

**CASES AND MATERIALS ON  
CONSTITUTIONAL LAW**

**Fifth Edition**

**2011 Cumulative Supplement**

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# **CASES AND MATERIALS ON CONSTITUTIONAL LAW**

**Fifth Edition**

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### **AUTHORS' NOTE**

With deepest regret, we must announce the death of our beloved colleague and coauthor, Eugene Gressman. Gene, in addition to being an accomplished teacher at the University of North Carolina and Seton Hall University Law Schools, was a prominent member of the Supreme Court bar and an author of the best work available on Supreme Court practice. As our coauthor, he had wonderful insight into the organization, expression, and editing of our casebook. Above all of this, he was our friend. We miss him.

## Chapter 1 JUDICIAL POWER AND ITS LIMITS

### § 1.01 Judicial Review: Its Nature and Its Appropriateness

#### [A] Can the Courts Overrule Congress?

##### [1] Inferring Judicial Review from the American Written Constitution: *Marbury v. Madison*

[At page 38, add the following as Note (8):]

(8) *Pre-Marbury Sources of Judicial Review*. The conventional understanding of *Marbury* may have overlooked the antecedents of judicial review from England, the American colonies, and the post-Revolutionary period. PHILLIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); *see also* Ann Althouse, *Law and Judicial Duty: The Historical Ordinarity of Judicial Review*, 78 *GEO. WASH. L. REV.* 1123 (2010).

### § 1.02 Limiting Judicial Power

#### [A] The Case or Controversy Requirement

##### [2] Other Conditions of Adjudication: Standing

[At page 56, add the following new Notes (4) - (6) and renumber current Note (4) as Note (7):]

(4) *The Continued Narrowing of the Flast Exception: Arizona Christian School Tuition Organization v. Winn*, 131 *S. Ct.* 1436 (2011). This case continued the trend in recent years of confining the *Flast* exception allowing taxpayer standing to the precise circumstances presented in *Flast*—an Establishment Clause challenge to the exercise of legislative authority to collect and spend tax dollars. Because this particular case involved a tax credit scheme rather than a governmental expenditure, the majority held *Flast* did not apply.

Under Arizona state law, taxpayers may claim a state income tax credit of up to \$500 for contributions made to school tuition organizations, or STOs. The STOs then use these contributions to provide scholarships to students attending private schools, including religious schools. A group of Arizona taxpayers challenged the STO tax credit under the Establishment Clause, alleging standing under *Flast*. The district court dismissed the taxpayers' suit for failure to state a claim, but the court of appeals reversed, holding that the taxpayers had standing and had stated a claim.

The Supreme Court, in an opinion by Justice Kennedy, reversed, holding the taxpayers lacked standing. The majority reasoned that a tax credit was not the same as the "religious tax" the Establishment Clause was intended to prevent. Awarding citizens a tax credit, according to the majority, allowed other citizens to retain control over their own funds in accordance with their own consciences, and were not governmental expenditures (notice that this reasoning parallels the Establishment Clause decision in *Zelman v. Simmons-Harris*, discussed in § 12.02, upholding

voucher programs used at religious schools as a matter of “true private choice”). As a result, the general rule barring taxpayer standing applied. Four Justices dissented in an opinion by Justice Kagan, arguing that tax credits were just as effective in financing religious activity as appropriations.

(5) *Standing and the Establishment Clause—Does the Establishment Clause Create Individual Liberty Rights?: Salazar v. Buono, 130 S. Ct. 1803 (2010)*. The *Flast* exception, however, is not the only means to obtain standing for an Establishment Clause challenge. *Salazar v. Buono* considered an Establishment Clause challenge to a “Latin cross” which was erected in 1934 by a local VFW Chapter on federal property in part of the Mojave National Preserve to honor American soldiers who had died in WWI. The cross was in a remote location where, according to Justice Alito’s separate concurrence, “it is likely that the cross was seen by more rattlesnakes than humans.” Nevertheless, Buono, a former Preserve employee and frequent visitor to the Preserve, sued the federal government, alleging that maintaining the cross on federal property violated the Establishment Clause. The district court ruled in Buono’s favor and enjoined the federal government from maintaining the cross on federal property. In response, Congress eventually passed a land-trade statute that authorized the federal government to transfer the federal land on which the cross was located to a private individual in exchange for private property. This land-trade statute sidestepped the district court’s injunction. Buono again sued, now challenging the constitutionality of the land-trade statute.

In this second action, the federal government defended on both standing and Establishment Clause grounds. The Supreme Court, per Justice Kennedy’s plurality opinion, concluded that Buono had standing. Buono’s success in securing an injunction in the earlier action was a “judicially cognizable” interest for purposes of standing. (The plurality then ruled, on the Establishment Clause merits, for the federal government, reversing the judgment and remanding the case.) The plurality recognized, for purposes of standing, an individual liberty interest created by the Establishment Clause. This conclusion runs contrary to the views of some Justices, such as Justice Thomas, who argue that the Establishment Clause did not create individual rights. As a result, Justice Scalia, joined by Justice Thomas, concurred only in the judgment of reversal because they disagreed with the standing analysis. Four Justices dissented—although they agreed Buono had standing, they would have also found in his favor on the merits, as discussed in § 12.02 [A] [2].

(6) *Standing and the Tenth Amendment: Bond v. United States, 131 S. Ct. 2355 (2011)*. This case considered whether an individual charged with violating a federal criminal statute had standing to challenge the statute on the ground that Congress exceeded its authority and intruded upon the sovereign prerogative of the states. Bond was indicted under 18 U.S.C. § 229, prohibiting the use of deadly chemicals not intended for “peaceful purposes,” because she applied various chemical agents in places her husband’s pregnant mistress (and her former close friend) might touch. Bond defended against the charges on the ground that § 229 infringed upon state sovereignty. In rejecting her appeal, the Third Circuit held that she had no standing to raise the state sovereignty issue, reasoning that such an argument must be raised by a state itself. But the Supreme Court, in a unanimous opinion by Justice Kennedy, disagreed. The Court highlighted that federalism rights were not merely protective of states, but also were designed to secure the liberty of the individual. Bond therefore had a direct interest in objecting to this law based on her claim that it upset the constitutional balance between the states and the federal government, thereby causing her a concrete, particular, and redressable injury in the form of a criminal prosecution. Without expressing a view on whether § 229 did in fact violate federalism principles, the Court remanded the case to the Third

Circuit to consider her Tenth Amendment argument.

[At page 59, add the following as new Note (8):]

(8) *The Specificity and Imminence Required for an Actual Injury: Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009). This case provides another example of the Supreme Court's exacting scrutiny of standing requirements. Despite a federal statute requiring the Forest Service to provide an extensive notice, comment, and appeal process before implementing land and resource management plans, the Forest Service adopted regulations that exempted certain fire rehabilitation activities and salvage timber sales from this process. Several environmental organizations filed suit shortly after the Forest Service used these regulations to approve, without providing for notice, comment, or appeal, the salvage sale of timber from a portion of Sequoia National Forest damaged by a fire. Members of the environmental organizations filed affidavits with the district court detailing that they had visited this part of the forest, had imminent plans to do so again, and their interests would be harmed by the proposed sale. After the district court issued a preliminary injunction to stop the sale, the parties resolved their dispute regarding the Sequoia timber sale. Notwithstanding the settlement, the environmental organizations proceeded to seek a nationwide injunction against the enforcement of the Forest Service's regulations in other unspecified locations. The district court granted the injunction, and the court of appeals affirmed, rejecting the Forest Service's argument that the organizations lacked the necessary injury in fact to challenge the regulations after the resolution of the Sequoia timber sale.

The Supreme Court, in a 5-4 decision by Justice Scalia, agreed with the Forest Service. Relying predominantly on *Lujan*, the majority reasoned that the environmental organizations no longer had standing to challenge the regulations in the absence of an identified concrete application of the regulations that created an imminent and concrete threat of harm. The affidavit of one member that he had visited many National Forests, planned to continue to do so in the future, and would be injured by development under the regulations that the Forest Service admitted would be used thousands of times in the future did not suffice, according to the Court, because it was not concrete and particularized enough to constitute an injury in fact. In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, argued that the affidavit was sufficient to demonstrate a realistic threat of future harm even though "the plaintiff cannot specify precise times, dates, and GPS coordinates. . . . To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive."

What should the environmental organizations have done differently to satisfy the actual injury requirement and ensure standing? Not settled the Sequoia timber sale? Waited until the regulations were enforced again? Provided more detailed affidavits before the rendition of judgment in the district court?

## Chapter 2 CONGRESSIONAL POWER

### § 2.01 National Legislative Power: Its Nature and Limits

#### [B] Enumerated, Implied and Inherent Powers

[At page 105, add the following as new Note (7):]

(7) *The Hamilton-Jefferson Debate in the 21<sup>st</sup> Century: United States v. Comstock*, 130 S. Ct. 1949 (2010). The extent of legislative power under the Necessary and Proper Clause is still being debated today, as illustrated by this splintered Supreme Court decision considering the necessary relationship between a congressional statute and an enumerated constitutional power. A federal statute allowed federal courts to order the civil commitment of mentally ill, sexually dangerous federal prisoners once they completed serving their criminal sentence. As defenses to civil commitment proceedings brought against them, Comstock and other federal prisoners asserted, among other claims, that the statute exceeded congressional power under the Necessary and Proper Clause. The lower federal courts agreed with the prisoners, but the Supreme Court reversed, holding that the Necessary and Proper Clause provided Congress the power to enact the statute.

The majority opinion, authored by Justice Breyer, concluded that Congress had the power to enact the commitment statute based on five (so-called) “considerations”: (1) the broad authority granted to Congress by the Necessary and Proper Clause under *McCulloch* and subsequent cases, (2) the longstanding history of similar federal statutes delivering mental health care to federal prisoners, (3) the sound reasons supporting the need to extend the federal civil commitment system to cover mentally ill and sexually dangerous prisoners, (4) the careful accommodation of the state’s interests in the commitment statute through the requirement that the federal government relinquish its authority over a prisoner upon request by a state, and (5) the relatively narrow scope of the commitment statute, which only applied to individuals in federal custody who were mentally ill and dangerous. Justices Kennedy and Alito each filed separate concurring opinions, agreeing that the commitment statute was within congressional power, but disagreeing with some of the expansive language used by the majority in describing federal legislative power under the Necessary and Proper Clause. The majority opinion used a deferential rational basis standard of review under the Necessary and Proper Clause—examining “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power,” with the “choice of means” being primarily left to the discretion of Congress—which Justices Kennedy and Alito believed did not place sufficient constraints on the exercise of congressional power. Justice Thomas, with Justice Scalia, dissented, contending that the relationship between the commitment statute and an enumerated power of Congress was too attenuated to constitute appropriate legislation under the Necessary and Proper Clause.

### § 2.03 The Taxing, Spending, and Other Powers

#### [B] The Spending Power: “Insurance” Plans, Transfer Payments, and Inducements for State Regulation

[At page 165, add the following as new Note (4) and renumber existing Notes (4) - (7) as Notes (5)-

(8):]

(4) *The Unambiguously Requirement in the Eleventh Amendment Context: Sossamon v. Texas*, 131 S. Ct. 1651 (2011). Many spending power issues arise in the context of a state asserting sovereign immunity under the Eleventh Amendment as a defense to a lawsuit. The Eleventh Amendment, which is discussed in § 3.05, generally prohibits suits in federal court against states for money damages without their consent. But states may consent to such suits, which frequently occurs when the state accepts federal funds under a federal spending statute unequivocally expressing that acceptance of the funds waives the state's sovereign immunity to suit. The Supreme Court has required that these waivers be "unmistakably clear" due to the importance of a state's sovereignty.

*Sossamon* involved a private damage action brought against Texas under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *Sossamon*, a Texas prisoner, asserted Texas violated RLUIPA by preventing him from attending religious services while he was on cell restriction due to disciplinary infractions. The issue was whether RLUIPA unambiguously conditioned the receipt of federal funds on the state's waiver of its sovereign immunity for suits in federal court.

The Court, per Justice Thomas, held that RLUIPA was not sufficiently clear to waive the state's sovereign immunity, as the relevant provision only authorized a claim for "appropriate relief" rather than specifically mentioning "damages." Because "damages" against a state are not an "appropriate" form of relief under the Eleventh Amendment, the term "appropriate relief" did not explicitly and unambiguously waive immunity for damage claims. Justice Sotomayor, joined by Justice Breyer, dissented, arguing it was self-evident that damages were a form of appropriate relief.

**Chapter 3**  
**FEDERALISM: NATIONAL POWER AS**  
**AFFECTING THE POWERS OF THE STATES**

**§ 3.01 Preemption Of State Power By Congressional Action: The Supremacy Clause**

**[A] Implied Preemption**

[At page 173, substitute the following Notes (4) & (5) for existing Note (4) and renumber existing Notes (5) - (7) as Notes (6) - (9):]

(4) *Implied Obstacle Preemption of Automotive Design Defect Claims: Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) and *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011). These two cases both involved the same statutory scheme—but different agency regulations—regarding passive restraint requirements for automobiles. In *Geier*, the Court held that the statutory scheme did not expressly preempt state lawsuits for design defects related to restraint requirements, such as seat belts and airbags. Nevertheless, according to Justice Breyer’s opinion for the Court, such claims were implicitly preempted by the 1984 regulations adopted by the Department of Transportation. These regulations had the objective of providing manufacturers the choice of whether to install airbags, and imposing tort liability for the failure to do so would deprive the manufacturers of this choice in contravention of the purpose of the regulations.

In 1988, however, the Department of Transportation issued new regulations. These regulations no longer included manufacturer’s choice as a significant regulatory objective. As a result, in *Williamson*, Justice Breyer, again writing for the Court, held that a design defect claim for installing only a lap belt -- even though it was allowed by the regulations -- was not implicitly preempted. Because the regulatory purpose had changed, a tort suit no longer stood as an obstacle to the accomplishment of the full purposes and objectives of federal law. The disparate results in these cases highlight the importance of ascertaining the purpose of a regulation in an implied preemption analysis -- it cannot be determined whether a state standard frustrates a federal regulation until the federal objective at issue is understood.

(5) *Implied Obstacle Preemption and the Federal Arbitration Act: AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Concepcion* likewise depended on legislative purpose, this time the legislative purpose supporting the Federal Arbitration Act (FAA). State judicial decisions in California adopted a rule that class-action waivers in consumer contracts of adhesion were unconscionable and therefore unenforceable. The Court, in an opinion by Justice Scalia, held that this judicially created rule was preempted in arbitration proceedings governed by the FAA. The purpose of the FAA, according to the majority, was to ensure the enforcement of arbitration agreements according to their terms and thereby facilitate streamlined arbitration proceedings. Because mandating the availability of classwide arbitration, which is more costly and complicated than arbitration involving two parties, frustrated these objectives, the Court invalidated the state rule. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented, contending that the FAA had a different purpose -- to enforce agreements to arbitrate that otherwise complied with state law regarding the formation of any contract. Since the California judicial rule prohibited class-action waivers in any consumer contract of adhesion, the dissent claimed no conflict existed.

## [B] Express Preemption

[At pages 179-180, add the following as new Notes (5) and (9), and renumber existing Notes (5) - (7) on pages 178-79 as Notes (6) - (8) and existing Note (8) on page 180 as Note (10):]

(5) *Revisiting the Cipollone Presumptions: Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008). This case followed *Cipollone*. Good filed suit against Philip Morris and its parent corporation Altria for violating the Maine Unfair Trade Practices Act by fraudulently conveying that their “light” cigarettes delivered less tar and nicotine, even though the companies allegedly knew that consumers would unwittingly inhale as much tar and nicotine by taking larger or more frequent puffs. The district court granted summary judgment to the cigarette companies on preemption grounds under the Cigarette Labeling and Advertising Act and its Amendments, but was reversed on appeal.

Justice Stevens’ majority opinion applied most of the analysis from his writing in *Cipollone* to hold that Good’s claims were not preempted. The Court first indicated that the analysis must begin with an “assumption” against preemption, and this “assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States.” The Court then reasoned that *Cipollone*’s holding that common-law fraud claims were not expressly preempted by the Labeling Act was equally applicable to Good’s statutorily-based fraud claims. The Court finally turned to implied preemption. Without mentioning *Cipollone*’s resolution of the implied preemption argument (discussed above in Note 3), the Court emphasized that the government in its briefing had disavowed any governmental policy or objective in favor of describing cigarettes as “light” or “low tar.” Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, dissented, reiterating many of the arguments from Justice Scalia’s *Cipollone* dissent in opining that Good’s claims were expressly preempted.

(9) *The Importance of Text: Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). The Court here stressed a preemption provision’s text over legislative purpose in ascertaining the scope of preemption. Federal law expressly preempts “any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.” Arizona enacted a statute authorizing the revocation of licenses of state employers that knowingly employed unauthorized aliens. Reasoning that, when a federal law contains an express preemption clause, the plain wording of the clause is the best evidence of congressional intent, the Court held that the Arizona law imposing sanctions through “licensing” laws fell comfortably within the savings clause exception in the federal statute for “licensing and similar laws.” Chief Justice Roberts’ opinion for the Court gave short shrift to the arguments for preemption made by the challengers of the law that were based on presumed legislative purpose and the legislative history of the provision. Justices Breyer, Ginsburg, and Sotomayor dissented.

### § 3.02 The Negative Commerce Clause: Restrictions on State Power to Affect Interstate Commerce

[At page 181, add the following as an additional introductory note after the excerpt from Federalist No. 42:]

*History and the Dormant Commerce Clause Doctrine.* In addition to sources such as Madison's reasoning in Federalist No. 42 above, the Supreme Court often relies on its understanding of the general history leading up to the Constitutional Convention as support for dormant Commerce Clause doctrine. A dramatic feature of this history is the remarkable contraction of the American economy from 1775-1790 – the economy shrank by 46 percent during this period (for comparison, the Great Depression resulted in a 48 percent contraction). See JOHN H. MCCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA 1607-1789* 385 (1985). So, the Framers were acting in a serious economic crisis, and they attributed the crisis, at least in part, to the actions of various states that discriminated against, or burdened, interstate and foreign commerce. The historical materials, and the debate about the history, is comprehensively reviewed in Brannon Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005). This historical evidence appears to be strong support for judicial review of state actions burdening interstate commerce, even accepting the argument that the dormant Commerce Clause is not supported by any explicit text.

**Chapter 5**  
**PRESIDENTIAL POWER AND RELATED POWERS**  
**OF CONGRESS; SEPARATION OF POWERS**

**§ 5.06 The Appointments Power, Power Over Personnel, and National Property Power**

**[B] Presidential Power Over Personnel and Property**

*[At page 318, add the following new paragraph to the end of existing Note (1):]*

*Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), was the first decision since *Myers* to hold that a limitation on the President’s removal power was unconstitutional. The members of the Public Accounting Oversight Board, a government-created entity with expansive powers to govern accounting auditing procedures, could only be removed “for good cause shown” by the Commissioners of the Securities Exchange Commission. In turn, the Court accepted that the Commissioners of the SEC could not be removed by the President except for “inefficiency, neglect of duty, or malfeasance in office.” This double good-cause removal insulation from the President, the majority opinion by Chief Justice Roberts reasoned, violated separation of powers principles by preventing the President, or an officer directly under by the President’s removal control, from making the decision whether good cause existed for removal. As a result, the Court held that members of the Board had to be removable at will by the SEC Commissioners. This would allow the President to hold the Board accountable by attributing its failings to the SEC Commissioners, whom he could remove for cause. Justice Breyer, joined by Justices Stevens, Ginsburg, and Sotomayor, dissented, urging that the removal provisions did not significantly interfere with the President’s executive powers and thus did not violate separation of powers principles.

**Chapter 6**  
**CONSTITUTIONAL PROTECTION OF ECONOMIC RIGHTS**

**§ 6.03 Taking of Property Without Just Compensation**

**[B] Taking by Regulation of Use**

**[1] When Does “Regulation” Become “A Taking”?**

*[At page 371, add the following as Note (3), and renumber existing Note (3) as Note (4):]*

(3) *Can a State Judicial Decision Be a Taking? Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S. Ct. 2592 (2010).* This case presented the question of whether a state judicial decision that contravened established private property rights was a violation of the Takings Clause. But the Court did not definitively resolve this issue—it instead unanimously held that the state court’s decision did not violate prior state law property principles. A plurality opinion, authored by Justice Scalia for the Chief Justice and Justices Thomas and Alito, nevertheless argued that a judicial decision could be a taking because there was no textual, precedential, or prudential justification preventing such a result when the Takings Clause was “concerned simply with the act, and not with the governmental actor.” But Justice Kennedy, joined by Justice Sotomayor, had a different view on this issue, urging that remedial difficulties existed in applying takings principles to the judiciary rather than the political branches. Kennedy’s concurring opinion, relying heavily on his *Eastern Enterprises v. Apfel* concurrence in the squib above, suggested that the Due Process Clause, rather than the Takings Clause, was the source of any limits on the power of state courts to eliminate or change established property rights. Justice Breyer concurred, with Justice Ginsburg, urging that deciding whether a judicial decree could be a taking was unnecessary here when the state court decision under review comported with pre-existing state property law principles.

## Chapter 8 THE BASIC PROCEDURAL STRUCTURE OF DUE PROCESS

### § 8.02 The Historical Development of Due Process Interpretation

#### **[B] The Incorporation Debate: The “Total Incorporation,” “Selective Incorporation,” “Ordered Liberty,” “Fundamental Fairness,” “American Scheme of Justice,” and “Federalism” Theories**

*[At page 439, add the following as new Note (3):]*

(3) *The Second Amendment Incorporation Debate on the Roberts Court: McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). For the first time in approximately forty years, the Supreme Court squarely addressed the issue of incorporation in this case addressing whether the right to keep and bear arms for self-defense applied to the states. Chicago adopted a handgun possession ban, which was challenged as a violation of the Second and Fourteenth Amendments. In a 5-4 decision with several separate writings, the Court held that “the Second Amendment right is fully applicable to the States.” After tracing the development of the incorporation debate, the plurality opinion by Justice Alito concluded that the right to keep and bear arms is incorporated in the concept of due process because it is fundamental to the American scheme of liberty and deeply rooted in the Nation’s history and tradition. Justice Alito primarily relied on a canvassing of historical arguments and the precedent in *District of Columbia v. Heller* (discussed in Chapter 15) as support for this conclusion. He maintained that, “if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States.” [A possible hint on the scope of this *stare decisis* limitation is contained in footnote 30, where Alito noted that many states do not use the grand juries and civil juries required by the Fifth and Seventh Amendments in federal court as a result of earlier Supreme Court decisions refusing to incorporate these jury rights against the states.] Justice Thomas concurred that the arms right was fundamental and applicable to the states, but maintained that the proper vehicle for incorporation was not the Due Process Clause, but rather the Privileges or Immunities Clause of the Fourteenth Amendment [in other words, Justice Thomas wanted to reconsider the scope of the Privileges or Immunities Clause as established in *Slaughter-House* and subsequent cases]. Justice Stevens dissented, arguing that the incorporation of substantive rights (as distinguished from procedural rights) through the Due Process Clause did not require jot-for-jot incorporation, and the analysis should depend on whether there is a constitutionally protected liberty to keep handguns in the home under substantive due process principles, which he did not believe existed. Finally, Justice Breyer, joined by Justices Ginsburg and Sotomayor, also dissented, arguing that the right to keep and bear arms should not be incorporated under the Due Process Clause because it did not protect the politically powerless, was outside the scope of judicial expertise, and intruded upon state police power concerns regarding the public safety.

## § 8.03 Procedural Due Process

### [C] What Process Is “Due” (i.e., Constitutionally Required)?

#### [4] Counsel (And Funds For Expert Witnesses?)

[At page 460, add the following as new Note (3):]

(3) *Counsel in Civil Contempt Proceedings: Turner v. Rogers*, 131 S. Ct. \_\_ (2011). This case addressed the appointment of counsel in a different context, incarceration for civil contempt for failing to pay child support. South Carolina’s family courts often enforce their child support orders through civil contempt proceedings, imprisoning those with the ability to pay either for up to a year or until the payment is made, whichever occurs first. After being held in contempt on five previous occasions, the father remained far behind on his required payments, so another contempt hearing was held, with the father and mother both unrepresented by counsel. The family court judge imposed a twelve-month sentence on the father, and he appealed on the basis that he was entitled to counsel at his contempt hearing. But the Supreme Court disagreed, at least in cases in which the custodial parent entitled to the child support (i.e., the mother here) was also unrepresented by counsel. Examining the *Matthews v. Eldridge* factors, Justice Breyer’s opinion for the Court reasoned that, although the father’s interest in being free from imprisonment was weighty, other interests counseled against the mandatory appointment of counsel in all child support civil contempt cases. First, the crucial issue in these cases is ability to pay, which often is relatively straightforward. Second, the opponent is the custodial parent, who also typically is unrepresented by counsel. And finally, other procedural safeguards short of appointing counsel (such as a pre-hearing notice to the defendant regarding the importance of ability to pay, a standardized form and an opportunity to respond to specific questions regarding financial status, and a judicial finding on ability to pay) could significantly reduce the risk of erroneous deprivations of liberty. But although the father was not entitled to an attorney at the hearing, the Court held that the failure of the state court to provide any of the other potential procedural safeguards described in its opinion violated due process. Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, dissented, agreeing that the father was not entitled to counsel, but disagreeing that his civil commitment without the other alternative procedures described in the majority opinion violated due process, especially when the defendant never had raised any argument about the necessity of such alternative procedures.

#### [5] An Ostensibly “Impartial” Factfinder

[At page 461, add the following as new Note (4):]

(4) “*Extraordinary*” *Campaign Expenditures Creating a Probability of Bias: Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). This case addressed whether excessive campaign expenditures in a state court judicial election could raise a constitutionally intolerable probability of bias. After a West Virginia state court jury returned a \$50 million verdict against A.T. Massey Coal Co., the company’s chairman, CEO, and president, Don Blakenship, spent \$3 million to unseat an incumbent judge on the West Virginia Supreme Court and elect attorney Brent Benjamin in his place. Blakenship’s expenditures provided 60% of the funds supporting Benjamin’s candidacy in a race Benjamin won by less than 50,000 votes. When the appeal of the \$50 million judgment

against Massey Coal was heard by the West Virginia Supreme Court, Justice Benjamin refused to recuse, joining the majority in a 3-2 decision in favor of Massey Coal. The Supreme Court, however, in a 5-4 decision, held that Justice Benjamin's failure to recuse violated due process. Justice Kennedy, writing for the majority, reasoned that, as in *Ward* and *Aetna*, sometimes the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," even if no proof of actual bias exists. Although not every campaign contribution by a litigant or attorney creates such a probability of bias, the exceptional nature of the expenditures in this case led to the conclusion that "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Examining the relative size of the expenditures, their timing, and their apparent impact, the Court opined that serious fears of bias arose when a litigant, without the consent of the other parties, chooses the judge in its own cause. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented, contending that the "probability of bias" standard announced by the majority provided insufficient guidance for future cases and would increase strategic allegations of judicial bias.

**Chapter 9**  
**DUE PROCESS: SUBSTANTIVE RIGHTS OF “PRIVACY”**  
**AND PERSONAL AUTONOMY**

**§ 9.05 Other Issues Related to Privacy or Autonomy: The Rights To Control One’s Personality, To Treatment, To Die, or To Be Let Alone**

**[B] Personality, Reputation, and Related Issues**

*[At page 554, add the following as new Note (4):]*

(4) *Another Rejection of a Novel Due Process Claim—No Right of Post-Conviction Access to DNA Evidence: District Attorney’s Office v. Osborne, 129 S. Ct. 2308 (2009).* The Court, in a 5-4 opinion by Chief Justice Roberts, rejected a convicted rapist’s claims, including a substantive due process claim, seeking post-conviction access to the state’s evidence for more precise DNA testing. The Court, relying on *Collins*, first reiterated its reluctance to expand the concept of substantive due process to encompass novel claims of purported rights unsupported by a long history. The Court also emphasized the legislative response of Congress, as well as the legislative and judicial response of all but one of the states, authorizing access to DNA evidence under certain circumstances. The Court reasoned that it should not short-circuit this process by enlisting “the Federal Judiciary in creating a new constitutional code of rules for handling DNA.” Justice Stevens dissented, arguing that the state’s failure to provide access to the evidence was arbitrary in light of the weighty individual interests and minimal governmental interests at stake.

## Chapter 10 EQUAL PROTECTION

### § 10.03 The “Upper Tier”: Strict Scrutiny and “Compelling” Governmental Interests

#### [A] Race and Other “Suspect Classifications”

##### [6] Affirmative Action: Addressing General Societal Effects by “Benign” Consideration of Race—or “Reverse” Discrimination?

[At page 651, add the following paragraph to the end of Note (4):]

But Michigan’s state constitutional amendment in response to *Grutter* was not the end of the story. The amendment is being challenged in federal court as a violation of the Equal Protection Clause. Although the federal district court granted summary judgment in favor of the state, the Sixth Circuit reversed and remanded in June 2011. The Sixth Circuit held that, under the circumstances, the adoption of a state constitutional amendment impermissibly denied the supporters of affirmative action equal access to the political process. *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary v. Regents of the University of Michigan*, \_\_\_ F.3d \_\_\_, Nos. 08-1387/1389/1534 (6th Cir. 2011). Perhaps the validity of the colorblindness theory of equal protection will reach the Supreme Court through this case, allowing the Court to revisit whether “educational diversity” is a “compelling state interest.”

[At page 665, add the following as new Note (5):]

(5) *The “Strong Basis in Evidence” Standard Applied To Governmental Conduct Designed To Avoid A Racially Disproportionate Impact: Ricci v. DeStefano, 129 S. Ct. 2658 (2009).* The results of a promotion exam for firefighters in New Haven, Connecticut would have resulted in 17 whites, 2 Hispanics, and no blacks being promoted, despite the fact that the qualified applicant pool was more than 20% black. Moreover, the passage rate for minorities on the exam was one-half the passage rate for whites. As a result, the city refused to certify the examination results, concerned about a lawsuit by minorities under Title VII’s statutory prohibition against employment decisions with a disparate impact on minorities. The firefighters who would have been entitled to a promotion if the exam had been certified filed suit, claiming that the city’s action constituted intentional discrimination under Title VII and the Equal Protection Clause of the Fourteenth Amendment.

Although the Supreme Court, in a 5-4 decision authored by Justice Kennedy, rendered judgment against the city based solely under Title VII, the Court drew analogies from equal protection precedents in reaching its result. The Court reasoned that the city had intentionally engaged in race-based decisionmaking by declining to certify the results solely because of the statistical disparity between the performance of minority and white candidates. Noting that its Equal Protection Clause decisions had held that government actions designed to remedy past racial discrimination are permissible only when there is a “strong basis in evidence” that the remedial actions were necessary, the Court borrowed this standard for Title VII. This meant that the City had to have a strong basis in evidence of disparate-impact liability before it could refuse to certify the test, which the Court held had not been met when the City relied on the statistics alone without evidence that the tests were unrelated to the job and inconsistent with business necessity.

Justice Scalia, while joining the Court’s opinion in full, authored a concurring opinion highlighting the tension between the disparate-impact provisions of Title VII and the commands of the Equal Protection Clause. Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented, urging that the failure to certify the test due to good faith concerns about disparate impact was not intentional discrimination “because of” race.

### **[B] Fundamental Rights**

*[At page 672, delete the Austin v. Michigan Chamber of Commerce squib and substitute the following Note on Conduct Classifications:]*

#### **NOTE ON CONDUCT CLASSIFICATIONS**

Almost all laws classify in some respect. These classifications can take a variety of forms. In addition to classifications based on personal characteristics shared by a group, like race and national origin, laws often classify on the basis of individual conduct, such as distinguishing between those who passed the test and those who failed the test in *Washington v. Davis*.

In most instances, classifications based on conduct only receive rational basis review. But there are exceptions. As discussed in Chapter 9, classifications that infringe upon a fundamental right are subject to strict scrutiny. In *Skinner v. Oklahoma*, for instance, the Court held that a law requiring the sterilization of those thrice convicted of larceny, while not imposing a similar punishment for embezzlers, was invalid under equal protection. Although general distinctions between punishments for larceny and embezzlement would be subject to mere rational basis review, the fact that the punishment of sterilization infringed on the fundamental right of procreation meant that a much more exacting scrutiny was required. The Court has similarly employed strict scrutiny in several other contexts under the Equal Protection Clause.

### **§ 10.04 The “Middle Tier”: Shifting Areas of Greater-Than-Normal (But Not Fundamental) Protection**

#### **[C] Sexual Orientation: The Arguments of Gays, Lesbians, and Others**

*[On page 711, substitute the following Problem K for existing Problem K:]*

#### **PROBLEM K**

Congress enacted the Defense of Marriage Act (DOMA) in 1996 based on concerns that same-sex marriage would soon be authorized in several states. DOMA has two main provisions. Section 2 of DOMA provides that a state does not have to give any effect to a same-sex marriage entered into in another state. Thus, under section 2, Texas, for instance, does not have to recognize as valid a marriage between two individuals of the same sex performed in Massachusetts, which has authorized same-sex marriages since 2003.

The other main provision of DOMA, section 3, defines “marriage” for the purpose of any federal law, regulation, or ruling as “only a legal union between one man and one woman as husband and wife.” As a result, section 3 prevents a same-sex couple legally and validly married in a state from being viewed as married for any purpose under federal law, such as tax filing status,

bankruptcy exemptions, social security benefits, and more than one thousand other federal statutory provisions where marital status is a factor in benefits, rights, and privileges. *See* GENERAL ACCOUNTING OFFICE, GAO-04-353R DEFENSE OF MARRIAGE ACT (Jan. 23, 2004) (identifying 1,138 federal statutory provisions based on marital status as of Dec. 31, 2003).

Several challenges have been brought to DOMA's constitutionality. Although some of these challenges have been successful at the district court level, all had been reversed on appeal. In February 2011, however, Attorney General Eric Holder announced that the Department of Justice would no longer defend the constitutionality of section 3 in court. The Attorney General issued the following statement:

In the two years since this Administration took office, the Department of Justice has defended Section 3 of the Defense of Marriage Act on several occasions in federal court. Each of those cases evaluating Section 3 was considered in jurisdictions in which binding circuit court precedents hold that laws singling out people based on sexual orientation, as DOMA does, are constitutional if there is a rational basis for their enactment. While the President opposes DOMA and believes it should be repealed, the Department has defended it in court because we were able to advance reasonable arguments under that rational basis standard.

Section 3 of DOMA has now been challenged in the Second Circuit, however, which has no established or binding standard for how laws concerning sexual orientation should be treated. In these cases, the Administration faces for the first time the question of whether laws regarding sexual orientation are subject to the more permissive standard of review or whether a more rigorous standard, under which laws targeting minority groups with a history of discrimination are viewed with suspicion by the courts, should apply.

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination.

Consequently, the Department will not defend the constitutionality of Section 3 of DOMA as applied to same-sex married couples in the two cases filed in the Second Circuit. We will, however, remain parties to the cases and continue to represent the interests of the United States throughout the litigation. I have informed Members of Congress of this decision, so Members who wish to defend the statute may pursue that option. The Department will also work closely with the courts to ensure that Congress has a full and fair opportunity to participate in pending litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the

Department will cease defense of Section 3.

The Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense. At the same time, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because – as here – the Department does not consider every such argument to be a “reasonable” one. Moreover, the Department has declined to defend a statute in cases, like this one, where the President has concluded that the statute is unconstitutional.

Much of the legal landscape has changed in the 15 years since Congress passed DOMA. The Supreme Court has ruled that laws criminalizing homosexual conduct are unconstitutional. Congress has repealed the military’s Don’t Ask, Don’t Tell policy. Several lower courts have ruled DOMA itself to be unconstitutional. Section 3 of DOMA will continue to remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down, and the President has informed me that the Executive Branch will continue to enforce the law. But while both the wisdom and the legality of Section 3 of DOMA will continue to be the subject of both extensive litigation and public debate, this Administration will no longer assert its constitutionality in court.

Is this an appropriate course of action by the executive branch, which is bound to “faithfully execute the laws”? Has the executive branch satisfied its duty by continuing to “enforce” the law while leaving it to the legislative branch to defend the constitutionality of the law in court? Does the President’s duty to “defend” the Constitution authorize the executive branch to refuse to defend a statute that the President believes conflicts with the Constitution? While Holder’s statement received more media attention, similar refusals by the executive branch to defend the constitutionality of a statute have occurred dozens of times over the last fifty years, including two of the cases discussed in Chapter 5 of this casebook -- the legislative veto in *INS v. Chadha* and the independent counsel law in *Morrison v. Olson*.

Even assuming, though, that it is generally appropriate for the executive branch to decline to defend a statute viewed as unconstitutional, was this really a situation, as Holder outlined in his statement, where there was no binding precedent? Why isn’t the following case, *Roemer v. Evans*, not support for the use of some sort of rationality review for DOMA? Would DOMA survive the standard it employed?

## Chapter 11 SPEECH, PRESS AND ASSOCIATION

### § 11.02 The “Preferred” Position of the Freedom of Speech: Utterances that Pose Alleged Dangers of Violence or Insurrection

#### [B] Advocacy of Unlawful Conduct (or of Unpopular Ideas)

##### [2] The Modern Test for Criminalizing Speech Urging Illegal Action

[At page 756, add the following as Note (4), and renumber existing Note (4) as Note (5):]

(4) *Other Doctrines Limiting “Dangerous” Speech: Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). The *Brandenburg* test applies to incitement of unlawful action, but there are other avenues to limit “dangerous” speech. Under federal law, it is a crime to “knowingly provide[e] material support or resources to a foreign terrorist organization” designated by the Secretary of State. Plaintiffs, who wanted to provide material support in the form of training and expert advice to the lawful, nonviolent activities of two designated foreign terrorist organizations, the Partiya Karkeran Kurdistan and the Liberation Tigers of Tamil Eelam, challenged the constitutionality of the statute under the First Amendment. In rejecting this challenge, the Supreme Court did not rely on *Brandenburg*, as the plaintiffs’ proposed expression was directed towards lawful action rather than illegal action. Nevertheless, the majority, per Chief Justice Roberts, reasoned that, due to the government’s interest in combating terrorism, “an urgent objective of the highest order,” the government had a sufficiently strong interest in prohibiting such support in light of congressional and executive findings that terrorist organizations frequently employed the support received for their lawful conduct to advance their terror activities and objectives. The Court held that the proposed training and advice the plaintiffs desired to furnish, such as using international law and the United Nations to resolve disputes and obtain relief, could be redirected towards the organizations’ promotion of terrorism. Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented, urging that the government had not sufficiently justified its intrusion on the plaintiffs’ expression.

### § 11.04 Unprotected Speech (or Speech “That Is Not Protected Speech”)

#### [A] Unprotected Speech Categories: An Overview

[At page 773, add the following squib on *United States v. Stevens* after the *Chaplinsky* squib. Delete Notes (1) and (2) on page 773 and substitute the following Notes and Questions:]

**UNITED STATES v. STEVENS**, 130 S. Ct. 1577 (2010). Stevens challenged on free speech grounds his conviction for selling dog fight videos in violation of a congressional statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty. The government contended that depictions of animal cruelty, as a class, were categorically unprotected by the First Amendment because the value of such speech was minimal compared to its societal costs. While the Supreme Court recognized that the First Amendment permits restrictions on the content of speech in a few, limited “historic and traditional categories long familiar to the bar” (such as obscenity, defamation, incitement, fraud, and speech integral to criminal

conduct), the Court, in an opinion authored by Chief Justice Roberts, viewed the government’s proposed balancing test as “startling and dangerous”:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweighs the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. . . .

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *R.A.V.*, *supra* (quoting *Chaplinsky*). [But] such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. [Our decisions] cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognitions of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.

After rejecting the government’s unprotected speech argument, *Stevens* proceeded to hold that statute as written was substantially overbroad when its presumptively impermissible applications far outnumbered the permissible applications. Justice Alito dissented, arguing that the case should be remanded to decide whether the statute as applied to dog-fighting videos was unconstitutional.

## NOTES AND QUESTIONS

(1) *The Significance of Unprotected Speech Categories.* There is a significant doctrinal distinction between “unprotected categories of speech” and speech that is ultimately unprotected in a particular context. For example, in the *Burson* decision discussed in § 11.03 [A], political campaign speech within 100 feet of a polling place was *ultimately not protected* because the government could satisfy strict scrutiny. This is very different than what occurred in *Chaplinsky*—because “fighting words” are a category of unprotected speech, the government only had to satisfy the rational basis test in order to have *Chaplinsky*’s conviction upheld. *Chaplinsky* thus did not receive the benefit of any heightened judicial scrutiny under either Track One or Track Two First Amendment analysis.

(2) *Identifying Unprotected Speech Categories.* The doctrinal significance of characterizing a class of speech as unprotected requires careful attention to the standard for making this determination. While *Chaplinsky* mentioned that the punishment of “these limited classes of speech” had “never been thought to raise any constitutional problem,” its analysis emphasized that “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the societal interest in order and morality.” The government relied on this articulation from *Chaplinsky* (and subsequent cases) in *Stevens*, claiming that depictions of animal cruelty were likewise of slight social value compared to their societal costs. But the *Stevens* Court appeared to shift the emphasis to a historical approach—concluding that categories of unprotected speech are identified by a longstanding tradition of exclusion from the First Amendment.

In *Brown v. Entertainment Merchants Association*, 131 S. Ct. \_\_\_\_ (2011) [below in § 11.04 [I]], the Court, per Justice Scalia, relied on the historical approach from *Stevens* to conclude, *inter alia*, that violent interactive videos were not a category of unprotected speech, even though the regulation applied only to minors. This seems to confirm the historical requirement from *Stevens*. The *Entertainment Merchants* Court also relied upon and quoted the language from *Chaplinsky*. It may be that, to have a “new” category of speech recognized as “unprotected,” the government must demonstrate both a historical tradition of unprotected status and that the category’s social value is substantially outweighed by the social harm caused by the speech.

(3) *The Classes of Unprotected Speech.* So what are these classes of historically unprotected speech? *Chaplinsky* listed the “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting words’ . . . .” *Stevens* provided a somewhat different list of unprotected speech—“obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” Notice that some *Chaplinsky* classes are no longer considered wholly outside the protection of the First Amendment, such as the lewd and the profane. *Stevens* also recognized two categories of historically unprotected classes of speech not mentioned in *Chaplinsky*—fraud and speech integral to criminal conduct.

*Stevens* relied on these new categories to justify the Court’s earlier extensions of classes of unprotected speech. As an example, *New York v. Ferber*, discussed in § 11.04 [D], recognized “child pornography” as a category of unprotected speech, for five stated reasons. While the *Stevens* Court acknowledged that one of these reasons involved a balancing of competing interests, *Stevens* emphasized that another basis of the *Ferber* holding was that the child pornography market “was ‘intrinsically related’ to the underlying abuse, and was therefore ‘an integral part of the production of such materials, an activity illegal throughout the Nation.’” *Stevens* concluded that the child pornography exception was therefore grounded in the exception for speech integral to criminal conduct, “a previously recognized, long-established category of unprotected speech.”

#### **[D] Child Pornography**

[At page 805, revise the title of the unnumbered Note by renumbering it as Note (1); then, after Problem M on page 806, add the following as new Note (2):]

(2) *Violent Speech Is Not Necessarily Unprotected Speech: United States v. Stevens, 130 S. Ct. 1577 (2010).* A clue to the answer to Problem M is found in the *Stevens* decision. Congress

passed 18 U.S.C. § 48, a federal statute that criminalized certain “depiction of animal cruelty.” Although the statute was probably aimed at so-called “crush videos” (depicting small animals crushed by women in high-heeled shoes), it was applied to Stevens, who sold dog-fight videos. While all fifty states and the District of Columbia prohibit *acts* of animal cruelty, Stevens urged that the *depictions* in the videos were protected by the First Amendment. The federal government’s main argument, presented by then-Solicitor General Elena Kagan, was that “depictions of animal cruelty,” as a class, were, like child pornography, outside the protection of the First Amendment.

The Supreme Court, in an opinion by Chief Justice Roberts with only Justice Alito dissenting, rejected the federal government’s theory. The Court criticized the government’s unprotected speech argument, apparently rereading *Chaplinsky* and subsequent cases as applying only to categories of speech that were historically unprotected. In response to the government’s argument that *Ferber*’s exception for child pornography was not a historically unprotected category, the Court suggested that child porn should be understood as part of the “speech integral to criminal conduct” category of unprotected speech.

After rejecting the unprotected speech argument, the Court analyzed § 48 under the overbreadth doctrine. *See* § 11.03 [B]. The Court read § 48 as a “criminal prohibition of alarming breadth,” covering hunting depictions, slaughtering of animals for food, and customary veterinary and agricultural husbandry practices. As a result, the Court reasoned that § 48 was substantially overbroad when its presumptively impermissible applications far outnumbered the permissible ones. The Court did try to limit its holding, stating that it was not deciding “whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.” Justice Alito dissented, primarily disagreeing that § 48 should be interpreted to reach so broadly.

(3) *Violent Video Games As Protected Speech: Brown v. Entertainment Merchants Association*, 131 S. Ct. \_\_\_ (2011). The Supreme Court’s answer to Problem M is contained in this case, which held that a similar ban on the sale or rental of violent video games to minors violated the First Amendment. The *Brown* case is discussed in detail in § 11.04 [I], below.

## **[G] Defamation and Invasion of Privacy**

### **[3] Invasion of Privacy and Intentional Infliction of Emotional Distress**

*[Add the following case and notes on page 831 before subsection [H]:]*

#### **SNYDER v. PHELPS** 131 S. Ct. 1207 (2011)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier’s funeral service. The picket signs reflected the church’s view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

## I

Fred Phelps founded the Westboro Baptist Church [which] believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing, often at military funerals. . . .

Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty. [His] father selected the Catholic church in the Snyders' hometown of Westminster, Maryland, as the site for his son's funeral. Local newspapers provided notice of the time and location of the service. [On] the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.

The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event.

Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church (collectively Westboro or the church) in the United States District Court for the District of Maryland under that court's diversity jurisdiction. [A] jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$ 2.9 million in compensatory damages and \$ 8 million in punitive damages. [In] the Court of Appeals, Westboro's primary argument was that the church was entitled to judgment as a matter of law because the First Amendment fully protected Westboro's speech. The Court of Appeals agreed. . . . We granted certiorari.

## II

To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. The Free Speech Clause of the First Amendment -- "Congress shall make no law . . . abridging the freedom of speech" -- can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the

circumstances of the case. "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (opinion of Powell, J.). . . . "[N]ot all speech is of equal First Amendment importance," however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. *Hustler*, supra, at 56. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import. *Dun & Bradstreet*, supra, at 760. . . .

Deciding whether speech is of public or private concern requires us to examine the "content, form, and context" of that speech, "as revealed by the whole record." As in other First Amendment cases, the court is obligated "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." The placards read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You." While these messages may fall short of refined social or political commentary, the issues they highlight -- the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy -- are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs -- such as "You're Going to Hell" and "God Hates You" -- were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.

Apart from the content of Westboro's signs, Snyder contends that the "context" of the speech -- its connection with his son's funeral -- makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro's speech. Westboro's signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is "fairly characterized as constituting speech on a matter of public concern," and the funeral setting does not alter that conclusion.

Snyder argues that the church members in fact mounted a personal attack on Snyder and his family, and then attempted to "immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality or the supposed evils of the Catholic Church." We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there

can be no serious claim that Westboro's picketing did not represent its "honestly believed" views on public issues. There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter. Contrast *Connick*, supra, at 153 (finding public employee speech a matter of private concern when it was "no coincidence that [the speech] followed upon the heels of [a] transfer notice" affecting the employee).

Snyder goes on to argue that Westboro's speech should be afforded less than full First Amendment protection "not only because of the words" but also because the church members exploited the funeral "as a platform to bring their message to a broader audience." There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views and because of the relation between those sites and its views -- in the case of the military funeral, because Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies.

Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term -- "emotional distress" -- fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a "special position in terms of First Amendment protection."

[That] said, "[e]ven protected speech is not equally permissible in all places and at all times." Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach -- it is "subject to reasonable time, place, or manner restrictions" that are consistent with the standards announced in this Court's precedents. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). Maryland now has a law imposing restrictions on funeral picketing, as do 43 other States and the Federal Government. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.

[In this case, the] distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. [The] jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside. . . .

[The concurring opinion of JUSTICE BREYER is omitted.]

JUSTICE ALITO, dissenting.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree. . . .

### NOTES AND QUESTIONS

(1) *First Amendment Protection from Tort Liability for Funeral Picketing: Snyder v. Phelps, 131 S. Ct. 1207 (2011)*. *Snyder* held that offensive picket signs addressing issues of public concern displayed in a public forum 1000 feet from a military funeral were protected from tort liability under the First Amendment. Because the very reason the signs caused distress was due to their content and viewpoint, the Court held that the First Amendment's special protection against content and viewpoint discrimination on matters of public concern encompassed the Westboro Baptist Church's crudely stated opinions on such issues as homosexuality in the military and scandals involving Roman Catholic priests.

(2) *The Limits of Snyder*. *Snyder*, however, was a narrow decision, only addressing the conduct of the Westboro Baptist Church at this particular funeral. The Court did not address, then, the time, place or manner restrictions that could lawfully be imposed on such picketing. Nor did the Court address whether other speech activities of the Church might be subject to liability under the First Amendment.

One key consideration for the Court was the fact that the overall thrust and dominant theme of the signs spoke to broader public issues rather than specifically to the Snyders. But what would have occurred if the signs specifically targeted the Snyders? Could the Church have distributed flyers or made Internet postings with the following message:

The Snyders taught their son Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater. Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?

Or, if the Snyders had created an online memorial for Matthew over the Internet, could the Church have hacked into the memorial and posted pop-ups with sayings similar to those contained in their

signs? How far does the *Snyder* opinion reach in protecting such activities under the First Amendment?

The Church actually did post an “epic” on the Internet that was substantially similar to the quoted material above, but the Court refused to address it because *Snyder* never mentioned it in his petition for certiorari. Is this still a matter of public concern, or has the “epic” crossed the line into a personal attack on *Snyder*? Would this demonstrate “actual malice”? More generally, are these types of statements deserving of First Amendment protection? Under what theory?

[At page 831, add the following as a new subsection to § 11.04 immediately before § 11.05:]

### [I] “Violent Speech” As Unprotected Speech?

**BROWN v. ENTERTAINMENT MERCHANTS ASSOCIATION**, 131 S. Ct. \_\_ (2011). Relying on social science studies concluding that playing violent video games is psychologically harmful to minors, California enacted a statute prohibiting the sale or rental of “violent videos” to minors. For purposes of the statute, violence included “killing, maiming, dismembering or sexually assaulting an image of a human being.” The video entertainment industry challenged the statute as a violation of the Free Speech Clause. The Supreme Court, per Justice Scalia, agreed with the challengers: “California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors.” Rejecting a series of California’s arguments, Justice Scalia concluded: “Even where the protection of children is the object, the constitutional limits on governmental action apply.”

The first issue was whether the violent video games were “speech.” Citing to *Winters v. New York*, 333 U.S. 507 (1948), Justice Scalia wrote: “Like the protected books, plays and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices...and through features distinctive to the medium.... That suffices to confer First Amendment protection.”

Having decided that videos were “speech,” the Court turned to the second issue: whether violent speech directed to minors was a category of “unprotected speech.” Relying on the historical analysis of the *Stevens* decision and the *Chaplinsky* decision, the Court stated: “As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a savings clause required for the latter. That does not suffice.” The Court held that violent speech is not a category of unprotected speech. *See* § 11.04 above.

California had several other arguments regarding unprotected speech status. California tried to rely on *Ginsberg*, but the Court distinguished *Ginsberg* since it involved “sexual materials.” California also argued that the violent videos were unprotected speech because they were “interactive.” The Court, relying on Judge Richard Posner, also rejected this contention by noting that “all literature is interactive.” Finally, the Court addressed the claim (advanced by Justice Alito’s concurrence) that the violent videos should be unprotected because they were “disgusting.” The Court rejected this argument because “disgust is not a valid basis for restricting expression.”

Having concluded that the California statute was a “subject matter restriction on speech,” the Court then applied the basic Two Track analysis. *See* § 11.03 above. Because this was a content

regulation, the Court required California to satisfy strict scrutiny. California argued that it had two “compelling state interests”: (1) addressing a “serious social problem” and (2) helping parents control their children. The Court rejected the state’s social science evidence of a serious social problem: the evidence showed “at best some correlation between exposure to violent entertainment and miniscule real-world effects....” Moreover, on the means prong of strict scrutiny, the Court concluded that the California “regulation is wildly underinclusive when judged against its asserted justification....” Regarding the asserted interest in “helping parents,” the Court concluded both that the actual state’s interest “can hardly be a compelling interest” and that the statute was “vastly overinclusive.” In sum, California failed both prongs of strict scrutiny for both asserted interests.

Justice Alito, joined by Chief Justice Roberts, concurred in the judgment. Justice Alito concluded that the California statute failed the void-for-vagueness standard. *See* § 11.03[B] above. He declined to address the majority’s broader (*i.e.*, Two Track) analysis. There were two dissents. Justice Thomas dissented on originalist grounds; he argued that minors do not have any free speech rights independent of their parents. Note that, because he relied on the original meaning, Justice Thomas did not enter into the controversy about relying on social science data between the majority and Justice Breyer’s dissent.

Justice Breyer separately dissented. Justice Breyer devoted part of his dissent to refuting Justice Alito’s concurrence (relying on a void-for-vagueness theory). He then relied on what he called “cutting-edge neuroscience” and the *Ginsberg* decision to conclude that California could satisfy strict scrutiny. Justice Breyer’s version of “strict scrutiny” is actually a multi-factor test that provides less protection than the traditional version of strict scrutiny (used by Justice Scalia’s majority opinion). Justice Breyer provided, as Appendices, two lists of “peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video games.” The list of articles “supporting the hypothesis that violent video games are harmful” is considerably longer than the list of articles rejecting the hypothesis.

## NOTES AND QUESTIONS

(1) *So-called “Violent Interactive Videos” Are Not Unprotected Speech: Brown v. Entertainment Merchants Association, 131 S. Ct. \_\_\_ (2011).* The California Legislature, based on social science studies concluding that playing violent video games was psychologically harmful to minors, passed a statute prohibiting the sale or rental of violent videos to minors. The lower courts struck down the statute, and the Supreme Court, by a 7-2 vote, affirmed. In an opinion by Justice Scalia, the Supreme Court rejected the State’s argument that violent speech was “unprotected speech” (and, therefore, that it could be regulated with only a rational basis). Relying on the historical analysis of the *Stevens* decision, *supra* § 11.04, the Court held that there was no longstanding tradition considering violent speech unprotected. The Court also rejected, in a *Chaplinsky* analysis, the State’s conclusions about the psychological harm to minors allegedly arising from viewing violent videos. Since the violent videos statute was a content-based regulation, the Court applied the strict scrutiny standard of Track One. The Court held that the State did not satisfy strict scrutiny. Justices Thomas and Breyer had separate dissents.

(2) *The Application of Track One-Strict Scrutiny.* California argued it had two compelling state interests that satisfied strict scrutiny: (1) addressing a “serious social problem” of psychological harm to minors; and (2) helping parents control their children. The Court rejected the psychological

harm contention. The Court also held that, because the State did not regulate other sources of such harm (e.g., Saturday cartoons on television), the statute was “wildly underinclusive” and failed the means prong of strict scrutiny. As for the asserted interest in helping parents, the Court expressed doubt that it was a compelling interest and concluded that the statute was “vastly overinclusive.” The *Entertainment Merchants* decision confirms the Court’s use of the Two Track system. If there were to be a “low-value speech” analysis, the case of violent videos (or “crush videos” in *Stevens*) would seem to have been the opportunity, but the Court declined to follow such an approach.

(3) *Entertainment Merchants and Legislative Reliance on Social Scientific Data.* The California Legislature relied on social science data supporting the hypothesis that playing violent video games is psychologically harmful to minors. In applying strict scrutiny, the majority did not accord any “deference” to these legislative findings of fact, and Justice Scalia’s opinion derides California’s social science literature for failing to prove *causation*. The majority concluded that, at the most, the studies showed “some correlation between exposure to violent entertainment and miniscule real-world effects.”

Justice Breyer’s dissent was in sharp contrast. Justice Breyer was apparently convinced that causal relationship was established. Justice Breyer also argued that, when the evidence of harm was “ambiguous,” the Court should be deferential to the legislature (whose members, after all, are politically accountable if they are mistaken).

The controversy about the Court’s reliance on social scientific studies is, of course, a longstanding feature of modern constitutional law. You have seen the most famous example (accepting the data) in *Brown v. Board of Education*, § 10.03 above. In the free speech context, you have seen how social science data about “adult pornography” has been rejected by American courts. See § 11.04[B] and Problem I. Note the lack of deference afforded to Congress in the *Lopez* and *Morrison* decisions in Chapter 2. Are Article III Judges institutionally competent to evaluate the social science (or other science) evidence—compared to legislators?

## § 11.05 The Free Press Clause: Prior Restraint, Subsequent Regulation, and Press Access

### [D] Press Access to Government Institutions

[At page 854, add the following as Note (4), and renumber the remaining notes:]

(4) *Following Press-Enterprise I, the Court Holds that the Defendant’s “Public Trial Right” Extends to Voir Dire: Presley v. Georgia, 130 S. Ct. 721 (2010).* This decision relied on *Press-Enterprise I* (Note 3 above). Defendant Presley was convicted in Georgia state court, by a jury, of cocaine trafficking. During jury selection, the trial court ordered the “lone courtroom observer” (the Defendant’s uncle) to leave the courtroom. The trial court stated that there was not enough space in the courtroom for the uncle and the 42 person juror pool. Defendant’s counsel objected to the exclusion of the public from *voir dire* and renewed the motion at a post-trial hearing. At the hearing, defense counsel established that one-half the courtroom could have still been available for the public even with all 42 prospective jurors in the room, as long as some were seated in the jury box. At this point, the trial court stated he preferred to seat prospective jurors throughout the courtroom and denied the public trial right claim on the grounds that: “It’s totally up to my discretion . . . .”

While the Georgia Supreme Court affirmed, the Supreme Court, in a *per curiam* opinion, determined that the “discretion” of a trial court is not “total” and is confined by the Sixth Amendment (and First Amendment) right to a public trial. The Court relied on the holding from *Press-Enterprise I* that the First Amendment right to a public trial extended to *voir dire*. Reasoning that there was no legitimate reason, at least in the context of juror selection proceedings, to favor the First Amendment public access right over the Sixth Amendment’s textually explicit right to a “public trial,” the Court reversed and remanded. Relying again on *Press-Enterprise I*, the Court recognized that the public trial right could be overcome by the state showing an overriding interest in closure and the use of less drastic alternatives. [This appears to be a version of strict scrutiny.] The Court further stated that the trial court had an obligation to “consider alternatives to closure” even if no party presented such evidence. Citing to *Press-Enterprise II* (above), the Court held that a trial court must articulate specific findings to justify closure. Justice Thomas, joined by Justice Scalia, dissented, largely based on the Court’s use of “summary disposition” to decide the case without the benefit of full briefing and oral argument.

## § 11.06 Track Two Regulation

### [B] The “Public Forum” Doctrine

#### [2] Different Kinds of Forums (with Different Levels of Protection): Traditional, Designated, and Nonpublic Forums

[At page 880, add the following new paragraph to the end of existing Note (3):]

Viewpoint neutrality was also central to the Supreme Court’s decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010). Before a student organization can be officially recognized by Hastings law school as a registered student organization eligible for funding and facility access, the student group must agree to allow all students to become members of the organization. Christian Legal Society, which excluded “unrepentant homosexuals” and nonbelievers in the Holy Trinity from membership, challenged this “accept-all-comers policy” on First Amendment grounds, but lost in the district court, the court of appeals, and the Supreme Court. Justice Ginsburg’s opinion for the Court held that, although Hastings had created a limited public forum through its registered student organization program, the program was both reasonable in light of the purpose served by the forum and viewpoint neutral in that it required “*all* student groups to accept *all* comers.” But Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented because they believed the policy—as actually applied by the law school—was viewpoint discriminatory and thus unconstitutional.

### [C] The Incidental Regulation Standard: The Standard for Regulation of “Symbolic Speech”

[At page 885, add the following as new Note (5):]

(5) *A Legislative Vote Is Not Symbolic Speech: Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011). This case also addressed the extent to which conduct is protected as speech under the First Amendment, but in a different context. Under Nevada’s ethics law, a public official could not vote on a matter if his or her interest would be materially affected by a private

commitment to a family member, business associate, or close friend. An ethics complaint was brought against Carrigan for voting in a matter in which he allegedly should have recused. Carrigan defended against the charge in part on the basis that the recusal law was unconstitutional under the First Amendment. The Nevada Supreme Court agreed with Carrigan, but the Supreme Court reversed, holding that a legislative vote was not protected expression.

The Court, in an opinion by Justice Scalia, first highlighted the longstanding history of legislative recusal rules for conflicts of interests, dating back to the founding. The Court then reasoned that restrictions on voting by legislators were not restrictions on speech, because a legislative vote was not the expression of an individual, but an apportionment of legislative power from the people. A legislative vote, according to the Court, “symbolizes nothing. It discloses . . . that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication.” Even if a legislative vote had some expressive element, the Court further contended that the legislator had no First Amendment right to employ official governmental powers for personal expressive purposes. Justice Alito disagreed in his concurrence that a legislative vote was not expressive, but he agreed that the longstanding history of legislative recusal rules established that they were not unconstitutional under the First Amendment.

### **§ 11.07 Commercial Speech**

[At page 907, add the following as new Note 10:]

(10) *Protected Commercial Speech in Pharmaceutical Marketing: Sorrell v. IMS Health Inc.*, 131 S. Ct. \_\_\_ (2011). This case, like *Thompson* above, analyzed regulations concerning pharmaceutical marketing. Vermont state law prohibited the sale, disclosure, and use of pharmacy records revealing the prescribing practices of individual doctors for marketing purposes without a doctor’s consent, but allowed the use of the information for other purposes, such as research and educational communications. The Court’s opinion by Justice Kennedy concluded that the textual distinctions in this law were both content-based and speaker-based, as the statute disfavored marketing of pharmaceutical products while favoring other communications by other speakers. The stated justifications of the law bolstered this conclusion, as the legislature found that the law was needed because pharmaceutical marketers often conveyed messages in “conflict with the goals of the state.” Because the law was content-based, it warranted “heightened judicial scrutiny.” Reasoning that the outcome would be the same under either the *Central Hudson* standard or the strict scrutiny standard, the Court employed the “special commercial speech inquiry” from *Central Hudson*. While acknowledging that privacy interests may be substantial, the Court opined that this law did not directly advance any privacy interests when the pharmacy records could be used for any purpose other than marketing. Likewise, the stated government interests in promoting public health and lower medical costs were also substantial, but the Court determined that there were other means to accomplish this objective rather than censorship of the message. Justice Breyer, joined by Justices Ginsburg and Kagan, dissented, urging that the incidental expressive restriction created by this law was a constitutional governmental effort to regulate a commercial enterprise.

### **§ 11.08 When Government Functions Are Intertwined with Speech: Public Schools, Elections, Government Employees, and Government Subsidy**

## [B] Election Campaigns

[At page 913, delete the *Austin v. Michigan Chamber of Commerce* squib and substitute the following squib on *Citizens United*. Delete Notes (2), (3), and (5) on page 914. Renumber Note (4) as Note (5), Note (6) as Note (2), and Note (7) as Note (6). Add the following new Notes (3) and (4):]

**CITIZENS UNITED v. FEDERAL ELECTION COMMISSION**, 130 S. Ct. 876 (2010). Federal law prohibited corporations and unions from using their general treasury funds to make even independent expenditures advocating the election or defeat of a candidate or referring to a candidate by name within 30 days of a primary or 60 days of a general election. *Citizens United*, a nonprofit corporation with an annual budget of about \$12 million, released a documentary entitled *Hillary: The Movie*, which was quite critical of then-Senator Hillary Clinton, a candidate in the Democratic Party's 2008 presidential primary elections. *Citizens United* desired to promote its documentary with advertisements during the prohibited 30-day period before the primary, so it challenged the constitutionality of the corporate independent expenditures ban on numerous grounds. Although prior decisions of the Court, such as *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), had upheld similar corporate bans due to the government's compelling "antidistortion" interest in preventing corporate wealth and legal advantages from influencing elections, Justice Kennedy, in a 5-4 decision, overruled these prior decisions and held that no compelling governmental interest existed in these circumstances for disfavoring the protected First Amendment speech of corporations:

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, simply for engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit the government to ban political speech simply because the speaker is an association that has taken on the corporate form. [But the] First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion." . . . *Austin's* antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations[, which] accumulate wealth with the help of the corporate form, [often] have "immense aggregations of wealth," and [express views with] "little or no correlation to the public's support" for those views. . . . *Austin* interferes with the "open marketplace" of ideas protected by the First Amendment [by permitting] Government to ban the political speech of millions of associations of citizens[, most of which] are small corporations without large amounts of wealth. . . .

[The] Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. . . . The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 states do not restrict independent expenditures by for-profit corporations. . . . The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent

with any suggestion that the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker. . . . Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption.

Chief Justice Roberts, joined by Justice Alito, and Justice Scalia, joined by Justices Kennedy and Alito, filed separate concurring opinions primarily to refute in greater detail arguments made by Justice Stevens’s very lengthy concurring and dissenting opinion, which was joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Stevens argued in part:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

Justice Thomas, while joining most of Justice Kennedy’s opinion, dissented from the Court’s separate holding rejecting Citizens United’s challenge to the reporting and disclosure requirements for independent expenditures.

(3) *Are Corporations Citizens Too?* Should corporations have the right to unlimited independent expenditures as the Court held in *Citizens United*? Should the answer depend on how “independent” such expenditures are in reality? The Court mentioned that, by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. But how coordinated does it need to be before it gives rise to the appearance of corruption? One district court judge found “that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications[,] Members express appreciation to organizations for the airing of these election-related advertisements [and] are quite aware of who is running advertisements on the candidate’s behalf, when they are being run, and where they are being run, [and] Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member.” *McConnell v. Fed. Elec. Comm’n*, 251 F. Supp. 2d 176, 623 (D.D.C.) (opinion of Kollar-Kotelly, J.), *aff’d in part & rev’d in part*, 540 U.S. 93 (2003). Is this the appearance of corruption?

How far does the *Citizens United* rationale extend in protecting the First Amendment rights of corporations? Could a corporation owned by foreign interests have a First Amendment claim to unlimited independent campaign expenditures in United States elections? Could a corporation have a First Amendment right to make direct contributions to political candidates? At what point would the government’s interests be compelling enough to limit corporate electioneering activities?

(4) *Burdens on Expenditures: Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. \_\_\_ (2011) and *Davis v. Federal Election Commission*, 554 U.S. 724 (2008).

These cases both involved campaign finance regulations that provided benefits to a candidate's opponents once expenditures on the candidate's behalf reached a defined threshold. In *Davis*, the Court addressed the so-called "Millionaire's Amendment," a federal law that increased the individual contribution limit for a congressional candidate if his opponent spent more than \$350,000 in personal funds. *Bennett* considered a public financing scheme under Arizona law that granted additional matching funds to those candidates for state-wide office opting for public financing once expenditures by opposing privately financed candidates or independent groups reached a certain threshold. In both cases, the Court, in 5-4 decisions, reasoned that the limitations "substantially burdened" the exercise of First Amendment rights. As a result, strict scrutiny was applied, and both regulations were invalidated as not narrowly tailored to the compelling governmental interest in preventing corruption or the appearance of corruption. The dissenters argued that there were compelling governmental interests supporting the regulations and that there was not even a "substantial burden" on a candidate's speech, but rather the subsidization of other speech, producing more speech overall.

## **[C] Government Speech: The Government as Speaker or the Government's Message**

### **[1] Government Subsidy or Support**

*[At page 923, add the following as new Note (6):]*

(6) *Permanent Monuments Displayed on Public Property as Government Speech: Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009)*. After Pleasant Grove rejected the request of a religious organization, Summum, to place a permanent monument in a city park which contained other privately donated monuments, Summum sued, urging that the city thereby violated the Free Speech Clause. Summum argued that, by erecting monuments from other private organizations in a public park, including a Ten Commandments monument donated by the Fraternal Order of Eagles, the city had created a public forum and therefore strict scrutiny applied. The city responded that its determination of which privately donated monuments to erect was properly analyzed as government speech, barring the application of the Free Speech Clause.

The Supreme Court unanimously agreed with the city that the placement of permanent monuments in a public park was a form of government speech, although several separate opinions were delivered. Justice Alito authored the majority opinion, reasoning that observers would reasonably interpret permanent donated monuments on public land as conveying some message on the government's behalf, especially in light of the general government practice of "selective receptivity" of such monuments throughout American history. It was unnecessary for the city to formally adopt a particular message for each donated monument, the Court explained, because the meaning of monuments frequently varies among observers and evolves over time. The Court then rejected Summum's public forum argument, declaring that forum analysis only applied in those situations in which the property "was capable of accommodating a large number of public speakers without defeating [its] essential function," such as speakers in a park who would eventually depart. Here, though, only a finite and limited number of permanent monuments could be placed in the park, so no public forum existed.

Despite joining the majority opinion, Justices Stevens, Ginsburg, and Breyer articulated concerns regarding the scope of the government speech doctrine in prior cases such as *Rust* and

*Johanns*. Justice Souter merely concurred in the judgment, expressing “qualms” about the categorical acceptance of public monuments as government speech, especially in light of potential Establishment Clause concerns when some religious monuments are preferred by the government (the Establishment Clause is covered below in §12.02). Justices Scalia and Thomas, while joining the Court’s opinion, offered their view that the city had not violated the Establishment Clause under these circumstances.

For a review and a critique of the government speech doctrine, see Steven H. Goldberg, *The Government Speech Doctrine: “Recently Minted” but Counterfeit*, 49 U. LOUISVILLE L. REV. 22 (2010); Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENVER U. L. REV. 899 (2010).

## **[2] Speech by Government Employees**

*[Add the following paragraphs to Note (3) on page 927:]*

The Court recently relied on *Rankin* to support its holding in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), that blatantly offensive and inappropriate picket signs near a military funeral were protected from tort liability because they addressed matters of public concern. The crude language in the signs, such as "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You," highlighted issues -- including the political and moral conduct of the United States, homosexuality in the military, and scandals involving the Catholic clergy -- of public import, according to the Court. These issues were of political and social concern and subjects of legitimate news interest. As a result, it did not matter that most people would view such picketing near a funeral as grossly inappropriate and morally reprehensible. Since *Rankin* involved speech by government employees and *Snyder* did not involve any speech by government employees, the reliance by the *Snyder* Court on *Rankin* may represent an expansive interpretation of *Rankin*.

The Roberts Court has since extended the public concern requirement to employee retaliation cases brought under the Petition Clause. In *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. \_\_\_ (2011), a police chief had prevailed on his § 1983 action in federal district court alleging that the borough council retaliated against him for filing union grievances and a lawsuit against the borough. The court of appeals affirmed, reasoning that the chief did not need to show that his grievances and the lawsuit were on matters of public concern because he brought his claim under the Petition Clause (rather than the Speech Clause) of the First Amendment. But the Supreme Court disagreed and vacated the judgment below. Justice Kennedy’s opinion for the Court concluded that there was no reason for dispensing with the public concern requirement merely because the chief asserted a right to relief under the Petition Clause rather than the Speech Clause. Justices Scalia and Thomas each wrote separately, both relying on the original meaning of the Petition Clause.

## **§ 11.09 Freedom of Association and Related Concepts**

### **[C] The Right to Exclude (or Meet Privately With) Others: Private (and Not-So-Private) Clubs**

*[At page 938, add the following as new Note (6):]*

(6) *Governmental Carrots and Exclusionary Membership Policies: Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010). This case concerned a public law school’s decision to deny official recognition benefits to student groups that employed exclusionary membership policies. Registered student organizations at Hastings must agree to allow all students to become members of their organization to obtain funding and facility access from the law school. The Christian Legal Society, which excluded “unrepentant homosexuals” and nonbelievers in the Holy Trinity from membership, challenged this “accept-all-comers” requirement on various First Amendment grounds, including that it violated its associational rights by interfering with its membership policies. But the Supreme Court, agreeing with the decisions of the lower courts, held that the Christian Legal Society faced “only indirect pressure to modify its membership policies” because it could “exclude any person for any reason if it forgoes the benefits of official recognition.” As a result, rather than applying the strict scrutiny required when the state compels a group to include unwanted members without any opportunity to opt out, as occurred in *Dale*, the Court analyzed the expressive association claim in light of the fact that the school was “dangling the carrot of subsidy, not wielding the stick of prohibition.” Justice Ginsburg’s majority opinion thus applied the same level of scrutiny to the Christian Legal Society’s associational rights claim as applied to its accompanying free speech claim. Since the parties agreed Hastings had created a limited public forum for free speech purposes through its registered student organization program, the infringement on Christian Legal Society’s associational rights only had to be viewpoint neutral and reasonable in light of the purpose served by the forum, which the Court held was satisfied when Hastings required “all student groups to accept all comers.” Justice Alito, for Chief Justice Roberts and Justices Scalia and Thomas, dissented, urging that a more searching level of scrutiny should be employed and that, in any event, the requirement to accept all comers was neither reasonable nor viewpoint neutral.

## § 11.10 The Right Not to Speak—And Not to Listen

### [A] Freedom Not to Speak and Loyalty Oaths

[At page 941, add the following as new Note (4):]

(4) *The Limits of “Compelled Speech” in the Commercial Speech Context: Milavetz, Gallop & Milavetz P.A. v. United States*, 130 S. Ct. 1324 (2010). The Court, in an opinion by Justice Sotomayor, rejected a law firm’s free speech challenge to disclosure provisions of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. These disclosure provisions compelled debt relief agencies, including attorneys advising, counseling, or assisting consumer debtors in bankruptcy proceedings, to identify themselves in advertisements as “a debt relief agency” whose services include or may involve “bankruptcy relief.” The law firm argued that these regulations violated the *Central Hudson* standard, discussed earlier in § 11.07, but the Supreme Court disagreed that *Central Hudson* applied.

The Court explained that the challenged disclosure provisions prevented inherently misleading advertisements by requiring an accurate statement identifying the advertiser’s legal status and the character of the assistance provided. This was necessary because debt relief agencies, as Congress found, frequently advertised that they could obtain relief for consumers without mentioning that the relief would require the consumer to file for bankruptcy. Under these circumstances, the Court held that the appropriate level of scrutiny was whether the “disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”

Although “unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech,” here the requirements were not unduly burdensome because they encompassed accurate factual matters reasonably related to preventing consumer deception and allowed debt relief agencies to convey additional information in their advertisements. Justice Thomas concurred, expressing his concern that the standard of review employed by the Court was not strict enough, but agreeing that the regulations could survive a pre-enforcement challenge to their constitutionality.

### **[B] Protection of the “Captive Auditor”**

*[Add the following new Note (3) on page 945:]*

(3) *The Limits of the Captive Audience: Snyder v. Phelps, 131 S. Ct. 1207 (2011)*. The Supreme Court in this case, discussed in § 10.04 [G] [3], refused to extend the captive audience doctrine to encompass picketers near a military funeral. While recognizing that cases such as *Rowan* and *Frisby* had protected unwilling listeners from protected speech, the Court reasoned that the doctrine was a limited exception to the typical burden of viewers to avoid any bombardment of their sensibilities by averting their eyes. Because the picketers in this case stayed well away from the memorial service and were not seen on the funeral route, and there was no indication that the picketing interfered with the funeral service itself, the Court declined to expand the captive audience doctrine to the presented circumstances.

## Chapter 12 FREEDOM OF RELIGION

### § 12.02 The Establishment Clause

#### [A] Aid to Religion or Religious Institutions

#### [2] Non-Financial Aid: “Accommodation or Official Recognition”

[At page 993, before Problem A, add the following:]

#### NOTES AND QUESTIONS

(1) *The Ten Commandment Decisions: Van Orden v. Perry, 545 U.S. 677 (2005) and McCreary County, KY v. American Civil Liberties Union, 545 U.S. 844 (2005)*. The *Ten Commandment Cases* were companion decisions, both involving government displays of religious symbols—namely the Ten Commandments (which, in Judeo-Christian belief, Moses brought down from the mountain to provide governing religious principles). These principles have historically served as the basis for laws and other cultural restraints on individual conduct.

The Court’s treatment of these cases has many parallels to its treatment of the two crèche cases. The *context* and *longevity* of the displayed symbol seemed to be the crucial determinants. In *Van Orden*, where the Ten Commandments monument was located for many decades on the statehouse campus with many other monuments, the Court held (5-4) that the display did not violate the Establishment Clause. In *McCreary County*, where the Ten Commandments were newly displayed (at least originally) as a solitary display, the Court held (5-4) that this display violated the Establishment Clause. Justice Breyer was the only Justice voting with the majority in the two cases.

After the *Ten Commandments Cases*, speculation arose regarding the Court’s approach in a case where the context and longevity factors were in tension rather than complementary. In *Buono*, discussed in the next note, a highly fractured Court provided some insight into this problem.

(2) *The Government’s Solitary, But Long-Standing, Display of a Religious Symbol (A Cross): Salazar v. Buono, 130 S. Ct. 1803 (2010)*. The *Buono* case involved the solitary display of a “Latin cross” on federal property (part of the Mojave Desert). The “Latin cross” had originally been placed in its location in 1934 by the VFW to honor the sacrifices of American military in WWI. So, the religious symbol was not set in a context (like *Lynch* or *Van Orden*) where its religious significance was diminished, but the symbol had been displayed for many decades apparently without any Establishment Clause objection.

*Buono*, a former employee at the federal Mojave Desert Preserve, sued under the Establishment Clause. In this first lawsuit, *Buono* prevailed (the district court used the *Lemon* standard), and the district court entered an injunction against the federal government’s maintaining the display (*Buono I*). Congressional reaction to *Buono I* involved several actions, including passing a land-transfer federal statute which allowed the federal government to trade the cross’s location for private property—making the cross’s location private.

Buono sued again, this time to enjoin the land-transfer statute, and was successful again in the lower courts. But the Supreme Court reversed the judgment and remanded for further proceedings, although in a very divided and splintered decision. Justice Kennedy’s plurality opinion concluded first that Buono had standing. [See § 1.02 [A] (2) on the standing issue.] The plurality then determined that the congressional land-transfer statute did not violate the Establishment Clause. The plurality reexamined the original purpose of the cross’s display and indicated that the purpose was not sectarian or religious, apparently relying on the context and the longevity of the display. The plurality also concluded that the land-transfer statute was a permissible “accommodation” of whatever religious symbolism might exist. Justices Scalia, with Justice Thomas, concurred solely on standing grounds, but they provided the necessary votes for the judgment of reversal.

Justice Stevens (once clerk to Justice Rutledge—a dissenter in the *Everson* decision) issued a lengthy dissent (which will be his final opinion regarding the Establishment Clause due to his retirement), joined by Justices Ginsburg and Sotomayor. Justice Stevens addressed the Establishment Clause merits of the case, using the endorsement standard, and would have affirmed the injunction against the land-transfer statute. Justice Breyer, the swing vote in the *Ten Commandments Cases*, filed a separate dissent, mostly focusing on the remedial and procedural posture of the case which he believed required an affirmance.

The case was argued for the government by Solicitor General Elena Kagan, who later was appointed to fill Justice Stevens’ seat, and now has her own opportunity to address the difficult issues of purpose, effect, and accommodation in Establishment Clause challenges.

## Chapter 14 CONGRESSIONAL ENFORCEMENT OF THE CIVIL RIGHTS AMENDMENTS

### § 14.02 Enforcing the Fourteenth and Fifteenth Amendments Against State Action

[At page 1053, add the following as new Note (4), and renumber existing Notes (4) - (9) on pages 1053-55 as Notes (5) - (10):]

(4) *The 2006 Extension of the Preclearance Requirements of the Voting Rights Act “Raises Serious Constitutional Concerns”*: *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. 2504 (2009). The preclearance requirements of the Voting Rights Act of 1965, which require covered jurisdictions to seek federal approval before changing anything about elections, were only originally scheduled to be effective for five years. But Congress extended the provisions in 1970 (for five years), 1975 (for seven years), 1982 (for twenty-five years), and again in 2006 (for another twenty-five years). The Court had upheld all the reauthorizations before the twenty-first century, concluding that circumstances continued to justify the provisions. But, in reviewing the 2006 extension, the Court noted that it raised “serious constitutional concerns.”

A small utility district in Austin, Texas with an elected board was required to obtain preclearance from the Justice Department before it could change any aspect of those elections (including moving the elections from a private garage to a local school), even though there was no evidence the district had ever employed a racially discriminatory voting practice. The district filed suit challenging the application of the preclearance requirements. Although the Court’s opinion by Chief Justice Roberts decided the case on the narrow statutory grounds that the district was eligible to seek an exemption from the preclearance requirements, the Court provided an extensive discussion of the potential constitutional infirmities of the 2006 extension. The Court recognized that the preclearance requirements severely interfered with state sovereignty in a manner that may no longer be appropriate as the registration gap between white and black voters in covered states was approaching parity and minority candidates held elected office at unprecedented levels. In addition, the coverage formula had not been updated for more than 35 years, raising concerns that it no longer accounted for current conditions, especially considering that covered jurisdictions actually had less of a racial gap in voting registration and turnout than the nationwide average. Justice Thomas dissented in part, urging that the Court should strike down the 2006 extension of the preclearance requirements as exceeding Congress’ power to enforce the Fifteenth Amendment because the intrusive remedy was no longer appropriate in light of the current lack of evidence of racial discrimination in voting.

**Chapter 15**  
**THE RIGHT TO KEEP AND BEAR ARMS AND THE MILITIA CLAUSES**

**§ 15.02 The Historical Context: Safeguarding State Militia Power, or Individual Self-Defense Against Crimes—Or, Perhaps, Preserving an Armed Citizenry as a Bulwark against Tyranny?**

*[At page 1096, add the following after the Notes and Questions:]*

**McDONALD v. CITY OF CHICAGO, 130 S. Ct. 3020 (2010).** In the Court’s first Second Amendment decision after *Heller*, the Court addressed one of the key questions left open by *Heller*—whether the Second Amendment applied through the Due Process Clause to state and local governments. The City of Chicago had a ban on handgun possession, which was challenged by individuals who claimed that the ban made them vulnerable to criminal activities and violated their right to keep and bear arms for the purpose of self-defense.

The City of Chicago defended on several grounds. The City argued that the Second Amendment was not incorporated by the Fourteenth Amendment against the States. *See generally*, §8.02 [B] above. Since this was the threshold issue, the Court, per Justice Alito’s opinion—which was a majority opinion in parts and a plurality opinion in parts—considered the incorporation issue at great length.

The Court reviewed the *Heller* decision and reaffirmed that the Second Amendment embodied an individual right of self-defense. As part of its analysis, the Court concluded that the Second Amendment individual right was a fundamental right. [*See* §9.05 and §10.03 [B].] (This will probably mean that gun regulation schemes in future cases will be tested under some form of heightened scrutiny, probably the strict scrutiny standard. *But see Casey*, §9.02 [E], applying the lesser “undue burden” standard to the fundamental right of abortion.)

The conclusion that the Second Amendment individual right was a fundamental right became a factor in the incorporation analysis. Justice Alito, writing for a plurality, examined textual, historical, and precedential materials. The plurality eventually concluded that the Second Amendment was incorporated by the Fourteenth Amendment’s Due Process Clause against the States. The plurality’s reliance on the Due Process Clause would lead Justice Thomas to file a concurring opinion.

There were two concurring opinions. Justice Scalia, the author of *Heller*, concurred and largely defended the *Heller* analysis against Justice Stevens’ dissent. Justice Thomas concurred in part and concurred in the judgment. Justice Thomas agreed that the Second Amendment was incorporated against the States, but he argued that the Framers of the Fourteenth Amendment used the Privileges or Immunities Clause rather than the Due Process Clause to protect fundamental constitutional guarantees from the States. Justice Thomas thus rejected the reasoning of the *Slaughter House Cases*. *See* §6.02 [B].

Four Justices dissented. Justice Stevens’ dissent argued that the “liberty” protected by the Fourteenth Amendment against state interference did not include a right to bear arms for purposes of private self-defense; he contested, in large measure, the holding in *Heller*. Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented from the majority’s incorporation holding, arguing

that the right at issue did not protect the politically powerless, was outside the scope of judicial expertise, and intruded upon state police power concerns regarding the public safety.