Understanding Constitutional Law

Third Edition

August 2008 Supplement

Norman Redlich
Dean Emeritus & Judge Edward Weinfeld Professor of Law Emeritus
New York University School of Law

John B. Attanasio
Dean & William Hawley Atwell Professor of Constitutional Law
Southern Methodist University
Dedman School of Law

Joel K. Goldstein
Vincent C. Immel Professor of Law
Saint Louis University School of Law

© 2008 Matthew Bender & Company, Inc., a member of the LexisNexis Group

Preface

This 2008 Supplement focuses on significant decisions of the most recent Supreme Court terms. Some cases may be useful in multiple parts of a course.

In editing cases, we have at times deleted footnotes, case citations, and statutory references without so indicating.

Acknowledgements

We would like to express our appreciation to several people whose efforts helped us prepare this 2008 Supplement. We would like to thank Kathleen Spartana for her administrative and editing work, research assistants Jennifer Allen, Jessica Benoit, Heather S. Bethancourt, Kristen Brown, Lacey Smith Cesarz, Henry Childs, Kate Douglas, Anthony Gilbreth, John J. Greffet, Matthew Guyman, Ryan Hardy, Meredith Head, Ausra Laurusaite-Kromelis, Michael Lyons, Leslie Mattingly, Mandi Montgomery, John Moore, Heather J. Panko, Daniel Pearson, David Poell, Tina Potter, Molly Quinn, Justin Reinus, Lacey Searfoss, Niel Smith, Paul Stohr, Kevin Sullivan, Elizabeth Mills Viney, and Elise Voges for their contributions, and Brenda Aylesworth, Tina Brosseau, Mary Dougherty, and Stephanie Haley for their help in typing the book. As always, we appreciate the institutional support of the Dedman School of Law at Southern Methodist University, Saint Louis University School of Law, and Wachtell, Lipton, Rosen & Katz.

Norman Redlich
John Attanasio
Joel K. Goldstein
August, 2008

§ 2.12 CASES AND CONTROVERSIES

[4] Standing

[a] Constitutional Requirements

[Insert at end of section]

In *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), the Court held that Massachusetts did have standing to challenge the EPA's refusal to regulate greenhouse gas emissions. Following Justice Kennedy's *Lujan* concurrence, the Court recognized that where Congress has conferred "a procedural right to protect . . . concrete interests" a party may exercise that right "without meeting all the normal standards for redressability and immediacy" that the Court had laid out in *Lujan v. Defenders of Wildlife*. Instead of requiring such a petitioner to show that it is likely that a favorable decision would redress the alleged injury, the Court explained that a litigant vested with a procedural right satisfies the requirements of standing "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Moreover, the Court emphasized the "special position and interest" of Massachusetts as a state, not simply a private individual as in *Lujan*. Massachusetts' ownership of a great deal of the allegedly affected territory confirmed that it had a concrete stake in the outcome of the case. The Court was untroubled by the vast number of sources of pollution which contribute to the proliferation of greenhouse gases and global warming; federal courts did not forfeit jurisdiction simply because a remedial change might have an impact which was small and incremental in nature.

[d] Taxpayers

[Insert at end of section]

During the 2005 term, the Court again reaffirmed the limited nature of the *Flast* exception. In *DaimlerChrysler Corp. v. Cuno* the Court held that state and local taxpayers lacked standing to challenge a franchise tax credit and property tax exemption under the Commerce Clause.[1] The Court rejected the taxpayers' argument that because a Commerce Clause challenge to a state government's taxing and spending decisions was analogous to an Establishment Clause challenge, the taxpayers had standing under the *Flast* exception.[2] The Court reasoned that the rights protected under the Commerce Clause are fundamentally different from those the Establishment Clause safeguards.[3] Further, the analogy between a challenge under the Commerce Clause and one under the Establishment Clause requires such generalized reasoning that applying *Flast* to the Commerce Clause would "leave no principled way of distinguishing those other constitutional provisions that we have recognized constrain governments' taxing and

---

[1]DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 346 (2006).
[2]*Id*. at 346.
[3]*Id*. at 347.

spending decisions."[4] Therefore, applying the *Flast* test to the Commerce Clause would "be quite at odds with . . . [the] narrow application [of the *Flast* test] in our precedent and *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'"[5]

In *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), the Court, in a plurality opinion by Justice Alito, concluded that the *Flast* exception to the rule against taxpayer standing did not apply unless a party challenges a specific congressional action or appropriation or asks the Court to invalidate an enactment or legislatively created program. Respondents challenged a 2001 executive order which created the White House Office of Faith-Based and Community Initiatives on the grounds that it violated the Establishment Clause. Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, concluded that the *Flast* two-part test had not been satisfied because the challenge was not directed at an exercise of congressional power and thus lacked the required nexus between taxpayer status and the legislative enactment attacked. The agency was established using general Executive Branch appropriations.

Justices Scalia and Thomas agreed that respondent lacked standing but reached that conclusion because they viewed *Flast* as "irreconcilable" with Article III. They would overrule, not distinguish, *Flast*.

The four dissenters thought the *Flast* exception should apply when a taxpayer challenges the expenditure by an executive agency of identifiable sums of tax dollars for religious purposes.

---

[4] *Id*. at 348.

[5] *Id*.

§ 3.01 STRUCTURE OF CONGRESS

[5] Legislative Immunity

Page 97: [Insert the following after § 3.01[4]]

In May 2006, federal agents searched the congressional office of Representative William Jefferson after he failed to comply with a Justice Department subpoena. Members of Congress condemned the unprecedented search as a violation of separation of powers and, more specifically, of the Speech or Debate Clause of Article I of the Constitution.

Article I, section 6, clause 1, provides:

> [The Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.[6]

The Speech or Debate Clause assures Congress wide freedom of speech, debate, and deliberation in the legislative process.[7] It protects the independence and integrity of the legislature against "prosecution by an unfriendly executive and conviction by a hostile judiciary."[8] The main purpose of the Clause is to allow Congress to legislate without fear of criminal prosecution. The Clause is "read broadly, to include not only 'words spoken in debate,' but anything 'generally done in a session of [Congress] by one of its members in relation to the business before it.'"[9] Thus, the Speech or Debate Clause confers legislative immunity for, among other activities, written reports and votes in Congress,[10] the investigative work of congressional committees,[11] and placing classified documents in the official public record.[12] It protects against executive inquiry into acts that occur in the regular course of the legislative process and the motivation for those acts. Thus, the Clause precluded a prosecution based upon inquiries into the motivations and language of a Congressman's speech on the House floor.[13]

But members enjoy no general immunity from criminal prosecution relating to all acts regularly performed by Members of Congress. In *United States v. Brewster*,[14] the Supreme Court overturned a District Court dismissal of the Government's indictment of a former Senator for bribery. The Court distinguished between "purely legislative activities" protected by the Speech or Debate Clause and "political" activities not

---

[6]U.S. Const. art. I, § 6, cl. 1.
[7]Gravel v. United States, 408 U.S. 606, 616 (1972).
[8]United States v. Johnson, 383 U.S. 169, 179 (1966).
[9]*Id*. at 179 (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)).
[10]Kilbourn v. Thompson, 103 U.S. at 204.
[11]Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975); Tenney v. Brandhove, 341 U.S. 367, 377 (1951).
[12]*Gravel*, 408 U.S. at 615-16.
[13]*Johnson*, 383 U.S. at 184-85.
[14]408 U.S. 501 (1972).

afforded the Clause's protection.[15] The Clause's privilege extends only to what is necessary to preserve the integrity of the legislative process. Because the Government's bribery indictment did not involve an inquiry into legislative acts or motivations, the Speech or Debate Clause provided no protection to Senator Brewster.[16]

The discussion so far has focused on the Speech or Debate Clause at the end of Article I, Section 6, clause 1. *Gravel v. United States*[17] implicated not only that Clause but the Privilege from Arrest Clause which precedes it. Congressman Gravel read from the classified "Pentagon Papers" during a subcommittee meeting, placed the 47 volume study in the public record and arranged for its private republication. The Government subpoenaed Gravel's congressional aide to testify before a grand jury investigating the private republication. Gravel intervened, claiming that the Speech or Debate Clause privilege applied to the private republication of the Pentagon Papers and protected his aide as well as himself.

The Court first addressed the scope of the Privilege from Arrest Clause and held it exempts members of Congress from arrest in civil cases only.[18] The narrow scope of the privilege from arrest reflects the judgment that "legislators ought not stand above the law they create but ought generally be bound by it as ordinary persons."[19] Even in civil suits, the privilege from arrest applies only "during their Attendance at the Session of their respective Houses, and in going to and returning from the same" so as not obstruct the legislative process. Members are not exempt from service,[20] the obligations of subpoena,[21] or "from testifying at trials or grand jury proceedings involving third-party crimes where questions do not require testimony about or impugn a legislative act."[22] The Speech or Debate Clause protected Senator Gravel from "question[ing] in any other Place for any speech or debate in either House."[23] It did not protect him from prosecution for the private republication of the Pentagon Papers, activity "in no way essential to the deliberations of the Senate."[24]

In *Gravel*, the Court also held that congressional aides and their members are to be "treated as one" under the Speech or Debate Clause.[25] The Court viewed this extension as "an expression of policy designed to aid in the effective functioning of government" given the "complexities and magnitude of governmental activity."[26] However, because the private republication of the Pentagon Papers was not privileged, the Court held that Gravel's aide could not invoke the testimonial privilege.

The private republication of libelous material likewise falls outside of the

---

[15] *Id*. at 512. "Political" activities include a "wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing. . .'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Id.*
[16] *Id*. at 528-29.
[17] 408 U.S. 606 (1972).
[18] *Id*. at 614.
[19] *Id*. at 615.
[20] *Id*.
[21] *Id*.
[22] *Id*. at 622.
[23] *Gravel*, 408 U.S. at 615.
[24] *Id*.
[25] *Id*. at 616.
[26] *Id*. at 617.

Clause's protection.[27] Actions which are not "purely legislative," but are official or "political" acts, are not privileged,[28] and members of Congress are bound by the law as ordinary persons.[29]

In the wake of the search of Representative Jefferson's office, Representative James Sensenbrenner, Chairman of the House Committee on the Judiciary, held an immediate hearing[30] where he condemned the search as a violation of the separation of powers and Speech or Debate Clause. On May 25, 2006, President Bush ordered the seized documents sealed for 45 days pending a resolution between the Justice Department and the House of Representatives.

On July 10, 2006, one day after the 45-day period expired, the District Court for the District of Columbia held the search did not violate the Speech or Debate Clause principles and upheld its validity.[31] On August 3, 2007, the Court of Appeals for the District of Columbia Circuit reversed. It held that "the compelled disclosure of privileged material to the Executive during execution of the search warrant. . .violated the *Speech and Debate Clause*" and it ordered the return of privileged documents.[32] The Supreme Court denied certiorari.[33]

---

[27]Doe v. McMillan, 412 U.S. 306, 316-17 (1973).
[28]*Brewster*, 408 U.S. at 512.
[29]*Gravel*, 408 U.S. at 615.
[30]*Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?: Hearing Before the H. Comm. on the Judiciary*,109th Cong. (2006).
[31]In re Search of the Rayburn House Office Building Room Number 2113, 432 F. Supp. 2d 100 (D.D.C. 2006).
[32]United States of America v. Rayburn House Office Building, Room 2113, 497 F.3d 654 (D.C. Cir. 2007).

[33] 128 S. Ct. 1738 (2008).

§ 3.08 TREATY POWER

Page 113: [Insert the following at end of section]

In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), the Court, in a 6-3 decision, limited the binding force of treaties on state law. *Medellin* held that although a treaty constitutes an international commitment, it is not binding domestic law unless: (1) Congress has enacted statutes implementing it, or (2) the treaty itself conveys the intention that it shall be "self-executing" and is ratified on that basis. The issue arose as a result of a ruling by the International Court of Justice (ICJ) requiring the United States to provide new review of criminal cases involving Mexican foreign nationals who had not been advised on their rights under the Treaty. Since the treaty at issue, the Vienna Convention on Consular Relations (which gives foreign nationals accused of a crime the right to meet with diplomats from their home country) was not self-executing a decision by ICJ interpreting it was not binding domestic law. The Court further held that such international obligations do not become binding merely because the President of the United States stated that States would abide by the ICJ decision.

§ 4.08 OTHER RECENT CASES

[1] Gonzales v. Raich

Page 150: [Insert the following]

In *Gonzales v. Raich*,[34] the Court held, 6-3, that Congress had power to prohibit the local cultivation and use of marijuana for medical purposes. *Raich* was one of the seminal cases of the 2004 Term because it tested whether the five justice federalism bloc of the Rehnquist Court would continue its effort to restrain federal legislative power under the Commerce Clause.

In a series of decisions spanning more than a decade, the Rehnquist Court had limited Congress' ability to regulate domestic life. In two of the marquee decisions, *United States v. Lopez*,[35] and *United States v. Morrison*,[36] the Court struck down federal laws which Congress passed pursuant to the Commerce Clause. The two cases were significant because they seemed to herald a judicial effort to limit Congress' power to regulate domestic life. Prior to *Lopez*, the Court had not, for nearly 60 years, invalidated legislation based on the Commerce Clause. The Court had deferred generally to Congress, reviewing Commerce Clause legislation under the forgiving rational basis standard. Both *Lopez* and *Morrison* rested on 5-4 margins, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas in the majority. Although apparently narrowing Congress' ability to regulate intrastate activity, *Lopez* and *Morrison* did not overturn any precedent. Indeed *Lopez* specifically affirmed that "[e]ven" *Wickard v. Filburn*, though "perhaps the most far reaching example of Commerce Clause authority over intrastate activity,"[37] involved regulation of an economic activity (i.e. growing wheat) which substantially affected commerce. Nonetheless, the two cases did seem to herald greater judicial scrutiny of federal Commerce Clause legislation.

In *Raich*, the Court distinguished *Lopez* and *Morrison* and upheld challenged federal legislation based, in large part on *Wickard*. The core of the majority consisted of the four *Lopez-Morrison* dissenters (Justices Stevens, Souter, Ginsburg and Breyer). Justice Kennedy joined their opinion and Justice Scalia concurred with the result reached.

In accordance with California's Compassionate Use Act of 1996, Angel Raich and Diane Monson used marijuana for medical purposes pursuant to their physicians' direction and prescriptions. In each case, a physician had concluded that marijuana was the only available drug which provided effective treatment for the patient. Monson grew her own marijuana; Raich relied on her care givers.

Acting pursuant to the federal Controlled Substances Act (CSA), federal drug enforcement agents confiscated and destroyed Monson's cannabis plants. Raich and Monson therefore sought declaratory and injunctive relief against the United States Attorney General and the head of the Drug Enforcement Agency. Although the District Court denied respondent's motion for a preliminary injunction on the ground that they

---

[34] 545 U.S. 1 (2005).
[35] 514 U.S. 549 (1995).
[36] 529 U.S. 598 (2000).
[37] *Lopez*, 514 U.S. at 560.

could not demonstrate likelihood of success on the merits, the Court of Appeals for the Ninth Circuit reversed and directed the District Court to issue the preliminary injunction against the federal officials. The Supreme Court granted certiorari, vacated the Ninth Circuit judgment and remanded the case. Before the Court, Raich and Monson did not challenge the constitutionality generally of the CSA. Rather, they made the more limited challenge that "CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause."[38]

The Court had little trouble concluding the CSA was "a valid exercise of federal power, even as applied to the troubling facts of this case."[39] It did so, ostensibly, within the boundaries earlier cases had set. *Raich* differed from *Lopez* and *Morrison*. Those cases raised challenges to the constitutionality of a statute *per se*. In *Raich*, Congress clearly had power to enact the statutory scheme but challenge was made instead to individual applications. This distinction was "pivotal" since where federal power extended to a regulated class of activities, courts could not exempt individual applications as trivial.[40] Moreover, unlike the Gun Free School Zones Act struck down in *Lopez*, CSA was an integral part of a larger economic regulation, the Comprehensive Drug Abuse Prevention and Control Act.[41] Whereas neither the Gun Free School Zones Act nor the Violence Against Women Act of 1994 struck down in *Morrison* regulated economic activity, CSA did since it regulated the production, distribution and use of a good. Moreover, "[p]rohibiting intrastate possession or manufacture" of marijuana was "a rational (and commonly utilized) means of regulating commerce"[42] in a product.

Whereas *Lopez* suggested that *Wickard* rubbed the boundary of the Commerce Clause, the Court in *Raich* found *Wickard* to be "of particular relevance."[43] *Wickard* had established that Congress could regulate noncommercial activity (i.e. production of items not for sale) "if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[44] The Court viewed *Raich* as virtually a reprise of its 1942 precedent.[45]

To be sure, *Raich* fit within an exception *Lopez* acknowledged. *Lopez* implicitly held that Congress had power to pass laws regulating intrastate activity which were "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut under the intrastate activity were regulated."[46] This exception relied upon the Necessary and Proper Clause to expand Congress' normal Commerce Clause power. So long as Congress had power to regulate economic activity under the Commerce Clause it could also use means necessary to make the regulatory scheme effective.

It is not entirely clear whether the Commerce Clause alone is sufficient to support

---

[38]545 U.S. at 15.
[39]*Id*. at 9.
[40]*Id*. at 23.
[41]*Id*.
[42]*Id*. at 26.
[43]*Id*. at 17.
[44]*Id*. at 18.
[45]*Id*. ("the similarities between this case and *Wickard* are striking.")
[46]514 U.S. at 561.

the result in *Raich* or whether the Commerce Clause needs the support of the Necessary and Proper Clause to do so. Justice Stevens framed the question presented as whether Congress' power under Art. I, § 8 "to make all laws which shall be necessary and proper for carrying into Execution"[47] its Commerce Clause power extends to prohibiting local cultivation and use of marijuana. Later the Court concluded that "Congress was acting well within its authority 'to make laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.'"[48] Other portions of the opinion suggested the Commerce Clause alone is sufficient. Justice Stevens discussed the Commerce Clause at length in broad form and concluded that the regulations at issue in *Wickard* and in *Raich* are "squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."[49]

In this respect, *Raich* is reminiscent of *United States v. Darby*.[50] There the Court invoked both theories to uphold the wage and hour provisions regarding employees engaged in production for interstate commerce. Those provisions were constitutional under the Commerce power because of their relationship to, and effect on, commerce. Alternatively, they were deemed constitutional under the Necessary and Proper Clause since reasonably adapted to an end which Congress could reach under the Commerce Clause, regulating shipment of goods in interstate commerce of goods made using improper labor.

The Court has generally relied on the Commerce Clause alone in upholding congressional regulation of intrastate activities. Indeed, even in *Lopez*, the Court viewed the Commerce Clause as authorizing Congress to regulate intrastate commerce activities which substantially affect commerce. In *Raich* the Court seemed to hedge its bets -- sometimes attributing federal power to the Commerce Clause while at other times leaning on the Necessary and Proper Clause, too.

Justice Scalia concurred with the Court's holding but only based on the Necessary and Proper Clause ground.[51] Justice Scalia articulated a narrower conception of the commerce power than do the other justices in the majority. Whereas the commerce power clearly extends to federal laws regulating instrumentalities and channels of commerce, he argued that it does not authorize regulation of intrastate activities which substantially affect, but are not part of, intrastate commerce.[52] Congress can reach these activities only through the Necessary and Proper Clause (appended to the Commerce Clause).[53]

Justice Scalia accordingly sees the Commerce Clause as cutting a narrower swath than do the others in the *Raich* majority. Standing alone, it does not allow Congress to reach intrastate transactions, even presumably intrastate economic transactions of the sort dicta in *Lopez* and *Morrison* blessed. It is only the Necessary and Proper Clause, when properly used, which provides federal power to reach these sorts of activities. That Clause does, however, allow Congress to reach not only economic activities that substantially affect commerce but also local activity that is "a necessary part of a more

---

[47]545 U.S. at 5.
[48]*Id*. at 22.
[49]*Id*. at 19.
[50]312 U.S. 100 (1941).
[51]545 U.S. at 34.
[52]*Id*.
[53]*Id*.

general regulation of intrastate commerce" even if it does not substantially affect commerce.

Justice O'Connor agreed with Justice Scalia that the power to regulate activities with a substantial connection to intrastate commerce stems from a combination of the Commerce and Necessary and Proper Clauses.[54] It contended, however, that Congress cannot immunize from judicial scrutiny federal regulation of local activity by packaging that regulation in a comprehensive statute. The majority's approach, Justice O'Connor wrote in her impassioned dissent, reduced *Lopez* to a case requiring Congress to follow certain procedures when it regulates local activity but one which afforded no meaningful substantive protection to state power. Justice O'Connor complained that the majority ignored the extent to which "the principle of state sovereignty embodied in the Tenth Amendment"[55] limits the Necessary and Proper Clause.

Justice Thomas, though joining Justice O'Connor's dissent, would go further in limiting federal power in this context. Under the "traditional" meaning of commerce which he attributed to the framers, the Commerce Clause could not justify regulating the intrastate, noncommercial activity at issue in *Raich*. Although the Necessary and Proper Clause presents a closer case, Justice Thomas concluded that the CSA, to the extent it imposes an intrastate ban, is not "necessary" since it is not "plainly adapted" to regulating interstate marijuana trade[56] nor is it proper since "Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens."[57] Unlike the rest of the Court, Justice Thomas rejected the "substantial effects" test as "malleable" and unrooted in the Constitution.[58]

Raich seems to reclaim for the commerce power at least some of the ground which *Lopez* and *Morrison* seized. *Lopez* signaled a higher degree of judicial scrutiny for Commerce Clause regulation of intrastate activity. Justice Stevens' majority opinion assigns the Court a much more "modest" role in Commence Clause cases.[59] He repeatedly applied a "rational basis" test. The Court's charge is not to determine whether the regulated intrastate activity substantially affected commerce but whether Congress had a rational basis to so conclude.[60] He embraced the test which Justice Breyer advanced in his *Lopez* dissent but which the Court there seemed to abandon.

The Court also interpreted "economic activity" to include "production, distribution and consumption of commodities."[61] Presumably, the majority would also include "provision of services" within its definition. In any event, Justice O'Connor viewed the Court's definition as expansive and as rendering all activity within Congress' reach and creating "a federal police power."[62]

In a recent article, Professor Thomas W. Merrill argued that the setback for the Rehnquist Court's federalism revolution in *Raich* related to the Court's shift from a clear

---

[54]*Id*. at 43 (O'Connor, J., dissenting).
[55]*Id*. at 52.
[56]*Id.* at 61 (Thomas, J., dissenting).
[57]*Id*. at 66.
[58]*Id*. at 67.
[59]*Id*. at 22 (majority opinion).
[60]*Id*. at 21, 22.
[61]*Id*. at 25-26.
[62]*Id*. at 49-50 (O'Connor, J., dissenting).

statement to a prohibitory limitations approach in federalism cases.[63] Professor Merrill suggested that until the mid 1990s, the Rehnquist Court adopted a "clear statement approach" in its federalism jurisprudence,[64] but later moved away from that approach in cases like *Lopez* in favor of imposing prohibitory limitations on the powers of Congress.[65] Professor Merrill argued that the clear statement requirement best protects federalism in the Commerce Clause context, where the interpretational question involves the need to accommodate stability and change in the balance of state and federal powers, the meaning of the constitutional provision is not well settled, and interpretation requires the determination of legislative facts rather than adjudicative facts.[66] In other contexts, where stability, not change, is needed or where the meaning of the constitutional provision is clear, a prohibitory approach is preferable.[67]

Raich illustrates the problem with following the prohibitory limitation approach in Commerce Clause cases.[68] In *Lopez*, in an attempt to reign in federal Commerce power, the Court identified three categories of permissible Congressional regulation and adopted the requirement that activities in the third category, intrastate activities that have a substantial effect on interstate commerce, be economic activities.[69] Professor Merrill argued that the *Lopez* tripartite classification was incomplete, and opened the door in *Raich*[70] for "revisionism" of the categories and of the activities within them. The *Raich* majority stretched the *Lopez* prohibitive limitations by relying on a fourth category of permissible regulation, the regulation of an intrastate activity that is an essential part of a larger regulation of economic activity.[71] It further flexed the limitations in *Lopez* by adopting a "sweepingly broad" definition of "economic activity."[72] According to Professor Merrill, a clear statement approach would have been preferable in *Raich*, even if it would have allowed for the same result.[73] A return to such an approach in Commerce Clause cases would be consistent with the outcome of the *Lopez* era cases and would best protect the balance between state and federal power.[74]

Raich does seem to signal a setback for the Rehnquist Court's federalism revolution. *Wickard* seems more deeply rooted now than it did after *Lopez* gave it a somewhat reserved vote of confidence. The death of Chief Justice Rehnquist and retirement of Justice O'Connor deprive the Court of two of those most committed to the Rehnquist Court's federalism doctrines. It is probably too early to tell the extent to which future doctrine will follow from *Raich* or will take its cues from *Lopez* and *Morrison*.

---

[63]Thomas W. Merrill, Paper Symposium: Federalism after Gonzales v. Raich: Symposium Article: Rescuing Federalism after Raich: The Case for Clear Statement Rules, 9 LEWIS & CLARK L. REV. 823, 824-25 (2005).
[64]*Id*. at 825.
[65]*Id*. at 825-26.
[66]*Id*. at 828-30.
[67]*Id*.
[68]*Id*. at 844.
[69]*Id*. at 843-44.
[70]*Id*.
[71]*Id*.
[72]*Id*.
[73]*Id*. at 851.
[74]*Id*.

§ 5.08 COOPERATIVE FEDERALISM

[2] Litigating Against a State

[Insert after first paragraph on page 177]

As reflected in the main text, *Seminole Tribe* suggested that Congress could not abrogate State sovereign immunity under an Article I power. The majority wrote in sweeping terms, "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[75] Although this language seems to apply to *any* Article I power, in *Central Community College v. Katz*, the Court rejected the sovereign immunity defense advanced by state agencies in the context of bankruptcy proceedings.[76] In a 5-4 decision, with the four justices who dissented in *Seminole Tribe* and *Alden v. Maine*[77] joined by Justice O'Connor in the majority, the Court held that Congress' determination that the States should be amenable to proceedings to recover preferential transfers paid by a debtor was within Congress' power under the Bankruptcy Clause, Article I, § 8, cl. 4, of the Constitution.[78] The majority reasoned that the assumption in *Seminole Tribe* that its holding would apply to the Bankruptcy Clause was erroneous and not fully debated, and therefore, the Court was not bound to follow the dicta quoted above.[79]

Although the Court granted certiorari in *Central Virginia Community College* to determine whether Congress' attempt to abrogate state sovereign immunity in 11 U.S.C. § 106(a) was valid, the Court ultimately determined that § 106(a) was not necessary to authorize the Bankruptcy Court's jurisdiction over State agencies in preference avoidance proceedings.[80] Indeed, "[t]he relevant question is not whether Congress had 'abrogated' States' immunity in proceedings to recover preferential transfers. The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of bankruptcies.' We think it beyond peradventure that it is."[81]

Based largely on its interpretation of the origins and early history of the Bankruptcy Clause, the Court reached the "ineluctable conclusion" that the States "agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'"[82] Further, "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts."[83] Therefore, independently of Congress' statutory attempt to abrogate state sovereign immunity in particular bankruptcy proceedings, Congress had the power to subject States

---

[75]Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72-73 (1996).
[76]546 U.S. 356, 359 (2006).
[77]527 U.S. 706 (1999).
[78]*Central Virginia Community College*, 546 U.S. at 379.
[79]*Id*. at 363.
[80]*Id*. at 361-62.
[81]*Id*. at 379.
[82]*Id*. at 368-77.
[83]*Id*. at 378.

to proceedings to recover preferential transfers paid by a debtor.[84]

The dissent, written by Justice Thomas and joined by Chief Justice Roberts, Justice Scalia, and Justice Kennedy, argued that "[n]othing in the text, structure, or history of the Constitution indicates that the Bankruptcy Clause, in contrast to all of the other provisions of Article I, manifests that States' consent to be sued by private citizens."[85] Reading precedent and the founders' intent differently, Justice Thomas argued that the majority's reasoning contravened "settled doctrine" barring abrogation of state sovereign immunity under various clauses of Article I, § 8, and that the majority's contention that States waived their sovereign immunity from suit by adopting the Bankruptcy Clause was unsupported by the historical record.[86]

Although the Court's decision in *Central Virginia Community College* seems to step back from the protections afforded to state sovereign immunity in *Seminole Tribe* and its progeny, the fact that the Court grounded its holding in the unique nature of bankruptcy proceedings and the Bankruptcy Clause itself, and not in Congress' recent statutory attempt to abrogate state immunity in bankruptcy proceedings, distinguishes *Central Virginia Community College* from cases involving other Article I powers and suggests that the Court's reasoning in *Seminole Tribe* will continue to prevent Congress from abrogating sovereign immunity under these other powers.

---

[84] *Id*. at 378-79

[85] *Id*. at 393 (Thomas, J., dissenting).

[86] *Id*. at 381.

§ 6.04 DISCRIMINATORY LAWS

Page 204: [Insert at end of section]

In *Granholm v. Heald*[87] the Court, in a 5-4 decision held unconstitutional state laws which regulated sale of wine from out-of-state wineries while permitting in-state sales. The laws violated that dormant commerce clause and were not saved by the Twenty-First Amendment. The Court applied familiar dormant commerce clause principles to these discriminatory laws and concluded that the Twenty-First Amendment did not authorize states "to pass nonuniform laws in order to discriminate against out-of-state goods[.]. . ." In dissent, Justice Thomas argued that the Twenty-First Amendment relieved the states from dormant commerce clause restraints which would otherwise apply.

In *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007), the Court upheld a flow control ordinance requiring that trash haulers deliver solid waste to a publicly owned processing plant. New York was discharging a traditional governmental function and accordingly was not subject to normal dormant Commerce Clause analysis.

In *Department of Revenue v. Davis*, 128 S. Ct. 1801 (2008), the Court extended that analysis to a Kentucky income tax statute which exempted from state tax municipal bond interest from municipal bonds which Kentucky, but not other states, issued.

[87] 544 U.S. 460.

§ 6.05 PIKE BALANCING TEST

[Insert at end of section]

The Court's decision in *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007) revealed a divergence among two justices who had previously spoken with one voice regarding the negative Commerce Clause. Justices Scalia and Thomas had previously been willing to enforce on stare decisis grounds a "negative" self-executing Commerce Clause in two situations: (1) against a state law that facially discriminated against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court. In *United Haulers*, Justice Scalia maintained this position while Justice Thomas disagreed. Citing the lack of a textual basis for a dormant Commerce Clause as well as the unworkability of the doctrine in practice, Justice Thomas reasoned that the Court's entire dormant Commerce Clause jurisprudence should be discarded. The divergence among these two Justices provides an instance in which Justice Scalia seems willing to accept some precedent in the interest of continuity and predictability while Justice Thomas appears more willing to abandon judgments of previous Courts which he deems as inconsistent with the Constitution's text and the framers' intent.

The Court declined to apply the *Pike* balancing test in *Department of Revenue v. Davis*, 128 S. Ct. 1801 (2008). Although stating that "we generally leave the courtroom door open to plaintiffs invoking" *Pike*, the Court, for a variety of reasons, found *Pike* inapplicable in *Davis*.

§ 7.02 THEORIES OF PRESIDENTIAL POWER

[6] Jackson's Categories and Inherent Power Limitations

Page 234: [Insert at end of section]

In *Medellin v. Texas*, 127 S. Ct. 1346 (2008), the Court applied Justice Jackson's *Youngstown* tripartite scheme to consider whether President Bush's Memorandum to the United States Attorney General (that state courts would give effect to a decision by the International Court of Justice) was binding. The Court found no prior practice of congressional acquiescence to such presidential declarations and concluded that the president's "narrow and strictly limited authority to settle international claims disputes" did not extend as far as President Bush claimed.

§ 7.07 COMMANDER-IN-CHIEF

[4] Military Justice

Page 262: [Insert at bottom of page]

The Supreme Court again addressed military tribunals created by the Executive after the terrorist attacks of September 11, 2001 in *Hamdan v. Rumsfeld*.[88] There, a five justice majority held that a military commission created by the President lacked power to proceed on charges of conspiracy to commit offenses triable by military commission against Salim Ahmed Hamdan, a Yemeni national in custody at Guantanamo Bay.[89] The Court found that neither of two congressional acts relied on by the President — the Detainee Treatment Act of 2005 and the Authorization for the Use of Military Force — expanded his authority to create military commissions.[90] The Court further reasoned that the procedures the President had decreed for the military commissions — including the exclusion of the accused from hearing the evidence against him, the circumvention of usual rules of evidence, and the requirement of only a two-thirds vote for a verdict of guilty — violated Article 36(b) of the Uniform Code for Military Justice (UCMJ) and Common Article 3 of the Geneva Conventions, both of which imposed congressional requirements for military commissions.[91]

In a concurring opinion, Justice Kennedy expounded on the notion that the President had exceeded the bounds placed on him by Congress in the UCMJ, and found that the case consequently fell within Justice Jackson's third category of Executive action in *Youngstown Sheet & Tube Co. v. Sawyer*.[92] This is a case of conflict between Presidential and congressional action, and when "the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[93] As Justice Kennedy noted, because Congress prescribed the limits on the Executive, Congress can act to change these limits, and, presumably, give the President the authority he needs to proceed against detainees like Hamdan.

---

[88] 548 U.S. 557 (2006).
[89] *Id*. at 612-13.
[90] *Id*. at 593-94.
[91] *Id*. at 613-35.
[92] *Id*. at 653 (Kennedy, J., concurring).
[93] *Id*. at 638, 639 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)).

Page 263: [Insert the following at end of section]

In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), in another rebuke of the Bush administration's war-on-terror detention policies, the Supreme Court held, 5-4, that aliens held at Guantanamo Bay Cuba have the constitutional privilege of habeas corpus which is not to be withdrawn except in compliance with the Suspension Clause, Art. I, sec. 9, cl. 2. Since the procedures Congress set forth in the Detainee Treatment Act of 2005 were not an adequate and effective substitute for habeas corpus, section 7 of the Military Commissions Act of 2006 unconstitutionally suspended the writ.

Both Justice Kennedy's majority opinion and Justice Scalia's dissent looked to the original intent behind the Suspension Clause and found no case where a noncitizen held outside the Crown's sovereignty had invoked habeas relief. Whereas Justice Scalia thought that finding definitive, Justice Kennedy did not, in part because he questioned the assumptions that the historical record was complete or that it answered the questions before it since 18th century courts may not have faced situations similar to that before the Court. Justice Kennedy's opinion rested on the premise that questions over extraterritoriality and the scope of the Constitution's due process protections should turn on objective factors and practical concerns, not formalism.

Although Justice Scalia argued that *Johnson v. Eisentrager*, 339 U.S. 763 (1950) held that the writ of habeas corpus did not apply to a noncitizen held outside the United States, the Court rejected that reading of *Eisentrager*. Instead, the Court used *Eisentrager* to develop a functional, three-factor test regarding the reach of the Suspension Clause: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." Applying this functionalist test, Court held that the Suspension Clause applied fully at Guantanamo Bay.

Page 288: [Insert the following before § 8.03 Vagueness]

§ 8.02A THE SECOND AMENDMENT

In *District of Columbia v. Heller*,[94] the Court held that the District of Columbia's law banning the possession of handguns in private homes and the requirement that lawful firearms be kept inoperable violated the Second Amendment.

The District of Columbia prohibited the registration of handguns and made it a crime to carry an unregistered firearm. No one could carry a handgun without a license, and only the chief of police could issue a license for one year. Further, residents were required to keep even their lawful firearms, such as registered long guns, "'unloaded and dissembled or bound by a trigger lock.'"[95] There were exceptions for guns located in a place of business that were being used for lawful recreational activities.

Justice Scalia began the majority opinion by reciting the Second Amendment: "'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'"[96] The Court interpreted the Constitution using the ordinary everyday meaning of its words and phrases that voters at the time of the Framing could understand. While the Court will not utilize "secret or technical"[97] meanings unknown to the ordinary citizens of the time, it will utilize idiomatic meanings.

The Second Amendment has two parts: the prefatory clause and the operative clause. The prefatory clause describes the purpose of the operative clause but does not limit it. The operative clause codified the "'right of the people.'" The Constitution used this term two other times, once in the First Amendment's Assembly-and-Petition Clause and another time in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment also used very similar terminology. In contrast, the militia was a "subset of 'the people' — those who were male, able bodied, and within a certain age range."[98] Therefore, interpreting "militia" as an organized militia "fits poorly with the operative clause's description of the holder of that right as 'the people.'"[99]

The Second Amendment protects all bearable arms and not just those that existed at the formation of the United States. Moreover, to "'keep Arms,'" protects individuals regardless of service in a militia. The term "'bear'" implied carrying a weapon for "offensive or defensive action," but did not connote "participation in a structured military organization."[100] Moreover, at the time of the founding, he explained "'bear Arms'" had an "idiomatic meaning that was significantly different from its natural meaning: 'to serve as a soldier [or] do military service.'"[101] The connection to the military or war was only clear when one bore arms "'against'"[102] someone.

---

[94] 128 S. Ct. 2783 (2008).
[95] *Id.* at 2788.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 2791.
[99] *Id.*
[100] *Id. at* 2793.
[101] *Id. at* 2794.
[102] *Id.*

In his dissent, Justice Stevens placed great weight on the original draft of the Second Amendment in which James Madison included a conscientious-objector clause. Justice Scalia retorted that the clause was not intended to exempt people who objected to going to war but, instead, was intended for those who objected to the use of weapons.

Justice Scalia turned to a historical analysis of the Second Amendment. The English Bill of Rights contains a provision stating that Protestants could never be disarmed. This predecessor to the Second Amendment was an individual right that had nothing to do with military service and applied only to the Crown, not parliament. Morever, Blackstone described the English right as, "'the right of having and using arms for self-preservation and defence.'"[103] As the Stuarts had tried to disarm their enemies, George III tried to disarm the most rebellious American colonists.

While the Second Amendment "conferred an individual right to keep and bear arms," it was limited just as the First Amendment's right of free speech was limited.

The prefatory clause reads, "'A well regulated Militia, being necessary to the security of a free State . . . .'" The Petitioners defined militias by the Militia Clauses (art. I, § 8, cls., 15-16). However, the clause empowers Congress to organize rather than create "'the'" militia, not "'a'" militia.[104] This terminology connotes a body already in existence. The phrase "'security of a free state'" connoted the "'security of a free polity,'"[105] and not the security of each State as argued by the dissent.

In addressing the relationship between the Prefatory Clause and Operative Clause, Justice Scalia noted, it was understood that the right to bear arms allowed for a citizen militia that could be used to oppose an oppressive military force. The threat of disarmament by the new Federal Government prompted this right to be codified in a written Constitution, unlike some English rights.

Justice Scalia noted the Second Amendment could not have ensured the creation of a citizen's militia to protect against tyranny if it simply had guaranteed a right to keep and use weapons as part of an organized militia. If Congress alone had retained the ability to organize the militia, it could have controlled who could participate in the militia and who could keep and use weapons just as the Stuart Kings had.

Four pre-Second Amendment provisions in state constitutions and seven analogous provisions in state constitutions adopted between 1789-1820 confirm that the generation conceived the Second Amendment as "an individual right to bear arms for defensive purposes."[106]

Justice Scalia next rejected Justice Stevens' reliance on the unaccepted proposals for the Second Amendment as well as the debates leading up to the Amendment's passage. "It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one."[107]

The Court buttressed its position by analyzing how the Second Amendment was interpreted from its ratification through the end of the 19th century. Justice Stevens equated these interpretive sources with postenactment legislative history. Postenactment legislative history refers to statements made, after a law has been enacted, by people who

---

[103] *Id.* at 2798.
[104] *Id.* at 2800.
[105] *Id.*
[106] *Id. at* 2803.
[107] *Id. at* 2804.

drafted or voted for the law making these statements irrelevant to congressional decision making. Instead, Justice Scalia relied on the "*public understanding*"[108] of a law after its enactment.

Three important founding-era legal scholars, including Joseph Story, understood the Second Amendment "to protect an individual right unconnected with militia service"[109] and abolitionists regularly invoked the Second Amendment to justify having weapons for self-defense purposes. Prior to the Civil War, 19th century case law universally interpreted the Second Amendment to support an individual right not related to militia service. After the Civil War, congressional debate observed that the founding generation "'were for every man bearing his arms about him and keeping them in his house, his castle, and for his own defense.'"[110] Similarly, all legal scholars after the Civil War whom the Court had read determined that the Second Amendment secured an individual right unrelated to militia service.

Justice Stevens' dissent heavily relied on *United States v. Miller*.[111] That case upheld convictions for carrying an unregistered short-barreled shotgun across state lines against Second Amendment claims. "Read in isolation, *Miller*'s phrase 'part of ordinary military equipment' could mean that only those weapons useful in warfare are protected."[112] Such an interpretation could have meant that the National Firearms Act that placed restrictions on machine guns could have been unconstitutional because machine guns had been used in warfare. Consequently, the majority interpreted the Second Amendment not to afford protection to "weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[113]

Justice Scalia concluded that the Court's prior decisions did not preclude "our adoption of the original understanding of the Second Amendment."[114] That the Court had not interpreted the Second Amendment for so long was not surprising as the federal government did not regulate the possession of the weapons "by law-abiding citizens,"[115] and for much of American history the Bill of Rights had not been incorporated against the states. Similarly, the Court did not find a law to violate the First Amendment until 1931.

The Court was careful to note that the Second Amendment right to bear arms was not unlimited. Nothing in the opinion should be "taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[116] Moreover, the Court recognized the limitation in *Miller* that the Second Amendment protected weapons "'in common use at the time.'"[117] The Court noted the historical practice going back to Blackstone of prohibiting "'dangerous or unusual

---

[108] *Id. at* 2805.
[109] *Id.*
[110] *Id. at* 2810.
[111] 307 U.S. 174 (1939).
[112] *Heller*, 128 S. Ct. at 2815.
[113] *Id. at* 2816.
[114] *Id.*
[115] *Id.*
[116] *Id. at* 2816-17.
[117] *Id. at* 2817.

weapons.'"[118]

A militia at the time of the Second Amendment's ratification was all the able-bodied men who brought weapons from home. Today for a militia to be as effective as one in the 18th century, it would require very sophisticated weapons that ordinary citizens do not have. However, technological advancements in weaponry should not alter the Court's interpretation of the right.

Pivotal to the Second Amendment right has been the inherent right of self-defense. As the handgun is the most popular weapon to protect the home and family, banning it is unconstitutional under any standard of scrutiny. And it is not enough to permit other firearms, like long guns. The District's requirement that all firearms in the home be kept inoperable at all times was also unconstitutional because it impedes the core lawful purpose of self-defense.

The Court did not address the licensing requirement because respondent conceded at oral argument that he did not contest it if it is "'not enforced in an arbitrary and capricious manner.'"[119] The Court also made clear that its decision did not suggest that "laws regulating the storage of firearms to prevent accidents"[120] were invalid. In response to Justice Breyer's criticism that the majority did not "establish a level of scrutiny for evaluating Second Amendment restrictions,"[121] Justice Scalia criticized Justice Breyer's balancing approach. He knew "of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[122] Such an approach which rests on "future judges' assessments of its usefulness is no constitutional guarantee at all."[123]

The Court also responded to Justice Breyer's other criticisms that the Court has left in doubt many of the specific applications of the Second Amendment right and that the Court has not provided historical justifications of the regulations that it has indicated are permissible. As this was the Court's extensive analysis of the Second Amendment, the decision could not cover the entire area.

The Court held that the District's handgun ban and its requirement that handguns be kept inoperable both violated the Second Amendment. It was the Court's interpretation that the Second Amendment still allowed the District to combat crime with a variety of permissible tools, including some handgun regulations.

Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer. Justice Stevens thought that the Second Amendment and its Framers evidenced no intention to restrict regulation of personal firearms outside of military use by state militias. *United States v. Miller*[124] held that the Second Amendment protected the right to have arms service in state militias but not for "'nonmilitary use and ownership of weapons.'"[125] The Supreme Court affirmed this holding in *Lewis v. United States*[126] and hundreds of lower courts have followed it.

---

[118] *Id. at* 2815.
[119] *Id. at* 2819.
[120] *Id. at* 2820.
[121] *Id. at* 2821.
[122] *Id.*
[123] *Id.*
[124] 307 U.S. 174 (1939).
[125] *Heller*, 128 S. Ct. at 2823.
[126] 445 U.S. 55 (1980).

Justice Stevens' textual analysis began with the preamble: "'A well regulated Militia, being necessary to the security of a free State.'"[127] While this language resembles that found in several state contemporaneous Declarations of Rights, the Framers of the Second Amendment did not include any additional language protecting the use of weapons for hunting or self defense, as did the state declarations of Pennsylvania and Vermont. Based on the words, "'[t]he right of the people,'"[128] the majority found that, as with the First and Fourth Amendments, "'the people'"[129] included all individuals. Contradicting its own interpretation, the majority later confined Second Amendment protection to "'law-abiding, responsible citizens,'"[130] which consequently only extends to a "'subset'" of the individuals protected by the First and Fourteenth Amendments. Turning to the phrase, "'[t]o keep and bear arms;'" not only is "'bear arms'" commonly read to mean military service, but both contemporaneous texts and the Oxford dictionary also point to a strictly military application. The phrase "to keep" appeared in several state militia laws when the Constitution was framed; it required militia members to store weaponry at their homes, ready for use in military service.

Taken together, the Second Amendment articulated "a right to use and possess arms in conjunction with service in a well-regulated militia."[131] Even if alternate meanings could be read into the amendment, the Court should not lightly stray from precedent and the ends articulated by the preamble.

The Militia Clauses of Article I and the Second Amendment are paradigmatic examples of the "Framers' 'splitting the atom of sovereignty.'"[132] Specifically, the Framers allowed Congress to call up, "organize, arm, and discipline the militia"[133] and to govern that part of the militia employed by the national government. In turn, the states could commission officers and train the militia following the discipline outlined by Congress. In drafting the Second Amendment, James Madison considered and rejected several state proposals which specifically mentioned a right to possess firearms for personal use. Also, an exemption for religious objectors was removed from the original text amid concerns that Congress could claim that the faithful could not bear arms. Such drafting choices illustrate the purpose of prohibiting Congress from disarming state militias.

The historical sources cited by the Court are vaguely, if at all, instructive. The English Bill of Rights, enabling only certain Protestants to bear arms was created to address different concerns and lacked militia-specific phrasing.. Moreover, the right applied only to a certain societal class and to the extent allowed by Parliament. Of the several post enactment commentators mentioned by the Court, Justice Stevens only maintained that Justice Story's work supported his view. Justice Story saw the Second Amendment as a necessary safeguard for democratic governance because it checked on centralized federal power. The post-Civil War legislative history invoked by the majority could not explain the Framers' intent, as the legislators' comments were made well after the amendment was written, during heated partisan debate.

---

[127] *Heller*, 128 S. Ct. at 2848.
[128] *Id.*
[129] *Id. at* 2791.
[130] *Id. at* 2827.
[131] *Id. at* 2831.
[132] *Id.*
[133] *Id. at* 2833.

Turning finally to precedent, minor Second Amendment objections did not affect the passage of the first federal laws expressly limiting ownership of firearms for personal use. Moreover, *Miller* was presented with much of the same evidence presented here; the *Miller* Court turned not on whether a gun is likely to be used for self-defense, but whether it was better suited for military or civilian use. The Court tried to discount *Miller* by noting the failure of those attacking the gun control law to file briefs or present oral argument to the Supreme Court. However, *Marbury v. Madison*[134] suffered a similar defect as only one party argued before the Court. More importantly, *Miller* was a unanimous decision which has been relied upon for almost 70 years.

As "most citizens are law-abiding" and the need to self-defense frequently arises outside the home, the Court may strike down many other gun control laws in the future.[135]

Justice Breyer filed a separate dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg. Justice Breyer argued that the majority erred for two reasons: first, the Second Amendment was designed to protect militia-related interests rather than self-defense. Second, the Amendment was not intended to provide absolute protection from government regulation of fire arms. Justice Breyer joined Justice Stevens' dissent regarding the first error and he focused on the government's latitude to respond to "serious, indeed life-threatening problem[s]."[136]

During colonial times, the three largest cities Boston, Philadelphia, and New York all had some type of regulation on discharging weapons within city limits. Moreover, several municipalities–including the above three–regulated the storage of gunpowder, an important part of an operational weapon, in order to prevent fires. It is unclear whether all of these laws prohibited the storage of gunpowder within a gun, such as the law in Boston did, but either way it impeded reloading the weapons of the time to fire a second shot.

The Court correctly rejected the respondent's proffered strict scrutiny test, by broadly endorsing prohibitions on concealed weapons and on criminals carrying weapons — which strict scrutiny may well invalidate. The Court has previously held "'compelling'"[137] protecting the safety of citizens and preventing crime. When a law impacts complex competing constitutional interests, Justice Breyer suggested a proportionality test which would consider a statute's effect upon individuals and the government together with the existence of a clearly better, less restrictive, alternative. When applying the proportionality standard, the Court generally defers to the legislature when the legislature probably has greater expertise and fact finding capacity.

The basic issue in this case was whether the statute's burdens were disproportionate to the City's legitimate objectives. When the District of Columbia adopted the ban in 1974, a national report revealed that over the past few years handguns had been used in approximately 54% of all murders, 87% of murders of law enforcement officers, 60% of robberies, and 26% of assaults nationwide. Moreover, the presence of a firearm made a crime seven times more likely to be deadly than one perpetrated with another weapon.

The respondent argued that European statistical studies showed that stricter guns

---

[134] 5 U.S. 137 (1803).
[135] *Heller*, 128 S. Ct. at 2846.
[136] *Id. at* 2847.
[137] *Id. at* 2851.

laws were related to more murders, not fewer. The respondent also pointed to a study which showed that armed homeowners deterred 98.8% of robbers. Justice Breyer noted the District's crime rate did increase after the handgun ban took effect. Nevertheless, it did not necessarily follow that these phenomena occurred "*because of [the ban].*"[138] It is impossible to predict what the crime rate in the District would have been if the handgun ban had not passed.

For their part, the District presented statistical studies that showed handgun regulations reduced crime. Specifically, one study indicated that firearm restrictions reduced homicide, suicide, and accidents at home. When the Court applied intermediate scrutiny in First Amendment cases, its only obligation was to ensure that the legislature's conclusions were based on reasonable inferences and substantial evidence. The District's decision met this test.

The District's handgun ban did not interfere with military training. Citizens of the District could register and keep weapons such as rifles and shotguns in their homes and were also allowed to use these weapons for recreational purposes. In sum, the ban's burden on the Second Amendment's primary objective or any sports-related or hunting-related objectives was small or nonexistent. The ban did, however, prevent a resident from having a loaded gun in his home and, consequently, made it more difficult for a homeowner to use a handgun in self-defense.

In this case, there was no clearly better, less burdensome alternative to the District's handgun ban. The ban allowed law enforcement officials to assume that any handgun they saw was illegal and take the appropriate actions against the armed person.

The handgun ban did not disproportionately burden Second Amendment–protected interests. First, the law addressed a serious problem in the District–handgun fatalities–while allowing residents to own rifles and shotguns. Secondly, the Second Amendment mentions militias, not self-defense. Finally, the majority's stand that the Second Amendment affords a right to possess weapons "typically possessed by law-abiding citizens for lawful purposes"[139] is unclear.

---

[138] *Id. at* 2859.
[139] *Id.* at 2869.

§ 8.04 REGULATION OF BUSINESS AND OTHER PROPERTY INTERESTS

[4] Economic Penalties

Page 321: [Insert the following after *State Farm Mut. Auto Ins. Co. v. Campbell*]

In *Philip Morris USA v. Williams*,[140] the Court held that the Due Process Clause prohibits juries from considering harm to third parties when awarding punitive damages. As a result of a jury trail and subsequent appeals, the plaintiff was awarded $821,000 in compensatory damages and $79.5 million in punitive damages.

The Due Process Clause allows individuals the right to present every available defense; however defendants cannot do this against allegedly injured nonparties who are not before the court. While juries may consider the harm that the defendant could have caused, this consideration is limited to harm caused to the plaintiff. Justice Breyer did allow the jury to consider in assessing punitive damages the overall harm caused by the defendant in determining the reprehensibility of the defendant's act, one of the three guideposts in *BMW of North America, Inc. v. Gore*.[141] The Court did not reach the issue of whether the punitive damages award at issue violated *State Farm* by being more than three to four times the size of the compensatory damages award.

Dissenting, Justice Stevens warned about the dangers of expanding the "unchartered area" of substantive due process where guideposts are "scarce and open-ended."[142] Also dissenting, Justice Thomas found no basis in the Constitution for limiting the size of punitive damage awards. Finally, in her dissent, Justice Ginsburg emphasized the confusing task the jury faces not considering harm to third parties in assessing punitive damages, but considering it to determine the reprehensibility of the defendant's actions.

---

[140] 127 S. Ct. 1057 (2007).
[141] 517 U.S. 559 (1996).
[142] 127 S. Ct. at 1066.

Page 322: [Insert the following after *BMW of North America, Inc. v. Gore*]

In *Exxon Shipping Co. v. Baker*,[143] the Supreme Court reduced over $5 billion in punitive damages stemming from the Exxon Valdez oil spill to a one to one ratio with compensatory damages. At the time of the accident, the ship's Captain, Hazelwood, had a blood alcohol level "three times the legal limit for driving in most states."[144] While working for Exxon, and with the knowledge of his employers, Hazelwood completed an alcohol treatment program. Hazelwood's employers were unaware that he later stopped attending follow-up treatment and Alcoholics Anonymous meetings. Contested testimony was offered at trial, however, that "Hazelwood drank with Exxon officials and members of Exxon management knew of his relapse."[145] There also was no evidence that Exxon monitored Hazelwood after he returned from the alcohol treatment program.

Following the spill, Exxon spent approximately $2.1 billion on cleanup efforts and settled both state and federal environmental damage claims for over $1 billion. In this case, the jury awarded plaintiffs $287 million in compensatory damages and $5 billion in punitive damages, which the Ninth Circuit later remitted to $2.5 billion.

The Court first considered whether maritime law allowed corporate liability for punitive damages based on acts of managerial agents. The Court was evenly split (Justice Alito did not participate). Consequently, the Court left undisturbed the decision of the Ninth Circuit ruling that Exxon was liable for Hazelwood's acts. However, the Supreme Court's decision on this issue had no precedential effect.

The Court next addressed punitive damages, which had to conform to federal maritime law, rather than under its constitutional due process analysis. The Court quoted a recent study comparing punitive and compensatory jury awards in "state civil trials" that reported a median ratio "of just 0.62:1, but a mean ratio of 2.90:1, and a standard deviation of 13.81."[146] Justice Souter compared the need to reduce "unjustified disparities"[147] in punitive damages with the need for consistency in criminal sentencing. The Court also drew from *State Farm v. Campbell*,[148] which held that "a single digit maximum" of punitive to compensatory damage awards "is appropriate in all but the most exceptional of cases."[149] The Court concluded that "constitutional upper limits confirm that the 1:1 ratio is not too low."[150]

Justice Stevens concurred in part and dissented in part, noting that legislatures rather than courts generally promulgate "caps and ratios."[151] Justice Ginsburg also concurred in part and dissented in part. She asked whether the Court would later "rule, definitively, that 1:1 is the ceiling due process requires."[152] Concurring in part and dissenting in part, Justice Breyer noted that Exxon's "'egregious'" conduct "'justifie[d] a considerably higher ratio'" than the 1:1 the Court had used in its most recent due process

---

[143] 128 S. Ct. 2605 (2008).
[144] *Id. at* 2613.
[145] *Id. at* 2612.
[146] *Id. at* 2625.
[147] *Id. at* 2627.
[148] 543 U.S. 874 (2004).
[149] *Exxon*, 128 s. Ct. at 2638.
[150] *Id.*
[151] *Id. at* 2637.
[152] *Id. at* 2639.

decision.[153]

[153] *Id. at* 2640.

§ 8.05 LIBERTY IN PROCREATION & OTHER PERSONAL MATTERS

[1] The Childbearing Decision: Contraception & Abortion

Page 330: [Insert the following after *Ohio v. Akron Center for Reproductive Health*]

In *Ayotte v. Planned Parenthood of N. New England*[154] the Court held that mere failure to provide a medical emergency exception was not sufficient to facially invalidate an entire abortion statute. The 2003 New Hampshire Parental Notification Prior to an Abortion Act prevents physicians from performing abortions on pregnant minors until 48 hours after written notice was provided to a parent or guardian. Although the Act provided three exceptions to the parental notification requirement, it did not provide a medical emergency exception.

Writing for a unanimous Court, Justice O'Connor stressed that the Court was not revisiting abortion precedents. In this connection, she outlined established propositions, the first two legal and the third factual. First, states may require parental involvement in a minor's decision to terminate a pregnancy. Second, states may not restrict abortions that are necessary to preserve the life or health of the mother. Third, minors, like adults, may need immediate abortions to avoid serious health problems.

This case simply invalidated reviewing the remedy of facial invalidation. Courts should avoid invalidating any more of the statute than necessary. Moreover, courts may not rewrite statutes to remedy constitutional problems. In determining what is the best action regarding a statute that contains unconstitutional aspects, courts may not rewrite the statute to remedy the problem. Further, a court should determine whether a legislature would prefer to retain the remaining constitutional portion of the statute or have the entire statute invalidated. Because the New Hampshire statute was only invalid in a few applications, facial invalidation was not warranted. Moreover, the statute at issue contained a severability clause that would have allowed the court to merely remove the unconstitutional language. The Court remanded the case to determine whether the legislature would have intended total invalidation.

---

[154] 546 U.S. 320 (2006).

Page 330: [Insert the following after *Ayotte v. Planned Parenthood of N. New England*]

In *Gonzales v Carhart*,[155] the Court — against "a broad, facial" challenge — upheld the Partial Birth Abortion Act of 2003. Congress passed the Act in reaction to the Court's opinion in *Sternberg v. Carhart*,[156] where it invalidated a state ban on partial birth abortions. Justice Kennedy wrote the opinion for the Court and was joined by Chief Justice Roberts, and Justices Scalia, Thomas and Alito. The Court said that the Act was more specific and precise than the one at issue in *Sternberg*.

In the United States, 85-90 % of abortions occur during the first 3 months of gestation or the first trimester. Most of the remaining abortions take place during the second trimester and are done using a surgical method referred to as "dilation and evacuation (D&E)." The general procedure is the same for all doctors. The doctor begins by dilating the cervix. Then the doctor uses forceps to remove the fetus. Because the friction involved in the procedure causes the fetus to tear apart, it may take the doctor 10-15 passes to evacuate the entire fetus. Some doctors chose to kill the fetus a day or two before the procedure, particularly in late second term abortions.

The Act — whose impetus was partial birth abortions — did not involve the standard D&E, but specifically deals with a variation on the procedure referred to as an "'intact D&E.'" This procedure involves fewer passes so that the fetus may be extracted largely intact. In an intact D&E, the fetus is killed just prior to birth. There are different methods for killing the fetus once it becomes lodged in the cervix. Some doctors force scissors into the base of the skull. Others collapse the skull using their forceps, killing the fetus just before it is born.

In passing the Act, Congress responded to the Court's holding in *Sternberg* in two ways. First, Congress made a series of factual findings in which they asserted that the *Sternberg* Court was required to accept the "'very questionable findings issued by the district court judge.'"[157] Congress also found that a "'moral, medical and ethical consensus exists and that the practice of performing a partial-birth abortion. . . . [was] a gruesome and inhumane procedure that [was] never medically necessary and should be prohibited.'"[158] Second, and more important, the Act's language was more specific than that in *Sternberg*.

Planned Parenthood of Southeastern Pa v. Casey[159] "rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted."[160] Moreover, *Casey* stated that: "'regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.'"[161]

---

[155] 127 S. Ct. 1610 (2007).
[156] 530 U.S. 914 (2000).
[157] 127 S. Ct. at 1654.
[158] *Id.*
[159] 505 U.S. 833 (1992).
[160] 127 S. Ct. at 1626.
[161] *Id.*

In rejecting this facial challenge, the Court concluded that the Act was not void for vagueness and did not impose an undue burden from any overbreadth on the right to choose an abortion. Justice Kennedy first rejected the vagueness challenge as the Act explicitly defined the actions that comprised an illegal abortion. "First, the person performing the abortion must 'vaginally deliver a living fetus.'"[162] The Act does not restrict abortion procedures which deliver an expired fetus or any medical procedures which do not entail vaginal delivery, such as, hysterectomies. Second, the Act required that the fetus be "delivered, 'until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.'"[163] Third, the "doctor must perform an 'overt act, other than completion of the delivery, that kills the partially delivered living fetus.'"[164] The doctor must perform this overt act following delivery to one of the anatomical landmarks defined in the Act.

Finally, the Act contained intent or knowledge requirements that pertained to each of the above-outlined acts involved in the performance of the prohibited abortion. For example, "the physician must have 'deliberately and intentionally' delivered the fetus to one of the Act's anatomical landmarks."[165] Additionally, the physician must have delivered the fetus "'for the purposes of performing an overt act that [doctor] knows will kill [it].'"[166] Thus, the Act does not apply if a living fetus is delivered past a critical point by accident or there is no intent to kill the fetus.

In defining vagueness, *Kolender v. Lawson*[167] required "'that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'"[168] The Congressional Act differed from the one at issue in *Sternberg* because it defined the line between potentially criminal conduct and a lawful abortion. *Sternberg* relied on vague language such as "delivery of a 'substantial portion' of the fetus."[169] A doctor might question what constituted a substantial portion. Moreover, past decisions also state that "scienter requirements alleviate vagueness concerns."[170] Finally, in addressing the remaining part of the vagueness test, the Act did not encourage "arbitrary or discriminatory enforcement."[171] The Act's anatomical landmarks provided "objective standards" that could be used to "'establish minimal guidelines'" for law enforcement.[172]

In the next major part of the opinion, the Court held that the Act did not impose an undue burden on second trimester abortions because it did not prohibit the standard D&E procedure that involves the piecemeal removal of the fetus. The Act specifically excluded most D&E procedures. Doctors intending to remove the fetus in parts from the

---

[162] 127 S. Ct. at 1628.
[163] *Id*. at 1627.
[164] *Id*.
[165] *Id*. at 1628.
[166] *Id*.
[167] 461 U.S. 352 (1983).
[168] *Id*. at 357.
[169] 127 S. Ct. at 1628.
[170] *Id*.
[171] *Id*. at 1629.
[172] *Id*.

start lack the scienter necessary for criminal liability. Moreover, the specific anatomical landmarks that were previously discussed differentiated the Act from *Sternberg*'s "substantial portion"[173] which could be interpreted to mean delivery of even an arm or a leg. Finally, the doctrine of avoidance of constitutional issues reinforced the Court's conclusions that the Act did not cover a typical D&E procedure. "'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[174] In this case, the most reasonable interpretation was that the Act did not prohibit standard D&E procedures.

The Court also rejected the facial challenge that the Act imposed a substantial obstacle on a woman's right to choose to have an abortion. The Act deals with a specific type of abortion in which a fetus is killed inches before the birth process is complete. In passing this Act, Congress stated: "'[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life.'"[175] Congress also expressed concern for the effects that partial birth abortions had on the medical community. As *Casey* reaffirmed, the government may use its regulatory power "to show its profound respect for the life within the woman."[176] If a regulation has a rational basis and does not impose an undue burden, it may "bar certain procedures and substitute others."[177] The Act's ban furthered "legitimate 'governmental objectives' in regulating the medical profession...to promote respect for life, including life of the unborn."[178] While many may think that standard D&E can "devalue human life," Congress could still find that intact D&E "implicate[d] additional ethical and moral concerns." Congress "was concerned with 'drawing a bright line that clearly distinguishes abortion and infanticide.'"[179]

Even though it advanced legitimate state interests, the Act could still impose an unconstitutional burden on the right to an abortion if it barred a procedure "'"necessary, in appropriate medical judgment for [the] preservation of the… health of the mother."'"[180] While the Act would be unconstitutional had it subjected women to unnecessary health risks, there was "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women...[t]he law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."[181] Medical uncertainty should not preclude regulation "in the abortion context any more than it does in other contexts." If an intact D&E was truly necessary, then the Act permits alternatives such as injection that kills the fetus prior to the delivery.

Whether a banned procedure is ever necessary to preserve a woman's health was not sufficient to make the law invalid on its face given the existence of safe alternatives. Balancing risks and marginal safety is within rational legislative competence. That one

[173] 530 U.S. at 922.
[174] 127 S. Ct. at 1631.
[175] *Id.* at 1633.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.* at 1634.
[180] *Id.* at 1635.
[181] *Id.* at 1636.

procedure is more convenient than another does not keep the State from imposing reasonable restrictions. As-applied challenges offer better opportunities to quantify and balance medical risk. As-applied challenges would not extend to threats of the woman's life as the Act already has a life exception. As plaintiffs failed to demonstrate "that the Act would be unconstitutional in a large fraction of relevant cases,"[182] the facial challenge failed.

Justice Thomas, joined by Justice Scalia, concurred. The Court's opinion accurately applied current jurisprudence, however, Justice Thomas reiterated his position that the general abortion jurisprudence including *Casey* and *Roe* had no basis in the Constitution. Moreover, the Court should not have addressed whether the Act was permissible under the Commerce Clause as the parties did not raise this issue.

Justice Ginsburg dissented, joined by Justices Stevens, Souter and Breyer. *Casey* clearly stated that any regulation of abortion, even post-viability abortions, must protect "'the health of the woman.'"[183] The Court's decision also blurred the firmly drawn line between pre-viability and post-viability abortions. Moreover, the Court for the first time since *Roe* upholds an abortion regulation that lacks an exception safeguarding the women's health. In the past, the Act would not have survived the "close scrutiny" applied to state-decreed limitations on a woman's reproductive health. Previously, regulations could not force women to resort to "less safe methods of abortion."[184]

Many situations arise in which women may find themselves in need of late second-trimester abortions. For instance, minors might not be aware of their pregnancy until late or poor women may have financial difficulties that constrain their ability to seek proper medical care. Late abortions are also necessitated by conditions that do not arise or are not diagnosed until late in the second trimester. *Sternberg* required a health exception if "'substantial medical authority'" demonstrated that banning a particular procedure "'could endanger a woman's health.'" [185] A division of medical opinion indicated an uncertainly, not an absence, of risk. Consequently, the Act's ban on intact D&E required a health exception.

Justice Ginsburg's dissent also disputed the Congressional claim that the banned procedure was never necessary as "the evidence 'very clearly demonstrated the opposite.'"[186] Compared to "dismemberment," intact D&E minimized the risk and trauma to the cervix as it entails fewer passes. Intact D&E also reduced the chances of fetal tissue being left in the uterus. Additionally, it diminished the chances of exposing the patient to sharp bony tissue and, because it takes less time, it would reduce the amount of bleeding and the risks of infection and anesthesia. Each District Court that considered the Congressional findings about the lack of necessity for an intact D&E viewed them as unreasonable and unsupported by the evidence.

The law did not even protect fetal life as it only targeted a method of abortion and did not save even one fetal life. The Court's use of the term "'abortion doctor'" and their use of the terms "'baby'" and "'unborn child'" for fetus evidences their "hostility to the right *Roe* and *Casey* secured." [187] Finally, a facial challenge to the Act was appropriate.

---

[182] *Id.* at 1639.
[183] *Id.* at 1640.
[184] *Id.* at 1642.
[185] *Id.* at 1642.
[186] *Id.* at 1644.
[187] *Id.* at 1650.

A health exception does not apply in the large fraction of cases as it is intended "to protect women in *exceptional* cases."[188]

[188] *Id.* at 1651.

§ 9.01 SEGREATION IN PUBLIC FACILITIES

[3] Limiting the Remedies

Page 375: [Insert the following after *Board of Oklahoma City v. Dowell*]

In *Parents Involved in Community Schools v. Seattle School District*,[189] Chief Justice Roberts announced the judgment of the divided Court in Parts I, II, III-A, and III-C. His opinion was joined by Justices Scalia, Thomas, and Alito in Parts III-B and IV. *Parents* combined cases involving two public school districts — Seattle and Jefferson County — that voluntarily adopted raced-based student classification programs. In Seattle, the district used white and non-white classifications to allocate spots in overpopulated schools. In Jefferson County, the district used black or "other" classifications to make elementary school assignment and transfer request decisions. In both cases, the district used an individual student's race to assign her to a school. The district's goal for each assignment was to meet pre-established racial composition quotas for each school.

In Part I, the Chief Justice, writing for the Court, identified the primary issue as "whether a public school that had not operated legally segregated schools or has been found to be unitary may . . . rely upon that classification in making school assignments."[190] Seattle School District No. 1 plan permitted students to select which district high school they would like to attend and rank their preferences. The district used a tiebreaking system to prevent oversubscription. First, the district gave a preference to students whose siblings attended the school. Second, the district considered the student's race and the racial balance of the school. The district's racial composition was "approximately 41 percent . . . white; the remaining 59 percent, comprising all other racial groups, [were] classified by Seattle for assignment purposes as nonwhite."[191] The district attempted to maintain schools whose racial compositions were "within 10 percentage points of the district's overall white/nonwhite racial balance."[192] Oversubscribed schools that did not meet this criterion were "'integration positive.'"[193] The district would select students who would help "'bring the school into balance.'"[194] If necessary, the district would then consider the student's proximity to the school as a third tiebreaker.

For the 2000 – 2001 term, five schools were oversubscribed. Approximately 82 percent of all incoming ninth graders requested one of these schools. The district classified three of these schools as "'integration positive'" because in the previous school year more than 51 percent of students in them were white. Seattle had never maintained segregated schools and was never under a court order to desegregate. However, most students in northern Seattle were white and most students in southern Seattle were nonwhite.

---

[189] 127 S. Ct. 2738 (2007).
[190] *Id.* at 2746.
[191] *Id.* at 2747.
[192] *Id.*
[193] *Id.*
[194] *Id.*

Turning to the Jefferson County School District, in 1975 a federal court ordered desegregation of Jefferson County's schools after the court had determined in 1973 that the county operated a segregated school district. In 2000, the court determined that the district had reached unitary status and dissolved the desegregation decree. Subsequently, Jefferson County enacted the plan at issue. It required the percentage of black enrollment at all non-magnet schools to be at least 15 percent, but no more than 50 percent. The racial composition of the county's student population was approximately "34 percent . . . black; most of the remaining 66 percent [were] white."[195] Once assigned, students could request a transfer to other non-magnet schools for any reason. However, the district reserved the right to reject a request based on the school's available space or racial composition.

Again writing for a majority in Part III-A, Chief Justice Roberts noted that both school districts had to show that their individual race-based plans were "'narrowly tailored' to achieve a 'compelling' government interest."[196] In prior cases, the Court acknowledged two interests that qualified as compelling. The first was a need to cure previous intentional discrimination. The harm must be traceable to segregation because "'the Constitution is not violated by racial imbalance in the schools, without more.'"[197]

Second, *Grutter v. Bollinger*[198] recognized the compelling interest in maintaining diversity in higher education. This interest is not concerned solely with racial composition, but includes "'all factors that may contribute to student body diversity.'"[199] The *Grutter* program did not focus solely on racial classification. Instead, racial classification was one of many individual factors in a "'highly individualized, holistic review.'"[200]

In contrast, the Seattle and Jefferson County plans did not consider an individual's race to expose their students to "'widely diverse people, cultures, ideas, and viewpoints.'"[201] Unlike the *Grutter* program, race was the only factor considered rather than one of many, which made these programs similar to the University of Michigan undergraduate plan struck down in *Gratz v. Bollinger*.[202] Moreover, the *Grutter* Court specifically narrowed its holding to higher education programs. Consequently, *Grutter* did not govern the plans at issue.

In Part III-B, joined by Justices Scalia, Thomas, and Alito, the Chief Justice explained that the Court has repeatedly struck down plans whose sole purpose was racial balance. In the cases at issue, the districts' plans were based solely on racial demographics rather than on "any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[203] Even the "undefined 'meaningful number' necessary to"[204] *Grutter* was permissible because its purpose was to achieve a genuinely diverse student population. The plurality expressed concern that "racial balancing has

---

[195] *Id.* at 2749.
[196] *Id.* at 2752.
[197] *Id.*
[198] 539 U.S. 306 (2003).
[199] 127 S. Ct. at 2753 (quoting *Grutter*, 539 U.S. at 337).
[200] *Id.*
[201] 127 S. Ct. at 2753.
[202] 539 U.S. 244 (2003).
[203] 127 S. Ct. at 2755.
[204] *Id.* at 2757.

'no logical stopping point'"[205] as demographic shifts will necessitate continued recalibrations.

Again writing for the majority in Part III-C, the Chief Justice determined that the districts failed to establish that the plans were narrowly tailored. The small effect plans had on student assignments meant that other measures could well have been just as effective. Moreover, the school districts did not demonstrate that they considered alternatives to overt racial classification. "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives.'"[206]

In Part IV, Chief Justice Roberts once again wrote for a plurality of Justices Scalia, Thomas, and Alito. The Chief Justice stated that Justice Breyer's dissent avoids the "distinction between *de jure* and *de facto* segregation."[207] *Brown v. Board of Education*[208] held that "'separate but equal'" facilities deprived black students of educational opportunities because racial classifications and separation "denoted inferiority." Prior to *Brown*, districts denied students access to certain schools based on their race. The school districts here have failed to carry the heavy burden that the Court should permit such practices "once again — even for very different reasons."[209]

In his concurrence, Justice Thomas compared the dissent's argument for allowing race-based considerations to that of the segregation advocates in *Brown*. "[R]acial imbalance without intentional state action to separate the races does not amount to segregation."[210] The dissent's allusion to preserving "their 'hard-won gains'" conflates the concepts of segregation and racial balancing.[211] The Court has permitted "race-based measures for remedial purpose in two narrow situations."[212] First, such measures may be permissible when they are "constitutionally compelled" to remedy schools that were previously segregated by law. Second, the holding in *Richmond v. J.A. Croson Co.*[213] permitted a government unit to use race-based considerations when the government unit itself had caused the past segregation. However, the more time that passes from the era of state-mandated segregation, "the less likely it is that racial imbalance has a traceable connection to any prior segregation."[214]

Scholars disagree as to whether racial balancing leads to any education benefits. Evidence also exists that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges. Arguing similarly to the dissent, "segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment."[215]

Justice Kennedy concurred in the judgment and joined Parts I, II, III-A, and III-C. He believed that the focus on race "may entrench the very prejudices we seek to overcome."[216] He did not join Parts III-B and IV because the plurality failed to recognize

[205] *Id.* at 2758.
[206] *Id.* at 2760.
[207] *Id.* at 2761.
[208] 347 U.S. 483 (1954).
[209] 127 S. Ct. at 2768.
[210] *Id.* at 2769.
[211] *Id.* at 2770.
[212] *Id.*
[213] 488 U.S. 469 (1989).
[214] 127 S. Ct. at 2773.
[215] *Id.* at 2785.
[216] *Id.* at 2788.

that diversity is a compelling state interest. "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[217]

Jefferson County failed to pass strict scrutiny because its explanation "of how and when" its uses racial classifications was "so broad and imprecise."[218] For instance, it did not clearly explain who made the school assignment decisions or if there was any oversight of the process. The district also failed to explain the precise circumstances which trigger a race-based assignment or how the school district decides "which of two similarly situated students will be subjected to a given race-based decision."[219] Seattle explained its process more clearly and extensively, but it failed to explain "how, in the context of a diverse student population, a blunt distinction between 'white' and 'non-white'"[220] encouraged diversity. For example, "a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not."[221] Not only did Seattle fail to narrowly tailor its plan, but it could be self-defeating. He suggested that other problems exist with the Seattle plan, but did not specifically discuss them.

Turning to his disagreements with the plurality opinion, Justice Kennedy disagreed with the plurality's conclusion that "the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling."[222] Unfortunately, Justice Harlan's famous assertion in his dissent in *Plessey v. Ferguson*[223] that "'our Constitution is color-blind'" regrettably "cannot be a universal constitutional principle" in the "real world."[224] Schools are free to adopt general race-conscious measures if they do not systematically target individual students solely on the basis of race, and their goal is to further equal educational opportunities for their entire student body. Permissible measures include: selecting locations for new schools generally recognizing the demographics of the area; setting aside funds for special programs; "recruiting students and faculty in a targeted fashion;" hiring faculty in a targeted way; and collecting various enrollment, performance, and other statistics based on race. As these measures do not tell students that they are being typed, based on race, they do not likely require strict scrutiny. In contrast, defining each student based on "a crude system of individual racial classifications"[225] is permissible only as a last resort to accomplish a compelling interest.

Joining Part III-C of the Court's opinion, Justice Kennedy agreed that since the schools' measures affected only a small number of student assignments, the schools could have achieved their desired objectives by other means. Such means could have been the facially race-neutral means previously outlined or, "if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might

---

[217] *Id.* at 2789.
[218] *Id.* at 2789-90.
[219] *Id.* at 2790.
[220] *Id.*
[221] *Id.* at 2791.
[222] *Id.*
[223] 163 U.S. 537 (1896).
[224] 127 S. Ct. at 2791.
[225] *Id.* at 2792.

include race as a component."[226]

The dissent is trying to justify "the explicit, sweeping, classwide racial classifications at issue here" and misread the Court's precedents in a way that "tends to undermine well-accepted principles needed to guard our freedom."[227] In *Freeman v. Pitts*,[228] the Court recognized a compelling interest in remedying past intentional discrimination. *Grutter* recognized a compelling state interest in fostering diversity in higher education. The dissent's permissive test, however, resembled rational-basis review, rather than strict scrutiny, which risked inviting widespread governmental use of racial classifications. A school district's objectives of avoiding racial isolation or of achieving a diverse student population both qualify as compelling state interests. In dissent, Justice Stevens noted that in *Brown* only blacks suffered discrimination. In contrast, both races bear the burdens of the programs at issue in this case.

Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg. The Court has previously approved "of 'narrowly tailored' plans that are no less race-conscious" than the ones currently before it, and "understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so."[229] The plurality's opinion threatened the local communities' objectives of integrated primary and secondary education, promised by *Brown*. Until recently, the racial integration was progressing considerably, but now it has "stalled." Now "more than one in six black children attend a school that is 99-100% minority."[230]

Under the current Seattle plan, students could transfer, regardless of race, after spending one year at a high school not of their choice. Under the Louisville plan, the transfer was also available to elementary and middle school students. However, it forbade transfers where it would lead to less than 15% or more than 50% black student population in a school. Both the Seattle and Louisville programs were remedial in nature. Louisville began to desegregate in response to a 1975 federal court order. Seattle's plan began as the result of a federal lawsuit settlement.

In Justice Breyer's view, applying a more lenient standard than strict scrutiny in this case "would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need."[231] Nonetheless, he would apply the version of strict scrutiny embodied in *Grutter*, and ask whether both plans were "'narrowly tailored'" to serve a "'compelling governmental interest.'" Such interest consists of three elements: 1) remedial: "in setting right the consequences of prior conditions of segregation;"[232] 2) educational: "in overcoming the adverse educational effects produced by and associated with highly segregated schools;"[233] and 3) democratic: "in producing an educational environment that reflects the 'pluralistic society.'"[234] Desegregation studies showed that black students' educational achievements improved in integrated schools and classes, they performed

---

[226] *Id.* at 2793.
[227] *Id.*
[228] 503 U.S. 467 (1992).
[229] 127 S. Ct. at 2800.
[230] *Id.* at 2802.
[231] *Id.* at 2819.
[232] *Id.* at 2820.
[233] *Id.*
[234] *Id.* at 2821.

better when removed from racial isolation early, and were more likely to move into higher-paid occupations traditionally closed to African-Americans.

Justice Breyer disagreed with the plurality's distinction between *de jure* ("'by state action'") and *de facto* ("'caused by other factors'") segregation, because it dealt with "what the Constitution *requires* school boards to do, not what it *permits* them to do."[235] The plans at issue passed even the strictest "narrow tailoring" test. They only defined the broad ranges, were less burdensome than other race-conscious measures the Court had previously approved, and tried to overcome the history of segregation, thus reflecting a "narrow tailoring." The plans were the embodiment of community experience; they sought to enhance student choice. Justice Breyer concluded that invalidating these plans "threaten[ed] the promise of *Brown*."[236]

[235] *Id.* at 2823.
[236] *Id.* at 2837.

§ 9.02 OTHER FORMS OF RACIAL DISCRIMINATION

[4] Voting

Page 389: [Insert the following after *Hunt v. Cromartie*]

The third part of Justice Kennedy's majority opinion in *League of United Latin Am. Citizens v. Perry*[237], joined by Justices Stevens, Souter, Ginsburg, and Breyer, held that District 23 of the Texas redistricting plan violated § 2 of the Voting Rights Act by diluting the Latino vote. Although the plan created a replacement majority-minority district, this attempt did not relieve the violation since this recourse was only available if the minority groups in both areas could not otherwise have been accommodated. Moreover, a compact district may not be dismantled and replaced by a noncompact district. In equal protection challenges, compactness focuses on district line-drawing to determine discriminatory intent. In contrast, § 2 of the Voting Rights Act assesses compactness of the minority population, not of the district.

Texas has a long history of minority-voter discrimination against African-Americans and Hispanics. Rearranging District 23 turned back the progress of a minority group that was becoming more "politically active and cohesive."[238] The Texas Legislature intentionally redrew district lines to protect an incumbent whose status was threatened by the increased political influence of a cohesive Latino community. While Texas' behavior may have indicated an equal protection violation, the Court did not decide the equal protection First Amendment issues since District 23 violated § 2 of the Voting Rights Act.

However, the fourth part of Justice Kennedy's opinion rejected a claim that District 24 diluted the votes of African-Americans. While only the Chief Justice and Justice Alito joined this part of Justice Kennedy's opinion, Justices Scalia and Thomas concurred in the judgment of this part of the opinion. African-Americans only held a majority in Democratic primaries. Extending § 2 voter dilution claims to these scenarios "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions."[239]

---

[237] 126 S. Ct. 2594 (2006).
[238] *Id.* at 2622.
[239] *Id.* at 2625.

§ 9.02 OTHER FORMS OF RACIAL DISCRIMINATION

[5] The Criminal Justice System

Page 399: [Insert the following after *Georgia v. McCollum*]

In *Snyder v. Louisiana*[240] the Court reversed a trial court's finding of lack of discriminatory intent as clearly erroneous. While thirty-six potential jurors survived challenges for cause, the prosecution used preemptory strikes to eliminate all five remaining black jurors.

The prosecution's explanation striking one of the black jurors was that the potential juror looked nervous throughout the questioning. The trial judge did not question this challenge. The prosecution also argued that the same juror was a student-teacher who might be concerned about missing class; consequently, he might vote for a lesser sentence. The Court held these rationales insufficient to meet the highly deferential clearly erroneous test. Moreover, the prosecutor declined to use a preemptory strike on a white juror with a more pressing time commitment.

Justice Thomas dissented, joined by Justice Scalia. Justice Thomas stated that the majority was merely "paying lip service"[241] to the deferential clearly erroneous standard.

---

[240] 128 S. Ct. 1203 (2008).

[241] *Id. at* 1213.

§ 12.03 EQUALITY IN THE POLITICAL PROCESS

[2] Other Barriers to Political Participation: Apportionment, Ballot Access for Minority Parties, Gerrymandering

Page 480: [Insert the following before *Vieth v. Jubelirer*]

In *Crawford v. Marion County Election Board*,[242] Justice Stevens writing for a plurality held that Indiana may require its citizens to present government-issued photo identification in order to vote in person. The statute at issue did not require such identification for voting by absentee ballot or from a resident of a "state-licensed facility such as a nursing home."[243] Moreover, an acceptable form of identification was available to state citizens free of charge upon verification of their residence and identity. The plurality concluded that these facts did not support a facial attack on the statute.

Harper v. Virginia Board of Elections[244] held that a state could not require its citizens to pay a poll tax of $1.50 to vote. Imposing even a nominal tax on the right to vote violated the Fourteenth Amendment's Equal Protection Clause because a voter's wealth or payment of a fee became a requirement for electoral participation. In *Anderson v. Celebrezze*,[245] the Court refused to identify any one factor that would determine whether a burden is too severe. Even a seemingly minor burden, such as the tax in *Harper*, could not stand without "relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[246]

The plurality next analyzed four interests presented by the State to justify the burdens of the new law: modernizing state elections, discovering and preventing voter fraud, correcting voter registration lists, and promoting voter confidence. Using government-issued photo identification to modernize elections was consistent with two recent federal statutes requiring reevaluation of state electoral procedures and the National Commission on Federal Election Reform (Carter-Baker Report). The prevention of in-person voter fraud was also a valid interest, despite a lack of evidence that it had ever occurred in Indiana.

Under *Harper*, the statute would be invalid if voters had to pay any fee to obtain the required identification. However, most voters already had an acceptable form of identification and if not, the State provided identification free of charge. Moreover, traveling to the nearest Bureau of Motor Vehicles (BMV) did not substantially burden the right to vote.

This statute did place a heavier burden on a limited group of people. Obtaining a birth certificate, which is needed to receive a free identification, was slightly more difficult for elderly citizens born outside the state and citizens facing economic hardship. Problems also existed for the homeless and voters whose religion prohibits being photographed. These challenges were somewhat decreased by the availability of provisional ballots, which were counted but required a trip to the circuit court clerk's

---

[242] 128 S. Ct. 1610 (2008).
[243] *Id. at* 1613.
[244] 383 U.S. 663 (1966).
[245] 460 U.S. 780 (1983).
[246] *Crawford*, 128 S. Ct. at 1616.

office to sign an affidavit. Still, the statute was not unconstitutional because it was not "wholly unjustified"[247] and the plurality found that no class of voters faced "'excessively burdensome requirements.'"[248] As the right to vote was not unduly burdened, the State's interests were enough to defeat a facial challenge. Moreover, even if the burden was unjustified, invalidating the entire statute would be an inappropriate measure.

Finally, the plurality noted that the statute is not invalid simply because the legislative vote which enacted it was totally divided along party lines: each party was unanimous in its approval or opposition.

Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment, stating that petitioners' burden was slight and justified. Citing *Burdick v. Takushi*,[249] Justice Scalia called for a deferential standard for "nonsevere, nondiscriminatory restrictions."[250] Common burdens spread widely through the populace are not severe, including burdens "requiring 'nominal effort' of everyone."[251] A burden becomes severe when it goes beyond a mere inconvenience. A generally applicable statute is not unconstitutional if it has a disparate impact but lacks discriminatory intent. Finally, resolving this case on the facts, without accepting or rejecting precedent, promotes uncertainty of the law and encourages more litigation.

Dissenting, Justice Souter, joined by Justice Ginsburg, did not find the burdens imposed by the statute minor or acceptable under *Burdick*, which requires that the interests advanced by a statute outweigh the burden it creates. The mere availability of absentee ballots to the elderly and disabled cannot justify the denial of their right to vote in person. Indigents who wish to vote in person must either pay $3 to $12 for a birth certificate or cast a provisional ballot, an option also available to voters with religious objections to being photographed. Casting a provisional ballot, however, still requires voters to bear the cost of traveling to the circuit court clerk within ten days of the election. This statute was passed without any proof of prior in-person voting fraud within the State, and it adversely affects nearly 43,000 eligible voters that do not already have the required identification.

Justice Breyer, also dissenting, did not agree with the plurality that the burden was too uncertain to allow a facial challenge or with Justice Scalia that the burden was slight or justified. Instead, Justice Breyer found that the travel and expense required to obtain the necessary identification posed a significant challenge to non-drivers who are more likely to be poor, elderly, or disabled.

---

[247] *Id. at* 1621.
[248] *Id. at* 1623.
[249] 504 U.S. 428 (1992).

[250] *Crawford*, 128 S. Ct. at 1624.
[251] *Id.*

Page 480: [Insert the following after *Davis v. Bandemer*]

In *League of United Latin Am. Citizens v. Perry*,[252] a divided Court partially upheld most of a redistricting plan against political gerrymandering claims under the Equal Protection Clause; however, the Court invalidated one district and upheld another against racial voter dilution claims. In the 2002 elections, the nonpartisan Texas plan created out of the *Balderas* litigation resulted in a victory for a majority of Democrats for Congress but Republican victories in a majority of state offices. Subsequently, the Texas legislature created a new congressional district map which led to Republicans winning the majority of the congressional seats in the 2004 elections.

Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, declined to resolve the question of whether a claim may be raised for political gerrymandering under the Equal Protection Clause.[253] Instead, the majority turned to the merits. While the Constitution calls for state legislatures to apportion their congressional districts, and legislatively drawn plans are more desirable than judicially drawn plans, a legislature cannot rely on "improper criteria"[254] to redistrict. The majority concluded that the legislature's plan did not violate the Constitution by replacing the court-drawn plan or by restricting mid-decade. To hold otherwise would have left the 1991 Democrat-biased plan in place while striking down the similarly Republican-biased 2003 plan.

Nevertheless, the third part of Justice Kennedy's majority opinion, in which Justices Stevens, Souter, Ginsburg, and Breyer joined, held that District 23 of the redistricting plan violated § 2 of the Voting Rights Act by diluting the Latino vote. Although the plan created a replacement majority-minority district, this attempt did not relieve the violation since this recourse was only available if the minority groups in both areas could not otherwise have been accommodated. Moreover, a compact district may not be dismantled and replaced by a noncompact district. In equal protection challenges, compactness focuses on district line-drawing to determine discriminatory intent. In contrast, § 2 of the Voting Rights Act assesses compactness of the minority population, not of the district.

Texas has a long history of minority-voter discrimination against African-Americans and Hispanics. Rearranging District 23 turned back the progress of a minority group that was becoming more "politically active and cohesive."[255] The Texas Legislature intentionally redrew district lines to protect an incumbent whose status was threatened by the increased political influence of a cohesive Latino community. While Texas' behavior may have indicated an equal protection violation, the Court did not decide the equal protection First Amendment issues since District 23 violated § 2 of the Voting Rights Act.

The fourth part of Justice Kennedy's opinion was only joined by Chief Justice Roberts and Justice Alito. Justices Scalia and Thomas concurred in the judgment.

---

[252] 126 S. Ct. 2594 (2006).

[253] *See Davis v. Bandemer,* 478 U.S. 109 (1986) and *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[254] *League,* 126 S. Ct. at 2609.

[255] *Id.* at 2622.

Justice Kennedy rejected the claim that District 24 diluted African-American votes. African-Americans only held a majority in Democratic primaries. Extending § 2 voter dilution claims to this scenario "would unnecessarily infuse race into virtually every redistricting."[256]

Justice Stevens concurred in part and dissented in part. Joined by Justice Breyer who also wrote a separate opinion concurring in part and dissenting in part, Justice Stevens concluded that the plan is completely invalid and would therefore replace it with the prior court-drawn nonpartisan plan. Replacing the court-drawn neutral plan only served partisan purposes. According to Justice Stevens, equal protection will not allow redistricting solely "'to minimize or cancel out the voting strength of racial *or political* elements of the voting population.'"[257] Justice Breyer stated that the entire plan violated equal protection as it was purely motivated by partisan concerns.

Chief Justice Roberts' separate opinion, joined by Justice Alito, agreed with the majority that the claims did not provide "'a reliable standard for identifying unconstitutional political gerrymanders.'"[258] The Chief Justice dissented from the majority's invalidation of District 25 since the Court has never compared the compactness of minority populations in one area versus another when evaluating a § 2 violation. Justice Scalia, joined by Justice Thomas, concurred in the judgment in part and dissented in part. He maintained that the constitutionality of partisan gerrymandering is a nonjusticiable claim. The Chief Justice and Justices Stevens, Souter, Thomas, Ginsburg, Breyer, and Alito all agreed with Justice Scalia's conclusion that compliance with § 5 of the Voting Rights Act in creating a majority-minority voting district may comprise a compelling state interest.

---

[256] *Id.* at 2625.
[257] *Id.* at 2628 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 498 (1965) (emphasis added)).
[258] *Id. at* 2652.

§ 12.05 "ECONOMIC AND SOCIAL LEGISLATION"

Page 495: [Insert the following after *Vacco v. Quill*]

In *Engquist v. Oregon Department of Agriculture*,[259] the Court refused to apply the "class-of-one" theory of equal protection to public employment matters. Plaintiff's "class-of-one" equal protection claim alleged that she was fired for "'arbitrary, vindictive, and malicious reasons,'" not because of her belonging to any particular identified class.[260] Chief Justice Roberts stated that the primary concern of the Equal Protection Clause is to protect against arbitrary classifications, and that the considerations applicable are different when the government is acting as an employer than when it is acting in its capacity as sovereign. The "class-of-one" theory does not apply in the public employment context. The Court frequently acknowledged that the government has more latitude in its dealings with citizen employees when acting as an employer than it does in its dealings with the general population when acting as a sovereign authority. The Court's precedent in the public employment area establishes two main principles. First, while government employees retain their constitutional rights, those rights must be balanced by the employment context. Second, the Court must assess whether the claim implicates the basic concerns of the asserted constitutional right, or whether the asserted right more easily gives way to the government's needs as an employer.

The Court previously had upheld a "class-of-one" claim involving government regulation of private property in *Village of Willowbrook v. Olech*.[261] *Olech*, however, relied on precedent regarding tax schemes and assessments of the property. Quoting from the judicial oath, the Chief Justice stated that "such legislative or regulatory classifications" should apply "'without respect to persons.'"[262] When government treats differently persons who seem to be similarly situated, equal protection demands at least a rational explanation. The government in *Olech* departed from its own clear, consistent standard in any one case. Specifically, the board required a 33-foot easement for Olech, rather than the standard 15-foot easement. This differential treatment raised a concern that the classification was arbitrary, and the Court required a rational basis for the distinctions.

In contrast, some state actions are inherently discretionary. Discretionary state actions plainly include employment decisions, which are generally subjective and rest on many factors that are difficult to express and quantify. In the public employment context, a "class-of-one" theory of equal protection runs counter to the employment-at-will doctrine which allows an employee to be terminated for any reason or no reason at all. Congress and the States have statutorily limited much of their discretion under the employment-at-will doctrine with various statutory schemes protecting public employees from discharge for impermissible reasons. However, Government could comply but not function if every employment decision came under constitutional scrutiny.

Justice Stevens dissented, joined by Justices Souter and Ginsburg. While government employers must have discretionary authority, that discretion requires

---

[259] 128 S. Ct. 2146 (2008)

[260] *Id. at* 2149.

[261] 528 U.S. 562 (2000).

[262] *Engquist*, 128 S. Ct. at 2153.

choosing among rational alternatives. While equal protection does not prohibit unwise decisions, it does proscribe arbitrary ones without any rational justification. Moreover, today, new statutes and constitutional decisions have almost rendered the employment-at-will doctrine insignificant.

§ 13.04 ASSOCIATIONAL RIGHTS IN OTHER CONTEXTS

Page 516: [Insert the following before *Eu v. San Francisco County Democratic Central Committee*]

In *Washington State Grange v. Washington Republican Party*,[263] the Court rejected a facial challenge to statute I-872. The statute provided that candidates would be identified on the ballot by the political party they designated; and the top two vote winners would advance to the general election, regardless of party preference. On its face, the statute did not severely burden the associational rights of political parties. Moreover, contention that this process would confuse voters could "be evaluated only in the context of an as-applied challenge."[264]

In *California Democratic Party v. Jones*,[265] the Court struck down blanket primaries, where voters could vote for a party's nominees even if they were not a part of that party. I-872, however, required a candidate to declare his party preference or independent status.

The Court disfavors the speculative nature of facial challenges because this can lead to interpreting statutes prematurely. Moreover, they undermined judicial restraint. Justice Thomas noted that the Constitution granted states broad powers to conduct congressional elections; states enjoyed similar powers over state elections.

Unlike the California primary, I-872 did not purport to select a party's nominees, which a party could do in any way it wanted, but only to reduce the number of candidates to two for the general election. The parties argued that voters will mistakenly assume that these final candidates are the parties' nominees, or at least that the party approves of them. The Court refused to strike down the statute on the " mere possibility of voter confusion."[266] Presumably, the state could design a ballot that eliminates voter confusion. The Court explained that ballots could include a disclaimer that party preference is not an endorsement by a party, but is only a designation provided by the candidate. As I-872 did not severely burden political parties, Washington did not need a compelling interest for structuring its primaries in this manner. Its interest in giving voters information about candidates was enough to uphold the statute.

Chief Justice Roberts concurred, joined by Justice Alito. The record failed to suggest that Washington could not design ballots that prevented voters from assuming that the party listed by the candidates was an indication of an endorsement of that party.

Justice Scalia dissented, joined by Justice Kennedy. Justice Scalia argued that nominating candidates for political office is the fundamental purpose of a political party. Washington's process severely burdened the parties' associational rights without a compelling interest. The statute allowed the state to exercise its exclusive power over ballots "to undermine the expressive activities of political parties."[267]

---

[263] 128 S. Ct. 1184 (2008).
[264] *Id. at* 1187.
[265] 530 U.S. 567 (2000).
[266] *Grange*, 128 S. Ct. at 1180-87.
[267] *Id. at* 1203.

Page: 516: [Insert the following after *Washington State Grange v. Washington Republican Party*]

In *New York State Board of Elections v. López Torres*,[268] the Court upheld a state statute prescribing the nomination process for the New York Supreme Court, New York's trial court of general jurisdiction. Under the statute, party nominees are automatically listed on the general-election ballot, while non-party candidates must follow an alternate procedure. To be considered a party nominee, a candidate must be nominated by a political party "at a convention of delegates chosen by party members in a primary election."[269] Party nominees are automatically listed on the general election ballot. Otherwise, independent candidates and candidates of political organizations (groups that have not received the 50,000 votes required to be a recognized party) must submit a nomination petition and collect signatures of voters in their district.

Writing for the Court, Justice Scalia stated that political parties have a First Amendment right to create membership restrictions and a nomination process that will yield a judicial candidate whom the party feels "best represents its political platform."[270] Answering respondent's challenge that the specific process used by her party was unfair, Justice Scalia noted that the Constitution does not mandate a "fair shot"[271] or even playing field for individuals seeking a party nomination. The Court also rejected respondent's argument that the First Amendment required a more competitive nomination process that would decrease the "'one-party rule'" present in parts of the State. Such trends may simply demonstrate the voters' approval of that party's chosen candidates.

Concurring, Justice Stevens, joined by Justice Souter, added that the Court was not endorsing this particular electoral system or nomination process. Justice Kennedy's concurrence stated that the law may have been invalid without an alternate means of appearing on the ballot. Specifically, a candidate not nominated by any political party could submit a petition signed by 4,000 voters or fewer, depending on the district. Justice Kennedy also commented that the campaigning and fundraising required of elective office may impair real and perceived "judicial independence and judicial excellence."[272]

---

[268] 128 S. Ct. 791 (2008).
[269] *Id.* at 795.
[270] *Id.* at 797.
[271] *Id.* at 799.
[272] *Id.* at 803.

§ 13.05 FREE SPEECH PROBLEMS OF GOVERNMENT EMPLOYEES

[3] Employee's Rights to Criticize Government

Page 531: [Insert the following after *Waters v. Churchill*]

In *Garcetti v. Ceballos*,[273] the Court held that when a public employee's speech is restricted by his job responsibilities, the First Amendment does not protect it. In *Garcetti*, a public employee discovered what he believed to be inaccuracies in an affidavit while performing his job responsibilities. He claimed that after notifying various personnel about his discovery he suffered retaliation.

First, the Court noted that government entities may restrict a public employee's speech as their employer so long as the restriction prevents speech that "has some potential to affect the entity's operations."[274] The government, like any employer, must ensure that services are rendered efficiently. In contrast, when a public employee's speech involves a matter of public concern, government may only impose "those speech restrictions that are necessary for their employers to operate efficiently and effectively."[275] As *Connick v. Meyers*[276] stated, however, this constitutional protection does not extend to employee grievances.

In *Ceballos*, the employee's speech was directly related to his job responsibilities. Consistent with federalism and the separation of powers, established precedents forbid "judicial supervision" overriding "managerial discretion" in supervision of government employees.[277] Public employees maintain some protection for public speech unrelated to their employment responsibilities as this activity resembles that of a private citizen. However, the Court cautioned that "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes."[278] The Court declined to consider the applicability of its analysis to speech involving scholarship or teaching: the employer-employee relationship does not fully encompass the constitutional interests in academic freedom. Finally, various whistleblower and labor laws protect public employees when exposing issues within the government.

Dissenting, Justice Stevens rejected the dichotomy between a public employee speaking as a private citizen or pursuant to her job responsibilities. Also dissenting, Justice Souter argued that a public employee's speech arising out of her job responsibilities might be more valuable to the public due to the employee's superior knowledge. Moreover, the majority's rule encourages government to draft expansive job descriptions thereby reducing First Amendment protections. Whistleblower statutes vary too dramatically to reduce the need for First Amendment protection. Finally, in a separate dissent, Justice Breyer agreed that the majority ruling is "too absolute"[279] but

---

[273] 126 S. Ct. 1951 (2006).
[274] *Id.* at 1958.
[275] *Id.*
[276] 461 U.S. 138 (1983).
[277] *Ceballos*, 126 S. Ct. at 1961.
[278] *Id.* at 1962.
[279] *Id. at* 1974.

argued that Justice Souter’s standard does not adequately consider the management concerns of government entities.

§ 15.02 EXPENDITURES OF MONEY IN THE POLITICAL ARENA

Page 646: [Insert the following after *McConnell v. Federal Election Commission*]

In *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.* (*WRTL*),[280] the Court declared Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) unconstitutional as applied to the corporate advertisements at issue because they were "not the 'functional equivalent' of express campaign speech." BCRA § 203 restricts corporate broadcasts shortly before an election that name a federal candidate for elected office and target the electorate. During this time, it is a federal crime for any labor union or incorporated entity to "pay for any 'electioneering communication'" from general treasury funds.[281] As part of a lobbying campaign, WRTL aired three commercials prior to the 2004 federal primary election that referred to Washington Senators by name. The commercials encouraged citizens to contact these Senators to request that they oppose a federal judicial nominee filibuster. BCRA § 203 prevented WRTL from broadcasting these commercials less than 30 days prior to the primary election.

Chief Justice Roberts delivered the judgment of the Court and the opinion of the Court with respect to Parts I and II. In *McConnell v. Fed. Election Comm'n*,[282] the Court had rejected a facial challenge to BCRA § 203. The Court distinguished issue advocacy from campaign speech or express advocacy of a particular candidate. Chief Justice Roberts first held that the speech at issue was "not the 'functional equivalent' of express campaign speech."[283] Second, the Court found that the interests justifying campaign speech regulation did not justify issue advocacy restrictions. Consequently, the Court held § 203 "unconstitutional as applied to the advertisements at issue."[284]

Only Justice Alito joined Parts III and IV of the Chief Justice's opinion. In Part III, the Chief Justice said that regulating WRTL's ads was not narrowly tailored to achieve a compelling state interest. Under *McConnell*, only regulation of express campaign speech "survives strict scrutiny."[285]

An ad comprises express campaign speech or its functional equivalent "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[286] The ads focused on issue promotion and advocated contacting public officials to take a position on the particular legislative issue. Second, the ads "do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidates' character, qualifications, or fitness for office."[287]

The Chief Justice also rejected Justice Scalia's criticism that his "*no reasonable interpretation"* test is vague. He said that "in a debatable case, the tie is resolved in favor of protecting speech."[288]

The government argued "that an expansive definition of 'functional equivalent'"

---

[280] 127 S. Ct. 2652 (2007).
[281] *Id.* at 2660.
[282] 540 U.S. 93 (2003).
[283] 127 S. Ct. at 2659.
[284] *Id.*
[285] *Id.* at 2663.
[286] *Id.* at 2667.
[287] *Id.*
[288] *Id.* at note 7.

is necessary to prevent issue advocacy from circumventing "the rule against express advocacy."[289] Rejecting this argument in part IV of his opinion, the Chief Justice rejected the "desire for a bright-line rule" as a compelling state interest. The plurality acknowledged that the state has a compelling interest in addressing "'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.'"[290] However, "the interest recognized in *Austin*[291] as justifying regulation of corporate campaign speech" does not apply "to issue advocacy."[292]

In conclusion, Chief Justice Roberts distinguished the Court's holding from that in *McConnell* and confirmed that its precedent was undisturbed. "*McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy."[293] However, when the issue is "what speech qualifies as the functional equivalent of express advocacy subject to such a ban" the Court will "give the benefit of the doubt to speech, not censorship."[294]

Justice Alito's concurrence predicted that if the Court's test as laid out "impermissibly chills political speech," then the Court might reconsider *McConnell*.[295]

Justice Scalia, joined by Justices Kennedy and Thomas, concurred in part and in the judgment. Justice Scalia explained that no test for distinguishing between express and issue advocacy "can both (1) comport with the requirement of clarity that unchilled freedom of political speech demands, and (2) be compatible with the facial validity of § 203 (as pronounced in *McConnell*)."[296] He would reconsider *McConnell* as it forces the Court to make "issue-speech from election-speech with no clear criterion."[297]

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. "Devoting concentrations of money in self-interested hands to the support of political campaigning...threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves."[298] The no other reasonable interpretation test flatly contradicts *McConnell*. After this decision, companies and unions can easily circumvent the ban on their making campaign contributions "simply by running 'issue ads' without express advocacy, or by funneling the money through an independent corporation like WRTL."[299]

---

[289] *Id.* at 2672.
[290] *Id.*
[291] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).
[292] 127 S. Ct. 2672.
[293] *Id.* at 2673.
[294] *Id.*
[295] *Id.*
[296] *Id.* at 2675.
[297] *Id.* at 2687.
[298] *Id.* at 2689.
[299] *Id.* at 2705.

§ 15.04 THE MODERN APPROACH: LIMITING SPEECH ACCORDING TO THE CHARACTER OF THE PROPERTY

[1] Public Property

Page 621: [Insert the following after *Scheidler v. Nat'l Org. for Women, Inc.*]

In *Scheidler v. Nat'l Org. for Women, Inc.*,[300] the Court held that the Hobbs Act does not prohibit acts or threats of physical violence unless accompanied by robbery or extortion.

[300] 547 U.S. 9 (2006).

§ 15.05 SPEECH IN PUBLIC SCHOOLS

Page 626: [Insert the following after *Bethel School District No. 403 v. Fraser*]

In *Morse v. Frederick*,[301] the Court held that schools can restrict student speech that encourages illegal drug use. In *Morse*, a student was suspended for holding up a sign that read "BONG HiTS 4 JESUS" at the Olympic torch event which students were released from school to attend.[302]

Chief Justice Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas, and Alito. The Court found the banner could be reasonably interpreted to encourage illegal drug use and was not political speech regarding the legalization of marijuana. Further, the student himself did not contend that the banner had any political or religious meaning.

Bethel Sch. Dist. No. 403 v. Fraser[303] established two principles: (1) students in public schools do not have free speech rights equal to adults in other settings and (2) the analysis of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*[304] — that student speech is protected unless it causes a substantial disruption — does not always apply. Restricting the speech at issue was appropriate because school officials have a very important interest in preventing student drug abuse.

Concurring, Justice Thomas emphasized that *Tinker's* analysis has no basis in the Constitution because it interferes with traditional *in loco parentis* powers that have been held by school officials since the framing period. Also concurring, Justice Alito, joined by Justice Kennedy, noted that restrictions on student speech advocating drug use are "at the far reaches of what the First Amendment permits."[305]

Dissenting, Justice Stevens, joined by Justices Souter and Ginsburg, maintained that the banner did not encourage illegal drug use. The banner's message was motivated by a desire to appear on television and had no meaning. Moreover, the majority's broad holding would restrict students' legitimate First Amendment rights to debate political issues regarding the legalization of drugs. Concurring in part and dissenting in part, Justice Breyer opined that the case should have been decided on grounds other than the First Amendment.

---

[301] 127 S. Ct. 2618 (2007).
[302] *Id.* at 2622.
[303] 478 U.S. 675 (1986).
[304] 393 U.S. 503 (1969).
[305] *Morse*, 127 S. Ct. at 2638.

§ 16.02 EXPENDITURES OF MONEY IN THE POLITICAL ARENA

Page 643: [Insert the following after *Austin v. Michigan Chamber of Commerce*]

In *Davenport v. Wash. Educ. Ass'n*,[306] the Court held that state governments may require unions to obtain affirmative consent from a nonmember before the nonmember's dues paid for collective bargaining purposes may be used for unrelated ideological purposes. This requirement is constitutional even though it exceeds the constitutional minimum established in *Abood v. Detroit Bd. of Educ.*[307] *Abood* merely required unions to give nonmembers the opportunity to object to their dues being used for ideological purposes.

Page 645: [Insert the following after *Federal Election Comm'n v. Colorado Republican Federal Campaign*]

In *Randall v. Sorrell*,[308] the Court invalidated both the expenditure and contribution limits of Vermont's campaign finance statute. Established precedent invalidates the expenditure limits. The contribution limits are invalid because their low maximum levels and other restriction are not carefully tailored.

The statute limited spending of incumbent candidates running for statewide office to 85% and those incumbents running for the State Senate or House to 90% of approximately the following amounts: governor, $300,000; lieutenant governor, $100,000; other statewide offices, $45,000. The limitations also applied to expenditures by a political party that are coordinated with candidate campaigns.[309] Contributions for statewide offices including governor and lieutenant governor were limited to $400; contributions for state senator to $300; and contributions for state representative to $200. These limits applied to both political committees and political parties. Finally, the statute limited the amount an individual can contribute to a political party to $2,000 per "2-year general election cycle."[310]

First, Justice Breyer relied on *Buckley v. Valeo*[311] in analyzing the constitutionality of the Act's expenditure limits. He emphasized that only in extremely rare and specific circumstances may the Court abandon established precedent. This principle is particularly important when the Court has repeatedly interpreted the law in the same way over time. Based on this interpretation of *stare decisis*, Justice Breyer, joined only by Chief Justice Roberts, found no reason to overrule *Buckley*.

Writing for the plurality, Justice Breyer explained that the Court will typically rely on the legislature's specific expertise to determine appropriate limits for campaign costs unless the limits are so obviously low that they would inhibit challengers from

---

[306] 127 S. Ct. 2372 (2007).
[307] 431 U.S. 209 (1977).
[308] 126 S. Ct. 2479 (2006).
[309] Moreover, "any party expenditure that 'primarily benefits six or fewer candidates who are associated with the political party' is 'presumed' to be coordinated with the campaign and therefore to count against the campaign's expenditure limit." *Id.* at 2486.
[310] *Id.*
[311] 424 U.S. 1 (1976).

competing with incumbents. The plurality believed the Vermont statute fell in this latter category since the limits were significantly lower than those of other states. For example, a person could only contribute a total of $200 for both the primary and general elections. In the year that *Buckley* was decided, this total would have amounted to approximately $57 per election rather than the $1,000 per election limit considered in *Buckley*.

Moreover, Vermont's limits were the lowest among all 50 states. The plurality found the contribution limits unconstitutionally restrictive based on a combination of five factors. The plurality found particularly disturbing the adverse impact of these low contribution limits on candidates challenging incumbents as challengers frequently incur higher costs. Second, the plurality agreed with the District Court's assessment that such low limits would significantly reduce political opposition. Third, the statute did not provide an exception for volunteer costs despite these "very low"[312] contribution limits. Fourth, the contribution limits were not indexed for inflation. Fifth, no "special justification"[313] legitimates these low contribution limits. Therefore, the plurality found that the statute was not "narrowly" tailored and "disproportionately burden[ed] numerous First Amendment interests."[314] The plurality concluded that severing part of the limits from the statute was not possible.[315]

Four Justices concurred in the judgment but disagreed with various parts of the plurality's analysis. Justice Alito found the plurality's discussion of whether to revisit *Buckley* unnecessary since those challenging the Vermont statute did not make a case for reexamination of *Buckley*. Justice Kennedy questioned the Court's overall approach to determine which limits are too low. Justice Thomas, joined by Justice Scalia, reiterated his view that the *Buckley* Court should have invalidated both the contribution and expenditure limits in *Buckley*.

Dissenting, Justice Stevens would overrule those parts of *Buckley* that stuck down expenditure limits as Justice White's dissent in *Buckley* recognized, "it is quite wrong to equate money and speech."[316] He analogized expenditures were more analogous to time, place, and manner restrictions than on content-based restrictions. Finally, Justice Souter filed a dissenting opinion which was joined by Justice Ginsburg and in part by Justice Stevens. He would defer to the Vermont legislature's determinations of both appropriate expenditure and contribution limits although such deference should not be absolute.

Page 652: [Insert the following after *McConnell v. Federal Election Commission*]

In *Davis v. Federal Election Commission*,[317] the Court invalidated two provisions of the federal Bipartisan Campaign Reform Act of 2002 (BCRA) known as the "'Millionaire's Amendment.'" Under the BCRA, a candidate was considered self-financing if she personally spent more than $350,000 on her own campaign. When a self-

[312] *Randall*, 126 S. Ct. at 2498.
[313] *Id.* at 2499.
[314] *Id.* at 2500.
[315] This "would require us to write words into the statute (inflation indexing), or leave gaping loopholes (no limits on party contributions), or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found." *Id.*
[316] *Id.* at 2508.
[317] 128 S. Ct. 2759 (2008).

financing candidate ran against a non-self-financing candidate, asymmetrical campaign contribution limits and reporting requirements were imposed on each. Specifically, the non-self-financing candidate could accept three times the normal limit of individual contributions and unlimited coordinated party expenditures until such contributions were equal to the personal expenditures of their self-financing opponent; at that point, the normal limits were reimposed. In contrast, the self-financing candidate did not have any of the above fund-raising advantages. Moreover, the self-financing candidate was required to report: a "'[d]eclaration of intent'" to spend more than $350,000 within 15 days of entering a race, an "'[i]nitial notification'" within 24 hours of crossing the $350,000 mark, and an "'[a]dditional notification'" within 24 hours of each additional expenditure from personal funds of $10,000 or more. The non-self-financing candidate faced less demanding disclosure requirements. These candidates were required to report only when: based on notification by a self-financing opponent, they believed $350,000 in personal funds had been spent; their additional contributions became equal to that opponent's personal expenditures; or they had to return "'excess funds.'"

A uniform change in contribution limits was facially constitutional under *Buckley v. Valeo*.[318] Even those limits, however, must be "'closely drawn' to serve a 'sufficiently important interest.'"[319] While campaign contribution limits could be impermissibly low, there was no constitutionally unacceptable upper limit. The Court has never upheld the imposition of disparate campaign contribution limits on candidates competing in the same election.

The BCRA effectively penalized self-financing candidates for exercising their First Amendment right to personally finance their own campaign speech. Candidates were forced to choose between limiting their personal expenditures and consequently their speech, or campaigning under the burden imposed by the BCRA's "discriminatory" contribution limits.

The Court found no "compelling state interest"[320] in eliminating real or perceived corruption and noted that *Buckley* rejected leveling candidates' financial resources as such an interest. This sort of equalization would allow Congress to infringe on the voters' right to independently evaluate candidates based on all their strengths–which could include fame, personal wealth, or wealthy supporters. If the permissible interests of preventing corruption or the perception that congressional seats may be bought were not served by the current contribution limits, those limits should be uniformly raised or eliminated altogether.

Justice Alito subjected BCRA's reporting requirements to "'exacting scrutiny,'" under which a court must find "'a "relevant correlation" or "substantial relation"'" between the claimed governmental interest and the disclosed information.[321] As the seriousness of the burden on First Amendment rights increases, so also must the strength of the government's interest. The BCRA requirements did not meet this standard, as the government could not justify the severity of the burden these symmetrical contribution limits imposed on First Amendment rights.

Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer. The

[318] 424 U.S. 1 (1976).
[319] *Davis*, 128 S. Ct. at 2770.
[320] *Id.* at 2772.
[321] *Id. at* 2775.

BCRA simply reduced the inequality between non-self-financing candidates and their self-financing opponents. In his *Buckley* dissent, Justice White explained that such limitations are comparable to "time, place, and manner regulations," rather than direct limitations on speech.[322] Justice Stevens noted that quantity limitations are common in other situations involving "high-value speech,"[323] such as Supreme Court oral arguments and briefs. Quantity limitations are often beneficial to speakers as well as their audiences. Without such restrictions, candidates could overwhelm voters and cloud important issues. Consequently, limiting the quantity of speech is not the same as limiting its content, which would violate the First Amendment. The BCRA was also consistent with *Buckley*'s rejecting of expenditure limitations as it did not restrict any speech at all, but allowed the non-self-financing candidate a voice equal to that of his opponent.

Finally, Justice Stevens rejected the conclusion that preventing real and perceived corruption are the only governmental interests weighty enough to justify campaign finance regulations. The government has legitimate, long-standing interests in minimizing the effect of a candidate's wealth on an election and the perception that wealth is the sole determinant in a political race. These concerns have typically arisen in past decisions involving corporations, but the same reasoning should also apply to individual wealth. Moreover, the self-financing candidate's opponent received no unfair advantage as he could only take advantage of the increased limits until he was financially equal to his opponent.

Justice Ginsburg, joined by Justice Breyer, wrote a separate dissent. She agreed with Justice Stevens that the challenged provisions did not violate *Buckley*'s holding, but thought that the issues presented in this case did not require reconsideration of the *Buckley*

---

[322] *Buckley,*. 424 U.S. at 264.
[323] *Davis*, 128 S. Ct. at 2779.

§ 16.03 GOVERNMENT SPENDING ON SPEECH RELATED ACTIVITIES

Page 656: [Insert the following after *Legal Services Corp. v. Velazquez*]

In *Rumsfeld v. Forum of Academic & Institutional Rights,*[324] a unanimous Court held that the Solomon Amendment, 10 U.S.C.§ 983, does not violate the First Amendment rights of law schools. Law schools claimed that the military's policies towards homosexuals violated their nondiscrimination policies. Thus, many law schools restricted military recruiters' access to their students. In reaction, the Solomon Amendment provided "that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution"[325] loses certain funds. Rather, "it looks to the result achieved by the policy" by comparing the recruiting access that a law school provides military versus non-military recruiters.

Turning to the question of whether the Solomon Amendment constituted an unconstitutional condition on the receipt of federal funds, Chief Justice Roberts noted that "judicial deference . . . is at its apogee when Congress legislates under its authority to raise and support armies."[326] Congress could have required schools to allow equal access to military recruiters under its authority to raise and support armies. Congress' choice to promote its goal through funding conditions deserves at least the same deferential treatment as a mandate imposed on universities.

The First Amendment prohibits the government from telling people what to say. The Solomon Amendment, however, regulates law schools' conduct, not speech. Law schools remain free to express their views on the military's employment policy. While recruiting assistance provided by the law schools may contain elements of speech such as sending emails or posting notices on bulletin boards on an employer's behalf, such services are dramatically different from requiring children to recite the Pledge of Allegiance in public school, or requiring motorists "to display the state motto 'live free or die on their license plates.'"[327] Rather, the alleged compelled speech was "incidental to the Solomon Amendment's regulation of conduct." The Court further noted that requiring access to military recruiters does not constitute compelled speech.

Prior decisions have extended First Amendment protections to conduct that was inherently expressive, such as flag burning. The Court, however, refused to extend this protection to the conduct regulated by the Solomon Amendment finding that it was not inherently expressive. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."[328] *United States v. O'Brien*[329] permits content neutral regulations that promote a substantial government interest if that interest could not have been achieved more effectively absent the regulation. "Military recruiting promotes the substantial government interest in raising and supporting the armed forces-an objective that would be achieved less effectively if the military were forced to recruit on less

---

[324] 546 U.S. 47 (2006)
[325] *Id*. at 51.
[326] *Id*. at 56.
[327] *Id* at 61 (Quoting *Wooley* v. *Maynard,* 430 U.S. 705 (1977)).
[328] 547 U.S. at 66.
[329] 391 U.S. 367 (1968).

favorable terms than other employers."

The Court also rejected the law schools' claim that the Solomon Amendment violates their expressive association. In *Boy Scouts of America v. Dale*,[330] the Court held that a New Jersey law requiring Boy Scouts "to accept a homosexual as a scoutmaster" violated this freedom. In contrast, military recruiters do not become part of the law schools they visit, and the Solomon Amendment does not force law schools to accept any particular members.

[330] 530 U.S. 640 (2000).

§ 16.04 COMMERCIAL SPEECH

[2] Lawyer Advertising

Page 674: [Insert the following after *Edenfield v. Fane*]

In *Tennessee Secondary School Athletic Assn. v. Brentwood Academy*,[331] the Court held that the Athletic Association's rule, which prohibited high school coaches from using "'undue influence'" in recruiting middle school students, did not violate the First Amendment. The Tennessee Secondary School Athletic Association (TSSAA) sanctioned one of its member schools, Brentwood Academy, for violating the rule. Brentwood's football coach had sent eighth-grade students a letter soliciting them to join the Academy's athletic program.

First, the Court noted that TSSAA's rule struck "nowhere near the heart of the First Amendment."[332] There was a "difference of constitutional dimension" between general advertising to the public and in-person solicitation "in a coercive setting."[333] The Court relied on *Ohralik v. Ohio State Bar Assn.*,[334] which held that in-person solicitation by the lawyer was not protected by the First Amendment because it posed the risk of overreaching. Similarly, in this case the high school coach's in-person solicitation of impressionable eighth-graders presented the risk of undue influence.

The athletic association's interest in enforcing rules can sometimes justify restricting the speech of its "voluntary participants."[335] Moreover, because the government's interest in efficiency can sometimes warrant curtailing employee speech, the athletic league's interest in enforcing the rules can in some circumstances outweigh the speech rights of its voluntary participants. While TSSAA did not have an "unbounded authority to condition membership on the relinquishment of any and all constitutional rights,"[336] it could impose such conditions that were necessary to ensure its effective and efficient management. TSSAA member schools remained free to advertise their athletic programs to the public at large through brochures and billboards.

Justice Kennedy concurred in part and concurred in the judgment, and Justice Thomas concurred in the judgment.

---

[331] 127 S. Ct. 2489 (2007).
[332] *Id.* at 2493.
[333] *Id.*
[334] 436 U.S. 447 (1978).
[335] *Brentwood*, 127 S. Ct. at 2495.
[336] *Id.*

§ 16.05 OBSCENITY

[1] The Constitutional Standard

Page: 680: [Insert the following after *Ashcroft v. The Free Speech Coalition*]

In *United States v. Williams*,[337] the Court upheld a federal statute that criminalized the "pandering or solicitation of child pornography."[338] In addressing Williams' overbreadth challenge, Justice Scalia construed the statute at issue. First, *New York v. Ferber*[339] had held that the government may ban child pornography. Distinguishing *Free Speech Coalition*, Justice Scalia noted that the statute at issue did not restrict the underlying material. Instead, it criminalized "the collateral speech" of pandering or soliciting such material that is, the offers and requests for the material.[340]

Justice Scalia noted five characteristics of the statute important in upholding it against an overbreadth challenge. First, the statute at issue included a scienter requirement. Second, the majority concluded that the statute's verbs — "'advertises, promotes, presents, distributes, or solicits'" — implied an intent to regulate both commercial and noncommercial transactions.[341] Although less obvious than "advertises" or "solicits," the verb "promotes" was equivalent to recommending in the provision's context. Third, the statute required that the defendant subjectively have believed that the material at issue was actual child pornography and objectively must have manifested that belief. Fourth, the defendant must have subjectively intended to make the recipient believe the material was actual child pornography. Fifth, unlike in *Free Speech Coalition*, the statute's prohibition required the material to depict actual minors even if the sexual conduct was simulated, unless the depiction was actually obscene.

"Offers to engage in illegal transactions" are not protected by the First Amendment because they have no "social value."[342] Instead, such offers are akin to speech criminalized for its inducement of commercial or noncommercial illegal activities such as conspiracy, incitement, and solicitation. Nevertheless, "there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[343]

Finally, Justice Scalia addressed the dissent's concern that the majority's holding essentially overrules *Free Speech Coalition*. He explained that First Amendment protections of *virtual* child pornography remained intact. Rather, the statute at issue prohibited transactions of material believed or intended to induce others to believe involved *actual* minors.

Concurring, Justice Stevens emphasized that the statute's reach was constrained by its lascivious intent requirement. Dissenting, Justice Souter, joined by Justice Ginsburg, concluded that upholding the statute's pandering prohibition undermined the

---

[337] 128 S. Ct. 1830 (2008).
[338] *Id. at* 1835.
[339] 458 U.S. 747 (1982).
[340] *Williams*, 128 S. Ct. at 1838.
[341] *Id.*
[342] *Id.* at 1836, 1841.
[343] *Id.* at 1842.

rationales in *Ferber* and *Free Speech Coalition*. Justice Souter argued that transactions involving a mistaken belief that fake pornography is real was not a crime but rather "an incomplete attempt to commit a crime."[344]

[344] *Id.* at 1854.

§ 17.05 FREE EXERCISE OF RELIGION

Page 750: [Insert the following after *Cutter v. Wilkinson*]

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* ("UDV")[345], the Court upheld a preliminary injunction prohibiting the government from enforcing the Controlled Substances Act ban on the defendant's use of a sacramental tea, *hoasca.* Defendant used the tea as part of communion.

The Religious Freedom Restoration Act of 1993 (RFRA) requires the government to satisfy the compelling interest test when the "sincere exercise of religion is being substantially burdened."[346] Additionally, the Controlled Substances Act allows for such exemptions. Congress allowed courts to find exemptions to the Act, and made an exemption for Indian Tribes with respect to peyote, another Schedule 1 substance. This specific exemption undermines the government's argument that the uniform application of the Controlled Substances Act was a compelling interest. In this case, the government failed to show a compelling interest in prohibiting "UDV's sacramental use of *hoasca.*"[347]

---

[345] 126 S. Ct. 1211 (2006).
[346] *Id*. at 1220.
[347] *Id*. at 1225.