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THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

2014 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JULY 1, 2014

PREPARED BY THE
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ARTICLE I

Section 5. Powers and Duties of the Houses

Clauses 1–4. Judging Elections

POWERS AND DUTIES OF THE HOUSES

Rules of Proceedings

[P. 134, delete last sentence at end of section and replace with the following:]

The constitutionality of the filibuster has been challenged in court several times, but those cases have never reached the merits of the issue.[1] More recently, the Senate interpreted its rules to require only a simple majority to invoke cloture on most nominations.[2]

Section 8. Powers of Congress

Clause 3. Power to Regulate Commerce

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

—The State Proprietary Activity (Market Participant) Exception

[P. 238, delete period at end of n.975 and add:]

; *see also* McBurney v. Young, 569 U.S. ___, No. 12–17, slip op. at 14 (2013) (to the extent that the Virginia Freedom of Information Act created a market for public documents in Virginia, the Commonwealth was the sole manufacturer of the product, and therefore did not offend the Commerce Clause when it limited access to those documents under the Act to citizens of the Commonwealth).

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

—The Standards Applied

[P. 275, delete period at end of n.1157 and add:]

Nw., Inc. v. Ginsberg, 572 U.S. ___, No. 12–462, slip op. (2014) (holding that the Airline Deregulation Act's preemption provision applied to state common law claims,

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[1] *See, e.g.*, Common Cause v. Biden, 748 F.3d 1280 (D.C. Cir. 2014); Judicial Watch, Inc. v. U.S. Senate, 432 F.3d 359 (D.C. Cir. 2005); Page v. Shelby, 995 F. Supp. 23 (D.D.C. 1998). The constitutionality of the filibuster has been a subject of debate for legal scholars. *See, e.g.*, Josh Chafetz & Michael J. Gerhardt, *Debate, Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010).

[2] 159 CONG. REC. S8416–S8418 (daily ed. Nov. 21, 2013).

including an airline customer's claim for breach of the implied covenant of good faith and fair dealing). *But see* Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. ___, No. 12–52, slip op. (2013) (provision of Federal Aviation Administration Authorization Act of 1994 preempting state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" held not to preempt state laws on the disposal of towed vehicles by towing companies).

[P. 283, add to n.1193:]

See also Wos v. E.M.A., 568 U.S. ___, No. 12–98, slip op. (2013) (North Carolina statute allowing the state to collect up to one-third of the amount of a tort settlement as reimbursement for state paid medical expenses under Medicaid held to conflict effectively with anti-lien provisions of the federal Medicaid statute where settlement designated an amount less than one-third as medical expenses award).

[P. 284, insert new paragraph before the first full paragraph:]

The Court reached a similar result in *Mutual Pharmaceutical Co. v. Bartlett*.[3] There, the Court again faced the question of whether the FDA labeling requirements preempted state tort law in a case involving sales by a generic drug manufacturer. The lower court had held that it was not impossible for the manufacturer to comply with both the FDA's labeling requirements and state law that required stronger warnings regarding the drug's safety because the manufacturer could simply stop selling the drug. The Supreme Court rejected the "stop-selling rationale" because that rationale "would render impossibility pre-emption a dead letter and work a revolution in . . . pre-emption case law."[4]

[P. 284, in the first sentence of the first full paragraph, after "Pliva, Inc. v. Mensing" add:]

and *Mutual Pharmaceutical Co. v. Bartlett*

[P. 285, delete period at end of first sentence, second paragraph of n.1202 and add:]

; Hillman v. Maretta, 569 U.S. ___, No. 11–1221, slip op. (2013) (state law cause of action against ex-spouse for life insurance proceeds paid under a designation of beneficiary in a federal employee policy held to be preempted by federal employee insurance statute giving employees the right to designate a beneficiary; beyond administrative convenience, Congress intended that the proceeds actually *belong* to named beneficiary).

Clause 18. Necessary and Proper Clause

NECESSARY AND PROPER CLAUSE

Definition of Punishment and Crimes

[3] 570 U.S. ___, No. 12–142, slip op. (2013).
[4] *Id.* at 1–2.

[P. 379, add footnote to text after last complete sentence:]

Where an ex-convict was released subject to legal requirements related to his previous conviction, the Court has found little difficulty in those requirements being modified after his release under a subsequently enacted statute. In *United States v. Kebodeaux*, 570 U.S. ___, No. 12–418, slip op. (2013), the Court found that a sex offender, convicted by the Air Force in a special court-martial, had, upon his release, been subject to state sex offender registration laws, violation of which was prohibited under the Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103–322, 108 Stat. 2038–2042. Kebodeaux was later convicted of failing to register under the "very similar" provisions of the later-enacted Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109–24, Title I, 120 Stat. 590, 42 U.S.C. §§ 16901 *et seq.*, which had superseded the Jacob Wetterling Act. The Court found Congress was well within its authority under the Necessary and Proper Clause to have modified the Wetterling Act's registration requirements, and Kebodeaux was properly subject to SORNA requirements, even if they were enacted after his release.

Section 10. Powers Denied to the States

Clause 1. Treaties, Coining Money, Impairing Contracts, Etc.

Ex Post Facto Laws

—Changes in Punishment

[P. 406, add to text after n.2023:]

The Court adopted similar reasoning regarding changes in the U.S. Sentencing Guidelines: even though the Guidelines are advisory only, an increase in the applicable sentencing range is ex post facto if applied to a previously committed crime because of a significant risk of a lengthier sentence being imposed.[5]

[5] Peugh v. United States, 569 U.S. ___, No. 12–62, slip op. (2013).

ARTICLE II

Section 2. Powers and Duties of the President

Clause 3. Vacancies During Recess of Senate

RECESS APPOINTMENTS

[P. 591, after final paragraph, substitute as the remainder of the section:]

Two fundamental textual issues arise in interpreting the Recess Appointments Clause. The first is the meaning of the phrase "the Recess of the Senate." As the Senate may recess both between and during its annual sessions, the time period during which the President may make a recess appointment is not clearly answered by the text of the Constitution. The second fundamental textual issue is what constitutes a vacancy that "may happen" during the recess of the Senate. If the words "may happen" are interpreted to refer only to vacancies that arise during a recess, then the President would lack authority to make a recess appointment to a vacancy that existed before the recess began. For over two centuries the Supreme Court did not address either of these issues,[1] leaving it to the lower courts and other branches of government to interpret the scope of the Recess Appointments Clause.[2]

The Supreme Court ultimately adopted a relatively broad interpretation of the Clause in *National Labor Relations Board v. Noel Canning*.[3] With respect to the meaning of the phrase "Recess of the Senate," the Court concluded that the phrase applied to both intersession recesses and intra-session recesses. In so holding, the Court,

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[1] *See* NLRB v. Noel Canning, 573 U.S. ___, No. 12–1281, slip op. at 9 (2014).

[2] For lower court decisions on the Recess Appointments Clause, see, e.g., *In re* Farrow, 3 Fed. 112 (C.C.N.D. Ga. 1880); United States v. Allocco, 305 F.2d 704, 712 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); Evans v. Stephens, 387 F.3d 1220, 1226–27 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). For prior executive branch interpretations of the Recess Appointments Clause, see Op. Att'y Gen. 631, 633–34 (1823); 2:525 (1832), 3:673 (1841), 4:361 (1845), 4:523 (1846), 10:356 (1862), 11:179 (1865), 12:32 (1866), 12:455 (1868), 14:563 (1875), 15:207 (1877), 16:523 (1880), 18:28 (1884), 19:261 (1889), 22:82 (1898), 23:599 (1901), 26:234 (1907), 30:314 (1914), 33:20 (1921), 41:463 (1960); 3 Op. OLC 314, 316 (1979); 6 Op. OLC 585, 586 (1982); 13 Op. OLC 271 (1989); 16 Op. OLC 15 (1992); 20 Op. OLC 124, 161 (1996); 25 Op. OLC 182 (2001). For the early practice on recess appointments, see G. Haynes, The Senate of the United States 772–78 (1938).

[3] 573 U.S. ___, No. 12–1281, slip op. (2014).

finding the text of the Constitution ambiguous,[4] relied on (1) a pragmatic interpretation of the Clause that would allow the President to ensure the "continued functioning" of the federal government when the Senate is away,[5] and (2) "long settled and established [historical] practice" of the President making intra-session recess appointments.[6] The Court declined, however, to say how long a recess must be to fall within the Clause, instead holding that historical practice counseled that a recess of more than three days but less than ten days is "presumptively too short" to trigger the President's appointment power under the Clause.[7] With respect to the phrase "may happen," the majority, again finding ambiguity in the text of the Clause,[8] held that the Clause applied both to vacancies that first come into existence during a recess and to vacancies that initially occur before a recess but continue to exist during the recess.[9] In so holding, the Court again relied on both pragmatic concerns[10] and historical practice.[11]

Even under a broad interpretation of the Recess Appointments Clause, the Senate may limit the ability to make recess appointments by exercising its procedural prerogatives. The Court in *Noel Canning* held that, for the purposes of the Recess Appointments

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[4] *Id.* at 9–11. More specifically, the Court found nothing in dictionary definitions or common usage contemporaneous to the Constitution that would suggest that an intra-session recess was not a recess. The Court noted that, while the phrase "the Recess" might suggest limiting recess appointments to the single break between sessions of Congress, the word "the" can also be used "generically or universally," *see, e.g.*, U.S. Const. art. I, sec. 3, cl. 5. (directing the Senate to choose a President pro tempore "in the Absence of the Vice-President"), and that there were examples of "the Recess" being used in the broader manner at the time of the founding. 573 U.S. ___, No. 12–1281, slip op. at 9–11.

[5] *Id.* at 11. ("The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.").

[6] The Court noted that Presidents have made "thousands" of intra-session recess appointments and that presidential legal advisors had been nearly unanimous in determining that the clause allowed these appointments. *Id.* at 12.

[7] *Id.* at 21. The Court left open the possibility that some very unusual circumstance, such as a national catastrophe that renders the Senate unavailable, could require the exercise of the recess appointment power during a shorter break. *Id.*

[8] The Court noted that even Thomas Jefferson thought the phrase in question could point to both vacancies that "may happen to be" during a recess as well as those that "may happen to fall" during a recess. *Id.* at 22.

[9] *Id.* at 1–2.

[10] *Id.* at 26 ("[W]e believe the narrower interpretation risks undermining constitutionally conferred powers [in that] . . . [i]t would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.").

[11] *Id.* at 34 ("Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison.").

Clause, the Senate is in session when the Senate says it is, provided that, under its own rules, it retains the capacity to transact Senate business.[12] In this vein, *Noel Canning* provides the Senate with the means to prevent recess appointments by a President, who attempts to employ the "subsidiary method" for appointing officers of the United States (i.e., recess appointments) to avoid the "norm"[13] for appointment (i.e., appointment pursuant to the Article II, sec. 2, cl. 2).[14]

[12] *Id.* In the context of *Noel Canning*, the Court held that the Senate was in session even during a pro forma session, a brief meeting of the Senate, often lasting minutes, in which no legislative business is conducted. *Id.* at 38–39. Because the Journal of the Senate (and the Congressional Record) declared the Senate in session during those periods, and because the Senate could, under its rules, have conducted business under unanimous consent (a quorum being presumed), the Court concluded that the Senate was indeed in session. In so holding, the Court deferred to the authority of Congress to "determine the Rules of its Proceedings," *see* U.S. CONST. art. I, sec. 5, cl. 2, relying on previous case law in which the Court refused to question the validity of a congressional record. 573 U.S. ___, No. 12–1281, slip op. at 39 (citing United States v. Ballin, 144 U.S. 1, 5 (1892)).

[13] 573 U.S. ___, No. 12–1281, slip op. at 40.

[14] It should be noted that, by an act of Congress, if a vacancy existed when the Senate was in session, the ad interim appointee, subject to certain exceptions, may receive no salary until he has been confirmed by the Senate. 5 U.S.C. § 5503. By targeting the compensation of appointees, as opposed to the President's recess appointment power itself, this limitation acts as an indirect control on recess appointments, but its constitutionality has not been adjudicated. A federal district court noted that "if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution," restricting payment to recess appointees might be invalid. Staebler v. Carter, 464 F. Supp. 585, 596 n.24 (D.D.C. 1979).

ARTICLE III

Section 2. Judicial Power and Jurisdiction

Clause 1. Cases and Controversies; Grants of Jurisdiction

JUDICIAL POWER AND JURISDICTION—CASES AND CONTROVERSIES

Adverse Litigants

[P. 722, add new paragraph to text at the end of the section:]

Concerns regarding adversity also arise when the Executive Branch chooses to enforce, but not defend in court, federal statutes that it has concluded are unconstitutional. In *United States v. Windsor*,[1] the Court considered the Defense of Marriage Act (DOMA), which excludes same-sex partners from the definition of "spouse" as used in federal statutes.[2] DOMA was challenged by the surviving member of a same-sex couple (married in Canada), who was seeking to claim a spousal federal estate tax exemption. Although the Executive Branch continued to deny the exemption, it also declined to defend the statute based on doubts as to whether it would survive scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause. Consequently, the Bipartisan Legal Advisory Group of the House of Representatives (BLAG)[3] intervened to defend the statute. The Court noted that, despite the decision not to defend, the failure of the United States to provide a refund to the taxpayer constituted an injury sufficient to establish standing, leaving only "prudential" limitations on judicial review at issue.[4] The Court found that the "prudential" concerns were outweighed by the presence of BLAG to offer an adversarial presentation of the issue, the legal uncertainty that would be caused by dismissing the case, and the concern that the Executive Branch's assessment of the constitutionality of the statute would be immunized from judicial review.

Substantial Interest: Standing

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

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[1] 570 U.S. ___, No. 12–307, slip op. (2013).

[2] Pub. L. 104–199, § 3, 110 Stat. 2419, 1 U.S.C. § 7.

[3] BLAG is a standing body of the House, created by rule, consisting of members of the House Leadership and authorized to direct the House Office of the General Counsel to file suit on its behalf in state or federal court.

[4] 570 U.S. ___, No. 12–307, slip op. at 6–7.

[P. 732, add new paragraph to text after n.410:]

Beyond these historical anomalies, the Court has indicated that, for parties lacking an individualized injury to seek judicial relief on behalf of an absent third party, there generally must be some sort of agency relationship between the litigant and the injured party. In *Hollingsworth v. Perry*,[5] the Court considered the question of whether the official proponents of Proposition 8,[6] a state proposition that amended the California Constitution to define marriage as a union between a man and a woman, had standing to defend the constitutionality of the provision on appeal. After rejecting the argument that the proponents of Proposition 8 had a particularized injury in their own right,[7] the Court considered the argument that the plaintiffs were formally authorized to litigate on behalf of the State of California.

Although the proponents were authorized by California law to argue in defense of the proposition,[8] the Court found that this authorization, by itself, was insufficient to create standing. The Court expressed concern that, although California law authorized the proponents to argue in favor of Proposition 8, the proponents were still acting as private individuals, not as state officials[9] or as agents that were controlled by the state.[10] Because the proponents did not act as agents or official representatives of the State of California in defending the law, the Court held that the proponents only possessed

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[5] 570 U.S. ___, No. 12–144, slip op. (2013).

[6] Under California Elections Code § 342, "'[p]roponents of an initiative or referendum measure' means . . . the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General . . . ; or . . . the person or persons who publish a notice or intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body."

[7] 570 U.S. ___, No. 12–144, slip op. at 7–9 (2013).

[8] California's governor and state and local officials declined to defend Proposition 8 in federal district court, so the proponents were allowed to intervene. After the federal district court held the proposition unconstitutional, the government officials elected not to appeal, so the proponents did. The federal court of appeals certified a question to the California Supreme Court on whether the official proponents of the proposition had the authority to assert the state's interest in defending the constitutionality of Proposition 8, *see* Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (2011), which was answered in the affirmative, *see* Perry v. Brown, 265 P. 3d 1002, 1007 (Cal. 2011).

[9] *See* 570 U.S. ___, No. 12–144, slip op. at 12 (citing Karcher v. May, 484 U.S. 72 (1987)).

[10] The Court noted that an essential feature of agency is the principal's right to control the agent's actions. Here, the proponents "decided what arguments to make and how to make them." *Hollingsworth*, 570 U.S. ___, No. 12–144, slip op. at 15. The Court also noted that the proponents were not elected to their position, took no oath, had no fiduciary duty to the people of California, and were not subject to removal. *Id.*

a generalized interest in arguing in defense of Proposition 8 and, therefore, lacked standing to appeal an adverse district court decision.

[P. 732, delete sentence after n.412 and add new paragraphs to text:]

In a number of cases where a plaintiff seeks prospective relief, such as an injunction or declaratory relief, the Supreme Court has strictly construed the nature of the injury-in-fact necessary to obtain such judicial relief. First, the Court has been hesitant to assume jurisdiction over matters in which the plaintiff seeking equitable relief cannot articulate a concrete harm.[11] For example, in *Laird v. Tatum*, the Court held that plaintiffs challenging a domestic surveillance program lacked standing when their alleged injury stemmed from a "subjective chill", as opposed to a "claim of specific present objective harm or a threat of specific future harm."[12] Second, the Court has required plaintiffs seeking equitable relief to demonstrate that the risk of a future injury is of a sufficient likelihood; past injury is insufficient to create standing to seek prospective relief.[13] The Court has articulated the threshold of likelihood of future injury necessary for standing in such cases in various ways in the past,[14] generally refusing to find standing where the risk of future injury is speculative.[15]

More recently, in *Clapper v. Amnesty International USA*, the Court held that, in order to demonstrate Article III standing, a plaintiff seeking injunctive relief must prove that the future injury, which is the basis for the relief sought, must be "certainly impending"; a showing of a "reasonable likelihood" of future injury is insuffi-

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[11] *See generally* Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) ("[D]eprivation of a . . . right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing."); *see, e.g.,* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 73 (1974) (plaintiffs allege that Treasury regulations will require them to report currency transactions, but make no additional allegation that any of the information required by the Secretary will tend to incriminate them).

[12] 408 U.S. 1, 14–15 (1972).

[13] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 110 (1983) (holding that a victim of a police chokehold seeking injunctive relief was unable to show sufficient likelihood of recurrence as to him).

[14] *See* Davis v. FEC, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.").

[15] *See, e.g.,* O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (no "sufficient immediacy and reality" to allegations of future injury that rest on the likelihood that plaintiffs will again be subjected to racially discriminatory enforcement and administration of criminal justice); Rizzo v. Goode, 423 U.S. 362, 372 (1976) ("[I]ndividual respondents' claim to 'real and immediate' injury rests not upon what the named petitioners might do to them in the future . . . but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures.").

cient.[16] Moreover, the Court in *Amnesty International* held that a plaintiff cannot satisfy the imminence requirement by merely "manufacturing" costs incurred in response to speculative, non-imminent injuries.[17]

A year after *Amnesty International*, the Court in *Susan B. Anthony List v. Driehaus* [18] reaffirmed that preenforcement challenges to a statute can occur "under circumstances that render the threatened enforcement sufficiently imminent." [19] In *Susan B. Anthony List*, an organization planning to disseminate a political advertisement, which was previously the source of an administrative complaint under an Ohio law prohibiting making false statements about a candidate or a candidate's record during a political campaign, challenged the prospective enforcement of that law. The Court, in finding that the plaintiff's future injury was certainly impending, relied on the history of prior enforcement of the law with respect to the advertisement, coupled with the facts that "any person" could file a complaint under the law, and any threat of enforcement of the law could burden political speech.[20]

The Requirement of a Real Interest

[16] 568 U.S. ___, No. 11–1025, slip op. at 10–11 (2013). In adopting a "certainly impending" standard, the five Justice majority conceded that the cases had not uniformly required literal certainty. *Id.* at 15 n.5. *Amnesty International*'s limitation on standing may be particularly challenging in certain contexts, such as national security, where evidence necessary to prove a "certainly impending" injury may be unavailable to a plaintiff.

[17] *Id.* at 10–11. In *Amnesty International*, defense attorneys, human rights organizations, and others challenged prospective, covert surveillance of the communications of certain foreigners abroad as authorized by the FISA Amendments Act of 2008. The Court found the plaintiffs lacked standing because they failed to show, inter alia, what the government's targeting practices would be, what legal authority the government would use to monitor any of the plaintiffs' overseas clients or contacts, whether any approved surveillance would be successful, and whether the plaintiffs' own communications from within the United States would incidentally be acquired. *Id.* at 11–15. Moreover, the Court rejected that the plaintiffs could demonstrate an injury-in-fact as a result of costs that they had incurred to guard against a reasonable fear of future harm (such as, travel expenses to conduct in person conversations abroad in lieu of conducting less costly electronic communications that might be more susceptible to surveillance) because those costs were the result of an injury that was not certainly impending. *Id.* at 16–19.

[18] 573 U.S. ___, No. 13–193, slip op. (2014).

[19] Relying on *Amnesty International*, the *Susan B. Anthony List* Court held that an allegation of future injury may suffice if the injury is " 'certainly impending' or there is a 'substantial risk' that the harm may occur." *Id.* at 8. Interestingly, while previous Court decisions have viewed preenforcement challenges as a question of "ripeness," *see* "Ripeness," *infra*, *Susan B. Anthony List* held that the doctrine of ripeness ultimately "boil[s] down to the same question" as standing and, therefore, viewed the case through the lens of Article III standing. 573 U.S. ___, No. 13–193, slip op. at 7 n.5.

[20] 573 U.S. ___, No. 13–193, slip op. at 14–17 (internal quotation marks omitted).

—Mootness

[P. 757, add to text at end of paragraph:]

So long as concrete, adverse legal interests between the parties continue, a case is not made moot by intervening actions that cast doubt on the practical enforceability of a final judicial order.[21]

[P. 758, add to n.544 after citation sentence referencing City of Mesquite v. Aladdin's Castle, Inc.:]

; *see also* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. ___, No. 11–338, slip op. (2013) (action to enforce penalty under former regulation not mooted by change in regulation where violation occurred before regulation was changed).

[P. 759, add to text after n.551:]

This amounts to a "formidable burden" of showing with absolute clarity that there is no reasonable prospect of renewed activity.[22]

[P. 761, add to n.561:]

Cf. Genesis Healthcare Corp. v. Symczyk, 569 U.S. ___, No. 11–1059, slip op. (2013).

[P. 761, delete last sentence in section and substitute the following:]

In *Genesis Healthcare Corporation v. Symczyk*,[23] the Court appeared to follow the "personal stake" rule applicable to class actions in the context of "collective actions" under the Fair Labor Standards Act, at least to the extent that actions that would moot the plaintiff's claims prior to a "conditional certification" by the court would likewise moot the collective action.

—Retroactivity Versus Prospectivity

[P. 764, add to beginning of n.582:]

For an example of the application of the *Teague* rule in federal collateral review of a federal court conviction, see *Chaidez v. United States*, 568 U.S. ___, No. 11–820, slip op. (2013).

JUDICIAL REVIEW

Limitations on the Exercise of Judicial Review

[21] Chafin v. Chafin, 568 U.S. ___, No. 11–1347, slip op. (2013) (appeal of district court order returning custody of a child to her mother in Scotland not made moot by physical return of child to Scotland and subsequent ruling of Scottish court in favor of the mother continuing to have custody).

[22] Already, LLC v. Nike, Inc., 568 U.S. ___, No. 11–982, slip op. at 4 (2013) (dismissal of a trademark infringement claim against rival and submittal of an unconditional and irrevocable covenant not to sue satisfies the burden under the voluntary cessation test) (citing Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 190 (2000)).

[23] 569 U.S. ___, No. 11–1059, slip op. (2013).

—Disallowance by Statutory Interpretation

[P. 790, delete period at end of n.724 and add:]

; Bond v. United States, 572 U.S. ___, No. 12–158, slip op. (2014).

Clause 2. Original and Appellate Jurisdiction

FEDERAL-STATE COURT RELATIONS

Conflicts of Jurisdiction: Rules of Accommodation

—Abstention

[P. 883, delete period at end of n.1272 and add:]

; Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. ___, No. 12–815, slip op. (2013).

Conflicts of Jurisdiction: Federal Court Interference with State Courts

—Federal Restraint of State Courts by Injunctions

[P. 892, substitute new paragraph for last paragraph in text:]

Beyond criminal prosecutions, the Court extended *Younger*'s general directive to bar interference with pending state civil cases that are akin to criminal prosecutions.[24] *Younger* abstention was also found appropriate when a judgment debtor in a state civil case sought to enjoin a state court order to enforce the judgment.[25] The Court further applied *Younger*'s principles to bar federal court interference with state administrative proceedings of a judicial nature, in which important state interests were at stake.[26]

Nonetheless, the Court has emphasized that "only exceptional circumstances justify a federal court's refusal to decide a case in

[24] Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (state action to close adult theater under the state's nuisance statute and to seize and sell personal property used in the theater's operations); Judice v. Vail, 430 U.S. 327 (1977); Trainor v. Hernandez, 431 U.S. 434 (1977); Moore v. Sims, 442 U.S. 415 (1979); Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

[25] Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (holding that federal abstention was warranted in a federal court action to block a state court order issued under the state's "lien and bond" authority). It was "the State's [particular] interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory'" that merited abstention, and not merely a general state interest in protecting ongoing civil proceedings from federal interference. *Id.* at 14 n.12 (quoting Judice v. Vail, 430 U.S. 327, 336 n.12 (1977)).

[26] Oh. Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986). The "judicial in nature" requirement is more fully explicated in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989).

deference to the States."[27] In *Sprint Communications, Inc. v. Jacobs*,[28] the Court made clear that federal forbearance under *Younger* was limited to three discrete types of state proceedings: (1) ongoing state criminal prosecutions; (2) particular state civil proceedings that are akin to criminal prosecutions; and (3) civil proceedings involving orders uniquely in furtherance of the state courts' ability to perform their judicial functions.[29] In so doing, the *Sprint Communications* Court clarified that the types of cases previously held to merit abstention under the *Younger* line defined *Younger*'s scope and did not merely exemplify it.[30]

[27] *See* New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368 (1989).

[28] 571 U.S. ___, No. 12–815, slip op. (2013).

[29] *Id.* at 2.

[30] *Id.* at 8.

ARTICLE IV

Section 2. Interstate Comity

Clause 1. State Citizenship: Privileges and Immunities

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

All Privileges and Immunities of Citizens in the Several States

[P. 962, add to text at end of first partial paragraph:]

Contrariwise, accessing public records through a state freedom of information act was held not to be a fundamental activity, and a state may limit such access to its own citizens.[1]

[1] McBurney v. Young, 569 U.S. ___, No. 12–17, slip op. (2013). The Court further found that any incidental burden on a nonresident's ability to earn a living, own property, or exercise another "fundamental" activity could largely be ameliorated by using other available authorities. The Court emphasized that the primary purpose of the state freedom of information act was to provide state citizens with a means to obtain an accounting of their public officials.

FIRST AMENDMENT

RELIGION

Establishment of Religion

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

[P. 1093, delete footnote 170 and substitute the following:]

The Court distinguished *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), holding that the opening of a state legislative session with a prayer by a state paid chaplain does not offend the Establishment Clause. The *Marsh* Court had distinguished *Abington* on the basis that state legislators, as adults, are "presumably not readily susceptible to 'religious indoctrination' or 'peer pressure,'" and the *Lee* Court reiterated this distinction. 505 U.S. at 596–97. This distinction was again relied on by a plurality of Justices in *Town of Greece v. Galloway*, see 572 U.S. ___, No. 12–696, slip op. at 18–24 (2014), in a decision upholding the use of legislative prayer at a town board meeting. Justice Kennedy, on behalf of himself and Chief Justice Roberts and Justice Alito, distinguished the situation in *Lee*, in that with legislative prayer, at least in the context of *Town of Greece*, those claiming offense at the prayer were "mature adults" who are not "susceptible to religious indoctrination or peer pressure" and were free to leave a town meeting during the prayer without any adverse implications. *Id.* at 22–23 (quoting *Marsh*, 463 U.S. at 792).

—Religion in Governmental Observances

[P. 1102, add new paragraph to text at end of section:]

The Court likewise upheld the use of legislative prayers in the context of a challenge to the use of sectarian prayers to open a town meeting. In *Town of Greece v. Galloway*,[1] the Court considered whether such legislative prayers needed to be "ecumenical" and "inclusive." The challenge arose when the upstate New York Town of Greece recruited local clergy, who were almost exclusively Christian, to deliver prayers at monthly town board meetings. Basing its holding largely on the nation's long history of using prayer to open legislative sessions as a means to lend gravity to the occasion and to reflect long held values, the Court concluded that the prayer practice in the Town of Greece fit within this tradition.[2] The Court also voiced pragmatic concerns with government scrutiny respecting the content of legislative prayers.[3] As a result, after *Town of Greece*, absent a "pattern of prayers that over time denigrate, proselytize, or

[1] 572 U.S. ___, No. 12–696, slip op. (2014).

[2] *Id.* at 9–18. The Court suggested that a pattern of prayers that over time "denigrate, proselytize, or betray an impermissible government purpose" could establish a constitutional violation. *Id.* at 17.

[3] *Id.* at 12 ("To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve gov-

betray an impermissible government purpose," First Amendment challenges based solely on the content of a legislative prayer appear unlikely to be successful.[4] Moreover, absent situations in which a legislative body discriminates against minority faiths, governmental entities that allow for sectarian legislative prayer do not appear to violate the Constitution.[5]

Free Exercise of Religion

—Free Exercise Exemption from General Governmental Requirements

[P. 1124, add new sentence to n.350:]

See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, No. 13–354, slip op. (2014) (holding that RFRA applied to for-profit corporations and that a mandate that certain employers provide their employees with "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" violated RFRA's general provisions).

FREEDOM OF EXPRESSION—SPEECH AND PRESS

Right of Association

—Conflict Between Organizations and Members

[P. 1183, add new paragraph to text after n.663:]

Doubts on the constitutionality of mandatory union dues in the public sector intensified in *Harris v. Quinn.*[6] The Court openly questioned *Abood*'s central holding that the collection of an agency fee from public employees withstood First Amendment scrutiny because of the desirability of "labor peace" and the problem of "free ridership." Specifically, the Court questioned (1) the scope of the precedents (like *Hanson* and *Street*) that the *Abood* Court relied on; (2) *Abood*'s failure to appreciate the distinctly political context of public sector unions; and (3) *Abood*'s dismissal of the administrative difficulties in distinguishing between public union expenditures for collective bargaining and expenditures for political purposes.[7] Notwithstanding these concerns about *Abood*'s core holding, the Court in *Harris* declined to overturn *Abood* outright. Instead, the Court focused on the peculiar status of the employees at issue in *Harris*: home health care assistants subsidized by Medicaid. These "partial-

ernment in religious matters to a far greater degree than is the case under the town's current practice . . . .").

[4] 572 U.S. ___, No. 12–696, slip op. at 17.

[5] *Id.*

[6] 573 U.S. ___, No. 11–681, slip op. (2014).

[7] *Id.* at 8–20.

public employees" were under the direction and control of their individual clients and not the state, had little direct interaction with state agencies or employees, and derived only limited benefits from the union.[8] As a consequence, the Court held that even *Abood*'s rationale—the labor peace and free rider concerns—did not justify compelling dissenting home health care assistants to subsidize union speech.[9] The question that remains after *Harris* is whether the Court will, given its open criticism of *Abood*, overturn the 1977 ruling in the future, or whether the Court will continue to limit *Abood* to its facts.

Particular Government Regulations that Restrict Expression

—Government as Employer: Free Expression Generally

[P. 1208, add new paragraphs to text after first partial paragraph:]

In distinguishing between wholly unprotected "employee speech" and quasi-protected "citizen speech," sworn testimony outside of the scope of a public employee's ordinary job duties appears to be "citizen speech." In *Lane v. Franks*,[10] the director of a state government program for underprivileged youth was terminated from his job following his testimony regarding the alleged fraudulent activities of a state legislator that occurred during the legislator's employment in the government program. The employee challenged the termination on First Amendment grounds. The Court held generally that testimony by a subpoenaed public employee made outside the scope of his ordinary job duties is to be treated as speech by a citizen, subject to the *Pickering-Connick* balancing test.[11] The Court noted that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation to the court and society at large, to tell the truth."[12] In so holding, the Court confirmed that *Garcetti*'s holding is limited to speech made in accordance with an employee's official job duties and does not extend to speech that merely concerns information learned during that employment.

The Court in *Lane* ultimately found that the plaintiff's speech deserved protection under the *Pickering-Connick* balancing test because the speech was both a matter of public concern (the speech was testimony about misuse of public funds) and the testimony did

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[8] 573 U.S. ___, No. 11–681, slip op. at 24–27.
[9] *Id.* at 27.
[10] 573 U.S. ___, No. 13–483, slip op. (2014).
[11] *Id.* at 9.
[12] *Id.*

not raise concerns for the government employer.[13] After *Lane*, some question remains about the scope of protection for public employees, such as police officers or official representatives of an agency of government, who testify pursuant to their official job duties, and whether such speech falls within the scope of *Garcetti*.

—Government as Regulator of the Electoral Process: Elections and Referendums

[P. 1222, add new paragraph to text after n.870:]

In *McCutcheon v. FEC*,[14] however, a plurality of the Court[15] appeared to signal an intent to scrutinize limits on contributions more closely to ensure a "fit" between governmental objective and the means utilized.[16] Considering aggregate limits on individual contributions—that is, the limits on the amount an individual can give in one campaign cycle[17]—the plurality opinion distinguished between the government interest in avoiding even the appearance of quid pro quo corruption versus the government interest in avoiding potential " 'influence over or access to' elected officials of political parties" as the result of large contributions; only the interest in preventing actual or apparent quid pro quo corruption constituted a legitimate objective sufficient to satisfy the First Amendment.[18] Given the more narrow interest of the government, the *McCutcheon* Court struck down the limits on aggregate contributions by an individual donor. The plurality opinion viewed the provision in question as impermissibly restricting an individual's participation in the political process by limiting the number of candidates and organizations to which the individual could contribute (once that individual had reached the aggregate limit).[19] Moreover, the plurality opinion held that the ag-

[13] *Id.* at 12–13. The Court, however, held that because no relevant precedent in the lower court or in the Supreme Court clearly established that the government employer could not fire an employee because of testimony the employee gave, the defendant was entitled to qualified immunity. *Id.* at 13–17.

[14] 572 U.S. ___, No. 12–536, slip op. (2014).

[15] Chief Justice Roberts wrote the plurality opinion, joined by Justices Scalia, Kennedy and Alito. Justice Thomas, concurring in judgment, declined to join the reasoning of the plurality, arguing that, to the extent that *Buckley* afforded a lesser standard of review to restrictions on contributions than to expenditures, it should be overruled.

[16] The Court declined to revisit the differing standards between contributions and expenditures established in *Buckley*, holding that the issue in question, aggregate spending limits, did not meet the demands of either test. 572 U.S. ___, slip op. at 10.

[17] In 2014, these aggregate limits capped total contributions per election cycle to $48,600 to all federal candidates and $74,600 to all other political committees, of which only $48,600 could be contributed to state or local party committees and PACs. 2 U.S.C. § 441a(a)(3); 78 Fed. Reg. 8532.

[18] 572 U.S. ___, No. 12–536, slip op. at 19.

[19] *Id.* at 15.

gregate limits on individual contributions were not narrowly tailored to prevent quid pro quo corruption, as the limits prevent any contributions (regardless of size) to any individual or organization once the limits are reached.[20] The plurality likewise rejected the argument that the restriction prevented circumvention of the restriction on base contributions to individual candidates, as such circumvention was either illegal (because of various anti-circumvention rules) or simply improbable.[21] Collectively, the Court concluded that the aggregate limits violate the First Amendment because of the poor "fit" between the interests proffered by the government and the means by which the limits attempt to serve those interests.[22]

—Government and the Power of the Purse

[P. 1245, add new paragraph to text after n.996:]

In contrast, in *Agency for International Development v. Alliance for Open Society International*,[23] the Court found that the federal government could not explicitly require a federal grantee to adopt a public policy position as a condition of receiving federal funds. In *Alliance for Open Society International*, organizations that received federal dollars to combat HIV/AIDS internationally were required (1) to ensure that such funds were not being used "to promote or advocate the legalization or practice of prostitution or sex trafficking" and (2) to have a policy "explicitly opposing prostitution."[24] While the first condition legitimately ensured that the government was not funding speech which conflicted with the purposes of the grant, the second requirement improperly affected the recipient's protected conduct outside of the federal program. Further, the organization could not, as in previous cases, avoid the requirement by establishing an affiliate to engage in opposing advocacy because of the "evident hypocrisy" that would entail.[25]

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

—Public Issue Picketing and Parading

[P. 1336, add new paragraph to text after first partial paragraph:]

In *McCullen v. Coakley*, the Court retained a content-neutral analysis similar to that in *Hill*, but nonetheless struck down a statu-

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[20] *Id.* at 21–22.
[21] *Id.* at 21–30.
[22] *Id.* at 30.
[23] 570 U.S. ___, No. 12–10, slip op. (2013).
[24] 22 U.S.C. § 7631(e), (f).
[25] 570 U.S. ___, No. 12–10, slip op. at 13.

tory 35-foot buffer zone at entrances and driveways of abortion facilities.[26] The Court concluded that the buffer zone was not narrowly tailored to serve governmental interests in maintaining public safety and preserving access to reproductive healthcare facilities, the concerns claimed by Massachusetts to underlie the law. The opinion cited several alternatives to the buffer zone that would not curtail the use of public sidewalks as traditional public fora for speech, nor significantly burden the ability of those wishing to provide "sidewalk counseling" to women approaching abortion clinics. The Court also held that, to preserve First Amendment rights, targeted measures, such as injunctions, enforcement of anti-harassment ordinances, and use of general crowd control authority, as needed, are preferable to broad, prophylactic measures.[27]

[26] 573 U.S. ___, No. 12–1168, slip op. (2014).
[27] *Id.* at 23–29.

FOURTH AMENDMENT

SEARCH AND SEIZURE

History and Scope of the Amendment

—Scope of the Amendment

[P. 1367, delete period at end of n.27 and add:]

; *see also* Missouri v. McNeely, 569 U.S. ___, No. 11–1425, slip op. (2013) (rejecting a *per se* exception for obtaining warrants in DWI cases, and requiring that exigent circumstances be evaluated under a "totality of the circumstances" test).

—The Interest Protected

[P. 1372, add to n.59:]

The Court reprised its physical trespass analysis in *Florida v. Jardines*. 569 U.S. ___, No. 11–564, slip op. (2013) (police use of drug-sniffing dog on the front porch of a house based on month-old anonymous tip). Emphasizing the primacy of the home among constitutionally protected areas, the Court reviewed the law of trespass and concluded that there is no implied license, under customary community practice, for police to mount a porch to conduct a drug sniff by a trained canine. *Id.* at 5–8. Any implied license for the public to approach a house is limited not only to specific areas, but also to specific purposes. *Id.* at 7.

—Arrests and Other Detentions

[P. 1374, delete period at end of n.66 and add:]

; Plumhoff v. Rickard, 572 U.S. ___, No. 12–1117, slip op. (2014) (police use of 15 gunshots to end a police chase).

Searches and Seizure Pursuant to Warrant

—Probable Cause

[P. 1386, add to n.123:]

For an application of the *Gates* "totality of the circumstances" test to the warrantless search of a vehicle by a police officer, see, e.g., *Florida v. Harris*, 568 U.S. ___, No. 11–817, slip op. (2013).

—Execution of Warrants

[P. 1395, add paragraph to text after n.186:]

Limits on detention incident to a search were addressed in *Bailey v. United States* after an occupant exited the premises and traveled some distance before being stopped and detained.[1] There the

[1] 568 U.S. ___, No. 11–770, slip op. (2013). In this case, the police obtained a warrant to search Bailey's residence for firearms and drugs. *Id.* at 2. Meanwhile, detectives staked out the residence, saw Bailey leave and drive away, and then called

Court held that the detention was not constitutionally sustainable under *Summers*.[2] According to the Court, application of the categorical exception to probable cause requirements for detention incident to a search is determined by spatial proximity, that is, whether the occupant is found "within the immediate vicinity of the premises to be searched,"[3] and not by temporal proximity, that is, whether the occupant is detained "as soon as reasonably practicable" consistent with safety and security. In so holding, the Court reasoned that limiting the *Summers* rule to the area within which an occupant poses a real threat ensures that the scope of the detention incident to a search is confined to its underlying justification.[4]

Valid Searches and Seizures Without Warrants

—Detention Short of Arrest: Stop and Frisk

[P. 1399, delete period at end of n.209 and add:]

; Prado Navarette v. California, 572 U.S. ___, No. 12–9490, slip op. (2014) (anonymous 911 call reporting an erratic swerve by a particular truck traveling in a particular direction held to be sufficient to justify stop).

—Search Incident to Arrest

[P. 1403, add new paragraph to text after n.231:]

Although the Court has disavowed a case-by-case evaluation of searches made post-arrest, the Court remains willing to make categorical evaluations as to post-arrest searches. Thus, in *Riley v. California*,[5] the Court declined to extend the holding of *United States v. Robinson* to the search of the digital data contained in a cell phone found on an arrestee. Specifically, the Court distinguished a search of cell phones, which contain vast quantities of personal data, from the limited physical search at issue in *Robinson*.[6] Focusing primarily on the rationale that searching cell phones would prevent the destruction of evidence, the government argued that cell phone data could be destroyed remotely or become encrypted by the passage of time. The Court, however, both discounted the prevalence of these

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in a search team. *Id.* While the search was proceeding, the detectives tailed Bailey about a mile before stopping and detaining him. *Id.* at 2–3.

[2] As an alternative ground, the district court had found that stopping Bailey was lawful as an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 20 (1968), but the Supreme Court offered no opinion on whether, assuming the stop was valid under *Terry*, the resulting interaction between law enforcement and Bailey could independently have justified Bailey's detention. 568 U.S. ___, No. 11–770, slip op. at 14.

[3] 568 U.S. ___, No. 11–770, slip op. at 13–14.

[4] *Id.* at 13.

[5] 573 U.S. ___, No. 13–132, slip op. (2014).

[6] "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 17.

events and the efficacy of warrantless searches to defeat them. Rather, the Court noted that other means existed besides a search of a cell phone to secure the data contained therein, including turning the phone off or placing the phone in a bag that isolates it from radio waves.[7]

—Vehicular Searches

[P. 1408, add to n.260:]

Cf. Florida v. Harris, 568 U.S. ___, No. 11–817, slip op. (2013).

—Consent Searches

[P. 1413, add to text at end of section:]

Common social expectations inform the analysis. A person at the threshold of a residence could not confidently conclude he was welcome to enter over the express objection of a present co-tenant. Expectations may change, however, if the objecting co-tenant leaves, or is removed from, the premises with no prospect of imminent return.[8]

—Prisons and Regulation of Probation and Parole

[P. 1420, add new paragraph to text after n.339:]

The Court in *Maryland v. King* cited a legitimate interest in having safe and accurate booking procedures to identify persons being taken into custody in order to sustain taking DNA samples from those charged with serious crimes.[9] Tapping the "unmatched potential of DNA identification" facilitates knowing with certainty who the arrestee is, his criminal history, the danger he poses to others, his flight risk, and so on.[10] By comparison, the Court characterized an arrestee's expectation of privacy as diminished and the intrusion posed by a cheek swab as minimal.[11]

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[7] *Id.* at 14.

[8] Fernandez v. California, 571 U.S. ___, No. 12–7822, slip op. (2014) (consent by co-occupant sufficient to overcome objection of a second co-occupant who was arrested and removed from the premises, so long as the arrest and removal were objectively reasonable).

[9] 569 U.S. ___, No. 12–207, slip op. (2013).

[10] *Id.* at 10–18, 23.

[11] *Id.* at 23–26.

FIFTH AMENDMENT

DOUBLE JEOPARDY

Reprosecution Following Acquittal

[P. 1468, add new sentence to text after n.96:]

Thus, an acquittal resting on the trial judge's misreading of the elements of an offense precludes further prosecution.[1]

—Trial Court Ruling Terminating Trial Before Verdict

[P. 1471, add new sentence to text after n.114:]

This is so even where the trial court's ruling on the sufficiency of the evidence is based on an erroneous interpretation of the statute defining the elements of the offense.[2]

SELF-INCRIMINATION

Development and Scope

[P. 1485, substitute for text beginning with the first new paragraph and continuing through the paragraph carrying-over from page 1486 to 1487:]

The historical studies cited demonstrate that in England and the colonies the privilege was narrower than the interpretation now prevailing. Of course, constitutional guarantees often expand, or contract, over time as judges adapt underlying policies to new factual patterns and practices. The difficulty is that the Court has generally not articulated the policy objectives underlying the privilege, usually citing a "complex of values" when it has attempted to state the interests served by it.[3] Commonly mentioned in numerous cases

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[1] Evans v. Michigan, 568 U.S. ___, No. 11–1327, slip op. (2013) (acquittal after judge ruled the prosecution failed to prove that a burned building was not a dwelling, but such proof was not legally required for the arson offense charged).

[2] *See* Evans v. Michigan, 568 U.S. ___, No. 11–1327, slip op. (2013).

[3] Discussing the privilege in one case, the Court stated:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human

was the assertion that the privilege was designed to protect the innocent and further the search for truth.[4]

It appears now, however, that the Court has rejected both of these as inapplicable and has settled upon the principle that the clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion.[5] To protect these interests and to preserve these values, the privilege "is not to be interpreted literally." Rather, the "sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts."[6] Furthermore, "[t]he privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . ."[7]

> personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations omitted).

[4] *E.g.*, Twining v. New Jersey, 211 U.S. 78, 91 (1908); Ullmann v. United States, 350 U.S. 422, 426 (1956); Quinn v. United States, 349 U.S. 155, 162–63 (1955).

[5] In *Tehan v. United States ex rel. Shott*, the Court noted:

> [T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load."
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> . . . .
>
> The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone.

Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415, 416 (1966); *see also* Miranda v. Arizona, 384 U.S. 436, 460 (1966); Schmerber v. California, 384 U.S. 757, 760–65 (1966); California v. Byers, 402 U.S. 424, 448–58 (1971) (Harlan, J., concurring). For a critical view of the privilege, see Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

[6] Ullmann v. United States, 350 U.S. 422, 438–39 (1956).

[7] Hoffman v. United States, 341 U.S. 479, 486 (1951); *see also* Emspak v. United States, 349 U.S. 190 (1955); Blau v. United States, 340 U.S. 159 (1950); Blau v. United States, 340 U.S. 332 (1951).

The privilege against self-incrimination parries the general obligation to provide testimony under oath when called upon, but it also applies in police interrogations. In all cases, the privilege must be supported by a reasonable fear that a response will be incriminatory. The issue is a matter of law for a court to determine,[8] and therefore, with limited exception, one must claim the privilege to benefit from it.[9] Otherwise, silence in the face of questioning may be insufficient to invoke the privilege because it may not afford an adequate opportunity either to test whether information withheld falls within the privilege or to cure a violation through a grant of immunity.[10] A witness who fails to claim the privilege explicitly when an affirmative claim is required is deemed to have waived it, and waiver may be found where the witness has answered some preliminary questions but desires to stop at a certain point.[11] However, an assertion of innocence in conjunction with a claim of the privilege does not obviate the right of a witness to invoke it, as her responses still may provide the government with evidence it may later seek to use against her.[12]

Although an individual must have reasonable cause to apprehend danger and cannot be the judge of the validity of his claim, a court that would deny a claim of the privilege must be "*perfectly*

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[8] *E.g.*, Mason v. United States, 244 U.S. 362 (1917).

[9] The primary exceptions are for a criminal defendant not taking the stand and a suspect in inherently coercive circumstances (*e.g.*, custodial interrogation). *See* Salinas v. Texas, 570 U.S. ___, No. 12–246, slip op. at 4–6 (2013) (plurality opinion).

[10] In *Salinas v. Texas*, 570 U.S. ___, No. 12–246, slip op. (2013), the defendant—Salinas—answered all questions during noncustodial questioning about a double murder, other than one about whether his shotgun would match shells recovered at the murder scene. He fell silent on this inquiry, but did not assert the privilege against self-incrimination. At closing argument at Salinas's murder trial, the prosecutor argued that this silence indicated guilt, and a majority of the Court endorsed these comments. The Court affirmed the Texas Supreme Court's ruling that Salinas had failed to invoke his Fifth Amendment rights because he did not do so explicitly. Although no opinion drew a majority of Justices, in an opinion joined by Chief Justice Roberts and Justice Kennedy, Justice Alito observed that a defendant could choose to remain silent for numerous reasons other than avoiding self-incrimination. 570 U.S. ___, No. 12–246, slip op. at 9 (plurality opinion).

[11] Rogers v. United States, 340 U.S. 367 (1951); United States v. Monia, 317 U.S. 424 (1943). The "waiver" concept here has been pronounced "analytically [un-]sound," with the Court preferring to reserve the term "waiver" "for the process by which one affirmatively renounces the protection of the privilege." Garner v. United States, 424 U.S. 648, 654, n.9 (1976). Thus, the Court has settled upon the concept of "compulsion" as applied to "cases where disclosures are required in the face of claim of privilege." *Id.* "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Id.* at 654. Similarly, the Court has enunciated the concept of "voluntariness" to be applied in situations where it is claimed that a particular factor denied the individual a "free choice to admit, to deny, or to refuse to answer." *Id.* at 654 n.9, 656–65.

[12] Ohio v. Reiner, 532 U.S. 17 (2001).

clear, from a careful consideration of all the circumstances in the case, that the individual is mistaken, and that the answer[s] *cannot possibly* have such tendency to incriminate." [13] To reach a determination, furthermore, a trial judge may not require a witness to disclose so much of the danger as to render the privilege nugatory. As the Court observed:

> [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.[14]

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

—Miranda v. Arizona

[P. 1518, add the following to n.355 before the period at the end of the first citation sentence:]

; Salinas v. Texas, 570 U.S. ___, No. 12–246, slip op. (2013) (plurality opinion) (voluntarily accompanying police to station for questioning)

NATIONAL EMINENT DOMAIN POWER

When Property Is Taken

—Government Activity Not Directed at Property

[P. 1570, replace first sentence at the beginning of the paragraph and n.667 with:]

But the Court also decided long ago that land can be "taken" in the constitutional sense by physical invasion or occupation by the government, as occurs when the government floods land permanently or recurrently.[15]

—Regulatory Takings

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[13] *Hoffman*, 341 U.S. at 488 (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)). For an application of these principles, see *Malloy v. Hogan*, 378 U.S. 1, 11–14 (1964), and *id.* at 33 (White, Stewart, JJ., dissenting). Where the government is seeking to enforce an essentially noncriminal statutory scheme through compulsory disclosure, some Justices would apparently relax the *Hoffman* principles. *Cf.* California v. Byers, 402 U.S. 424 (1971) (plurality opinion).

[14] *Hoffman*, 341 U.S. at 486–87.

[15] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1872). Recurrent, temporary floodings are not categorically exempt from Takings Clause liability. Ark. Game & Fishing Comm'n v. United States, 568 U.S. ___, No. 11–597, slip op. (2012) (downstream timber damage caused by changes in seasonal water release rates from government dam).

[P. 1582, after the parenthesis on line 4 add the following footnote:]

A third type of inverse condemnation, in addition to regulatory and *Nollan*, also applies to exactions imposed as conditions precedent to permit approval. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. ___, No. 11–1447 (2013). To the argument that nothing is "taken" when a permit is denied for failure to agree to a condition precedent, the Court stated that what is at stake is not whether a taking has occurred, but whether the right not to have property taken without just compensation has been burdened impermissibly. *Id.* at 10. The Court does not discuss what remedies might be available to a plaintiff who refuses to accept certain conditions precedent and thereby is refused a permit.

[P. 1582, after n.735 add:]

The Court clarified this uncertainty in *Koontz v. St. Johns River Water Management District* by holding that monetary exactions imposed under land use permitting were subject to essential nexus/rough proportionality analysis.[16]

[16] 570 U.S. ___, No. 11–1447 (2013).

SIXTH AMENDMENT

RIGHT TO TRIAL BY JURY

Jury Trial

—When the Jury Trial Guarantee Applies

[P. 1606, add to text after n.93:]

In *Alleyne v. United States*, the Court extended *Apprendi* to require "that any fact that increases the mandatory minimum [sentence] . . . must be submitted to the jury." [1]

[P. 1609, replace the second paragraph beginning on the page with:]

The Court, however, has refused to extend *Apprendi* to a judge's decision to impose sentences for discrete crimes consecutively rather than concurrently.[2] The Court explained that, when a defendant has been convicted of multiple offenses, each involving discrete sentencing prescriptions, the states apply various rules regarding whether a judge may impose the sentences consecutively or concurrently.[3] The Court held that "twin considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi*'s rule" to preclude judicial factfinding in this situation as well.[4]

ASSISTANCE OF COUNSEL

Absolute Right to Counsel at Trial

—Limits on the Right to Retained Counsel

[P. 1641, in the first full paragraph, add new footnote after "defense counsel.":]

On the same day, the Court also rejected a due process challenge to the same statute, holding that it was permissible to restrain the use of the seized property preconviction even when the defendant sought to use the seized assets to pay for his attorney as long as probable cause had been established that a qualifying crime had

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[1] 570 U.S. ___, No. 11–9335, slip op. at 1–2 (2013) (overruling Harris v. United States, 536 U.S. 545 (2002)).

[2] Oregon v. Ice, 555 U.S. 160 (2009).

[3] Most states follow the common law tradition of giving judges unfettered discretion over the matter, while some states presume that sentences will run consecutively but allow judges to order concurrent sentences upon finding cause to do so. "It is undisputed," the Court noted, "that States may proceed on [either of these] two tracks without transgressing the Sixth Amendment." *Id.* at 163.

[4] *Id.* at 525. The Court also noted other decisions judges make that are likely to evade the strictures of *Apprendi*, including determining the length of supervised release, attendance at drug rehabilitation programs, terms of community service, and imposition of fines and orders of restitution. *Id.* at 171–72.

been committed. United States v. Monsanto, 491 U.S. 600, 615 (1989) ("Indeed, it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that . . . the Government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense."). A subsequent case held that where a grand jury had returned an indictment based on probable cause, that conclusion is binding on a court during forfeiture proceedings and the defendants did not have a right to have such conclusion re-examined in a separate judicial hearing in order to unfreeze the assets to pay for his counsel. Kaley v. United States, 571 U.S. ___, No. 12–464, slip op. (2014).

—Effective Assistance of Counsel

[P. 1645, delete period at end of n.320 and add:]

; Burt v. Titlow, 571 U.S. ___, No. 12–414, slip op. (2013).

[P. 1645, delete period at end of n.325 and add:]

; Burt v. Titlow, 571 U.S. ___, No. 12–414, slip op. (2013) (where a reasonable interpretation of the record indicated that a criminal defendant claimed actual innocence, his attorney was justified in withdrawing a guilty plea).

[P. 1646, delete period at end of n.329 and add:]

; Hinton v. Alabama, 571 U.S. ___, No. 13–6440, slip op. (2014) (per curiam) (attorney's hiring of a questionably competent expert witness because of a mistaken belief in the legal limit on the amount of funds payable on behalf of an indigent defendant constitutes ineffective assistance).

[P. 1647, add new footnote to text at end of first partial paragraph:]

In *Chaidez v. United States*, 568 U.S. ___, No. 11–820, slip op. (2013), the Court held that *Padilla* announced a "new rule" of criminal procedure that did not apply "retroactively" during collateral review of convictions then already final. Retroactive application of the Court's criminal procedure decisions is discussed under the topic "Retroactivity Versus Prospectivity" in Article III, *supra.*

EIGHTH AMENDMENT

CRUEL AND UNUSUAL PUNISHMENTS

Capital Punishment

Limitations on Capital Punishment: Diminished Capacity

[P. 1711, add new paragraph to text after n.160:]

In *Hall v. Florida*,[1] however, the Court limited the states' ability to define intellectual disability by invalidating Florida's "bright line" cutoff based on Intelligence Quotient (IQ) test scores. A Florida statute stated that anyone with an IQ above 70 was prohibited from offering additional evidence of mental disability and was thus subject to capital punishment.[2] The Court invalidated this rigid standard, observing that "[i]ntellectual disability is a condition, not a number."[3] The majority noted that, although IQ scores are helpful in determining mental capabilities, they are imprecise in nature and may only be used as a factor of analysis in death penalty cases.[4] This reasoning was buttressed by a consensus of mental health professionals that an IQ test score should be read not as a single fixed number, but as a range.[5]

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[1] 572 U.S. ___, No. 12–10882, slip op. (2014).

[2] Fla. Stat. § 921.137.

[3] 572 U.S. ___, No. 12–10882, slip op. at 21.

[4] *Id.* Of those states that allow for the death penalty, a number of them do not have strict cut-offs for IQ scores. *See, e.g.*, Cal. Penal Code § 1376; La. Code Crim. Proc. Ann. art. 905.5.1; Nev. Rev. Stat. § 174.098.7; Utah Code Ann. § 77–15a–102. Similarly, the U.S. Code does not set a strict IQ cutoff. *See* 18 U.S.C. § 3596(c).

[5] This range, referred to as a "standard error or measurement" or "SEM," is used by many states in evaluating the existence of intellectual disability. 572 U.S. ___, No. 12–10882, slip op. at 12.

FOURTEENTH AMENDMENT

Section 1. Rights Guaranteed

PROCEDURAL DUE PROCESS: CIVIL

Jurisdiction

—In Personam Proceedings Against Individuals

[P. 1955, add the following new paragraph to the end of the section:]

Walden v. Fiore further articulated what "minimum contacts" are necessary to create jurisdiction as a result of the relationship between the defendant, the forum, and the litigation.[1] In *Walden*, the plaintiffs, who were residents of Nevada, sued a law enforcement officer in federal court in Nevada as a result of an incident that occurred in the Atlanta airport as the plaintiffs were attempting to board a connecting flight from Puerto Rico to Las Vegas. The Court held that the court in Nevada lacked jurisdiction because of insufficient contacts between the officer and the state relative to the alleged harm, as no part of the officer's conduct occurred in Nevada. In so holding, the Court emphasized that the minimum contacts inquiry should not focus on the resulting injury to the plaintiffs; instead, the proper question is whether the defendant's conduct connects him to the forum in a meaningful way.[2]

—Suing Out-of-State (Foreign) Corporations

[P. 1956, replace both paragraphs starting on that page with:]

Presence alone, however, does not expose a corporation to all manner of suits through the exercise of general jurisdiction. Only corporations, whose continuous and systematic affiliations with a forum make them "essentially at home" there, are broadly amenable to suit.[3] Without the protection of such a rule, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any state in which they happened to be carrying

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[1] 571 U.S. ___, No. 12–574, slip op. (2014). This type of "jurisdiction" is often referred to as "specific jurisdiction."

[2] *Id.* at 6–8.

[3] Daimler AG v. Bauman, 571 U.S. ___, No. 11–965, slip op. at 8 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. ___, No. 10–76, slip op. at 2 (2011)) (holding Daimler Chrysler, a German public stock company, could not be subject to suit in California with respect to acts taken in Argentina by Argentinian subsidiary of Daimler, notwithstanding the fact that Daimler Chrysler had a U.S. subsidiary that did business in California).

on business, suits for torts wherever committed and claims on contracts wherever made.[4] And if the corporation stopped doing business in the forum state before suit against it was commenced, it might well escape jurisdiction altogether.[5] In early cases, the issue of the degree of activity and, in particular, the degree of solicitation that was necessary to constitute doing business by a foreign corporation, was much disputed and led to very particularistic holdings.[6] In the absence of enough activity to constitute doing business, the mere presence of an agent, officer, or stockholder, who could be served, within a state's territorial limits was not sufficient to enable the state to exercise jurisdiction over the foreign corporation.[7]

The touchstone in jurisdiction cases was recast by *International Shoe Co. v. Washington* and its "minimum contacts" analysis.[8] International Shoe, an out-of-state corporation, had not been issued a license to do business in Washington State, but it systematically and continuously employed a sales force of Washington residents to solicit therein and thus was held amenable to suit in Washington for unpaid unemployment compensation contributions for such salesmen. The Court deemed a notice of assessment served personally upon one of the local sales solicitors, and a copy of the assessment sent by registered mail to the corporation's principal office in Missouri, sufficient to apprise the corporation of the proceeding.

EQUAL PROTECTION AND RACE

Education

[4] *E.g.*, Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907); Simon v. S. Ry., 236 U.S. 115, 129–30 (1915); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907); Rosenberg Co. v. Curtis Brown Co., 260 U.S. 516 (1923); Davis v. Farmers Cooperative Co., 262 U.S. 312 (1923); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984). Continuous operations were sometimes sufficiently substantial and of a nature to warrant assertions of jurisdiction. St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913); *see also* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. ___, No. 10–76, slip op. (2011) (distinguishing application of stream-of-commerce analysis in specific cases of in-state injury from the degree of presence a corporation must maintain in a state to be amenable to general jurisdiction there).

[5] Robert Mitchell Furn. Co. v. Selden Breck Constr. Co., 257 U.S. 213 (1921); Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373, 379 (1920). Jurisdiction would continue, however, if a state had conditioned doing business on a firm's agreeing to accept service through state officers should it and its agent withdraw. Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361, 364 (1933).

[6] Solicitation of business alone was inadequate to constitute "doing business," *Green v. Chicago, B. & Q. Ry.*, 205 U.S. 530 (1907), but when connected with other activities would suffice to confer jurisdiction. Int'l Harvester Co. v. Kentucky, 234 U.S. 579 (1914). Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141–42 (2d Cir. 1930) (Hand, J.) (providing survey of cases).

[7] *E.g.*, Goldey v. Morning News, 156 U.S. 518 (1895); Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903); Riverside Mills v. Menefee, 237 U.S. 189, 195 (1915); *but see* Conn. Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[8] 326 U.S. 310 (1945).

—Efforts to Curb Busing and Other Desegregation Remedies

[P. 2098, add new paragraph to text after n.1655:]

The Court subsequently declined to extend the reasoning of these cases to remedies for exclusively de facto racial segregation. In *Schuette v. BAMN*,[9] the Court considered the constitutionality of an amendment to the Michigan Constitution, approved by that state's voters, to prohibit the use of race-based preferences as part of the admissions process for state universities. In *Schuette*,[10] a plurality of the Court restricted its prior holdings as applying only to those situations where state action had the serious risk, if not purpose, of causing specific injuries on account of race. Finding no similar risks of injury with regard to the Michigan Amendment and no similar allegations of past discrimination in the Michigan university system, the Court declined to "restrict the right of Michigan voters to determine that race-based preferences granted by state entities should be ended."[11] The plurality opinion and a majority of the Court, however, explicitly rejected a broader "political process theory" with respect to the constitutionality of race-based remedies. Specifically, the Court held that state action that places effective decision making over a policy that "inures primarily to the benefit of the minority" at a different level of government is not subject to heightened constitutional scrutiny.[12]

Affirmative Action: Remedial Use of Racial Classifications

[P. 2116, add new footnote at end of first full paragraph:]

539 U.S. at 315. While an educational institution will receive deference in its judgment as to whether diversity is essential to its educational mission, the courts must closely scrutinize the means by which this goal is achieved. Thus, the institution will receive no deference regarding the question of the necessity of the means cho-

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[9] 572 U.S. ___, No. 12–682, slip op. (2014).

[10] The plurality opinion was written by Justice Kennedy, joined by Chief Justice Roberts and Justice Alito. Justice Scalia authored an opinion concurring in judgment, joined by Justice Thomas, arguing that *Seattle School District* and the case on which it was based should be overturned in their entirety. 572 U.S. ___, No. 12–682, slip op. at 7–8 (2014) (Scalia, J., concurring in judgment). Justice Breyer also wrote an opinion concurring in judgment that the Michigan amendment did not violate the Equal Protection Clause. Specifically, Justice Breyer relied on the facts that (1) the amendment forbid racial preferences aimed at achieving diversity in education (as opposed to remedying past discrimination); (2) the amendment was aimed at ensuring the democratic process (as opposed to the university administration) controlled with respect to affirmative action policy; and (3) the underlying racial preference policy had been adopted by individual school administrations, not by elected officials. *Id.* at 5 (Breyer, J., concurring in judgment). Justice Sotomayor, joined by Justice Ginsburg, dissented. *Id.* at 5, 22 (Sotomayor, J., dissenting). Justice Kagan recused herself.

[11] *Id.* at 3–4.

[12] *Id.* at 11.

sen and will bear the burden of demonstrating that "each applicant is evaluated as an individual and not in a way that an applicant's race or ethnicity is the defining feature of his or her application." Fisher v. Univ. of Tex. at Austin, 570 U.S. ___, No. 11–345, slip op. at 10 (2013) (citation omitted).

THE NEW EQUAL PROTECTION

Sexual Orientation

[P. 2172, add new paragraphs to text at end of section:]

In *United States v. Windsor*,[13] the Court struck down section 3 of the Defense of Marriage Act (DOMA), which provided that for purposes of any federal act, ruling, regulation, or interpretation by an administrative agency, the word "spouse" would mean a person of the opposite sex who is a husband or a wife.[14] In *Windsor*, the petitioner had been married to her same-sex partner in Canada and she lived in New York, where the marriage was recognized. After her partner died, the petitioner sought to claim a federal estate tax exemption for surviving spouses.[15] In examining the federal statute, the Court initially noted that, while "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States,"[16] section 3 of DOMA took the "unusual" step of departing from the "history and tradition of reliance on state law to define marriage" in order to alter the reach of over 1,000 federal laws and limit the scope of federal benefits.[17] Citing to *Romer*, the Court noted that discrimination of "unusual character" warranted more careful scrutiny.[18]

In approving of same-sex marriages, the State of New York was conferring a "dignity and status of immense import,"[19] and the federal government, with section 3 of DOMA, was aiming to impose "restrictions and disabilities" on and "injure the very class" New York sought to protect.[20] In so doing, the Court concluded that section 3 of DOMA was motivated by improper animus or purpose because the law's avowed "purpose and practical" effect was to "impose a . . . stigma upon all who enter into same-sex marriages made lawful" by the states.[21] Holding that "no legitimate purpose over-

[13] 570 U.S. ___, No. 12–307, slip op. (2013).
[14] 110 Stat. 2419, 1 U.S.C. § 7.
[15] Section 3 also provided that "marriage" would mean only a legal union between one man and one woman.
[16] 570 U.S. ___, No. 12–307, slip op. at 14–16.
[17] *Id.* at 18–19.
[18] *Id.* at 19 (citing Romer v. Evans, 517 U.S. 620, 633 (1996)).
[19] *Id.* at 18.
[20] *Id.* at 19–20.
[21] *Id.* at 21.

comes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,"[22] the Court held that section 3 of DOMA violates "basic due process and equal protection principles applicable to the Federal Government."[23] In striking down section 3, the Court did not expressly set out what test the government must meet to justify laws calling for differentiated treatment based on sexual orientation.

[22] *Id.* at 25–26.

[23] *Id.* at 20. Because the case was decided under the due process clause of the Fifth Amendment, which comprehends both substantive due process and equal protection principles (as incorporated through the Fourteenth Amendment), this statement leaves unclear precisely how each of these doctrines bears on the presented issue.

FIFTEENTH AMENDMENT

Sections 1 and 2

ABOLITION OF SUFFRAGE QUALIFICATIONS ON BASIS OF RACE

Congressional Enforcement

Federal Remedial Legislation

[P. 2212, after first paragraph, delete remaining paragraphs in section and replace with:]

But, it was in upholding the constitutionality of the 1965 Act in *South Carolina v. Katzenbach* that the Court sketched the outlines of a broad power in Congress to enforce the Fifteenth Amendment.[1] Although section 1 authorized the courts to strike down state statutes and procedures that denied the vote on the basis of race, the Court held section 2 authorized Congress to go beyond proscribing certain discriminatory statutes and practices to "enforce" the guarantee by any rational means at its disposal. The standard was the same as that used under the "Necessary and Proper" Clause supporting other congressional legislation. Congress was therefore justified in deciding that certain areas of the nation were the primary locations of voting discrimination and in directing its remedial legislation to those areas. The Court found that Congress chose a rational formula based on the existence of voting tests that could be used to discriminate and on low registration or voting rates, which demonstrated the likelihood that the tests had been so used; that Congress could properly suspend for a period all literacy tests in the affected areas upon findings that they had been administered discriminatorily and that illiterate whites had been registered while both literate and illiterate African-Americans had not been; and that Congress could require the states to seek federal permission to reinstitute old tests or institute new ones; and it could provide for federal examiners to register qualified voters.[2]

The *Katzenbach* decision appeared to afford Congress discretion to enact measures designed to enforce the Amendment through broad affirmative prescriptions rather than through proscriptions of specific practices.[3] Subsequent decisions of the Burger Court con-

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[1] 383 U.S. 301 (1966).

[2] *Id.* at 333–37.

[3] Justice Black dissented from the portion of the decision that upheld the requirement that before a state could change its voting laws it must seek approval of the

firmed the reach of this power. In one case, the Court held that evidence of past discrimination in the educational opportunities available to black children precluded a North Carolina county from reinstituting a literacy test.[4] And, in 1970, when Congress suspended for a five-year period literacy tests throughout the nation,[5] the Court unanimously sustained the action as a valid measure to enforce the Fifteenth Amendment.[6]

Moreover, in *City of Rome v. United States*,[7] the Court read the scope of Congress's remedial powers under section 2 of the Fifteenth Amendment to parallel similar reasoning under section 5 of the Fourteenth Amendment. In *City of Rome*, the City had sought to escape from coverage of the Voting Rights Act by showing that it had not utilized any discriminatory practices within the prescribed period.[8] The lower court found that the City had engaged in practices without any discriminatory motive, but that its practices had had a discriminatory impact.[9] The City thus argued that, because the Fifteenth Amendment reached only purposeful discrimination, the Act's proscription of effect, as well as of purpose, went beyond Congress's power.[10] The Court held, however, that, even if discriminatory intent was a prerequisite to finding a violation of section 1 of the Fifteenth Amendment,[11] Congress still had authority to proscribe electoral devices that had the effect of discriminating.[12] The Court held that section 2, like section 5 of the Fourteenth Amendment, was in effect a "Necessary and Proper Clause," which enabled Congress to enact enforcement legislation that was rationally related to the end sought, and that section 2 of the Fifteenth Amendment did not prohibit such legislation since the legislation was consistent with the letter and spirit of the Constitution, even though the actual practice, which the legislation outlawed or restricted, would not, in itself, violate the Fifteenth Amendment.[13] In so acting, Congress could prohibit state action that perpetuated the effect of past discrimination, or that, because of the existence of past

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Attorney General or a federal court. *Id.* at 355.

[4] Gaston Cty. v. United States, 395 U.S. 285 (1969).

[5] 84 Stat. 315, 42 U.S.C. § 1973aa.

[6] Oregon v. Mitchell, 400 U.S. 112, 131–34, 144–47, 216–17, 231–36, 282–84 (1970).

[7] 446 U.S. 156 (1980).

[8] *Id.* at 172.

[9] *Id.*

[10] *Id.* at 173.

[11] *Cf.* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980).

[12] *Id.*

[13] *Id.* at 174–77.

purposeful discrimination, raised a risk of purposeful discrimination that might not lend itself to judicial invalidation.[14] The Court stated:

> It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia* . . . . Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.[15]

In 1975 and 1982, Congress extended and revised the Voting Rights Act.[16] Congress used the 1982 Amendments to revitalize section 2 of the Act, which, unlike section 5, applies nationwide.[17] As enacted in 1965, section 2 largely tracked the language of the Fifteenth Amendment. In *City of Mobile v. Bolden*,[18] a majority of the Court agreed that the Fifteenth Amendment and section 2 of the Act were coextensive, but the Justices did not agree on the meaning to be ascribed to the statute. A plurality believed that, because

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[14] *Id.* at 175–76.

[15] City of Rome v. United States, 446 U.S. 156, 177 (1980). In *Lopez v. Monterey Cty.*, 525 U.S. 266 (1999), the Court reiterated its prior holdings that Congress may exercise its enforcement power based on discriminatory effects, and without any finding of discriminatory intent.

[16] The 1975 amendments, Pub. L. 94–73, 89 Stat. 400, extended the Act for seven years; expanded it to include those areas having minorities distinguished by their language, i.e., "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," § 207, in which certain statistical tests are met; and required election materials to be provided in an alternative language if more than five percent of the voting age citizens of a political subdivision are members of a single language minority group whose illiteracy rate is higher than the national rate. § 301. The 1982 amendments, Pub. L. 97–205, 96 Stat. 131, in addition to the section 2 revision, provided that a covered jurisdiction may remove itself from the Act's coverage by proving to the special court in the District of Columbia that the jurisdiction has complied with the Act for the previous ten years and that it has taken positive steps both to encourage minority political participation and to remove structural barriers to minority electoral influence. § 2. Moreover, the 1982 amendments change the result in *Beer v. United States*, 425 U.S. 130 (1976), in which the Court had held that a covered jurisdiction was precluded from altering a voting practice covered by the Act only if the change would lead to a retrogression in the position of racial minorities; if a change in voting practice merely perpetuated a practice that was not covered by the Voting Rights Act because it was enacted prior to November 1964, the jurisdiction could implement it. The 1982 amendments provide that the change may not be approved if it would "perpetuate voting discrimination," in effect applying the new section 2 results test to preclearance procedures. S. REP. NO. 417, 97th Congress, 2d Sess. 12 (1982); H.R. REP. NO. 227, 97th Congress, 1st Sess. 28 (1981).

[17] Private parties may bring suit to challenge electoral practices under section 2.

[18] 446 U.S. 55 (1980). *See id.* at 60–61 (Burger, C.J., Stewart, Powell, Rehnquist, JJ.), and *id.* at 105 n.2 (Marshall, J. dissenting).

the constitutional provision reached only purposeful discrimination, section 2 was similarly limited. A major purpose of Congress in 1982 had been to set aside this possible interpretation and to provide that any electoral practice "which results in a denial or abridgement" of the right to vote on account of race or color will violate the Act.[19]

The Court in *Shelby County v. Holder*,[20] however, emphasized the limits to the enforcement power of the Fifteenth Amendment in striking down section 4 of the Act, which provided the formula that determined which states or electoral districts are required to submit electoral changes to the Department of Justice or a federal court for preclearance under section 5 of the Act. In 2006, Congress had reauthorized the Act for twenty-five years, and provided that the preclearance requirement extended to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972.[21]

In *Shelby County*, the Court described the section 5 preclearance process as an "extraordinary departure from the traditional course of relations between the States and the Federal Government" [22] and as "extraordinary legislation otherwise unfamiliar to our federal system." [23] This led the Court to find the formula in section 4 violated the "fundamental principle of equal sovereignty" among states because the section, by definition, applied to only some states and not others.[24] While the Court acknowledged that the disparate

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[19] Before the 1982 amendments, section 2 provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. 89–110, § 2, 79 Stat. 437. Section 3 of the 1982 amendments amended section 2 of the Act by inserting the language quoted and by setting out a nonexclusive list of factors making up a "totality of circumstances test" by which a violation of section 2 would be determined. 96 Stat. 131, 134, amending 42 U.S. § 1973. Without any discussion of the Fifteenth Amendment, the Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), interpreted and applied the "totality of the circumstances" test in the context of multimember districting. *Id.* at 80.

[20] 570 U.S. ___, No. 12–96, slip op. (2013).

[21] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub. L. 109–246, 120 Stat. 577.

[22] 570 U.S. ___, No. 12–96, slip op. at 12.

[23] *Id.* (citation omitted).

[24] 570 U.S. ___, No. 12–96, slip op. at 9 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).The significance of the principle of equal sovereignty as enunciated in *Coyle v. Smith* had been considered by the Court in a previous challenge to the Act. *See* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966). Considering the disparate treatment of states under the section 5 preclearance requirement, the *Katzenbach* Court had referenced the case of *Coyle v. Smith*, 221 U.S. 559 (1911), which upheld the authority of Oklahoma to move its state capitol despite language to the contrary in the enabling act providing for its admission as a state. This case, while based on the theory that the United States "was and is

treatment of states under section 4 could be justified by "unique circumstances," such as those before Congress at the time of enactment of the Voting Rights Act,[25] the Court held that "Congress could no longer distinguish between States in such a fundamental way based on 40-year-old-data, when today's statistics tell an entirely different story" with respect to racial discrimination in covered jurisdictions.[26] The Court added, however, that Congress could "draft another formula [for pre-clearance] based on current conditions" that demonstrate "that exceptional conditions still exist justifying such an 'exceptional departure from the traditional course of relations between the States and the Federal Government.'"[27]

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a union of States, equal in power, dignity and authority," 221 U.S. at 580, was distinguished by the Court in *Katzenbach* as concerning only the admission of new states and not remedies for actions occurring subsequent to that event. The Court in *Shelby County* held, however, that a broader principle regarding equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." 570 U.S. ___, No. 12–96, slip op. at 11 (citing *Nw. Austin*, 557 U.S. at 203).

[25] 570 U.S. ___, No. 12–96, slip op. at 12–13 (quoting *Katzenbach*, 383 U.S. at 334, 335).

[26] *Id.* at 13, 23–24.

[27] *Id.* at 24 (quoting Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 500–01 (1992)).

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

[This entry should follow #109 in the main volume:]

Act of August 6, 1965 (Pub. L. 89–110, § 4(b), 79 Stat. 438, 42 U.S.C. § 1973(b))

Section 4 of the Voting Rights Act of 1965, which provides the formula for determining the states or electoral districts that are required to submit electoral changes to the Department of Justice or a federal court for preclearance approval under section 5 of the Act, exceeds Congress's enforcement power under the Fifteenth Amendment by violating the "fundamental principle of equal sovereignty" among states without sufficient justification.

Shelby Cty. v. Holder, 570 U.S. ___, No. 12–96, slip op. (2013).
Justices concurring: Roberts, C.J., Scalia, Kennedy, Thomas, Alito
Justices dissenting: Ginsburg, Breyer, Sotomayor, Kagan

[This entry should follow #162 in the main volume:]

Act of September 21, 1996 (Pub. L. No. 104–199, § 2(a), 110 Stat. 2419, 1 U.S.C. § 7)

Section 3 of the Defense of Marriage Act (DOMA), which provides that—for purposes of any federal act, ruling, regulation, or interpretation by an administrative agency—the word "spouse" is defined as a person of the opposite sex who is a husband or a wife, was "motivated by improper animus or purpose" to disparage and injure those whom a state, by its marriage laws, "sought to protect in personhood and dignity," amounting to a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.

United States v. Windsor, 570 U.S. ___, No. 12–307, slip op. (2013).
Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

[This entry should follow #168 in the main volume:]

Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107–155, § 307(b), 2 U.S.C. § 441a(a)(3))

Aggregate limits on the amount of money individuals are allowed to contribute to candidates, political action committees, national party committees, and state or local party committees violate the First Amendment by restricting participation in the political process without furthering the government's interest in preventing quid pro quo corruption or the appearance thereof.

McCutcheon v. FEC, 572 U.S. ___, No. 12–536, slip op. (2014).
Justices concurring: Roberts, C.J., Scalia, Kennedy, Alito
Justice concurring in judgment only: Thomas
Justices dissenting: Ginsburg, Breyer, Sotomayor, Kagan

[This entry should follow #171 in the main volume:]

Act of May 27, 2003 (Pub. L. 108–25, Title III, § 301(f), 117 Stat. 711, 734, 22 U.S.C. § 7631(f))

A condition on the provision of federal funds intended to combat HIV/AIDS requiring a recipient to have a policy "explicitly opposing prostitution and sex trafficking" violates First Amendment free speech rights by improperly interfering with the recipient's protected conduct outside of the federal program.

Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. ___, No. 12–10, slip op. (2013).
Justices concurring: Roberts, C.J., Kennedy, Ginsburg, Breyer, Alito, Sotomayor
Justices dissenting: Scalia, Thomas

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

I. STATE LAWS HELD UNCONSTITUTIONAL

954. *Hall v. Florida*, 572 U.S. ___, No. 12–10882, slip op. (2014)

Florida state law that provides a "bright line" cutoff based on IQ test scores to determine if a defendant is ineligible for capital punishment because of intellectual disability violates the Eighth Amendment because IQ scores are imprecise in nature and may only be used as a factor of analysis in death penalty cases.

Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

955. *McCullen v. Coakley*, 573 U.S. ___, No. 12–1168, slip op. (2014)

Massachusetts statute requiring a 35-foot buffer zone at entrances and driveways of abortion facilities violates the First Amendment, as the zone created is not narrowly tailored to serve governmental interests in maintaining public safety and preserving access to reproductive healthcare facilities because less intrusive alternatives were available to the state.

Justices concurring: Roberts, C.J., Ginsburg, Breyer, Sotomayor, Kagan
Justices concurring in judgment: Scalia, Kennedy, Thomas, Alito

956. *Harris v. Quinn*, 573 U.S. ___, No. 11–681, slip op. (2014)

An Illinois law requiring a Medicaid recipient's "personal assistant" (who is part of a collective bargaining unit but not a member of the bargaining union) to pay an "agency" fee to the union violates the First Amendment's prohibitions against compelled speech and could not be justified under the rationale of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Justices concurring: Roberts, C.J., Scalia, Kennedy, Thomas, Alito
Justices dissenting: Ginsburg, Breyer, Sotomayor, Kagan

III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

[Insert the following at the beginning of list:]

The Constitution of the United States of America: Analysis and Interpretation is currently undergoing significant revisions as part of a regular review of the document. As part of the revision process, the list of state and local

laws held preempted by federal law is being eliminated.

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

Asterisks (*) identify cases expressly overruled.

	Overruling Case	*Overruled Case*
*	957. Alleyne v. United States, 570 U.S. ___, No. 11–9335, slip op. (2013)	Harris v. United States, 536 U.S. 545 (2002)

TABLE OF CASES

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