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THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

2006 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 2006

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ARTICLE I

Section 2. House of Representatives

Clause 1. Congressional Districting

CONGRESSIONAL DISTRICTING

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

Vieth v. *Jubelirer*, 541 U.S. 267 (2004) (same); *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006). Additional discussion of this issue appears under Amendment 14, The New Equal Protection, Apportionment and Districting.

Section 7. Bills and Resolutions

Clause 3. Presentation of Resolutions

THE LEGISLATIVE PROCESSδ

Presentation of Resolutions

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

The purpose of clause 3, the Orders, Resolutions, and Votes Clause (ORV Clause), is not readily apparent. For years it was assumed that the Framers inserted the clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[1] Why a separate clause was needed for this purpose has not been explained. Recent scholarship presents a different possible explanation for the ORV Clause — that it was designed to authorize delegation of law-making power to a single House, subject to presentment, veto, and possible two-House veto override.[2] If construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments. At the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the clause had been interpreted over the years. Briefly, it was shown that the word "necessary" in the clause had come to refer to the necessity for law-making; that is, any "order, resolution, or vote" must be submitted if it is to have the force of law. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the other

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

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

House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[3]

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

Section 8. Powers of Congress

Clause 1. Power to Tax and Spend

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

[P. 164, add new paragraph at end of section:]

As with its other powers, Congress may enact legislation "necessary and proper" to effectuate its purposes in taxing and spending. In upholding a law making it a crime to bribe state and local officials who administer programs that receive federal funds, the Court declared that Congress has authority "to see to it that taxpayer dollars . . . are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."[6] Congress' failure to require proof of a direct connection between the bribery and the federal funds was permissible, the Court concluded, because "corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value."[7]

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

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

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

[6] Sabri v. United States, 541 U.S. 600, 605 (2004).

[7] 541 U.S. at 606.

—Conditional Grants-in-Aid

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

This is not to say that Congress may police the effectiveness of its spending only by means of attaching conditions to grants; Congress may also rely on criminal sanctions to penalize graft and corruption that may impede its purposes in spending programs. Sabri v. United States, 541 U.S. 600 (2004).

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

Arlington Central School Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006) (because Individuals with Disabilities Education Act, which was enacted pursuant to the Spending Clause, does not furnish clear notice to states that prevailing parents may recover fees for services rendered by experts in IDEA actions, it does not authorize recovery of such fees).

Clause 3. Commerce Power

POWER TO REGULATE COMMERCE

Definition of Terms

—Necessary and Proper Clause

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

Gonzales v. Raich, 125 S. Ct. 2195 (2005).

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

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

THE COMMERCE CLAUSE AS A SOURCE OF NATIONAL POLICE POWER

Is There an Intrastate Barrier to Congress' Commerce Power.

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

Congress' commerce power has been characterized as having three, or sometimes four, very interrelated principles of decision, some old, some of recent vintage. The Court in 1995 described "three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those

[8] *See, e.g.*, United States v. Darby, 312 U.S. 100, 115-16 (1941).

activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[9]

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

Yet, the ultimate impact of these cases on the Congress' power over commerce may be limited. In *Gonzales v. Raich*,[10] the Court reaffirmed an expansive application of *Wickard v. Filburn*, and signaled that its jurisprudence is unlikely to threaten the enforcement of broad regulatory schemes based on the Commerce Clause. In *Raich*, the Court considered whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances Act (CSA).[11] The respondents argued that this class of activities should be considered as separate and distinct from the drug-trafficking that was the focus of the CSA, and that regulation of this limited non-commercial use of marijuana should be evaluated separately.

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

The Court's decision also contained an intertwined but potentially separate argument that the Congress had ample authority

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

[10] 125 S. Ct. 2195 (2005).

[11] 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq*.

[12] 125 S. Ct. at 2206-09.

[13] 125 S. Ct. at 2211, quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966).

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

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

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

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

—Congressional Authorization of Impermissible State Action

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

The Court applied the "original package" doctrine to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce."[17] Although holding that a state was entitled to prohibit the manufacture and sale of intoxicants within its boundaries,[18] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Ry. Co.*,[19] that, so long as Congress remained silent in the matter, a state lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the importation of liquor from a sister state. This holding was soon followed by another to the effect that, so

[14] 125 S. Ct. at 2206, 2210, 2211

[15] 125 S. Ct. at 2206-09.

[16] 125 S. Ct. at 2216 (Scalia, J., concurring).

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

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

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

long as Congress remained silent, a state had no power to prevent the sale in the original package of liquors introduced from another state.[20] Congress soon attempted to overcome the effect of the latter decision by enacting the Wilson Act,[21] which empowered states to regulate imported liquor on the same terms as domestically produced liquor, but the Court interpreted the law narrowly as subjecting imported liquor to local authority only after its resale.[22] Congress did not fully nullify the *Bowman* case until 1913, when it enacted of the Webb-Kenyon Act[23] which clearly authorized states to regulate direct shipments for personal use.

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

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

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

State Taxation and Regulation: The Modern Law

—Taxation

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

But see American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2419 (2005), upholding imposition of a flat annual fee on all trucks engaged in intrastate hauling (including trucks engaged in interstate hauling that "top off" loads with intrastate pickups and deliveries) and concluding that levying the fee on a per-truck rather than per-mile basis was permissible in view of the objectives of defraying costs of administering various size, weight, safety, and insurance requirements.

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

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

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

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

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

—Regulation

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

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

Foreign Commerce and State Powers

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

The tax, it was found, did not impair federal uniformity or prevent the Federal Government from speaking with one voice in international trade, in view of the fact that Congress had rejected proposals that would have preempted California's practice.[25] The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[26]

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

—The Standards Applied

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

Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004) (suit brought against HMO under state health care liability act for failure to exercise ordinary care when denying benefits is preempted).

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

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

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

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

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

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

COMMERCE WITH INDIAN TRIBES

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

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

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

Congress may also remove restrictions on tribal sovereignty. The Court has held that, absent authority from federal statute or treaty, tribes possess no criminal authority over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court also held, in *Duro v. Reina*, 495 U.S. 676 (1990), that a tribe has no criminal jurisdiction over non-tribal Indians who commit crimes on the reservation; jurisdiction over members rests on consent of the self-governed, and absence of consent defeats jurisdiction. Congress, however, quickly enacted a statute recognizing inherent authority of tribal governments to exercise criminal jurisdiction over nonmember Indians, and the Court upheld congressional authority to do so in *United States v. Lara*, 541 U.S. 193 (2004).

Clause 8. Copyrights and Patents

Scope of the Power

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

These English statutes curtailed the royal prerogative in the creation and bestowal of monopolistic privileges, and the Copyright and Patent Clause similarly curtails congressional power with regard both to subject matter and to the purpose and duration of the rights granted.[27]

[P. 313, convert final sentence of paragraph to a separate paragraph and place it after the following new paragraph to be added at end of section:]

The constitutional limits, however, do not prevent the Court from being highly deferential to congressional exercise of its power. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," the Court has said.[28] "Satisfied" in *Eldred v. Ashcroft* that the Copyright Term Extension Act did not violate the "limited times" prescription, the Court saw the only remaining question as whether the enactment was "a rational exercise of the legislative authority conferred by the Copyright Clause."[29] The Act, the Court concluded, "reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain." Moreover, the limitation on the duration of copyrights and patents is largely unenforceable. The protection period may extend well be-

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

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

[29] 537 U.S. at 204.

yond the life of the author or inventor.[30] Congress may extend the duration of existing copyrights and patents, and in so doing may protect the rights of purchasers and assignees.[31]

Nature and Scope of the Right Secured

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

The leading case on the nature of the rights that Congress is authorized to "secure" under the Copyright and Patent Clause is *Wheaton v. Peters*.[32] Wheaton was the official reporter for the Supreme Court from 1816 to 1827, and Peters was his successor in that role. Wheaton charged Peters with having infringed his copyright in the twelve volumes of "Wheaton's Reports" by reprinting material from Wheaton's first volume in "a volume called 'Condensed Reports of Cases in the Supreme Court of the United States'";[33] Wheaton based his claim on both common law and a 1790 act of Congress. On the statutory claim, the Court remanded to the trial court for a determination of whether Wheaton had complied with all the requirements of the act.[34] On the common law claim, the Court held for Peters, finding that, under common law, publication divests an author of copyright protection. Wheaton argued that the Constitution should be held to protect his common law copyright, because "the word *secure* . . . clearly indicates an intention, not to originate a right, but to protect one already in existence."[35] The Court found, however, that "the word *secure*, as used in the constitution, could not mean the protection of an acknowledged legal right," but was used "in reference to a future right."[36] Thus, the exclusive right that the Constitution authorizes Congress to "secure" to authors and inventors owes its existence solely to acts of Congress that secure it, from which it follows that the

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

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

[32] 33 U.S. (8 Pet.) 591 (1834).

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

[34] 33 U.S. (8 Pet.) at 667.

[35] 33 U.S. (8 Pet.) at 661; Holmes v. Hurst, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.

[36] 33 U.S. (8 Pet.) at 661.

rights granted by a patent or copyright are subject to such qualifications and limitations as Congress sees fit to impose.[37]

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

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

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

CONSTITUTIONAL RIGHTS IN WARTIME

The Constitution at Home in Wartime

—Enemy Aliens

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

Because this use of military tribunals was sanctioned by Congress, the Court found it unnecessary to decide whether "the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity.'"[38]

Clause 18. Necessary and Proper Clause

Scope of Incidental Powers

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

The Necessary and Proper Clause, sometimes called the "coefficient" or "elastic" clause, is an enlargement, not a constriction, of the powers expressly granted to Congress. Chief Justice Marshall's classic opinion in *McCulloch v. Maryland*[39] set the standard in words that reverberate to this day.

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[37] 33 U.S. (8 Pet.) at 662; Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815). A major limitation of copyright law is that "fair use" of a copyrighted work is not an infringement. Fair use can involve such things as quotation for the use of criticism and reproduction for classroom purposes, but it may not supersede the use of the original work. *See* Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985) (an unauthorized 300- to 400-word excerpt, published as a news "scoop" of the authorized prepublication excerpt of former President Ford's memoirs and substantially affecting the potential market for the authorized version, was not a fair use within the meaning of § 107 of the Copyright Act. 17 U.S.C. § 107). For fair use in the context of a song parody, *see Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569 (1994).

[38] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 (2006). *But see*, id. at 2773 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need.").

[39] 17 U.S. (4 Wheat.) 316 (1819).

Operation of Clause

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

Congress may also legislate to protect its spending power. Sabri v. United States, 541 U.S. 600 (2004) (upholding imposition of criminal penalties for bribery of state and local officials administering programs receiving federal funds).

Courts and Judicial Proceedings

[P. 361, add clause in text after n.1759:]

may require the tolling of a state statute of limitations while a state cause of action that is supplemental to a federal claim is pending in federal court,[40]

Section 10 — Powers Denied to States

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

Ex Post Facto Laws

—Scope of the Provision

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

Distinguishing between civil and penal laws was at the heart of the Court's decision in *Smith v. Doe*[41] upholding application of Alaska's "Megan's Law" to sex offenders who were convicted before the law's enactment. The Alaska law requires released sex offenders to register with local police and also provides for public notification via the Internet. The Court accords "considerable deference" to legislative intent; if the legislature's purpose was to enact a civil regulatory scheme, then the law can be ex post facto only if there is "the clearest proof" of punitive effect.[42] Here, the Court determined, the legislative intent was civil and non-punitive — to promote public safety by "protecting the public from sex offenders." The Court then identified several "useful guideposts" to aid analysis of whether a law intended to be non-punitive nonetheless has punitive effect. Registration and public notification of sex offenders are of recent origin, and are not viewed as a "traditional means of punishment."[43] The Act does not subject the registrants to an "affirmative disability or restraint"; there is no physical restraint or

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

[41] 538 U.S. 84 (2003).

[42] 538 U.S. at 92.

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

occupational disbarment, and there is no restraint or supervision of living conditions, as there can be under conditions of probation. The fact that the law might deter future crimes does not make it punitive. All that is required, the Court explained, is a rational connection to a non-punitive purpose, and the statute need not be narrowly tailored to that end.[44] Nor is the act "excessive" in relation to its regulatory purpose.[45] Rather, "the means chosen are 'reasonable' in light of the [state's] non-punitive objective" of promoting public safety by giving its citizens information about former sex offenders, who, as a group, have an alarmingly high rate of recidivism.[46]

—Changes in Punishment

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

Justice Chase in *Calder v. Bull* gave an alternative description of the four categories of ex post facto laws, two of which related to punishment. One such category was laws that inflict punishment "where the party was not, by law, liable to any punishment"; the other was laws that inflict greater punishment than was authorized when the crime was committed.[47]

Illustrative of the first of these punishment categories is "a law enacted after expiration of a previously applicable statute of limitations period [as] applied to revive a previously time-barred prosecution." Such a law, the Court ruled in *Stogner v. California*,[48] is prohibited as *ex post facto*. Courts that had upheld extension of unexpired statutes of limitation had been careful to distinguish situations in which the limitations periods have expired. The Court viewed revival of criminal liability after the law had granted a person "effective amnesty" as being "unfair" in the sense addressed by the *Ex Post Facto* Clause.

Illustrative of the second punishment category are statutes that changed an indeterminate sentence law to require a judge to

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[44] 538 U.S. at 102.

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

[46] 538 U.S. at 105. Unlike involuntary civil commitment, where the "magnitude of restraint [makes] individual assessment appropriate," the state may make "reasonable categorical judgments," and need not provide individualized determinations of dangerousness. Id. at 103.

[47] 3 U.S. (3 Dall.) 386, 389 (1798).

[48] 539 U.S. 607, 632-33 (2003) (invalidating application of California's law to revive child abuse charges 22 years after the limitations period had run for the alleged crimes).

impose the maximum sentence,[49] that required solitary confinement for prisoners previously sentenced to death,[50] and that allowed a warden to fix, within limits of one week, and keep secret the time of execution.[51]

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

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

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

ARTICLE II

Section 1. The President

Clause 1. Powers and Term of the President.

NATURE AND SCOPE OF PRESIDENTIAL POWER

—The Youngstown Case

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

And, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Kennedy, in a concurring opinion joined by three other Justices, id. at 2800.

Section 2. Powers and Duties of the President

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

COMMANDER-IN-CHIEF

Martial Law and Constitutional Limitations

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

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

In response to the September 11, 2001 terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the Authorization for Use of Military Force,[1] which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." During a military action in Afghanistan pursuant to this authorization, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hostilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statutory grounds.[2] However, the Court did find that the government

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

[2] Hamdi v. Rumsfeld, 542 U.S. 507 (2004). There was no opinion of the Court. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy and Justice

may not detain the petitioner indefinitely for purposes of interrogation, without giving him the opportunity to offer evidence that he is not an enemy combatant.[3]

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

Clause 2. Treaties and Appointment of Officers

THE TREATY-MAKING POWER

Treaties as Law of the Land

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

The meaning of treaties, as of statutes, is determined by the courts. "If treaties are to be given effect as federal law under our legal sys-

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Breyer, avoided ruling on the Executive Branch argument that such detentions could be authorized by its Article II powers alone, and relied instead on the "Authorization for Use of Military Force" passed by Congress. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, although his dissenting opinion found that such detentions were authorized by Article II. Justice Souter, joined by Justice Ginsberg, rejected the argument that the Congress had authorized such detentions, while Justice Scalia, joined with Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*.

[3] At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney. 542 U.S. at 533, 539.

[4] 542 U.S. 466 (2004).

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

[6] The petitioners were Australians and Kuwaitis.

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

[8] The Court found that 28 U.S.C. § 2241, which had previously been construed to require the presence of a petitioner in a district court's jurisdiction, was now satisfied by the presence of a jailor-custodian. See Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973). Another "enemy combatant" case, this one involving an American citizen arrested on American soil, was remanded after the Court found that a federal court's *habeas* jurisdiction under 28 U.S.C. § 2241 was limited to jurisdiction over the immediate custodian of a petitioner. Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal court's jurisdiction over Secretary of Defense Rumsfeld was not sufficient to satisfy the presence requirement under 28 U.S.C. § 2241).

tem, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." [9] In addition, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.'" [10] Decisions of the International Court of Justice (ICJ) interpreting treaties, however, have "*no binding force* except between the parties and in respect of that particular case." [11] ICJ decisions "are therefore entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court." [12]

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The Domestic Obligation of Executive Agreements

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

Initially, it was the view of most judges and scholars that executive agreements based solely on presidential power did not become the "law of the land" pursuant to the Supremacy Clause because such agreements are not "treaties" ratified by the Senate.[13] The Supreme Court, however, found another basis for holding state laws to be preempted by executive agreements, ultimately relying

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[9] Sanchez-Llamas v. Oregon,126 S. Ct. 2669, 2684 (2006), quoting Marbury v. Madison, 5 U.S. (1 Cr.) 137, 177 (1803). In *Sanchez-Llamas*, two foreign nationals were arrested in the United States, and, in violation of Article 36 of the Vienna Convention on Consular Relations, their nations' consuls were not notified that they had been detained by authorities in a foreign country (the U.S.). The foreign nationals were convicted in Oregon and Virginia state courts, respectively, and cited the violations of Article 36 in challenging their convictions. The Court did not decide whether Article 36 grants rights that may be invoked by individuals in a judicial proceeding (four justices would have held that it did grant such rights). The reason that the Court did not decide whether Article 36 grants rights to defendants was that it held, by a 6-to-3 vote, that, even if Article 36 does grant rights, the defendants in the two cases before it were not entitled to relief on their claims. It found, specifically, that "suppression of evidence is [not] a proper remedy for a violation of Article 36," and that "an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial." Id. at 2677.

[10] Sanchez-Llamas v. Oregon, 126 S. Ct. at 2685, quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[11] Sanchez-Llamas v. Oregon, 126 S. Ct. at 2684, quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 933 (1945) (emphasis added by the Court).

[12] Sanchez-Llamas v. Oregon, 126 S. Ct. at 2685, quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

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

on the Constitution's vesting of foreign relations power in the national government.

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

*Belmon*t and *Pink* were reinforced in *American Insurance Association v. Garamendi*.[14] In holding that California's Holocaust Victim Insurance Relief Act was preempted as interfering with the Federal Government's conduct of foreign relations, as expressed in executive agreements, the Court reiterated that "valid executive agreements are fit to preempt state law, just as treaties are."[15] The preemptive reach of executive agreements stems from "the Constitution's allocation of the foreign relations power to the National Government."[16] Because there was a "clear conflict" between the California law and policies adopted through the valid exercise of federal executive authority (settlement of Holocaust-era insurance claims being "well within the Executive's responsibility for foreign affairs"), the state law was preempted.[17]

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

State Laws Affecting Foreign Relations — Dormant Federal Power and Preemption

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

The exclusive nature of the federal foreign relations power has long been asserted by the Supreme Court. In 1840, for example, the Court declared that "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities."[18] A hundred

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[14] 539 U.S. 396 (2003). The Court's opinion in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), was rich in learning on many topics involving executive agreements, but the preemptive force of agreements resting solely on presidential power was not at issue, the Court concluding that Congress had either authorized various presidential actions or had long acquiesced in others.

[15] 539 U.S. at 416.

[16] 539 U.S. at 413.

[17] 539 U.S. at 420.

[18] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-76 (1840). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("The external powers of the United

years later the Court remained emphatic about federal exclusivity. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." [19]

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the nation's foreign policy interests in the absence of an established federal policy. In *Zschernig v. Miller*,[20] the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien's country, and that the alien heir would be allowed to receive payments from the Oregon estate "without confiscation." [21] Although a Justice Department *amicus* brief asserted that application of the Oregon law in this one case would not cause any "undu[e] interfer[ence] with the United States' conduct of foreign relations," the Court saw a "persistent and subtle" effect on international relations stemming from the "notorious" practice of state probate courts in denying payments to persons from Communist countries.[22] Regulation of descent and distribution of estates is an area traditionally regulated by states, but such "state regulations must give way if they impair the effective exercise of the Nation's foreign policy." If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints "must be provided by the Federal Government." [23]

States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear"); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

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

[20] 389 U.S. 429 (1968).

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

[22] 389 U.S. at 440.

[23] 389 U.S. at 440, 441.

Zschernig lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign governments or to curtail trade with out-of-favor countries.[24] In 1999, the Court struck down Massachusetts' Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding applying *Zschernig*.[25] Similarly, in 2003 the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although the Court discussed *Zschernig* at some length, it saw no need to resolve issues relating to its scope.[26]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemption not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[27] and grants of power.[28] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice Souter suggested for the Court in *Garamendi*, field preemption may be appropriate if a state legislates "simply to take a position

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

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

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

[27] It is contended, for example, that Article I, § 10's specific prohibitions against states' engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, *supra*, 75 NOTRE DAME L. REV. 341.

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

on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional responsibility, "but in a way that affects foreign relations."[29] We must await further litigation to see whether the Court employs this distinction.[30]

THE EXECUTIVE ESTABLISHMENT

Appointments and Congressional Regulation of Offices

—Congressional Regulation of Conduct in Office

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

Until 1993, § 9(a) of the Hatch Act[31] prohibited any person in the executive branch, or any executive branch department or agency, except the President and the Vice President and certain "policy determining" officers, to "take an active part in political management or political campaigns," although employees had been permitted to "express their opinions on all political subjects and candidates." In *United Public Workers v. Mitchell*,[32] these provisions were upheld as "reasonable" against objections based on the First, Fifth, Ninth, and Tenth Amendments. The Hatch Act Reform Amendments of 1993, however, substantially liberalized the rules for political activities during off-duty hours for most executive branch employees, subject to certain limitations on off-duty hours activities and express prohibitions against on-the-job partisan political activities.[33]

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[29] 539 U.S. at 419 n.11.

[30] Justice Ginsburg's dissent in *Garamendi*, joined by the other three dissenters, suggested limiting *Zschernig* in a manner generally consistent with Justice Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting HENKIN, *supra* n.24, at 164). But Justice Ginsburg also voiced more general misgivings about judges' becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, *supra* n.24, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[31] 53 Stat. 1147, 1148 (1939), then 5 U.S.C. § 7324(a). The 1940 law, § 12(a), 54 Stat. 767-768, applied the same broad ban to employees of federally funded state and local agencies, but this provision was amended in 1974 to restrict state and local government employees in only one respect: running for public office in partisan elections. Act of Oct. 15, 1974, P. L. 93-443, § 401(a), 88 Stat. 1290, 5 U.S.C. § 1502.

[32] 330 U.S. 75 (1947). See also *Civil Serv. Corp. v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), in which the constitutional attack was renewed, in large part based on the Court's expanding free speech jurisprudence, but the act was again sustained. A "little Hatch Act" of a state, applying to its employees, was sustained in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[33] P. L. 103-94, § 2(a), 107 Stat. 1001 (1993), 5 U.S.C. §§ 7321-7326. Executive branch employees (except those appointed by the President, by and with the advice

The Presidential Aegis: Demands for Papers

—Private Access to Government Information

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

Reynolds dealt with an evidentiary privilege. There are other circumstances, however, in which cases must be "dismissed on the pleadings without ever reaching the question of evidence."[34] In holding that federal courts should refuse to entertain a breach of contract action seeking enforcement of an agreement to compensate someone who performed espionage services during the Civil War, the Court in *Totten v. United States* declared that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[35]

—Prosecutorial and Grand Jury Access to Presidential Documents

[P. 559, add to text at end of section:]

Public disclosure was at issue in 2004 when the Court weighed a claim of executive privilege asserted as a bar to discovery orders for information disclosing the identities of individuals who served on an energy task force chaired by the Vice President.[36] Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon*,[37] and, in instructing the appeals court on how to proceed, emphasized the importance of confidentiality for advice tendered the President.[38]

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and consent of the Senate) who are listed in § 7323(b)(2), which generally include those employed by agencies involved in law enforcement or national security, remain under restrictions similar to the those in the old Hatch Act on taking an active part in political management or political campaigns.

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

[35] 92 U.S. 105, 107 (1875). *See also* Tenet v. Doe, 544 U.S. 1, 9 (2005) (reiterating and applying *Totten's* "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden"). The Court in *Tenet* distinguished *Webster v. Doe* on the basis of "an obvious difference . . . between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy." Id. at 10.

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

[37] Although the information sought in *Nixon* was important to "the constitutional need for production of relevant evidence in a criminal proceeding," the suit against the Vice President was civil, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" 542 U.S. at 383, 384.

[38] The Court recognized "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." 542 U.S. at 382. *But cf.* Clinton v. Jones, 520 U.S. 681, 702 (1997).

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

Power Denied by Congress

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

In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006), Justice Kennedy, in a concurring opinion joined by three other Justices, endorsed "the three-part scheme used by Justice Jackson" as "[t]he proper framework for assessing whether Executive actions are authorized." The Court in this case found "that the military commission convened [by the President, in Guantanamo Bay, Cuba] to try Hamdan lacks power to proceed because its structure and procedures violate [the Uniform Code of Military Justice]." Id. at 2759. Thus, as Justice Kennedy noted, "the President has acted in a field with a history of congressional participation and regulation." Id. at 2800.

ARTICLE III

Section 1. Judicial Power, Courts, Judges

ANCILLARY POWERS OF FEDERAL COURTS

Power to Issue Writs: The Act of 1789

—*Habeas Corpus*: Congressional and Judicial Control

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

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

—*Habeas Corpus*: The Process of the Writ

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

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

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

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

[3] Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-95 (1973) (issue is whether "the custodian can be reached by service of process"). *See also* Rasul v. Bush, 542 U.S. 466 (2004) (federal district court for District of Columbia had jurisdiction of *habeas* petitions from prisoners held at U.S. Naval base at Guantanamo Bay, Cuba); Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal district court in New York lacks jurisdiction over prisoner being held in a naval brig in Charleston, South Carolina; the commander of the brig, not the Secretary of Defense, is the immediate custodian and proper respondent).

Section 2. Judicial Power and Jurisdiction

Clause 1. Cases and Controversies; Grants of Jurisdiction

JUDICIAL POWER AND JURISDICTION—CASES AND CONTROVERSIES

Substantial Interest: Standing

—Taxpayer Suits

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

Most recently, the Court refused to create an exception for Commerce Clause violations to the general prohibition on taxpayer standing.[4]

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

In *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (2006), the Court held that a plaintiff's status as a *municipal* taxpayer does not give him standing to challenge a *state* tax credit.

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

The taxpayer's action in *Doremus*, the Court wrote, "is not a direct dollars-and-cents injury but is a religious difference."[5] This rationale was similar to the spending program-regulatory program distinction of *Flast*. But, even a dollar-and-cents injury resulting from a state spending program will apparently not constitute a *direct* dollars-and-cents injury. The Court in *Doremus* wrote that a taxpayer challenging either a federal or a state statute "must be able to show not only that the statute is invalid but that he has sustained some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[6]

—Standing to Assert the Constitutional Rights of Others

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

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

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[4] DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1864-65 (2006) (standing denied to taxpayer claim that state tax credit given to vehicle manufacturer violated the Commerce Clause).

[5] 342 U.S. at 434.

[6] 342 U.S. at 434, quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); quoted with approval in DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1863 (2006).

The Requirement of a Real Interest

—Retroactivity Versus Prospectivity

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

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

Political Questions

—The Doctrine Reappears

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

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

Clause 2. Original and Appellate Jurisdiction

FEDERAL-STATE COURT RELATIONS

Conflicts of Jurisdiction: Rules of Accommodation

—Res Judicata

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

Closely related is the *Rooker-Feldman* doctrine, holding that federal subject-matter jurisdiction of federal district courts does not extend to review of state court judgments.[7] The Supreme Court, not federal district courts, has such appellate jurisdiction. The doctrine thus prevents losers in state court from obtaining district court review, but "does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions."[8]

Conflicts of Jurisdiction: Federal Court Interference with State Courts

—*Habeas Corpus*: Scope of the Writ

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

In *House v. Bell*, 126 S. Ct. 2064, 2086-2087 (2006), the Court declined to resolve the issue that in *Herrera* it had assumed without deciding: that "a truly persuasive

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

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

demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." See Amendment 8, Limitations on *Habeas Corpus* Review of Capital Sentences.

ARTICLE IV

Section 1. Full Faith and Credit

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

[P. 896, substitute for entire section:]

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

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

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

[2] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998), quoted in Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003). Justice Nelson in the *Dred Scott* case drew an analogy to international law, concluding that states, as well as nations, judge for themselves the rules governing property and persons within their territories. Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857). "One State cannot exempt property from taxation in another," the Court concluded in *Bonaparte v. Tax Court*, 104 U.S. 592 (1882), holding that no provision of the Constitution, including the Full Faith and Credit Clause, enabled a law exempting from taxation certain debts of the enacting state to prevent another state (the state in which the creditor resided) from taxing the debts. *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589-96 (1839); Kryger v. Wilson, 242 U.S. 171 (1916); and Bond v. Hume, 243 U.S. 15 (1917).

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

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

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

Section 2. Interstate Comity

Clause 1. State Citizenship: Privileges and Immunities

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

Origin and Purpose

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

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

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

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

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

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

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

ARTICLE V

AMENDMENT OF THE CONSTITUTION

Proposing a Constitutional Amendment

—Proposals by Congress

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

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

FIRST AMENDMENT

RELIGION

Establishment of Religion

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

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

An opportunity to flesh out this distinction was lost when the Court dismissed for lack of standing an Establishment Clause challenge to public school recitation of the Pledge of Allegiance with the words "under God." Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

—Religious Displays on Government Property

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

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

There was no opinion of the Court in *Van Orden*. Justice Breyer, the swing vote in the two cases,[5] distinguished the Texas Capitol grounds display from the Kentucky courthouse displays. In

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[1] McCreary County v. ACLU of Kentucky, 125 S. Ct. 2722 (2005).

[2] Van Orden v. Perry, 125 S. Ct. 2854 (2005).

[3] 125 S. Ct. at 2738. The Court in its previous Ten Commandments case, *Stone v. Graham*, 449 U.S. 39, 41 (1980) (invalidating display in public school classrooms) had concluded that the Ten Commandments are "undeniably a sacred text," and the 2005 Court accepted that characterization. *McCreary*, 125 S. Ct. at 2732.

[4] 125 S. Ct. at 2745. An "indisputable" religious purpose was evident in the resolutions authorizing a second display, and the Court characterized statements of purpose accompanying authorization of the third displays as "only . . . a litigating position." 125 S. Ct. at 2739, 2740.

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

some contexts, the Ten Commandments can convey a moral and historical message as well as a religious one, the Justice explained. Although it was "a borderline case" turning on "a practical matter of degree," the capitol display served "a primarily nonreligious purpose."[6] The monument displaying the Ten Commandments was one of 17 monuments and 21 historical markers on the Capitol grounds; it was paid for by a private, civic, and primarily secular organization; and it had been in place, unchallenged, for 40 years. Under the circumstances, Justice Breyer thought it unlikely that the monument will be understood to represent an attempt by government to favor religion.[7]

Free Exercise of Religion

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

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

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

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

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

Government need not, however, offer the same accommodations to secular entities that it extends to religious practitioners in order to facilitate their religious exercise; "[r]eligious accommodations . . . need not 'come packaged with benefits to secular entities.'"[9]

"Play in the joints" can work both ways, the Court ruled in upholding a state's exclusion of theology students from a college scholarship program.[10] Although the state could have included theology students in its scholarship program without offending the Establishment Clause, its choice not to fund religious training did not offend the Free Exercise Clause even though that choice singled out theology students for exclusion.[11] Refusal to fund religious train-

[6] 125 S. Ct. at 2869, 2871.

[7] 125 S. Ct. at 2871.

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

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

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

[11] 540 U.S. at 720-21. Excluding theology students but not students training for other professions was permissible, the Court explained, because "[t]raining someone to lead a congregation is an essentially religious endeavor," and the Constitution's

ing, the Court observed, was "far milder" than restrictions on religious practices that have been held to offend the Free Exercise Clause.[12]

—Free Exercise Exemption from General Governmental Requirements

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

In 2004, the Court rejected for lack of standing an Establishment Clause challenge to recitation of the Pledge of Allegiance in public schools. Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

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

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

Congress responded to *Boerne* by enacting a new law purporting to rest on its commerce and spending powers. The Religious Land Use and Institutionalized Persons Act (RLUIPA)[14] imposes the same strict scrutiny test struck down in *Boerne* but limits its application to certain land use regulations and to religious exercise by persons in state institutions.[15] In *Cutter v. Wilkinson*,[16] the Court upheld RLUIPA's prisoner provision against a facial chal-

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special treatment of religion finds "no counterpart with respect to other callings or professions." Id. at 721.

[12] 540 U.S. at 720-21 (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law aimed at restricting ritual of a single religious group); McDaniel v. Paty, 435 U.S. 618 (1978) (law denying ministers the right to serve as delegates to a constitutional convention); and Sherbert v. Verner, 374 U.S. 398 (1963) (among the cases prohibiting denial of benefits to Sabbatarians)).

[13] *See*, *e.g.*, In re Young, 141 F.3d 854 (8th Cir.), *cert. denied*, 525 U.S. 811 (1998) (RFRA is a valid exercise of Congress' bankruptcy powers as applied to insulate a debtor's church tithes from recovery by the bankruptcy trustee); O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003) (RFRA may be applied to require the Bureau of Prisons to accommodate religious exercise by prisoners); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (RFRA applies to Bureau of Prisons).

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

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

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

lenge under the Establishment Clause, but it did not rule on congressional power to enact RLUIPA. The Court held that RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices." [17] Rather, the provision "fits within the corridor" between the Free Exercise and Establishment Clauses, and is "compatible with the [latter] because it alleviates exceptional government-created burdens on private religious exercise." [18]

FREEDOM OF EXPRESSION — SPEECH AND PRESS

The Doctrine of Prior Restraint

—Obscenity and Prior Restraint

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

City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 784 (2004) ("Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria . . . and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type");

Subsequent Punishment: Clear and Present Danger and Other Tests

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

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

and indecency

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

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

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

But, even in a First Amendment situation, the Court has written, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do now swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute

[17] 544 U.S. at 714.
[18] 544 U.S. at 720.

sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation. . . . Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." [19]

Closely related at least to the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to do so, "[i]f the First Amendment means anything, it means that regulating speech must be a last — not first — resort." [20] Thus, when the Court applies "strict scrutiny" to a content-based regulation of fully protected speech, it requires that the regulation be "the least restrictive means to further the articulated interest." [21] Similarly, the Court requires "narrow tailoring" even of restrictions to which it does not apply strict scrutiny. Thus, in the case of restrictions that are not content-based (time, place, or manner restrictions; incidental restrictions); or in the case of restrictions of speech to which the Court accords less than full First Amendment protection (campaign contributions and other freedoms of association; commercial speech), though the Court does not require that the government use the least restrictive means available to accomplish its end, it does require that the regulation not restrict speech unreasonably.[22] The Court uses tests closely related to one another in

[19] Virginia v. Hicks, 539 U.S. 113, 119-20, 124 (2003) (italics in original; citations omitted) (upholding, as not addressed to speech, an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose for being on the premises"). *Virginia v. Hicks* cited *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which, in the opinion of the Court and in Justice Brennan's dissent, id. at 621, contains extensive discussion of the overbreadth doctrine. Other restrictive decisions are *Arnett v. Kennedy*, 416 U.S. 134, 158-64 (1974); *Parker v. Levy*, 417 U.S. 733, 757-61 (1974); and *New York v. Ferber*, 458 U.S. 747, 766-74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, 815-18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932-34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633-39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport); Reno v. ACLU, 521 U.S. 844, 874-879 (1997) (statute banning "indecent" material on the Internet).

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

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

[22] *E.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988) (time, place, and manner restriction upheld as "narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication"); Ward v. Rock Against Racism, 491 U.S. 781, 798-799 (1989) (incidental restriction upheld as

these instances in which it does not apply strict scrutiny. It has indicated that the test for determining the constitutionality of an incidental restriction on speech "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,"[23] and that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context."[24]

Also, except apparently when the government seeks to deny minors access to sexually explicit material, the Supreme Court, even when applying less than strict scrutiny, requires that, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[25]

"promot[ing] a substantial governmental interest that would be achieved less effectively absent the regulation"); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (campaign contribution ceiling "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedom"); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (commercial speech restrictions need not be "absolutely the least severe that will achieve the desired end," but must exhibit "a 'fit' between the legislature's ends and the means chosen to accomplish those ends — a fit that is not necessarily perfect, but reasonable . . .") (internal quotation mark and citation ommited)). *But see* Thompson v. Western States Medical Center, 535 U.S. 357, 371 (2002) (commercial speech restriction struck down as "more extensive than necessary to serve" the government's interests).

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

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

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

Freedom of Belief

—Flag Salute Cases

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

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

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

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

Other governmental efforts to compel speech have also been held by the Supreme Court to violate the First Amendment; these include a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,[26] a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their records,[27] an Ohio statute that prohibited the distribution of anonymous campaign literature,[28] and a Massachusetts statute that required private citizens who organized a parade to include among the marchers a group imparting a message — in this case support for gay rights — that the organizers did not wish to convey.[29]

By contrast, the Supreme Court has found no First Amendment violation when government compels disclosures in commercial speech, or when it compels the labeling of foreign political propaganda. Regarding compelled disclosures in commercial speech, the Court held that an advertiser's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information

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

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

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

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

regarding his services is not . . . a fundamental right." [30] Regarding compelled labeling of foreign political propaganda, the Court upheld a provision of the Foreign Agents Registration Act of 1938 that required that, when an agent of a foreign principal seeks to disseminate foreign "political propaganda," he must label such material with certain information, including his identity, the principal's identity, and the fact that he has registered with the Department of Justice. The Court found that "Congress did not prohibit, edit, or restrain the distribution of advocacy materials. . . . To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda." [31]

Right of Association

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

530 U.S. at 653. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1312 (2006), the Court held that the Solomon Amendment's forcing law schools to allow military recruiters on campus does not violate the schools' freedom of expressive association because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students — not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Rumsfeld* is discussed below under "Government and the Power of the Purse."

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

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

Particular Government Regulations That Restrict Expression

—Government as Employer: Free Expression Generally

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

In *City of San Diego v. Roe*,[32] the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating. The Court found that the officer's "expression

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[30] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985).
[31] Meese v. Keene, 481 U.S. 465, 480 (1987).
[32] 543 U.S. 77 (2004) (per curiam).

does not qualify as a matter of public concern . . . and *Pickering* balancing does not come into play."[33] The Court also noted that the officer's speech, unlike federal employees' speech in *United States v. National Treasury Employees Union (NTEU)*,[34] was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and functions of his employer."[35] Therefore, the Court had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [*i.e., Pickering* or *NTEU*]."[36] This leaves uncertain whether, had the officer's expression not been linked to his official status, the Court would have overruled his firing under *NTEU* or would have upheld it under *Pickering* on the ground that his expression was not a matter of public concern.

In *Garcetti v. Ceballos*, the Court cut back on First Amendment protection for government employees by holding that there is no protection — *Pickering* balancing is not to be applied — "when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern.[37] In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and sued. The Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[38] The fact that the employee's speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to foreclose First Amendment protection.[39] Rather, the "controlling factor" was that his expressions

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[33] 543 U.S. at 84.

[34] 513 U.S. 454 (1995) (discussed under "Government as Employer: Political and Other Outside Activities," *supra*).

[35] 543 U.S. at 84.

[36] 543 U.S. at 80.

[37] 126 S. Ct. 1951, 1960 (2006).

[38] 126 S. Ct. at 1960.

[39] The Court cited *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979), for these points. In *Givhan*, the Court had upheld the First Amendment right of a public school teacher to complain to the school principal about "employment policies and practices at [the] school which [she] conceived to be racially discriminatory in purpose or effect." Id. at 413. The difference between *Givhan* and *Ceballos* was apparently that Givhan's complaints were not made pursuant to her job duties, whereas Ceballos' were. Therefore, Givhan spoke as a citizen whereas Ceballos spoke as a government employee. See *Ceballos*, 126 S. Ct. at 1959.

were made pursuant to his duties."[40] Therefore, another employee in the office, with different duties, might have had a First Amendment right to utter the speech in question, and the deputy district attorney himself might have had a First Amendment right to communicate the information that he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

—Government as Regulator of the Electoral Process: Elections

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

The Court in *Buckley* recognized that political contributions "serve[ ] to affiliate a person with a candidate" and "enable[ ] like-minded persons to pool their resources in furtherance of common political goals." Contribution ceilings, therefore, "limit one important means of associating with a candidate or committee. . . ."[41] Yet "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[42]

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

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

In *FEC v. Beaumont*,[43] the Court held that the federal law that bars corporations from contributing directly to candidates for federal office may constitutionally be applied to nonprofit advocacy corporations. Corporations may make such contributions only through PACs, and the Court in Beaumont wrote that, in *National Right to Work*, it had "specifically rejected the argument . . . that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations."[44] Though nonprofit advocacy corporations, the Court held in *Massachusetts Citizens for Life*, have a First Amendment right to make independent expenditures, the same is not true for direct contributions to candidates.

In *McConnell v. Federal Election Commission*,[45] the Court upheld against facial constitutional challenges key provisions of the

[40] 126 S. Ct. at 1959-60.
[41] 424 U.S. at 22.
[42] 424 U.S. at 25 (internal quotation mark omitted).
[43] 539 U.S. 146 (2003).
[44] 539 U.S. at 157.
[45] 540 U.S. 93 (2003).

Bipartisan Campaign Reform Act of 2002 (BCRA). A majority opinion coauthored by Justices Stevens and O'Connor upheld two major provisions of BCRA: (1) the prohibition on "national party committees and their agents from soliciting, receiving, directing, or spending any soft money,"[46] which is money donated for the purpose of influencing state or local elections, or for "mixed-purpose activities — including get-out-the-vote drives and generic party advertising,"[47] and (2) the prohibition on corporations and labor unions' using funds in their treasuries to finance "electioneering communications,"[48] which BCRA defines as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal Office," made within 60 days before a general election or 30 days before a primary election. Electioneering communications thus include both "express advocacy and so-called issue advocacy."[49]

As for the soft-money prohibition on national party committees, the Court applied "the less rigorous scrutiny applicable to contribution limits."[50] and found it "closely drawn to match a sufficiently important interest."[51] The Court's decision to use less rigorous scrutiny, it wrote, "reflects more than the limited burdens they [*i.e.*, the contribution restrictions] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits — interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"[52]

As for the prohibition on corporations and labor unions' using their general treasury funds to finance electioneering communications, the Court applied strict scrutiny, but found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideals."[53] These corrosive and distorting effects result both from express advocacy and from so-called issue advocacy. The Court also noted that, because corporations and unions "remain free to organize and

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[46] 540 U.S. at 133.
[47] 540 U.S. at 123.
[48] 540 U.S. at 204.
[49] 540 U.S. at 190.
[50] 540 U.S. at 141.
[51] 540 U.S. at 136 (internal quotation marks omitted).
[52] 540 U.S. at 136.
[53] 540 U.S. at 205.

administer segregated funds, or PACs," for electioneering communications, the provision was not a complete ban on expression.[54]

In *Randall v. Sorrell*, a plurality of the Court struck down a Vermont campaign finance statute's limitations on both expenditures and contributions.[55] As for the statute's expenditure limitations, the plurality found *Buckley* to control and saw no reason to overrule it and no adequate basis upon which to distinguish it. As for the statute's contribution limitations, the plurality, following *Buckley*, considered whether the "contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy'; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny."[56] The plurality found that they were. Vermont's limit of $200 per gubernatorial election "(with significantly lower limits for contributions to candidates for State Senate and House of Representatives) . . . are well below the limits this Court upheld in *Buckley*," and "are the lowest in the Nation."[57] But the plurality struck down Vermont's contribution limits "based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections."[58]

—Government as Investigator: Reporter's Privilege

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

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

[54] 540 U.S. at 204.

[55] 126 S. Ct. 2479 (2006). Justice Breyer wrote the plurality opinion, with only Chief Justice Roberts joining it in full. Justice Alito joined the opinion as to the contribution limitations but not as to the expenditure limitations. Justice Alito and three other Justices concurred in the judgment as to the limitations on both expenditures and contributions, and three Justices dissented.

[56] 126 S. Ct. at 2492 (citation omitted).

[57] 126 S. Ct. at 2493 (citation omitted). The plurality noted that, "in terms of real dollars (*i.e.*, adjusting for inflation)," they were lower still. Id.

[58] 126 S. Ct. at 2495.

ring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

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

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

The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[59] Although efforts in Congress have failed, 49 states have done so — 33 (plus the District of Columbia) by statute and 16 by court decision, with Wyoming the sole holdout.[60] As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[61] The federal courts have not resolved whether the common law provides a journalists' privilege.[62]

—Government as Administrator of Prisons

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

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

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[59] 408 U.S. at 706.

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

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

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

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

Four factors "are relevant in determining the reasonableness of a regulation at issue."[63] "First, is there a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it? Second, are there alternative means of exercising the right that remain open to prison inmates? Third, what impact will accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally? And, fourth, are ready alternatives for furthering the governmental interest available?"[64] Two years after *Turner v. Safley*, in *Thornburgh v. Abbott*, the Court restricted *Procunier v. Martinez* to the regulation of *outgoing* correspondence, finding that the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[65]

In *Beard v. Banks*, a plurality of the Supreme Court upheld "a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates."[66] These inmates were housed in Pennsylvania's Long Term Segregation Unit and one of the prison's penological rationales for its policy, which the plurality found to satisfy the four Turner factors, was to motivate better behavior on the part of the prisoners by providing them with an incentive to move back to the regular prison population.[67] Applying the four *Turner* factors to this rationale, the plurality found that (1) there was a logical connection between depriving inmates of newspapers and magazines and providing an incentive to improve behavior; (2) the Policy provided no alternatives to the deprivation of newspapers and magazines, but this was "not 'conclusive' of the reasonableness of the Policy"; (3) the impact of accommodating the asserted constitutional right would be negative; and (4) no alternative would "fully accommodate the prisoner's rights at *de minimis* cost to valid peno-

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[63] 482 U.S. at 89.

[64] Beard v. Banks,126 S. Ct. 2572, 2578 (2006) (citations and internal quotation marks omitted; this quotation quotes language from *Turner v. Safley*, 482 U.S. at 89-90).

[65] 490 U.S. 401, 411-14 (1989). *Thornburgh v. Abbott* noted that, if regulations deny prisoners publications on the basis of their content, but the grounds on which the regulations do so is content-neutral, *e.g.*, to protect prison security), then the regulations will be deemed neutral. Id. at 415-16.

[66] 126 S. Ct. 2572, 2575 (2006). This was a 4-2-2 decision, with Justice Alito, who had written the court of appeals decision, not participating.

[67] 126 S. Ct. at 2579.

logical interests."[68] The plurality believed that its "real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation" between the Policy and legitimate penological objections, as *Turner* requires.[69] The plurality concluded that he had. Justices Thomas and Scalia concurred in the result but would do away with *Turner* factors because they believe that "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivation — *provided only that those deprivations are consistent with the Eighth Amendment*.[70]

—Government and Power of the Purse

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

In *United States v. American Library Association, Inc.*, a four-justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[71] The plurality considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance by requiring public libraries (public schools were not involved in the case) to limit their freedom of speech if they accept federal funds. The plurality, citing *Rust v. Sullivan*, found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized."[72] The plurality distinguished *Legal Services Corporation v. Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys "that pits them *against* the Government, and there is no comparable assumption that they must be free of any conditions

[68] 126 S. Ct. at 2579-2580.

[69] 126 S. Ct. at 2580.

[70] 126 S. Ct. at 2582-2583 (Thomas, J., concurring), quoting Overton v. Bazzetta, 539 U.S. at 139 (Thomas, J., concurring) (emphasis originally in *Overton*).

[71] 539 U.S. 194, 199 (2003).

[72] 539 U.S. at 211.

that their benefactors might attach to the use of donated funds or other assistance."[73]

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment, which provides that, in the Court's summary, "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[74] FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military's discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding. The Court concluded: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."[75] The Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must *do* — afford equal access to military recruiters — not what they may or may not *say*."[76] The law schools' conduct in barring military recruiters, the Court found, "is not inherently expressive," and, therefore, unlike flag burning, for example, is not "symbolic speech."[77] Applying the *O'Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly "promotes a substantial government interest that would be achieved less effectively absent the regulation."[78]

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government's message. As for compelling speech, law schools must "send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. . . . This sort of recruiting assistance, however, is a far cry from the compelled speech

[73] 539 U.S. at 213 (emphasis in original). Other grounds for the plurality decision are discussed under "Non-obscene But Sexually Explicit and Indecent Expression" and "Internet as Public Forum."

[74] 126 S. Ct. 1297, 1302 (2006).

[75] 126 S. Ct. at 1307. The Court stated that Congress' authority to directly require campus access for military recruiters comes from its Article I, section 8, powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy. 126 S. Ct. at 1306.

[76] 126 S. Ct. at 1307.

[77] 126 S. Ct. at 1310.

[78] 126 S. Ct. at 1311.

in *Barnette* and *Wooley*. . . . [It] is plainly incidental to the Solomon Amendment's regulation of conduct."[79] As for forcing one speaker to host or accommodate another, "[t]he compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[80] By contrast, the Court wrote, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[81] Finally, the Court found that the Solomon Amendment was not analogous to the New Jersey law that had required the Boy Scouts to accept a homosexual scoutmaster, and that the Supreme Court struck down as violating the Boy Scouts' "right of expressive association."[82] Recruiters, unlike the scoutmaster, are "outsiders who come onto campus for the limited purpose of trying to hire students — not to become members of the school's expressive association."[83]

Government Regulation of Communications Industries

—Commercial Speech

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

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

Government Restraint of Content of Expression

—Group Libel, Hate Speech

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

In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of per-

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[79] 126 S. Ct. at 1308.
[80] 126 S. Ct. at 1309.
[81] 126 S. Ct. at 1310.
[82] 126 S. Ct. at 1312, quoting Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).
[83] 126 S. Ct. at 1312.

sons.[84] Such a prohibition does not discriminate on the basis of a defendant's beliefs — "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . . . The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ."[85]

—Non-obscene but Sexually Explicit and Indecent Expression

[P. 1234. add to text after n.1254:]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source."[86] Subsequently, a federal district court issued a permanent injunction against the enforcement of COPA.[87]

In *United States v. American Library Association*, a four-justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to

[84] 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. 538 U.S. at 365-66.

[85] 538 U.S. at 362-63.

[86] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004). Justice Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" and "[i]t is always less restrictive to do *nothing* than to do *something*." Id. at 684. In addition, Breyer asserted, "filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision." Id. The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." Id. at 669.

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

them."[88] The plurality asked "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires."[89] Does CIPA, in other words, effectively violate library *patrons*' rights? The plurality concluded that it does not, after finding that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," and that it therefore would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[90]

The plurality acknowledged "the tendency of filtering software to 'overblock' — that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block."[91] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[92]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance — in other words, does it violate public *libraries'* rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so."[93]

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

—The Public Forum

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

In *United States v. American Library Association, Inc.*, a four-justice plurality of the Supreme Court found that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[94] The plurality therefore did not apply "strict scrutiny" in

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[88] 539 U.S. 194, 199 (2003).
[89] 539 U.S. at 203.
[90] 539 U.S. at 205.
[91] 539 U.S. at 208.
[92] 539 U.S. at 209. Justice Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case." Id. at 215. Justice Souter, dissenting, noted that "the statute says only that a library 'may' unblock, not that it must." Id. at 233.
[93] 539 U.S. at 212.
[94] 539 U.S. 194, 205 (2003).

upholding the Children's Internet Protection Act, which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[95] The plurality found that Internet access in public libraries is not a "traditional" public forum because "[w]e have 'rejected the view that traditional public forum status extends beyond its historical confines.'"[96] And Internet access at public libraries is not a "designated" public forum because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[97]

Nevertheless, although Internet access in public libraries is not a public forum, and particular Web sites, like particular newspapers, would not constitute public fora, the Internet as a whole might be viewed as a public forum, despite its lack of a historic tradition. The Supreme Court has not explicitly held that the Internet as a whole is a public forum, but, in *Reno v. ACLU*, which struck down the Communications Decency Act's prohibition of "indecent" material on the Internet, the Court noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information."[98]

—Door-to-Door Solicitation

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

In *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003), the Court held unanimously that the First Amendment does not prevent a state from bringing

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[95] 539 U.S. at 199.
[96] 539 U.S. at 206.
[97] 539 U.S. at 206 (citation omitted).
[98] A federal court of appeals wrote: "Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. *Compare Forbes*, 523 U.S. at 679 ("reject[ing] the view that traditional public forum status extends beyond its historic confines" [to a public television station]) *with Reno v. ACLU*, 521 U.S. 844, 851-53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web)." Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternate citations to *Forbes and Reno* omitted).

fraud actions against charitable solicitors who falsely represent that a "significant" amount of each dollar donated would be used for charitable purposes.

FOURTH AMENDMENT

SEARCH AND SEIZURE

History and Scope of the Amendment

—Scope of the Amendment

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

Brigham City, Utah v. Stuart, 126 S. Ct. 1943 (2006) (warrantless entry into a home when police have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury).

—The Interest Protected

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

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

—Arrests and Other Detentions

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

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

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

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

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

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

Searches and Seizures Pursuant to Warrant

—Probable Cause

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

An "anticipatory" warrant does not violate the Fourth Amendment as long as there is probable cause to believe that the condition precedent to execution of the search warrant will occur and that, once it has occurred, "there is a fair probability that contraband or evidence of a crime will be found in a specified place." United States v. Grubbs, 126 S. Ct. 1494, 1499, 1500 (2006), quoting Illinois v. Gates, 462 U.S. 213, 238 (1983). "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place.'" 126 S. Ct. at 1498.

—Particularity

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

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

—Execution of Warrants

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

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

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

But see Maryland v. Pringle, 540 U.S. 366 (2003) (distinguishing *Ybarra* on basis that passengers in car often have "common enterprise," and noting that the tip in *Di Re* implicated only the driver).

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

For the same reasons, officers may use "reasonable force," including handcuffs, to effectuate a detention.[3]

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[1] Groh v. Ramirez, 540 U.S. 551 (2004) (a search based on a warrant that did not describe the items to be seized was "plainly invalid"; particularity contained in supporting documents not cross-referenced by the warrant and not accompanying the warrant is insufficient). United States v. Grubbs, 126 S. Ct. 1494, 1500-01 (2006) (because the language of the Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized[,]' . . . the Fourth Amendment does not require that the triggering condition for an anticipatory warrant be set forth in the warrant itself."

[2] United States v. Banks, 540 U.S. 31 (2003) (forced entry was permissible after officers executing a warrant to search for drugs knocked, announced "police search warrant," and waited 15-20 seconds with no response).

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

Valid Searches and Seizures Without Warrants

—Detention Short of Arrest: Stop-and-Frisk

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

The Court provided a partial answer in 2004, when it upheld a state law that required a suspect to disclose his name in the course of a valid *Terry* stop.[4] Questions about a suspect's identity "are a routine and accepted part of many *Terry* stops," the Court explained.[5]

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

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

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

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

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

—Vehicular Searches

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

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

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

See also United States v. Flores-Montano, 541 U.S. 149 (2004) (upholding a search at the border involving disassembly of a vehicle's fuel tank).

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

Edmond was distinguished in *llinois v. Lidster*, 540 U.S. 419 (2004), upholding use of a checkpoint to ask motorists for help in solving a recent hit-and-run accident that had resulted in death. The public interest in solving the crime was deemed "grave," while the interference with personal liberty was deemed minimal.

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

[5] 542 U.S. at 186.

[P. 1325, add to n.250:]

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

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

Thornton v. United States, 541 U.S. 615 (2004) (the *Belton* rule applies regardless of whether the arrestee exited the car at the officer's direction, or whether he did so prior to confrontation);

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

, or unless there is individualized suspicion of criminal activity by the passengers.[6]

—Consent Searches

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

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

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

If, however, one occupant consents to a search of shared premises, but a physically present co-occupant expressly objects to the search, the search is unreasonable.[7]

—Border Searches

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

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

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[6] Maryland v. Pringle, 540 U.S. 366 (2003) (probable cause to arrest passengers based on officers finding $783 in glove compartment and cocaine hidden beneath back seat armrest, and on driver and passengers all denying ownership of the cocaine).

[7] Georgia v. Randolph, 126 S. Ct. 1515 (2006) (warrantless search of a defendant's residence based on his estranged wife's consent was unreasonable and invalid as applied to a physically present defendant who expressly refused to permit entry). The Court in *Randolph* admitted that it was "drawing a fine line," id. at 1527, between situations where the defendant is present and expressly refuses consent, and that of *United States v. Matlock*, 415 U.S. 164, 171 (1974), and *Illinois v. Rodriguez*, 497 U.S. 177 (1990), where the defendants were nearby but were not asked for their permission. In a dissenting opinion, Chief Justice Roberts observed that the majority's ruling "provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room." Id. at 1531.

—Prisons and Regulation of Probation

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

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

A warrant is also not required if the purpose of a search of a probationer is investigate a crime rather than to supervise probation.[8]

"[O]n the 'continuum' of state-imposed punishments . . . , parolees have [even] fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[9] The Fourth Amendment, therefore, is not violated by a warrantless search of a parolee that is predicated upon a parole condition to which a prisoner agreed to observe during the balance of his sentence.[10]

—Drug Testing

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

Seven years later, the Court in *Board of Education v. Earls*[11] extended *Vernonia* to uphold a school system's drug testing of all junior high and high school students who participated in extra-curricular activities. The lowered expectation of privacy that athletes have "was not essential" to the decision in *Vernonia*, Justice Thomas wrote for a 5-4 Court majority.[12] Rather, that decision "depended primarily upon the school's custodial responsibility and authority."[13] Another distinction was that, although there was some evidence of drug use among the district's students, there was no evidence of a significant problem, as there had been in *Vernonia*. Rather, the Court referred to "the nationwide epidemic of drug use," and stated that there is no "threshold level" of drug use that need be present.[14] Because the students subjected to testing in *Earls* had the choice of not participating in extra-curricular activities rather than submitting to drug testing, the case stops short of holding that public school authorities may test all junior and senior

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

[9] Samson v. California, 126 S. Ct. 2193, 2198 (2006).

[10] 126 S. Ct. at 2199. The parole condition at issue in *Samson* required prisoners to "agree in writing to be subject to a search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Id. at 2196, quoting Cal. Penal Code Ann. § 3067(a).

[11] 536 U.S. 822 (2002).

[12] 536 U.S. at 831.

[13] 536 U.S. at 831

[14] 536 U.S. at 836.

high school students for drugs. Thus, although the Court's rationale seems broad enough to permit across-the-board testing,[15] Justice Breyer's concurrence, emphasizing among other points that "the testing program avoids subjecting the entire school to testing,"[16] raises some doubt on this score. The Court also left another basis for limiting the ruling's sweep by asserting that "regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren."[17]

Enforcing the Fourth Amendment: The Exclusionary Rule

—Alternatives to the Exclusionary Rule

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

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

—Narrowing Application of the Exclusionary Rule

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

In addition, a violation of the "knock-and-announce" procedure that police officers must follow to announce their presence before entering a residence with a lawful warrant[18] does not require suppression of the evidence gathered pursuant to the warrant.[19]

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

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

[17] 536 U.S. at 831-32. The best the Court could do to support this statement was to assert that "some of these clubs and activities require occasional off-campus travel and communal undress," to point out that all extracurricular activities "have their own rules and requirements," and to quote from general language in *Vernonia*. Id. Dissenting Justice Ginsburg pointed out that these situations requiring change of clothes on occasional out-of-town trips are "hardly equivalent to the routine communal undress associated with athletics." Id. at 848.

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

[19] Hudson v. Michigan, 126 S. Ct. 2159 (2006). Writing for the majority, Justice Scalia explained that the exclusionary rule was inappropriate because the purpose of the knock-and-announce requirement was to protect human life, property, and the homeowner's privacy and dignity; the requirement has never protected an individual's interest in preventing seizure of evidence described in a warrant. Id. at 2165.

Furthermore, the Court believed that the "substantial social costs" of applying the exclusionary rule would outweigh the benefits of deterring knock-and-announce violations by applying it. Id. The Court also reasoned that other means of deterrence, such as civil remedies, were available and effective, and that police forces have become increasingly professional and respectful of constitutional rights in the past half-century. Id. at 2168. Justice Kennedy wrote a concurring opinion emphasizing that "the continued operation of the exclusionary rule . . . is not in doubt." Id. at 2170. In dissent, Justice Breyer asserted that the majority's decision "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection." Id. at 2171.

FIFTH AMENDMENT

DOUBLE JEOPARDY

Development and Scope

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

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

Reprosecution Following Conviction

—Sentence Increases

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

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

Reprosecution Following Acquittal

—Acquittal by the Trial Judge

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

When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.[2] There is no possibility of retrial for the same offense.[3] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be able to appeal or the judge may be able to reconsider.[4] The question is "whether the rul-

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[1] United States v. Lara, 541 U.S. 193 (2004) (federal prosecution for assaulting a federal officer after tribal conviction for "violence to a policeman"). The Court concluded that Congress has power to recognize tribal sovereignty to prosecute nonmember Indians, that Congress had done so, and that consequently the tribal prosecution was an exercise of tribal sovereignty, not an exercise of delegated federal power on which a finding of double jeopardy could be based.

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

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

[4] As a general rule a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. Smith v. Massachusetts, 543 U.S. 462 (2005) (Massachusetts had not done so, however, so the judge's

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

SELF-INCRIMINATION

Development and Scope

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

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

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

—Miranda v. Arizona

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

Yarborough v. Alvarado, 541 U.S. 652 (2004) (state court determination that teenager brought to police station by his parents was not "in custody" was not "unreasonable" for purposes of federal *habeas* review).

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

Elstad was distinguished in *Missouri v. Seibert*, 542 U.S. 600 (2004), however, when the failure to warn prior to the initial questioning was a deliberate attempt to circumvent *Miranda* by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

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midtrial acquittal on one of three counts became final for double jeopardy purposes when the prosecution rested its case).

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

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

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

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

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

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

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

[P. 1429, substitute for clause containing n.367:]

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

DUE PROCESS

Procedural Due Process

—Aliens: Entry and Deportation

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

The Court has frequently said that Congress exercises "sovereign" or "plenary" power over the substance of immigration law, and this power is at its greatest when it comes to exclusion of aliens.[11]

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

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

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

In *Demore v. Kim*,[12] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of removability, the Court reaffirmed Congress' broad powers over aliens. "[W]hen the Government deals with deportable aliens, the

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[10] United States v. Patane, 542 U.S. 630 (2004) (allowing introduction of a pistol, described as a "nontestimonial fruit" of an unwarned statement). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (upholding use of a witness revealed by defendant's statement elicited without proper *Miranda* warning). Note too that confessions may be the poisonous fruit of other constitutional violations, such as illegal searches or arrests. *E.g.*, Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982).

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

[12] 538 U.S. 510 (2003). The goal of detention in *Zadvydas* had been found to be "no longer practically attainable," and detention therefore "no longer [bore] a reasonable relation to the purpose for which the individual was committed." 538 U.S. at 527.

Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[13]

—Judicial Review of Administrative or Military Proceedings

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

Failure of the Executive Branch to provide for any type of proceeding for prisoners alleged to be "enemy combatants," whether in a military tribunal or a federal court, was at issue in *Hamdi v. Rumsfeld*.[14] During a military action in Afghanistan,[15] a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had authority to detain Hamdi as an "enemy combatant," and to deny him meaningful access to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.[16] However, the Court ruled that the Government may not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney.[17]

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[13] 538 U.S. at 528. There was disagreement among the Justices as to whether existing procedures afforded the alien an opportunity for individualized determination of danger to society and risk of flight.

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

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

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

[17] 542 U.S. 533, 539 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice Souter, joined by Justice Ginsberg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. Id. at 553 (concurring in part, dissenting in part, and concurring in judgement). Justice Scalia, joined by Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*, and thus would have required a criminal prosecution of the petitioner. Id. at 554 (dissenting).

NATIONAL EMINENT DOMAIN POWER

Public Use

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

Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005). The taking need only be "rationally related to a conceivable public purpose." Id. at 2669 (Justice Kennedy concurring).

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

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

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

Most recently, the Court equated public use with "public purpose." Kelo v. City of New London, 125 S. Ct. 2655, 2662 (2005).

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

The expansive interpretation of public use in eminent domain cases may have reached its outer limit in *Kelo v. City of New London*.[19] There, a five-justice majority upheld as a public use the private-to-private transfer of land for purposes of economic development, at least in the context of a well-considered, areawide redevelopment plan adopted by a municipality to invigorate a depressed economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed in *Berman* and *Midkiff*, and stressed the importance of judicial deference to the legislative judgment as to public needs. At the same time, the Court cautioned that private-to-private condemnations of individual properties, not part of an "integrated development plan . . . raise a suspicion that a private purpose [is] afoot."[20] A vigorous four-justice dissent countered that localities will always be able to manufacture a plausible public purpose, so that the majority opinion leaves the vast majority of private parcels subject to condemnation when a higher-valued use is desired.[21] Backing off from the Court's past endorsements in *Berman* and *Midkiff* of a public use/police power equation, the dissenters asserted that such was "errant language" that was "unnecessary" to the holdings of those decisions.[22]

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

[19] 125 S. Ct. 2665 (2005).

[20] 125 S. Ct. at 2667.

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

[22] 125 S. Ct. at 2675.

Just Compensation

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

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

When Property is Taken

—Regulatory Takings

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

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

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

The first prong of the *Agins* test, asking whether land use controls "substantially advance legitimate governmental interests," has now been erased from takings jurisprudence, after a quarter-century run. The proper concern of regulatory takings law, said *Lingle v. Chevron U.S.A. Inc.*,[23] is the magnitude, character, and distribution of the burdens that a regulation imposes on property rights. In "stark contrast," the "substantially advances" test addresses the means-end efficacy of a regulation, more in the nature of a due process inquiry.[24] As such, it is not a valid takings test.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. A two-part test has emerged. The first part debuted in *Nollan v. California Coastal Commission*,[25] and holds that in order not to be a taking, an exaction condition on a development permit approval (requiring, for example, that a portion of a tract to be subdivided be dedicated for public roads) must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise the condition is "an out-and-out plan of extortion."[26] The second part of the exaction-takings test, an-

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

[24] 544 U.S. at 542.

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

[26] 483 U.S. at 837. Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of" the social evil (*e.g.*, congestion)

nounced in *Dolan v. City of Tigard*,[27] specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by such conditions on the property owner, and the impact of the property owner's proposed development on the community — at least in the context of adjudicated (rather than legislated) conditions.

Nollan and *Dolan* occasioned considerable debate over the breadth of what became known as the "heightened scrutiny" test. The stakes were plainly high in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[28] the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. Still unclear, however, is whether the Court meant to place outside *Dolan* exactions of a purely monetary nature, in contrast with the physically invasive dedication conditions involved in *Nollan* and *Dolan*.[29]

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

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that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 485 U.S. at 20, 22.

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

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

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

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

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

The requirement that state remedies be exhausted before bringing a federal taking claim to federal court has occasioned countless dismissals of takings claims brought initially in federal court, while at the same time posing a bar under doctrines of preclusion to filing first in state court, per *Williamson County*, then relitigating in federal court. The effect in many cases is to keep federal takings claims out of federal court entirely — a consequence the plaintiffs' bar has long argued could not have been intended by the Court. In *San Remo Hotel, L.P. v. City and County of San Francisco*,[31] the Court unanimously declined to create an exception to the federal full faith and credit statute[32] that would allow relitigation of federal takings claims in federal court. Nor, said the Court, may an *England* reservation of the federal taking claim in state court[33] be used to require a federal court to review the reserved claim, regardless of what issues the state court may have decided. While concurring in the judgment, four justices asserted that the state-exhaustion prong of *Williamson County* "may have been mistaken."[34]

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[31] 125 S. Ct. 2491 (2005).

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

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

[34] 125 S. Ct. at 2507 (Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas).

SIXTH AMENDMENT

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

—The Attributes and Function of the Jury

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

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

—Criminal Proceedings to Which the Guarantee Applies

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

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

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

Within the context of a criminal trial, what factual issues are submitted to the jury has traditionally been determined by whether the fact to be established is an element of a crime or instead is a sentencing factor.[3] Under this approach, the right to a jury extends to the finding of all facts establishing the elements of a crime, and sentencing factors may be evaluated by a judge. Evaluating the issue primarily under the Fourteenth Amendment's Due Process Clause, the Court initially deferred to Congress and the states on this issue, allowing them broad leeway in determining which facts are elements of a crime and which are sentencing factors.[4]

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[1] Washington v. Recuenco, 126 S. Ct. 2546, 2552 (2006). *Apprendi* is discussed in the next section.

[2] Ford v. Wainwright, 477 U.S. 399, 416-417 (1986); Atkins v. Virginia, 536 U.S. 304, 317 (2002); Schriro v. Smith, 126 S. Ct. 7, 9 (2005). *See* Eighth Amendment, "Limitations on Capital Punishment: Diminished Capacity," *infra*.

[3] In *Washington v. Recuenco*, however, the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element [of a crime] to the jury, is not structural error," entitling the defendant to automatic reversal, but can be harmless error. 126 S. Ct. 2546, 2553 (2006).

[4] For instance, the Court held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and deter-

Breaking with this tradition, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[5] "The relevant inquiry is one not of form, but of effect."[6] Apprendi had been convicted of a crime punishable by imprisonment for no more than ten years, but had been sentenced to 12 years based on a judge's findings, by a preponderance of the evidence, that enhancement grounds existed under the state's hate crimes law. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum," the Court concluded, "must be submitted to a jury, and proved beyond a reasonable doubt."[7] The one exception the *Apprendi* Court recognized was for sentencing enhancements based on recidivism.[8] Subsequently, the Court refused to apply *Apprendi*'s principles to judicial factfinding that supports imposition of mandatory minimum sentences.[9]

Apprendi's importance soon became evident as the Court applied its reasoning in other situations. In *Ring v. Arizona*,[10] the

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mined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). After resolving the issue under the Due Process Clause, the Court dismissed the Sixth Amendment jury trial claim as "merit[ing] little discussion." Id. at 93. For more on the due process issue, see the discussion in the main text under "Proof, Burden of Proof, and Presumptions."

[5] 530 U.S. 466, 490 (2000).

[6] 530 U.S. at 494. "[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id. at 495 (internal quotation omitted).

[7] 530 U.S. at 490.

[8] 530 U.S. at 490. Enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, and a judge may find the existence of previous valid convictions even if the result is a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States is subject to a maximum sentence of two years, but upon proof of a felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has the burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

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

[10] 536 U.S. 584 (2002).

Court, overruling precedent,[11] applied *Apprendi* to invalidate an Arizona law that authorized imposition of the death penalty only if the judge made a factual determination as to the existence of any of several aggravating factors. Although Arizona required that the judge's findings as to aggravating factors be made beyond a reasonable doubt, and not merely by a preponderance of the evidence, the Court ruled that those findings must be made by a jury.[12]

In *Blakely v. Washington*,[13] the Court sent shockwaves through federal as well as state sentencing systems when it applied *Apprendi* to invalidate a sentence imposed under Washington State's sentencing statute. Blakely, who pled guilty to an offense for which the "standard range" under the state's sentencing law was 49 to 53 months, was sentenced to 90 months based on the judge's determination — not derived from facts admitted in the guilty plea — that the offense had been committed with "deliberate cruelty," a basis for an "upward departure" under the statute. The 90-month sentence was thus within a statutory maximum, but the Court made "clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." [14]

In *United States v. Booker*,[15] the Court held that the same principles limit sentences that courts may impose under the federal Sentencing Guidelines. As the Court restated the principle in Booker, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted

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

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

[13] 542 U.S. 296 (2004).

[14] 542 U.S. at 303-304 (italics in original; citations omitted).

[15] 543 U.S. 220 (2005).

by the defendant or proved to a jury beyond a reasonable doubt."[16] Attempts to distinguish *Blakely* were rejected. Because the Sentencing Reform Act made application of the Guidelines "mandatory and binding on all judges,"[17] the Court concluded that the fact that the Guidelines were developed by the Sentencing Commission rather than by Congress "lacks constitutional significance.[18] The mandatory nature of the Guidelines was also important to the Court's formulation of a remedy.[19] Rather than engrafting a jury trial requirement onto the Sentencing Reform Act, the Court instead invalidated two of its provisions, one making application of the Guidelines mandatory, and one requiring *de novo* review for appeals of departures from the mandatory Guidelines, and held that the remainder of the Act could remain intact.[20] As the Court explained, this remedy "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well."[21]

CONFRONTATION

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

In *Ohio v. Roberts*, 448 U.S. 56 (1980), a Court majority adopted the reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[22] *Roberts* was applied and narrowed over the course of 24 years,[23] and then

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[16] 543 U.S. at 244.

[17] 543 U.S. at 233.

[18] 543 U.S. at 237. Relying on *Mistretta v. United States*, 488 U.S. 361 (1989), the Court also rejected a separation-of-powers argument. Id. at 754-55.

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

[20] 543 U.S. at 259. The Court substituted a "reasonableness" standard for the *de novo* review standard. Id. at 262.

[21] 543 U.S. at 245-246 (statutory citations omitted).

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

[23] Applying *Roberts*, the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986). *Roberts* was narrowed in *United States v. Inadi*, 475 U.S. 387 (1986), which held that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is

overruled in *Crawford v. Washington*.[24] The Court in *Crawford* rejected reliance on "particularized guarantees of trustworthiness" as inconsistent with the requirements of the Confrontation Clause. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[25] Reliability is an "amorphous" concept that is "manipulable," and the *Roberts* test had been applied "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[26] "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[27]

Crawford represents a decisive turning point for Confrontation Clause analysis. The basic principles are now clearly stated. "Testimonial evidence" may be admitted against a criminal defendant only if the declarant is available for cross-examination at trial, or, if the declarant is unavailable even though the government has made reasonable efforts to procure his presence, the defendant has had a prior opportunity to cross-examine as to the content of the statement.[28] The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" The Court indicated, however, that the term covers "at a minimum" prior testimony at a preliminary hearing, at a former trial, or before a grand jury, and statements made during police interrogation.[29]

In *Davis v. Washington*,[30] the Court began an exploration of the parameters of *Crawford* by considering when a police interrogation is "testimonial" for purposes of the Confrontation Clause. The *Davis* case involved a 911 call in which a women described being assaulted by a former boyfriend. A tape of that call was admitted

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inapplicable to co-conspirators' out-of-court statements. *See also* White v. Illinois, 502 U.S. 346, 357 (1992) (holding admissible "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment"); and Idaho v. Wright, 497 U.S. 805, 822-23 (1990) (insufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a "residual" hearsay exception rather than under a firmly rooted exception).

[24] 541 U.S. 36 (2004).

[25] 541 U.S. at 60-61.

[26] 541 U.S. at 63.

[27] 541 U.S. at 68-69.

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

[29] 541 U.S. at 68.

[30] 126 S. Ct. 2266 (2006).

as evidence of a felony violation of a domestic no-contact order, despite the fact that the women in question did not testify. While again declining to establish all parameters of when a response to police interrogation is testimonial, the Court did hold that statements to the police are nontestimonial when made under circumstances that "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[31] Statements made after such emergency has ended, however, would be treated as testimonial, and could not be introduced.[32]

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel at Trial

—Johnson v. Zerbst

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

A waiver must be knowing, voluntary, and intelligent, but need not be based on a full and complete understanding of all of the consequences. Iowa v. Tovar, 541 U.S. 77 (2004) (holding that warnings by trial judge detailing risks of waiving right to counsel are not constitutionally required before accepting guilty plea from uncounseled defendant).

—Protection of the Right to Retained Counsel

[P. 1531, add new paragraph in text after n.229:]

Where the right to be assisted by counsel of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant.[33] Further, because such a denial is not a "trial error" (a constitutional error that occurs during presentation of a case to the jury), but a "structural defect" (a constitutional error that affects the framework of the trial),[34] the Court had held that the decision is not subject to a "harmless error" analysis.[35]

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[31] Id. at 2273.

[32] Id. at 2277-78. Thus, where police responding to a domestic violence report interrogated a woman in the living room while her husband was being questioned in the kitchen, there was no present threat to the woman, so such information as was solicited was testimonial. Id. at 2278 (facts of *Hammon v. Indiana*, considered together with *Davis*.)

[33] United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561-62 (2006).

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

[35] *Gonzalez-Lopez*, 126 S. Ct. at 2557, 2563-64. The Court noted that an important component of the finding that denial of the right to choose one's own counsel was a "structural defect" was the difficulty of assessing the effect of such denial on a trial's outcome. Id. at 2564 n.4.

—Effective Assistance of Counsel

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

Strickland, 466 U.S. at 689-91. *See also* Yarborough v. Gentry, 540 U.S. 1 (2003) (deference to attorney's choice of tactics for closing argument).

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

Woodford v. Visciotti, 537 U.S. 19 (2002) (state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors). *But see* Wiggins v. Smith, 539 U.S. 510 (2003) (attorney's failure to pursue defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable); and Rompilla v. Beard, 125 S. Ct. 2456 (2005) (attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate).

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

and decisions selecting which issues to raise on appeal.[36]

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

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

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

and consequently most claims of inadequate representation are to be measured by the *Strickland* standard.[37]

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

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

—Self-Representation

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

The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 126 S. Ct. 407 (2005).

Right to Assistance of Counsel in Nontrial Situations

—Custodial Interrogation

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

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

EIGHTH AMENDMENT

CRUEL AND UNUSUAL PUNISHMENTS

Capital Punishment

—Implementation of Procedural Requirements

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

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

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

Although, under the Eighth and Fourteenth Amendments, the state must bear the burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality). *A fortiori*, a statute "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 126 S. Ct. 2516, 2524 (2006).

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

What is the effect on a death sentence if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor, to be weighed against mitigating factors, in determining whether a defendant who has been found eligible for the death penalty should receive it) is found invalid? In *Brown v. Sanders*, the Court announced "the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." [1]

[1] 126 S. Ct. 884, 892 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." Id. at 890. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." Id. Prior to *Brown v. Sanders*, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." Id.

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

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not present at the scene of the crime."[2] Although "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.[3] Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime", and "thereby attacks a previously determined matter in a proceeding [*i.e.*, sentencing] at which, in principle, that matter is not at issue."[4]

—Limitations on Capital Punishment: Diminished Capacity

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

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

[P. 1591, add new paragraph in text after n.143:]

In *Atkins*, the Court wrote, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[5] In *Schriro v. Smith*, the Court again quoted this language, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim."[6] States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge."[7]

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

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme

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[2] 126 S. Ct. 1226, 1231, 1230 (2006).
[3] 126 S. Ct. at 1231, 1232 (Court's emphasis deleted in part).
[4] 126 S. Ct. at 1232.
[5] 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright.
[6] 126 S. Ct. 7, 9 (2005) (per curiam).
[7] 126 S. Ct. at 9.

that permitted capital punishment to be imposed for crimes committed before age 16, but upheld other statutes authorizing capital punishment for crimes committed by 16 and 17 year olds.

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

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing the mentally retarded with what it saw as a lack of consensus regarding execution of juvenile offenders over age 15,[8] less than three years later the Court held that such a consensus had developed. The Court's decision in *Roper v. Simmons*[9] drew parallels with *Atkins*. A consensus had developed, the Court held, against the execution of juveniles who were age 16 or 17 when they committed their crimes. Since *Stanford*, five states had eliminated authority for executing juveniles, and no states that formerly prohibited it had reinstated the authority. In all, 30 states prohibited execution of juveniles: 12 that prohibited the death penalty altogether, and 18 that excluded juveniles from its reach. This meant that 20 states did not prohibit execution of juveniles, but the Court noted that only five of these states had actually executed juveniles since *Stanford*, and only three had done so in the 10 years immediately preceding *Simmons*. Although the pace of change was slower than had been the case with execution of the mentally retarded, the consistent direction of change toward abolition was deemed more important.[10]

As in *Atkins*, the *Simmons* Court relied on its "own independent judgment" in addition to its finding of consensus among the states.[11] Three general differences between juveniles and

[8] 536 U.S. at 314, n.18.

[9] 543 U.S. 551 (2005). The case was decided by 5-4 vote. Justice Kennedy wrote the Court's opinion, and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor, who had joined the Court's 6-3 majority in *Atkins*, wrote a dissenting opinion, as did Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas.

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

[11] 543 U.S. at 564. The *Stanford* Court had been split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would have focused almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 492 U.S. at 377 ("A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."). The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 492 U.S.

adults make juveniles less morally culpable for their actions. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and ill-considered actions and decisions." Juveniles are also more susceptible than adults to "negative influences" and peer pressure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed."[12] For these reasons, irresponsible conduct by juveniles is "not as morally reprehensible," they have "a greater claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed.[13] Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. The majority preferred a categorical rule over individualized assessment of each offender's maturity, explaining that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[14]

The *Simmons* Court found confirmation for its holding in "the overwhelming weight of international opinion against the juvenile death penalty."[15] Although "not controlling," the rejection of the juvenile death penalty by other nations and by international authorities was "instructive," as it had been in earlier cases, for Eighth Amendment interpretation.[16]

—Limitations on *Habeas Corpus* Review of Capital Sentences

[P. 1594, delete everything after citation in n.161, and add new footnote at end of second sentence of paragraph in text:]

The "new rule" limitation was suggested in a plurality opinion in *Teague*. A Court majority in *Penry* and later cases has adopted it. "*Teague* by its terms applies only

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at 394-96. The *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play alongwith their analysis of consensus on the issue of executing the mentally retarded.

[12] 543 U.S. at 569, 570.

[13] 543 U.S. at 570.

[14] w543 U.S. at 572-573. Strongly disagreeing, Justice O'Connor wrote that "an especially depraved juvenile offender may . . . be just as culpable as many adult offenders considered bad enough to deserve the death penalty. . . . [E]specially for 17-year-olds . . . the relevant differences between 'adults' and 'juveniles' appear to be a matter of degree, rather than of kind." Id. at 600.

[15] 543 U.S. at 578 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," id. at 575).

[16] Citing as precedent Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (plurality opinion); *Atkins*, 536 U.S. at 317, n.21; Enmund v. Florida, 458 U.S. 782, 796-97, n.22 (1982); Thompson v. Oklahoma, 487 U.S. 815, 830-31 & n.31 (1988) (plurality opinion); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

to procedural rules." Bousley v. United States, 523 U.S. 614, 620 (1998). "New substantive rules generally apply retroactively." This is so because new substantive rules "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him." Schriro v. Summerlin, 542 U.S. 348, 351, 352 (2004) (citation and internal quotation omitted) (decision in *Ring v. Arizona*, holding that jury not judge must decide existence of aggravating factors on which imposition of death sentence may be based, was a procedural, not a substantive rule).

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

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

[P. 1595, add to n.167:]

Accord, House v. Bell, 126 S. Ct. 2064, 2086-2087 (2006) (defendant failed to meet *Herrera* standard but nevertheless put forward enough evidence of innocence to meet the less onerous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), which "held that prisoners asserting innocence as a gateway to [*habeas* relief for claims forfeited under state law] must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Id. at 2076-2077, quoting Schlup v. Delo, 513 U.S. at 327.) The Court here distinguished "freestanding" claims under *Herrera* from "gateway" claims under *Schlup*, the difference apparently being that success on a freestanding claim results in the overturning of a conviction, whereas success on a gateway claim results in a remand to the trial court to hear the claim. *See also* Article III, "*Habeas Corpus*: Scope of the Writ."

Proportionality

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

Twelve years after *Harmelin* the Court still could not reach a consensus on rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to sentence a repeat felon to 25 years to life imprisonment for stealing three golf clubs valued at $399 apiece.[17] A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record," and hence was not the "rare case" of "gross disproportional[ity]."[18] The other two Justices voting in the majority were Justice Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[19] and Justice Thomas, who asserted that the Cruel and Unusual Punish-

[17] Ewing v. California, 538 U.S. 11 (2003).
[18] 538 U.S. at 29-30.
[19] 538 U.S. at 31.

ments Clause "contains no proportionality principle."[20] Not surprisingly, the Court also rejected a *habeas corpus* challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."[21] Justice O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow."[22]

Prisons and Punishment

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

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

[20] 538 U.S. at 32. The dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the *Solem v. Helm* test would have been more appropriate for a recidivism case. *See* 538 U.S. at 32, n.1 (opinion of Justice Stevens).

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

[22] 538 U.S. at 72.

ELEVENTH AMENDMENT

STATE SOVEREIGN IMMUNITY

Suits Against States

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

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

The application of this last exception to the bankruptcy area has become less relevant, because even when a bankruptcy case is not focused on a particular *res* the Court has held that a state's sovereign immunity is not infringed by being subject to an order of a bankruptcy court. "The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[2] Thus, where a federal law authorized a bankruptcy trustee to recover "preferential transfers" made to state educational institutions,[3] the court held that the sovereign immunity of the state was not infringed despite the fact that the issue was "ancillary" to a bankruptcy court's *in rem* jurisdiction.[4]

[P. 1639, add to n.80 after citation to Mt. Healthy City Bd. of Education v. Doyle:]

Northern Insurance Company of New York v. Chatham County, 126 S. Ct. 1689, 1693 (2006).

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[1] See Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446-48 (2004) (exercise of bankruptcy court's *in rem* jurisdiction over a debtor's estate to discharge a debt owed to a state does not infringe the state's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507-08 (1998) (despite state claims to title of a ship-wrecked vessel, the Eleventh Amendment does not bar federal court *in rem* admiralty jurisdiction where the *res* is not in the possession of the sovereign)

[2] Central Virginia Community College v. Katz, 126 S. Ct. 990, 996 (2006).

[3] A "preferential transfer" was defined as the transfer of a property interest from an insolvent debtor to a creditor, which occurred on or within 90 days before the filing of a bankruptcy petition, and which exceeds what the creditor would have been entitled to receive under such bankruptcy filing. 11 U.S.C. § 547(b).

[4] 126 S. Ct. at 1001-02.

—Congressional Withdrawal of Immunity

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

See also Frew v. Hawkins, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

Suits Against State Officials

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

In *Frew v. Hawkins*, 540 U.S. 431 (2004), Texas, which was under a consent decree regarding its state Medicaid program, attempted to extend the reasoning of *Pennhurst*, arguing that unless an actual violation of federal law had been found by a court, such court would be without jurisdiction to enforce such decree. The Court, in a unanimous opinion, declined to so extend the 11th Amendment, noting, among other things, that the principles of federalism were served by giving state officials the latitude and discretion to enter into enforceable consent decrees. *Id*. at 442.

FOURTEENTH AMENDMENT

Section 1. Rights Guaranteed

DUE PROCESS OF LAW

Definitions

—"Liberty"

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

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

Fundamental Rights (Noneconomic Substantive Due Process)

—Development of the Right of Privacy

[P. 1767, Substitute for portion of paragraph following n.552:]

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

—Abortion

[P. 1778, add new footnote at end of last paragraph in the section:]

As to the question of whether an abortion statute that is unconstitutional in some instances should be struck down in application only or in its entirety, see *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006) (challenge to parental notification restrictions based on lack of emergency health exception remanded to determine legislative intent regarding severability of those applications).

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

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

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

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

[P. 1784, substitute for final sentence of paragraph carried over from p.1783:]

Although *Bowers* has since been overruled by *Lawrence v. Texas*[4] based on precepts of personal autonomy, the latter case did not appear to signal the resurrection of the doctrine of protecting activities occurring in private places.

[P. 1784, substitute for second full paragraph and all remaining paragraphs within the topic:]

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

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

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

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

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

For a time, the limits of the privacy doctrine were contained by the 1986 case of *Bowers v. Hardwick*,[7] where the Court by a 5-4 vote roundly rejected the suggestion that the privacy cases protecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[8] and also rejected the more comprehensive claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[9] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practice.[10] The privacy of the home does not protect all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults."[11] Interestingly, Justice Blackmun, in dissent, was most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[12]

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

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

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

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

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

[12] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. See id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomous acts by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219. Justice Blackmun would instead have addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he as-

Yet, *Lawrence v. Texas*,[13] by overruling *Bowers*, brought the outer limits of noneconomic substantive due process into question by once again using the language of "privacy" rights. Citing the line of personal autonomy cases starting with *Griswold*, the Court found that sodomy laws directed at homosexuals "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." [14]

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

For instance, the extent to which the government may regulate the sexual activities of minors has not been established.[17] Analysis of this question is hampered, however, because the Court has still not explained what about the particular facets of human relationships — marriage, family, procreation — gives rise to a protected liberty, and how indeed these factors vary significantly enough

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serted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. 478 U.S. at 204-06. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to "family, marriage, motherhood, procreation, and child rearing." 478 U.S. at 190. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

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

[14] Id. at 567.

[15] Id.

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

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

from other human relationships. The Court's observation in *Roe v. Wade* "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[18] little elucidates the answers.[19]

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

PROCEDURAL DUE PROCESS: CIVIL

Generally

—The Requirements of Due Process

[P. 1796, add to text after n.697]

This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available.[20]

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

[19] In the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests - compelling interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is not its social significance, but is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). That this limitation has not been honored with respect to equal protection analysis or due process analysis can be easily discerned. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).

[20] Jones v. Flowers, 126 S. Ct. 1708, 1719 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.)

The Procedure Which is Due Process

—The Property Interest

[P. 1804, add new paragraph to text after paragraph ending with n.647:]

The further one gets from traditional precepts of property, the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*,[21] the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order obtained by an estranged wife against her husband, despite having probable cause to believe the order had been violated. While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently mandatory arrest statutes.[22] Finally, the Court even questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.[23]

—The Liberty Interest

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

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

[P. 1809, add to n.770:]

Wilkinson v. Austin, 125 S. Ct. 2384, 2394-95 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypcial and significant" deprivation.)

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[21] 125 S. Ct. 2796 (2005).

[22] 125 S. Ct. at 2805. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. Such indeterminancy is not the "hallmark of a duty that is mandatory." Id. at 2807-08.

[23] 125 S. Ct. at 2809-10.

—When Process is Due

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

A delay in processing a claim for recovery of money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David*,[24] a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected — the temporary loss of the use of the money — could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30-day delay was unlikely to create a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

Jurisdiction

—Notice: Service of Process

[P. 1834, add to the beginning of n.903:]

Thus, in *Jones v. Flowers*, 126 S. Ct. 1708 (2006), the Court held that, after a state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed," the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.

Power of the States to Regulate Procedure

—Costs, Damages, and Penalties

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

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

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

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

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[24] 538 U.S. 715 (2003).

PROCEDURAL DUE PROCESS — CRIMINAL

The Elements of Due Process

—Fair Trial

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

Middleton v. McNeil, 541 U.S. 43 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear).

[P. 1856, add new paragraph to text following n.1028:]

The use of visible physical restraints, such as shackles, leg irons or belly chains, in front of a jury, has been held to raise due process concerns. In *Deck v. Missouri*,[25] the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need."[26] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and "affronts the dignity and decorum of judicial proceedings."[27] Even where guilt has already been adjudicated, and a jury is considering the application of the death penalty, the latter two considerations would preclude the routine use of visible restraints. Only in special circumstances, such as where a judge has made particularized findings that security or flight risk requires it, can such restraints be used.

[P. 1856, add to n.1030 after the citation to Crane v. Kentucky:]

Holmes v. South Carolina, 126 S. Ct. 1727 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability).

—Prosecutorial Misconduct

[P. 1857, add to n.1037:]

Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005) (Court remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

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[25] 544 U.S. 622 (2005).

[26] 544 U.S. at 626. In *Illinois v. Allen*, 397 U.S. 337, 344 (1970), the Court held, in dicta, that "no person should be tried while shackled or gagged except as a last resort."

[27] 544 U.S. at 630, 631 (internal quotation marks omitted).

[P. 1858, add new footnote after the words "prosecutor withheld it" four lines from bottom of page:]

A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283-84 (1999); Banks v. Dretke, 540 U.S. 668, 693 (2004).

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

Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

[P. 1859, add new paragraph to text after n.1049:]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.' . . . '[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.'" [28]

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

See also Banks v. Dretke, 540 U.S. 668, 692-94 (2004) (failure of prosecution to correct perjured statement that witness had not been coached and to disclose that separate witness was a paid government informant established prejudice for purposes of *habeas corpus* review).

—Proof, Burden of Proof, and Presumptions

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

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

[P. 1862, add to n.1063:]

See also Dixon v. United States, 126 S. Ct. 2437 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In *Dixon*, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a "willful" violation (having knowledge of the facts that constitute the offense) and the other requiring a "knowing" violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of mens *rea* (such as "malicious intent") might require that a prosecutor prove that a defendant's intent was without justification or excuse, the Court held that neither of the forms of *mens rea* at issue in *Dixon* contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process.

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[28] Youngblood v. West Virginia, 126 S. Ct. 2188, 2190 (2006) (per curiam), quoting Kyles v. Whitley, 514 U.S. 419, 438, 437 (1995).

[P. 1862, add new paragraph to text after n.1064:]

Despite the requirement that states prove each element of a criminal offense, criminal trials generally proceed with a presumption that the defendant is sane, and a defendant may be limited in the evidence that he may present to challenge this presumption. In *Clark v. Arizona*,[29] the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of *mens rea*, ruling that the use of such evidence could be limited to an insanity defense. In *Clark*, the Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to the controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.[30]

—The Problem of the Incompetent or Insane Defendant or Convict

[P. 1865, add new paragraph to text after n.1078:]

Where a defendant is found competent to stand trial, a state appears to have significant discretion in how it takes account of mental illness or defect at the time of the offense in determining criminal responsibility.[31] The Court has identified several tests that are used by states in varying combinations to address the issue: the M'Naghten test (cognitive incapacity or moral incapacity),[32] volitional incapacity,[33] and the irresistible-impulse test.[34] "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[35]

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[29] 126 S. Ct. 2709 (2006).

[30] 126 S. Ct. at 2731-32, 34-36.

[31] Clark v. Arizona, 126 S. Ct. 2709 (2006).

[32] *M'Naghten's Case*, 8 Eng. Rep. 718 (1843) states that "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722.

[33] *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible").

[34] *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife — if the killing was the product of mental disease in him — he is not guilty; he is innocent — as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance").

[35] *Clark*, 126 S. Ct. at 2772. In *Clark*, the Court considered an Arizona statute, based on the *M'Naghten* case, that was amended to eliminate the defense of cog-

[P. 1866, add to text after n.1085:]

The Court, however, left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[36]

In *Atkins v. Virginia*, the Court held that the Eighth Amendment also prohibits the state from executing a person who is mentally retarded, and added, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[37]

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*,[38] the Court had found that an individual has a significant "liberty interest" in avoiding the unwanted administration of antipsychotic drugs. In *Sell v. United States*,[39] the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is important in a particular case.[40] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

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nitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. Id. at 2722.

[36] 477 U.S. at 416-17.

[37] 536 U.S. at 317 (citation omitted) (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)). The Court quoted this language again in *Schriro v. Smith*, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." 126 S. Ct. 7, 9 (2005) (per curiam). States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge." *Id*.

[38] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

[39] 539 U.S. 166 (2003).

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

—Guilty Pleas

[P. 1868, substitute for final sentence of n.1092:]

However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

—Rights of Prisoners

[P. 1874, add to n.1132:]

There was some question as to the standard to be applied to racial discrimination in prisons after *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In *Johnson v. California*, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509-13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment).

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

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

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

For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. 539 U.S. at 135.

[P. 1877, add new paragraph to text after n.1148, consisting of the following sentence followed by the material through n.1149:]

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[41]

[41] Wilkinson v. Austin, 125 S. Ct. 2384, 2394-95 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypcial and significant" deprivation). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 2392-93, 2395-98.

EQUAL PROTECTION OF LAWS

Scope and Applicaton

—State Action

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

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

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

Taxation

—Classification for Purposes of Taxation

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

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

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

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

EQUAL PROTECTION AND RACE

Juries

[P. 1958, add new footnote at end of first sentence of second full paragraph:]

476 U.S. 79, 96 (1986). Establishing a *prima facie* case can be done through a "wide variety of evidence, so long as the sum of proffered facts gives rise to an inference of discriminatory purpose." Id. at 93-94. A state, however, cannot require that a defendant prove a *prima facie* case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

[P. 1958, add to n.1594:]

In fact, "[a]lthough the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[42] Such a rebuttal

[42] Rice v. Collins, 126 S. Ct. 969, 973-74 (2006) (citation omitted). The holding of the case was that, in a *habeas corpus* action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." Id. at 973. Justice Breyer, joined by Justice Souter, concurred but suggested "that

having been offered, "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" [43]

Permissible Remedial Utilization of Racial Classifications

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

By applying strict scrutiny, the Court was in essence affirming Justice Powell's individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether the Court would endorse Justice Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Powell's line of reasoning in the cases of *Grutter v. Bollinger* [44] and *Gratz v. Bollinger*.[45]

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in his file (*e.g.*, grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (*e.g.*, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." While the policy did not limit diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[46]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who otherwise might not

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legal life without peremptories is no longer unthinkable" and "that we should reconsider *Batson*'s test and the peremptory challenge system as a whole." Id. at 977.

[43] Rice v. Collins, 126 S. Ct. at 974 (citations omitted). In *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005), the Court found discrimination in the use of peremptory strikes based on numerous factors, including the high ratio of minorities struck from the venire panel (of 20 blacks, nine were excused for cause and ten were peremptorily struck). Other factors considered by the Court were the fact that the race-neutral reasons given for the peremptory strikes of black panelists "appeared equally on point as to some white jurors who served," id. at 2325-26; the prosecution used "jury shuffling" (rearranging the order of panel members to be seated and questioned) twice when blacks were at the front of the line; the prosecutor asked different questions of black and white panel members; and there was evidence of a long-standing policy of excluding blacks from juries.

[44] 539 U.S. 306 (2003).

[45] 539 U.S. 244 (2003).

[46] 539 U.S. at 323-26.

have been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[47] As the University did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the University's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.

The law school's admission policy, however, can be contrasted with the University's undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the Law School. Applicants with scores over 100 were usually admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was the fact that an applicant was entitled to 20 points based solely upon membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[48]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Powell's opinion in *Bakke*. While Justice Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file,"[49] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an underrepresented minority group, the policy effectively admitted every qualified minority applicant. While acknowledging that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve the University's asserted compelling interest in diversity.[50]

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[47] 539 U.S. at 335.
[48] 539 U.S. at 272-73.
[49] 438 U.S. at 317.
[50] 438 U.S. at 284-85.

THE NEW EQUAL PROTECTION

Fundamental Interests: The Political Process

—Apportionment and Districting

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

In the following years, however, litigants seeking to apply *Davis* against alleged partisan gerrymandering were generally unsuccessful. Then, when the Supreme Court revisited the issue in 2004, it all but closed the door on such challenges. In *Vieth v. Jubelirer*,[51] a four-Justice plurality would have overturned *Davis v. Bandemer*'s holding that challenges to political gerrymandering are justiciable, but five Justices disagreed. The plurality argued that partisan considerations are an intrinsic part of establishing districts,[52] that no judicially discernable or manageable standards exist to evaluate unlawful partisan gerrymandering,[53] and that the power to address the issue of political gerrymandering resides in Congress.[54]

Of the five Justices who believed that challenges to political gerrymandering are justiciable, four dissented, but Justice Kennedy concurred with the four-Justice plurality's holding, thereby upholding Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. Justice Kennedy agreed that the lack "of any agreed upon model of fair and effective representation" or "substantive principles of fairness in districting" left the Court with "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."[55] But, though he concurred in the holding, Justice Kennedy held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale were found" to evaluate partisan redistricting. *Davis v. Bandemer* was thus preserved.[56]

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[51] 541 U.S. 267 (2004).

[52] 541 U.S. at 285-86.

[53] 541 U.S. at 281-90.

[54] 541 U.S. at 271 (noting that Article I, § 4 provides that Congress may alter state laws regarding the manner of holding elections for Senators and Representatives).

[55] 541 U.S. at 307-08 (Justice Kennedy, concurring).

[56] 541 U.S. at 306 (Justice Kennedy, concurring). Although Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposed on representational rights or to confine judicial intervention once a violation has been established, he held out the possibility that such a standard may emerge, based on either equal protection or First Amendment principles.

In *League of United Latin American Citizens v. Perry*, a widely splintered Supreme Court plurality largely upheld a Texas congressional redistricting plan that the state legislature had drawn mid-decade, seemingly with the sole purpose of achieving a Republican congressional majority.[57] The plurality did not revisit the justiciability question, but examined "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[58] The plurality was "skeptical . . . of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." For one thing, although "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, . . . partisan aims did not guide every line it drew."[59] Apart from that, the "sole-motivation theory" fails to show what is necessary to identify an unconstitutional act of partisan gerrymandering: "a burden, as measured by a reliable standard, on the complainants' representational rights."[60] Moreover, "[t]he sole-intent standard . . . is no more compelling when it is linked to . . . mid-decennial legislation. . . . [T]here is nothing inherently suspect about a legislature's decision to replace a mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders."[61] The plurality also found "that mid-decade redistricting for exclusively partisan purposes" did not in this case "violate[ ] the one-person, one-vote requirement."[62] Because ordinary mid-decade districting plans do not necessarily violate the one-person, one-vote requirement, the only thing out of the ordinary with respect to the Texas plan was that it was motivated solely by partisan considerations, and the plurality had already rejected the sole-motivation theory.[63] *League of United Latin American Citizens v. Perry* thus left earlier Court precedent essentially unchanged. Claims of unconstitutional partisan gerrymandering are justiciable, but a reliable measure of what constitutes unconstitutional partisan gerrymandering remains to be found.

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[57] 126 S. Ct. 2594, 2609 (2006). The design of one congressional district was held to violate the Voting Rights Act because it diluted the voting power of Latinos. Id. at 2612-2623.

[58] 126 S. Ct. at 2607.

[59] 126 S. Ct. at 2609-2610.

[60] 126 S. Ct. at 2610.

[61] 126 S. Ct. at 2610.

[62] 126 S. Ct. at 2611.

[63] 126 S. Ct. at 2612.

Section 5. Enforcement

Congressional Definition of Fourteenth Amendment Rights

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

The Court's most recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when the class being discriminated against is protected by heightened scrutiny of the government's action. In *Nevada Department of Human Resources v. Hibbs*,[64] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees can take up to twelve weeks of unpaid leave to care for a close relative with a serious health condition. Noting that the Fourteenth Amendment could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than men were provided paternity leave.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test[65] . . . it was easier for Congress to show a pattern of state constitutional violations."[66] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the gender stereotype.

Applying the same approach, the Court in *Tennessee v. Lane*[67] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act (ADA) provides that

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[64] 538 U.S. 721 (2003).

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

[66] 538 U.S. at 736.

[67] 541 U.S. 509 (2004).

no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[68] but since disability is not a suspect class, the application of Title II against states would seem suspect under the reasoning of Garrett.[69] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[70]

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a "congruent and proportional" response to a congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[71] However, as pointed out by both the majority and by Justice Rehnquist in dissent, the deprivations relied upon by the majority were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.[72] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage and voting, and on limitations of access to public services beyond the use of courts.[73]

Congress' authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,[74] a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the state of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were

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[68] 42 U.S.C. δ 12132.

[69] 531 U.S. 356 (2001).

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

[71] 541 U.S. at 531, 524.

[72] 541 U.S. at 541-542 (Rehnquist, C.J., dissenting).

[73] 541 U.S. at 524-525. Justice Rehnquist, in dissent, disputed Congress' reliance on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. Id. at 1999-2000. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, *Mt. Healthy City Bd. of Educ. v. Doyle*, U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as *South Carolina v. Katzenbach*, 383 U.S. 301 312-15 (1966).

[74] 125 S. Ct. 877 (2006).

based on conduct that independently violated the provisions of the Fourteenth Amendment, they could be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.[75]

[75] "While the Members of this Court have disagreed regarding the scope of Congress' 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for actual violations of those provisions." 125 S. Ct. at 881 (citations omitted).

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

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

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

McConnell v. FEC, 540 U.S. 93 (2003).

160. Act of April 30, 2003, Pub. L. 108-21, § 401(a)(1), 401(d)(2), 117 Stat. 667, 670; 18 U.S.C. §§ 3553(b)(1), 3742(e).

Two provisions of the Sentencing Reform Act, one that makes the Guidelines mandatory, and one that sets forth standards governing appeals of departures from the mandatory Guidelines, are invalidated. The Sixth Amendment right to jury trial limits sentence enhancements that courts may impose pursuant to the Guidelines.

United States v. Booker, 543 U.S. 220 (2005).

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

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

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

I. STATE LAWS HELD UNCONSTITUTIONAL

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

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

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

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

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

Justices concurring: O'Connor, Stevens, Breyer, Rehnquist, C.J.
Justices concurring specially: Souter, Kennedy, Ginsburg.
Justices dissenting: Scalia, Thomas.

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

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

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.
Justice concurring specially: O'Connor.
Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

939. *Blakely v. Washington*, 542 U.S. 296 (2004).

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

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

940. *Granholm v. Heald*, 544 U.S. 460 (2005).

Michigan and New York laws that allow in-state wineries to sell wine directly to consumers but prohibit or discourage out-of-state

wineries from doing so discriminate against interstate commerce in violation of the Commerce Clause, and are not authorized by the Twenty-first Amendment.

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

941. *Halbert v. Michigan*, 125 S. Ct. 2582 (2005).

A Michigan statute making appointment of appellate counsel discretionary with the court for indigent criminal defendants who plead nolo contendere or guilty is unconstitutional to the extent that it deprives indigents of the right to the appointment of counsel to seek "first-tier review" in the Michigan Court of Appeals.

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

942. *Roper v. Simmons*, 543 U.S. 551 (2005).

Missouri's law setting the minimum age at 16 for persons eligible for the death penalty violates the Eighth Amendment's ban on cruel and unusual punishment as applied to persons who were under 18 at the time they committed their offense.

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, and Breyer.
Justices dissenting: O'Connor, Scalia, Thomas, and Rehnquist.

943. *Jones v. Flowers*, 126 S. Ct. 1708 (2006).

Arkansas statute violated due process when interpreted not to require the Arkansas Commissioner of State Lands to take additional reasonable steps to notify a property owner of intent to sell the property to satisfy a tax delinquency, after the initial notice was returned by the Post Office unclaimed.

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, and Breyer.
Justices dissenting: O'Connor, Scalia, Thomas, Rehnquist.

944. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

Vermont campaign finance statute's limitations on both expenditures and contributions violated freedom of speech.

Justices concurring: Breyer, Roberts, C.J., Alito, Kennedy, Thomas, Scalia.
Justices dissenting: Stevens, Souter, Ginsberg.

III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

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

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

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

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

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

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

227. *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

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

228. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

California law allowing use of marijuana for medical purposes is preempted by the Controlled Substances Act's categorical prohibition of the manufacture and possession of marijuana.

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

229. *Arkansas Department of Health and Human Services v. Ahlborn*, 126 S. Ct. 1752 (2006).

Arkansas statute that imposes lien on tort settlements in an amount equal to Medicaid costs, even when Medicaid costs exceed the portion of the settlement that represents medical costs, is preempted by the Federal Medicaid law insofar as the Arkansas statute applies to amounts other than medical costs.

230. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006).

Part III of the opinion found a Texas redistricting statute to violate the federal Voting Rights Act because it diluted the voting power of Latinos.

Justices concurring in Part III: Kennedy, Stevens, Souter, Ginsberg, Breyer.
Justice dissenting from Part III: Roberts, C.J., Alito, Scalia, Thomas.

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

	Overruling Case	*Overruled Case(s)*
221.	*Lapides v. Board of Regents, 535 U.S. 613 (2002).*	*Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945).*
222.	*Atkins v. Virginia, 536 U.S. 304 (2002).*	*Penry v. Lynaugh, 492 U.S. 302 (1989).*
223.	*Ring v. Arizona, 536 U.S. 584 (2002).*	*Walton v. Arizona, 497 U.S. 639 (1990).*
224.	*Lawrence v. Texas, 539 U.S. 558 (2003).*	*Bowers v. Hardwick, 478 U.S. 186 (1986).*
225.	*Crawford v. Washington, 541U.S. 36 (2004).*	*Ohio v. Roberts, 448 U.S. 56 (1980).*

TABLE OF CASES

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