. The Court viewed as "wholly arbitrary" the discrimination "between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came to Vermont after buying a car elsewhere." [51]

EQUAL PROTECTION AND RACE

Juries

[P. 1746, add to N. 5:]

Vasquez v. *Hillery*, 474 U.S. —, 88 L.Ed.2d 598 (1986) (habeas corpus remedy).

[P. 1746, add to N. 6:]

The same class rule was revived to an uncertain degree in *Hobby* v. *United States*, 468 U.S. 339, 347 (1984), the Court suggesting that a white defendant chal-

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[48] 470 U.S. at 880.

[49] The first level of the Court's "two-tiered" analysis of state statutes affecting commerce tests for virtual per se invalidity. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. —, 90 L.Ed.2d 552, 559 (1986).

[50] *Williams* v. *Vermont*, 472 U.S. 14 (1985).

[51] 472 U.S. at 23, 27. Dissenting Justice Blackmun questioned whether the statute, correctly interpreted, would extend the credit to in-state residents who purchased and registered a car out-of-state before registering in-state, and deemed the residency distinction valid as based on a reasonable assumption that most people will use their cars primarily in the state in which they reside.

lenging on due process grounds exclusion of blacks as grand jury foremen could not rely on equal protection principles protecting black defendants from "the injuries of stigmatization and prejudice" associated with the practice.

[P. 1748, add to text at end of section:]

The *Swain* holding as to the evidentiary standard was overruled in *Batson* v. *Kentucky*, the Court ruling that "a defendant may establish a prima facie case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial." To rebut this showing, the prosecutor "must articulate a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause." [52]

Discrimination in the selection of grand jury foremen presents a closer question, answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus the Court had "assumed without deciding" that discrimination in selection of foremen for state grand juries would violate equal protection in a system in which the judge selected a foreman to serve as a thirteenth voting juror, and that foreman exercised significant powers.[53] That situation was distinguished, however, in a due process challenge to the federal system, where the foreman's responsibilities are "essentially clerical" and where the selection is from among the members of an already-chosen jury.[54]

Other Areas of Discrimination

— Marriage

[P. 1750, add to text following N. 12:]

Similarly, a court may not deny custody of a child based on a parent's remarriage to a person of another race and the presumed "best interests of the child" to be free from the prejudice and stigmatization that might result.[55]

— Elections

[P. 1751, add to N. 21:]

Hunter v. *Underwood*, 471 U.S. 222 (1985) (disenfranchisement for crimes involving moral turpitude adopted for purpose of racial discrimination).

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[52] 476 U.S. —, 90 L.Ed.2d 69, 87–88 (1986).
[53] *Rose* v. *Mitchell*, 443 U.S. 545, 551 n.4 (1979).
[54] *Hobby* v. *United States*, 468 U.S. 339 (1984).
[55] *Palmore* v. *Sidoti*, 466 U.S. 429 (1984).

Permissible Remedial Utilizations of Racial Classifications

[P. 1751, add to N. 1:]

Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. —, 92 L.Ed.2d 405 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. —, 92 L.Ed.2d 344 (1986).

[P. 1755, add to text following N. 18:]

There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court holding that adoption of "a wholly neutral admissions policy" for voluntary membership in state-sponsored 4-H Clubs was sufficient even though single race clubs continued to exist under that policy.[56]

THE NEW EQUAL PROTECTION

Classifications Meriting Close Scrutiny

— Alienage and Nationality

[P. 1758, add to N. 12:]

The "political function" exception is inapplicable to notaries public, who do not perform functions going to the heart of representative government. *Bernal* v. *Fainter*, 467 U.S. 216 (1984).

[P. 1761, add to N. 3:]

But *cf. Bernal* v. *Fainter*, 467 U.S. 216 (1984) (citizenship requirement for notaries public violates equal protection).

— Sex

[P. 1763, add to N. 16 list of title VII cases:]

Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. *Norris*, 463 U.S. 1073 (1983) (actuarially based lower monthly retirement benefits for women employees violates Title VII); *Meritor Savings Bank* v. *Vinson*, 477 U.S. —, 91 L.Ed.2d 49 (1986) ("hostile environment" sex harassment claim is actionable).

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[56] *Bazemore* v. *Friday*, 478 U.S. —, 92 L.Ed.2d 315 (1986). The voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a "wholly different milieu" from public schools.

[P. 1763, add to text following N. 16:]

Some states have followed suit.[57]

[P. 1769, add to N. 11:]

Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the *Goldfarb* gender-based dependency classification for a five-year "grace period" was upheld in *Heckler* v. *Mathews*, 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-*Goldfarb* payment levels.

— Illegitimacy

[P. 1776, add to N. 12:]

Also not interfering with orderly administration of estates is application of *Trimble* in a probate proceeding ongoing at the time *Trimble* was decided; the fact that the death had occurred prior to *Trimble* was irrelevant. *Reed* v. *Campbell*, 476 U.S. —, 90 L.Ed.2d 858 (1986).

[P. 1777, add to N. 15:]

Similarly, a 2-year statute of limitations on paternity and support actions denies equal protection to illegitimates. *Pickett* v. *Brown*, 462 U.S. 1 (1983). The burden of a 2-year limitation is still substantial, the Court believed, and the state's interest in imposing it was undercut by exceptions (e.g., for illegitimates receiving public assistance), by different treatment for minors generally, and by the fact that improved blood testing for paternity had lessened the risk posed by stale or fraudulent claims.

Fundamental Interests: The Political Process

— Apportionment and Districting

[P. 1791, add to N. 4:]

The Court has continued to adhere to this strict standard for congressional districting, voiding a plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons. *Karcher* v. *Daggett*, 462 U.S. 725 (1983) (rejecting assertion that deviations less than estimated census error are necessarily permissible).

[P. 1792, add to N. 9:]

In *Brown* v. *Thomson*, 462 U.S. 835 (1983), the Court held that a consistent state policy assuring each county at least one representative can justify substantial deviation from population equality when only the marginal impact of representation for the state's least populous county was challenged (the effect on plaintiffs, voters in larger districts, was that they would elect 28 of 64 members rather than 28 of 63),

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[57] See, e.g., *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984) (state prohibition on gender discrimination in aspects of public accommodation, as applied to membership in a civic organization, is justified by compelling state interest).

but there was indication in Justice O'Connor's concurring opinion that a broader-based challenge to the plan, which contained a 16% average deviation and an 89% maximum deviation, could have succeeded.

[P. 1792, add to N. 10:]

See also *Brown* v. *Thomson*, 462 U.S. 835, 842 (1983): "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations [insufficient to make out a prima facie case]."

[P. 1792, add to N. 11:]

By contrast, the Court has held that estimated margin of error for census statistics does not justify deviation from population equality in congressional districting. *Karcher* v. *Daggett*, 462 U.S. 725 (1983).

[P. 1793, add to text following N. 14:]

In a decision of potentially major import reminiscent of *Baker* v. *Carr*, the Court in *Davis* v. *Bandemer*[58] ruled that partisan gerrymandering in state legislative redistricting is justiciable under the Equal Protection Clause. However, although the vote was 6 to 3 in favor of justiciability, a majority of Justices could not agree on the proper test for determining whether particular gerrymandering is unconstitutional, and the lower court's holding of unconstitutionality was reversed by vote of 7 to 2.[59] Thus, while courthouse doors are now ajar for claims of partisan gerrymandering, it is unclear what it will take to succeed on the merits. On the justiciability issue, the Court viewed the "political question" criteria as no more applicable than they had been in *Baker* v. *Carr*. Because *Reynolds* v. *Sims* had declared "fair and effective representation for all citizens" to be "the basic aim of legislative apportionment,"[60] and be-

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[58] 478 U.S. —, 92 L.Ed.2d 85 (1986). The vote on justiciability was 6–3, with Justice White's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens. This represented an apparent change of view by 3 of the majority Justices, who just 2 years earlier had denied that "the existence of noncompact or gerrymandered districts is by itself a constitutional violation." *Karcher* v. *Daggett*, 466 U.S. 910, 917 (1983) (Justice Brennan, joined by Justices White and Marshall, dissenting from denial of stay in challenge to district court's rejection of a remedial districting plan on the basis that it contained "an intentional gerrymander").

[59] Only Justices Powell and Stevens thought the Indiana redistricting plan void; Justice White, joined by Justices Brennan, Marshall, and Blackmun, thought the record inadequate to demonstrate continuing discriminatory impact, and Justice O'Connor, joined by Chief Justice Burger and by Justice Rehnquist, would have ruled that partisan gerrymandering is nonjusticiable as constituting a political question not susceptible to manageable judicial standards.

[60] 377 U.S. 533, 565–66 (1964). This phrase has had a life of its own in the commentary. See D. Alfange, Jr., "Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last," 1986 Sup. Ct. Rev. 175, and sources cited therein. It is not clear from its original context, however, that the phrase was coined with such broad application in mind.

cause racial gerrymandering issues had been treated as justiciable, the Court viewed the representational issues raised by partisan gerrymandering as indistinguishable. Agreement as to the existence of "judicially discoverable and manageable standards for resolving" gerrymandering issues, however, did not result in a consensus as to what those standards are.[61] While a majority of Justices agreed that discriminatory effect as well as discriminatory intent must be shown, there was significant disagreement as to what constitutes discriminatory effect. Justice White's plurality opinion suggested that there need be "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." [62] Moreover, continued frustration of the chance to influence the political process cannot be demonstrated by the results of only one election; there must be a history of disproportionate results or a finding that such results will continue. Justice Powell, joined by Justice Stevens, did not formulate a strict test, but suggested that "a heavy burden of proof" should be required, and that courts should look to a variety of factors as they relate to "the fairness of a redistricting plan" in determining whether it contains invalid gerrymandering. Among these factors are the shapes of the districts, adherence to established subdivision lines, statistics relating to vote dilution, the nature of the legislative process by which the plan was formulated, and evidence of intent revealed in legislative history.[63]

[P. 1795, add to N. 22:]

In *Thornburg* v. *Gingles*, 478 U.S. —, 92 L.Ed.2d 25, 46–47 (1986), the Court held that multimember districting violates § 2 of the Voting Rights Act by diluting the voting power of a racial minority when that minority is "sufficiently large and geographically compact to constitute a majority in a single-member district," when it is politically cohesive, and when block voting by the majority "usually" defeats preferred candidates of the minority. Use of multimember districting for purposes of political gerrymandering was at issue in *Davis* v. *Bandemer*, 478 U.S. —, 92 L.Ed.2d 85 (1986), decided the same day as *Gingles*, but there was no agreement as to the appropriate constitutional standard. A plurality led by Justice White relied on the *Whitcomb* v. *Chavis* reasoning, suggesting that proof that multimember districts were constructed for the advantage of one political party falls short of the necessary showing of deprivation of opportunity to participate in the electoral process. 92 L.Ed.2d at 108. Two Justices thought the proof sufficient for a holding of invalidity, the minority party having won 46% of the vote but only 3 of 21 seats from the multimember districts, and "the only discernible pattern [being] the appearance of these

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[61] The quotation is from the *Baker* v. *Carr* measure for existence of a political question, 369 U.S. 186, 217 (1962).

[62] 92 L.Ed.2d at 106. Joining in this part of the opinion were Justices Brennan, Marshall, and Blackmun.

[63] 92 L.Ed.2d at 131–32. A similar approach had been proposed in Justice Stevens' concurring opinion in *Karcher* v. *Daggett*, 462 U.S. 725, 744 (1983).

districts in areas where their winner-take-all aspects can best be employed to debase [one party's] voting strength," (id., at 135–37, Justices Powell and Stevens), and three Justices thought political gerrymandering claims to be nonjusticiable.

[P. 1795, add to N. 24:]

But see *Karcher* v. *Daggett*, 466 U.S. 910 (1983) (denying cert. over dissent's suggestion that court-adopted congressional districting plan had strayed too far from the structural framework of the legislature's invalidated plan).

The Right to Travel

— Durational Residency Requirements

[P. 1798, add to N. 14:]

Somewhat similar was the Court's invalidation of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices thought the preference penalized the right to travel, and two viewed it as irrational. *Attorney General of New York* v. *Soto-Lopez*, 476 U.S. —, 90 L.Ed.2d 899 (1986).

[P. 1798, add to N. 16:]

See also *Martinez* v. *Bynum*, 461 U.S. 321 (1983) (bona fide residency requirement for free tuition to public schools).

Marriage and Familial Relations

[P. 1800, add to N. 7:]

Accord: *Lehr* v. *Robertson*, 463 U.S. 248 (1983).

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

— Generally

[P. 1803, add to text following N. 8:]

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents' exercise of the right of appeal. "In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal." [64]

[64] *Evitts* v. *Lucey*, 469 U.S. 387, 405 (1985) (holding that due process requires that counsel provided for appeals as of right must be effective).

— Criminal Procedure

[P. 1803, add to text following N. 15:]

The right to counsel on appeal necessarily means the right to *effective* assistance of counsel.[65]

— The Criminal Sentence

[P. 1805, add to text as penultimate sentence of section:]

Similarly, a sentencing court in revoking probation must consider alternatives to incarceration if the reason for revocation is the inability of the indigent to pay a fine or restitution.[66]

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[65] *Evitts* v. *Lucey*, 469 U.S. 387 (1985).

[66] *Bearden* v. *Georgia*, 461 U.S. 660 (1983).

FIFTEENTH AMENDMENT

Racial Gerrymandering

[P. 1827, add to N. 25:]

The Supreme Court interpreted the 1982 amendments to § 2 in *Thornburg* v. *Gingles*, 478 U.S. —, 92 L.Ed.2d 25, (1986), determining that Congress had effectively overruled the *City of Mobile* intent standard in returning to a "totality of the circumstances" results test.

[P. 1834, add to N. 13:]

Without any discussion of the Fifteenth Amendment, the Court in *Thornburg* v. *Gingles*, 478 U.S. —, 92 L.Ed.2d 25 (1986), interpreted and applied the "totality of the circumstances" test in the context of multimember districting.

TWENTY-FIRST AMENDMENT

Scope of Regulatory Power Conferred Upon the States

— Discrimination as Between Domestic and Imported Products

[P. 1865, add new paragraph at end of section:]

Recent cases have undercut the expansive interpretation of state powers in the *Young's Market* and *Triner Corp.* cases. Twenty-first Amendment and Commerce Clause principles are to be harmonized where possible. The Court now phrases the question in terms of "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." [1] "[T]he central power reserved by § 2 of the Twenty-first Amendment [is] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' " [2] Because "[t]he central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition," the "central tenet" of the Commerce Clause will control to invalidate "mere economic protectionism," at least where the state cannot justify its tax or regulation as "designed to promote temperance or to carry out any other purpose of the . . . Amendment." [3]

— Foreign Imports, Exports; Taxation, Regulation

[P. 1867, add to text following N. 19:]

Similarly, a state "affirmation law" prohibiting wholesalers from charging lower prices on out-of-state sales than those already approved for in-state sales is invalid as a direct regulation of interstate commerce. "The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and

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[1] *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984).

[2] 467 U.S. at 715 (quoting *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

[3] *Bacchus Imports, Ltd.*, v. *Dias*, 468 U.S. 263, 276 (1984). See also *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. —, 90 L.Ed. 2d 552 (1986) (attempt to regulate prices of out-of-state sales); and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984) (state's limited interest in banning wine commercials carried on cable TV while permitting various other forms of liquor advertisement is outweighed by federal interest in promoting access to cable TV).

sale of alcoholic beverages destined for distribution and consumption in a foreign country . . . or another State." [4]

— Effect of Section 2 Upon Other Constitutional Provisions

[P. 1867, add to text following N. 24:]

Similarly, a state "may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment." [5]

[P. 1868, add to N. 4:]

And for utilization of the argument in the commercial speech context, see *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. —, 92 L.Ed.2d 266, 283 (1986). But see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), not addressing the commercial speech issue but holding state regulation of liquor advertisements on cable TV to be preempted, in spite of the Twenty-first Amendment, by federal policies promoting access to cable TV).

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[4] *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. —, 90 L.Ed. 2d 552, 563–64 (1986) (citation omitted).

[5] *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982).

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

113. Act of March 3, 1873 (ch. 258, § 2, 17 Stat. 599, recodified in 39 U.S.C. § 3001(e)(2)).

Comstock Act provision barring from the mails any unsolicited advertisement for contraceptives, as applied to circulars and flyers promoting prophylactics or containing information discussing the desirability and availability of prophylactics, violates the free speech clause of the First Amendment.

Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

Justices concurring: Marshall, White, Blackmun, Powell, and Chief Justice Burger.

Justices concurring specially: Rehnquist and O'Connor; Stevens.

114. Act of August 18, 1949 (ch. 479, § 6, 63 Stat. 617, 40 U.S.C. § 13k).

Provision, insofar as it applies to the public sidewalks surrounding the Supreme Court building, which bars the display of any flag, banner, or device designed to bring into public notice any party, organization, or movement, violates the free speech clause of the First Amendment.

United States v. *Grace*, 461 U.S. 171 (1983).

Justices concurring: White, Brennan, Blackmun, Powell, Rehnquist, O'Connor, and Chief Justice Burger.

Justices concurring specially: Marshall and Stevens.

115. Act of June 27, 1952 (ch. 477, § 244(c)(2), 66 Stat. 214, 8 U.S.C. § 1254 (c)(2).

Provision of the immigration law that permits either House of Congress to veto the decision of the Attorney General to suspend the deportation of certain aliens violates the bicameralism and presentation requirements of lawmaking imposed upon Congress by Article I, §§ 1 and 7.

INS v. *Chadha*, 462 U.S. 919 (1983).

Justices concurring: Chief Justice Burger, and Brennan, Marshall, Blackmun, and Stevens.

Justice concurring specially: Powell.

Justices dissenting: Rehnquist and White.

116. Act of September 2, 1958 (Pub. L. 85–921, § 1, 72 Stat. 1771, 18 U.S.C. § 504(1)).

Exemptions from ban on photographic reproduction of currency "for philatelic, numismatic, educational, historical, or newsworthy

purposes" violates the First Amendment because it discriminates on the basis of the content of a publication.

Regan v. *Time, Inc.*, 468 U.S. 641 (1984).
Justices concurring: White, Brennan, Blackmun, Marshall, Powell, Rehnquist, O'Connor, and Chief Justice Burger.
Justice dissenting: Stevens.

117. Act of November 7, 1967 (Pub. L. 90–129, § 201(8), 81 Stat. 368), as amended by Act of August 13, 1981 (Pub. L. 97–35, § 1229, 95 Stat. 730, 47 U.S.C. § 399).

Communications Act provision banning noncommercial educational stations receiving grants from the Corporation for Public Broadcasting from engaging in editorializing violates the First Amendment.

FCC v. *League of Women Voters*, 468 U.S. 364 (1984).
Justices concurring: Brennan, Marshall, Blackmun, Powell, and O'Connor.
Justices dissenting: White, Rehnquist, Stevens, and Chief Justice Burger.

118. Act of December 10, 1971 (Pub. L. 92–178, § 801, 85 Stat. 570, 26 U.S.C § 9012(f)).

Provision of Presidential Election Campaign Fund Act limiting to $1,000 the amount that independent committees may expend to further the election of a presidential candidate financing his campaign with public funds is an impermissible limitation of freedom of speech and association protected by the First Amendment.

FEC v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985).
Justices concurring: Rehnquist, Brennan, Blackmun, Powell, O'Connor, Stevens, and Chief Justice Burger.
Justices dissenting: White and Marshall.

119. Act of November 9, 1978 (Pub. L. 95–621, § 202(c)(1), 92 Stat. 3372, 15 U.S.C. § 3342(c)(1)).

Decision of Court of Appeals holding unconstitutional provision giving either House of Congress power to veto rules of Federal Energy Regulatory Commission on certain natural gas pricing matters is summarily affirmed on the authority of *Chadha*.

Process Gas Consumers Group v. *Consumer Energy Council*, 463 U.S. 1216 (1983).

120. Act of May 28, 1980 (Pub. L. 96–252, § 21(a), 94 Stat. 393, 15 U.S.C. § 57a–1(a)).

Decision of Court of Appeals holding unconstitutional provision of FTC Improvements Act giving Congress power by concurrent resolution to veto final rules of the FTC is summarily affirmed on the basis of *Chadha*.

United States Senate v. *FTC*, 463 U.S. 1216 (1983).

121. Act of December 12, 1985 (Pub. L. 99–177, § 251, 99 Stat. 1063, 2 U.S.C. § 901).

That portion of the Balanced Budget and Emergency Deficit Control Act which authorizes the Comptroller General to determine the amount of spending reductions which must be accomplished each year to reach congressional targets and which authorizes him to report a figure to the President which the President must implement violates the constitutional separation of powers inasmuch as the Comptroller General is subject to congressional control (removal) and cannot be given a role in the execution of the laws.

Bowsher v. *Synar*, 477 U.S. —, 106 S. Ct. 3181 (1986).

Justices concurring: Chief Justice Burger, and Brennan, Powell, Rehnquist, and O'Connor.

Justices concurring specially: Stevens and Marshall.

Justices dissenting: White and Blackmun.

STATE ACTS HELD UNCONSTITUTIONAL

974. *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

Ohio statute requiring candidates to disclose the names and addresses of campaign contributors and the recipients of campaign expenditures is invalid, under the First Amendment, as applied to a minor political party whose members and supporters may be subjected to harassment or reprisals.

Justices concurring: Marshall, Brennan, White, Powell, and Chief Justice Burger.

Justice concurring specially: Blackmun.

Justices concurring in part and dissenting in part: O'Connor, Rehnquist, and Stevens.

975. *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982).

Massachusetts statute permitting any church to block issuance of a liquor license to any establishment to be located within 500 feet of the church violates the Establishment Clause by delegating governmental decisionmaking to a church.

Justices concurring: Chief Justice Burger, and Brennan, White, Marshall, Blackmun, Powell, and Stevens.

Justice dissenting: Rehnquist.

976. *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983).

Tennessee tax on the net earnings of banks, applied to interest earned on obligations of the United States, is void under the Supremacy Clause as conflicting with 31 U.S.C. § 3124.

977. *King* v. *Sanchez*, 459 U.S. 801 (1982).

Federal district court's decision invalidating New Mexico legislative reapportionment as violating the one person, one vote requirement of the Equal Protection Clause because the "votes cast" formula resulted in substantial population variances among districts, is summarily affirmed.

978. *Busbee* v. *Georgia*, 459 U.S. 1166 (1983).

Federal district court decision that Georgia congressional redistricting plan is invalid as having a racially discriminatory purpose in conflict with the Voting Rights Act is summarily affirmed.

979. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

Minnesota ink and paper use tax violates the First Amendment by providing "differential treatment" for the press.

Justices concurring: O'Connor, Brennan, Marshall, Powell, Stevens, and Chief Justice Burger.

Justices concurring specially: White and Blackmun.
Justice dissenting: Rehnquist.

980. *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983).

Ohio statute requiring independent candidates for President and Vice President to file nominating petitions by March 20 in order to qualify for the November ballot is unconstitutional as substantially burdening the associational rights of the candidates and their supporters.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, and Chief Justice Burger.
Justices dissenting: Rehnquist, White, Powell, and O'Connor.

981. *Kolender* v. *Lawson*, 461 U.S. 352 (1983).

California statute requiring that a person detained in a valid *Terry* stop provide "credible and reliable" identification is unconstitutionally vague in violation of the Fourteenth Amendment Due Process Clause.

Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell, and Stevens.
Justices dissenting: White and Rehnquist.

982. *Pennsylvania Public Utility Comm'n* v. *CONRAIL*, 461 U.S. 912 (1983).

Federal district court decision holding that federal statutes (the Federal Railroad Safety Act and the locomotive boiler inspection laws) preempt a Pennsylvania law requiring locomotives to maintain speed records and indicators, summarily affirmed by an appeals court, is summarily affirmed.

983. *Pickett* v. *Brown*, 462 U.S. 1 (1983).

Tennessee's two-year statute of limitations for paternity and child support actions violates the equal protection rights of illegitimates.

984. *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983).

Prohibition on pass-through to consumers of increase in Alabama oil and gas severance tax is invalid as conflicting with the Natural Gas Act to the extent that it applies to sales of gas in interstate commerce.

985. *Philco Aviation* v. *Shacket*, 462 U.S. 406 (1983).

Illinois statute recognizing the validity of an unrecorded, oral sale of an aircraft is preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid.

986. *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983).

Missouri statute requiring that all abortions performed after the first trimester of pregnancy be performed in a hospital unreasonably infringes upon the right of a woman to have an abortion.

Justices concurring (on this issue only): Powell, Brennan, Marshall, Blackmun, Stevens, and Chief Justice Burger.
Justices dissenting: O'Connor, White, and Rehnquist.

987. *Karcher* v. *Daggett*, 462 U.S. 725 (1983).

New Jersey congressional districting statute creating districts in which the deviation between largest and smallest districts was 0.7%, or 3,674 persons, violates Art. I, § 2's "equal representation" requirement as not resulting from a good-faith effort to achieve population equality.

Justices concurring: Brennan, Marshall, Blackmun, Stevens, and O'Connor.
Justices dissenting: White, Powell, Rehnquist, and Chief Justice Burger.

988. *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791 (1983).

Indiana statute providing for constructive notice to mortgagee of tax sale of real property violates the Due Process Clause of the Fourteenth Amendment; instead, personal service or notice by mail is required.

Justices concurring: Marshall, Brennan, White, Blackmun, Stevens, and Chief Justice Burger.
Justices dissenting: O'Connor, Powell, and Rehnquist.

989. *Shaw* v. *Delta Airlines*, 463 U.S. 85 (1983).

The New York Human Rights Law is preempted by ERISA to the extent that it prohibits practices that are lawful under the federal law.

990. *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855 (1983).

Texas property tax on bank shares, computed on the basis of a bank's net assets without any deduction for the value of United States obligations held by the bank, is invalid as conflicting with Rev. Stat. § 3701 (31 U.S.C. § 3124).

Justices concurring: Blackmun, Brennan, White, Marshall, Powell, and Chief Justice Burger.
Justices dissenting: Rehnquist and Stevens.

991. *Arcudi* v. *Stone & Webster Engineering*, 463 U.S. 1220 (1983).

Appeals court holding that Connecticut statute requiring employers to provide health and life insurance to former employees is preempted by ERISA as related to an employee benefit plan, is summarily affirmed.

992. *Aloha Airlines* v. *Director of Taxation*, 464 U.S. 7 (1983).

Hawaii "property tax" on the gross income of airlines operating within the State is preempted by a federal prohibition on state taxes on carriage of air passengers "or on the gross receipts derived therefrom."

993. *Healy* v. *United States Brewers Ass'n*, 464 U.S. 909 (1983).

Appeals court decision invalidating as an undue burden on interstate commerce the beer price "affirmation" provisions of Connecticut's liquor control laws, which restrict out-of-state sales to prices set for in-state sales, is summarily affirmed.

994. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).

California franchise law, requiring judicial resolution of certain claims, is preempted by the United States Arbitration Act, which precludes judicial resolution in state or federal courts of claims contracting parties agree to submit to arbitration.

Justices concurring: Chief Justice Burger, and Brennan, Marshall, Blackmun, and Powell.
Justice concurring in part and dissenting in part: Stevens.
Justices dissenting: O'Connor and Rehnquist.

995. *Texas* v. *KVUE-TV*, 465 U.S. 1092 (1984).

Appeals court holding that Texas statute regulating broadcast of political advertisements is preempted by the Federal Election Campaign Act of 1971 to the extent that it imposes sponsorship identification requirements on advertising for candidates for federal office, and to the extent that it conflicts with federal regulation of political advertising rates, is summarily affirmed.

996. *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984).

New York corporate franchise tax unconstitutionally discriminates against interstate commerce by allowing an offsetting credit for receipts from products shipped from an in-state place of business.

997. *Wallace* v. *Jaffree*, 466 U.S. 924 (1984).

Appeals court decision holding invalid under the Establishment Clause an Alabama statute authorizing the recitation in public schools of a government-composed prayer is summarily affirmed.

998. *Bernal* v. *Fainter*, 467 U.S. 216 (1984).

Texas requirement that a notary public be a United States citizen furthers no compelling state interest and denies equal protection of the laws to resident aliens.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Stevens, O'Connor, and Chief Justice Burger.
Justice dissenting: Rehnquist.

999. *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461 (1984).

Michigan statute making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by nonmember producers is preempted as conflicting with federal policy

of the Agricultural Fair Practices Act of 1967, protecting the right of farmers to join or not join such associations.

1000. *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984).

West Virginia gross receipts tax on businesses selling tangible property at wholesale unconstitutionally discriminates against interstate commerce due to exemption granted local manufacturers.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, and Chief Justice Burger.
Justice dissenting: Rehnquist.

1001. *Capital Cities Cable* v. *Crisp*, 467 U.S. 691 (1984).

Oklahoma Constitution's general ban on advertising of alcoholic beverages, as applied to out-of-state cable television signals carried by in-state operators, is preempted by federal regulations implementing the Communications Act.

1002. *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984).

Maryland prohibition on charitable organizations paying more than 25% of solicited funds for expenses of fundraising violates the Fourteenth Amendment by creating an unnecessary risk of chilling protected First Amendment activity.

Justices concurring: Blackmun, Brennan, White, Marshall, and Stevens.
Justices dissenting: Rehnquist, Powell, O'Connor, and Chief Justice Burger.

1003. *Brown* v. *Brandon*, 467 U.S. 1223 (1984).

Federal district court decision that Ohio congressional districting plan is invalid because population variances were shown to be not unavoidable and were not justified by legitimate state interest is summarily affirmed.

1004. *Bacchus Imports* v. *Dias*, 468 U.S. 263 (1984).

Hawaii excise tax on wholesale liquor sales, exempting sales of specified local products, violates Commerce Clause by discriminating in favor of local commerce.

1005. *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

South Dakota statute requiring local governments to distribute federal payments in lieu of taxes in the same manner that they distribute general tax revenues conflicts with the Payment in Lieu of Taxes Act, which provides that the recipient local government may use the payment for any governmental purpose.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, O'Connor, and Chief Justice Burger.
Justices dissenting: Rehnquist and Stevens.

1006. *Deukmejian* v. *National Meat Ass'n*, 469 U.S. 1100 (1985).

Appeals court holding that California tax on sales by out-of-state beef processors discriminates against interstate commerce in violation of the Commerce Clause, there being no corresponding and comparable tax on in-state processors, is summarily affirmed.

1007. *Westhafer* v. *Worrell Newspapers*, 469 U.S. 1200 (1985).

Appeals court decision holding invalid under the First Amendment an Indiana statute punishing as contempt the publication of the name of an individual against whom a sealed indictment or information has been filed is summarily affirmed.

1008. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985).

Alabama's domestic preference tax, imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies, violates the Equal Protection Clause.

Justices concurring: Powell, White, Blackmun, Stevens, and Chief Justice Burger.

Justices dissenting: O'Connor, Brennan, Marshall, and Rehnquist.

1009. *Board of Educ.* v. *National Gay Task Force*, 470 U.S. 903 (1985).

Court of appeals decision holding unconstitutionally overbroad in violation of the First and Fourteenth Amendments an Oklahoma statute prohibiting advocating, encouraging, or promoting homosexual conduct is affirmed by equally divided vote.

1010. *Hunter* v. *Underwood*, 471 U.S. 222 (1985).

Provision of Alabama Constitution requiring disenfranchisement for crimes involving moral turpitude, adopted in 1901 for the purpose of racial discrimination, violates the Equal Protection Clause.

1011. *Williams* v. *Vermont*, 472 U.S. 14 (1985).

Vermont use tax discriminating between residents and nonresidents in application of a credit for automobile sales taxes paid to another state violates the Equal Protection Clause.

Justices concurring: White, Brennan, Marshall, Stevens, and Chief Justice Burger.

Justices dissenting: Blackmun, Rehnquist, and O'Connor.

1012. *Wallace* v. *Jaffree*, 472 U.S. 38 (1985).

Alabama statute authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer" violates the Establishment Clause, the record indicating that the sole legislative purpose in amending the statute to add "or voluntary prayer" was to return voluntary prayer to the public schools.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, and Powell.
Justice concurring specially: O'Connor.
Justices dissenting: White, Rehnquist, and Chief Justice Burger.

1013. *Jensen* v. *Quaring*, 472 U.S. 478 (1985).

Appeals court decision holding invalid Nebraska's driver's licensing requirement that applicant be photographed, and that photo be affixed to license, as burdening the free exercise of sincerely held religious beliefs against submitting to being photographed, is affirmed by equally divided vote.

1014. *Brockett* v. *Spokane Arcades*, 472 U.S. 491 (1985).

Washington "moral nuisance" statute is invalid under the First Amendment to the extent that it proscribes exhibition of films or sale of publications inciting "lust," defined as referring to normal sexual desires.

Justices concurring: White, Blackmun, Rehnquist, Stevens, O'Connor, and Chief Justice Burger.
Justices dissenting on other grounds: Brennan and Marshall.

1015. *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985).

New Mexico property tax exemption for Vietnam War veterans who became residents before May 8, 1976, violates the Equal Protection Clause as not meeting the rational basis test.

Justices concurring: Chief Justice Burger and Brennan, White, Marshall, and Blackmun.
Justices dissenting: Stevens, Rehnquist, and O'Connor.

1016. *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985).

Connecticut statute requiring employers to honor the Sabbath day of the employee's choice violates the Establishment Clause.

Justices concurring: Chief Justice Burger and Brennan, White, Marshall, Blackmun, Powell, Stevens, and O'Connor.
Justice dissenting: Rehnquist.

1017. *Gerace* v. *Grocery Mfrs. of America*, 474 U.S. —, 88 L.Ed.2d 29 (1985).

Appeals court decision holding that federal laws (the Food, Drug, and Cosmetic Act; the Meat Inspection Act; and the Poultry Products Act) preempt a New York requirement that cheese alternatives be labeled "imitation" is summarily affirmed.

1018. *Wisconsin Dep't of Industry* v. *Gould, Inc.*, 475 U.S. —, 89 L.Ed.2d 223 (1986).

Wisconsin statute debarring from doing business with the state persons or firms guilty of repeat violations of the National Labor Relations Act is preempted by that Act.

1019. *Exxon Corp.* v. *Hunt*, 475 U.S. —, 89 L.Ed.2d 364 (1986).

New Jersey statute creating an oil spill compensation fund is preempted in part by the Comprehensive Environmental Response, Compensation, and Liability Act to the extent that the state fund is used to finance cleanup activities at sites listed in the National Contingency Plan.

Justices concurring: Marshall, Brennan, White, Blackmun, Rehnquist, O'Connor, and Chief Justice Burger.
Justice dissenting: Stevens.

1020. *Philadelphia Newspapers* v. *Hepps*, 475 U.S. —, 89 L.Ed.2d 783 (1986).

Pennsylvania statute incorporating the common law rule that defamatory statements are presumptively false violates the First Amendment as applied to a libel action brought by a private figure against a media defendant; instead, the plaintiff must bear the burden of establishing falsity.

Justices concurring: O'Connor, Brennan, Marshall, Blackmun, and Powell.
Justices dissenting: Stevens, White, Rehnquist, and Chief Justice Burger.

1021. *Brown-Forman Distillers* v. *New York State Liquor Auth.*, 476 U.S. —, 90 L.Ed.2d 552 (1986).

New York affirmation law, having the practical effect of controlling liquor prices in other states, violates the Commerce Clause.

Justices concurring: Marshall, Powell, O'Connor, and Chief Justice Burger.
Justice concurring specially: Blackmun.
Justices dissenting: Stevens, White, and Rehnquist.

1022. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. —, 90 L.Ed.2d 779 (1986).

Pennsylvania statute prescribing a variety of requirements for performance of an abortion, including informed consent, reporting of various information concerning the mother's history and condition, and standard-of-care and second-physician requirements after viability, infringes a woman's *Roe* v. *Wade* right to have an abortion.

Justices concurring: Blackmun, Brennan, Marshall, Powell, and Stevens.
Justices dissenting: Chief Justice Burger, and White, Rehnquist, and O'Connor.

1023. *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. —, 90 L.Ed.2d 881 (1986).

North Dakota statute disclaiming jurisdiction over actions brought by tribal Indians suing non-Indians in state courts over claims arising in Indian country is preempted by federal Indian law (Pub. L. 280).

Justices concurring: O'Connor, White, Marshall, Blackmun, Powell, and Chief Justice Burger.

Justices dissenting: Rehnquist, Brennan, and Stevens.

1024. *Offshore Logistics* v. *Tallentire*, 477 U.S. —, 91 L.Ed.2d 174 (1986).

Louisiana's wrongful death statute is preempted by the Death on the High Seas Act as applied to helicopter crash 35 miles off shore.

Justices concurring: O'Connor, White, Blackmun, Rehnquist, and Chief Justice Burger.

Justices dissenting: Powell, Brennan, Marshall, and Stevens.

1025. *Roberts* v. *Burlington Industries*, 477 U.S. —, 91 L.Ed.2d 558 (1986).

Appeals court holding that New York severance pay requirements were preempted by ERISA is summarily affirmed.

1026. *Brooks* v. *Burlington Industries*, 477 U.S. —, 91 L.Ed.2d 559 (1986).

Appeals court holding that North Carolina severance pay requirements were preempted by ERISA is summarily affirmed.

1027. *Thornburg* v. *Gingles*, 478 U.S. —, 92 L.Ed.2d 25 (1986).

North Carolina legislative redistricting plan, creating multimember districts having the effect of impairing the opportunity of black voters to participate in the political process, is invalid under § 2 of the Voting Rights Act.

Justices concurring: Brennan, White, Marshall, Blackmun, and Stevens.

Justices concurring specially: O'Connor, Powell, Rehnquist, and Chief Justice Burger.

Justices concurring in part and dissenting in part: Stevens, Marshall, and Blackmun.

ORDINANCES HELD UNCONSTITUTIONAL

110. *Giacobbe* v. *Andrews*, 459 U.S. 801 (1982).

Federal district court decision holding that New York City's plan for apportioning 10 at-large seats for the City Council among the City's five boroughs violates the one person, one vote requirements of the Equal Protection Clause, summarily affirmed by the U.S. Court of Appeals for the Second Circuit, is summarily affirmed.

111. *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

Ordinance regulating the circumstances of abortions is unconstitutional in the following respects: by requiring all abortions performed after the first trimester to be performed in a hospital, by requiring parental consent or court order for abortions performed on minors under age 15, by requiring the attending physician to provide detailed information on which "informed consent" may be premised, by requiring a 24-hour waiting period, and by requiring disposal of fetal remains in a "humane and sanitary manner."

Justices concurring: Powell, Brennan, Marshall, Blackmun, Stevens, and Chief Justice Burger.

Justices dissenting: O'Connor, White, Rehnquist.

112. *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985).

City zoning requirement that special use permit is required for operation of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses are permitted without such special use permits is a denial of equal protection as applied, the record containing no rational basis for the distinction.

Justices concurring: White, Powell, Rehnquist, Stevens, O'Connor, and Chief Justice Burger.

Justices concurring specially: Marshall, Brennan, and Blackmun.

113. *Hudnut* v. *American Booksellers Ass'n*, 475 U.S. —, 89 L.Ed.2d 291 (1986).

Appeals court decision holding invalid under the First Amendment an ordinance prohibiting as pornography "graphic sexually explicit subordination of women" without regard to appeal to prurient interests or offensiveness to community standards is summarily affirmed.

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

Overruling Case	*Overruled Case(s)*
176. *Illinois* v. *Gates*, *462 U.S. 213 (1983).*	*Aguilar* v. *Texas*, *378 U.S. 108 (1964);* *Spinelli* v. *United States*, *393 U.S. 410 (1969).*
177. *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89 (1984).	*Rolston* v. *Missouri Fund Comm'rs*, 120 U.S. 390 (1887) (in part); *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909) (in part); *Atchison, T. & S.F. Ry. Co.* v. *O'Connor*, 223 U.S. 280 (1912) (in part); *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499 (1917) (in part); *Johnson* v. *Lankford*, 245 U.S. 541 (1918) (in part); *Numerous other cases fall more or less under the Pennhurst doctrine. See 465 U.S., 109–111 nn. 17–21, 117–121 (maj. op.), and id., 130–37, 159–163, 165–166 nn. 50 & 52 (dissent) (listing 28 cases).*
178. *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984).	*Coffey* v. *United States*, 116 U.S. 436 (1886).
179. *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984).	*Hoover & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945).
180. *Cooperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984).	*United States* v. *Yellow Cab Co.*, *332 U.S. 218 (1947);* *Kiefer-Stewart Co.* v. *Jos. E. Seagram & Sons*, 340 U.S. 211 (1951).
181. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).	*National League of Cities* v. *Usery*, 426 U.S. 833 (1976).
182. *United States* v. *Miller*, 471 U.S. 130 (1985).	*Ex parte Bain*, 121 U.S. 1 (1887) (in part).
183. *Daniels* v. *Williams*, 474 U.S. —, 88 L.Ed.2d 662 (1986).	*Parratt* v. *Taylor*, 451 U.S. 527 (1981) (in part).
184. *Batson* v. *Kentucky*, 476 U.S. —, 90 L.Ed.2d 69 (1986).	*Swain* v. *Alabama*, 380 U.S. 202 (1965) (in part).

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