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THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

1998 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 26, 1998

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ARTICLE I

Delegation

[P. 78, add to text following n.79:]

The infirm state of the nondelegation doctrine was demonstrated further in *Loving v. United States*.[1] Article 118 of the Uniform Code of Military Justice (UCMJ)[2] provides for the death penalty for premeditated murder and felony murder for persons subject to the Act, but the statute does not comport with the Court's capital punishment jurisprudence, which requires the death sentence to be cabined by standards so that the sentencing authority is constrained to narrow the class of convicted persons to be so sentenced and to justify the individual imposition of the sentence.[3] However, the President in 1984 had promulgated standards that purported to supply the constitutional validity the UCMJ needed.[4]

The Court held that Congress could delegate to the President the authority to prescribe standards for the imposition of the death penalty—Congress' power under Article I, § 8, cl. 14, is not exclusive—and that Congress had done so in the UCMJ by providing that the punishment imposed by a court-martial may not exceed "such limits as the President may prescribe."[5] Acknowledging that a delegation must contain some "intelligible principle" to guide the recipient of the delegation, the Court nonetheless held this not to be true when the delegation was made to the President in his role as Commander-in-Chief. "The same limitations on delegation do not apply" if the entity authorized to exercise delegated authority itself possesses independent authority over the subject matter. The President's responsibilities as Commander-in-Chief require him to superintend the military, including the courts-martial, and thus the delegated duty is interlinked with duties already assigned the President by the Constitution.[6]

In the course of the opinion, the Court distinguished between its usual separation-of-powers doctrine—emphasizing arrogation of power by a branch and impairment of another branch's ability to carry out its functions—and the delegation doctrine, "another

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[1] 517 U.S. 748 (1996). The decision was unanimous in result, but there were several concurrences reflecting some differences among the Justices.

[2] 10 U.S.C. §§ 918(1), (4).

[3] The Court assumed the applicability of Furman v. Georgia, 408 U.S. 238 (1972), and its progeny, to the military, 517 U.S. at 755–56, a point on which Justice Thomas disagreed, id. at 777.

[4] Rule for Courts-Martial; see 517 U.S. at 754.

[5] 10 U.S.C. §§ 818, 836(a), 856.

[6] 517 U.S. at 771–74.

branch of our separation of powers jurisdiction," which is informed not by the arrogation and impairment analyses but solely by the provision of standards,[7] thus confirming what has long been evident that the delegation doctrine is unmoored to separation-of-powers principles alogether.

[P. 82, add to n.106:]

Notice Clinton v. City of New York, 118 S.Ct. 2091 (1998), in which the Court struck down what Congress had intended to be a delegation to the President, finding that the authority conferred on the President was legislative power, not executive power, which failed because the presentment clause had not and could not have been complied with. The dissenting Justices argued that the law, the Line Item Veto Act, was properly treated as a delegation and was clearly constitutional. Id. at 2110 (Justice Scalia concurring in part and dissenting in part), 2118 (Justice Breyer dissenting).

Qualifications of Members of Congress

[P. 111, add to n.297:]

Powell's continuing validity was affirmed in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995), both by the Court in its holding that the qualifications set out in the Constitution are exclusive and may not be added to by either Congress or the States, id. at 787–98, and by the dissent, which would hold that Congress, for different reasons, could not add to qualifications, although the States could. Id. at 875–76.

[P. 114, add to text following n.312:]

The long-debated issue whether the States could add to the qualifications that the Constitution prescribed for Senators and Representations was finally resolved, by a surprisingly close vote, in *U.S. Term Limits, Inc. v. Thornton*.[8] Arkansas, along with twenty-two other States, all but two by citizen initiatives, had imposed maximum numbers of terms that Members of Congress could serve. In this case, the Court held that the Constitution's qualifications clauses[9] establish exclusive qualifications for Members that may not be added to either by Congress or the States. The four-Justice dissent argued that while Congress had no power to increase qualifications, the States did.

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[7] Id. at 758–59.

[8] 514 U.S. 779 (1995). The majority was composed of Justice Stevens (writing the opinion of the Court) and Justices Kennedy, Souter, Ginsburg, and Breyer. Dissenting were Justice Thomas (writing the opinion) and Chief Justice Rehnquist and Justices O'Connor and Scalia. Id. at 845.

[9] Article I, § 2, cl. 2, provides that a person may qualify as a Representative if she is at least 25 years old, has been a United States citizen for at least 7 years, and is an inhabitant, at the time of the election, of the State in which she is chosen. The qualifications established for Senators, Article I, § 3, cl. 3, are an age of 30, nine years' citizenship, and being an inhabitant of the State at time of election.

Richly embellished with disputatious arguments about the text of the Constitution, the history of its drafting and ratification, and the practices of Congress and the States in the early years of the United States, the actual determination of the Court as controverted by the dissent was much more over founding principles than more ordinary constitutional interpretation.[10]

Thus, the Court and the dissent drew different conclusions from the text of the qualifications clauses and the other clauses respecting the elections of Members of Congress; the Court and the dissent reached different conclusions after a minute examination of the records of the Convention respecting the drafting of these clauses and the ratification debates; and the Court and the dissent were far apart on the meaning of the practices in the States in legislating qualifications and election laws and in Congress in deciding election contests based on qualifications disputes.

A default principle relied on by both Court and dissent, given the arguments drawn from text, creation, and practice, had to do with the fundamental principle at the foundation of the Constitution's founding. In the dissent's view, the Constitution was the result of the resolution of the peoples of the separate States to create the National Government. The conclusion to be drawn from this was that the peoples in the States agreed to surrender powers expressly forbidden them and to surrender those limited powers that they had delegated to the Federal Government expressly or by necessary implication. They retained all other powers and still retained them. Thus, "where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it."[11] The Constitution's silence about the States being limited meant that the States could legislate additional qualifications.

Radically different were the views of the majority of the Court. After the adoption of the Constitution, the States had two kinds of powers: powers that they had before the founding and powers that were reserved to them. The States could have no reserved powers with respect to the Federal Government. "As Justice Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'"[12] The States could

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[10] See Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995).

[11] 514 U.S. at 848 (Justice Thomas dissenting). *See generally* id. at 846–65.

[12] Id. at 802.

not before the founding have possessed powers to legislate respecting the Federal Government, and since the Constitution did not delegate to the States the power to prescribe qualifications for Members of Congress, the States did not have it. [13]

Evidently, the opinions in this case reflect more than a decision on this particular dispute. They rather represent conflicting philosophies within the Court respecting the scope of national power in the context of the States, an issue at the core of many controversies today.

[P. 115, add to n.317:]

Another census controversy was resolved in Wisconsin v. City of New York, 517 U.S. 1 (1996), in which the Court held that the decision of the Secretary of Commerce not to conduct a post-enumeration survey and statistical adjustment for an undercount in the 1990 Census was reasonable and within the bounds of discretion conferred by the Constitution and statute.

Presentation of Resolutions

[P. 144, add new topic at end of section:]

The Line Item Veto.— For more than a century, United States Presidents had sought the authority to strike out of appropriations bills particular items, to veto "line items" of money bills and sometimes legislative measures as well. Finally, in 1996, Congress approved and the President signed the Line Item Veto Act. [14] The law empowered the President, within five days of signing a bill, to "cancel in whole" spending items and targeted, defined tax benefits. In acting on this authority, the President was to determine that the cancellation of each item would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." [15] In *Clinton v. City of New York*, [16] the Court held the Act to be unconstitutional because it did not comply with the presentment clause.

Although Congress in passing the Act considered itself to have been delegating power, [17] and although the dissenting Justices would have upheld the Act as a valid delegation, [18] the Court instead analyzed the statute under the presentment clause. In the Court's view, the two bills from which the President subsequently struck items became law the moment the President signed them.

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[13] Id. at 798–805. *And see* id. at 838–45 (Justice Kennedy concurring).
[14] Pub. L. 104–130, 110 Stat. 1200, codified in part at 2 U.S.C. §§ 691–92.
[15] Id. at § 691(a)(A).
[16] 118 S.Ct. 2091 (1998).
[17] E.g., H.R. Conf. Rep. No. 104–491, 104th Cong., 2d Sess., 15 (1996) (stating that the proposed law "delegates limited authority to the President").
[18] Id. at 118 S.Ct., 2110 (Justice Scalia concurring in part and dissenting in part); id. at 2118 (Justice Breyer dissenting).

His cancellations thus amended and in part repealed the two federal laws. Under its most immediate precedent, the Court continued, statutory repeals must conform to the presentment clauses's "single, finely wrought and exhaustively considered, procedure" for enacting or repealing a law.[19] In no respect did the procedures in the Act comply with that clause, and in no way could they. The President was acting in a legislative capacity, altering a law in the manner prescribed, and legislation must, in the way Congress acted, be bicameral and be presented to the President after Congress acted. Nothing in the Constitution authorized the President to amend or repeal a statute unilaterally, and the Court could construe both constitutional silence and the historical practice over 200 years as "an express prohibition" of the President's action.[20]

Commerce Clause

[P. 167, add to n.619, immediately after *New York v. United States*:]

See also Printz v. United States, 521 U.S. 898 (1997).

[P. 207, add to text following n.820:]

For the first time in almost sixty years,[21] the Court invalidated a federal law as exceeding Congress' authority under the commerce clause.[22] The statute was a provision making it a federal offense to possess a firearm within 1,000 feet of a school.[23] The Court reviewed the doctrinal development of the commerce clause, especially the effects and aggregation tests, and reaffirmed that it is the Court's responsibility to decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce when a law is challenged.[24] The Court identified three broad categories of activity that Congress may regulate under its commerce power. "First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even

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[19] Id. at 2103–04 (citing and quoting INS v. Chadha, 462 U.S. 919, 951 (1983).

[20] Id. at 2103–04.

[21] The last such decision had been Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[22] United States v. Lopez, 514 U.S. 549 (1995). The Court was divided 5-to–4, with Chief Justice Rehnquist writing the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with dissents by Justices Stevens, Souter, Breyer, and Ginsburg.

[23] 18 U.S.C. § 922(q)(1)(A). Congress subsequently amended the section to make the offense jurisdictionally turn on possession of "a firearm that has moved in or that otherwise affects interstate or foreign commerce." Pub. L. 104–208, 110 Stat. 3009–370.

[24] 514 U.S. at 556–57, 559.

though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."[25]

Clearly, said the Court, the criminalized activity did not implicate the first two categories.[26] As for the third, the Court found an insufficient connection. First, a wide variety of regulations of "intrastate economic activity" has been sustained where an activity substantially affects interstate commerce. But the statute being challenged, the Court continued, was a criminal law that had nothing to do with "commerce" or with "any sort of economic enterprise." Therefore, it could not be sustained under precedents "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[27] The provision did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[28] The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case. Finally, the Court rejected the arguments of the Government and of the dissent that there existed a sufficient connection between the offense and interstate commerce.[29] At base, the Court's concern was that accepting the attenuated connection arguments presented would result in the evisceration of federalism. "Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[30]

Whether this decision bespeaks a Court determination to police more closely Congress' exercise of its commerce power, so that it would be a noteworthy case,[31] or whether it is rather a "warning shot" across the bow of Congress, urging more restraint in the exer-

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[25] Id. at 558–59.
[26] Id. at 559.
[27] Id. at 559–61.
[28] Id. at 561.
[29] Id. at 563–68.
[30] Id. at 564.
[31] "Not every epochal case has come in epochal trappings." Id. at 615 (Justice Souter dissenting) (wondering whether the case is only a misapplication of established standards or is a veering in a new direction).

cise of power or more care in the drafting of laws, is unclear. Obviously, Justice Thomas would undo much of modern commerce-clause jurisprudence. He writes that the substantial-effects test in conjunction with the aggregation principle betrays the intent of the Framers and confers a "police power" on Congress that it should not, indeed, does not, have. He argues that the Court in a future case should undo what it has done.[32] On the other hand, Justice Kennedy, with whom Justice O'Connor joined, argued that the Court should generally not upset the stability of commerce-clause jurisprudence and should not erode the "essential principles now in place respecting the congressional power to regulate transactions of a commercial nature." But, when a congressional enactment upsets the federal balance by extending federal power into areas "to which States lay claim by right of history and expertise," he would have the Court intervene.[33]

Thus, it seems unlikely that the Court, as now constituted, will retreat from much of the existing law in this area, but it may well be that, outside the area of economic regulation,[34] the Court will exert a restraining hand to legislation such as that federalizing much state criminal law enforcement.

Dormant Commerce Clause—State Regulation and Taxation

[Pp. 215–16, add to n.864:]

Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Justice Scalia concurring) (reiterating view); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Justice Scalia, with Justice Thomas joining) (same). Justice Thomas has written an extensive opinion rejecting both the historical and jurisprudential basis of the dormant commerce clause and expressing a preference for reliance on the imports-exports clause. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 (1997) (dissenting; joined by Justice Scalia entirely and by Chief Justice Rehnquist as to the commerce clause but not the imports-exports clause).

[P. 223, add to n.907:]

Notice the Court's distinguishing of *Central Greyhound* in Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 188–91 (1995).

[P. 227, add to n.928:]

And see C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994) (discrimination against interstate commerce not preserved because local businesses also suffer).

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[32] Id. at 584–602 (Justice Thomas concurring).

[33] Id. at 568–83 (Justice Kennedy concurring).

[34] For a striking example, in the same Term as *Lopez*, see Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

[P. 227, add to n.930:]

For the most recent case in this saga, *see* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

[P. 229, add to n.941:]

A recent application of the four-part *Complete Auto Transit* test is Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[P. 232, add to text following n.959:]

A deference to state taxing authority was evident in a case in which the Court sustained a state sales tax on the price of a bus ticket for travel that originated in the State but terminated in another State. The tax was not apportioned to reflect the intrastate travel and the interstate travel.[35] The tax in this case was different, the Court held. The previous tax constituted a levy on gross receipts, payable by the seller, whereas the present tax was a sales tax, also assessed on gross receipts, but payable by the buyer. The Oklahoma tax, the Court continued, was internally consistent, since if every State imposed a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one tax. The tax was also externally consistent, the Court held, because it was a tax on the sale of a service that took place in the State, not a tax on the travel.[36]

However, the Court found discriminatory and thus invalid a state intangibles tax on a fraction of the value of corporate stock owned by state residents inversely proportional to the corporation's exposure to the state income tax.[37]

[P. 232, add to n.961:]

And see Oregon Waste Systems v. Department of Envtl. Quality, 511 U.S. 93 (1994) (surcharge on in-state disposal of solid wastes that discriminates against companies disposing of waste generated in other States invalid).

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[35] Indeed, there seemed to be a precedent squarely on point. Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948). Struck down in that case was a state statute that failed to apportion its taxation of interstate bus ticket sales to reflect the distance traveled within the State.

[36] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995). Indeed, the Court analogized the tax to that in Goldberg v. Sweet, 488 U.S. 252 (1989), a tax on interstate telephone services that originated in or terminated in the State and that were billed to an in-state address.

[37] Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The State had defended on the basis that the tax was a "compensatory" one designed to make interstate commerce bear a burden already borne by intrastate commerce. The Court recognized the legitimacy of the defense, but it found the tax to meet none of the three criteria for classification as a valid compensatory tax. Id. at 333–44.

[P. 233, add to n.965:]

Compare Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (state intangibles tax on a fraction of the value of corporate stock owned by in-state residents inversely proportional to the corporation's exposure to the state income tax violated dormant commerce clause), *with* General Motors Corp. v. Tracy, 519 U.S. 278 (1997) (state imposition of sales and use tax on all sales of natural gas except sales by regulated public utilities, all of which were in-state companies, but covering all other sellers that were out-of-state companies did not violate dormant commerce clause because regulated and unregulated companies were not similarly situated).

[P. 233, add to text following n.965:]

Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[38] applied its nondiscrimination element of the doctrine to invalidate the State's charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily non-state residents. The claimant here operated a church camp for children, most of whom resided out-of-state. The discriminatory tax would easily have fallen had it been applied to profit-making firms, and the Court saw no reason to make an exception for nonprofits. The tax scheme was designed to encourage entities to care for local populations and to discourage attention to out-of-state individuals and groups. "For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant."[39]

[P. 236, add to n.978:]

In West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), the Court held invalidly discriminatory against interstate commerce a state milk pricing order, which imposed an assessment on all milk sold by dealers to in-state retailers, the entire assessment being distributed to in-state dairy farmers despite the fact that about two-thirds of the assessed milk was produced out of State. The avowed purpose and undisputed effect of the provision was to enable higher-cost in-state dairy farmers to compete with lower-cost dairy farmers in other States.

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[38] 520 U.S. 564 (1997). The decision was a 5-to–4 one with a strong dissent by Justice Scalia, id. at 595, and a philosophically departure by Justice Thomas. Id. at 609.

[39] Id. at 586.

[P. 236, add to text following n.980:]

Further extending the limitation of the clause on waste disposal,[40] the Court invalidated as a discrimination against interstate commerce a local "flow control" law, which required all solid waste within the town to be processed at a designated transfer station before leaving the municipality.[41] The town's reason for the restriction was its decision to have built a solid waste transfer station by a private contractor, rather than with public funds by the town. To make the arrangement appetizing to the contractor, the town guaranteed it a minimum waste flow, for which it could charge a fee significantly higher than market rates. The guarantee was policed by the requirement that all solid waste generated within the town be processed at the contractor's station and that any person disposing of solid waste in any other location would be penalized.

The Court analogized the constraint as a form of economic protectionism, which bars out-of-state processors from the business of treating the localities solid waste, by hoarding a local resource for the benefit of local businesses that perform the service. The town's goal of revenue generation was not a local interest that could justify the discrimination. Moreover, the town had other means to accomplish this goal, such as subsidization of the local facility through general taxes or municipal bonds. The Court did not deal with, indeed, did not notice, the fact that the local law conferred a governmentally-granted monopoly, an exclusive franchise, indistinguishable from a host of local monopolies at the state and local level.[42]

[P. 241, add to n.1001:]

See also Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (sustaining state sales tax as applied to lease of containers delivered within the State and used in foreign commerce).

[P. 242, add to text following n.1004:]

Extending *Container Corp.*, the Court in *Barclays Bank v. Franchise Tax Bd. of California*,[43] upheld the State's worldwide-combined reporting method of determining the corporate franchise tax owed by unitary multinational corporations, as applied to a for-

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[40] *See also* Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) (discriminatory tax).

[41] C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

[42] See *The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 149–59 (1994). Weight was given to this consideration by Justice O'Connor, 511 U.S. at 401 (concurring) (local law an excessive burden on interstate commerce), and by Justice Souter, id. at 410 (dissenting).

[43] 512 U.S. 298 (1994).

eign corporation. The Court determined that the tax easily satisfied three of the four-part *Complete Auto* test—nexus, apportionment, and relation to State's services—and concluded that the nondiscrimination principle—perhaps violated by the letter of the law—could be met by the discretion accorded state officials. As for the two additional factors, as outlined in *Japan Lines*, the Court pronounced itself satisfied. Multiple taxation was not the inevitable result of the tax, and that risk would not be avoided by the use of any reasonable alternative. The tax, it was found, did not impair federal uniformity nor prevent the Federal Government from speaking with one voice in international trade. The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause. [44]

Preemption

[P. 247, add to n.1026, immediately preceding *City of New York v. FCC*:]

Smiley v. Citibank, 517 U.S. 735 (1996).

[P. 247, add to n.1027:]

And see Department of Treasury v. Fabe, 508 U.S. 491 (1993).

[P. 247, add to n.1029:]

See also American Airlines v. Wolens, 513 U.S. 219 (1995).

[P. 248, add to n.1032:]

District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992) (law requiring employers to provide health insurance coverage, equivalent to existing coverage, for workers receiving workers' compensation benefits); John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank, 510 U.S. 86 (1993) (ERISA's fiduciary standards, not conflicting state insurance laws, apply to insurance company's handling of general account assets derived from participating group annuity contract); New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (no preemption of statute that required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients covered by Blue Cross/Blue Shield plan); De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997); California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316 (1997); Boggs v. Boggs, 520 U.S. 833 (1997) (decided not on the basis of the express preemption language but instead by implied preemption analysis).

[P. 249, add to text following n.1035:]

Little clarification of the confusing *Cipollone* decision and opinions resulted in the cases following, although it does seem evident that the attempted distinction limiting courts to the particular lan-

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

guage of preemption when Congress has spoken has not prevailed. At issue in *Medtronic, Inc. v. Lohr,*[45] was the Medical Device Amendments (MDA) of 1976, which prohibited States from adopting or continuing in effect "with respect to a [medical] device" any "requirement" that is "different from, or in addition to" the applicable federal requirement and that relates to the safety or effectiveness of the device.[46] The issue, then, was whether a common-law tort obligation imposed a "requirement" that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as determined by the FDA to be "substantially equivalent" to a device previously on the market, a situation of some import to at least some of the Justices.

Unanimously, the Court determined that a defective design claim was not preempted and that the MDA did not prevent States from providing a damages remedy for violation of common-law duties that paralleled federal requirements. But the Justices split 4–1–4 with respect to preemption of various claims relating to manufacturing and labeling. FDA regulations, which a majority deferred to, limited preemption to situations in which a particular state requirement threatens to interfere with a specific federal interest. Moreover, the common-law standards were not specifically developed to govern medical devices and their generality removed them from the category of requirements "with respect to" specific devices. However, five Justices did agree that common-law requirements could be, just as statutory provisions, "requirements" that were preempted, though they did not agree on the application of that view.[47]

Following *Cipollone*, the Court observed that while it "need not go beyond" the statutory preemption language, it did need to "identify the domain expressly pre-empted" by the language, so that "our interpretation of that language does not occur in a contextual vacuum." That is, it must be informed by two presumptions about the nature of preemption: the presumption that Congress does not

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[45] 518 U.S. 470 (1996). *See also* CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) (under Federal Railroad Safety Act, a state common-law claim alleging negligence for operating a train at excessive speed is preempted, but a second claim alleging negligence for failure to maintain adequate warning devices at a grade crossing is not preempted).

[46] 21 U.S.C. § 350k(a).

[47] The dissent, by Justice O'Connor and three others, would have held preempted the latter claims, 518 U.S. at 509, whereas Justice Breyer thought that common-law claims would sometimes be preempted, but not here. Id. at 503 (concurring).

cavalierly preempt common-law causes of action and the principle that it is Congress' purpose that is the ultimate touchstone. [48]

[P. 252, add to n.1050 before *Free v. Brand*:]

Allied-Bruce Terminix Cos., v. Dobson, 513 U.S. 265 (1995) (federal arbitration law preempts state law invalidating pre-dispute arbitration agreements that were not entered into in contemplation of substantial interstate activity); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) (federal arbitration law preempts state statute that conditioned enforceability of arbitration clause on compliance with special notice requirement).

[P. 252, add to n.1054:]

See also Barnett Bank v. Nelson, 517 U.S. 25 (1996) (federal law empowering national banks in small towns to sell insurance preempts state law prohibiting banks from dealing in insurance; despite explicit preemption provision, state law stands as an obstacle to accomplishment of federal purpose).

[P. 253, add to text following n.1057:]

In *Boggs v. Boggs*, [49] the Court, 5-to–4, applied the "stands as an obstacle" test for conflict even though the statute (ERISA) contains an express preemption section. The dispute arose in a community-property State, in which heirs of a deceased wife claimed property that involved pension-benefit assets that was left to them by testamentary disposition, as against a surviving second wife. Two ERISA provisions operated to prevent the descent of the property to the heirs, but under community-property rules the property could have been left to the heirs by their deceased mother. The Court did not pause to analyze whether the ERISA preemption provision operated to preclude the descent of the property, either because state law "relate[d] to" a covered pension plan or because state law had an impermissible "connection with" a plan, but it instead decided that the operation of the state law insofar as it conflicted with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. "We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve

[48] Id. at 484–85. *See also* id. at 508 (Justice Breyer concurring); Freightliner Corp. v. Myrick, 514 U.S. 280, 288–89 (1995); Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316, 334 (1997) (Justice Scalia concurring); Boggs v. Boggs, 520 U.S. 833 (1997) (using "stands as an obstacle" preemption analysis in an ERISA case, having express preemptive language, but declining to decide when implied preemption may be used despite express language), and id. at 854 (Justice Breyer dissenting) (analyzing the preemption issue under both express and implied standards).

[49] 520 U.S. 833 (1997).

the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption." [50]

[P. 255, add to n.1069, immediately following *Bethlehem Steel*:]

See also Livadas v. Bradshaw, 512 U.S. 107 (1994) (finding preempted because it stood as an obstacle to the achievement of the purposes of NLRA a practice of a state labor commissioner).

[P. 263, add to n.1114:]

For recent tax controversies, see Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Department of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[P. 263, add to n.1117, immediately following *Brendale* discussion:]

And see Hagen v. Utah, 510 U.S. 399 (1994).

[P. 264, add to n.1119:]

See South Dakota v. Bourland, 508 U.S. 679 (1993) (abrogation of Indian treaty rights and reduction of sovereignty).

Aliens

[P. 276, add to n.1199:]

See Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (construing statutes and treaty provisions restrictively to affirm presidential power to interdict and seize fleeing aliens on high seas to prevent them from entering U.S. waters).

[P. 281, add to n.1232:]

In Reno v. Flores, 507 U.S. 292 (1993), the Court upheld an INS regulation providing for the ongoing detention of juveniles apprehended on suspicion of being deportable, unless parents, close relatives, or legal guardians were available to accept release, as against a substantive due process attack.

Copyrights and Patents

[P. 297, add to n.1353:]

In Markman v. Westview Instruments, Inc., 517 U.S. 348 (1996), the Court held that the interpretation of terms in a patent claim is a matter of law reserved entirely for the court. The Seventh Amendment does not require that such issues be tried to a jury.

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[50] Id. at 841. The dissent, id. at 854 (Justice Breyer), agreed that conflict analysis was appropriate, but he did not find that the state law achieved any result that ERISA required.

[P. 298, add to n.1359:]

For fair use in the context of a song parody, see Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

The War Power

[P. 316, add to n.1465:]

See Loving v. United States, 517 U.S. 748 (1996) (in context of the death penalty under the UCMJ).

Taxes on Exports

[P. 356, add to text following n.1772:]

Continuing its refusal to modify its export clause jurisprudence,[51] the Court held unconstitutional the Harbor Maintenance Tax (HMT) under the export clause insofar as the tax was applied to goods loaded at United States ports for export. The HMT required shippers to pay a uniform charge on commercial cargo shipped through the Nation's ports. The clause, said the Court, "categorically bars Congress from imposing any tax on exports."[52] However, the clause does not interdict a "user fee," that is a charge that lacks the attributes of a generally applicable tax or duty and is designed to compensate for government supplied services, facilities, or benefits, and it was that defense to which the Government repaired once it failed to obtain a modification of the rules under the clause. But the HMT bore the indicia of a tax. It was titled as a tax, described as a tax in the law, and codified in the Internal Revenue Code. Aside from naming, however, courts must look to how things operate, and the HMT did not qualify as a user fee. It did not represent compensation for services rendered. The value of export cargo did not correspond reliably with the federal harbor services used or usable by the exporter. Instead, the extent and manner of port use depended on such factors as size and tonnage of a vessel and the length of time it spent in port.[53] The HMT was thus a tax, and therefore invalid.

[P. 356, add to text following n.1775:]

In *United States v. IBM Corp.*,[54] the Court declined the Government's argument that it should refine its export-tax-clause jurisprudence. Rather than read the clause as a bar on any tax that applies to a good in the export stream, the Government contended

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[51] *See* United States v. IBM, 517 U.S. 843, 850–61 (1996).
[52] United States v. United States Shoe Corp., 523 U.S. 360, 363 (1998).
[53] Id. at 367–69.
[54] 517 U.S. 843 (1996).

that the Court should bring this clause in line with the import-export clause[55] and with dormant-commerce-clause doctrine. In that view, the Court should distinguish between discriminatory and nondiscriminatory taxes on exports. But the Court held that sufficient differences existed between the export clause and the other two clauses, so that its bar should continue to apply to any and all taxes on goods in the course of exportation.

[P. 356, add to n.1778:]

In United States v. IBM Corp., 517 U.S. 843 (1996), the Court adhered to *Thames & Mersey*, and held unconstitutional a federal excise tax upon insurance policies issued by foreign countries as applied to coverage for exported products. The Court admitted that one could question the earlier case's equating of a tax on the insurance of exported goods with a tax on the goods themselves, but it observed that the Government had chosen not to present that argument. Principles of *stare decisis* thus cautioned observance of the earlier case. Id. at 854–5. The dissenters argued that the issue had been presented and should be decided by overruling the earlier case. Id. at 863 (Justices Kennedy and Ginsburg dissenting).

Ex Post Facto Laws

[P. 362, add to n.1815:]

In Eastern Enterprises v. Apfel, 118 S.Ct. 2131, 2154 (1998) (concurring), Justice Thomas indicated a willingness to reconsider *Calder* to determine whether the clause should apply to civil legislation.

[P. 364, add to n.1829:]

But see California Dep't of Corrections v. Morales, 514 U.S. 499 (1995) (a law amending parole procedures to decrease frequency of parole-suitability hearings is not *ex post facto* as applied to prisoners who committed offenses before enactment). The opinion modifies previous opinions that had invalidated some laws because they operated to the "disadvantage" of covered offenders. Henceforth, "the focus of *ex post facto* inquiry is . . . whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Id. at 506 n.3.

Imposts or Duties on Imports or Exports

[P. 399, add to n.2000:]

Justice Thomas has called recently for reconsideration of *Woodruff* and the possible application of the clause to interstate imports and exports. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609, 621 (1997) (dissenting).

[P. 400, add to n.2020:]

See also Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 76–8 (1993). And see id. at 81–2 (Justice Scalia concurring).

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[55] Article I, § 10, cl. 2, applying to the States.

ARTICLE II

Executive Power

[P. 420, add to n.34:]

In Loving v. United States, 517 U.S. 748 (1996), the Court recurred to the original setting of *Curtiss-Wright*, a delegation to the President without standards. Congress, the Court found, had delegated to the President authority to structure the death penalty provisions of military law so as to bring the procedures, relating to aggravating and mitigating factors, into line with constitutional requirements, but Congress had provided no standards to guide the presidential exercise of the authority. Standards were not required, held the Court, because the President's role as Commander-in-Chief gave him responsibility to superintend the military establishment and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising the delegated authority itself possesses independent authority over the subject matter, the familiar limitations on delegation do not apply. Id. at 771–74.

Separation of Powers

[P. 422, add to text following n.45:]

Significant change in the position of the Executive Branch on separation of powers may be discerned in two briefs of the Department of Justice's Office of Legal Counsel, which may spell some measure of judicial modification of the formalist doctrine of separation and adoption of the functionalist approach to the doctrine.[1] The two opinions withdraw from the Department's earlier contention, following *Buckley v. Valeo*, that the execution of the laws is an executive function that may be carried out only by persons appointed pursuant to the appointments clause, thus precluding delegations to state and local officers and to private parties (as in *qui tam* actions), as well as to glosses on the take care clause and other provisions of the Constitution. Whether these memoranda signal long-term change depends on several factors, importantly on whether they are adhered to by subsequent administrations.

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[1] Memorandum for John Schmidt, Associate Attorney General, from Assistant Attorney General Walter Dellinger, Constitutional Limitations on Federal Government Participation in Binding Arbitration (Sept. 7, 1995); Memorandum for the General Counsels of the Federal Government, from Assistant Attorney General Walter Dellinger, The Constitutional Separation of Powers Between the President and Congress (May 7, 1996). The principles laid down in the memoranda depart significantly from previous positions of the Department of Justice. For conflicting versions of the two approaches, see *Constitutional Implications of the Chemical Weapons Convention*, Hearings Before the Senate Judiciary Subcommittee on the Constitution, Federalism, and Property Rights, 104th Cong., 2d Sess. (1996), 11–26, 107–10 (Professor John C. Woo), 80–106 (Deputy Assistant Attorney General Richard L. Shiffrin).

[P. 425, add to text following n.61:]

In the course of deciding that the President's action in approving the closure of a military base, pursuant to statutory authority, was not subject to judicial review, the Court enunciated a principle that may mean a great deal, constitutionally speaking, or that may not mean much of anything.[2] The lower court had held that, while review of presidential decisions on statutory grounds might be precluded, his decisions were reviewable for constitutionality; in that court's view, whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine. The Supreme Court found this analysis flawed. "Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority."[3] Thus, the Court drew a distinction between executive action undertaken without even the purported warrant of statutory authorization and executive action in excess of statutory authority. The former may violate separation of powers, while the latter will not.[4]

Doctrinally, the distinction is important and subject to unfortunate application.[5] Whether the brief, unilluminating discussion in *Dalton* will bear fruit in constitutional jurisprudence, however, is problematic.

Appointment of Officers

[P. 514, add to text following n.468:]

The Court, in *Edmond v. United States*,[6] reviewed its pronouncements regarding the definition of "inferior officer" and, disregarding some implications of its prior decisions, seemingly set-

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[2] Dalton v. Specter, 511 U.S. 462 (1994).

[3] Id. at 472.

[4] See *The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 300–10 (1994).

[5] "As a matter of constitutional logic, the executive branch must have some warrant, either statutory or constitutional, for its actions. The source of all federal governmental authority is the Constitution and, because the Constitution contemplates that Congress may delegate a measure of its power to officials in the executive branch, statutes. The principle of separation of powers is a direct consequence of this scheme. Absent statutory authorization, it is unlawful for the President to exercise the powers of the other branches because the Constitution does not vest those powers in the President. The absence of statutory authorization is not merely a statutory defect; it is a constitutional defect as well." Id. at 305–06 (footnote citations omitted).

[6] 520 U.S. 651 (1997).

tled, unanimously, on a pragmatic characterization. Thus, the importance of the responsibilities assigned an officer, the fact that duties were limited, that jurisdiction was narrow, and that tenure was limited, are only factors but are not definitive.[7] "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase 'lesser officer.' Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[8]

[P. 516, add new note to end of first sentence of first full paragraph:]

As the text suggested, *Freytag* seemed to be a tentative decision, and Edmond v. United States, 520 U.S. 651 (1997), a unanimous decision written by Justice Scalia, whose concurring opinion in *Freytag* challenged the Court's analysis, may easily be read as retreating considerably from it.

[P. 519, add to n.498:]

The Supreme Court held this provision unconstitutional in United States v. NTEU, 513 U.S. 454 (1995).

Presidential Immunity From Judicial Direction

[P. 579, add to n.723:]

See also, following *Franklin*, Dalton v. Specter, 511 U.S. 462 (1994).

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[7] Id. at 661–62.

[8] Id. at 662–63. The case concerned whether the Secretary of Transportation, a presidential appointee with the advice and consent of the Senate, could appoint judges of the Coast Guard Court of Military Appeals; necessarily, the judges had to be "inferior" officers. In related cases, the Court held that designation or appointment of military judges, who are "officers of the United States," does not violate the appointments clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review by the same method was impermissible; they had either to be appointed by an officer who could exercise appointment-clause authority or by the President, and their actions were not salvageable under the *de facto* officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[P. 582, add to text following n.738:]

Unofficial Conduct.—In *Clinton v. Jones*,[9] the Court, in a case of first impression, held that the President did not have qualified immunity from suit for conduct alleged to have taken place prior to his election to the Presidency, which would entitle him to delay of both the trial and discovery. The Court held that its precedents affording the President immunity from suit for his official conduct—primarily on the basis that he should be enabled to perform his duties effectively without fear that a particular decision might give rise to personal liability—were inapplicable in this kind of case. Moreover, the separation-of-powers doctrine did not require a stay of all private actions against the President. Separation of powers is preserved by guarding against the encroachment or aggrandizement of one of the coequal branches of the Government at the expense of another. However, a federal trial court tending to a civil suit in which the President is a party performs only its judicial function, not a function of another branch. No decision by a trial court could curtail the scope of the President's powers. The trial court, the Supreme Court observed, had sufficient powers to accommodate the President's schedule and his workload, so as not to impede the President's performance of his duties. Finally, the Court stated its belief that allowing such suits to proceed would not generate a large volume of politically motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary to legislate, to afford the President protection.[10]

[P. 582, add to n.743:]

Following the *Westfall* decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time of the incident out of which a suit arose; upon certification, the employee is dismissed from the action, and the United States is substituted, the Federal Tort Claims Act (FTCA) then governing the action, which means that sometimes the action must be dismissed against the Government because the FTCA has not waived sovereign immunity. Cognizant of the temptation set before the Government to immunize both itself and its employee, the Court in Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), held that the Attorney General's certification is subject to judicial review.

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[9] 520 U.S. 681 (1997).

[10] The Court observed at one point that it doubted that defending the suit would much preoccupy the President, that his time and energy would not be much taken up by it. "If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency." Id. at 702.

Impeachment

[P. 591, add to text following n.784:]

Upon at last reaching the question, the Court has held that a claim to judicial review of an issue arising in an impeachment trial in the Senate presents a nonjusticiable question, a "political question." [11] Specifically, the Could held that a claim that the Senate had not followed the proper meaning of the word "try" in the impeachment clause, a special committee being appointed to take testimony and to make a report to the full Senate, complete with a full transcript, on which the Senate acted, could not be reviewed. But the analysis of the Court applies to all impeachment clause questions, thus seemingly putting off-limits to judicial review the whole process.

[11] Nixon v. United States, 506 U.S. 224 (1993). Nixon at the time of his conviction and removal from office was a federal district judge in Mississippi.

ARTICLE III

Judicial Power

[P. 618, add to text following n.126:]

Judicial power confers on federal courts the power to decide a case, to render a judgment conclusively resolving a case. Judicial power is the authority to render dispositive judgments, and Congress violates the separation of powers when it purports to alter *final* judgments of Article III courts.[1] In this controversy, the Court had unexpectedly fixed on a shorter statute of limitations to file certain securities actions than that believed to be the time in many jurisdictions. Resultantly, several suits that had been filed later than the determined limitations had been dismissed and had become final because they were not appealed. Congress enacted a statute, which, while not changing the limitations period prospectively, retroactively extended the time for suits dismissed and provided for the reopening of the final judgments rendered in the dismissals of suits.

Holding the congressional act invalid, the Court held it impermissible for Congress to disturb a final judgment. "Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was."[2]

[P. 620, add to n.140:]

Notice the Court's discussion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225–26 (1995).

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[1] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995). The Court was careful to delineate the difference between attempting to alter a final judgment, one rendered by a court and either not appealed or affirmed on appeal, and legislatively amending a statute so as to change the law as it existed at the time a court issued a decision that was on appeal or otherwise still alive at the time a federal court reviewed the determination below. A court must apply the law as revised when it considers the prior interpretation. Id. at 226–27.

Article III creates or authorizes Congress to create not a collection of unconnected courts, but a judicial *department* composed of "inferior courts" and "one Supreme Court." "Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." Id. at 227.

[2] Id. at 227 (emphasis by Court).

Contempt Power

[P. 622, add to text following n.154:]

In *International Union, UMW v. Bagwell*,[3] the Court formulated a new test for drawing the distinction between civil and criminal contempts, which has important consequences for the procedural rights to be accorded those cited. Henceforth, the imposition of non-compensatory contempt fines for the violation of any complex injunction will require criminal proceedings. This case, as have so many, involved the imposition of large fines (here, $52 million) upon a union in a strike situation for violations of an elaborate court injunction restraining union activity during the strike. The Court was vague with regard to the standards for determining when a court order is "complex" and thus requires the protection of criminal proceedings.[4] Much prior doctrine remains, however, as in the distinction between remedial sanctions, which are civil, and punitive, which are criminal, and between in-court and out-of-court contempts.

[P. 631, add to n.195:]

See also International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (refining the test for when contempt citations are criminal and thus require jury trials).

[P. 631, add to n.196:]

In International Union, UMW v. Bagwell, 512 U.S. 821, 837 n.5 (1994), the Court continued to reserve the question of the distinction between petty and serious contempt fines, because of the size of the fine in that case.

[P. 634, add to n.206:]

See also International Union, UMW v. Bagwell, 512 U.S. 821 (1994).

Congressional Control Over Habeas

[P. 639, add to text following n.238:]

In *Felker v. Turpin*,[5] the Court again passed up the opportunity to delineate Congress' permissive authority over *habeas*, finding that of the provisions of the Antiterrorism and Effective Death Penalty Act[6] none did raise questions of constitutional import.

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[3] 512 U.S. 821 (1994).

[4] Id. at 832–38. Relevant is the fact that the alleged contempts did not occur in the presence of the court and that determinations of violations require elaborate and reliable factfinding. See esp. id. at 837–38.

[5] 518 U.S. 651 (1996).

[6] P. L. 104–132, §§ 101–08, 110 Stat. 1214, 1217–26, amending, *inter alia*, 28 U.S.C. §§ 2244, 2253, 2254, 2255, and Fed. R. App. P. 22.

Congressional Control Over the Injunctive Process

[P. 642, add to text following n.264:]

Perhaps pressing its powers further than prior legislation, Congress has enacted the Prison Litigation Reform Act of 1996.[7] Essentially, the law imposes a series of restrictions on judicial remedies in prison-conditions cases. Thus, courts may not issue prospective relief that extends beyond that necessary to correct the violation of a federal right that they have found, that is narrowly drawn, is the least intrusive, and that does not give attention to the adverse impact on public safety. Preliminary injunctive relief is limited by the same standards. Consent decrees may not be approved unless they are subject to the same conditions, meaning that the court must conduct a trial and find violations, thus cutting off consent decrees. If a decree was previously issued without regard to the standards now imposed, the defendant or intervenor is entitled to move to vacate it. No prospective relief is to last longer than two years if any party or intervenor so moves. A number of constitutional challenges can be expected respecting Congress' power to limit federal judicial authority to remedy constitutional violations.

Standing

[P. 657, add to n.335:]

Richardson in its generalized grievance constriction does not apply when Congress confers standing on litigants. FEC v. Akins, 524 U.S. 11 (1998). When Congress confers standing on "any person aggrieved" by the denial of information required to be furnished them, it matters not that most people will be entitled and will thus suffer a "generalized grievance," the statutory entitlement is sufficient. Id. at 21–25.

[P. 657, add to n.336:]

The Court's present position on *Flast* is set out severely in Lewis v. Casey, 518 U.S. 343, 353 n. 3 (1996), in which the Court largely plays down the "serious and adversarial treatment" prong of standing and strongly reasserts the separation-of-powers value of keeping courts within traditional bounds. The footnote is a response to Justice Souter's separate opinion utilizing *Flast*, id., 398–99, for a distinctive point.

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[7] The statute was part of an Omnibus Appropriations Act signed by the President on April 26, 1996. P. L. 104–134, §§ 801–10, 110 Stat. 1321–66–77, amending 18 U.S.C. § 3626. Most of the appellate courts to have passed on the constitutionality of PLRA have upheld it, although not without reservations and limiting constructions. E.g., Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), cert. denied, 522 U.S.1039 (1997); Hadix v. Johnson, 133 F.3d 940 (6th Cir.), cert. denied, 118 S.Ct. 2368 (1998); Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999) (en banc). Only the Ninth Circuit has struck parts of the Act down. Taylor v. United States, 143 F.3d 1178 (9th Cir.), reh. en banc granted, 158 F.3d 1059 (9th Cir. 1998).

[P. 659, add to text following n.347:]

In *FEC v. Akins*,[8] the Court found "injury-in-fact" present when plaintiff voters alleged that the Federal Election Commission had denied them information, to which they alleged an entitlement, respecting an organization that might or might not be a political action committee. Congress had afforded persons access to the Commission and had authorized "any person aggrieved" by the actions of the FEC to sue to challenge the action. That the injury was widely shared did not make the claimed injury a "generalized grievance," the Court held, but rather in this case, as in others, it was a concrete harm to each member of the class. The case is a principal example of the ability of Congress to confer standing and to remove prudential constraints on judicial review.

[P. 660, add to n.352:]

In Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), the Court denied standing because of the absence of redressability. An environmental group sued the company for failing to file timely reports required by statute; by the time the complaint was filed, the company was in full compliance. Acknowledging that the entity had suffered injury in fact, the Court found that no judicial action would afford it a remedy.

[P. 661, add to text following n.360:]

In a case permitting a plaintiff contractors' association to challenge an affirmative-action, set-aside program, the Court seemed to depart from several restrictive standing decisions in which it had held that the claims of attempted litigants were too "speculative" or too "contingent."[9] The association had sued, alleging that many of its members "regularly bid on and perform construction work" for the city and that they would have bid on the set-aside contracts but for the restrictions. The Court found the association had standing, because certain prior cases under the equal protection clause established a relevant proposition. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from

[8] 524 U.S. 11 (1998).

[9] Northeastern Fla. Ch., Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993). Thus, it appears that had the Court applied its standard in the current case, the results would have been different in such cases as Linda R. S. v. Richard D., 410 U.S. 614 (1973); Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); and Allen v. Wright, 468 U.S. 737 (1984).

the imposition of the barrier, not the ultimate inability to obtain the benefit." [10] The association, therefore, established standing by alleging that its members were able and ready to bid on contracts but that a discriminatory policy prevented them from doing so on an equal basis. [11]

[Pp. 661–62, add to n.360:]

Justice Scalia, who wrote the opinion in *Lujan*, reiterated the separation-of-powers objection to congressional conferral of standing in FEC v. Akins, 524 U.S. 11, 29, 36 (1998) (alleged infringement of President's "take care" obligation), but this time in dissent; the Court did not advert to this objection in finding that Congress had provided for standing based on denial of information to which the plaintiffs, as voters, were entitled.

[P. 662, add to n.362:]

See also Bennett v. Spear, 520 U.S. 154 (1997).

[P. 663, add to n.370:]

The Court has expanded the rights of non-minority defendants to challenge the exclusion of minorities from petit and grand juries, both on the basis of the injury-in-fact to defendants and because the standards for being able to assert the rights of third parties were met. Powers v. Ohio, 499 U.S. 400 (1991); Campbell v. Louisiana, 523 U.S. 392 (1998).

[P. 668, add new paragraph at end of section:]

Member or legislator standing has been severely curtailed, although not quite abolished, in *Raines v. Byrd*. [12] Several Members of Congress, who had voted against passage of the Line Item Veto Act, sued in their official capacities as Members of Congress to invalidate the law, alleging standing based on the theory that the statute adversely affected their constitutionally prescribed lawmaking power. [13] Emphasizing its use of standing doctrine to maintain separation-of-powers principles, the Court adhered to its holdings that, in order to possess the requisite standing, a person must establish that he has a "personal stake" in the dispute and that the alleged injury suffered is particularized as to him. [14] Neither re-

[10] 508 U.S. at 666. The Court derived the proposition from another set of cases. Turner v. Fouche, 396 U.S. 346 (1970); Clements v. Fashing, 457 U.S. 957 (1982); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 281 n.14 (1978).

[11] 508 U.S. at 666. But see, in the context of ripeness, Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993), in which the Court, over the dissent's reliance on *Jacksonville*, id. at 81–2, denied the relevance of its distinction between entitlement to a benefit and equal treatment. Id. at 58 n.19.

[12] 521 U.S. 811 (1997).

[13] The Act itself provided that "[a]ny Member of Congress or any individual adversely affected" could sue to challenge the law. 2 U.S.C. § 692(a)(1). After failure of this litigation, the Court in the following Term, on suits brought by claimants adversely affected by the exercise of the veto, held the statute unconstitutional. Clinton v. City of New York, 118 S.Ct. 2091 (1998).

[14] 521 U.S. at 819.

quirement, the Court held, was met by these legislators. First, the Members did not suffer a particularized loss that distinguished them from their colleagues or from Congress as an entity. Second, the Members did not claim that they had been deprived of anything to which they were personally entitled. "[A]ppellees' claim of standing is based on loss of political power, not loss of any private right, which would make the injury more concrete. . . . If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power." [15]

So, there is no such thing as Member standing? Not necessarily so, because the Court turned immediately to preserving (at least a truncated version of) *Coleman v. Miller,* [16] in which the Court had found that 20 of the 40 members of a state legislature had standing to sue to challenge the loss of the effectiveness of their votes as a result of a tie-breaker by the lieutenant governor. Although there are several possible explanations for the result in that case, the Court in *Raines* chose to fasten on a particularly narrow point. "[O]ur holding in *Coleman* stands (at most, . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." [17] Because these Members could still pass or reject appropriations bills, vote to repeal the Act, or exempt any appropriations bill from presidential cancellation, the Act did not nullify their votes and thus give them standing. [18]

It will not pass notice that the Court's two holdings do not cohere. If legislators have standing only to allege personal injuries suffered in their personal capacities, how can they have standing to assert official-capacity injury in being totally deprived of the effectiveness of their votes? A period of dispute in the D. C. Circuit seems certain to follow.

[P. 669, add to n.401:]

See also National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998), in which the Court found that a bank had standing to challenge an agency ruling expanding the role of employer credit unions to include multi-employer credit unions, despite a statutory limit that any such union could

[15] 521 U.S. at 821.
[16] 307 U.S. 433 (1939).
[17] 521 U.S. at 823.
[18] 521 U.S. at 824–26.

be of groups having a common bond of occupation or association. The Court held that a plaintiff did not have to show it was the congressional purpose to protect its interests. It is sufficient if the interest asserted is "*arguably* within the zone of interests to be protected . . . by the statute." Id. at 492 (internal quotation marks and citation omitted). But the Court divided 5-to–4 in applying the test. And see Bennett v. Spear, 520 U.S. 154 (1997).

[P. 670, add to n.405:]

But see Bennett v. Spear, 520 U.S. 154 (1997) (fact that "citizen suit" provision of Endangered Species Act is directed at empowering suits to further environmental concerns does not mean that suitor who alleges economic harm from enforcement of Act lacks standing); FEC v. Akins, 524 U.S. 11 (1998) (expansion of standing based on denial of access to information).

Declaratory Judgments

[P. 674, add to n.436:]

See also Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

Ripeness

[P. 676, add to n.449:]

For recent examples of lack of ripeness, see Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998); Texas v. United States, 523 U.S. 296 (1998).

[P. 678, add to n.457:]

In the context of ripeness to challenge agency regulations, as to which there is a presumption of available judicial remedies, the Court has long insisted that federal courts should be reluctant to review such regulations unless the effects of administrative action challenged have been felt in a concrete way by the challenging parties, i.e., unless the controversy is "ripe." See, of the older cases, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167 (1967). More recent cases include Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993); Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990).

Mootness

[P. 679, add to n.462:]

Munsingwear had long stood for the proposition that the appropriate practice of the Court in a civil case that had become moot while on the way to the Court or after *certiorari* had been granted was to vacate or reverse and remand with directions to dismiss. But, in U. S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), the Court held that when mootness occurs because the parties have reached a settlement, vacatur of the judgment below is ordinarily not the best practice; instead, equitable principles should be applied so as to preserve a presumptively correct and valuable precedent, unless a court concludes that the public interest would be served by vacatur.

[PP. 679, add to n.463:]

Consider the impact of Cardinal Chemical Co. v. Morton Int'l, Inc., 508 U.S. 83 (1993).

[P. 680, add to n.466:]

Following *Aladdin's Castle*, the Court in Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 660–63 (1993), held that when a municipal ordinance is repealed but replaced by one sufficiently similar so that the challenged action in effect continues, the case is not moot. But see id. at 669 (Justice O'Connor dissenting) (modification of ordinance more significant and case is mooted).

[P. 680, add to n.467:]

In Arizonans For Official English v. Arizona, 520 U.S. 43 (1997), a state employee attacking an English-only work requirement had standing at the time she brought the suit, but she resigned following a decision in the trial court, thus mooting the case before it was taken to the appellate court, which should not have acted to hear and decide it.

[P. 680, add to n.469:]

But compare Spencer v. Kemna, 523 U.S. 1 (1998).

Retroactivity of Judicial Decisions

[P. 686, add to n.503:]

For additional elaboration on "new law," see O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

[P. 687, add to text following n.509:]

Apparently, the Court now has resolved this dispute, although the principal decision is a close five-to-four result. In *Harper v. Virginia Dep't of Taxation*,[19] the Court adopted the principle of the *Griffith* decision in criminal cases and disregarded the *Chevron Oil* approach in civil cases. Henceforth, in civil cases, the rule is: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[20] Four Justices

[19] 509 U.S. 86 (1993).

[20] Id. at 97. While the conditional language in this passage might suggest that the Court was leaving open the possibility that in some cases it might rule purely prospectively, not even applying its decision to the parties before it, other language belies that possibility. "This rule extends *Griffith*'s ban against '"selective application of new rules."' [Citing 479 U.S. at 323]. Inasmuch as *Griffith* rested in part on the principle that "the nature of judicial review requires that [the Court] adjudicate specific cases," *Griffith*, 479 U.S. at 322, deriving from Article III's case or controversy requirement for federal courts and forbidding federal courts from acting legislatively, the "Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." 509 U.S. at 97 (quoting *American Trucking*, 496 U.S. at 214 (Justice Stevens dissenting)). The point is made more clearly in Justice Scalia's concurrence, in

continued to adhere to *Chevron Oil*, however,[21] so that with one Justice each retired from the different sides one may not regard the issue as definitively settled.[22]

Political Questions

[P. 696, add to text following n.569:]

A challenge to the Senate's interpretation of and exercise of its impeachment powers was held to be nonjusticiable; there was a textually demonstrable commitment of the issue to the Senate, and there was a lack of judicially discoverable and manageable standards for resolving the issue.[23]

Judicial Review—Stare Decisis

[P. 712, add to n.639:]

Recent discussions of and both applications of and refusals to apply *stare decisis* may be found in Hohn v. United States, 118 S.Ct. 1969, 1977–78 (1998), and id. at 1981–83 (Justice Scalia dissenting); State Oil Co. v. Khan, 522 U.S. 3, 20–2 (1997); Agostini v. Felton, 521 U.S. 203, 235–36 (1997), and id. at 523–54 (Justice Souter dissenting); United States v. IBM Corp., 517 U.S. 843, 854–56 (1996) (noting principles of following precedent and declining to consider overturning an old precedent when parties have not advanced arguments on the point), with which compare id. at 863 (Justice Kennedy dissenting) (arguing that the United States had presented the point and that the old case ought to be overturned); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231–35 (1996) (plurality opinion) (discussing *stare decisis*, citing past instances of overrulings, and overruling 1990 decision), with which compare the dissents, id. at 242, 264, 271; Seminole Tribe of Florida v. Florida, 517 U.S. 44, 61–73 (1996) (discussing policy of *stare decisis*, why it should not be followed with respect to a 1989 decision, and overruling that precedent), with which compare the dissents, id. at 76, 100. Justices Scalia and Thomas have argued for various departures from precedent. E.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Justice Scalia concurring) (negative commerce jurisprudence); Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604, 631 (1996) (Justice Thomas concurring in part and dissenting in part) (rejecting framework of *Buckley v. Valeo* and calling for overruling of part of case). Compare id. at 626 (Court notes those issues not raised or argued).

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which he denounces all forms of nonretroactivity as "the handmaid of judicial activism." Id. at 105.

[21] Id. at 110 (Justice Kennedy, with Justice White, concurring); 113 (Justice O'Connor, with Chief Justice Rehnquist, dissenting). However, these Justices disagreed in this case about the proper application of *Chevron Oil*.

[22] *But see* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (setting aside a state court refusal to give retroactive effect to a U. S. Supreme Court invalidation of that State's statute of limitations in certain suits, in an opinion by Justice Breyer, Justice Blackmun's successor); Ryder v. United States, 515 U.S. 177, 184–85 (1995) ("whatever the continuing validity of *Chevron Oil* after" *Harper* and *Reynoldsville Casket*).

[23] Nixon v. United States, 506 U.S. 224 (1993). The Court pronounced its decision as perfectly consonant with *Powell v. McCormack*. Id. at 236–38.

Federal Question Jurisdiction

[P. 721, add to n.702:]

See also Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994); Peacock v. Thomas, 516 U.S. 349 (1996) (both cases using the new vernacular of "ancillary jurisdiction").

[P. 722, add to n.713:]

In City of Chicago v. International College of Surgeons, 522 U.S. 156 (1998), the Court, despite the absence of language making § 1367 applicable, held that the statute gave district courts jurisdiction over state-law claims in cases originating in state court and then removed to federal court.

Admiralty

[P. 734, add to n.780:]

And see Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), a tort claim arising out of damages allegedly caused by negligently driving piles from a barge into the riverbed, which weakened a freight tunnel that allowed flooding of the tunnel and the basements of numerous buildings along the Chicago River, the Court found that admiralty jurisdiction could be invoked. The location test was satisfied, because the barge, even though fastened to the river bottom, was a "vessel" for admiralty tort purposes; the two-part connection test was also satisfied, inasmuch as the incident had a potential to disrupt maritime commerce and the conduct giving rise to the incident had a substantial relationship to traditional maritime activity.

United States as a Party

[P. 743, add to n.842:]

But, in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), a case involving a death in territorial waters from a jet ski accident, the Court held that *Moragne* does not provide the exclusive remedy in cases involving the death in territorial waters of a "nonseafarer"—a person who is neither a seaman covered by the Jones Act nor a longshore worker covered by the LHWCA.

[P. 747, add to n.863:]

See FDIC v. Meyer, 510 U.S. 471 (1994) (FSLIC's "sue-and-be-sued" clause waives sovereign immunity; but a *Bivens* implied cause of action for constitutional torts cannot be used directly against FSLIC).

Suits Between States

[P. 755, add to n.909:]

But in Mississippi v. Louisiana, 506 U.S. 73 (1992), the Court's reluctance to exercise original jurisdiction ran afoul of the "uncompromising language" of 28 U.S.C. § 1251(a) giving the Court "original and *exclusive* jurisdiction" of these kinds of suits.

Diversity of Citizenship

[P. 772, add to text following n.1013:]

Some confusion has been injected into consideration of which law to apply—state or federal—in the absence of a federal statute or a Federal Rule of Civil Procedure.[24] In an action for damages, the federal courts were faced with the issue of the application either of a state statute, which gave the appellate division of the state courts the authority to determine if an award is excessive or inadequate if it *deviates materially* from what would be reasonable compensation, or of a federal judicially-created practice of review of awards as so exorbitant that it shocked the conscience of the court. The Court determined that the state statute was both substantive and procedural, which would result in substantial variations between state and federal damage awards depending on whether the state or the federal approach was applied; it then followed the mode of analysis exemplified by those cases emphasizing the importance of federal courts reaching the same outcome as would the state courts,[25] rather than what had been the prevailing standard, in which the Court balanced state and federal interests to determine which law to apply.[26] Emphasis upon either approach to considerations of applying state or federal law reflects a continuing difficulty of accommodating "the constitutional power of the states to regulate the relations among their citizens . . . [and] the constitutional power of the federal government to determine how its courts are to be operated."[27] Additional decisions will be required to determine which approach, if either, prevails.

[P. 773, add to n.1016:]

But see O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

Power of Congress to Control the Federal Courts

[P. 788, add to n.1105:]

A restrained reading of *McCardle* is strongly suggested by Felker v. Turpin, 518 U.S. 651 (1996). A 1996 congressional statute giving to federal courts of appeal a "gate-keeping" function over the filing of second or successive *habeas* petitions limited further review, including denying the Supreme Court appellate review of circuit court denials of motions to file second or successive *habeas* petitions. Pub. L. 104–132, § 106, 110 Stat. 1214, 1220, amending 28 U.S.C. § 2244(b). Upholding the limi-

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[24] Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). The decision was five-to-four, so that the precedent may or may not be stable for future application.

[25] E.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[26] E.g., Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[27] 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1996), § 4511, at 311.

tation, which was nearly identical to the congressional action at issue in *McCardle* and *Yerger*, the Court held that its jurisdiction to hear appellate cases had been denied, but just as in *Yerger* the statute did not annul the Court's jurisdiction to hear *habeas* petitions filed as original matters in the Supreme Court. No constitutional issue was thus presented.

Federal-State Court Relations

[Pp. 798–99, add to n.1161:]

But in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), an exercise in *Burford* abstention, the Court held that federal courts have power to dismiss or remand cases based on abstention principles only where relief being sought is equitable or otherwise discretionary but may not do so in common-law actions for damages.

Habeas Corpus

[P. 816, add to n.1256:]

See also O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

[P. 818, add to n.1268:]

In Bousley v. Brooks, 523 U.S. 614 (1998), a federal post-conviction relief case, petitioner had pled guilty to a federal firearms offense. Subsequently, the Supreme Court interpreted more narrowly the elements of the offense than had the trial court in Bousley's case. The Court held that Bousley by his plea had defaulted, but that he might be able to demonstrate "actual innocence" so as to excuse the default if he could show on remand that it was more likely than not that no reasonable juror would have convicted him of the offense, properly defined.

[P. 818, add to text following n.1270:]

The Court continues, with some modest exceptions, to construe *habeas* jurisdiction quite restrictively, but it has now been joined by new congressional legislation that is also restrictive. In *Herrera v. Collins*,[28] the Court appeared, though ambiguously, to take the position that, while it requires a showing of actual innocence to permit a claimant to bring a successive or abusive petition, a claim of innocence is not alone sufficient to enable a claimant to obtain review of his conviction on *habeas*. Petitioners are entitled in federal *habeas* courts to show that they are imprisoned in violation of the Constitution, not to seek to correct errors of fact. But a claim of innocence does not bear on the constitutionality of one's conviction or detention, and the execution of one claiming actual innocence would not itself violate the Constitution.[29]

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[28] 506 U.S. 390 (1993).

[29] Id. at 398–417. However, in a subsequent part of the opinion, the Court purports to reserve the question whether "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for making this showing. Id. at 417–19. Jus-

But, in *Schlup v. Delo*,[30] the Court adopted the plurality opinion of *Kuhlmann v. Wilson* and held that, absent a sufficient showing of "cause and prejudice," a claimant filing a successive or abusive petition must, as an initial matter, make a showing of "actual innocence" so as to fall within the narrow class of cases implicating a fundamental miscarriage of justice. The Court divided, however, with respect to the showing a claimant must make. One standard, found in some of the cases, was championed by the dissenters; "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[31] The Court adopted a second standard, under which the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." To meet this burden, a claimant "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[32]

In the Antiterrorism and Effective Death Penalty Act of 1996,[33] Congress imposed tight new restrictions on successive or abusive petitions, including making the circuit courts "gate keepers" in permitting or denying the filing of such petitions, with bars to appellate review of these decisions, provisions that in part were upheld in *Felker v. Turpin*.[34] An important new restriction on the authority of federal *habeas* courts is that found in the new law, which provides that a *habeas* court shall not grant a writ to any person in custody pursuant to a judgment of a state court "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable ap-

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tices Scalia and Thomas would have unequivocally held that "[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Id. at 427–28 (Concurring). However, it is not at all clear that all the Justices joining the Court believe innocence to be nondispositive on *habeas*. Id. at 419 (Justices O'Connor and Kennedy concurring), 429 (Justice White concurring).

[30] 513 U.S. 298 (1995).

[31] Id. at 334 (Chief Justice Rehnquist dissenting, with Justices Kennedy and Thomas), 342 (Justice Scalia dissenting, with Justice Thomas). This standard was drawn from Sawyer v. Whitney, 505 U.S. 333 (1995).

[32] 513 U.S. at 327. This standard was drawn from Murray v. Carrier, 477 U.S. 478 (1986).

[33] P. L. 104–132, Title I, 110 Stat. 1217–21, amending 28 U.S.C. §§ 2244, 2253, 2254, and Rule 22 of the Federal Rules of Appellate Procedure. For a narrowly decided case weakening somewhat the congressional provisions on "gate-keeping," see Hohn v. United States, 118 S.Ct. 1969 (1998).

[34] 518 U.S. 651 (1996).

plication of, *clearly established Federal law, as determined by the Supreme Court of the United States*[.]"[35]

[35] The amended 28 U.S.C. § 2254(d) (emphasis supplied). On the constitutionality and application of this provision, see the various opinions in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997); Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998), cert. denied, 119 S.Ct. 844 (1999).

ARTICLE IV

PRIVILEGES AND IMMUNITIES

All Privileges and Immunities of Citizens in the Several States

[P. 874, add to n.194:]

For the application of this test, see Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 296–99 (1998).

Taxation

[P. 877, add to text following n.215:]

The Court returned to the privileges-and-immunities restrictions upon disparate state taxation of residents and nonresidents in *Lunding v. New York Tax Appeals Tribunal.*[36] In this case, the State denied nonresidents any deduction from taxable income for alimony payments, although it permitted residents to deduct such payments. While observing that approximate equality between residents and nonresidents was required by the clause, the Court acknowledged that precise equality was neither necessary nor in most instances possible. But it was required of the challenged State that it demonstrate a "substantial reason" for the disparity, and the discrimination must bear a "substantial relationship" to that reason.[37] A State, under this analysis, may not deny nonresidents a general tax exemption provided to residents that would reduce their tax burdens, but it could limit specific expense deductions based on some relationship between the expenses and their in-state property or income. Here, the State flatly denied the exemption. Moreover, the Court rejected various arguments that had been presented, finding that most of those arguments, while they might support targeted denials or partial denials, simply reiterated the State's contention that it need not afford any exemptions at all.

[36] 522 U.S. 287 (1998).

[37] 522 U.S. at 298.

ARTICLE VI

NATIONAL SUPREMACY

Obligation of State Courts Under the Supremacy Clause

[P. 921, add to n.20]

The Court's re-emphasis upon "dual federalism" has not altered this principle. See, e.g., Printz v. United States, 521 U.S. 898, 905–10 (1997).

Supremacy Clause Versus the Tenth Amendment

[P. 930, add to text at end of carryover paragraph]

Expanding upon its anti-commandeering rule, the Court in *Printz v. United States*[1] established "categorically" the rule that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[2] At issue in *Printz* was a provision of the Brady Handgun Violence Prevention Act, which required, pending the development by the Attorney General of a national system by which criminal background checks on prospective firearms purchasers could be conducted, the chief law enforcement officers of state and local governments to conduct background checks to ascertain whether applicants were ineligible to purchase handguns. Confronting the absence of any textual basis for a "categorical" rule, the Court looked to history, which in its view demonstrated a paucity of congressional efforts to impose affirmative duties upon the States.[3] More important, the Court relied on the "structural Constitution" to demonstrate that the Constitution of 1787 had not taken from the States "a residuary and inviolable sovereignty,"[4] that it had, in fact and theory, retained a system of "dual sovereignty"[5] reflected in many things but most notably in the constitutional conferral "upon Congress of not all governmental powers, but only discrete, enumerated ones," which was expressed in the Tenth Amendment. Thus, while it had earlier rejected the commandeering of legislative assistance, the Court now made clear that administrative officers and resources were also fenced off from federal power.

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[1] 521 U.S. 898 (1997).

[2] 521 U.S. at 933 (internal quotation marks omitted) (quoting New York v. United States, 505 U.S. 144, 188 (1992)).

[3] 521 U.S. at 904–18. Notably, the Court expressly exempted from this rule the continuing role of the state courts in the enforcement of federal law. Id. at 905–08.

[4] 521 U.S. at 919 (quoting THE FEDERALIST NO. 39 (Madison).

[5] 521 U.S. at 918.

The scope of the rule thus expounded remains unclear. Particularly, Justice O'Connor in concurrence observed that Congress retained the power to enlist the States through contractual arrangements and on a voluntary basis. More pointedly, she stated that "the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid."[6]

[6] 521 U.S. at 936 (citing 42 U.S.C. § 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice)).

FIRST AMENDMENT

RELIGION

An Overview

—Court Tests Applied to Legislation Affecting Religion

[Pp. 973–74, change text following n.25 to read:]

and in several instances have not been applied at all by the Court.

[P. 974, add to n.26 following *Lee v. Weisman* citation:]

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) (upholding provision of sign-language interpreter to deaf student attending parochial school); Board of Education of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994) (invalidating law creating special school district for village composed exclusively of members of one religious sect); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (upholding the extension of a university subsidy of student publications to a student religious publication).

[P. 974, change text following n.26 to read:]

Nonetheless, the Court did employ the *Lemon* tests in its most recent establishment clause decision,[1] and it remains the case that those tests have served as the primary standard of establishment clause validity for the past three decades. Justice Kennedy has proffered "coercion" as an alternative test for violations of the establishment clause,[2] but that test has been criticized on the grounds it would eliminate a principal distinction between the establishment clause and the free exercise clause and make the former a "virtual nullity."[3] Justice O'Connor has suggested "endorsement" as an alternative test, *i.e.*, that the establishment clause is violated if the government intends its action to endorse or disapprove of religion or if a "reasonable observer" would perceive the government's action as such an endorsement or disapproval;[4] but others have criticized that test as too amorphous to

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[1] Agostini v. Felton, 521 U.S. 203 (1997) (upholding under the *Lemon* tests the provision of remedial educational services by public school teachers to sectarian elementary and secondary schoolchildren on the premises of the sectarian schools).

[2] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy concurring in part and dissenting in part); and Lee v. Weisman, 505 U.S. 577 (1992).

[3] Lee v. Weisman, 505 U.S. 577, 621 (Souter, J., concurring). *See also* County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

[4] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (concurring); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 625 (1989) (concurring); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 712 (1994) (concurring).

provide certain guidance.[5] She has also suggested that it may be inappropriate to try to shoehorn all establishment clause cases into one test, and has called instead for recognition that different contexts may call for different approaches.[6]

ESTABLISHMENT OF RELIGION

[P. 977, add to text following n.41:]

"[The] Court has long held that the First Amendment reaches more than classic, 18th century establishments."[7]

Financial Assistance to Church-Related Institutions

[P. 980, strike n.54 and accompanying text:]

[P. 984, add to text following n.74:]

In two more recent decisions, however, the Court reversed course with respect to the constitutionality of public school teachers providing educational services on the premises of pervasively sectarian schools. First, in *Zobrest v. Catalina Foothills School District*[8] the Court held the public subsidy of a sign-language interpreter for a deaf student attending a parochial school to create no primary effect or entanglement problems. The payment did not relieve the school of an expense that it would otherwise have borne, the Court stated, and the interpreter had no role in selecting or editing the content of any of the lessons. Reviving the child benefit theory of its earlier cases, the Court said that "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." Secondly, and more pointedly, the Court in *Agostini v. Felton*[9] overturned both the result and the reasoning of its decision in *Aguilar v. Felton*[10] striking down the Title I program as administered in New York City as well as the analogous parts of its decisions in *Meek v. Pittenger*[11] and *Grand Rapids School District v. Ball*.[12] The as-

[5] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy, concurring in the judgment in part and dissenting in part); and Capitol Square Review Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995) (Justice Scalia).

[6] Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 718–723 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

[7] Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 709 (1994) (citing Torcaso v. Watkins, 367 U.S. 488, 492–95 (1961)).

[8] 509 U.S. 1 (1993).

[9] 521 U.S. 203 (1997).

[10] 473 U.S. 402 (1985).

[11] 421 U.S. 349 (1975).

[12] 473 U.S. 373 (1985).

sumptions on which those decisions had rested, the Court stated, had been "undermined" by its more recent decisions. Decisions such as *Zobrest* and *Witters v. Washington Department of Social Services*,[13] it said, had repudiated the notions that the placement of a public employee in a sectarian school creates an "impermissible symbolic link" between government and religion, that "all government aid that directly aids the educational function of religious schools" is constitutionally forbidden, that public teachers in a sectarian school necessarily pose a serious risk of inculcating religion, and that "pervasive monitoring of [such] teachers is required." The proper criterion under the primary effect prong of the *Lemon* test, the Court asserted, is religious neutrality, *i.e.*, whether "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[14] Finding the Title I program to meet that test, the Court concluded that "accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law."[15]

[P. 988, add to n.92:]

Similar reasoning led the Court to rule that provision of a sign-language interpreter to a deaf student attending a parochial school is permissible as part of a neutral program offering such services to all students regardless of what school they attend. Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993). The interpreter, the Court noted additionally, merely transmits whatever material is presented, and neither adds to nor subtracts from the school's sectarian environment. Id. at 13.

[P. 997, change heading to:]

Access of Religious Groups to Public Property

[P. 997, add to text following n.130:]

Similarly, public schools may not rely on the Establishment Clause as grounds to discriminate against religious groups in after-

[13] 474 U.S. 481 (1986).

[14] Evidencing the continuing vitality of the *Lemon* tests, the Court analyzed the constitutionality of the Title I program in *Agostini* under both the primary effect and entanglement tests. But in so doing it eliminated entanglement as a separate test. "[T]he factors we use to assess whether an entanglement is 'excessive,'" the Court stated, "are similar to the factors we use to examine 'effect.'" "Thus," it concluded, "it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect." *Agostini v. Felton*, supra, at 232, 233.

[15] Justice Souter, joined by Justices Stevens and Ginsburg, dissented from the Court's ruling, contending that the establishment clause mandates a "flat ban on [the] subsidization" of religion (521 U.S. at 243) and that the Court's contention that recent cases had undermined the reasoning of *Aguilar* was a "mistaken reading" of the cases. Id. at 248. Justice Breyer joined in the second dissenting argument.

hours use of school property otherwise available for non-religious social, civic, and recreational purposes;[16] public colleges may not exclude student religious organizations from benefits otherwise provided to a full spectrum of student "news, information, opinion, entertainment, or academic communications media groups;"[17] and a state that creates a traditional public forum for citizen speeches and unattended displays on a plaza at its state capitol cannot, on Establishment Clause grounds, deny access for a religious display.[18] These cases make clear that the Establishment Clause does not necessarily trump the First Amendment's protection of freedom of speech; in regulating private speech in a public forum, government may not justify discrimination against religious viewpoints as necessary to avoid creating an "establishment" of religion.

[P. 1002, add new heading following n.163:]

Religious Displays on Government Property

[P. 1004, add new paragraph at end of section:]

In *Capitol Square Review Bd. v. Pinette*,[19] the Court distinguished privately sponsored from governmentally sponsored religious displays on public property. There the Court ruled that Ohio violated free speech rights by refusing to allow the Ku Klux Klan to display an unattended cross during the Christmas season in a publicly owned plaza outside the Ohio Statehouse. Because the plaza was a public forum in which the State had allowed a broad range of speakers and a variety of unattended displays, the State could regulate the expressive content of such speeches and displays only if the restriction was necessary, and narrowly drawn, to serve

[16] Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993). The Court explained that there was "no realistic danger that the community would think that the District was endorsing religion," and that the three-part *Lemon* test would not have been violated. Id. at 395. Concurring opinions by Justice Scalia, joined by Justice Thomas, and by Justice Kennedy, criticized the Court's reference to *Lemon*. "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again," Justice Scalia lamented. Id. at 398.

[17] Rosenberger v. University of Virginia, 515 U.S. 819 (1995).

[18] Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995).

[19] 515 U.S. 753 (1995). The Court was divided 7–2 on the merits of *Pinette*, a vote that obscured continuing disagreement over the proper analytical approach. The portions of Justice Scalia's opinion that formed the opinion of the Court were joined by Chief Justice Rehnquist and by Justices O'Connor, Kennedy, Souter, Thomas, and Breyer. A separate part of Justice Scalia's opinion, joined only by the Chief Justice and by Justices Kennedy and Thomas, disputed the assertions of Justices O'Connor, Souter, and Breyer that the "endorsement" test should be applied. Dissenting Justice Stevens thought that allowing the display on the Capitol grounds did carry "a clear image of endorsement," and Justice Ginsburg's brief opinion seemingly agreed with that conclusion.

a compelling state interest. The Court recognized that compliance with the Establishment Clause can be a sufficiently compelling reason to justify content-based restrictions on speech, but saw no need to apply this principle when permission to display a religious symbol is granted through the same procedures, and on the same terms, required of other private groups seeking to convey non-religious messages.

Miscellaneous

[P. 1005, add to text at end of section:]

Using somewhat similar reasoning, the Court in *Board of Education of Kiryas Joel Village v. Grumet*,[20] invalidated a New York law creating a special school district for an incorporated village composed exclusively of members of one small religious sect. The statute failed "the test of neutrality," the Court concluded, since it delegated power "to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism." It was the "anomalously case-specific nature of the legislature's exercise of authority" that left the Court "without any direct way to review such state action" for conformity with the neutrality principle. Because the village did not receive its governmental authority simply as one of many communities eligible under a general law, the Court explained, there was no way of knowing whether the legislature would grant similar benefits on an equal basis to other religious and nonreligious groups.

FREE EXERCISE OF RELIGION

[P. 1007, add to n.188:]

Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 706–07 (1994) ("accommodation is not a principle without limits;" one limitation is that "neutrality as among religions must be honored").

The Jehovah's Witnesses Cases

[P. 1010, add to n. 201:]

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (Santeria faith).

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[20] 512 U.S. 687 (1994). Only four Justices (Souter, Blackmun, Stevens, and Ginsburg) thought that the *Grendel's Den* principle applied; in their view the distinction that the delegation was to a village electorate rather than to a religious body "lack[ed] constitutional significance" under the peculiar circumstances of the case.

Free Exercise Exemption From General Governmental Requirements

[P. 1018, add new note following comma after word "treatment" in third sentence of paragraph beginning after n.253:]

This much was made clear by *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), striking down a city ordinance that prohibited ritual animal sacrifice but that allowed other forms of animal slaughter.

[P. 1018, add to text at end of third sentence of same paragraph:]

That the Court views the principle as a general one, not limited to criminal laws, seems evident from its restatement in *Church of the Lukumi Babalu Aye v. City of Hialeah*: "our cases establish the general proposition that a law that is neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." [21]

[P. 1019, add new paragraphs following n.257:]

Because of the broad ramifications of *Smith*, the political processes were soon utilized in an attempt to provide additional legislative protection for religious exercise. In the Religious Freedom Restoration Act of 1993 (RFRA), [22] Congress sought to supersede *Smith* and substitute a statutory rule of decision for free exercise cases. The Act provides that laws of general applicability—federal, state, and local—may substantially burden free exercise of religion only if they further a compelling governmental interest and constitute the least restrictive means of doing so. The purpose, Congress declared in the Act itself, was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened." [23] But this legislative effort was partially frustrated in 1997 when the Court in *City of Boerne v. Flores* [24] held the Act to be unconstitutional as applied to the states, 6–3. In applying RFRA to the states Congress had utilized its power under § 5 of the Fourteenth Amendment to enact "appropriate legislation" to enforce the substantive protections of the Amendment, including the religious liberty protections incorporated in the due process clause. But the Court held that RFRA exceeded Congress' power under § 5, because the measure did not

[21] 508 U.S. 520, 531 (1993).
[22] Pub. L. 103–141, 107 Stat. 1488 (1993); 42 U.S.C. §§ 2000bb to 2000bb–4.
[23] Pub. L. 103–141, § 2(b)(1) (citations omitted). Congress also avowed a purpose of providing "a claim or defense to persons whose religious exercise is substantially burdened by government." § 2(b)(2).
[24] 117 S. Ct. 2157 (1997).

simply enforce a constitutional right but substantively altered that right. "Congress," the Court said, "does not enforce a constitutional right by changing what the right is."[25] Moreover, it said, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved . . . [and] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[26] "RFRA," the Court concluded, "contradicts vital principles necessary to maintain separation of powers and the federal balance."[27]

Boerne does not close the books on *Smith*, however. It remains an open issue whether RFRA remains valid as applied to the federal government, and Congress is likely to attempt to use powers other than § 5 to try to re-apply a strict scrutiny standard to the states.[28] These issues ensure continuing litigation over the appropriate test for free exercise cases.[29]

FREEDOM OF EXPRESSION—SPEECH AND PRESS

Adoption and Common Law Background

[P. 1025, add to text at end of section:]

The First Amendment by its terms applies only to laws enacted by Congress, and not to the actions of private persons.[30] This leads to a "state action" (or "governmental action") limitation similar to that applicable to the Fourteenth Amendment.[31] The limitation has seldom been litigated in the First Amendment context, but there is no obvious reason why analysis should differ markedly from Fourteenth Amendment state action analysis. Both contexts require "cautious analysis of the quality and degree of Government relationship to the particular acts in question."[32] In holding that the National Railroad Passenger Corporation (Amtrak) is a governmental entity for purposes of the First Amendment, the Court de-

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[25] 521 U.S. at 519.

[26] 521 U.S. at 533–34.

[27] 521 U.S. at 536.

[28] *See* H.R. 4019 and S. 2148, 105th Cong., 2d Sess. (1998) (using Congress' power over interstate commerce and its power to attach conditions to federal spending as the means of re-applying a strict scrutiny standard to the states with respect to the exercise of religion).

[29] *See, e.g.*, In re Young, 141 F.3d 854 (8th Cir.), *cert. denied*, 119 S. Ct. 43 (1998) (lower court held RFRA to be constitutional as applied to federal bankruptcy law).

[30] Through interpretation of the Fourteenth Amendment, the prohibition extends to the States as well. *See* discussion on incorporation, main text, pp. 957–64.

[31] *See* discussion on state action, main text, pp. 1786–1802.

[32] CBS v. Democratic Nat'l Comm., 412 U.S. 94, 115 (1973) (opinion of Chief Justice Burger).

clared that "[t]he Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'. . . [a]nd under whatever congressional label."[33] The relationship of the government to broadcast licensees affords other opportunities to explore the breadth of "governmental action."[34]

The Doctrine of Prior Restraint

—Obscenity and Prior Restraint

[P. 1033, add to n.69:]

But cf. Alexander v. United States, 509 U.S. 544 (1993) (RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses, based on the predicate acts of selling four magazines and three videotapes, does not constitute a prior restraint and is not invalid as "chilling" protected expression that is not obscene).

Freedom of Belief

—Imposition of Consequences for Holding Certain Beliefs

[P. 1054, add to n.177:]

The First Amendment does not preclude the Government from "compel[ling] financial contributions that are used to fund advertising," provided such contributions do not finance "political or ideological" views. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471, 472 (1997) (upholding Secretary of Agriculture's marketing orders that assessed fruit producers to cover the expenses of generic advertising of California fruit).

[P. 1054, add to n.181 following cite to *Barclay v. Florida*:]

Wisconsin v. Mitchell, 508 U.S. 476 (1993) (criminal sentence may be enhanced because the defendant intentionally selected his victim on account of the victim's race),

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[33] Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 392 (1995) (quoting Ex parte Virginia, 100 U.S. 339, 346–47 (1880)). The Court refused to be bound by the statement in Amtrak's authorizing statute that the corporation is "not . . . an agency or establishment of the United States Government." This assertion can be effective "only for purposes of matters that are within Congress' control," the Court explained. "[I]t is not for Congress to make the final determination of Amtrak's status as a governmental entity for purposes of determining the constitutional rights of citizens affected by its actions." 513 U.S. at 392.

[34] In CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court held that a broadcast licensee could refuse to carry a paid editorial advertisement. Chief Justice Burger, joined only by Justices Stewart and Rehnquist in that portion of his opinion, reasoned that a licensee's refusal to accept such an ad did not constitute "governmental action" for purposes of the First Amendment. "The First Amendment does not reach acts of private parties in every instance where the Congress or the [Federal Communications] Commission has merely permitted or failed to prohibit such acts." Id. at 119.

Right of Association

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

When application of a public accommodations law was viewed as impinging on an organization's ability to present its message, the Court found a First Amendment violation. Massachusetts could not require the private organizers of Boston's St. Patrick's Day parade to allow a group of gays and lesbians to march as a unit proclaiming its members' gay and lesbian identity, the Court held in *Hurley v. Irish-American Gay Group*.[35] To do so would require parade organizers to promote a message they did not wish to promote. The *Roberts* and *New York City* cases were distinguished as not involving "a trespass on the organization's message itself."[36] Those cases stood for the proposition that the state could require equal access for individuals to what was considered the public benefit of organization membership. But even if individual access to the parade might similarly be mandated, the Court reasoned, the gay group "could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."[37]

—Political Association

[P. 1063, add to text before first full paragraph on page:]

In 1996 the Court extended *Elrod* and *Branti* to protect independent government contractors.[38]

Particular Governmental Regulations That Restrict Expression

[P. 1081, change subheading to:]

—Government as Employer: Political and Other Outside Activities

[P. 1084, add new paragraph to end of section:]

The Hatch Act cases were distinguished in *United States v. National Treasury Employees Union*,[39] in which the Court struck

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[35] 515 U.S. 557 (1995).

[36] Id. at 580.

[37] Id. at 580–81.

[38] O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (allegation that city removed petitioner's company from list of those offered towing business on a rotating basis, in retaliation for petitioner's refusal to contribute to mayor's campaign, and for his support of mayor's opponent, states a cause of action under the First Amendment). *See also* Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) (termination or non-renewal of a public contract in retaliation for the contractor's speech on a matter of public concern can violate the First Amendment).

[39] 513 U.S. 454 (1995).

down an honoraria ban as applied to lower level employees of the Federal Government. The honoraria ban suppressed employees' right to free expression while the Hatch Act sought to protect that right, and also there was no evidence of improprieties in acceptance of honoraria by members of the plaintiff class of federal employees.[40] The Court emphasized further difficulties with the "crudely crafted" honoraria ban: it was limited to expressive activities and had no application to other sources of outside income, it applied when neither the subjects of speeches and articles nor the persons or groups paying for them bore any connection to the employee's job responsibilities, and it exempted a "series" of speeches or articles without also exempting individual articles and speeches. These "anomalies" led the Court to conclude that the "speculative benefits" of the ban were insufficient to justify the burdens it imposed on expressive activities.[41]

—Government as Employer: Free Expression Generally

[P. 1089, add to text following n.113:]

The protections applicable to government employees have been extended to independent government contractors, the Court announcing that "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection."[42]

[P. 1089, add to n.116:]

In Waters v. Churchill, 511 U.S. 661 (1994), the Court grappled with what procedural protections may be required by the First Amendment when public employees are dismissed on speech-related grounds, but reached no consensus.

—Government as Regulator of the Electoral Process: Elections

[P. 1095, add to text following n.143:]

Minnesota, however, could prohibit a candidate from appearing on the ballot as the candidate of more than one party.[43] The Court wrote that election "[r]egulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests

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[40] The plaintiff class consisted of all Executive Branch employees below grade GS–16. Also covered by the ban were senior executives, Members of Congress, and other federal officers, but the possibility of improprieties by these groups did not justify application of the ban to "the vast rank and file of federal employees below grade GS–16."

[41] 513 U.S. at 477.

[42] Board of County Comm'rs v. Umbehr, 518 U.S. 668, 673 (1996).

[43] Timmons v. Twin City Area New Party, 520 U.S. 351 (1997).

will usually be enough to justify reasonable nondiscriminatory restrictions."[44] Minnesota's ban on "fusion" candidates was not severe, as it left a party that could not place another party's candidate on the ballot free to communicate its preference for that candidate by other means, and the ban was justified by "valid state interests in ballot integrity and political stability."[45]

[P. 1097, add to n.150:]

See also Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996) (the First Amendment bars application of the Party Expenditure Provision of the Federal Election Campaign Act, 2 U.S.C. § 441a(d)(3), to expenditures that the political party makes independently, without coordination with the candidate).

—Government and the Power of the Purse

[P. 1113, add to text following n.236:]

In *National Endowment for the Arts v. Finley*, the Supreme Court upheld the constitutionality of a federal statute requiring the NEA, in awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[46] The Court acknowledged that, if the statute were "applied in a manner that raises concern about the suppression of disfavored viewpoints,"[47] then such application might be unconstitutional. The statute on its face, however, is constitutional because it "imposes no categorical requirement," being merely "advisory."[48] "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. . . . The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applications,' and absolute neutrality is simply 'inconceivable.'"[49] The Court also found that the terms of the statute, "if they appeared in a criminal statute or regulatory scheme, . . . could raise substantial vagueness concerns. . . . But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[50]

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[44] Id. at 358 (internal quotation marks omitted).
[45] Id. at 369–70.
[46] 118 S. Ct. 2168, 2171 (1998).
[47] Id. at 2179.
[48] Id. at 2176. Justice Scalia, in a concurring opinion joined by Justice Thomas, claimed that this interpretation of the statute "gutt[ed] it." Id. at 2180. He believed that the statute "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional." Id.
[49] Id. at 2177, 2178.
[50] Id. at 2179.

Governmental Regulation of Communications Industries

—Commercial Speech

[P. 1116, add to n.12:]

Shapero was distinguished in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), a 5–4 decision upholding a prohibition on targeted direct-mail solicitations to victims and their relatives for a 30-day period following an accident or disaster. The ban struck down in *Shapero* was far broader, both in scope and in duration, the Court explained, and was not supported, as Florida's was, by findings describing the harms to be prevented by the ban. Dissenting Justice Kennedy disagreed that there was a valid distinction, pointing out the Court's previous reliance on the mode of communication (in-person solicitation versus mailings) as "mak[ing] all the difference." 515 U.S. at 637 (quoting *Shapero*, 486 U.S. at 475).

[P. 1116, add to text following n.13:]

, or prohibit a certified public accountant from holding herself out as a certified financial planner.[51]

[P. 1116, add to text following n.14:]

The Court later refused, however, to extend this principle to in-person solicitation by certified public accountants, explaining that CPAs, unlike attorneys, are not professionally "trained in the art of persuasion," and that the typical business executive client of a CPA is "far less susceptible to manipulation" than was the accident victim in *Ohralik*.[52] To allow enforcement of such a broad prophylactic rule absent identification of a serious problem such as ambulance chasing, the Court explained, would dilute commercial speech protection "almost to nothing."[53]

[P. 1117, delete last two sentences of paragraph continued from p. 1116, and substitute the following:]

The Court has developed a four-pronged test to measure the validity of restraints upon commercial expression.

[P. 1117, add to n.19 following *San Francisco Arts & Athletics* cite:]

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (government's interest in curbing strength wars among brewers is substantial, but interest in facilitating state regulation of alcohol is not substantial). *Contrast* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), finding a substantial federal interest in facilitating state restrictions on lotteries. "Unlike the situation in *Edge Broadcasting*," the *Coors* Court explained, "the policies of some States do not prevent neighboring States from pursuing their own alcohol-related policies within their respective borders." 514 U.S. at 486.

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[51] Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994) (also ruling that Accountancy Board could not reprimand the CPA, who was also a licensed attorney, for truthfully listing her CPA credentials in advertising for her law practice).

[52] Edenfield v. Fane, 507 U.S. 761, 775 (1993).

[53] Id. at 777.

[P. 1118, add to n.20 following *Bolger* cite:]

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels does not directly and materially advance government's interest in curbing strength wars among brewers, given the inconsistencies and "overall irrationality" of the regulatory scheme); Edenfield v. Fane, 507 U.S. 761 (1993) (Florida's ban on in-person solicitation by certified public accountants does not directly advance its legitimate interests in protecting consumers from fraud, protecting consumer privacy, and maintaining professional independence from clients).

[P. 1118, add to text following n.20:]

Instead, the regulation must "directly advance" the governmental interest. The Court resolves this issue with reference to aggregate effects, and does not limit its consideration to effects on the challenging litigant.[54]

[P. 1118, add to n.21 following *Bolger* cite:]

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (there are less intrusive alternatives—e.g., direct limitations on alcohol content of beer—to prohibition on display of alcohol content on beer label).

[P. 1118, add to n.22:]

In a 1993 opinion the Court elaborated on the difference between "reasonable fit" and least restrictive alternative. "A regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction . . ., that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993).

[P. 1118, delete remainder of section after n.22, and add the following:]

The "reasonable fit" standard has some teeth, the Court made clear in *City of Cincinnati v. Discovery Network, Inc.*,[55] striking down a city's prohibition on distribution of "commercial handbills" through freestanding newsracks located on city property. The city's aesthetic interest in reducing visual clutter was furthered by reducing the total number of newsracks, but the distinction between prohibited "commercial" publications and permitted "newspapers" bore "no relationship *whatsoever*" to this legitimate interest.[56] The city could not, the Court ruled, single out commercial speech to bear the full onus when "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at

[54] United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993) ("this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity").

[55] 507 U.S. 410 (1993). *See also* Edenfield v. Fane, 507 U.S. 761 (1993), decided the same Term, relying on the "directly advance" third prong of *Central Hudson* to strike down a ban on in-person solicitation by certified public accountants.

[56] Id. at 424.

fault."[57] By contrast, the Court upheld a federal law that prohibited broadcast of lottery advertisements by a broadcaster in a state that prohibits lotteries, while allowing broadcast of such ads by stations in states that sponsor lotteries. There was a "reasonable fit" between the restriction and the asserted federal interest in supporting state anti-gambling policies without unduly interfering with policies of neighboring states that promote lotteries.[58] The prohibition "directly served" the congressional interest, and could be applied to a broadcaster whose principal audience was in an adjoining lottery state, and who sought to run ads for that state's lottery.[59]

In a 1986 decision the Court asserted that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[60] Subsequently, however, the Court has eschewed reliance on *Posadas*,[61] and it seems doubtful that the Court would again embrace the broad principle that government may ban all advertising of an activity that it permits but has power to prohibit. Indeed, the Court's very holding in *44 Liquormart, Inc. v. Rhode Island*,[62] striking down the State's ban on advertisements that provide truthful information about liquor prices, is inconsistent with the general proposition. A Court plurality in *44 Liquormart* squarely rejected *Posadas*, calling it "erroneous," declining to give force to its "highly deferential approach," and proclaiming that a state "does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate."[63] Four other Justices concluded that *Posadas* was inconsist-

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[57] Id. at 426. The Court also noted the "minute" effect of removing 62 "commercial" newsracks while 1,500 to 2,000 other newsracks remained in place. Id. at 418.

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

[59] Id. at 428.

[60] Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986). For discussion of the case, *see* P. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1.

[61] In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating a federal ban on revealing alcohol content on malt beverage labels), the Court rejected reliance on *Posadas*, pointing out that the statement in *Posadas* had been made only after a determination that the advertising could be upheld under *Central Hudson*. The Court found it unnecessary to consider the greater-includes-lesser argument in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 427 (1993), upholding through application of *Central Hudson* principles a ban on broadcast of lottery ads.

[62] 517 U. S. 484 (1996).

[63] Id. at 510 (opinion of Stevens, joined by Justices Kennedy, Thomas, and Ginsburg). The Stevens opinion also dismissed the *Posadas* "greater-includes-the-lesser argument" as "inconsistent with both logic and well-settled doctrine," pointing out that the First Amendment "presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." Id. at 511–512.

ent with the "closer look" that the Court has since required in applying the principles of *Central Hudson*.[64]

The "different degree of protection" accorded commercial speech has a number of consequences. Somewhat broader times, places, and manner regulations are to be tolerated.[65] The rule against prior restraints may be inapplicable,[66] and disseminators of commercial speech are not protected by the overbreadth doctrine.[67]

Different degrees of protection may also be discerned among different categories of commercial speech. The first prong of the *Central Hudson* test means that false, deceptive, or misleading advertisements need not be permitted; government may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent deception.[68] But even truthful, non-misleading commercial speech may be regulated, and the validity of such regulation is tested by application of the remaining prongs of the *Central Hudson* test. The test itself does not make further distinctions based on the content of the commercial message or the nature of the governmental interest (that interest need only be "substantial"). Recent decisions suggest, however, that further distinctions may exist. Measures aimed at preserving "a fair bargaining process" between consumer and advertiser[69] may be more likely to pass the test[70]

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[64] Id. at 1531 (concurring opinion of O'Connor, joined by Chief Justice Rehnquist and by Justices Souter and Breyer).

[65] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977). But in Linmark Associates v. Township of Willingboro, 431 U.S. 85, 93–94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting "For Sale" signs on residential lawns. First, ample alternative channels of communication were not available, and, second, the ban was seen as a content limitation.

[66] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 571 n.13 (1980).

[67] Bates v. State Bar of Arizona, 433 U.S. 350, 379–81 (1977); Central Hudson Gas & Electric Co. v. Public Service Comm'n, 477 U.S. 557, 565 n.8 (1980).

[68] Bates v. State Bar of Arizona, 433 U.S. 350, 383–84 (1977); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Requirements that advertisers disclose more information than they otherwise choose to are upheld "as long as [they] are reasonably related to the State's interest in preventing deception of consumers," the Court explaining that "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right" requiring strict scrutiny of the disclosure requirement. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 & n.14 (1985) (upholding requirement that attorney's contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs).

[69] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (opinion of Justice Stevens, joined by Justices Kennedy and Ginsburg).

[70] See, e.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 (1978) (upholding ban on in-person solicitation by attorneys due in part to the "potential for over-

than regulations designed to implement general health, safety, or moral concerns.[71] As the governmental interest becomes further removed from protecting a fair bargaining process, it may become more difficult to establish the absence of less burdensome regulatory alternatives and the presence of a "reasonable fit" between the commercial speech restriction and the governmental interest.[72]

—Radio and Television

[P. 1126, delete last paragraph on page:]

—Governmentally Compelled Right of Reply to Newspapers

[P. 1127, add to n.65:]

See also Hurley v. Irish-American Gay Group, 515 U.S. 557 (1995) (state may not compel parade organizer to allow participation by a parade unit proclaiming message that organizer does not wish to endorse).

[P. 1127, add new section following n.65:]

—Regulation of Cable Television

The Court has recognized that cable television "implicates First Amendment interests," since a cable operator communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering.[73] Moreover, "settled principles of . . . First Amend-

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reaching" when a trained advocate "solicits an unsophisticated, injured, or distressed lay person").

[71] *Compare* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (upholding federal law supporting state interest in protecting citizens from lottery information) *and* Florida Bar v. Went For It, Inc., 515 U.S. 618, (1995) (upholding a 30-day ban on targeted, direct-mail solicitation of accident victims by attorneys, not because of any presumed susceptibility to overreaching, but because the ban "forestall[s] the outrage and irritation with the . . . legal profession that the [banned] solicitation . . . has engendered") *with* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down federal statute prohibiting display of alcohol content on beer labels) *and* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down state law prohibiting display of retail prices in ads for alcoholic beverages).

[72] Justice Stevens has criticized the *Central Hudson* test because it seemingly allows regulation of any speech propounded in a commercial context regardless of the content of that speech. "[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (concurring opinion). The Justice repeated these views in 1996: "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (a portion of the opinion joined by Justices Kennedy and Ginsburg).

[73] City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986) (leaving for future decision how the operator's interests are to be balanced against a com-

ment jurisprudence" govern review of cable regulation; cable is not limited by "scarce" broadcast frequencies and does not require the same less rigorous standard of review that the Court applies to regulation of broadcasting.[74] Cable does, however, have unique characteristics that justify regulations that single out cable for special treatment.[75] The Court in *Turner Broadcasting System v. FCC*[76] upheld federal statutory requirements that cable systems carry local commercial and public television stations. Although these "must-carry" requirements "distinguish between speakers in the television programming market," they do so based on the manner of transmission and not on the content the messages conveyed, and hence are "content neutral."[77] The regulations could therefore be measured by the "intermediate level of scrutiny" set forth in *United States v. O'Brien*.[78] Two years later, however, a splintered Court could not agree on what standard of review to apply to content-based restrictions of cable broadcasts. Striking down a requirement that cable operators must, in order to protect children, segregate and block programs with patently offensive sexual material, a Court majority in *Denver Area Educational Telecommunications Consortium v. FCC*[79] found it unnecessary to determine whether strict scrutiny or some lesser standard applies, since the restriction was deemed invalid under any of the alternative tests. There was no opinion of the Court on the other two holdings in the case,[80]

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munity's interests in limiting franchises and preserving utility space); Turner Broadcasting System v. FCC, 512 U.S. 622, 636 (1994).

[74] Turner Broadcasting System v. FCC, 512 U.S. 622, 638–639 (1994).

[75] Id. at 661 (referring to the "bottleneck monopoly power" exercised by cable operators in determining which networks and stations to carry, and to the resulting dangers posed to the viability of broadcast television stations). *See also* Leathers v. Medlock, 499 U.S. 439 (1991) (application of state gross receipts tax to cable industry permissible even though other segments of the communications media were exempted).

[76] 512 U.S. 622 (1994).

[77] Id. at 645. "Deciding whether a particular regulation is content-based or content-neutral is not always a simple task," the Court confessed. Id. at 642. Indeed, dissenting Justice O'Connor, joined by Justices Scalia, Ginsburg, and Thomas, viewed the rules as content-based. Id. at 674–82.

[78] 391 U.S. 367, 377 (1968). The Court remanded *Turner* for further factual findings relevant to the *O'Brien* test. On remand, the district court upheld the must-carry provisions, and the Supreme Court affirmed, concluding that it "cannot displace Congress" judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination. Turner Broadcasting System v. FCC, 520 U.S. 180, 224 (1997).

[79] 518 U.S. 727, 755 (1996) (invalidating § 10(b) of the Cable Television Consumer Protection and Competition Act of 1992).

[80] Upholding § 10(a) of the Act, which permits cable operators to prohibit indecent material on leased access channels; and striking down § 10(c), which permits a cable operator to prevent transmission of "sexually explicit" programming on public access channels. In upholding § 10(a), Justice Breyer's plurality opinion cited

and a plurality[81] rejected assertions that public forum analysis,[82] or a rule giving cable operators' editorial rights "general primacy" over the rights of programmers and viewers,[83] should govern.

Government Restraint of Content of Expression

—Group Libel, Hate Speech

[P. 1136, add to n.111:]

On the other hand, the First Amendment does permit enhancement of a criminal penalty based on the defendant's motive in selecting a victim of a particular race. Wisconsin v. Mitchell, 508 U.S. 476 (1993). The law has long recognized motive as a permissible element in sentencing, the Court noted. Id. at 485. The Court distinguished *R.A.V.* as involving a limitation on "speech" rather than conduct, and because the state might permissibly conclude that bias-inspired crimes inflict greater societal harm than do non-bias inspired crimes (e.g., they are more likely to provoke retaliatory crimes). Id. at 487–88. *See generally* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

—Obscenity

[P. 1152, add to n.14:]

None of these strictures applies, however, to forfeitures imposed as part of a criminal penalty. Alexander v. United States, 509 U.S. 544 (1993) (upholding RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses). Justice Kennedy, dissenting in *Alexander*, objected to the "forfeiture of expressive material that had not been adjudged to be obscene." Id. at 578.

—Nonobscene But Sexually Explicit and Indecent Expression

[P. 1161, add to n.61:]

Similar rules apply in regulation of cable TV. In Denver Area Educ. Tel. Consortium v. FCC, 518 U.S. 727, 755 (1996), the Court, acknowledging that protection of children from sexually explicit programming is a "compelling" governmental interest (but refusing to determine whether strict scrutiny applies), nonetheless struck down a requirement that cable operators segregate and block indecent programming on leased access channels. The segregate and block restrictions, which included a requirement that a request for access be in writing, and which allowed for up to 30 days' delay in blocking or unblocking a channel, were not sufficiently protective of adults' speech/viewing interests to be considered either narrowly or reasonably tailored to serve the government's compelling interest in protecting children.

FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and noted that cable television "is as 'accessible to children' as over-the-air broadcasting, if not more so." 518 U.S. at 744.

[81] This section of Justice Breyer's opinion was joined by Justices Stevens, O'Connor, and Souter. 518 U.S. at 749.

[82] Justice Kennedy, joined by Justice Ginsburg, advocated this approach. 518 U. S. at 791, and took the plurality to task for its "evasion of any clear legal standard." Id. at 784.

[83] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, advocated this approach.

[P. 1161, add to text following n.61:]

In *Reno v. American Civil Liberties Union*,[84] the Court struck down two provisions of the Communications Decency Act of 1996 (CDA), one of which would have prohibited use of an "interactive computer service" to display indecent material "in a manner available to a person under 18 years of age."[85] This prohibition would, in effect, have banned indecent material from all Internet sites except those accessible by adults only. Although intended "to deny minors access to potentially harmful speech . . ., [t]hat burden on adult speech," the Court wrote, "is unacceptable if less restrictive alternatives would be at least as effective. . . . [T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"[86]

In *Reno*, the Court distinguished *FCC v. Pacifica Foundation*,[87] in which it had upheld the FCC's restrictions on indecent radio and television broadcasts, because (1) "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet," (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts "would justify a criminal prosecution," and (3) radio and television, unlike the Internet, have, "as a matter of history . . . 'received the most limited First Amendment protection,' . . . in large part because warnings could not adequately protect the listener from unexpected program content. . . . [the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."[88]

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[84] 521 U.S. 844 (1997).

[85] The other provision the Court struck down would have prohibited indecent communications, by telephone, fax, or e-mail, to minors. The Court held it unconstitutional because the Government had not met its "heavy burden . . . to explain why a less restrictive provision would not be as effective as the CDA." 521 U.S. at 879. The Court also hinted, however, that protecting minors from indecent material may not always be a compelling governmental interest, and whether it is may depend upon the age of the minor, the value of the message, and the presence or absence of parental approval. Id. at 878.

[86] 521 U.S. at 875. The Court did not address whether, if less restrictive alternatives would *not* be as effective, the Government would then be permitted to reduce the adult population to only what is fit for children.

[87] 438 U.S. 726 (1978).

[88] 521 U.S. at 867.

[P. 1161, start a new paragraph of text with the material that previously followed n.61, and change the opening words of that new paragraph from "Also, government may" to "The government may also":]

Speech Plus

—The Public Forum

[P. 1167, add to n.98 following cite to *Niemotko v. Maryland*:]

Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (denial of permission to Ku Klux Klan, allegedly in order to avoid Establishment Clause violation, to place a cross in plaza on grounds of state capitol); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (University's subsidy for printing costs of student publications, available for student "news, information, opinion, entertainment, or academic communications," could not be withheld because of the religious content of a student publication); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (school district rule prohibiting after-hours use of school property for showing of a film presenting a religious perspective on child-rearing and family values, but allowing after-hours use for non-religious social, civic, and recreational purposes).

[P. 1169, add to n.106:]

Candidate debates on public television are an example of this third type of public forum: the "nonpublic forum." Arkansas Educational Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998). "Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine [*i.e.*, public broadcasters ordinarily are entitled to the editorial discretion to engage in viewpoint discrimination], candidate debates present the narrow exception to this rule." Id. at 1640. A public broadcaster, therefore, may not engage in viewpoint discrimination in granting or denying access to candidates. Under the third type of forum analysis, however, it may restrict candidate access for "a reasonable, viewpoint-neutral" reason, such as a candidate's "objective lack of support." Id. at 1644.

—Public Issue Picketing and Parading

[P. 1179, add to text at end of section:]

More recently, disputes arising from anti-abortion protests outside abortion clinics have occasioned another look at principles distinguishing lawful public demonstrations from proscribable conduct. In *Madsen v. Women's Health Center*,[89] the Court refined principles governing issuance of "content-neutral" injunctions that restrict expressive activity.[90] The appropriate test, the Court stated, is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental

[89] 512 U.S. 753 (1994).

[90] The Court rejected the argument that the injunction was necessarily content-based or viewpoint-based because it applied only to anti-abortion protesters. "An injunction by its very nature applies only to a particular group (or individuals). . . . It does so, however, because of the group's past actions in the context of a specific dispute." There had been no similarly disruptive demonstrations by pro-abortion factions at the abortion clinic. Id. at 762.

interest."[91] Regular time, place, and manner analysis (requiring that regulation be narrowly tailored to serve a significant governmental interest) "is not sufficiently rigorous," the Court explained, because injunctions create greater risk of censorship and discriminatory application, and because of the established principle "that an injunction should be no broader than necessary to achieve its desired goals."[92] Applying its new test, the Court upheld an injunction prohibiting protesters from congregating, picketing, patrolling, demonstrating, or entering any portion of the public right-of-way within 36 feet of an abortion clinic. Similarly upheld were noise restrictions designed to ensure the health and well-being of clinic patients. Other aspects of the injunction, however, did not pass the test. Inclusion of private property within the 36-foot buffer was not adequately justified, nor was inclusion in the noise restriction of a ban on "images observable" by clinic patients. A ban on physically approaching any person within 300 feet of the clinic unless that person indicated a desire to communicate burdened more speech than necessary. Also, a ban on demonstrating within 300 feet of the residences of clinic staff was not sufficiently justified, the restriction covering a much larger zone than an earlier residential picketing ban that the Court had upheld.[93]

In *Schenck v. Pro-Choice Network of Western New York*,[94] the Court applied *Madsen* to another injunction that placed restrictions on demonstrating outside an abortion clinic. The Court upheld the portion of the injunction that banned "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities"—what the Court called "fixed buffer zones."[95] It struck down a prohibition against demonstrating "within fifteen feet of any person or vehicles seeking access to or leaving such facilities"—what it called "floating buffer zones."[96] The Court cited "public safety and order"[97] in upholding the fixed buffer zones, but it found that the floating buffer zones "burden more speech than is necessary to serve the relevant governmental interests"[98] because they make it "quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction."[99] The Court also

[91] Id. at 765.
[92] Id.
[93] Referring to Frisby v. Schultz, 487 U.S. 474 (1988).
[94] 519 U.S. 357 (1997).
[95] Id. at 366 n.3.
[96] Id.
[97] Id. at 376.
[98] Id. at 377.
[99] Id. at 378.

upheld a "provision, specifying that once sidewalk counselors who had entered the buffer zones were required to 'cease and desist' their counseling, they had to retreat 15 feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones." [100]

Different types of issues were presented by *Hurley v. Irish-American Gay Group*, [101] in which the Court held that a state's public accommodations law could not be applied to compel private organizers of a St. Patrick's Day parade to accept in the parade a unit that would proclaim a message that the organizers did not wish to promote. Each participating unit affects the message conveyed by the parade organizers, the Court observed, and application of the public accommodations law to the content of the organizers' message contravened the "fundamental rule . . . that a speaker has the autonomy to choose the content of his own message." [102]

—Leafleting, Handbilling, and the Like

[P. 1181, add to text after n.168:]

Talley's anonymity rationale was strengthened in *McIntyre v. Ohio Elections Comm'n*, [103] invalidating Ohio's prohibition on the distribution of anonymous campaign literature. There is a "respected tradition of anonymity in the advocacy of political causes," the Court noted, and neither of the interests asserted by Ohio justified the limitation. The State's interest in informing the electorate was "plainly insufficient," and, while the more weighty interest in preventing fraud in the electoral process may be accomplished by a direct prohibition, it may not be accomplished indirectly by an indiscriminate ban on a whole category of speech. Ohio could not apply the prohibition, therefore, to punish anonymous distribution of pamphlets opposing a referendum on school taxes.

[P. 1181, substitute for first full paragraph on page:]

The handbilling cases were distinguished in *City Council v. Taxpayers for Vincent*, [104] in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. While a city's concern over visual blight could be addressed by an anti-littering ordinance that did not restrict the expressive activity of distributing handbills, in the case of utility pole signs "it is the

[100] Id. at 367.
[101] 515 U.S. 557 (1995).
[102] Id. at 573.
[103] 514 U.S. 334 (1995).
[104] 466 U.S. 789 (1984).

medium of expression itself" that creates the visual blight. Hence, the city's prohibition, unlike a prohibition on distributing handbills, was narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose.[105] Ten years later, however, the Court unanimously invalidated a town's broad ban on residential signs that permitted only residential identification signs, "for sale" signs, and signs warning of safety hazards.[106] Prohibiting homeowners from displaying political, religious, or personal messages on their own property "almost completely foreclosed a venerable means of communication that is both unique and important," and that is "an unusually cheap and convenient form of communication" without viable alternatives for many residents.[107] The ban was thus reminiscent of total bans on leafleting, distribution of literature, and door-to-door solicitation that the Court had struck down in the 1930's and 1940's. The prohibition in *Vincent* was distinguished as not removing a "uniquely valuable or important mode of communication," and as not impairing citizens' ability to communicate.[108]

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

[106] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[107] Id. at 54, 57.

[108] Id. at 54. The city's legitimate interest in reducing visual clutter could be addressed by "more temperate" measures, the Court suggested. Id. at 58.

SECOND AMENDMENT

[P. 1193, add to n.1:]

JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); William Van Alystyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994).

[P. 1194, add to n.7:]

See also Hickman v. Block, 81 F.3d 98 (9th Cir.) (plaintiff lacked standing to challenge denial of permit to carry concealed weapon, because Second Amendment is a right held by states, not by private citizens), *cert. denied* 117 S. Ct. 276 (1996); United States v. Gomez, 92 F.3d 770, 775 n.7 (9th Cir. 1996) (interpreting federal prohibition on possession of firearm by a felon as having a justification defense "ensures that [the provision] does not collide with the Second Amendment"); United States v. Wright, 117 F.3d 1265 (11th Cir.), *cert. denied* 118 S. Ct. 584 (1997) (member of Georgia unorganized militia unable to establish that his possession of machineguns and pipe bombs bore any connection to the preservation or efficiency of a well regulated militia).

[P. 1194, add to text at end of section:]

Pointing out that interest in the "character of the Second Amendment right has recently burgeoned," Justice Thomas, concurring in the Court's invalidation (on other grounds) of the Brady Handgun Violence Prevention Act, questioned whether the Second Amendment bars federal regulation of gun sales, and suggested that the Court might determine "at some future date . . . whether Justice Story was correct . . . that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'" [109]

[109] Printz v. United States, 521 U.S. 898, 937–39 (1997) (quoting 3 COMMENTARIES § 1890, p. 746 (1833)). Justice Scalia, in extra-judicial writing, has sided with the individual rights interpretation of the Amendment. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW, 136–37 n.13 (A. Gutmann, ed., 1997) (responding to Professor Tribe's critique of "my interpretation of the Second Amendment as a guarantee that the federal government will not interfere with the individual's right to bear arms for self-defense").

FOURTH AMENDMENT

History and Scope of the Amendment

—The Interest Protected

[P. 1206, add to n.38:]

Property rights are still protected by the Amendment, however. A "seizure" of property can occur when there is some meaningful interference with an individual's possessory interests in that property, and regardless of whether there is any interference with the individual's privacy interest. Soldal v. Cook County, 506 U.S. 56 (1992) (a seizure occurred when sheriff's deputies assisted in the disconnection and removal of a mobile home in the course of an eviction from a mobile home park). The reasonableness of a seizure, however, is an additional issue that may still hinge on privacy interests. United States v. Jacobsen, 466 U.S. 109, 120–21 (1984) (DEA agents reasonably seized package for examination after private mail carrier had opened the damaged package for inspection, discovered presence of contraband, and informed agents).

[P. 1214, add to text following n.82:]

In another unusual case, the Court held that a sheriff's assistance to a trailer park owner in disconnecting and removing a mobile home constituted a "seizure" of the home.[1]

Searches and Seizures Pursuant to Warrant

—Probable Cause

[P. 1218, add to n.98:]

Similarly, the preference for proceeding by warrant leads to a stricter rule for appellate review of trial court decisions on warrantless stops and searches than is employed to review probable cause to issue a warrant. Ornelas v. United States, 517 U.S. 690 (1996) (determinations of reasonable suspicion to stop and probable cause to search without a warrant should be subjected to *de novo* appellate review).

—Execution of Warrants

[P. 1226, delete first sentence of section and substitute the following:]

The Fourth Amendment's "general touchstone of reasonableness . . . governs the method of execution of the warrant."[2] Until recently, however, most such issues have been dealt with by statute and rule.[3]

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[1] Soldal v. Cook County, 506 U.S. 56, 61 (1992) (home "was not only seized, it literally was carried away, giving new meaning to the term 'mobile home'").

[2] United States v. Ramirez, 118 S. Ct. 992, 996 (1998).

[3] Rule 41(c), Federal Rules of Criminal Procedure, provides, inter alia, that the warrant shall be served in the daytime, unless the magistrate "for reasonable cause shown" directs in the warrant that it be served at some other time. *See* Jones v.

[P. 1227, add to text following sentence containing n.158:]

In *Wilson v. Arkansas*,[4] the Court determined that the common law "knock and announce" rule is an element of the Fourth Amendment reasonableness inquiry. The "rule" is merely a presumption, however, that yields yields under various circumstances, including those posing a threat of physical violence to officers, those in which a prisoner has escaped and taken refuge in his dwelling, and those in which officers have reason to believe that destruction of evidence is likely. The test, articulated two years later in *Richards v. Wisconsin*,[5] is whether police have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime." In *Richards*, the Court held that there is no blanket exception to the rule whenever officers are executing a search warrant in a felony drug investigation; instead, a case-by-case analysis is required to determine whether no-knock entry is justified under the circumstances.[6]

[P. 1227, delete sentence containing n.159:]

Valid Searches and Seizures Without Warrants

—Detention Short of Arrest—Stop-and-Frisk

[P. 1230, add to n.12:]

Maryland v. Wilson, 519 U.S. 408, 413 (1997) (after validly stopping car, officer may order passengers as well as driver out of car; "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger").

[P. 1230, add to text following n.12:]

If, in the course of a weapons frisk, "plain touch" reveals presence of an object that the officer has probable cause to believe is contraband, the officer may seize that object.[7] The Court viewed the situation as analogous to that covered by the "plain view" doctrine: obvious contraband may be seized, but a search may not be expanded to determine whether an object is contraband.[8]

United States, 357 U.S. 493, 498–500 (1958); Gooding v. United States, 416 U.S. 430 (1974). A separate statutory rule applies to narcotics cases. 21 U.S.C. § 879(a).

[4] 514 U.S. 927 (1995).

[5] 520 U.S. 385, 394 (1997).

[6] The fact that officers may have to destroy property in order to conduct a no-knock entry has no bearing on the reasonableness of their decision not to knock and announce. United States v. Ramirez, 118 S. Ct. 992 (1998).

[7] Minnesota v. Dickerson, 508 U.S. 366 (1993).

[8] Id. at 375, 378–79. In *Dickerson* the Court held that seizure of a small plastic container that the officer felt in the suspect's pocket was not justified; the officer

—Vehicular Searches

[P. 1239, add to n.62:]

An automobile's "ready mobility [is] an exigency sufficient to excuse failure to obtain a search warrant once probable cause is clear"; there is no need to find the presence of "unforeseen circumstances" or other additional exigency. Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).

[P. 1239, delete text accompanying n.63, and substitute the following:]

and they may not make random stops of vehicles on the roads, but instead must base stops of individual vehicles on probable cause or some "articulable and reasonable suspicion"[9] of traffic or safety violation or some other criminal activity.[10]

—Consent Searches

P. 1242, add to n.82:]

Ohio v. Robinette, 519 U.S. 33 (1996) (officer need not always inform a detained motorist that he is free to go before consent to search auto may be deemed voluntary).

—Drug Testing

[P. 1249, substitute for paragraph beginning after n.128:]

Emphasizing the "special needs" of the public school context, reflected in the "custodial and tutelary" power that schools exercise over students, and also noting schoolchildren's diminished expectation of privacy, the Court in *Vernonia School District v. Acton*[11] upheld a school district's policy authorizing random urinalysis drug testing of students who participate in interscholastic athletics. The Court redefined the term "compelling" governmental interest. The

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should not have continued the search, manipulating the container with his fingers, after determining that no weapon was present.

[9] Delaware v. Prouse, 440 U.S. 648, 663 (1979) (discretionary random stops of motorists to check driver's license and registration papers and safety features of cars constitute Fourth Amendment violation); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (violation for roving patrols on lookout for illegal aliens to stop vehicles on highways near international borders when only ground for suspicion is that occupants appear to be of Mexican ancestry). In *Prouse*, the Court cautioned that it was not precluding the States from developing methods for spot checks, such as questioning all traffic at roadblocks, that involve less intrusion or that do not involve unconstrained exercise of discretion. 440 U.S. at 663.

[10] An officer who observes a traffic violation may stop a vehicle even if his real motivation is to investigate for evidence of other crime. Whren v. United States, 517 U.S. 806 (1996). The existence of probable cause to believe that a traffic violation has occurred establishes the constitutional reasonableness of traffic stops regardless of the actual motivation of the officers involved, and regardless of whether it is customary police practice to stop motorists for the violation observed.

[11] 515 U.S. 646 (1995).

phrase does not describe a "fixed, minimum quantum of governmental concern," the Court explained, but rather "describes an interest which appears *important enough* to justify the particular search at hand."[12] Applying this standard, the Court concluded that "deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . or deterring drug use by engineers and trainmen."[13] On the other hand, the interference with privacy interests was not great, the Court decided, since schoolchildren are routinely required to submit to various physical examinations and vaccinations. Moreover, "[l]egitimate privacy expectations are even less [for] student athletes," since they normally suit up, shower, and dress in locker rooms that afford no privacy, and since they voluntarily subject themselves to physical exams and other regulations above and beyond those imposed on non-athletes.[14] The Court "caution[ed] against the assumption that suspicionless drug testing will readily pass muster in other contexts," identifying as "the most significant element" in *Vernonia* the fact that the policy was implemented under the government's responsibilities as guardian and tutor of schoolchildren.[15]

No "special needs" justified Georgia's requirement that candidates for state office certify that they had passed a drug test, the Court ruled in *Chandler v. Miller*.[16] Rather, the Court concluded that Georgia's requirement was "symbolic" rather than "special." There was nothing in the record to indicate any actual fear or suspicion of drug use by state officials, the required certification was not well designed to detect illegal drug use, and candidates for state office, unlike the customs officers held subject to drug testing in *Von Raab*, are subject to "relentless" public scrutiny.

Enforcing the Fourth Amendment: The Exclusionary Rule

—Narrowing Application of the Exclusionary Rule

[P. 1267, add to n.211:]

Similarly, the exclusionary rule does not require suppression of evidence that was seized incident to an arrest that was the result of a clerical error by a court clerk. Arizona v. Evans, 514 U.S. 1 (1995).

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[12] Id. at 661.
[13] Id.
[14] Id. at 657.
[15] Id. at 665.
[16] 520 U.S. 305 (1997).

[P. 1267, add to text following n.213:]

The rule is inapplicable in parole revocation hearings.[17]

—Operation of the Rule: Standing

[P. 1270, add to n.229 following cite to *Rakas v. Illinois*:]

United States v. Padilla, 508 U.S. 77 (1993) (only persons whose privacy or property interests are violated may object to a search on Fourth Amendment grounds; exerting control and oversight over property by virtue of participation in a criminal conspiracy does not alone establish such interests).

[17] Pennsylvania Bd. of Probation and Parole v. Scott, 118 S. Ct. 2014 (1998).

FIFTH AMENDMENT

RIGHTS OF PERSONS

DOUBLE JEOPARDY

Development and Scope

[P. 1282, n.59, delete citation to *One Lot Emerald Cut Stones* case:]

[P. 1283, n.60, delete citation to *89 Firearms* case and add:]

Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (tax on possession of illegal drugs, "to be collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment for purposes of double jeopardy).

[P. 1283, add to text following n.60:]

Ordinarily, however, civil *in rem* forfeiture proceedings may not be considered punitive for purposes of double jeopardy analysis,[1] and the same is true of civil commitment following expiration of a prison term.[2]

Reprosecution Following Acquittal

—Acquittal by Jury

[P. 1290, add note to end of first sentence in section:]

What constitutes a jury acquittal may occasionally be uncertain. In Schiro v. Farley, 510 U.S. 222 (1994), the Court ruled that a jury's action in leaving the verdict sheet blank on all but one count did not amount to an acquittal on those counts, and that consequently conviction on the remaining count, alleged to be duplicative of one of the blank counts, could not constitute double jeopardy. In any event, the Court added, no successive prosecution violative of double jeopardy could result from an initial sentencing proceeding in the course of an initial prosecution.

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[1] United States v. Ursery, 518 U.S. 267 (1996) (forfeitures, pursuant to 19 U.S.C. § 981 and 21 U.S.C. § 881, of property used in drug and money laundering offenses, are not punitive). The Court in *Ursery* applied principles that had been set forth in Various Items of Personal Property v. United States, 282 U.S. 577 (1931) (forfeiture of distillery used in defrauding government of tax on spirits); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (*per curiam*) (forfeiture of jewels brought into United States without customs declaration); and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (forfeiture, pursuant to 18 U.S.C. § 924(d), of firearms "used or intended to be used in" firearms offenses). A two-part inquiry is followed. First, the Court inquires whether Congress intended the forfeiture proceeding to be civil or criminal. Then, if Congress intended that the proceeding be civil, the court determines whether there is nonetheless the "clearest proof" that the sanction is "so punitive" as to transform it into a criminal penalty. *89 Firearms*, supra, 465 U.S. at 366.

[2] Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) (commitment under State's Sexually Violent Predator Act).

Reprosecution Following Conviction

—Sentence Increases

[P. 1296, add to n.131:]

In Monge v. California, 118 S. Ct. 2246 (1998), the Court refused to extend the "narrow" *Bullington* exception outside the area of capital punishment.

[P. 1297, add new paragraph to text following n.133:]

The Court is also quite deferential to legislative classification of recidivism sentencing enhancement factors as relating only to sentencing and as not constituting elements of an "offense" that must be proved beyond a reasonable doubt. Ordinarily, therefore, sentence enhancements cannot be construed as additional punishment for the previous offense, and the Double Jeopardy Clause is not implicated. "Sentencing enhancements do not punish a defendant for crimes for which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime of conviction."[3]

"For the Same Offence"

—Legislative Discretion as to Multiple Sentences

[P. 1299, add to n.142:]

But cf. Rutledge v. United States, 517 U.S. 292 (1996) (21 U.S.C. § 846, prohibiting conspiracy to commit drug offenses, does not require proof of any fact that is not also a part of the continuing criminal enterprise offense under 21 U.S.C. § 848, so there are not two separate offenses).

—Successive Prosecutions for the Same Offense

[P. 1300, substitute for the two sentences immediately following n.150:]

In 1990, the Court modified the *Brown* approach, stating that the appropriate focus is on same conduct rather than same evi-

[3] United States v. Watts, 519 U.S. 148, 154 (1997) (relying on Witte v. United States, 515 U.S. 389 (1995), and holding that a sentencing court may consider earlier conduct of which the defendant was acquitted, so long as that conduct is proved by a preponderance of the evidence). *See also* Almendarez-Torres v. United States, 118 S. Ct. 1219 (1998) (Congress' decision to treat recidivism as a sentencing factor does not violate due process); Monge v. California, 118 S. Ct. 2246 (1998) (retrial is permissible following appellate holding of failure of proof relating to sentence enhancement). Justice Scalia, whose dissent in *Almendarez-Torres* argued that there was constitutional doubt over whether recidivism factors that increase a maximum sentence must be treated as a separate offense for double jeopardy purposes (118 S. Ct. at 1233), answered that question affirmatively in his dissent in *Monge*. 118 S. Ct. at 2255.

dence.[4] That interpretation held sway only three years, however, before being repudiated as "wrong in principle [and] unstable in application."[5]

[P. 1301, add to n.154:]

The fact that *Felix* constituted a "large exception" to *Grady* was one of the reasons the Court cited in overruling *Grady*. United States v. Dixon, 509 U.S. 688, 709–10 (1993).

[P. 1301, add to text following n.154:]

For double jeopardy purposes, a defendant is "punished . . . only for the offense of which [he] is convicted"; a later prosecution or later punishment is not barred simply because the underlying criminal activity has been considered at sentencing for a different offense.[6] Similarly, recidivism-based sentence enhancement does not constitute multiple punishment for the "same" prior offense, but instead is a stiffened penalty for the later crime.[7]

SELF-INCRIMINATION

Development and Scope

[P. 1309, add to n.190:]

In determining whether a state prisoner is entitled to federal habeas corpus relief because the prosecution violated due process by using his post-*Miranda* silence for impeachment purposes at trial, the proper standard for harmless-error review is that announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946)—whether the due process error "had substantial and injurious effect or influence in determining the jury's verdict—not the stricter "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24 (1967), applicable on direct review. Brecht v. Abrahamson, 507 U.S. 619 (1993).

[P. 1311, add to text at end of section:]

There is no "cooperative internationalism" that parallels the cooperative federalism and cooperative prosecution on which appli-

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[4] Grady v. Corbin, 495 U.S. 508 (1990) (holding that the state could not prosecute a traffic offender for negligent homicide because it would attempt to prove conduct for which the defendant had already been prosecuted—driving while intoxicated and failure to keep to the right of the median). A subsequent prosecution is barred, the Court explained, if the government, to establish an essential element of an offense, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Id. at 521.

[5] United States v. Dixon, 509 U.S. 688, 709 (1993) (applying *Blockburger* test to determine whether prosecution for a crime, following conviction for criminal contempt for violation of a court order prohibiting that crime, constitutes double jeopardy).

[6] Witte v. United States, 515 U.S. 389 (1995) (consideration of defendant's alleged cocaine dealings in determining sentence for marijuana offenses does not bar subsequent prosecution on cocaine charges).

[7] Monge v. California, 118 S. Ct. 2246, 2250 (1998).

cation against states is premised, and consequently concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause. [8]

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

—Miranda v. Arizona

[P. 1332, substitute for paragraph that carries over to P. 1333:]

Although the Court had suggested in 1974 that most *Miranda* claims could be disallowed in federal *habeas corpus* cases,[9] such a course was squarely rejected in 1993. The *Stone v. Powell* [10] rule, precluding federal *habeas corpus* review of a state prisoner's claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal *habeas* review of a state prisoner's claim that his conviction had been obtained in violation of *Miranda* safeguards, the Court ruled in *Withrow v. Williams*. [11] The *Miranda* rule differs from the *Mapp v. Ohio* [12] exclusionary rule denied enforcement in *Stone*, the Court explained. While both are prophylactic rules, *Miranda* unlike *Mapp*, safeguards a fundamental trial right, the privilege against self-incrimination. *Miranda* also protects against the use at trial of unreliable statements, hence, unlike *Mapp*, relates to the correct ascertainment of guilt. [13] A further consideration was that eliminating review of *Miranda* claims would not significantly reduce federal *habeas* review of state convictions, since most *Miranda* claims could be recast in terms of due process denials resulting from admission of involuntary confessions. [14]

[P. 1334, add to text following n.324:]

Whether a person is "in custody" is an objective test assessed in terms of how a reasonable person in the suspect's shoes would perceive his or her freedom to leave; a police officer's subjective and undisclosed view that a person being interrogated is a suspect is not relevant for *Miranda* purposes. [15]

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[8] United States v. Balsys, 118 S. Ct. 2218 (1998).

[9] In Michigan v. Tucker, 417 U.S. 433, 439 (1974), the Court had suggested a distinction between a constitutional violation and a violation of "the prophylactic rules developed to protect that right." The actual holding in *Tucker*, however, had turned on the fact that the interrogation had preceded the *Miranda* decision and that warnings—albeit not full *Miranda* warnings—had been given.

[10] 428 U.S. 465 (1976).

[11] 507 U.S. 680 (1993).

[12] 367 U.S. 643 (1961).

[13] 507 U.S. at 691–92.

[14] Id. at 693.

[15] Stansbury v. California, 511 U.S. 318 (1994).

[P. 1338, add to text following n.344:]

After a suspect has knowingly and voluntarily waived his *Miranda* rights, police officers may continue questioning until and unless the suspect clearly requests an attorney.[16]

The Operation of the Exclusionary Rule

—Supreme Court Review

[P. 1341, add to text at end of section:]

In *Withrow v. Williams*,[17] the Court held that the rule of *Stone v. Powell*,[18] precluding federal *habeas corpus* review of a state prisoner's claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal *habeas* review of a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda*.

DUE PROCESS

Substantive Due Process

—Discrimination

[P. 1358, add to n.75 following *Richardson v. Belcher* citation:]

FCC v. Beach Communications, 508 U.S. 307 (1993) (exemption from cable TV regulation of facilities that serve only dwelling units under common ownership).

—Retroactive Taxes

[P. 1364, substitute for last paragraph in section:]

Although the Court during the 1920s struck down gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute,[19] those decisions have recently been distinguished, and their precedential value limited.[20] In *United States v. Carlton*, the Court declared that "[t]he

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[16] Davis v. United States, 512 U.S. 452 (1994) (suspect's statement that "maybe I should talk to a lawyer," uttered after *Miranda* waiver and after an hour and a half of questioning, did not constitute such a clear request for an attorney when, in response to a direct follow-up question, he said "no, I don't want a lawyer").

[17] 507 U.S. 680 (1993).

[18] 428 U.S. 465 (1976). *See* main text, pp. 1265–66.

[19] Untermyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927), modified, 276 U.S. 594 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927). *See also* Heiner v. Donnan, 285 U.S. 312 (1932) (invalidating as arbitrary and capricious a conclusive presumption that gifts made within two years of death were made in contemplation of death).

[20] *Untermyer* was distinguished in United States v. Hemme, 476 U.S. 558, 568 (1986), upholding retroactive application of unified estate and gift taxation to a tax-

due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation—retroactive application of legislation must be shown to be "'justified by a rational legislative purpose.'" [21] Applying that principle, the Court upheld retroactive application of a 1987 amendment limiting application of a federal estate tax deduction originally enacted in 1986. Congress' purpose was "neither illegitimate nor arbitrary," the Court noted, since Congress had acted "to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." Also, "Congress acted promptly and established only a modest period of retroactivity." The fact that the taxpayer had transferred stock in reliance on the original enactment was not dispositive, since "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." [22]

—Deprivation of Property: Retroactive Legislation

[P. 1365, add to n.130:]

Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 636–41 (1993) (imposition of multiemployer pension plan withdrawal liability on an employer is not irrational, even though none of its employees had earned vested benefits by the time of withdrawal). In Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998), the challenge was to a statutory requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that had placed its mining operations in a wholly owned subsidiary three decades earlier, before labor agreements included an express promise of lifetime benefits. In a fractured opinion, the justices ruled 5–4 that the scheme's severe retroactive effect offended the Constitution, though differing on the governing clause. Four of the majority justices based the judgment solely on takings law, while opining that "there is a question" whether the statute violated due process as well. The remaining majority justice, and the four dissenters, viewed substantive due process as the sole appropriate framework for resolving the case, but disagreed on whether a violation had occurred.

[P. 1366, add to n.138:]

The Court has addressed similar issues under breach of contract theory. United States v. Winstar Corp., 518 U.S. 839 (1996).

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payer as to whom the overall impact was minimal and not oppressive. All three cases were distinguished in United States v. Carlton, 512 U.S. 26, 30 (1994), as having been "decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'" The Court noted further that *Untermyer* and *Blodgett* had been limited to situations involving creation of a wholly new tax, and that *Nichols* had involved a retroactivity period of 12 years. Id.

[21] 512 U.S. 26, 30 (1994) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976)). These principles apply to estate and gift taxes as well as to income taxes, the Court added. 512 U.S. at 34.

[22] 512 U.S. at 33.

NATIONAL EMINENT DOMAIN POWER

When Property Is Taken

—Regulatory Takings

[P. 1387, add to n.277 after initial citation:]

Accord, Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 645–46 (1993).

[P. 1387, add to text at end of sentence containing n.277:]

However, where a statute imposes severe and "substantially disproportionate" retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in *Eastern Enterprises v. Apfel* [23] struck down the Coal Miner Retiree Health Benefit Act's requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that spun off its mining operation in 1965 before collective bargaining agreements included an express promise of lifetime benefits.

[P. 1391, delete remainder of paragraph after n.299 and substitute the following:]

"If [the government] wants an easement across the Nollans' property, it must pay for it." [24] Because the *Nollan* Court found no essential nexus between the permit condition and the asserted government interest, it did not address whether there is any additional requirement when such a nexus does exist, as is often the case with land dedications and other permit conditions. [25] Seven years later, however, the Court announced in *Dolan v. City of*

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[23] 118 S. Ct. 2131 (1998). The split doctrinal basis of *Eastern Enterprises* undercuts its precedent value, and that of *Connolly* and *Concrete Pipe*, for takings law. A majority of the justices (one supporting the judgment and four dissenters) found substantive due process, not takings law, to provide the analytical framework where, as in *Eastern Enterprises*, the gravamen of the complaint is the unfairness and irrationality of the statute, rather than its economic impact.

[24] 483 U.S. at 842.

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

Tigard [26] that exaction conditions attached to development permits must be related to the impact of the proposed development not only in nature but also in degree. Government must establish a "rough proportionality" between permit conditions and the developmental impacts at which they are aimed. [27] The Court ruled in *Dolan* that the city's conditioning of a building permit for expansion of a hardware store on the store owner's dedication of a portion of her land for a floodplain/recreational easement and for an adjacent pedestrian/bicycle pathway amounted to a taking. The requisite nexus existed between the city's interest in flood control and imposition of the floodplain easement, and between the interest in minimizing traffic congestion and the required bike path dedication, but the Court found that the city had not established a rough proportionality of degree. The floodplain/recreational easement not only prevented the property owner from building in the floodplain—a legitimate constraint—but also deprived her of the right to exclude others. And the city had not adequately demonstrated that the bike path was necessitated by the additional vehicle and bicycle trips that would be generated by the applicant's development. [28]

[P. 1393, add to text following n.306:]

Outside the land-use context, however, the Court has now recognized a limited number of situations where invalidation, rather than compensation, remains the appropriate takings remedy. [29]

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[26] 512 U.S. 374 (1994).

[27] Id. at 391. Justice Stevens' dissent criticized the Court's "abandon[ment of] the traditional presumption of constitutionality and imposi[tion of] a novel burden of proof on [the] city." Id. at 405. The Court responded by distinguishing between challenges to generally applicable zoning regulations, where the burden appropriately rests on the challenging party, and imposition of property exactions through adjudicative proceedings, where "the burden properly rests on the city." Id. at 391 n.8. As for the standard of proof, the Court looked to state law and rejected the two extremes—a generalized statement of connection deemed "too lax" to protect the Fifth Amendment right to just compensation, and a "specific and uniquely attributable" test deemed too exacting. Instead, the Court chose an "intermediate position" requiring a showing of "reasonable relationship," but recharacterized it as "rough proportionality" in order to avoid confusion with "rational basis." Id. at 391.

[28] The city had quantified the traffic increases that could be expected from the development, but had merely speculated that construction of the bike path "could offset" some of that increase. While "[n]o precise mathematical calculation is required," the Court concluded, "the city must make some effort to quantify its findings in support of the dedication." Id. at 395–96.

[29] Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) (statute imposing generalized monetary liability); Babbitt v. Youpee, 519 U.S. 234 (1997) (amended statutory requirement that small fractional interests in allotted Indian lands escheat to tribe, rather than pass on to heirs); Hodel v. Irving, 481 U.S. 704 (1987) (pre-amendment version of escheat statute).

[P. 1394, change n.312 to read:]

Hodel v. Irving, 481 U.S. 704 (1987) (complete abrogation of the right to pass on to heirs fractionated interests in lands constitutes a taking); Babbitt v. Youpee, 519 U.S. 234 (1997) (same result based on "severe" restriction of the right).

[P. 1394, add to text after n.312:]

Nor must property have realizable net value to fall under the Takings Clause.[30]

[P. 1395, delete remainder of paragraph after n.314 and substitute the following new paragraph:]

Failure to incur such administrative (and judicial) delays can result in dismissal of an as-applied taking claim based on ripeness doctrine, an area of takings law that the Court has developed extensively since *Penn Central*. In the leading decision of *Williamson County Regional Planning Comm'n v. Hamilton Bank*,[31] the Court announced the canonical two-part ripeness test for takings actions brought in federal court against state and local agencies. First, for an as-applied challenge, the property owner must obtain from the regulating agency a "final, definitive position" regarding how it will apply its regulation to the owner's land. Second, the owner must exhaust any possibilities for obtaining compensation from state fora before coming to federal court. Thus, the claim in *Williamson County* was found unripe because the plaintiff had failed to seek a variance (first prong of test), and had not sought compensation from the state courts in question even though they recognized inverse condemnation claims (second prong). Similarly, in *MacDonald, Sommer & Frates v. County of Yolo*,[32] a final decision was found lacking where the landowner had been denied approval for one subdivision plan calling for intense development, but that denial had not foreclosed the possibility that a scaled-down (though still economic) version would be approved.[33] In a somewhat different context, a taking challenge to a municipal rent control ordi-

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[30] Phillips v. Washington Legal Foundation, 118 S. Ct. 1925 (1998) (interest on client funds in state Interest on Lawyers Trust Account program is property of client within meaning of Takings Clause, though funds could not generate net interest in absence of program).

[31] 473 U.S. 172 (1985).

[32] 477 U.S. 340 (1986).

[33] Most recently, the Court found the final-decision prerequisite met in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997). That threshold showing, said the Court, did not demand that a landowner first apply for approval of her sale of transferrable development rights (TDRs) where the parties agreed on the TDRs to which she was entitled and their value was simply an issue of fact. *Suitum* is also significant for reaffirming the two-prong *Williamson County* ripeness test, despite its rigorous application by lower federal courts to avoid reaching the merits in the majority of takings cases.

nance was considered "premature" in the absence of evidence that a tenant hardship provision had ever been applied to reduce what would otherwise be considered a reasonable rent increase.[34] Facial challenges dispense with the *Williamson County* final decision prerequisite, though at great risk to the plaintiff in that without pursuing administrative remedies, a claimant often lacks evidence that a statute has the requisite economic impact on his or her property.[35]

[34] Pennell v. City of San Jose, 485 U.S. 1 (1988).

[35] *See, e.g.,* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295–97 (1981) (facial challenge to surface mining law rejected); United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (mere permit requirement does not itself take property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493–502 (1987) (facial challenge to anti-subsidence mining law rejected).

SIXTH AMENDMENT

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

[P. 1408, change heading to:]

—The Attributes and Function of the Jury

[P. 1410, add to text following n.64:]

Certain functions of the jury are likely to remain consistent between the federal and state court systems. For instance, the requirement that a jury find a defendant guilty beyond a reasonable doubt, which had already been established under the Due Process Clause,[1] has been held to be a standard mandated by the Sixth Amendment.[2] The Court has further held that the Fifth Amendment Due Process Clause and the Sixth Amendment require that a jury find a defendant guilty of every element of the crime with which he is charged, including questions of mixed law and fact.[3] Thus, a district court presiding over a case of providing false statements to a federal agency in violation of 18 U.S.C. § 1001 erred when it took the issue of the "materiality" of the false statement away from the jury.[4]

—Criminal Proceedings to Which the Guarantee Applies

[P. 1411, add to text following n.68:]

A defendant who is prosecuted in a single proceeding for multiple petty offenses, however, does not have a constitutional right to a jury trial, even if the aggregate of sentences authorized for the offense exceeds six months.[5]

[P. 1411, add to n.73:]

The distinction between criminal and civil contempt may be somewhat more elusive. International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (fines levied on the union were criminal in nature where the conduct did not occur in the court's presence, the court's injunction required compliance with an entire code of conduct, and the fines assessed were not compensatory).

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[1] *See* In re Winship, 397 U.S. 358, 364 (1970).
[2] Sullivan v. Louisiana, 508 U.S. 275 (1993).
[3] United States v. Gaudin, 515 U.S. 506 (1995).
[4] *Gaudin*, 515 U.S. at 523.
[5] Lewis v. United States, 518 U.S. 322 (1996).

PLACE OF TRIAL—JURY OF VICINAGE

[P. 1419, add to text following n.128:]

Thus, a defendant cannot be tried in Missouri for money-laundering if the charged offenses occurred in Florida and there was no evidence that the defendant had been involved with the receipt or transportation of the proceeds from Missouri.[6]

CONFRONTATION

[P. 1423, add to n.158:]

Bruton was held applicable, however, where a blank space or the word "deleted" is substituted for the defendant's name in a co-defendant's confession, making such confession incriminating of the defendant on its face. Gray v. Maryland, 118 S. Ct. 1151 (1998).

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel

—*Gideon v. Wainwright*

[P. 1435, n.217, delete citation and parenthetical to *Baldasar v. Illinois* appearing after last semi-colon, and insert the following:]

But see Nichols v. United States, 511 U.S. 738 (1994) (as Scott v. Illinois, 440 U.S. 367 (1979) provides that an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction may be used as the basis for penalty enhancement upon a subsequent conviction).

—Effective Assistance of Counsel

[P. 1439, add to n.244:]

In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court applied the *Strickland* test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty.

[P. 1439, delete last sentence at end of first full paragraph on page and add the following:]

In *Lockhart v. Fretwell,*[7] the Court refined the *Strickland* test to require that not only would a different trial result be probable because of attorney performance, but that the trial result which did occur was fundamentally unfair or unreliable.[8]

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[6] United States v. Cabrales, 118 S. Ct. 1772 (1998).

[7] 506 U.S. 364 (1993).

[8] 506 U.S. at 368–70 (1993) (failure of counsel to raise a constitutional claim that was valid at time of trial did not constitute "prejudice" because basis of claim had since been overruled).

SEVENTH AMENDMENT

TRIAL BY JURY IN CIVIL CASES

Application of the Amendment

—Cases "at Common Law"

[P. 1455, add to n.29:]

Feltner v. Columbia Pictures Television, 118 S. Ct. 1279 (1998) (jury trial required for copyright action with close analog at common law, even though the relief sought is not actual damages but statutory damages based on what is "just)."

[P.1455, add to text following n.30:]

Where there is no direct historical antecedent dating to the adoption of the amendment, the court may also consider whether existing precedent and the sound administration of justice favor resolution by judges or juries. [1]

—Procedures Limiting Jury's Role

[P.1461, add to n.59:]

A federal appellate court may also review a district court's denial of a motion to set aside an award as excessive under an abuse of discretion standard. Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) (New York State law which requires a review of jury awards to determine if they "deviate materially from reasonable compensation" may be adopted by federal district, but not appellate, court exercising diversity jurisdiction).

—Directed Verdicts

[P. 1461, add new note at end of sentence beginning after n.61:]

But see Hetzel v. Prince William County, 118 S. Ct. 1210 (1998) (when an appeals court affirms liability but orders level of damages to be reconsidered, the plaintiff has a Seventh Amendment right either to accept the reduced award or to have a new trial).

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[1] Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) (interpretation and construction of terms underlying patent claims may be reserved entirely for the court).

EIGHTH AMENDMENT

EXCESSIVE FINES

[P. 1471, add to text following n.35:]

The Court has held, however, that the excessive fines clause can be applied in civil forfeiture cases.[1]

[P. 1471, delete paragraph after n.35, and add the following:]

In 1998, however, the Court discerned a previously unseen vitality in the strictures of this clause. In *United States v. Bajakajian*,[2] the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than $10,000 in currency out of the country forfeit the currency involved, which totaled $357,144. The Court held that the forfeiture[3] in this particular case would violate the Excessive Fines clause and that the amount forfeited was grossly disproportionate to the gravamen of defendant's offense. In determining proportionality, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense.[4]

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[1] In Austin v. United States, 509 U.S. 602 (1993), the Court noted that the application of the excessive fines clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be seen as punishment. The Court was apparently willing to consider any number of factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more recent incarnations.

[2] 118 S. Ct. 2028 (1998).

[3] The Court held that a criminal forfeiture, which is imposed at the time of sentencing, should be considered a fine, because it serves as a punishment for the underlying crime. 118 S.Ct. at 2033. The Court distinguished this from civil forfeiture, which, as an *in rem* proceeding against property, would generally not function as a punishment of the criminal defendant. 118 S.Ct. at 2036.

[4] In *Bajakajian*, the lower court found that the currency in question was not derived from illegal activities, and that the defendant, who had grown up a member of the Armenian minority in Syria, had failed to report the currency out of distrust of the government. 118 S.Ct. at 2032. The Court found it relevant that the defendant did not appear to be among the class of persons for whom the statute was designed, *i.e.* a money launderer or tax evader, and that the harm to the government from the defendant's failure to report the currency was minimal. 118 S.Ct. at 2038–39.

CRUEL AND UNUSUAL PUNISHMENT

Capital Punishment

[P. 1478, add to n.69:]

Consequently, a judge may be given significant discretion to override a jury sentencing recommendation, as long as the court's decision is adequately channeled to prevent arbitrary results. Harris v. Alabama, 513 U.S. 504 (1995) (Eighth Amendment not violated where judge is only required to "consider" a capital jury's sentencing recommendation).

[P. 1480, add to n.76:]

But see Tuilaepa v. California, 512 U.S. 967 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant's prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).

[P. 1480, add to n.77:]

Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase "exhibited utter disregard for human life" to require that the defendant be a "cold-blooded, pitiless slayer" cures vagueness).

[P. 1480, add to n.81 after citation to *Spaziano v. Florida*:]

See Hopkins v. Reeves, 118 S. Ct. 1895 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses).

[P. 1481, add to n.82:]

Romano v. Oklahoma, 512 U.S. 1 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment).

[P. 1483, add new note at end of second sentence of paragraph beginning after n.93:]

See, e.g., Johnson v. Texas, 509 U.S. 350 (1993) (consideration of youth as a mitigating factor may be limited to jury estimation of probability that defendant would commit future acts of violence).

[P. 1483, add new note at end of third sentence of paragraph beginning after n.93:]

Richmond v. Lewis, 506 U.S. 40 (1992) (no cure of trial court's use of invalid aggravating factor where appellate court fails to reweigh mitigating and aggravating factors).

[P. 1484, add to n.98]

A court is not required give a jury instruction expressly directing the jury to consider mitigating circumstance, as long as the instruction actually given affords the jury the discretion to take such evidence into consideration. Buchanan v. Angelone, 118 S. Ct. 757 (1998).

[P. 1484, add to n.103:]

Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 516 U.S. 10 (1995) (per curiam).

[P. 1487, add to text following n.116:]

In addition, the Court has held that, absent an independent constitutional violation, *habeas corpus* relief for prisoners who assert innocence based on newly discovered evidence should generally be denied.[5]

[P.1498, add to n.171:]

Helling v. McKinney, 509 U.S. 25 (1993) (prisoner who alleged exposure to secondhand "environmental" tobacco smoke stated a cause of action under the Eighth Amendment).

[P. 1498, add to n.174:]

Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires a finding that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994).

[5] Herrera v. Collins, 506 U.S. 390 (1993) (holding that a petitioner would have to meet an "extraordinarily high" threshold of proof of innocence to warrant federal *habeas* relief).

TENTH AMENDMENT

RESERVED POWERS

Effect of Provisions on Federal Powers

—Federal Police Powers

[P. 1514, add to text following first sentence in paragraph starting after n.42:]

More recently, the Court struck down a statute prohibiting possession of a gun at or near a school, rejecting an argument that possession of firearms in school zones can be punished under the Commerce Clause because it impairs the functioning of the national economy. Acceptance of this rationale, the Court said, would eliminate "a[ny] distinction between what is truly national and what is truly local," would convert Congress' commerce power into "a general police power of the sort retained by the States," and would undermine the "first principle" that the Federal Government is one of enumerated and limited powers.[1]

—Federal Regulations Affecting State Activities and Instrumentalities

[P. 1518, add new paragraph at end of section:]

Extending the principle applied in *New York*, the Court in *Printz v. United States*[2] held that Congress may not "circumvent" the prohibition on commandeering a state's regulatory processes "by conscripting the State's officers directly."[3] Struck down in *Printz* were interim provisions of the Brady Handgun Violence Protection Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[4]

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[1] United States v. Lopez, 514 U.S. 549, 552, 567–68 (1995).

[2] 521 U.S. 898 (1997).

[3] 521 U.S. at 935.

[4] Id.

ELEVENTH AMENDMENT

STATE IMMUNITY

Purpose and Early Interpretation

—Expansion of the Immunity of the States

[P. 1526, add to text following n.31:]

An *in rem* admiralty action may be brought, however, if the State is not in possession of the *res*.[1]

[P. 1527, add to n.32 after first citation:]

Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) (foreign nation may not contest validity of criminal conviction after State's failure at time of arrest to comply with notice requirements of Vienna Convention on Consular Relations).

The Nature of the States' Immunity

[P. 1527, add to n.33:]

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 64 (1996).

[P. 1528, add to n.43 after first sentence and accompanying citation:]

Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is "the authority that makes the law" creating the right of action. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 154 (1996) (Justice Souter dissenting).

[P. 1530, delete n.51 and accompanying text]

[P. 1530, delete second full paragraph on page]

[P. 1531, add to text at end of section:]

The *Hans* interpretation has been solidified with the Court's ruling in *Seminole Tribe of Florida v. Florida*,[2] that Congress lacks the power under Article I to abrogate state immunity under the Eleventh Amendment. That too, however, was a 5–4 decision, with the four dissenting Justices believing that *Hans* was wrongly decided.[3]

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[1] California v. Deep Sea Research, Inc., 118 S. Ct. 1464 (1998) (application of the Abandoned Shipwreck Act) (distinguishing *Ex parte New York* and *Treasure Salvors* as involving *in rem* actions against property actually in possession of the State).

[2] 517 U.S. 44 (1996).

[3] Chief Justice Rehnquist wrote the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Stevens dissented, as did Justice Souter, whose opinion was joined by Justices Ginsburg and Breyer.

Suits Against States

—Consent to Suit and Waiver

[P. 1533, add to n.68:]

The fact that a state agency can be indemnified for the costs of litigation does not divest the agency of its Eleventh Amendment immunity. Regents of the University of California v. Doe, 519 U.S. 425 (1997).

—Congressional Withdrawal of Immunity

[P. 1535, delete last sentence of first paragraph and substitute the following new paragraph:]

Pennsylvania v. Union Gas lasted less than seven years, the Court overruling it in *Seminole Tribe of Florida v. Florida*.[4] Chief Justice Rehnquist, writing for a 5–4 majority, concluded that there is "no principled distinction in favor of the States to be drawn between the Indian Commerce Clause [at issue in *Seminole Tribe*] and the Interstate Commerce Clause [relied upon in *Union Gas*]."[5] In the majority's view, *Union Gas* had deviated from a line of cases tracing back to *Hans v. Louisiana*[6] that viewed the Eleventh Amendment as implementing the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III."[7] Because "the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[8] Section 5 of the Fourteenth Amendment, of course, is another matter. *Fitzpatrick v. Bitzer*,[9] "based upon a rationale wholly inapplicable to the Interstate Commerce Clause, *viz.*, that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to

[4] 517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

[5] 517 U.S. at 63.

[6] 134 U.S. 1 (1890).

[7] 517 U.S. at 64 (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–98 (1984).

[8] Id. at 72–73. Justice Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in *Hans v. Louisiana* was a common law concept that "had no constitutional status and was subject to congressional abrogation." 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This "imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty." Id. at 160.

[9] 427 U.S. 445 (1976).

alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," remains good law. [10]

Suits Against State Officials

[P. 1540, add to n.105:]

In the process of limiting application of *Young*, a Court majority has recently referred to "the *Young* fiction." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997).

[P. 1541, add to n.112:]

In a case removed from state court, presence of a claim barred by the Eleventh Amendment does not destroy jurisdiction over non-barred claims. Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047 (1998).

[P. 1544, add as first full paragraph on page (penultimate paragraph in section):]

In *Idaho v. Coeur d'Alene Tribe*, [11] the Court further narrowed *Ex parte Young*. The implications of the case are difficult to predict, due to the narrowness of the Court's holding, the closeness of the vote (5–4), and the inability of the majority to agree on a rationale. The holding was that the Tribe's suit against state officials for a declaratory judgment and injunction to establish the Tribe's ownership and control of the submerged lands of Lake Coeur d'Alene is barred by the Eleventh Amendment. The Tribe's claim was based on federal law—Executive Orders issued in the 1870s, prior to Idaho Statehood. The portion of Justice Kennedy's opinion that represented the opinion of the Court concluded that the Tribe's "unusual" suit was "the functional equivalent of a quiet title action which implicates special sovereignty interests." [12] The case was "unusual" because state ownership of submerged lands traces to the Constitution through the "equal footing doctrine," and because navigable waters "uniquely implicate sovereign interests." [13] This was therefore no ordinary property dispute in which the State would retain regulatory control over land regardless of title. Rather, grant of the "far-reaching and invasive relief" sought by the Tribe "would diminish, even extinguish, the State's control over a vast reach of lands and waters long . . . deemed to be an integral part of its territory." [14] A separate part of Justice Kennedy's opinion, joined only by Chief Justice Rehnquist, advocated more

[10] 517 U.S. at 65–66.
[11] 521 U.S. 261 (1997).
[12] 521 U.S. at 281.
[13] Id. at 284.
[14] Id. at 282.

broadscale diminishment of *Young*. The two would apply case-by-case balancing, taking into account the availability of a state court forum to resolve the dispute and the importance of the federal right at issue. Concurring Justice O'Connor, joined by Justices Scalia and Thomas, rejected such balancing. *Young* was inapplicable, Justice O'Connor explained, because "it simply cannot be said" that a suit to divest the State of all regulatory power over submerged lands "is not a suit against the State." [15]

[15] Id. at 296.

FOURTEENTH AMENDMENT

DUE PROCESS OF LAW

The Development of Due Process of Law

—"Liberty"

[P. 1581, add to n.75:]

County of Sacramento v. Lewis, 118 S. Ct. 1708 (1998) (high-speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment's guarantee of substantive due process).

Health, Safety and Morals

—Protecting Morality

[P.1636, add to text following n.163:]

Similarly, a court may order a car used in an act of prostitution forfeited as a public nuisance, even if this works a deprivation on an innocent joint owner of the car. [1]

Procedure in Taxation

—Sufficiency of Remedy

[P.1665, add to n.177:]

See also Reich v. Collins, 513 U.S. 106 (1994) (violation of due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dep't of Revenue, 118 S. Ct. 904 (1998) (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy).

Substantive Due Process and Noneconomic Liberty

[P. 1690, change heading to:]

—Liberty Interests of the Retarded, Mentally Ill or Abnormal: Civil Commitment and Treatment

[P. 1691, add paragraph to text after n.310:]

The Court's resolution of a case involving persistent sexual offenders suggests that state civil commitment systems, besides confining the dangerously mentally ill, may also act to incapacitate persons predisposed to engage in specific criminal behaviors. In

[1] Bennis v. Michigan, 516 U.S. 442 (1996).

Kansas v. Hendricks,[2] the Court upheld a Kansas state law which allowed civil commitment without a showing of "mental illness," so that a defendant diagnosed as a pedophile could be committed based on his having a "mental abnormality" which made him "likely to engage in acts of sexual violence." Although the Court minimized the use of this expanded nomenclature,[3] the concept of abnormality appears both more encompassing and less defined than the concept of illness. It is unclear how, or whether, the Court would distinguish this case from the indefinite civil commitment of other recidivists such as drug offenders.

—"Right to Die"

[P. 1693, add new paragraph at end of section:]

In *Washington v. Glucksberg*,[4] however, the Supreme Court rejected an argument that the Due Process Clause provides a terminally ill individual the right to seek and obtain a physician's aid in committing suicide. Reviewing a challenge to a state statutory prohibition against assisted suicide, the Court noted that it moves with "utmost care" before breaking new ground in the area of liberty interests.[5] The Court pointed out that suicide and assisted suicide have long been disfavored by the American judicial system, and courts have consistently distinguished between passively allowing death to occur and actively causing such death. The Court rejected the applicability of *Cruzan* and other liberty interest cases,[6] noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected. By rejecting the notion that assisted suicide is constitutionally protected, the Court also appears to preclude constitutional protection for other forms of intervention in the death process, such as suicide or euthanasia.[7]

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[2] 521 U.S. 346 (1997).

[3] 521 U.S. at 359. *But see* Foucha v. Lousiana, 504 U.S. 71, 80 (1992) (holding that a state can not hold a person suffering from a personality disorder without clear and convincing proof of a mental illness).

[4] 521 U.S. 702 (1997). In the companion case of Vacco v. Quill, 521 U.S. 793 (1997), the Court also rejected an argument that a state which prohibited assisted suicide but which allowed termination of medical treatment resulting in death unreasonably discriminated against the terminally ill in violation of the Equal Protection Clause of the Fourteenth Amendment.

[5] 521 U.S. at 720.

[6] *E.g.,* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a liberty interest in terminating pregnancy).

[7] A passing reference by Justice O'Connor in a concurring opinion in *Glucksberg* and its companion case *Vacco v. Quill* may, however, portend a liberty interest in seeking pain relief, or "palliative" care. *Glucksberg* and *Vacco* 521 U.S. at 736–37 (Justice O'Connor, concurring).

PROCEDURAL DUE PROCESS: CIVIL

Power of the State to Regulate Procedure

—Costs, Damages, and Penalties

[P. 1698, add to n.34:]

See also Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution limiting judicial review of the amount of punitive damages awarded by a jury).

[P. 1698, add to text after n.34:]

The Court has indicated, however, that the amount of punitive damages is limited to those reasonably necessary to vindicate a state's interest in deterring unlawful conduct.[8] These limits may be discerned by a court by examining the degree of reprehensibility of the act, the ratio between the punitive award and plaintiff's actual or potential harm, and the legislative sanctions provided for comparable misconduct.[9]

Jurisdiction

[P. 1716, change heading:]

—Actions In Rem: Proceeding Against Property

[P. 1717, add to n.144:]

Predeprivation notice and hearing may be required if the property is not the sort that, given advance warning, could be removed to another jurisdiction, destroyed, or concealed. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (notice to owner required before seizure of house by government).

The Procedure Which is Due Process

—The Interests Protected: Entitlement and Positivist Recognition

[P. 1730, add to n.214 after citation to *Connecticut Bd. of Pardons v. Dumschat*:]

Ohio Adult Parole Auth. v. Woodard, 118 S. Ct. 1244 (1998).

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[8] BMW v. Gore, 517 U.S. 559 (1996) (holding that a $2 million judgement for failing to disclose to a purchaser that a "new" car had been repainted was "grossly excessive" in relation to the state's interest, as only a few of the 983 similarly repainted cars had been sold in that same state). *But see* TXO Prod. Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause of the Fourteenth Amendment even though the jury awarded actual damages of only $19,000).

[9] BMW v. Gore, 517 U.S. at 574–75 (1996).

[P.1731, add to text following n.215:]

In an even more recent case, the Court limited the application of this test to those circumstances where the restraint on freedom imposed by the State creates an "atypical and significant" deprivation. [10]

—When is Process Due

[P. 1737, add to text following n.246:]

Where the adverse action is less than termination of employment, the governmental interest is significant, and where reasonable grounds for such action have been established separately, then a prompt hearing held after the adverse action may be sufficient. [11]

—The Requirements of Due Process

[P. 1741, add to n.269:]

See also Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayers who challenged a county's occupation tax had not been informed of the prior case and where their interests had not been adequately protected).

PROCEDURAL DUE PROCESS: CRIMINAL

The Elements of Due Process

—Other Aspects of Statutory Notice

[P. 1750, add to text following n.24:]

Persons may be bound by a novel application of a statute, not supported by Supreme Court or other "fundamentally similar" case precedent, so long as the court can find that, under the circumstance, "unlawfulness . . . is apparent" to the defendant. [12]

—Initiation of Prosecution

[P. 1753, add to n.43:]

The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. Albright v. Oliver, 510 U.S. 266 (1994) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause).

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[10] Sandin v. Conner, 515 U.S. 472, 484 (1995) (solitary confinement not atypical "in relation to the ordinary incidents of prison life").

[11] Gilbert v. Homar, 520 U.S. 924 (1997) (no hearing required prior to suspension without pay of tenured police officer arrested and charged with a felony).

[12] United States v. Lanier, 520 U.S. 259, 271–72 (1997).

—Fair Trial

[P. 1756, add to n.59:]

But see Montana v. Egelhoff, 518 U.S. 37 (1996) (state may bar defendant from introducing evidence of intoxication to prove lack of *mens rea*).

—Prosecutorial Misconduct

[P. 1760, add to n.76:]

See also Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no Due Process violation where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case).

—Proof, Burden of Proof, and Presumptions

[P. 1761, add to n.83:]

See also Sullivan v. Louisiana, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt).

[P. 1762, add to n.87:]

But see Victor v. Nebraska, 511 U.S. 1 (1994) (considered as a whole, jury instructions that define "reasonable doubt" as requiring a "moral certainty" or as equivalent to "substantial doubt" did not violate due process because other clarifying language was included.)

[P. 1764, add to n.96:]

The Court has held, however, that for purposes of a recidivism-based sentence enhancement where a prosecutor carries the burden of establishing a prior conviction, a defendant can be required to bear the burden of production in challenging the validity of such conviction. *See* Parke v. Raley, 506 U.S. 20 (1992) (a sentencing court considering a guilty plea in prior case may rely upon a presumption of regularity during that proceeding).

Where the sentencing factor in question is one traditionally associated with sentencing, such factor may even be the basis for a significant increase in the maximum sentence available, despite the fact that the factor itself is not treated as an element of that crime. Almendarez-Torres v. United States, 118 S. Ct. 1219 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to maximum sentence of twenty years.)

[P. 1765, add to n.104 after *Spencer v. Texas* cite:]

Parke v. Raley, 506 U.S. 20 (1992).

—The Problem of the Incompetent or Insane Defendant or Convict

[P. 1769, add to n.120:]

It is a violation of due process, however, for a state to require that a defendant must prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

—Corrective Process: Appeals and Other Remedies

[P. 1773, add to n.150:]

Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim. *See* Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the State "enable [a] prisoner to discover grievances, and to litigate effectively").

—Probation and Parole

[P. 1780, add to text at end of sentence carried over from preceding page:]

The power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.[13]

EQUAL PROTECTION OF THE LAWS

Equal Protection: Judging Classification by Law

—The Traditional Standard: Restrained Review

[P. 1805, add footnote to sentence appearing after n.107:]

Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and patients who are not on life support systems and are not allowed to hasten death by self-administering prescribed drugs).

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

Police Power Regulation

—Classification

[P. 1831, add to n.260 after paragraph headed "Attorneys":]

Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single owner.

EQUAL PROTECTION AND RACE

Juries

[P. 1855, add to n.79 after citation to *Powers v. Ohio*:]

Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury).

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[13] Ohio Adult Parole Auth. v. Woodard, 118 S. Ct. 1244 (1998).

Permissible Remedial Utilization of Racial Classifications

[P. 1868, delete last sentence and add to text at end of section:]

The distinction between federal and state power to apply racial classifications proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Pena*[14] that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefited by the particular classification; there is no intermediate standard applicable to "benign" racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection . . . has not been infringed."[15]

THE NEW EQUAL PROTECTION

Classifications Meriting Close Scrutiny

—Sex

[P. 1879, add to text after n.51:]

Even when the negative "stereotype" which is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In *J.E.B. v. Alabama ex rel. T.B.*,[16] the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would undermine the litigants' interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

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[14] 515 U.S. 200 (1995). This was a 5–4 decision. Justice O'Connor's opinion of Court was joined by Chief Justice Rehnquist, and by Justices Kennedy, Thomas, and—to the extent not inconsistent with his own concurring opinion—Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.

[15] 515 U.S. at 227 (emphasis original).

[16] 511 U.S. 127 (1994).

[P. 1881, add to n.58:]

See also Miller v. Albright, 118 S. Ct. 1428 (1998) (opinion by Justice Stevens, joined by Justice Rehnquist) (equal protection not violated where child of a citizen mother is established at birth, but child of citizen father must establish paternity by age 18).

[P. 1885, add to text after n.76:]

In a 1996 case, the Court required that a state demonstrate "exceedingly persuasive justification" for gender discrimination. When a female applicant challenged the exclusion of women from the historically male-only Virginia Military Institute (VMI), the State of Virginia defended the exclusion of females as essential to the nature of training at the military school.[17] The State argued that the VMI program, which included rigorous physical training, deprivation of personal privacy, and an "adversative model" that featured minute regulation of behavior, would need to be unacceptably modified to facilitate the admission of women. While recognizing that women's admission would require accommodation such as different housing assignments and physical training programs, the Court found that the reasons set forth by the State were not "exceedingly persuasive," and thus the State did not meet its burden of justification. The Court also rejected the argument that a parallel program established by the State at a private women's college served as an adequate substitute, finding that the program lacked the military-style structure found at VMI, and that it did not equal VMI in faculty, facilities, prestige, or alumni network.

Fundamental Interests: The Political Process

—Apportionment and Districting

[P. 1905, add to n.157 after cite for *Summers v. Cenarrusa*:]

But see Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for further consideration the rejection of a deviation in excess of 10% intended to preserve political subdivision boundaries).

[P. 1906, add to text following n.161:]

Even if racial gerrymandering is intended to benefit minority voting populations, it is subject to strict scrutiny under the Equal Protection Clause if racial considerations are the dominant and controlling rationale in drawing district lines.[18] Showing that a district's "bizarre" shape departs from traditional districting prin-

[17] United States v. Virginia, 518 U.S. 515 (1996).

[18] Miller v. Johnson, 515 U.S. 900 (1995) (drawing congressional district lines in order to comply with § 5 of the Voting Rights Act as interpreted by the Department of Justice not a compelling governmental interest).

ciples such as compactness, contiguity, and respect for political subdivision lines may serve to reinforce such a claim,[19] although three Justices would not preclude the creation of "reasonably compact" majority-minority districts in order to remedy past discrimination or to comply with the requirements of the Voting Rights Act of 1965.[20]

[P. 1916, add new heading and text following n.24:]

Sexual Orientation

In *Romer v. Evans*,[21] the Supreme Court struck down a state constitutional amendment which both overturned local ordinances prohibiting discrimination against homosexuals, lesbians or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or to grant preferences based on sexual orientation. The Court declined to follow the lead of the Supreme Court of Colorado, which had held that the amendment infringed on gays' and lesbians' fundamental right to participate in the political process.[22] The Court also rejected the application of the heightened standard reserved for suspect classes, and sought only to determine whether the legislative classification had a rational relation to a legitimate end.

The Court found that the amendment failed even this restrained review. Animus against a class of persons was not considered by the Court as a legitimate goal of government: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[23] The Court then rejected arguments that the amendment protected the freedom of association rights of landlords and employers, or that it would conserve resources in fighting discrimination against other groups. The Court found that the scope of the law was unnecessarily broad to achieve these stated

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[19] *Id.*; Shaw v. Reno, 509 U.S. 630 (1993). *See also* Shaw v. Hunt, 517 U.S. 899 (1996) (creating an unconventionally-shaped majority-minority congressional district in one portion of state in order to alleviate effect of fragmenting geographically compact minority population in another portion of state does not remedy a violation of § 2 of Voting Rights Act, and is thus not a compelling governmental interest).

[20] Bush v. Vera, 517 U.S. 952, 979 (1996) (opinion of Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy) (also involving congressional districts).

[21] 517 U.S. 620 (1996).

[22] Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

[23] 517 U.S. at 634, *quoting* Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

purposes, and that no other legitimate rationale existed for such a restriction.

THE NEW EQUAL PROTECTION

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

—Access to Courts

[P. 1922, add paragraph to text following n.56:]

The continuing vitality of *Griffin v. Illinois*, however, is seen in the case of *M.L.B. v. S.L.J.*,[24] where the Court considered whether a state seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in *Boddie*, the State, Mississippi, had afforded the plaintiff a trial on the merits, and thus the "monopolization" of the avenues of relief alleged in *Boddie* was not at issue. As in *Boddie,* however, the Court focused on the substantive due process implications of the state limiting "[c]hoices about marriage, family life, and the upbringing of children,"[25] while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the state pay for the transcript needed for an effective appeal,[26] and that the forced dissolution of parental rights was "more substantial than mere loss of money,"[27] the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

ENFORCEMENT

Congressional Definition of Fourteenth Amendment Rights

[P. 1936, add to text following n.127:]

The case of *City of Boerne v. Flores*,[28] however, illustrates that the Court will not always defer to Congress's determination as to what legislation is appropriate to "enforce" the provisions of the Fourteenth Amendment. In *Flores*, the Court held that the Religious Freedom Restoration Act,[29] which expressly overturned the Court's narrowing of religious protections under *Employment Division v. Smith*,[30] exceeded congressional power under section 5 of

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[24] 519 U.S. 102 (1996).
[25] 519 U.S. at 106. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).
[26] Mayer v. Chicago, 404 U.S. 189 (1971).
[27] 519 U.S. at 121 (*quoting* Santosky v. Kramer, 455 U.S. 745, 756 (1982)).
[28] 521 U.S. 507 (1997).
[29] Pub. L. 103–141, 107 Stat. 1488, 42 U.S.C. § 2000bb *et. seq.*
[30] 494 U.S. 872 (1990).

the Fourteenth Amendment. Although the Court allowed that Congress's power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be "a congruence and proportionality" between the means adopted and the injury to be remedied.[31] Unlike the pervasive suppression of the African American vote in the South which led to the passage of the Voting Rights Act, there was no similar history of religious persecution constituting an "egregious predicate" for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates.[32]

[31] 521 U.S. at 533.

[32] 521 U.S. at 532–33. The Court found that the Religious Freedom Restoration Act was "so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

TWENTY-FIRST AMENDMENT

Effect of Section 2 Upon Other Constitutional Provisions

[P. 1982, delete sentence containing n.31 and substitute the following:]

The Court departed from this line of reasoning in *California v. LaRue*.[1]

[P. 1983, add to text at end of section:]

In *44 Liquormart, Inc. v. Rhode Island*,[2] the Court disavowed LaRue and Bellanca, and reaffirmed that, "although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a state's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution,'"[3] and therefore does not afford a basis for state legislation infringing freedom of expression protected by the First Amendment. There is no reason, the Court asserted, for distinguishing between freedom of expression and the other constitutional guarantees (e.g., those protected by the Establishment and Equal Protection Clauses) held to be insulated from state impairment pursuant to powers conferred by the Twenty-first Amendment. The Court hastened to add by way of dictum that states retain adequate police powers to regulate "grossly sexual exhibitions in premises licensed to serve alcoholic beverages." "Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations."[4]

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[1] 409 U.S. 109 (1972).

[2] 517 U.S. 484 (1996) (statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is not shielded from constitutional scrutiny by the Twenty-first Amendment).

[3] 517 U.S. at 516 (quoting Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691, 712 (1984)).

[4] 517 U.S. at 515.

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

128. Act of August 29, 1935, ch. 814 § 5(e), 49 Stat. 982, 27 U.S.C. § 205(e).

The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels is inconsistent with the protections afforded to commercial speech by the First Amendment. The government's interest in curbing strength wars among brewers is substantial, but, given the "overall irrationality" of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
Justices concurring: Thomas, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, and Chief Justice Rehnquist.
Justice concurring specially: Stevens.

129. Act of Aug. 16, 1954, ch. 736, 68A Stat. 521, 26 U.S.C. § 4371(1).

A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, § 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

United States v. IBM Corp., 517 U.S. 843 (1996).
Justices concurring: Thomas, Rehnquist, O'Connor, Scalia, Souter, Breyer, and Chief Justice Rehnquist.
Justices dissenting: Kennedy, Ginsburg.

130. Act of May 11, 1976 (Pub. L. 94–283, § 112(2)), 90 Stat. 489; 2 U.S.C. § 441a(d)(3).

The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures by a political party "in connection with the general election campaign of a [congressional] candidate," violates the First Amendment when applied to expenditures that a political party makes independently, without coordination with the candidate.

Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996).
Justices concurring: Breyer, O'Connor and Souter.
Justices concurring in part and dissenting in part: Kennedy, Rehnquist, Scalia, and Thomas.
Justices dissenting: Stevens and Ginsburg.

131. Act of Oct. 17, 1988 (Pub. L. 100–497, § 11(d)(7)), 102 Stat. 2472, 25 U.S.C. § 2710(d)(7).

A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact

violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate States' Eleventh Amendment immunity from suit in federal court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), is overruled.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
Justices concurring: Chief Justice Rehnquist, and O'Connor, Scalia, Kennedy, and Thomas.
Justices dissenting: Stevens, Souter, Ginsburg and Breyer.

132. Act of Nov. 30, 1989 (Pub. L. 101–194, § 601), 103 Stat. 1760, 5 U.S.C. app. § 501.

Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit Members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS–16. The ban is limited to expressive activity and does not include other outside income, and the "speculative benefits" of the ban do not justify its "crudely crafted burden" on expression.

United States v. National Treasury Employees Union, 513 U.S. 454 (1995).
Justices concurring: Stevens, Kennedy, Souter, Ginsburg, and Breyer.
Justice concurring in part and dissenting in part: O'Connor.
Justices dissenting: Chief Justice Rehnquist, and Scalia and Thomas.

133. Act of Nov. 29, 1990 (Pub. L. 101–647, § 1702), 104 Stat. 4844, 18 U.S.C. § 922q.

The Gun Free School Zones Act of 1990, which makes it a criminal offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." Possession of a gun at or near a school "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."

United States v. Lopez, 514 U.S. 549 (1995).
Justices concurring: Chief Justice Rehnquist, O'Connor, Scalia, Kennedy, and Thomas.
Justices dissenting: Stevens, Souter, Breyer, and Ginsburg.

134. Act of Dec. 19, 1991 (Pub. L. 102–242 § 476), 105 Stat. 2387, 15 U.S.C. § 78aa–1.

Section 27A(b) of the Securities Exchange Act of 1934, as added in 1991, requiring reinstatement of any section 10(b) actions that were dismissed as time barred subsequent to a 1991 Supreme Court decision, violates the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments in private civil actions. The provision violates a fundamental principle of Article III that the federal judicial power comprehends the power to render dispositive judgments.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

Justices concurring: Scalia, O'Connor, Kennedy, Souter, and Thomas, and Chief Justice Rehnquist.
Justice concurring specially: Breyer.
Justices dissenting: Stevens and Ginsburg.

135. Act of Oct. 5, 1992 (Pub. L. 102–385, §§ 10(b) and 10(c)), 106 Stat. 1487, 1503; 47 U.S.C. § 532(j) and § 531 note, respectively.

Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violates the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of "sexually explicit" programming on public access channels, also violates the First Amendment.

Denver Area Educ. Tel. Consortium v. FCC, 518 U.S. 727 (1996).
Justices concurring: Breyer, Stevens, O'Connor (§ 10(b) only), Kennedy, Souter, and Ginsburg.
Justices dissenting: Thomas, Rehnquist, Scalia, O'Connor (§ 10(c) only).

136. Act of Oct. 30, 1984, (Pub. L. 98–608, § 1(4)), 98 Stat. 3173, 25 U.S.C. § 2206.

Section 207 of the Indian Land Consolidation Act, as amended in 1984, effects an unconstitutional taking of property without compensation by restricting a property owner's right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in *Hodel v. Irving* (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cures the constitutional defect.z

Babbitt v. Youpee, 519 U.S. 234 (1997).
Justices concurring: Ginsburg, Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer.
Justice dissenting: Stevens.

137. Act of Nov. 16, 1993 (Pub. L. 103–141), 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb–4.

The Religious Freedom Restoration Act, which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion, exceeds congressional power under section 5 of the Fourteenth Amendment. Congress' power under Section 5 to "enforce" the Fourteenth Amendment by "appropriate legislation" does not extend to defining the substance of the Amendment's restrictions. This RFRA appears to do. RFRA "is so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

City of Boerne v. Flores, 521 U.S. 507 (1997).
Justices concurring: Kennedy, Stevens, Thomas, Ginsburg, and Chief Justice Rehnquist.

Justice concurring specially: Scalia.
Justices dissenting: O'Connor, Breyer; Souter.

138. Act of Feb. 8, 1996, 110 Stat. 56, 133–34 (Pub. L. 104–104, title V, § 502), 47 U.S.C. §§ 223(a), 223(d).

Two provisions of the Communications Decency Act of 1996—one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to anyone under 18 years of age—violate the First Amendment.

Reno v. ACLU, 521 U.S. 844 (1997).
Justices concurring: Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.
Justices concurring in part and dissenting in part: O'Connor and Chief Justice Rehnquist.

139. Act of Nov. 30, 1993 (Pub. L. 103–159), 107 Stat. 1536.

Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between Federal and State governments. In *New York v. United States*, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and "Congress cannot circumvent that prohibition by conscripting the State's officers directly."

Printz v. United States, 521 U.S. 898 (1997).
Justices concurring: Scalia, O'Connor, Kennedy, Thomas, and Chief Justice Rehnquist.
Justices dissenting: Stevens, Souter, Ginsburg, and Breyer.

140. Act of Nov. 17, 1986 (Pub. L. 99–662, title IV, § 1402(a)), 26 U.S.C. §§ 4461, 4462.

The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5 to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125% of cargo value on commercial cargo shipped through the Nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used by exporters, and the tax does not, therefore, represent compensation for services rendered.

United States v. United States Shoe Corp., 118 S. Ct. 1290 (1998).

141. Act of Oct. 19, 1976 (Pub. L. 94–553, § 101(c)), 17 U.S.C. § 504(c).

Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, "in a sum of not less than $500 or more than $20,000 as the court considers

just," does not grant the right to a jury trial on the amount of statutory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.

Feltner v. Columbia Pictures Television, 118 S. Ct. 1279 (1998).

142. Act of Oct. 24, 1992, Title XIX, 106 Stat. 3037 (Pub. L. 102–486), 26 U.S.C. §§ 9701–9722.

The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998).
Justices concurring: O'Connor, Scalia, Thomas, and Chief Justice Rehnquist.
Justice concurring specially: Kennedy.
Justices dissenting: Stevens, Souter, Ginsburg, and Breyer.

143. Act of April 9, 1996, 110 Stat. 1200 (Pub. L. 104–130), 2 U.S.C. §§ 691 et seq.

The Line Item Veto Act, which gives the President the authority to "cancel in whole" three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President "the unilateral power to change the text of duly enacted statutes." This Line Item Veto Act authority differs in important respects from the President's constitutional authority to "return" (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.

Clinton v. City of New York, 118 S. Ct. 2091 (1998).
Justices concurring: Stevens, Kennedy, Souter, Thomas, Ginsburg, and Chief Justice Rehnquist.
Justices dissenting: Scalia, O'Connor, and Breyer.

STATE ACTS HELD UNCONSTITUTIONAL

1090. *Edenfield v. Fane*, 507 U.S. 761 (1993).

A rule of the Florida Board of Accountancy banning "direct, in-person, uninvited solicitation" of business by certified public accountants is inconsistent with the free speech guarantees of the First Amendment.

Justices concurring: Kennedy, White, Blackmun, Stevens, Scalia, Souter, Thomas, and Chief Justice Rehnquist.
Justice dissenting: O'Connor.

1091. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993).

Oklahoma may not impose income taxes or motor vehicle taxes on members of the Sac and Fox Nation who live in "Indian country," whether the land is within reservation boundaries, on allotted lands, or in dependent communities. Such tax jurisdiction is considered to be preempted unless Congress has expressly provided to the contrary.

1092. *Department of Treasury v. Fabe*, 508 U.S. 491 (1993).

An Ohio statute setting priority of claims against insolvent insurance companies is preempted by the federal priority statute, 31 U.S.C. § 3713, which accords first priority to the United States, to the extent that the Ohio law protects the claims of creditors who are not policyholders. Insofar as it protects the claims of policyholders, the law is saved from preemption by section 2(b) of the McCarran-Ferguson Act.

Justices concurring: Blackmun, White, Stevens, O'Connor, and Chief Justice Rehnquist.
Justices dissenting: Kennedy, Scalia, Souter, Thomas.

1093. *Oregon Waste Systems v. Oregon Dep't of Environmental Quality*, 511 U.S. 93 (1994).

Oregon's imposition of a surcharge on in-state disposal of solid waste generated in other states—a tax three times greater than the fee charged for disposal of waste that was generated in Oregon—constitutes an invalid burden on interstate commerce. The tax is facially discriminatory against interstate commerce, is not a valid compensatory tax, and is not justified by any other legitimate state interest.

Justices concurring: Thomas, Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg.
Justices dissenting: Chief Justice Rehnquist, and Blackmun.

1094. *Associated Industries v. Lohman*, 511 U.S. 641 (1994).

Missouri's uniform, statewide use tax constitutes an invalid discrimination against interstate commerce in those counties in which the use tax is greater than the sales tax imposed as a local option, even though the overall statewide effect of the use tax places a lighter

aggregate tax burden on interstate commerce than on intrastate commerce.

1095. *Montana Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994).

Montana's tax on the possession of illegal drugs, to be "collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment, and violates the prohibition, derived from the Double Jeopardy Clause, against successive punishments for the same offense.

Justices concurring: Stevens, Blackmun, Kennedy, Souter, and Ginsburg.
Justices dissenting: Chief Justice Rehnquist, and O'Connor, Scalia, and Thomas.

1096. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

A Massachusetts milk pricing order, imposing an assessment on all milk sold by dealers to Massachusetts retailers, is an unconstitutional discrimination against interstate commerce because the entire assessment is then distributed to Massachusetts dairy farmers in spite of the fact that about two-thirds of the assessed milk is produced out of state. The discrimination imposed by the pricing order is not justified by a valid factor unrelated to economic protectionism.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, and Ginsburg.
Justices concurring specially: Scalia and Thomas.
Justices dissenting: Chief Justice Rehnquist and Blackmun.

1097. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

A provision of the Oregon Constitution, prohibiting judicial review of the amount of punitive damages awarded by a jury unless the court can affirmatively say there is no evidence to support the verdict, is invalid under the Due Process Clause of the Fourteenth Amendment. Judicial review of the amount awarded was one of the few procedural safeguards available at common law, yet Oregon has removed that safeguard without providing any substitute procedure, and with no indication that the danger of arbitrary awards has subsided.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter, and Thomas.
Justices dissenting: Ginsburg and Chief Justice Rehnquist.

1098. *Board of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994).

A New York State law creating a special school district for an incorporated village composed exclusively of members of one small religious sect violates the Establishment Clause.

Justices concurring: Souter, Blackmun, Stevens, O'Connor, and Ginsburg.
Justice concurring specially: Kennedy.
Justices dissenting: Scalia, Thomas, and Chief Justice Rehnquist.

1099. *American Airlines v. Wolens*, 513 U.S. 219 (1995).

The Illinois Consumer Fraud Act, to the extent that it authorizes actions in state court challenging as "unfair or deceptive" marketing

practices an airline company's changes in its frequent flyer program, is preempted by the Airline Deregulation Act, which prohibits states from "enact[ing] or enforc[ing] any law . . . relating to [air carrier] rates, routes, or services."

Justices concurring: Ginsburg, Kennedy, Souter, Breyer, and Chief Justice Rehnquist.

Justices concurring specially: O'Connor, Thomas.

Justice dissenting: Stevens.

1100. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

Ohio's prohibition on the distribution of anonymous campaign literature abridges the freedom of speech. The law, aimed at speech designed to influence voters in an election, is a limitation on political expression subject to exacting scrutiny. Neither of the interests asserted by Ohio justifies the limitation.

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

Justice concurring specially: Thomas.

Justices dissenting: Scalia, and Chief Justice Rehnquist.

1101. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

An amendment to the Arkansas Constitution denying ballot access to congressional candidates who have already served three terms in the House of Representatives or two terms in the Senate is invalid as conflicting with the qualifications for office set forth in Article I of the U.S. Constitution, (specifying age, duration of U.S. citizenship, and state inhabitancy requirements). Article I sets the exclusive qualifications for a United States Representative or Senator.

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

Justices dissenting: Thomas, O'Connor, Scalia, and Chief Justice Rehnquist.

1102. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

Oklahoma may not impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on tribal trust land. The legal incidence of the motor fuels tax falls on the retailer, located within Indian country, and the petitioner did not properly raise the issue of whether Congress had authorized such taxation in the Hayden-Cartwright Act.

1103. *Hurley v. Irish-American Gay Group*, 515 U.S. 557 (1995).

Application of Massachusetts' public accommodations law to require the private organizers of a St. Patrick's Day parade to allow participation in the parade by a gay and lesbian group wishing to proclaim its members' gay and lesbian identity violates the First Amendment because it compels parade organizers to include in the parade a message they wish to exclude.

1104. *Miller v. Johnson*, 515 U.S. 900 (1995).

Georgia's congressional districting plan violates the Equal Protection Clause. The district court's finding that race was the predominant factor in drawing the boundaries of the Eleventh District was not clearly erroneous. The State did not meet its burden under strict scrutiny review to demonstrate that its districting was narrowly tailored to achieve a compelling interest.

Justices concurring: Kennedy, Rehnquist, O'Connor, Scalia, and Thomas.
Justices dissenting: Stevens Ginsburg, Breyer, and Souter.

1105. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

North Carolina's intangibles tax on a fraction of the value of corporate stock owned by North Carolina residents inversely proportional to the corporation's exposure to the State's income tax, violates the "dormant" Commerce Clause. The tax facially discriminates against interstate commerce, and is not a "compensatory tax" designed to make interstate commerce bear a burden already borne by intrastate commerce.

1106. *Barnett Bank v. Nelson*, 517 U.S. 25 (1996).

A federal law empowering national banks in small towns to sell insurance (12 U.S.C. § 92) preempts a Florida law prohibiting banks from dealing in insurance. The federal law contains no explicit statement of preemption, but preemption is implicit because the state law stands as an obstacle to the accomplishment of one of the federal law's purposes.

1107. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages abridges freedom of speech protected by the First Amendment, and is not shielded from constitutional scrutiny by the Twenty-first Amendment. There is not a "reasonable fit" between the blanket prohibition and the State's goal of reducing alcohol consumption.

Justices concurring: Stevens, Scalia (in part), Kennedy (in part), Souter (in part), Thomas (in part), and Ginsburg (in part).
Justices concurring specially: Scalia, Thomas, O'Connor, Souter, Breyer, and Chief Justice Rehnquist.

1108. *Romer v. Evans*, 517 U.S. 620 (1996).

Amendment 2 to the Colorado Constitution, which prohibits all legislative, executive, or judicial action at any level of state or local government if that action is designed to protect homosexuals, violates the Equal Protection Clause of the Fourteenth Amendment. The amendment, adopted by statewide referendum in 1992, does not bear a rational relationship to a legitimate governmental purpose.

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

Justices dissenting: Scalia, Thomas, and Chief Justice Rehnquist.

1109. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

A Montana law declaring an arbitration clause unenforceable unless notice that the contract is subject to arbitration appears in underlined capital letters on the first page of the contract is preempted by the Federal Arbitration Act.

Concurring Justices: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Breyer, and Chief Justice Rehnquist.

Justice dissenting: Thomas.

1110. *Shaw v. Hunt*, 517 U.S. 899 (1996).

North Carolina's congressional districting law, containing the racially gerrymandered 12th Congressional District as well as another majority-black district, violates the Equal Protection Clause because, under strict scrutiny applicable to racial classifications, creation of District 12 was not narrowly tailored to serve a compelling state interest. Creation of District 12 was not necessary to comply with either section 2 or section 5 of the Voting Rights Act, and the lower court found that the redistricting plan was not actually aimed at ameliorating past discrimination.

Justices concurring: Chief Justice Rehnquist, and O'Connor, Scalia, Kennedy, and Thomas.

Justices dissenting: Stevens, Ginsburg, Souter, and Breyer.

1111. *Bush v. Vera*, 517 U.S. 952 (1996).

Three congressional districts created by Texas law constitute racial gerrymanders that are unconstitutional under the Equal Protection Clause. The district court correctly held that race predominated over legitimate districting considerations, including incumbency, and consequently strict scrutiny applies. None of the three districts is narrowly tailored to serve a compelling state interest.

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

Justices concurring specially: O'Connor, Kennedy, Thomas, and Scalia.

Justices dissenting: Stevens, Ginsburg, Breyer, and Souter.

1112. *United States v. Virginia*, 518 U.S. 515 (1996).

Virginia's exclusion of women from the educational opportunities provided by Virginia Military Institute denies to women the equal protection of the laws. A state must demonstrate "exceedingly persuasive justification" for gender discrimination, and Virginia has failed to do so in this case.

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

Justice dissenting: Scalia.

1113. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

Mississippi statutes that condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay for preparation of a trial transcript violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Decrees terminating parental rights belong in the same category of cases, starting with *Griffin v. Illinois*, 351 U.S. 12 (1956), in which the Court has ruled that the State's adverse action against an individual is so devastating that access to appellate review may not be made contingent upon ability to pay.

Justices concurring: Ginsburg, Stevens, O'Connor, Souter, and Breyer.
Justice concurring specially: Kennedy.
Justices dissenting: Chief Justice Rehnquist, Thomas, and Scalia.

1114. *Lynce v. Mathis*, 519 U.S. 433 (1997).

A Florida statute canceling early release credits awarded to prisoners as a result of prison overcrowding violates the Ex Post Facto Clause, Art. I, § 10, cl. 1, as applied to a prisoner who had already been awarded the credits and released from custody. The cancellation of early release credits met the two-part test for an ex post facto law: it was "clearly retrospective" and it disadvantaged the petitioner by lengthening his period of incarceration.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, and Chief Justice Rehnquist.
Justices concurring specially: Thomas, and Scalia.

1115. *Chandler v. Miller*, 520 U.S. 305 (1997).

A Georgia statute requiring that candidates for state office certify that they have passed a drug test effects a "search" that is plainly not tied to individualized suspicion, and does not fit within the "closely guarded category of constitutionally permissible suspicionless searches," and hence violates the Fourth Amendment. Georgia has failed to establish existence of a "special need, beyond the normal need for law enforcement," that can justify such a search.

Justices concurring: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer.
Justice dissenting: Chief Justice Rehnquist.

1116. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997).

Maine's property tax law, which contains an exemption for charitable institutions but limits that exemption to institutions serving principally Maine residents, violates the "dormant" Commerce Clause as applied to deny exemption status to a nonprofit corporation that operates a summer camp for children, most of whom are not Maine residents. The nonprofit character of the enterprise does not exclude it from protection. Protectionism, whether targeted at for-profit or not-for-profit entities, is prohibited.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, and Breyer.
Justices dissenting: Scalia, Thomas, Ginsburg, and Chief Justice Rehnquist.

1117. *Foster v. Love*, 118 S. Ct. 464 (1997).

A Louisiana statute that provides for an "open primary" in October for election of Members of Congress and that provides that any candidate receiving a majority of the vote in that primary "is elected," conflicts with the federal law, 2 U.S.C. §§ 1 and 7, that provides for a uniform federal election day in November, and is void to the extent of conflict. "[A] contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day . . . clearly violates § 7."

1118. *Lunding v. New York Tax Appeals Tribunal*, 118 S. Ct. 766 (1998).

A New York law that effectively denies only nonresident taxpayers an income tax deduction for alimony paid violates the Privileges and Immunities Clause of Art. IV, § 2. New York did not adequately justify its failure to treat resident and nonresident taxpayers with substantial equality.

Justices concurring: O'Connor, Stevens, Scalia, Souter, Thomas, and Breyer.
Justices dissenting: Ginsburg, Rehnquist and Kennedy.

ORDINANCES HELD UNCONSTITUTIONAL

125. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Cincinnati's refusal, pursuant to an ordinance prohibiting distribution of commercial handbills on public property, to allow the distribution of commercial publications through freestanding newsracks located on public property, while at the same time allowing similar distribution of newspapers and other noncommercial publications, violates the First Amendment.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, and Souter.

Justices dissenting: Chief Justice Rehnquist, and White and Thomas.

126. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

Hialeah, Florida ordinances banning the killing of animals in a ritual sacrifice are unconstitutional as infringing the free exercise of religion by members of the Santeria religion.

Justices concurring: Kennedy, White, Stevens, Scalia, Souter, Thomas, and Chief Justice Rehnquist.

Justices concurring specially: Blackmun and O'Connor.

127. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

Clarkstown, New York "flow control" ordinance, which requires all solid waste within the town to be processed at a designated transfer station before leaving the municipality, discriminates against interstate commerce and is invalid under the Commerce Clause.

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

Justice concurring specially: O'Connor.

Justices dissenting: Souter, Blackmun, and Chief Justice Rehnquist.

128. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

An ordinance of the City of Ladue, Missouri, which prohibits all signs but makes exceptions for several narrow categories, violates the First Amendment by prohibiting a resident from placing in the window of her home a sign containing a political message. By prohibiting residential signs that carry political, religious, or personal messages, the ordinance forecloses "a venerable means of communication that is both unique and important."

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

	Overruling Case	*Overruled Case(s)*
*	205. United States v. Dixon, 509 U.S. 688 (1993).	Grady v. Corbin, 495 U.S. 508 (1990).
*	206. Nichols v. United States, 511 U.S. 738 (1994).	Baldasar v. Illinois, 446 U.S. 222 (1980).
*	207. Hubbard v. United States, 514 U.S. 695 (1995).	United States v. Bramblett, 348 U.S. 503 (1955).
*	208. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).	Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1990) (in part).
*	209. United States v. Gaudin, 515 U.S. 506 (1995).	Sinclair v. United States, 279 U.S. 263 (1929).
*	210. Fulton Corp. v. Faulkner, 516 U.S. 325 (1996).	Darnell v. Indiana, 226 U.S. 390 (1912).
*	211. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).	Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).
*	212. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).	California v. LaRue, 409 U.S. 109 (1972) (in part); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (in part); City of Newport v. Iacobucci, 479 U.S. 92 (1986) (in part).
*	213. Agostini v. Felton, 521 U.S. 203 (1997).	Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (in part).
*	214. State Oil Co. v. Khan, 118 S. Ct. 275 (1997).	Albrecht v. Herald Co., 390 U.S. 145 (1968).
*	215. Hudson v. United States, 118 S. Ct. 488 (1997).	United States v. Halper, 490 U.S. 435 (1989).
*	216. Hohn v. United States, 118 S. Ct. 1969 (1998).	House v. Mayo, 324 U.S. 42 (1945).

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