

UNDERSTANDING CONSTITUTIONAL LAW

Third Edition

2011 Supplement

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Understanding Constitutional Law

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Preface

This 2011 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.

We mourn the death on June 10, 2011, of our co-author and friend, Norman Redlich. Norman was a giant in the law who made enormous contributions as a lawyer, scholar, academic administrator, public servant and citizen. In all respects he modeled professional excellence and human decency. Although a man of strong convictions and principles, he invariably gave those with different views a fair and courteous hearing and addressed their positions in a rational and intellectually honest manner. Notwithstanding his impressive accomplishments, Norman displayed constant humility. We are grateful for the inspiration he provided and the opportunity to have been associated with him. His passing is a great loss and we miss him.

Acknowledgements

We would like to express our appreciation to several people whose efforts over the years helped the undersigned prepare this 2011 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, John T. Davis, Kate Douglas, Christine Falgout, Jessie Gasch, Anthony Gilbreth, John J. Greffet, Matthew Guyman, Ryan Hardy, Meredith Head, Eric Hoffmann, Maxwell Huber, Sarah Jackson, Ausra Laurusaite-Kromelis, Sarah Lopano, Michael Lyons, Leslie Mattingly, Mandi Montgomery, John Moore, Heather J. Panko, Daniel Pearson, David Poell, Tina Potter, Molly Quinn, Bennett Rawicki, Justin Reinus, Lacey Searfoss, Jonathan Skrabacz, Niel Smith, Paul Stohr, Kevin Sullivan, Phong Tran, Elizabeth Mills Viney, Elise Voges, and Ryan Yager 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.

John Attanasio
Joel K. Goldstein
August, 2011

Chapter 2

THE COURTS AND JUDICIAL REVIEW

§ 2.08 COURT ORGANIZATION: THE SUPREME COURT

[Insert at end of section]

Pursuant to Article II, section 2 of the Constitution, the President nominates, and “by and with the Advice and Consent of the Senate” appoints justices of the Supreme Court who hold their positions “during good behavior.” The Constitution sets no qualifications for membership on the Court. To date, all 112 individuals who have served on the Court were lawyers but that is a matter of practice, not constitutional or statutory requirement. Edwin M. Yoder, Jr.’s lively new novel, [Vacancy: A Judicial Misadventure](#) presents a thoughtful discussion of these issues.

§ 2.11 NON-ARTICLE III ADJUDICATION

[Insert at end of section]

In *Stern v. Marshall*, [131 S. Ct. 2594](#) (2011) the Court held that the public rights exception was not broad enough to allow Congress to empower a non-Article III court to enter final judgment on a common law tort claim. The tort counterclaim at issue was a dispute between two private parties arising under state common law, not one “that can be pursued only by grace of the other branches,” or one that historically only could have been determined by the political branches. It did not “flow from a federal statutory scheme,” (cf. *Thomas*), and was not “completely dependent upon” adjudication of a federal law claim (cf. *Schor*). The counterclaim defendant had not really consented to the forum since he was compelled to file his claim in the bankruptcy proceeding and there was no need to invoke the expertise of the bankruptcy court to handle the tort counterclaim.

§ 2.12 CASES AND CONTROVERSIES

[4] Standing

[a] Constitutional Requirements

[Insert at end of section]

In *Massachusetts v. Environmental Protection Agency*, [549 U.S. 497](#) (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.

More recently, in *Summers v. Earth Island Institute*, [555 U. S. 488](#) (2009), the Court (5-4) held that an environmental group lacked standing to challenge a governmental regulation after settling a portion of the lawsuit in which it had alleged a concrete injury against it. Writing for the majority, Justice Scalia stated that to allow standing to persist in those circumstances "would fly in the face of Article III's injury-in-fact requirement." Justice Scalia's majority opinion also rejected claims that petitioners had suffered procedural injury in being denied the right to file comments on certain governmental actions since they had no concrete interest at stake. The four dissenters reasoned that where "a plaintiff has *already* been subject to the injury it wishes to challenge" the plaintiff must only show a "realistic likelihood" that the challenged conduct will recur and harm them in to establish an injury-in-fact.

[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 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.*, [551 U.S. 587](#) (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.

The Court further narrowed the *Flast* taxpayer standing exception in a 5-4 decision in *Arizona Christian School Tuition Organization v. Winn*, [131 S. Ct. 1436](#) (2011) where the Court held that the *Flast* exception to the normal rule against general taxpayer standing did not apply where a taxpayer challenged as unconstitutional under the First Amendment an Arizona tax credit (as opposed to a tax expenditure) given to support religious study. Although the Court acknowledged that tax credits could have similar effects as tax expenditures, it reasoned that the *Flast* exception did not apply to tax credits since they did not involve an extraction and expenditure of some portion of the objecting taxpayer's funds.

¹DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 346 (2006).

²*Id.* at 346.

³*Id.* at 347.

⁴*Id.* at 348.

⁵*Id.*

Chapter 3

CONGRESSIONAL POWER

§ 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

⁶U.S. Const. art. I, § 6, cl. 1.

⁷Gravel v. United States, 408 U.S. 606, 616 (1972).

⁸United States v. Johnson, 383 U.S. 169, 179 (1966).

⁹*Id.* at 179 (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)).

¹⁰Kilbourn v. Thompson, 103 U.S. at 204.

¹¹Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491, 504 (1975); Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

¹²Gravel, 408 U.S. at 615-16.

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 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

¹³*Johnson*, 383 U.S. at 184-85.

¹⁴408 U.S. 501 (1972).

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.

¹⁷408 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.*

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 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 hearing³⁰ 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

²⁵*Id.* at 616.

²⁶*Id.* at 617.

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).

³³ 552 U.S. 1295 (2008).

§ 3.02 Implied Powers

Page 100 [Insert the following at end of section]

The Supreme Court further demonstrated the breadth of the Necessary and Proper Clause in *United States v. Comstock*, [130 S.Ct. 1949](#) (2010) when it upheld Congress's power to pass a federal statute authorizing civil commitment of mentally ill, sexually dangerous federal prisoners after their criminal sentence ended. The Court rejected Justice Thomas's argument that the Necessary and Proper Clause only allows Congress to pursue means which directly execute an enumerated power.

The Court reasoned that the Necessary and Proper Clause conferred a broad power which allowed Congress to pursue means which were connected by a chain of reasoning to any enumerated power. The Constitution grants few enumerated powers to create federal crimes (counterfeiting, treason, piracies and felonies on the high seas) yet Congress has criminalized much conduct as a means to enforce various enumerated powers (e.g., mail theft or fraud). Having done so, it may also use the Necessary and Proper Clause to establish a federal prison system, regulate its administration and adopt other criminal laws to protect against threats to it as means reasonably related to those ends.

The Court pointed out that a long history of governmental conduct offered precedents for the civil commitment statute at issue and this ongoing history was suggestive, though not conclusive, of its constitutionality. The statute also accounted for state interests by requiring that the justice department contact the state which would have jurisdiction over the prisoner and surrender him or her to it if it prefers to accept responsibility. The combination of these, and other factors, established the constitutionality of the statute.

§ 3.08 TREATY POWER

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

In *Medellin v. Texas*, [552 U.S. 491](#) (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.

Chapter 4

COMMERCE CLAUSE

§ 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

³⁴545 U.S. 1 (2005).

³⁵514 U.S. 549 (1995).

³⁶529 U.S. 598 (2000).

³⁷*Lopez*, 514 U.S. at 560.

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 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

³⁸545 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.")

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 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

⁴⁶514 U.S. at 561.

⁴⁷545 U.S. at 5.

⁴⁸*Id.* at 22.

⁴⁹*Id.* at 19.

⁵⁰312 U.S. 100 (1941).

⁵¹545 U.S. at 34.

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 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 trade⁵⁶ 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 Commerce 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

⁵²*Id.*

⁵³*Id.*

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).

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 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

⁶⁰*Id.* at 21, 22.

⁶¹*Id.* at 25-26.

⁶²*Id.* at 49-50 (O’Connor, J., dissenting).

⁶³Thomas 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.*

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*.

⁷³*Id.* at 851.

⁷⁴*Id.*

Chapter 5

THE FEDERAL SYSTEM

§5.01 Main Features

[6] Federal Supremacy

Page 155: [Insert at end of page 155]

In *Haywood v. Drown*, [129 S. Ct. 2108](#) (2009), the Court (5-4), held that a New York law removing jurisdiction in New York state courts for damage suits against corrections officers violated the Supremacy Clause and was therefore unconstitutional. The Court relied on a “presumption of concurrency” for state and federal court jurisdiction that a state could only overcome by passing a “neutral state rule regarding the administration of the courts” is present. Although a State has a substantial right to control its judicial system, a State cannot use a jurisdictional rule to dissociate itself from federal law because of a disagreement with the content of a federal law or a refusal to recognize its superiority. The Court, speaking through Justice Stevens, found the New York law to be at odds with [42 U.S.C. § 1983](#). Finding the New York law to be an “immunity statute cloaked in jurisdictional garb,” the Court held that it must yield to the Supremacy Clause because a “State’s authority to organize its courts, while considerable, remains subject to the strictures of the Constitution.” The four dissenters argued that the New York law was jurisdictional and within the domain of the State.

§ 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,

⁷⁵*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996).

⁷⁶546 U.S. 356, 359 (2006).

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 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

⁷⁷527 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.

⁸⁴*Id.* at 378-79.

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

⁸⁶*Id.* at 381.

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.

Page 189 [Insert at end of page]

In *Alabama v. North Carolina*, [130 S. Ct. 2295](#) (2010), the Court held that sovereign immunity considerations did not bar a private commission from suing a state when it asserted the same claims and sought the same relief as plaintiff states who were not barred.

Chapter 6

COMMERCE AND THE STATES: THE DORMANT COMMERCE CLAUSE

§ 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*, [550 U.S. 330](#) (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*, [553 U.S. 328](#) (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.

§ 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*, [550 U.S. 330](#) (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

⁸⁷544 U.S. 460.

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*, [553 U.S. 328](#) (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*.

§6.09 CONGRESSIONAL CONFLICT:PREEMPTION

Page 215: [Insert at end of section]

In *Altria Group Inc. v. Good*, [555 U.S. 70](#) (2008), the Court (5-4) held that the Federal Cigarette Labeling and Advertising Act ("FCLAA") neither expressly nor implicitly pre-empted a claim filed under the Maine Unfair Trade Practices Act ("MUTPA"). Cigarette smokers had alleged that promoting cigarettes as "light" deceptively suggested they delivered less tar and nicotine in violation of MUTPA. The manufacturer countered by alleging the FCLAA expressly, or FTC policy implicitly, pre-empted MUTPA. Applying its familiar preemption doctrine ("the purpose of Congress is the ultimate touchstone in every pre-emption case" and historic State police powers, especially in areas States traditionally occupied, will not be superseded absent a showing of "clear and manifest" Congressional purpose) the Court found no such purpose. It narrowly construed the text of FCLAA, finding that the Maine law which allowed claims for deceptive advertising did not conflict with the federal provision barring States from imposing requirements or prohibitions "based on smoking and health" with respect to cigarette advertising. The Court also rejected the implied preemption argument, concluding that the manufacturers had mischaracterized the FTC's policy.

Later in the 2008 term, in *Wyeth v. Levine*, [555 U.S. 555](#) (2009), the Court (6-3) held that FDA approval of warnings on a drug label did not pre-empt a state-law tort claim based upon injury allegedly following use of the drug in a manner the label did not address. Wyeth, the drug manufacturer, made two conflict pre-emption arguments: 1) that it was impossible for it to comply with both the federal law and the duties underlying the state-law tort claims, and 2) that requiring compliance with state-law duties to provide a stronger warning would "obstruct the purposes and objectives of federal drug labeling regulation." The Court rejected the impossibility argument based on its conclusion that an FDA regulation provided a means for Wyeth to revise its label. The Court rejected Wyeth's claim that compliance with the State law duty would frustrate federal objectives since it found Wyeth had misconstrued Congressional purpose and overstated the FDA's power to preempt State law.

Justice Thomas concurred in the judgment but wrote separately to articulate his

misgivings with implied pre-emption doctrine based on conflict with Congressional “purposes and objectives” which he suggested violates the Constitution.

§ 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*, [552 U.S. 491](#) (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.

Page 244 [Insert at end of section]

In a sharply divided decision, the Supreme Court held unconstitutional a statutory restriction on the president’s ability to remove a principal officer who was restricted in his ability to remove an inferior officer in *Free Enterprise Fund v. Public Company Accounting Oversight Board et al*, [130 S.Ct. 3138](#) (2010). In the opinion for a five person majority, Chief Justice Roberts wrote that the multilevel protection violated the Article II Vesting and Take Care Clauses. Although the Court had upheld “limited restrictions” on the president’s removal power, the Chief Justice’s opinion said that the multilevel protection “transforms” that power and makes the Board unaccountable. Justice Breyer’s dissent argued that the Court had typically examined such restrictions by looking at how they would function and the likely impact on presidential and congressional and by being deferential to the judgments of political branches.

§ 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.

⁸⁸548 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*, [550 U.S. 1301](#) (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.

Chapter 8

LIBERTY, PROPERTY, AND DUE PROCESS, TAKING AND CONTRACT CLAUSES

§ 8.02 THE RIGHTS OF THE ACCUSED: THE “INCORPORATION CONTROVERSY”

Page 288. [Insert the following before new § 8.02A The Second Amendment]

In *Caperton v. A.T. Massey Coal Co.*,⁹⁴ the Court required the recusal of a state supreme court justice under the Due Process Clause. A jury found defendant Massey Coal Co. liable and awarded \$50 million to plaintiff Caperton. While the appeal of Massey’s case was pending, Blankenship, (Massey’s CEO), donated almost \$2.5 million to a political organization that opposed an incumbent state supreme court justice, and supported his opponent, Benjamin. Blankenship also made over \$500,000 of independent expenditures to support Benjamin’s campaign.

Following Benjamin’s election, Caperton unsuccessfully moved to recuse him. The West Virginia Supreme Court of Appeals (3-2) set aside Caperton’s jury verdict.

Judicial recusals rarely involve constitutional issues as prejudice or personal bias alone are insufficient unless the “probability of actual bias” rises to the level of a due process violation.⁹⁵

Notably, when a judge has a financial interest in the outcome of a case or when a judge participates in an earlier proceeding, judicial disqualification is required. For example, a judge cannot try the cases of parties before him whom he had charged with perjury and criminal contempt. Not every attack on a judge should result in recusal. For example, a judge may try a lawyer whom he has charged with “disruptive, recalcitrant and disagreeable commentary,” as the lawyer did not attack “the integrity of the judge carrying such potential for bias as to require disqualification.”⁹⁶ The Court inquires “whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”⁹⁷

While actual bias would require recusal, the Court could not easily review Justice Benjamin’s finding lack of actual bias. Instead, Justice Kennedy applied an objective standard, asking “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden.’”⁹⁸

Thus, “not every campaign contribution by a litigant or attorney creates a

⁹⁴ 129 S. Ct. 2252 (2009).

⁹⁵ *Id.* at 2257.

⁹⁶ 129 S. Ct. at 2262 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964))).

⁹⁷ 129 S. Ct. at 2262.

⁹⁸ 129 S. Ct. at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

probability of bias” requiring recusal.⁹⁹ Instead, the Court analyzes “the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”¹⁰⁰

The Court focused on Blankenship’s \$3 million contribution to the campaign against the incumbent, which “eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin’s campaign committee.”¹⁰¹ In mandating recusal, the Court did not require that a contribution be a “necessary and sufficient cause”¹⁰² of victory. Instead, Justice Kennedy ruled “that Blankenship’s significant and disproportionate influence — coupled with the temporal relationship between the election and the pending case — ““offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.””¹⁰³ The Court reiterated that these facts are extreme making a flood of recusal motions unlikely. Legislated codes of judicial conduct, more vigorous than due process requirements, would lead most disqualification disputes to be resolved without invoking the Constitution.¹⁰⁴

Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito. Historically, the Due Process Clause required a judge’s disqualification only “when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts.”¹⁰⁵ Bias or the appearance of bias never merited disqualification, at common law or under the Constitution. The majority’s “probability of bias”¹⁰⁶ standard will increase allegations of judicial bias and erode public confidence in judicial impartiality more than a failure to recuse.

Chief Justice Roberts noted a number of factors that could create the appearance or probability of bias, including “friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations.”¹⁰⁷ These reasons, he said, never before mandated recusal under the Due Process Clause. Significantly, he also felt it “unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.”¹⁰⁸

The Chief Justice argued that the case is not so extreme as the majority believed. Beyond Blankenship’s direct \$1,000 contribution, Benjamin and his campaign had no

⁹⁹ 129 S. Ct. at 2263.

¹⁰⁰ *Id.* at 2264.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 2265 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)))).

¹⁰⁴ “The ABA Model Code’s test for appearance of impropriety is ‘whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.’” *Id.* at 2266 (quoting Model Code of Judicial Conduct Canon 2 (2004)).

¹⁰⁵ 129 S. Ct. at 2267.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2268.

¹⁰⁸ *Id.* at 2269.

control over Blankenship’s other expenditures. Moreover, another independent group received \$2 million from the plaintiffs’ bar. Finally, Blankenship spent heavily during many prior state elections.

Justice Scalia also dissented, concerned with the ambiguity that the decision introduced in recusal standards in all litigated cases in states that elect judges.

Page 530: Insert the following as Note 4

In *Turner v. Rogers*,¹⁰⁹ an indigent defendant failed to pay child support and at the civil contempt hearing was denied appointment of counsel. Writing for the Court, Justice Breyer held “that the Due Process Clause does not *automatically* require the state to provide counsel at civil contempt proceedings to an indigent non-custodial parent who is subject to a child support order, even if that individual faces incarceration [for up to a year]. In particular, that Clause does not require that counsel be provided where the opposing parent or other custodian [to whom support funds are owed] is not represented by counsel and the State provides alternative procedural safeguards.”¹¹⁰ These safeguards include or must be equivalent to “(1) notice to the defendant that his ‘ability to pay’ is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions about his financial status, [e.g., those triggered by his responses on the form]; and (4) an express finding by the court that the defendant has the ability to pay.”¹¹¹ The Court remanded the case because defendant “received neither counsel nor the benefit of alternative procedures like those the Court describes.”¹¹² Justice Thomas dissented joined by Justice Scalia, and joined in part by Chief Justice Roberts and Justice Alito. Justice Thomas would affirm the decision below because the basis on which the Court vacated the judgment had not been raised by either party.

§ 8.02A THE SECOND AMENDMENT

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

In *District of Columbia v. Heller*,¹¹³ 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

¹⁰⁹ 131 S. Ct. 2507 (2011).

¹¹⁰ *Id.* at 2520.

¹¹¹ *Id.* at 2519.

¹¹² *Id.* at 2520.

¹¹³ 128 S. Ct. 2783 (2008).

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 disassembled or bound by a trigger lock.”¹¹⁴ 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.”¹¹⁵ 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”¹¹⁶ 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.”¹¹⁷ Therefore, interpreting “militia” as an organized militia “fits poorly with the operative clause’s description of the holder of that right as ‘the people.’”¹¹⁸

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.”¹¹⁹ 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.’”¹²⁰ The connection to the military or war was only clear when one bore arms “against”¹²¹ someone.

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.

¹¹⁴ *Id.* at 2788.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2791.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2793.

¹²⁰ *Id.* at 2794.

¹²¹ *Id.*

Moreover, Blackstone described the English right as, “the right of having and using arms for self-preservation and defence.”¹²² 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.¹²³ This terminology connotes a body already in existence. The phrase “security of a free state” connoted the “security of a free polity,”¹²⁴ 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.”¹²⁵

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.”¹²⁶

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 drafted or voted for the law making these statements irrelevant to congressional decision making. Instead, Justice Scalia relied on the “*public understanding*”¹²⁷ 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

¹²² *Id.* at 2798.

¹²³ *Id.* at 2800.

¹²⁴ *Id.*

¹²⁵ *Id.* at 2803.

¹²⁶ *Id.* at 2804.

¹²⁷ *Id.* at 2805.

service”¹²⁸ 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.’”¹²⁹ 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*.¹³⁰ 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.”¹³¹ 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.”¹³²

Justice Scalia concluded that the Court’s prior decisions did not preclude “our adoption of the original understanding of the Second Amendment.”¹³³ 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,”¹³⁴ 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.”¹³⁵ Moreover, the Court recognized the limitation in *Miller* that the Second Amendment protected weapons “‘in common use at the time.’”¹³⁶ The Court noted the historical practice going back to Blackstone of prohibiting “‘dangerous or unusual weapons.’”¹³⁷

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

¹²⁸ *Id.*

¹²⁹ *Id.* at 2810.

¹³⁰ 307 U.S. 174 (1939).

¹³¹ *Heller*, 128 S. Ct. at 2815.

¹³² *Id.* at 2816.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 2816-17.

¹³⁶ *Id.* at 2817.

¹³⁷ *Id.* at 2815.

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.”¹³⁸ The Court also made clear that its decision did not suggest that “laws regulating the storage of firearms to prevent accidents”¹³⁹ were invalid. In response to Justice Breyer's criticism that the majority did not “establish a level of scrutiny for evaluating Second Amendment restrictions,”¹⁴⁰ 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.”¹⁴¹ Such an approach which rests on “future judges’ assessments of its usefulness is no constitutional guarantee at all.”¹⁴²

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*¹⁴³ held that the Second Amendment protected the right to have arms service in state militias but not for “nonmilitary use and ownership of weapons.”¹⁴⁴ The Supreme Court affirmed this holding in *Lewis v. United States*¹⁴⁵ and hundreds of lower courts have followed it.

Justice Stevens' textual analysis began with the preamble: “A well regulated

¹³⁸ *Id.* at 2819.

¹³⁹ *Id.* at 2820.

¹⁴⁰ *Id.* at 2821.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 307 U.S. 174 (1939).

¹⁴⁴ *Heller*, 128 S. Ct. at 2823.

¹⁴⁵ 445 U.S. 55 (1980).

Militia, being necessary to the security of a free State.”¹⁴⁶ 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,”¹⁴⁷ the majority found that, as with the First and Fourth Amendments, “the people”¹⁴⁸ included all individuals. Contradicting its own interpretation, the majority later confined Second Amendment protection to “law-abiding, responsible citizens,”¹⁴⁹ 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.”¹⁵⁰ 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.’”¹⁵¹ Specifically, the Framers allowed Congress to call up, “organize, arm, and discipline the militia”¹⁵² 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

¹⁴⁶ *Heller*, 128 S. Ct. at 2848.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2791.

¹⁴⁹ *Id.* at 2827.

¹⁵⁰ *Id.* at 2831.

¹⁵¹ *Id.*

¹⁵² *Id.* at 2833.

the amendment was written, during heated partisan debate.

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*¹⁵³ 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.¹⁵⁴

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].”¹⁵⁵

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,””¹⁵⁶ 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

¹⁵³ 5 U.S. 137 (1803).

¹⁵⁴ *Heller*, 128 S. Ct. at 2846.

¹⁵⁵ *Id.* at 2847.

¹⁵⁶ *Id.* at 2851.

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 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].*"¹⁵⁷ 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"¹⁵⁸ is unclear.

¹⁵⁷ *Id.* at 2859.

¹⁵⁸ *Id.* at 2869.

Page 288: [Insert the following after *District of Columbia v. Heller* and before § 8.03]

In *McDonald v. City of Chicago*, the Court held that the Second Amendment right established in *District of Columbia v. Heller* is “fully applicable to the States” through incorporation by the Fourteenth Amendment.¹⁵⁹ A plurality opinion written by Justice Alito — and joined by the Chief Justice, Justice Scalia and Justice Kennedy — incorporated the Second Amendment through the Due Process Clause, while Justice Thomas’ decisive fifth vote effected incorporation through the Privileges or Immunities Clause. By applying the Second Amendment to the States, the Court invalidated Chicago laws that banned possession of handguns.

The plurality used the Due Process Clause to apply the Second Amendment to the states as for many decades incorporation occurred through that avenue rather than the Privileges or Immunities Clause. There was no reason to “disturb” the approach of the *Slaughter-House Cases* toward the Privileges or Immunities Clause.¹⁶⁰ The plurality declined to adopt Justice Black’s theory of “ ‘total incorporation,’ ” but noted that very few provisions of the Bill of Rights remain unincorporated. Incorporated protections apply in the same way against the States as they do against federal encroachment.

To incorporate through the Due Process Clause, the plurality required that the right be “fundamental to *our* scheme of ordered liberty,” or the right is “ ‘deeply rooted in this Nation’s history and tradition.’ ”¹⁶¹ The plurality, joined by Justice Thomas, found that the debates of the 39th Congress about the Fourteenth Amendment referred to this right as fundamental. “Evidence from the period immediately following the ratification of the Fourteenth Amendment” confirms this.¹⁶² Moreover, the legal commentators and state constitutions of the time treated the right to keep and bear arms as fundamental.

The plurality thought that due process should not be interpreted using the practices of other nations. Such reasoning is “of course, inconsistent with the long-established standard we apply in incorporation cases.”¹⁶³ The fact that countries such as “England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership,” does not entail a lack of Fourteenth Amendment protection.¹⁶⁴ Many of the Bill of Rights protecting criminal defendants “are virtually unique to this country.”¹⁶⁵ While the United States incorporates the Establishment Clause against the states, several countries listed above “that municipal respondents recognize as civilized have established state churches.”¹⁶⁶

This ruling, as made clear in *Heller*, does not cast “doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the

¹⁵⁹ 130 S. Ct. 3020, 3026 (2010).

¹⁶⁰ *Id.* at 3031.

¹⁶¹ *Id.* at 3036.

¹⁶² *Id.*

¹⁶³ *Id.* at 3044.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* For example, “the United States affords criminal jury trials far more broadly than other countries. Similarly, our rules governing pretrial interrogation differ from those in countries sharing a similar legal heritage. And the ‘Court-pronounced exclusionary rule . . . is distinctively American.’ ”

¹⁶⁶ *Id.* at 3045.

mentally ill,’ ‘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.’ ”¹⁶⁷ *Heller* rejected the argument that the right to bear arms only protected militias, instead finding self-defense “ ‘the *central component* of the right.’ ”¹⁶⁸ The number of homicide victims in Chicago this year equaled that of American soldiers killed in Afghanistan and Iraq, and “80% of the Chicago victims were black.”¹⁶⁹

The plurality disagreed with Justice Stevens that incorporated provisions of the Bill of Rights “need not be identical in shape or scope to the rights protected against Federal Government infringement,” explaining that “the Court, for the past half-century, has moved away from the two-track approach.”¹⁷⁰ Instead, “[t]he relationship between the *Bill of Rights*’ guarantees and the States must be governed by a single, neutral principle.”¹⁷¹

Concurring, Justice Scalia acquiesced in incorporation through the Due Process Clause because that avenue is “ ‘both long established and narrowly limited.’ ”¹⁷² Defending historical interpretation, he conceded that analyzing history “requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.” Nevertheless, the issue “is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world.”¹⁷³ It is “less subjective” than “a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.”¹⁷⁴ The historical method limits judicial discretion. In this connection, “*any* historical methodology, under *any* plausible standard of proof,” would produce the same on the constitutionality of the death penalty, “prohibiting abortion, assisted suicide, or homosexual sodomy.”¹⁷⁵ Even Justice Stevens’ approach “would not *replace* history with moral philosophy, but would have courts consider *both*.”¹⁷⁶

Justice Thomas concurred in part and in the judgment. He disagreed that the Second Amendment “is enforceable against the States through a clause that speaks only to ‘process,’ ” and instead would incorporate it through the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁷⁷ From the time of Blackstone to the Amendment’s ratification, the terms “ ‘privileges’ ” and “ ‘immunities,’ ” “standing alone or paired together, were used interchangeably with the words ‘rights,’ ‘liberties,’ and ‘freedoms.’ ”¹⁷⁸ The goal of interpreting constitutional text “is to discern the most likely

¹⁶⁷ *Id.* at 3047.

¹⁶⁸ *Id.* at 3048.

¹⁶⁹ *Id.* at 3049.

¹⁷⁰ *Id.* at 3048.

¹⁷¹ *Id.*

¹⁷² *Id.* at 3050 (Scalia, J., concurring).

¹⁷³ *Id.* at 3057-58.

¹⁷⁴ *Id.* at 3058.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 3059 (Thomas, J., concurring in part and in the judgment).

¹⁷⁸ *Id.* at 3063.

public understanding of a particular provision” upon adoption.¹⁷⁹ Comments by legislators can help to establish how people used or understood a word or phrase. The “right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.”¹⁸⁰ The *Cruikshank* decision deserves no respect as precedent. *Cruikshank* held that “the right to keep and bear arms was not a privilege of American citizenship, thereby overturning the convictions of militia members responsible for the brutal Colfax Massacre.”¹⁸¹ That holding meant blacks could only look to state governments for protection of their right to keep and bear arms, and it “enabled” private forces, “often with the assistance of local governments, to subjugate the newly freed slaves.”¹⁸² Justice Thomas expressed no view on regulating firearm possession for noncitizens. The issue arises because the Privileges or Immunities Clause applies only to citizens, whereas the Due Process Clause “covers all ‘person[s].’ ” The claimant here was a citizen.

Justice Stevens dissented. “The so-called incorporation question” was already “correctly resolved in the late 19th century” by *Cruikshank*.¹⁸³ Disputing that the Due Process Clause only involves process, he stated that by the Civil War or “much earlier, the phrase ‘due process of law’ had acquired substantive content.”¹⁸⁴ Against incorporation, Justice Stevens argued that the Bill of Rights was drafted only to directly constrain the Federal Government, and although the Fourteenth Amendment “profoundly altered our legal order, it ‘did not unstitch the basic federalist pattern woven into our constitutional fabric.’ ”¹⁸⁵ The plurality’s statement that “ ‘abandoned’, a ‘two-track approach to incorporation,’ ” is exaggerated – although the Court has moved away from a two-track approach to criminal procedure.¹⁸⁶

This ruling applies a uniform national standard to an area where the “relevant regulatory interests vary significantly across localities.”¹⁸⁷ It also prevents States’ “beneficent ‘experimentation,’ ” and “implicates the States’ core police powers.”¹⁸⁸

Undercutting fundamentality, America’s oldest allies almost uniformly regulate firearms extensively. “While the ‘American perspective’ must always be our focus, it is silly — indeed, arrogant — to think we have nothing to learn about liberty from the billions of people beyond our borders.”¹⁸⁹

The preamble to the Second Amendment demonstrates its structural function to protect the states from the federal government, even though the *Heller* Court tries to write that preamble out of the Constitution. As many different firearm regulations are now implicated, “today’s decision invites an avalanche of litigation.”¹⁹⁰ Justice Stevens also

¹⁷⁹ *Id.* at 3072.

¹⁸⁰ *Id.* at 3077.

¹⁸¹ *Id.* at 3086.

¹⁸² *Id.* at 3087.

¹⁸³ *Id.* at 3088 (Stevens, J., dissenting).

¹⁸⁴ *Id.* at 3090.

¹⁸⁵ *Id.* at 3093.

¹⁸⁶ *Id.* at 3094.

¹⁸⁷ *Id.* at 3095.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 3111.

¹⁹⁰ *Id.* at 3115.

criticized historical analysis as casting federal judges as “amateur historians.”¹⁹¹

Justice Breyer also dissented, joined by Justices Ginsburg and Sotomayor. The British Declaration of Right allowed private persons to “possess guns only ‘as allowed by law,’ ” and “ ‘*Parliament* had the power’ to arm the citizenry.”¹⁹² *Heller’s* historical account “would lose a poll taken among professional historians of this period, say, by a vote of 8 to 1.”¹⁹³ Where history is so opaque, the Court “should consider the basic values that underlie a constitutional provision and their contemporary significance,” and a provision’s “relevant consequences and practical justifications.”¹⁹⁴

Legislatures are better able to find answers to the “complex empirically based questions” surrounding firearm regulations: “Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic?”¹⁹⁵ Other questions include: “Does the presence of a convicted felon in the house matter? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders?”¹⁹⁶

Incorporation stifles federalism, which empowers “States to reflect local preferences and conditions.”¹⁹⁷ Gun ownership differs significantly across the Nation. In the relatively sparsely populated Western States of Alaska, Montana, and Wyoming 60% of households keep a gun, while fewer than 15% of households do in the densely populated Eastern States of Rhode Island, New Jersey, and Massachusetts. Factors argue against incorporation include: “the police power, the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations.”¹⁹⁸

The right to bear arms was not considered fundamental when the Fourteenth Amendment was ratified. The Second Freedman’s Bureau Act recognized a “constitutional right to bear arms . . . without *respect to race or color, or previous condition of slavery,*” which is “an *antidiscrimination* provision.”¹⁹⁹ Moreover, “why would those who wrote the *Fourteenth Amendment* have wanted to give such a right to Southerners who had so recently waged war against the North?”²⁰⁰ Also, “in every State and many local communities, highly detailed and complicated regulatory schemes governed (and continue to govern) nearly every aspect of firearm ownership.”²⁰¹ This “breadth of existing regulations” demonstrates that “States and local governments maintain substantial flexibility to regulate firearms — much as they seemingly have

¹⁹¹ *Id.* at 3119.

¹⁹² *Id.* at 3122 (Breyer, J., dissenting)

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 3126.

¹⁹⁶ *Id.* at 3126-27.

¹⁹⁷ *Id.* at 3128.

¹⁹⁸ *Id.* at 3129.

¹⁹⁹ *Id.* at 3133.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 3135.

throughout the Nation's history — even in those States with an arms right in their constitutions.”²⁰² Nothing in American history shows that *Heller's* right to private armed self-defense is “ ‘deeply rooted in this Nation's history or tradition’ or is otherwise ‘fundamental.’ Indeed, incorporating the right recognized in *Heller* may change the law in many of the 50 States.”²⁰³

²⁰² *Id.* at 3135-36.

²⁰³ *Id.* at 3136.

§ 8.04 REGULATION OF BUSINESS AND OTHER PROPERTY INTERESTS

[3] Government Takings of Property Requiring Just Compensation

Page 315: [Insert the following after *Lucas v. South Carolina Coastal Council*]

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* the Court unanimously found no Fifth Amendment taking.²⁰⁴ Under Florida law, as interpreted by the Florida Supreme Court, the beachfront owners had suffered no property right infringement from the state filling in submerged coastline as public land. The disagreement among the Justices arose over the plurality's assertion that the Takings Clause applies to the judicial branch, which the other Justices found was unnecessary to reach the result as no taking had occurred.

The Florida Supreme Court had concluded that the doctrine of avulsion permitted the State to reclaim the restored beach as public land. The property owners appealed on the grounds that "the Florida Supreme Court's decision itself effected a taking of the Members' littoral rights contrary to the *Fifth* and *Fourteenth Amendments*."²⁰⁵

Justice Scalia wrote for a unanimous Court in holding that no taking occurred under Florida law as interpreted by the Florida Supreme Court's assertion that the Takings Clause applies to the judicial branch. However, Justice Scalia, who maintained that "the particular state *actor* is irrelevant," was only joined by the Chief Justice and Justices Thomas and Alito.²⁰⁶ A state cannot "do by judicial decree what the *Takings Clause* forbids it to do by legislative fiat."²⁰⁷ Had the Supreme Court found "that the Florida Supreme Court had effected an uncompensated taking" it would not have ordered Florida to pay compensation. Instead, the Court would simply have reversed "the judgment that the Beach and Shore Preservation Act can be applied" to the property, leaving the "power to effect a *compensated* taking" with the Florida Legislature.²⁰⁸

Justice Kennedy, joined by Justice Sotomayor, concurred in part and in the judgment. Justice Kennedy agreed with Justice Breyer that "this case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the *Takings Clause of the Fifth Amendment*."²⁰⁹ Instead of the Takings Clause, the Due Process Clause offers a "strong footing" for overruling as " 'arbitrary or irrational' " a judicial taking.²¹⁰ Judicial takings raise difficult questions, such as a temporary taking that would occur if a state court rescinded its decision that changed the law. Such issues should caution the Court not to "reach beyond the necessities of the case to recognize a judicial takings doctrine."

Justice Breyer also concurred in part and in the judgment, joined by Justice

²⁰⁴ 130 S. Ct. 2592 (2010).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

Ginsburg. As state courts decide so many property rights cases each year, the plurality's approach may result in "constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges."²¹¹ Justice Stevens took no part in the case.

[4] Economic Penalties

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

In *Philip Morris USA v. Williams*,²¹² 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 trial 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*.²¹³ 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."²¹⁴ 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.

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

In *Exxon Shipping Co. v. Baker*,²¹⁵ 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."²¹⁶ While working for Exxon, and with the knowledge of his employers, Hazelwood completed an

²¹¹ *Id.*

²¹² 549 U.S. 346 (2007).

²¹³ 517 U.S. 559 (1996).

²¹⁴ 549 U.S. at 361.

²¹⁵ 128 S. Ct. 2605 (2008).

²¹⁶ *Id.* at 2613.

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.”²¹⁷ 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.”²¹⁸ Justice Souter compared the need to reduce “unjustified disparities”²¹⁹ in punitive damages with the need for consistency in criminal sentencing. The Court also drew from *State Farm v. Campbell*,²²⁰ which held that “a single digit maximum” of punitive to compensatory damage awards “is appropriate in all but the most exceptional of cases.”²²¹ The Court concluded that “constitutional upper limits confirm that the 1:1 ratio is not too low.”²²²

Justice Stevens concurred in part and dissented in part, noting that legislatures rather than courts generally promulgate “caps and ratios.”²²³ 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.”²²⁴ 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 decision.²²⁵

²¹⁷ *Id.* at 2612.

²¹⁸ *Id.* at 2625.

²¹⁹ *Id.* at 2627.

²²⁰ 543 U.S. 874 (2004).

²²¹ *Exxon*, 128 s. Ct. at 2638.

²²² *Id.*

²²³ *Id.* at 2637.

²²⁴ *Id.* at 2639.

²²⁵ *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*²²⁶ 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.

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

In *Gonzales v. Carhart*,²²⁷ 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*,²²⁸ 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

²²⁶ 546 U.S. 320 (2006).

²²⁷ 550 U.S. 124 (2007).

²²⁸ 530 U.S. 914 (2000).

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.’”²²⁹ 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.’”²³⁰ Second, and more important, the Act’s language was more specific than that in *Sternberg*.

*Planned Parenthood of Southeastern Pa v. Casey*²³¹ “rejected both *Roe*’s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted.”²³² 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.’”²³³

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.’”²³⁴ 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

²²⁹ 550 U.S. at 141.

²³⁰ *Id.*

²³¹ 505 U.S. 833 (1992).

²³² 550 U.S. at 146.

²³³ *Id.*

²³⁴ *Id.*

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.”²³⁵ Third, the “doctor must perform an ‘overt act, other than completion of the delivery, that kills the partially delivered living fetus.’”²³⁶ 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.”²³⁷ Additionally, the physician must have delivered the fetus “‘for the purposes of performing an overt act that [doctor] knows will kill [it].’”²³⁸ 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*²³⁹ 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.’”²⁴⁰ 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.’”²⁴¹ A doctor might question what constituted a substantial portion. Moreover, past decisions also state that “‘scienter requirements alleviate vagueness concerns.’”²⁴² Finally, in addressing the remaining part of the vagueness test, the Act did not encourage “‘arbitrary or discriminatory enforcement.’”²⁴³ The Act’s anatomical landmarks provided “‘objective standards’” that could be used to “‘establish minimal guidelines’” for law enforcement.²⁴⁴

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 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’”²⁴⁵ 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. In this case, the most reasonable interpretation was that the Act did

²³⁵ 550 U.S. at 147-48.

²³⁶ *Id.* at 148.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 461 U.S. 352 (1983).

²⁴⁰ *Id.* at 357.

²⁴¹ 550 U.S. at 149.

²⁴² *Id.*

²⁴³ *Id.* at 150.

²⁴⁴ *Id.*

²⁴⁵ 530 U.S. at 922.

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."²⁴⁶ 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."²⁴⁷ If a regulation has a rational basis and does not impose an undue burden, it may "bar certain procedures and substitute others."²⁴⁸ The Act's ban furthered "legitimate 'governmental objectives' in regulating the medical profession...to promote respect for life, including life of the unborn."²⁴⁹ 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.'"²⁵⁰

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."²⁵¹ 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."²⁵² 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 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,"²⁵³ the facial challenge failed.

²⁴⁶ 550 U.S. 157.

²⁴⁷ *Id.* at 158

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 161.

²⁵² *Id.* at 163.

²⁵³ *Id.* at. 167-68.

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."²⁵⁴ 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."²⁵⁵

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."²⁵⁶ A division of medical opinion indicated an uncertainty, 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.'"²⁵⁷ 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."²⁵⁸ Finally, a facial challenge to the Act was appropriate. A health exception does not apply in the large fraction of cases as it is intended "to protect women in *exceptional* cases."²⁵⁹

²⁵⁴ *Id.* at 170.

²⁵⁵ *Id.* at 172.

²⁵⁶ *Id.* at 174.

²⁵⁷ *Id.* at 176.

²⁵⁸ *Id.* at 186.

²⁵⁹ *Id.* at 189.

[5] Other Autonomy Issues

Page 523: Insert the following *Whalen v. Roe*.

In *NASA v. Nelson*,²⁶⁰ the Court upheld, as applied to NASA contract employees, a Homeland Security Presidential Directive requiring background checks. The Court assumed “without deciding, that the Constitution protects a privacy right.” However, it held that the “Government’s interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act of 1974, satisfy any ‘interest in avoiding disclosure’ that may ‘arguably ha[ve] its roots in the Constitution.’ ”²⁶¹

The NASA contract employees worked at the Jet Propulsion Laboratory (JPL) in Pasadena, California, which is owned by NASA and operated by the California Institute of Technology under a government contract. The JPL “is the lead NASA center for deep-space robotics and communications.”

For the background check, the JPL employees were first required to complete Standard Form 85 (SF-85), which primarily sought “basic biographical information.”²⁶² However, the form’s final question asked “whether the employee has ‘used, possessed, supplied, or manufactured illegal drugs’ in the last year.”²⁶³ The form did note that a truthful response “cannot be used as evidence against the employee in a criminal proceeding.”²⁶⁴ Once a completed SF-85 was on file, Form 42 was sent to the employee’s former landlords and references. The two-page document asked “if the reference has ‘any reason to question’ the employee’s ‘honesty or trustworthiness.’ ”²⁶⁵ It also asked “if the reference knows of any ‘adverse information’ concerning the employee’s ‘violations of the law,’ ‘financial integrity,’ ‘abuse of alcohol and/or drugs,’ ‘mental or emotional stability,’ ‘general behavior or conduct,’ or ‘other matters.’ ”²⁶⁶ If the reference had checked “ ‘yes,’ ” the form asked for an “explanation in the space below” the form and also asked for any “ ‘additional information’ (‘derogatory’ or ‘favorable’) that may bear on ‘suitability for government employment or a security clearance.’ ”²⁶⁷

Writing for the Court (8-0), Justice Alito explained that *Whalen v. Roe*²⁶⁸ considered a similar question concerning informational privacy. *Whalen* considered “New York’s practice of collecting ‘the names and addresses of all persons’ prescribed dangerous drugs with both ‘legitimate and illegitimate uses.’ ”²⁶⁹ According to *Whalen*,

²⁶⁰ 131 S. Ct. 746 (2011).

²⁶¹ *Id.* at 751.

²⁶² *Id.* at 753.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ 429 U.S. 589 (1977)

²⁶⁹ *Nelson*, 131 S. Ct. at 755.

the Court’s decisions on privacy issues involve at least two different interests: “one, an ‘interest in avoiding disclosure of personal matters’; the other, an interest in ‘making certain kinds of important decisions’ free from government interference.”²⁷⁰ Regarding the interest in avoiding disclosure, *Nixon v. Administrator of General Services*²⁷¹ rejected former President Nixon’s challenge to the Presidential Recordings and Materials Preservation Act, which required the President to “turn over his presidential papers and tape recordings for archival review and screening.”²⁷² *Whalen* and *Nixon* are the only two Supreme Court decisions squarely addressing a constitutional “ ‘right to informational privacy.’ ”²⁷³ However, “[s]tate and lower federal courts have offered a number of different interpretations of *Whalen* and *Nixon*,” and many have held “that disclosure of at least some kinds of personal information should be subject to a test that balances the government’s interests against the individual’s interest in avoiding disclosure.”²⁷⁴

As in *Whalen*, Justice Alito assumed that “the Government’s challenged inquiries implicate a privacy interest of constitutional significance.”²⁷⁵ Nevertheless, “whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included on SF-85 and Form 42 in an employment background investigation that is subject to the Privacy Act’s safeguards against public disclosure.”²⁷⁶ The Government was not exercising “its sovereign power ‘to regulate and license,’ ” but was instead conducting the “challenged background checks in its capacity ‘as proprietor’ and manager of its ‘internal operation.’ ”²⁷⁷ The Government’s inquiry was “part of a standard employment background check of the sort used by millions of private employers.”²⁷⁸ Moreover, the Government has been doing employment investigations since the days of George Washington. Therefore, the questions at issue are “reasonable, employment related inquiries that furthered the Government’s” proprietary and managerial interests.²⁷⁹

The Court then considered the questions regarding illegal-drug use. The follow-up question in SF-85 regarding treatment for illegal-drug use was a “reasonable, employment-related inquiry.”²⁸⁰ The Government used the treatment inquiry as a “mitigating factor” for “illegal-drug users who are taking steps to address and overcome their problems.”²⁸¹ Like the question in SF-85, the open-ended questions on Form 42 were “reasonably aimed at identifying capable employees who will faithfully conduct the

²⁷⁰ *Id.*

²⁷¹ 433 U.S. 425 (1977).

²⁷² *Nelson*, 131 S. Ct. at 755.

²⁷³ *Id.* at 756. (Court’s Footnote 9)

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 756-57.

²⁷⁷ *Id.* at 757.

²⁷⁸ *Id.* at 758.

²⁷⁹ *Id.* at 759.

²⁸⁰ *Id.* at 760.

²⁸¹ *Id.*

Government's business."²⁸² Such questions were reasonable in light of "their pervasiveness in the public and private sectors."²⁸³

The Privacy Act offered protection to the employees, for it allowed the Government to "maintain records 'about an individual' only to the extent the records [we]re 'relevant and necessary to accomplish' a purpose authorized by law."²⁸⁴ Furthermore, the Privacy Act "require[d] written consent before the Government may disclose records pertaining to any individual" and "impose[d] criminal liability for willful violations."²⁸⁵

Justice Scalia, joined by Justice Thomas, concurred in the judgment. Justice Scalia commented that informational privacy is one of many "desirable things not included in the Constitution."²⁸⁶ Justice Scalia criticized the Court for basing its denial of respondents' claim on many factors: the respondents were "Government contractor employees" who were "working with highly expensive scientific equipment."²⁸⁷ Also, the Government was seeking "only information . . . from third parties that is standard in background checks," and the Government would be liable for revealing such information.²⁸⁸ Lastly, NASA's Privacy Act regulations were "very protective of private information."²⁸⁹ As the Court cited "*all* of these factors as the basis for its decision," future cases could be easily distinguished, and the lack of one or more factors could result in a successful privacy challenge.²⁹⁰

Justice Thomas agreed that "the Constitution does not protect a right to informational privacy."²⁹¹

²⁸² *Id.* at 761.

²⁸³ *Id.*

²⁸⁴ *Id.* at 762.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 764. (Scalia, J., concurring).

²⁸⁷ *Id.* at 769.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* (Thomas, J., concurring).

Chapter 9

RACIAL EQUALITY

§ 9.01 SEGREGATION 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*,²⁹² 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.”²⁹³ 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.”²⁹⁴ The district attempted to maintain schools whose racial compositions were “within 10 percentage points of the district’s overall white/nonwhite racial balance.”²⁹⁵ Oversubscribed schools that did not meet this criterion were ““integration positive.””²⁹⁶ The district would select students who would help ““bring the school into balance.””²⁹⁷ If

²⁹² 551 U.S. 701 (2007).

²⁹³ *Id.* at 711.

²⁹⁴ *Id.* at 712.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

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.

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.”²⁹⁸ 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. 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.”²⁹⁹

Second, *Grutter v. Bollinger*³⁰⁰ 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.”³⁰¹ 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.”³⁰²

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.”³⁰³ 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*.³⁰⁴ Moreover, the *Grutter* Court specifically narrowed its holding to higher education programs. Consequently, *Grutter*

²⁹⁸ *Id.* at 716.

²⁹⁹ *Id.* at 721.

³⁰⁰ 539 U.S. 306 (2003).

³⁰¹ 551 U.S. at 722 (quoting *Grutter*, 539 U.S. at 337).

³⁰² *Id.* at 723.

³⁰³ *Id.*

³⁰⁴ 539 U.S. 244 (2003).

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."³⁰⁵ Even the "undefined 'meaningful number' necessary to"³⁰⁶ *Grutter* was permissible because its purpose was to achieve a genuinely diverse student population. The plurality expressed concern that "racial balancing has 'no logical stopping point'"³⁰⁷ 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.'"³⁰⁸

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."³⁰⁹ *Brown v. Board of Education*³¹⁰ 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."³¹¹

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."³¹² The dissent's allusion to preserving "their 'hard-won gains'" conflates the concepts of segregation and racial balancing.³¹³ The Court has permitted "race-based measures for remedial purpose in two narrow situations."³¹⁴ 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.*³¹⁵ 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

³⁰⁵ 551 U.S. at 726.

³⁰⁶ *Id.* at 729.

³⁰⁷ *Id.* at 731.

³⁰⁸ *Id.* at 735.

³⁰⁹ *Id.*

³¹⁰ 347 U.S. 483 (1954).

³¹¹ 551 U.S. at 747.

³¹² *Id.* at 750.

³¹³ *Id.* at n.3.

³¹⁴ *Id.* at 751

³¹⁵ 488 U.S. 469 (1989).

connection to any prior segregation.”³¹⁶

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.”³¹⁷

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.”³¹⁸ He did not join Parts III-B and IV because the plurality failed to recognize that diversity is a compelling state interest. “Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”³¹⁹

Jefferson County failed to pass strict scrutiny because its explanation “of how and when” its uses racial classifications was “so broad and imprecise.”³²⁰ 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.”³²¹ 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’”³²² 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.”³²³ 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.”³²⁴ Unfortunately, Justice Harlan’s famous assertion in his dissent in *Plessey v. Ferguson*³²⁵ that “our Constitution is color-blind” regrettably “cannot be a universal constitutional principle” in the “real world.”³²⁶ 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

³¹⁶ 551 U.S. at 756.

³¹⁷ *Id.* at 777.

³¹⁸ *Id.* at 782.

³¹⁹ *Id.* at 783.

³²⁰ *Id.* at 784-85.

³²¹ *Id.* at 784.

³²² *Id.* at 787.

³²³ *Id.*

³²⁴ *Id.* at 788.

³²⁵ 163 U.S. 537 (1896).

³²⁶ 551 U.S. at 788.

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”³²⁷ 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 include race as a component.”³²⁸

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.”³²⁹ In *Freeman v. Pitts*,³³⁰ 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.”³³¹ 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.”³³²

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

³²⁷ *Id.* at 789.

³²⁸ *Id.* at 790.

³²⁹ *Id.* at 791.

³³⁰ 503 U.S. 467 (1992).

³³¹ 551 U.S. at 803.

³³² *Id.* at 805.

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.”³³³ 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;”³³⁴ 2) educational: “in overcoming the adverse educational effects produced by and associated with highly segregated schools;”³³⁵ and 3) democratic: “in producing an educational environment that reflects the ‘pluralistic society.’”³³⁶ Desegregation studies showed that black students’ educational achievements improved in integrated schools and classes, they performed 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.”³³⁷ 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*.”³³⁸

§ 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*³³⁹, 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

³³³ *Id.* at 836.

³³⁴ *Id.* at 838.

³³⁵ *Id.* at 839.

³³⁶ *Id.* at 840.

³³⁷ *Id.* at 844.

³³⁸ *Id.* at 868.

³³⁹ 548 U.S. 399 (2006).

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.”³⁴⁰ 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.”³⁴¹

[5] The Criminal Justice System

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

In *Snyder v. Louisiana*³⁴² 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”³⁴³ to the deferential clearly erroneous standard.

³⁴⁰ *Id.* at 439.

³⁴¹ *Id.* at 446.

³⁴² 552 U.S.472 (2008).

³⁴³ *Id.* at 487.

Chapter 11

AFFIRMATIVE ACTION

§ 11.02 EMPLOYMENT

[1] Title VII and the Equal Protection Clause

Page 444: [Insert the following before [2] Government Set Asides]

In *Ricci v. DeStefano*³⁴⁴, the Court held that discarding promotional examinations taken by New Haven firefighters, on the basis of racially disparate results, violated Title VII by discriminating against those “who had performed well.”³⁴⁵ Writing for a majority of five, Justice Kennedy stated that Title VII prohibits “race-based action” like this one “unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”³⁴⁶

Following its contract with the union, New Haven implemented a merit-based promotion examination designed by an outside consultant. Based on the examinations, 10 white candidates were eligible for promotion to 8 lieutenant positions, and 7 whites and 2 Hispanics were eligible for promotion to 7 captain positions. However, the City disregarded the examinations to avoid a disparate impact lawsuit by minority groups. Subsequently, 17 white firefighters and 1 Hispanic firefighter, who were denied a chance at promotion, brought suit.

Although Title VII differs from the Constitution, constitutional principles provide guidance in the statutory context. For example, in *Wygant v. Jackson Bd. of Ed.*³⁴⁷ and *Richmond v. J. A. Croson Co.*,³⁴⁸ the Court applied the “strong basis in evidence” standard, whereby a vague claim of past discrimination cannot justify “an unyielding racial quota.”³⁴⁹

A similar interplay of interests governs a Title VII claim and a Title VII disparate-impact claim as elucidated in *Griggs v. Duke Power*.³⁵⁰ “Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of ‘practices that are fair in form, but discriminatory in operation.’”³⁵¹ Employers only have discretion when they have a strong basis in evidence of disparate-impact liability; they need not, however, have “a provable, actual violation.”³⁵² As Title VII did not permit defendants’ justification, the Court did not decide whether the Constitution permits

³⁴⁴ 129 S. Ct. 2658 (2009).

³⁴⁵ *Id.* at 2664.

³⁴⁶ *Id.*

³⁴⁷ 476 U.S. 267 (1986).

³⁴⁸ 488 U.S. 469 (1989).

³⁴⁹ 129 S. Ct. at 2675.

³⁵⁰ 401 U.S. 424 (1971).

³⁵¹ 129 S. Ct. at 2676 (quoting *Griggs*, 401 U.S. at 431).

³⁵² *Id.* at 2676.

discrimination for a “legitimate fear of disparate impact”³⁵³ litigation.

Title VII affords employers significant discretion to develop an inclusive promotion process, but once established, employers cannot then invalidate the test results and thus upset “an employee’s legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact,”³⁵⁴ comprises a prohibited racial preference under § 2000e-2(j). In contrast, before it is administered, Title VII allows an employer to consider how to construct a “test or practice in order to provide a fair opportunity for all individuals, regardless of their race.”³⁵⁵

Even if the City was motivated by a desire to avoid disparate-impact liability, there was not “an objective, strong basis in evidence” that the tests were “inadequate.”³⁵⁶ The Court concluded that no genuine issue of material fact existed, and that the law entitled the firefighters to summary judgment.

The minorities’ pass rate on the exam was approximately one-half the pass rates for white candidates, which fell well “below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII.”³⁵⁷ Had the City certified the examinations, not one black candidate for any of the then-vacant positions would have been considered. Nevertheless, the significant statistical disparity was “far from a strong basis in evidence.”³⁵⁸ Title VII required disparate-impact liability “only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt.”³⁵⁹ No genuine dispute existed that the exams were job-related, and the City “lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative.”³⁶⁰ A few statements made by an individual who had little knowledge of the test did not create the requisite genuine issue of fact. The individual was a “direct competitor” of the consultant company that designed the examination, and became employed by the City. Finally, plaintiff’s personal and financial expense to prepare for the test made the City’s “reliance on raw racial statistics”³⁶¹ even more problematical.

Concurring, Justice Scalia stated that the Court’s decision was merely postponing the day the Court must confront whether Title VII’s disparate-impact provisions are consistent with the Equal Protection Clause. Disparate-impact theory might be justified as an “evidentiary tool” to establish a *prima facie* showing of discriminatory intent.

Justice Alito’s concurrence, joined by Justices Scalia and Thomas, argued that a reasonable jury could find that upon the City’s disclosure of the racial makeup of those firefighters scoring highest on the exam, an influential community leader lobbied the City

³⁵³ *Id.*

³⁵⁴ *Id.* at 2677.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 2678.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 2679.

³⁶¹ *Id.* at 2681.

to disregard the test results.

Dissenting, Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, noted that the population of New Haven was 40% African-American and 20% Hispanic. For entry level jobs, minorities were slightly underrepresented, but in officer ranks of captain or higher, there was major underrepresentation as only 9% were African-American and 9% were Hispanic. Furthermore, only one of 21 fire captains was African-American. The promotion process should be judged against this context of “entrenched inequality.”³⁶²

The passage rate on the lieutenant exam for African-American candidates was about half the rate for Caucasian candidates and even lower for Hispanic candidates. On the captain exam, African-American and Hispanic candidates passed at about half the rate of Caucasian test takers. Moreover, while nearly half of the lieutenant candidates were African-American or Hispanic, the test left none eligible for the eight open lieutenant positions.

Justice Ginsberg cited federal court precedent only allowing practices that were discriminatory in effect upon an employer’s showing of “an overriding and compelling business purpose.”³⁶³ When the Supreme Court began moving away from *Griggs*’ disparate impact approach,³⁶⁴ Congress “formally codified the disparate-impact component of Title VII”³⁶⁵ and other principles in *Griggs*.

The majority failed to show “why the evidence of the tests’ multiple deficiencies does not create at least a triable issue under a strong-basis-in-evidence standard.”³⁶⁶ Justice Ginsberg also criticized Justice Alito’s analysis equating “political considerations with unlawful discrimination.”³⁶⁷

³⁶² *Id.* at 2691.

³⁶³ *Id.* at 2698 (quoting *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1261, n. 9 (CA6 1981)).

³⁶⁴ *Wards Cove Packing Co, v. Antonio*, 490 U.S. 642 (1989).

³⁶⁵ 129 S. Ct. at 2698 (citing Civil Rights Act of 1991).

³⁶⁶ 129 S. Ct. at 2707.

³⁶⁷ *Id.* at 2709.

Chapter 12

EQUAL PROTECTION FOR OTHER GROUPS AND INTERESTS

§ 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*,³⁶⁸ 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.”³⁶⁹ 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*³⁷⁰ 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*,³⁷¹ 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.’”³⁷²

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,

³⁶⁸ 553 U.S. 181 (2008).

³⁶⁹ *Id.* at 186.

³⁷⁰ 383 U.S. 663 (1966).

³⁷¹ 460 U.S. 780 (1983).

³⁷² *Crawford*, 553 U.S. at 191.

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 office to sign an affidavit. Still, the statute was not unconstitutional because it was not "wholly unjustified"³⁷³ and the plurality found that no class of voters faced "excessively burdensome requirements."³⁷⁴ 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*,³⁷⁵ Justice Scalia called for a deferential standard for "nonsevere, nondiscriminatory restrictions."³⁷⁶ Common burdens spread widely through the populace are not severe, including burdens "requiring 'nominal effort' of everyone."³⁷⁷ 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

³⁷³ *Id.* at 199.

³⁷⁴ *Id.* at 202.

²⁸⁶ 504 U.S. 428 (1992).

³⁷⁶ *Crawford*, 553 U.S. 204.

³⁷⁷ *Id.* at 205.

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.

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

In *League of United Latin Am. Citizens v. Perry*,³⁷⁸ 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.³⁷⁹ 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”³⁸⁰ 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.”³⁸¹ 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.

³⁷⁸ 548 U.S. 399 (2006).

³⁷⁹ See *Davis v. Bandemer*, 478 U.S. 109 (1986) and *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

³⁸⁰ *League*, 548 S. Ct. at 416.

³⁸¹ *Id.* at 439.

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. 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.”³⁸²

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.”³⁸³ 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.”³⁸⁴ 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.

Page 481: [Insert the following before *Bush v. Palm Beach County Canvassing Board*]

In *Bartlett v. Strickland*,³⁸⁵ the Court determined that § 2 of the Voting Rights Act of 1965 could not be used to draw a voting “district that is not a majority-minority district”³⁸⁶ just so that crossover majority voters could aid racial minorities in electing candidates of their choice. The “Whole County Provision”³⁸⁷ of North Carolina’s Constitution prohibits the General Assembly from “dividing counties when drawing legislative districts.”³⁸⁸

³⁸² *Id.* at 446.

³⁸³ *Id.* at 448 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 498 (1965) (emphasis added)).

³⁸⁴ *Id.* at 492.

³⁸⁵ 129 S. Ct. 1231(2009).

³⁸⁶ *Id.* at 1238.

³⁸⁷ *Id.* at 1239.

³⁸⁸ *Id.*

In the present case, when the African-American voting population in Pender County fell to 35.33%, the North Carolina General Assembly forged District 18 by combining portions of Pender and New Hanover Counties to attain an African-American voting population of 39.36%. State officials thought that their action was necessary to avoid a § 2 voter dilution claim.

Writing for a plurality of three, Justice Kennedy said that a majority-minority legislative district does not meet the first requirement for § 2 liability, and that § 2 does not require “a so-called crossover district.”³⁸⁹ Moreover, the Court’s ruling does not extend to instances of “intentional discrimination.”³⁹⁰

The plurality also said that “the ‘moral imperative of racial neutrality is the driving force of the *Equal Protection Clause*,’ and racial classifications are permitted only ‘as a last resort.’”³⁹¹ A broad interpretation of § 2 “‘would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.’”³⁹²

Moreover, § 2 does not “entrench majority-minority districts”³⁹³ as that could raise Constitutional problems. Under “a totality of the circumstances,”³⁹⁴ § 2 requires majority-minority districts only if “all three *Gingle*³⁹⁵’s factors are met.”³⁹⁶ On the other hand, the Fourteenth and Fifteenth Amendments would raise “serious constitutional questions”³⁹⁷ if states intentionally destroyed “effective crossover districts.”³⁹⁸

Concurring in the judgment, Justice Thomas, joined by Justice Scalia, stated that he “continue[d] to disagree”³⁹⁹ with the *Thornburg v. Gingles*’ “framework.”⁴⁰⁰ In a dissent, joined by Justices Ginsburg, Stevens, and Breyer, Justice Souter stated that: “a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.”⁴⁰¹

§ 12.05 “ECONOMIC AND SOCIAL LEGISLATION”

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

In *Engquist v. Oregon Department of Agriculture*,⁴⁰² the Court refused to apply

³⁸⁹ *Id.* at 1242.

³⁹⁰ *Id.* at 1246.

³⁹¹ *Id.* at 1247.

³⁹² *Id.*

³⁹³ *Id.* at 1248.

³⁹⁴ *Id.*

³⁹⁵ 478 U.S. 30 (1986).

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 1245.

³⁹⁸ *Id.* at 1249.

³⁹⁹ *Id.* at 1250.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² 128 S. Ct. 2146 (2008)

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.⁴⁰³ 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*.⁴⁰⁴ *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.”⁴⁰⁵ 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 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.

⁴⁰³ *Id.* at 2149.

⁴⁰⁴ 528 U.S. 562 (2000).

⁴⁰⁵ *Engquist*, 128 S. Ct. at 2153.

Chapter 13

POLITICAL SPEECH AND ASSOCIATION

§ 13.01 Advocacy of Unlawful Objectives

Page 508: [Insert the following after *McIntyre v. Ohio Elections Commission*]

In *Doe v. Reed*,⁴⁰⁶ the Court held disclosure of referendum petitions authorized by the Washington Public Records Act (PRA) did not violate the *First Amendment*. The PRA was used to obtain the names and addresses of those who signed a petition for a referendum on a law which expanded certain benefits of state-registered domestic partners, including same-sex partnerships. Plaintiffs must meet the standards for a facial challenge. *Buckley* requires those opposing disclosure to demonstrate a “ ‘reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.’ ”⁴⁰⁷ The Court rejected the facial challenge as only modest burdens attend disclosure of most state referenda in areas like tax or budget.

Concurring, Justice Breyer largely joined Justice Stevens’ opinion.

Justice Alito concurred. He would require prompt judicial remedies well before the relevant speech occurs with a low burden of proof.⁴⁰⁸

Justice Sotomayor concurred, joined by Justices Stevens and Ginsburg. Justice Sotomayor urged skepticism on as-applied challenges to disclosure of the identities of participants in the referendum process as the Constitution advances transparency.⁴⁰⁹

Concurring in part and concurring in the judgment, Justice Stevens, stated that a significant threat of harassment would have to exist for a successful as-applied challenge. Concurring, Justice Scalia warned about expanding the mistake of *McIntyre v. Ohio Elections Comm’n*.⁴¹⁰ Prohibiting disclosure of petition signatures undercuts the centuries-old practice of legislating and voting publically. Dissenting, Justice Thomas viewed compelled disclosure as a harsh burden on *First Amendment* rights.

§ 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*,⁴¹¹ the Court

⁴⁰⁶ 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010).

⁴⁰⁷ *Id.*, 177 L.Ed. 2d at 505 (quoting *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)).

⁴⁰⁸ *Id.*, 177 L.Ed. 2d at 512.

⁴⁰⁹ *Id.*, 177 L.Ed. 2d at 514.

⁴¹⁰ 514 U.S. 344 (1995).

⁴¹¹ 552 U.S. 442 (2008).

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.”⁴¹²

In *California Democratic Party v. Jones*,⁴¹³ 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.”⁴¹⁴ 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.”⁴¹⁵

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

In *New York State Board of Elections v. López Torres*,⁴¹⁶ the Court upheld a state statute prescribing the nomination process for the New York Supreme Court, New York’s

⁴¹² *Id.* at 444.

⁴¹³ 530 U.S. 567 (2000).

⁴¹⁴ *Grange*, 552 U.S. at 455.

⁴¹⁵ *Id.* at 471.

⁴¹⁶ 552 U.S. 196 (2008).

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.”⁴¹⁷ 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.”⁴¹⁸ 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”⁴¹⁹ 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.”⁴²⁰

§ 13.04A Associational Rights to Assist Other Organizations

Page 520: [Insert the following at the end of Section 13.04]

Holder v. Humanitarian Law Project upheld a federal law prohibiting “the provision of ‘material support or resources’ ” to foreign terrorist organizations.⁴²¹ The statute did not violate freedom of speech or association and was not impermissibly vague.

The prohibition on material support was premised on a congressional finding that designated foreign terrorist organizations “ ‘are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.’ ”⁴²² The Secretary of State designates a “ ‘foreign terrorist organization,’ ” which can be appealed within 30 days. Plaintiffs seek to support two foreign terrorist organizations, the Partiya Karkeran

⁴¹⁷ *Id.* at 198.

⁴¹⁸ *Id.* at 203.

⁴¹⁹ *Id.* at 205.

⁴²⁰ *Id.* at 212.

⁴²¹ 130 S. Ct. 2705 (2010).

⁴²² *Id.* at 2724.

Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK aims to establish an independent Kurdish state in southeastern Turkey, and the LTTE seeks an independent Tamil state in Sri Lanka. The Government presented evidence that both groups have committed numerous terrorist attacks, some of which harmed American citizens. The LTTE appealed its designation as a foreign terrorist organization, but the D.C. Circuit upheld it. Two U.S. citizens and six domestic organizations filed suit in 1998 claiming “they wished to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B.”⁴²³

Congress decided to make the mental state for a violation of § 2339B “knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.”⁴²⁴ *Scales v. United States*⁴²⁵ was distinguishable, for § 2339B criminalizes providing “ ‘material support’ ” and not “mere membership.”⁴²⁶

Chief Justice Roberts wrote for Court. The material-support statute was not unconstitutionally vague under the Due Process Clause of the Fifth Amendment. The Court does subject to a stringent vagueness test statutes that impact the right of free speech or association, but “ ‘perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.’ ”⁴²⁷ If a statute clearly proscribes one’s speech, he cannot succeed in a vagueness claim “for lack of notice. And he certainly cannot do so based on the speech of others.”⁴²⁸ He may, however, have a valid First Amendment overbreadth claim. The statutory terms “ ‘training,’ ‘expert advice or assistance,’ ‘service,’ and ‘personnel’ ” are not vague, as they do not require “untethered, subjective judgments.”⁴²⁹ Moreover, the statute’s knowledge requirement “further reduces any potential for vagueness.”⁴³⁰ Although the statute’s scope “may not be clear in every application,” the terms clearly apply to the conduct at issue.⁴³¹ A “person of ordinary intelligence” would understand that most of the plaintiffs’ proposed activities “readily fall within the scope of the terms ‘training’ and ‘expert advice or assistance.’ ”⁴³² Moreover, the preenforcement timing of the challenge renders scope of application questions “entirely hypothetical.”⁴³³

The material-support statute, as applied to the plaintiffs, did not abridge freedom of speech. Congress has not banned “ ‘pure political speech.’ ”⁴³⁴ The “plaintiffs may say anything they wish on any topic,” including the PKK and LTTE.⁴³⁵ Congress banned

⁴²³ *Id.* at 2714.

⁴²⁴ *Id.* at 2717.

⁴²⁵ 361 U.S. 952 (1960).

⁴²⁶ *Holder*, 130 S. Ct. at 2718.

⁴²⁷ *Id.* at 2719.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 2720.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.* at 2722.

⁴³⁴ *Id.* at 2723.

⁴³⁵ *Id.* at 2722-23.

“ ‘material support,’ ” which generally is not speech. The Government presses this point too far, claiming that only conduct is at issue, not speech. However, “the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”⁴³⁶ The regulations are content-based as they prohibit plaintiffs from speaking to the PKK and LTTE. Consequently, *United States v. O’Brien* is inapplicable.

In enacting the statute, Congress “considered and rejected the view that ostensibly peaceful aid would have no harmful effects.”⁴³⁷ Specific findings on the serious threat of international terrorism showed that foreign terrorist organizations “ ‘are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct.’ ”⁴³⁸ The PKK has killed more than 22,000 people, and the LTTE “has engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security Minister, and Deputy Defense Minister.”⁴³⁹ The LTTE also killed 100 people with a truck bomb. Material support “frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups -- legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds -- all of which facilitate more terrorist attacks.”⁴⁴⁰ Money is fungible, and although terrorist organizations that also pursue civilian and humanitarian activities emphasize those activities, evidence exists that the PKK and the LTTE “have not ‘respected the line between humanitarian and violent activities.’ ”⁴⁴¹

The dissent argues that there is “ ‘no natural stopping place’ ” for the argument that support is fungible, but Congress has specified such a point: “The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.”⁴⁴² Allowing American citizens to provide material support to terrorist organizations may also strain relations with our allies. Moreover, the Court saw “no reason to question Congress’s finding that ‘international cooperation is required for an effective response to terrorism.’ ”⁴⁴³ Congress and the Executive’s factual evaluations deserve deference. The Court does “not defer to the Government’s reading of the *First Amendment*,” but respect is appropriate in collecting evidence and drawing factual inferences.⁴⁴⁴ Information on national security, foreign policy, and evolving terrorist threats is difficult to obtain and assess, yet the dissent “slights these real constraints in demanding hard proof” with “ ‘detail’ ” and “ ‘specific facts.’ ”⁴⁴⁵ The “Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the

⁴³⁶ *Id.* at 2723.

⁴³⁷ *Id.* at 2725.

⁴³⁸ *Id.* at 2724.

⁴³⁹ *Id.* at 2725.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 2726.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at 2727.

⁴⁴⁵ *Id.*

puzzle before we grant weight to its empirical conclusions.”⁴⁴⁶

The Court also credited Congress with being conscious of its constitutional limits. The statute only applies to the limited number of foreign terrorist organizations, who may seek judicial review of their designation. Moreover, Congress responded to adverse lower court holdings in this litigation by clarifying the statute with narrower definitions. Also, some exceptions exist to the ban on material support, including medicine and religious materials. Most important, Congress did not restrict independent advocacy.

The dissent ignores some real dangers. For example, the United Nations had to close a Kurdish refugee camp in Iraq controlled by the PKK, who did not respect the camp’s “ ‘neutral and humanitarian nature.’ ”⁴⁴⁷ Had the PKK been trained on how to work with the United Nations, then the U.N. “could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities.”⁴⁴⁸

Not all future applications of the material-support statute to speech will survive First Amendment scrutiny. Regulation of independent speech may not be constitutional, even if the speech benefitted foreign terrorist organizations. The Court also did not suggest that such regulations could extend to domestic organizations.

Lastly, the statute did not violate plaintiffs’ freedom of association because it only prohibited material support, not being a member of the group or promoting and supporting its political goals.

The Preamble to the Constitution and Madison in *The Federalist Papers* proclaim security against foreign danger an essential object of the Government.

Justice Breyer dissented, joined by Justices Ginsburg and Sotomayor. The dissent agreed that the statute was not unconstitutionally vague. However, Justice Breyer objected to the Court concluding that the Constitution permits criminal prosecution for coordinated teaching and advocacy with designated organizations that furthers their lawful political objectives. The “Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government’s compelling interest in combating terrorism.”⁴⁴⁹ Consequently, the statute should be interpreted to exclude this kind of activity.

The plaintiffs, all United States citizens or associations, seek an injunction and declaration allowing them to “(1) ‘train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes’; (2) ‘engage in political advocacy on behalf of Kurds who live in Turkey’; (3) ‘teach PKK members how to petition various representative bodies such as the United Nations for relief’; and (4) ‘engage in political advocacy on behalf of Tamils who live in Sri Lanka.’ ”⁴⁵⁰ *Brandenburg v. Ohio*⁴⁵¹ held that “the *First Amendment* protects advocacy even of *unlawful* action so long as that advocacy is not ‘directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action.’ Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek

⁴⁴⁶ *Id.* at 2728.

⁴⁴⁷ *Id.* at 2730.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 2731 (Breyer, J., dissenting).

⁴⁵⁰ *Id.* at 2731-32.

⁴⁵¹ 395 U.S. 444 (1969).

to teach others how to do the same.”⁴⁵² Under *Scales*, a person does not lose First Amendment protection for freedom of association by associating with a group that uses unlawful means to achieve its ends. The statute here imposes criminal penalties at least arguably with content-based distinctions, and should be strictly scrutinized for a “‘compelling’ need that cannot be ‘less restrictively’ accommodated.”⁴⁵³ Even assuming *arguendo* that strict scrutiny is inapplicable, the Court should “at the very least ‘measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the *First Amendment*.’”⁴⁵⁴ The Government’s “compelling countervailing interest” was national security.⁴⁵⁵

There is no “*obvious*” way that advocacy for peaceful political change or teaching the PKK or LTTE to petition the United Nations for political change is fungible with “more sinister ends in the way that donations of money, food, or computer training are fungible.”⁴⁵⁶ Moreover, speech, association, and related activities will often, perhaps always, help legitimize an organization. This argument has “no natural stopping place.”⁴⁵⁷ The Communist Party was part of a world movement that (1) “sought to employ ‘espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship,’ and (2) ‘endeavor[ed]’ to bring about “the overthrow of existing governments by . . . force if necessary.”⁴⁵⁸ Nevertheless, the Court protected the “right to belong to that party -- despite whatever ‘legitimizing’ effect membership might have had -- as long as the person did not share the party’s unlawful purposes.”⁴⁵⁹

When free speech is threatened, *Whitney v. California*⁴⁶⁰ requires the judiciary to determine “whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.”⁴⁶¹ The Government’s foreign affairs expertise frequently warrants deference, but the Court must decide whether the Government has shown an interest that justifies criminalizing speech activity that is otherwise protected by the First Amendment, regardless of the effect on other nations.

When, like here, “there is ‘a serious doubt’ as to the statute’s constitutionality,” it should be construed constitutionally. Criminal penalties should be limited to speech and associational activities which the defendant knows or intends “will assist the organization’s unlawful terrorist actions.”⁴⁶² Congress primarily sought to end assistance with fungible money or goods, and the statute itself states it shall not be construed or applied to abridge First Amendment rights.

⁴⁵² *Holder*, 130 S. Ct. at 2733 (Breyer, J., dissenting).

⁴⁵³ *Id.* at 2734.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 2735.

⁴⁵⁷ *Id.* at 2736.

⁴⁵⁸ *Id.* at 2737

⁴⁵⁹ *Id.*

⁴⁶⁰ 274 U.S. 357 (1927) (Brandeis, J., concurring).

⁴⁶¹ *Holder*, 130 S. Ct. at 2739 (Breyer, J., dissenting).

⁴⁶² *Id.* at 2740.

§ 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*,⁴⁶³ 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."⁴⁶⁴ 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."⁴⁶⁵ As *Connick v. Meyers*⁴⁶⁶ 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.⁴⁶⁷ 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."⁴⁶⁸ 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

⁴⁶³ 547 U.S. 410 (2006).

⁴⁶⁴ *Id.* at 418.

⁴⁶⁵ *Id.* at 419.

⁴⁶⁶ 461 U.S. 138 (1983).

⁴⁶⁷ *Ceballos*, 126 S. Ct. at 1961.

⁴⁶⁸ *Id.* at 1962.

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”⁴⁶⁹ but argued that Justice Souter’s standard does not adequately consider the management concerns of government entities.

Page 829: Insert the following after *Connick v. Myers*

In *Borough of Duryea v. Guarnieri*,⁴⁷⁰ Charles Guarnieri filed a union grievance to reverse the Duryea City Council’s decision to terminate him as chief of police. When he returned to employment “the council issued 11 directives instructing Guarnieri in the performance of his duties,” including prohibiting overtime, restricting use of his police car to “ ‘official business,’ ” and requiring the police department to work in a “ ‘smoke free building.’ ”⁴⁷¹ Guarnieri filed a lawsuit claiming “that his first union grievance was a petition protected by the Petition Clause,” and that the 11 directives issued “were retaliation for that protected activity.”⁴⁷² After being denied overtime, Guarnieri further “alleged that his § 1983 lawsuit was a petition and that the denial of overtime constituted retaliation for his having filed the lawsuit.”⁴⁷³ The Supreme Court declined to decide Guarnieri’s claim, remanding the case for determination of whether Guarnieri’s grievance was a petition of “public concern.”

Justice Kennedy wrote for the Court. “This Court’s precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.”⁴⁷⁴ Guarnieri’s claim could also have invoked protection under freedom of speech. While the Court did not find the Speech and Petition Clause “identical,” they do “share substantial common ground” and “are ‘cognate rights.’ ”⁴⁷⁵ The difference between the two rights is that “[t]he right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.”⁴⁷⁶ Thus, while “both speech and petition advance personal expression” . . . the right to petition is “generally concerned with expression directed to the government.”⁴⁷⁷

Recognizing government’s “significant interest in disciplining public employees who abuse the judicial process,” Justice Kennedy cautioned that “[u]nrestrained application of the Petition Clause in the context of government employment would

⁴⁶⁹ *Id.* at 1974.

⁴⁷⁰ 131 S. Ct. 2488 (2011).

⁴⁷¹ *Id.* at 2492.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 2494.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 2495.

⁴⁷⁷ *Id.*

subject a wide range of government operations to invasive judicial superintendence” and “raise “serious federalism and separation-of-powers concerns.”⁴⁷⁸ Moreover, “the Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances.”⁴⁷⁹

Even beyond limiting the speech of government employees, “ ‘government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.’ ”⁴⁸⁰ The government has an interest in “managing its internal affairs” and “[t]he public concern test was developed to protect these substantial government interests.”⁴⁸¹ At this country’s founding, “[p]etitions to the colonial legislatures concerned topics as diverse as debt actions, estate distributions, divorce proceedings, and requests for modifications of a criminal sentence.”⁴⁸² While these were largely private concerns, “[t]he proper scope and application of the Petition Clause . . . cannot be determined merely by tallying up petitions to the colonial legislatures.”⁴⁸³ Instead, courts must “identify the historic and fundamental principles that led to the enumeration of the right to petition.”⁴⁸⁴ For instance, “[t]he right to petition traces its origins to Magna Carta, which confirmed the right of barons to petition the King.”⁴⁸⁵

Justice Kennedy noted that “[i]f a public employee petitions as an employee on a matter of purely private concern, the employee’s First Amendment interest must give way, as it does in speech cases.”⁴⁸⁶ However, “[w]hen a public employee petitions as a citizen on a matter of public concern, the employee’s First Amendment interest must be balanced against the countervailing interest of the government in the effective and efficient management of its internal affairs.”⁴⁸⁷

As with free speech claims, “whether an employee’s petition relates to a matter of public concern will depend on ‘the content, form, and context of [the petition], as revealed by the whole record.’ ”⁴⁸⁸ Moreover, “[t]he forum in which a petition is lodged will be relevant to the determination of whether the petition relates to a matter of public concern.”⁴⁸⁹ For example, “[a] petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context.”⁴⁹⁰ The Court remanded the case to apply the public concern analysis.

Justice Thomas concurred in the judgment, but stated that “[f]or the reasons set forth by Justice Scalia, I seriously doubt that lawsuits are ‘petitions’ within the original

⁴⁷⁸ *Id.* at 2496.

⁴⁷⁹ *Id.* at 2497.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 2498.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 2499.

⁴⁸⁶ *Id.* at 2500.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

meaning of the Petition Clause of the First Amendment.”⁴⁹¹

Justice Scalia concurred in part and dissented in part. “The Court has never actually *held* that a lawsuit is a constitutionally protected ‘Petition,’ nor does today’s opinion” so hold.⁴⁹² “There is abundant historical evidence that ‘Petitions’ were directed to the executive and legislative branches of government, not to the courts.”⁴⁹³ Justice Scalia also disagreed “with the Court’s decision to apply the ‘public concern’ framework of *Connick v. Myers*.”⁴⁹⁴ He noted that “petitions to redress *private* grievances were such a high proportion of petitions at the founding.”⁴⁹⁵ Moreover, “[t]he text of the Petition Clause does not distinguish petitions of public concern from petitions of private concern.”⁴⁹⁶

⁴⁹¹ *Id.* at 2501 (Thomas, J., concurring)

⁴⁹² *Id.* at 2503 (Scalia, J., concurring and dissenting in part)

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 2504.

⁴⁹⁵ *Id.* at 2505.

⁴⁹⁶ *Id.*

Chapter 14

GOVERNMENT AND THE MEDIA: PRINT & ELECTRONIC

§ 14.03 Access by the Media to Government Activity

Page 866: Insert the following after *Press Enterprise Company v. Superior Court of California* (“*Press Enterprise II*”):

In *Presley v. Georgia*,⁴⁹⁷ the Supreme Court held that exclusion of the public from *voir dire* violated defendant’s Sixth Amendment rights. The right to a public trial rests on both the First and Sixth Amendments. The Court determined in *Press-Enterprise I*⁴⁹⁸ that the First Amendment requires *voir dire* to be open to the public. Later, the Court held in *Waller v. Georgia*⁴⁹⁹ that under the Sixth Amendment the right to a public trial exists in a pretrial hearing to suppress evidence. These precedents clearly provide defendant a Sixth Amendment right to a *voir dire* open to the public. Whether the First and Sixth Amendment rights to a public trial are “coextensive,” remains “an open question.”⁵⁰⁰

An open trial may sometimes be closed to the public, for example, when it would compromise a fair trial, jeopardize sensitive information protected by the government, involve concrete threats of inappropriate communications with jurors, or endanger safety. To determine if closure is proper, there must be “ ‘an overriding interest that is likely to be prejudiced,’ ”⁵⁰¹ and “ ‘closure must be no broader than necessary to protect that interest.’ ”⁵⁰² Finally, trial courts must consider alternatives to closure, even if the parties themselves do not offer alternatives, and make findings specific enough for appellate review. If courtroom space is limited, courts may reserve rows for them, divide the jury venire panel, or warn prospective jurors not to speak or interact with the audience. As the trial court in this case failed to consider all reasonable alternatives to closure, its closure order was unwarranted.

Justice Thomas, joined by Justice Scalia, dissented. Justice Thomas would reject summary disposition as neither *Walker* nor *Press Enterprise I* is directly in point.

⁴⁹⁷ 103 S. Ct. 721 (2010).

⁴⁹⁸ *Press-Enterprise Co. v. Superior Court of Cal. Riverside Cty.*, 464 U.S. 501 (1984).

⁴⁹⁹ 467 U.S. 39 (1984).

⁵⁰⁰ 103 S. Ct. at 724.

⁵⁰¹ *Id.* (quoting 467 U.S. at 48).

⁵⁰² *Id.* (quoting 467 U.S. at 48).

Chapter 15

SPEECH IN PUBLIC PLACES

§ 15.02 SPEECH IN TRADITIONAL PUBLIC FORUMS STREETS, SIDEWALKS, PARKS

Page 981: Insert the following after *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*

In *Snyder v. Phelps*,⁵⁰³ the Court set aside a jury verdict and held that the First Amendment barred tort claims against protestors at a military funeral.⁵⁰⁴ The jury found liability and imposed millions of dollars in damages on Westboro Baptist Church for picketing near a soldier's funeral service. "The [Westboro] church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military," and over the last twenty years has picketed nearly 600 funerals.⁵⁰⁵

The picketing of Mathew Snyder's funeral took place "approximately 1,000 feet from where the funeral was held," and "[t]he Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited bible verses. None of the picketers entered church property or went to the cemetery. They did not yell, or use profanity, and there was no violence associated with the picketing."⁵⁰⁶ Moreover, "[t]he funeral procession passed within 200 to 300 feet of the picket site," and although Snyder's father ("Snyder") "could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until . . . watching a news broadcast covering the event."⁵⁰⁷ Snyder brought suit against Westboro, and "a jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages."⁵⁰⁸ Later, "[t]he District Court remitted the punitive damages award to \$2.1 million."⁵⁰⁹

Chief Justice Roberts delivered the opinion of the Court. "Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. '[S]peech on "matters of public concern" . . . is "at the heart

⁵⁰³ 131 S. Ct. 1207 (2010).

⁵⁰⁴ A few weeks after the funeral, one of the picketers posted a message on Westboro's web site discussing the picketing which contained religiously oriented denunciations of the Snyders. However, that posting was not properly before the Court as "Snyder never mentioned it in his petition for certiorari."

⁵⁰⁵ *Id.* at 1213.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 1213-14.

⁵⁰⁸ *Id.* at 1214.

⁵⁰⁹ *Id.*

of the First Amendment.”’⁵¹⁰ Moreover, “speech deals with matters of public concern” when the speech relates to “any matter of political, social, or other concern to the community, or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”⁵¹¹

The Court in *Dun & Bradstreet*⁵¹² held that an “individual’s credit report ‘concerns no public issue.’”⁵¹³ In deciding whether speech is public or private, the Court must “examine the ‘content, form, and context’” of that speech, “as revealed by the whole record.”’⁵¹⁴ When considering “content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech.”⁵¹⁵ Moreover, “[a]s in other first Amendment cases, the Court is obligated ‘to “make an independent examination of the whole record” in order to make sure that “the judgment does not constitute a forbidden intrusion on the field of free expression.”’⁵¹⁶

The content of the congregation’s signs plainly highlighted a public concern, as issues such as “political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy are all matters of public import.”⁵¹⁷ And “even if a few of the signs—such as ‘You’re Going to Hell’ and ‘God Hates You’—were viewed as containing messages related to Mathew Snyder or the Snyders specifically, that would not change the fact that the overall thrust . . . spoke to broader public issues.”⁵¹⁸ The Court was not concerned that “Westboro’s speech on public matters was in any way contrived to insulate speech on a private matter from liability,” since “Westboro had been actively engaged in speaking on the subjects” long before Mathew Snyder.⁵¹⁹

Chief Justice Roberts noted that “‘[e]ven protected speech is not equally permissible in all places and at all times.’”⁵²⁰ For example, “Westboro’s choice of where and when to conduct its picketing is . . . ‘subject to reasonable time, place, or manner restrictions’ that are consistent with the standards announced in this Court’s precedents.”⁵²¹ Also, “Maryland now has a law imposing restrictions on funeral picketing, as do 43 other states, and the Federal Government.”⁵²² However, “[t]o the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case.”⁵²³ Regardless, Maryland’s law “was not in effect at the time

⁵¹⁰ *Id.*

⁵¹¹ *Id.* at 1216.

⁵¹² 472 U.S. 749

⁵¹³ *Snyder*, 131 S. Ct. at 1216.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* at 1217.

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ *Id.* at 1218.

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.*

of the events at issue,” so the Court had “no occasion to consider how it might apply” to the facts here, or “whether it or other similar regulations are constitutional.”⁵²⁴

In the past the Court has “identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral.”⁵²⁵ For example, in *Frisby v. Schultz*,⁵²⁶ the Court “upheld a ban on picketing ‘before or about’ a particular residence.”⁵²⁷ In *Madison v. Women’s Health Center, Inc.*,⁵²⁸ the Court approved an “injunction requiring a buffer zone between protestors and an abortion clinic entrance.”⁵²⁹ However, the Court held that “the facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.”⁵³⁰ The major difference is that the church members had “the right to be where they were.”⁵³¹ The congregation “complied with police guidance on where the picketing could be staged,” and “the picketing was conducted under police supervision some 1,000 feet from the church, out of sight of those at the church.”⁵³² Moreover, “[t]he protest was not unruly; there was no shouting, profanity, or violence.”⁵³³

The record confirmed that Snyder’s distress “turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”⁵³⁴ In *Texas v. Johnson*⁵³⁵ the Court stated that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁵³⁶

It was noted that “[t]he jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro’s picketing was ‘outrageous.’ ” However, this standard “would allow a jury to impose liability on the basis of the jurors’ tastes or views, or . . . [the juror’s] dislike of a particular expression.”⁵³⁷

In regard to the intrusion upon seclusion claim, in most circumstances the “burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.”⁵³⁸ As a general matter, the Court has “applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech,” and the Court declined to expand the doctrine.⁵³⁹ Here, “Snyder could see no more than

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ 487 U.S. 474 (1988).

⁵²⁷ *Snyder*, 131 S. Ct. at 1218.

⁵²⁸ 512 U.S. 753 (1994).

⁵²⁹ *Snyder*, 131 S. Ct. at 1218.

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.*

⁵³³ *Id.* at 1218-19.

⁵³⁴ *Id.* at 1219.

⁵³⁵ 491 U.S. 397 (1989).

⁵³⁶ *Snyder*, 131 S. Ct. at 1219.

⁵³⁷ *Id.*

⁵³⁸ *Id.* at 1220.

⁵³⁹ *Id.*

the tops of the signs when driving to the funeral,” and “there is no indication that the picketing in any way interfered with the funeral service itself.”⁵⁴⁰ Therefore, the First Amendment barred recovery for both intention infliction of emotional distress and intrusion upon seclusion. Without those torts as a basis, Snyder’s claim of civil conspiracy was also barred.

Justice Breyer concurred in the opinion, but recognized that the Court did “not examine in depth the effect of television broadcasting” or address an internet posting about the protesters that was introduced at trial.⁵⁴¹ Moreover, “suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A’s use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected.”⁵⁴² However, such hypothetical did not apply to Westboro, for it communicated its views through lawful picketing and could not be heard or seen from the funeral. Therefore, “[t]o uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the state’s interest in protecting its citizens against severe emotional harm.”⁵⁴³

Justice Alito dissented. “Our profound national commitment to free and open debate is not a license for the vicious, verbal assault that occurred in this case.”⁵⁴⁴

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

[1] Public Property

Page 619: [Insert the following after *Hill v. Colorado*]

In *Pleasant Grove City, Utah v. Summum*,⁵⁴⁵ the Court held that public forum analysis does not apply to the display of a permanent monument in a public park which “is a traditional public forum for speeches and other transitory acts.”⁵⁴⁶ A permanent monument placed in a public park is a form of government speech which is, consequently, not protected speech.

Summum, a religious organization, sought to display a stone monument of “the Seven Aphorisms of SUMMUM” that was similar in size and nature to a Ten Commandments monument in the park that had been previously donated by another

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* at 1221 (Breyer, J., concurring).

⁵⁴² *Id.*

⁵⁴³ *Id.* at 1222.

⁵⁴⁴ *Id.* (Alito, J., dissenting).

⁵⁴⁵ 129 S. Ct. 1125 (2009).

⁵⁴⁶ *Id.* at 1129.

private group. The city denied authorization.

Justice Alito explained that the Constitution “restricts government regulation of private speech”⁵⁴⁷ not of government speech. Restraints do exist on government speech; for example, it cannot violate the Establishment Clause. Moreover, public officials involved “in advocacy may be limited by law, regulation, or practice.”⁵⁴⁸ Ultimately, the electorate oversees all government speech.

“Permanent monuments displayed on public property typically represent government speech.”⁵⁴⁹ Both government-financed and privately financed or donated monuments displayed on public property are government speech.

By selecting certain monuments that contain “such content-based factors as esthetics, history, and local culture” government conveys “a government message.”⁵⁵⁰

The City maintained approval authority over all permanent monuments in the Park and, also owns most of them, including the Ten Commandments. While a public park is a traditional public forum, this doctrine applies when government property or government programs are “capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations.”⁵⁵¹ Applying the viewpoint neutrality requirement in traditional public forums to monuments would require government to display either all or no donated monuments. Consequently, most parks would effectively have to refuse all such donations.

Concurring, Justice Stevens, joined by Justice Ginsburg, stated that the decision does not give government broad discretion to communicate “offensive or partisan messages”⁵⁵² because even if the Constitution “neither restricts nor protects government speech, government speakers”⁵⁵³ remain bound by its other restrictions including the Establishment and Equal Protection Clauses.

Concurring, Justice Scalia, joined by Justice Thomas, noted that *Van Orden v. Perry*,⁵⁵⁴ rejected an Establishment Clause challenge to a “virtually identical Ten Commandments monument”⁵⁵⁵ with all the Justices agreeing that “government speech was at issue.”⁵⁵⁶

Concurring, Justice Breyer maintained that the government speech doctrine had limits. For example, government may not be able to select monuments based on reasons “unrelated to the display’s theme, say solely on political grounds.”⁵⁵⁷

Concurring in the judgment, Justice Souter agreed that the monument at issue was government speech, but rejected “the position that public monuments are

⁵⁴⁷ *Id.* at 1131.

⁵⁴⁸ *Id.* at 1132.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.* at 1134.

⁵⁵¹ *Id.* at 1137.

⁵⁵² *Id.* at 1139.

⁵⁵³ *Id.*

⁵⁵⁴ 545 U.S. 677 (2005).

⁵⁵⁵ 129 S. Ct. at 1139.

⁵⁵⁶ *Id.* at 1139.

⁵⁵⁷ *Id.* at 1140.

government speech categorically.”⁵⁵⁸ He would “try to keep the inevitable issues open”⁵⁵⁹ at the intersection between the government speech doctrine and the Establishment Clause.

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

In *Scheidler v. Nat’l Org. for Women, Inc.*,⁵⁶⁰ the Court held that the Hobbs Act does not prohibit acts or threats of physical violence unless accompanied by robbery or extortion.

§ 15.05 SPEECH IN PUBLIC SCHOOLS

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

In *Morse v. Frederick*,⁵⁶¹ 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.⁵⁶²

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*⁵⁶³ 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.*⁵⁶⁴ — 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.”⁵⁶⁵

⁵⁵⁸ *Id.* at 1141.

⁵⁵⁹ *Id.* at 1142.

⁵⁶⁰ 547 U.S. 9 (2006).

⁵⁶¹ 127 S. Ct. 2618 (2007).

⁵⁶² *Id.* at 2622.

⁵⁶³ 478 U.S. 675 (1986).

⁵⁶⁴ 393 U.S. 503 (1969).

⁵⁶⁵ *Morse*, 127 S. Ct. at 2638.

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.

§ 15.06 Religious Speech in Public Places

Page 629: [Insert at end of section, following *Capitol Square Review Board v. Pinette*]

*Christian Legal Society v. Martinez*⁵⁶⁶ upheld a law school’s requirement that a religious student organization accept “all-comers,” including students who did not share the group’s core religious beliefs.⁵⁶⁷ The Court said that the Hastings College of the Law (Hastings) may “condition its official recognition of a student group -- and the attendant use of school funds and facilities -- on the” group’s making membership and leadership available to all students.⁵⁶⁸ The Christian Legal Society (CLS) contended that Hastings violated its freedom of speech, freedom of association, and free exercise of religion by refusing CLS “ ‘Registered Student Organization’ ” (RSO) status.⁵⁶⁹

The Court treated the RSO as a limited public forum. First, a less restrictive scrutiny applies to both speech and association claims in limited public forums. Second, applying strict scrutiny, which has been applied where laws burden expressive association, would negate the ability of the state to reserve limited public forums for certain groups. Third, precedent has distinguished between government regulations that compel certain actions and those that simply deny government benefits. “Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition.”⁵⁷⁰ The Court distinguished *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,⁵⁷¹ which invalidated a state law requirement that gay individuals be permitted to march in a St. Patrick’s Day parade. *Hurley*, however, involved a traditional public forum, the street.

The Hastings policy was reasonable in light of the RSO forum’s function and all of the surrounding circumstances. As “judges lack the on-the-ground expertise and experience of school administrators,” courts should “resist ‘substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.’ ”⁵⁷² Hastings’ “all-comers requirement” ensures that a student is not forced to

⁵⁶⁶ 130 S. Ct. 2971 (2010).

⁵⁶⁷ *Id.* at 2978.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.* at 2979.

⁵⁷⁰ *Id.* at 2986 (quoting *Norwood v. Harrison*, 413 U.S. 455, 463 (1973)).

⁵⁷¹ 515 U.S. 557 (1995)

⁵⁷² 130 S. Ct. at 2988 (quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v.*

fund a group that would reject her as a member.⁵⁷³ Moreover, the all-comers policy “ ‘encourages tolerance, cooperation, and learning among students.’ ”⁵⁷⁴ It also develops conflict-resolution skills. CLS retains alternative channels to communicate including school facilities, chalkboards, and bulletin boards. Moreover, CLS could also communicate using electronic media or social-networking sites. In fact, the year after CLS lost RSO status, CLS doubled the number of students at its meetings and events.

At bottom, “the *advisability* of Hastings’ policy does not control its *permissibility*.”⁵⁷⁵ In a limited public forum, access restrictions “ ‘need not be the most reasonable or the only reasonable limitation.’ ”⁵⁷⁶ CLS could not substantiate its concern that the all-comers policy would lead to “hostile takeovers” and “saboteurs.”⁵⁷⁷ Should such actions occur, “Hastings presumably would revisit and revise its policy.”⁵⁷⁸

A policy requiring acceptance of all comers was “viewpoint-neutral.”⁵⁷⁹ While RSOs must drop “access barriers, they may express any viewpoint they wish -- including a discriminatory one.”⁵⁸⁰ CLS’s contention that “ ‘peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext’ ” may be considered on remand “if, and to the extent, it is preserved.”⁵⁸¹

Concurring, Justice Stevens rejected the dissent’s view that Hastings’ refusal to exempt CLS from its Nondiscrimination Policy was religious discrimination. While “the *First Amendment* may protect CLS’s discriminatory practices off campus, it does not require a public university to validate or support them.”⁵⁸² Although a free society must “tolerate” groups who “mistreat Jews, blacks, and women,” or in this case, homosexuals, “[i]t need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.”⁵⁸³

Concurring, Justice Kennedy noted that broad diversity in RSOs advanced by the all-comers policy promotes professional, “vibrant dialogue” in a law school.⁵⁸⁴ However, CLS would have a substantial claim if it could show that Hastings “adopted or enforced its policy with the intent or purpose of discriminating or disadvantaging a group on account of its views” or “that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views.”⁵⁸⁵

Justice Alito dissented, joined by Chief Justice Roberts and Justices Scalia and Thomas. “The proudest boast of our free speech jurisprudence is that we protect the

Rowley, 458 U.S. 176, 206 (1988)).

⁵⁷³ *Id.* at 2989-90.

⁵⁷⁴ *Id.* at 2990 (quoting App. 349).

⁵⁷⁵ *Id.* at 2992.

⁵⁷⁶ *Id.* (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 808 (1985)).

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.* at 2993.

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.* at 2993 n.26.

⁵⁸¹ *Id.* at 2995 (quoting Reply Brief 23).

⁵⁸² *Id.* at 2996.

⁵⁸³ *Id.* at 2998.

⁵⁸⁴ *Id.* at 3000.

⁵⁸⁵ *Id.*

freedom to express ‘the thought that we hate.’ ”⁵⁸⁶ However, today’s decision denies protection for speech “that offends prevailing standards of political correctness in our country’s institutions of higher learner.”⁵⁸⁷ Currently, Hastings recognizes over 60 RSOs; CLS is the only organization that Hastings has ever been denied RSO status. Contrary to the majority’s suggestion, the all-comers policy is not viewpoint neutral; instead, it is “a pretext to justify viewpoint discrimination.”⁵⁸⁸ Overwhelming evidence establishes that CLS was denied RSO status under the school’s Nondiscrimination Policy, not the accept-all-comers policy, which first surfaced when a former dean discussed it in a deposition in this case. Before the accept-all-comers policy was unveiled in July 2005, Hastings routinely registered student organizations whose bylaws limited “membership and leadership positions to those who agreed with the groups’ viewpoints.”⁵⁸⁹ The majority refused to focus on the Nondiscrimination Policy as both sides have stipulated to the existence of the all-comers policy. However, CLS did not stipulate that its application had been denied under the accept-all-comers policy or that it even existed in fall, 2004. The majority did not recognize the binding effect of the answer which admitted that the all-comers policy did not exist when CLS was denied recognition.

Although the majority stated that CLS had access to school facilities, CLS was given access only if registered organizations were not using them and was occasionally required to pay, treatment common among other community groups. Moreover, CLS did not flourish after losing RSO status; in the fall of 2005, CLS had seven members.

Refusing registration because CLS’s “bylaws impermissibly discriminated on the basis of religion and sexual orientation” constituted viewpoint discrimination on both grounds.⁵⁹⁰ Animal rights groups could deny membership to students who advocated animal testing for cosmetics, but CLS is “required to admit avowed atheists.”⁵⁹¹

To encourage diversity, Hastings could permit groups of students, no matter how small, to form the groups they want. “In sum, Hastings’ accept-all-comers policy is not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints ‘among’ -- not within -- ‘registered student organization.’ ”⁵⁹²

Since the “ ‘argument that Hastings selectively enforces its all-comer policy’ ” was not addressed in the lower courts, the Court could sidestep this issue by remanding it to the Ninth Circuit.⁵⁹³ Denigrating free speech, the Court’s holding “permits small unpopular groups to be taken over by students who wish to change the views that the group expresses.”

⁵⁸⁶ *Id.* (quoting *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929)).

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 3001.

⁵⁸⁹ *Id.* at 3004. The Association of Trial Lawyers of America at Hastings required each member to “ ‘adhere to the objectives of the Student Chapter as well as the mission of ATLA.’ ” *Id.* (quoting App. to Pet. for Cert. at 110a). Also, student voting membership of Silenced Right was limited to those who “ ‘are committed’ to the group’s ‘mission’ of ‘spread[ing] the pro-life message.’ ” *Id.* (quoting App. to Pet for Cert. at 142a-143a).

⁵⁹⁰ 130 S. Ct. at 3010.

⁵⁹¹ *Id.*

⁵⁹² *Id.* at 3016 (quoting App. 216).

⁵⁹³ *Id.* at 3018 (quoting 130 S. Ct. at 2995). This is an ante cite.

Chapter 16

SPECIAL DOCTRINES IN THE SYSTEM OF FREEDOM OF EXPRESSION

§ 16.01 EXPRESSIVE CONDUCT

Page 636: Insert the following after *United States v. Eichman*.

In *Nevada Commission on Ethics v. Carrigan*,⁵⁹⁴ the Court upheld against an overbreadth challenge a recusal provision that prohibited a public official from voting upon or “ ‘advocat[ing] the passage or failure’ ”⁵⁹⁵ of a proposal in which he has a conflict of interest. Writing for the Court, Justice Scalia referenced a tradition of similarly “ ‘applicable conflict-of-interest recusal rules’ ” which “ ‘creates a strong presumption’ ”⁵⁹⁶ of constitutionality. For example, recusal rules applicable to federal judges have been in place since the establishment of the courts. State common-law rules also “ ‘have long required recusal of public officials with a conflict.’ ”⁵⁹⁷ Moreover, “ ‘virtually every State has enacted some type of recusal law, many of which, not unlike Nevada’s, require public officials to abstain from voting on all matters presenting a conflict of interest.’ ”⁵⁹⁸ Legislators’ votes were non-expressive conduct “ ‘engaged in for an independent governmental purpose,’ ”⁵⁹⁹ because the voting power “ ‘is not personal to the legislator but belongs to the people.’ ”⁶⁰⁰ Therefore, voting by legislators does not warrant First Amendment protection.

Justice Kennedy concurred but expressed concern that “[t]he statute may well impose substantial burdens on what undoubtedly is speech.”⁶⁰¹ He questioned “[t]he constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter” because of the “ ‘logical and inevitable burden on speech and association that preceded the vote.’ ”⁶⁰²

Justice Alito concurred stating that conflict-of-interest recusal rules were permissible restrictions since the “ ‘founding era.’ ” However, he disagreed with the Court’s notion that “[a] legislative vote is not speech” when it expresses a view favored by constituents but not shared by the legislator himself, because “ ‘the same is sometimes true of legislators’ speeches,’ ”⁶⁰³ which are considered protected speech.

⁵⁹⁴ 131 S. Ct. 2343 (2011).

⁵⁹⁵ *Id.* at 2346.

⁵⁹⁶ *Id.* at 2347-48.

⁵⁹⁷ *Id.* at 2349.

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.* at 2350-51.

⁶⁰⁰ *Id.* at 2350.

⁶⁰¹ *Id.* at 2352.

⁶⁰² *Id.* at 2353.

⁶⁰³ *Id.* at 2354.

§ 16.02 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)*,⁶⁰⁴ 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.⁶⁰⁵ 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*,⁶⁰⁶ 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.”⁶⁰⁷ 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.”⁶⁰⁸

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.”⁶⁰⁹

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.”⁶¹⁰ 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.”⁶¹¹

The Chief Justice also rejected Justice Scalia’s criticism that his “*no reasonable*

⁶⁰⁴ 551 U.S. 449 (2007).

⁶⁰⁵ *Id.* at 457.

⁶⁰⁶ 540 U.S. 93 (2003).

⁶⁰⁷ 127 S. Ct. at 2659.

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* at 2663.

⁶¹⁰ *Id.* at 2667.

⁶¹¹ *Id.*

interpretation” test is vague. He said that “in a debatable case, the tie is resolved in favor of protecting speech.”⁶¹²

The government argued “that an expansive definition of ‘functional equivalent’” is necessary to prevent issue advocacy from circumventing “the rule against express advocacy.”⁶¹³ 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.”⁶¹⁴ However, “the interest recognized in *Austin*⁶¹⁵ as justifying regulation of corporate campaign speech” does not apply “to issue advocacy.”⁶¹⁶

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.”⁶¹⁷ 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.”⁶¹⁸

Justice Alito’s concurrence predicted that if the Court’s test as laid out “impermissibly chills political speech,” then the Court might reconsider *McConnell*.⁶¹⁹

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*).”⁶²⁰ He would reconsider *McConnell* as it forces the Court to make “issue-speech from election-speech with no clear criterion.”⁶²¹

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.”⁶²² 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.”⁶²³

⁶¹² *Id.* at note 7.

⁶¹³ *Id.* at 2672.

⁶¹⁴ *Id.*

⁶¹⁵ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

⁶¹⁶ 127 S. Ct. 2672.

⁶¹⁷ *Id.* at 2673.

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

⁶²⁰ *Id.* at 2675.

⁶²¹ *Id.* at 2687.

⁶²² *Id.* at 2689.

⁶²³ *Id.* at 2705.

Page 652: [Insert the following after *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.* (which follows *McConnell v. Fed. Election Comm'n* that starts at page 646)]

In *Citizens United v. Federal Election Commission*, the Supreme Court struck down a federal law that prohibited corporations and unions from using general treasury funds to make independent expenditures for “ ‘electioneering communication’ ” or for speech expressly advocating the election or defeat of a candidate.⁶²⁴ The Court also overturned *Austin v. Michigan Chamber of Commerce* and the portion of *McConnell v. Federal Election Commission* which upheld limits on corporate electioneering communications. However, the Court upheld disclaimer and disclosure requirements on corporate political speech.

Citizens United released a film in 2008 that criticized Senator Hillary Clinton, entitled *Hillary: The Movie*. The organization received most of its funds from individuals, but in addition accepted a small portion from for-profit corporations. Citizens United sought to pay to make its film available through video-on-demand within 30 days of the 2008 primary election, which would have violated the restrictions on corporate expenditures. The Supreme Court requested reargument from the parties to determine whether to overturn *Austin* and that portion of *McConnell* upholding against a facial challenge the prohibition on corporate expenditures, § 441b. The Court allowed a facial challenge because the distinction between facial and as-applied challenges was “not so well defined.”⁶²⁵ Answering solely an as-applied challenge would prolong the chilling effect of § 441b on corporate expenditures. Corporations fearing the possibility of civil and criminal penalties would either have to refrain from speaking or request an advisory opinion from the FEC. This was an “unprecedented governmental intervention into the realm of speech.”⁶²⁶

Section 441b punished by felony any corporation, even nonprofit advocacy corporations, that broadcasted electioneering communications or expressly advocated for or against a candidate within 30 days of a primary election and 60 days of a general election. The statute’s exception for a corporation’s PAC did “not alleviate the *First Amendment* problems,” for “PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.”⁶²⁷ As an indication of this, “fewer than 2,000 of the millions of corporations in this country have PACs.”⁶²⁸

Writing for the majority, Justice Kennedy said that laws that burden political speech require strict scrutiny *viz.* proof that the restriction “ ‘furthers a compelling

⁶²⁴ 130 S. Ct. 876, 886 (2010).

⁶²⁵ *Citizens United*, 130 S. Ct. at 893.

⁶²⁶ *Id.* at 896.

⁶²⁷ *Id.* at 897. Every PAC must file an organizational statement and detailed monthly reports with the FEC. Also, each required a treasurer who receives donations, keeps detailed records of the donations and the identity of donors, and preserves receipts for three years.

⁶²⁸ *Id.*

interest and is narrowly tailored to achieve that interest.’ ”⁶²⁹ *Bellotti* recognized that the *First Amendment* extends protection to corporations. *Bellotti* struck down a ban of independent corporate expenditures on referenda, but did not address state bans on independent expenditures to support or oppose candidates. *Austin* upheld such a ban, finding a compelling governmental interest in preventing “ ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’ ”⁶³⁰

Austin and its progeny collided with pre-*Austin* precedent that prohibited speech restrictions based on the speaker’s corporate identity. *Austin*’s reasoning would allow the government to prohibit a corporation from printing books expressing political views. Justice Kennedy noted that the Government’s arguments did little to defend *Austin*’s antidistortion of wealth rationale. *Buckley* explicitly denied the antidistortion rationale by rejecting that the government had an interest in equalizing the ability to influence elections. The *Austin* majority distinguished corporations from wealthy individuals on the ground that state law afforded the corporate structure special financial advantages. However, “ ‘the State cannot exact as the price of those special advantages the forfeiture of *First Amendment* rights.’ ”⁶³¹ Also, it is irrelevant for First Amendment purposes that corporate funds are amassed without regard to public support for the corporation’s political ideas.

While some media corporations have “ ‘immense aggregations of wealth,’ ” they are all exempt from § 441b.⁶³² This exemption also applied to corporations consisting of both a media business and an unrelated business. Greater influence over government officials does not necessarily entail corruption. “ ‘Favoritism and influence are not . . . avoidable in representative politics.’ ”⁶³³ Moreover, the Government’s other asserted interest in protecting dissenting shareholders from funding political speech could even ban the political speech of media corporations. The statute is underinclusive in protecting dissenting shareholders because it only prohibits speech within 30 or 60 days of an election. The statute is overinclusive by covering all corporations, including nonprofit and single-shareholder corporations. The Court did not address whether the Government has a compelling interest in preventing foreign individuals or entities from influencing domestic politics.

The Court determined whether to adhere to *stare decisis* based on the precedent’s workability, antiquity, “ ‘the reliance interests at stake, and of course whether the decision was well reasoned.’ ”⁶³⁴ As neither party defended *Austin*’s rationale, the pull of *stare decisis* diminishes. Apparently, § 441b would prohibit a corporate blog post. “The *First Amendment* does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”⁶³⁵

⁶²⁹ *Federal Election Commission v. Wisconsin Right to Life (WRTL)*, 551 U.S. 449, 464 (2007).

⁶³⁰ *Citizens United*, 130 S. Ct. at 903.

⁶³¹ *Id.* at 905.

⁶³² *Id.*

⁶³³ *Id.* at 910.

⁶³⁴ *Id.* at 912

⁶³⁵ *Id.*

Moreover, no serious reliance interest is at stake.

The Court overruled *Austin* and returned to the principle of *Buckley* and *Bellotti* that the Government cannot suppress political speech because of the speaker's corporate identity. Section 441b's ban on independent corporate expenditures is invalid and cannot be applied to the film *Hillary*. The Court thus overruled that part of *McConnell*.

Citizens United also challenged the FEC's disclaimer and disclosure requirements. BCRA § 311 requires independent electioneering communications to include a statement disclaiming candidate authorization and also provides the name and address or website address of the person or group funding the communication. Under BCRA § 201 organizations must also file FEC statements disclosing the person making the expenditure, the amount, the election to which it is directed, and the names of certain contributors. *Buckley* subjects disclosure and disclaimer "requirements to 'exact[ing] scrutiny,' which require[s] a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."⁶³⁶ Disclosures are justified based on a governmental interest in " 'provid[ing] the electorate with information' about the sources of election-related spending."⁶³⁷ *McConnell* used this interest to reject facial challenges to BCRA §§ 201 and 311. Disclosure helped to identify groups running advertisements using " ' "dubious and misleading names." ' " ⁶³⁸

As-applied challenges to disclosure requirements would succeed if a group showed a " ' "reasonable probability" ' that disclosure of its contributors' names ' "will subject them to threats, harassment, or reprisals from either Government officials or private parties." ' " ⁶³⁹ Justice Kennedy also rejected Citizens United's argument that § 311 was underinclusive because its required disclaimer, that the advertisement was not produced by a party or candidate, did not apply to print or Internet advertising. Disclosures in the era of modern technology and the Internet can provide rapid information that shareholders and citizens need to hold corporations and elected officials accountable. The Court upheld BCRA §§ 201 and 311, and affirmed their application to *Hillary*.

Chief Justice Roberts concurred, joined by Justice Alito. Regardless of whether the Court labeled Citizens United's challenge " 'facial' or 'as-applied,' " the consequences are the same.⁶⁴⁰ Chief Justice Roberts termed *stare decisis* a " 'principle of policy.' " ⁶⁴¹ The Court should be more willing to depart from a precedent that does more damage than good to the orderly development of the law. First, *Austin* was inconsistent with *Buckley's* "explicit repudiation" of a governmental interest in equalizing the ability to influence elections.⁶⁴² It was also inconsistent with *Bellotti*. Second, *Austin* has been consistently disputed within this Court, which undermines "the precedent's ability to contribute to the stable and orderly development of the law."⁶⁴³ Moreover, *Austin* is

⁶³⁶ *Id.* at 914.

⁶³⁷ *Id.* at 914.

⁶³⁸ *Id.*

⁶³⁹ *Id.*

⁶⁴⁰ *Id.* at 919.

⁶⁴¹ *Id.* at 920.

⁶⁴² *Id.* at 921.

⁶⁴³ *Id.* at 922.

“uniquely destabilizing” by threatening to subvert decisions outside corporate speech. Its logic would authorize broad prohibition of political speech in the name of equality.⁶⁴⁴ The Government’s arguments to reaffirm *Austin* were “radically reconceptualizing its reasoning,” and thus these new arguments are not entitled to the special deference given to precedent.⁶⁴⁵

Justice Scalia filed a concurrence, in which Justice Alito joined and Justice Thomas joined in part. The dissent argued that the original understanding of the First Amendment does not support this decision. However, even if the Founders disliked founding-era corporations and it was proper to exclude from First Amendment coverage what the Founders disliked, modern corporations might not be excluded. Most of the Founders’ resentment applied to corporations with state-granted monopolies.

Justice Stevens dissented in part, joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Stevens concurred with the Court’s decision to uphold BCRA’s disclosure provisions. The real issue is not if, but how, Citizens United may finance its electioneering. Citizens United, a wealthy nonprofit with millions of dollars in assets, could have spent unrestricted sums to broadcast *Hillary* at any time other than 30 days before the primary election. This ruling “threatens to undermine the integrity of elected institutions across the Nation.”⁶⁴⁶

Justice Stevens disagreed with treating this case as a facial challenge. The Court has “repeatedly emphasized in recent years that ‘[f]acial challenges are disfavored.’”⁶⁴⁷ The Court here negates Congress’ efforts to combat corruption where previous legislation failed, and overrules a “virtual mountain of research” without any evidence except how the law affects Citizens United. The Court taking free reign to construe litigants’ claims would upend not only the distinction between as-applied and facial challenges, but the basic relationship between litigants and courts. There were narrower grounds to decide this case. “[T]he Court could have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an ‘electioneering communication’ ” under § 441b.⁶⁴⁸ Also, “the Court could have expanded the *MCFL* exemption to cover § 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations.”⁶⁴⁹

The Court’s central argument for trumping *stare decisis* “is that it does not like *Austin*.”⁶⁵⁰ The majority’s arguments against *stare decisis* say almost nothing about the Court’s standard considerations of the precedent’s antiquity, workability, and the reliance interests at stake. “*Austin* has been on the books for two decades, and many of the statutes called into question by today’s opinion have been on the books for a half-century or more.”⁶⁵¹ The Court also offers no argument that *Austin* and *McConnell* are unworkable. Moreover, more than half of the States, along with leading groups in the nonprofit sector,

⁶⁴⁴ *Id.* at 922.

⁶⁴⁵ *Id.* at 924.

⁶⁴⁶ *Id.* at 931.

⁶⁴⁷ *Id.* at 932.

⁶⁴⁸ *Id.* at 937.

⁶⁴⁹ *Id.*

⁶⁵⁰ *Id.* at 938.

⁶⁵¹ *Id.* at 941.

business, and organized labor, seek to preserve *Austin*, including the United States Chamber of Commerce and the AFL-CIO. This ruling “strikes at the vitals of *stare decisis*,” for the “majority opinion is essentially an amalgamation of resuscitated dissents,” and the “only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court.”⁶⁵²

Under § 441b there are many options for corporate political speech. Corporate and union PACs in the last election cycle raised nearly a billion dollars. Corporations with a common ideology can make unlimited expenditures through an *MCFL* organization which ensures that it remains free from business or union interests. Corporations can spend unlimited sums to communicate to executives and shareholders, “fund additional PAC activity through trade associations, to distribute voting guides and voting records, to underwrite voter registration and voter turnout activities, to host fundraising events for candidates within certain limits, and to publicly endorse candidates through a press release and press conference.”⁶⁵³ Existing law only prohibits speech by a labor union or a non-MCFL, nonmedia corporation if it was a broadcast, cable, or satellite communication that could reach 50,000 persons in the relevant electorate, was made within 30 days of a primary or 60 days of a general federal election, was paid for with general treasury funds, and was “ ‘susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.’ ”⁶⁵⁴

It has long been recognized that corporations have the “distinctive potential” to corrupt the electoral process.⁶⁵⁵ Moreover, within campaign finance, corporate spending is “ ‘furthest from the core of political expression, since corporations’ *First Amendment* speech and association interests are derived largely from those of their members and of the public in receiving information.’ ”⁶⁵⁶

Justice Scalia’s concurrence does not dislodge the argument that the founding generation cautiously viewed corporate power, narrowly viewed corporate rights, and “conceptualized speech in individualistic terms.”⁶⁵⁷ Justice Scalia “emphasizes the unqualified nature of the *First Amendment* text,” but to be able to claim that views on newspapers must track those on corporations he seemingly read out the Free Press Clause.⁶⁵⁸

In 1907 Congress made an express distinction between corporate and individual spending on elections, banning all corporate contributions to federal candidates by the Tillman Act. In *McConnell* we found corporate spending restrictions “faithful to the compelling governmental interests in ‘ ‘preserving the integrity of the electoral process, preventing corruption,’ ’ ” and sustaining confidence in government and the individual citizen’s active, alert responsibility that is necessary to secure wise conduct in a

⁶⁵² *Id.* at 942.

⁶⁵³ *Id.* at 944.

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.* at 947.

⁶⁵⁶ *Id.*

⁶⁵⁷ *Id.* at 951.

⁶⁵⁸ *Id.*

democratic government.⁶⁵⁹ Corporations' option to form PACs made the answer even easier.

Bellotti dealt with dramatically different facts than *Austin*. The statute challenged in *Bellotti* barred a business corporation “ ‘from making contributions or expenditures “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.” ’ ”⁶⁶⁰ The statute even labeled income taxation as not materially affecting the assets of the corporation, for the legislature had enacted the statute to limit corporate speech on a proposed state constitutional amendment that authorized a graduated income tax. The statute also did not allow corporations to spend through PACs. All six Members of the *Austin* majority were on the Court for *Bellotti*, and none even hinted at a tension between the decisions.

Corruption can take many forms, as the congressional record for the BCRA shows. The BCRA legislative and judicial “ ‘record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.’ ”⁶⁶¹ There is no such record here because “the Government had no reason to develop a record at trial for a facial challenge the plaintiff had abandoned.”⁶⁶² Members of the Court suggested in *McConnell* that the BCRA “may be little more than ‘an incumbency protection plan,’ ” however there is an absence of evidence in the record of “ ‘invidious discrimination against challengers.’ ”⁶⁶³

Who is speaking when a corporation publishes an advertisement? The officers or directors hold the best claim, for it is not the customers or employees, nor the shareholders who are removed from day-to-day decisions. Recognizing the weakness of arguing for the corporation’s “right to electioneer,” the majority emphasizes the listener interests.⁶⁶⁴ If the audience’s interest is overriding, then “the public’s perception of the value of corporate speech should be given important weight.”⁶⁶⁵

The majority “raised some interesting and difficult questions about Congress’ authority to regulate electioneering by the press.”⁶⁶⁶ However, “*that is not the case before us.*”⁶⁶⁷ The holding does not protect shareholders from coerced speech, which PACs do by assuring that those who pay for an electioneering communication will actually support its content.

Justice Thomas concurred in part and dissented in part. He would invalidate the disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311. “Congress may not abridge the ‘right to anonymous speech’ based on the ‘ ‘simple interest in

⁶⁵⁹ *Id.* at 957.

⁶⁶⁰ *Id.* at 959.

⁶⁶¹ *Id.* at 966. In *Caperton* the Court accepted that, “at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption.” *Id.* at 967.

⁶⁶² *Id.* at 966-967.

⁶⁶³ *Id.* at 968.

⁶⁶⁴ *Id.* at 973.

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.* at 976.

⁶⁶⁷ *Id.*

providing voters with additional relevant information.” ’ ’⁶⁶⁸ He also noted “the threat of retaliation from *elected officials*.”⁶⁶⁹

Page 1072: Insert the following after *Buckley v. Valeo*:

In *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, the Court held that “Arizona’s matching funds scheme substantially burdens protected political speech without serving a compelling state interest.”⁶⁷⁰ Arizona granted publicly funded candidates “additional ‘equalizing’ or matching funds” in both primary and general elections.⁶⁷¹ “During the general election, matching funds were triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate,” are more than “the general election allotment of state funds to the publicly financed candidate.”⁶⁷² Once that occurred, “every dollar that a candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign” triggered “an almost one dollar increase in public funding to each of the publicly financed candidates.”⁶⁷³ Moreover, additional expenditures by independent groups can result in dollar-for-dollar matching funds as well.”⁶⁷⁴ But, “[t]he matching funds provision is not activated . . . when independent expenditures are made in opposition to a privately financed candidate.”⁶⁷⁵ Such funds would “top out at two times the initial authorized grant of public funding to the publicly financed candidate.”⁶⁷⁶

Chief Justice Roberts delivered the opinion (5-4) of the Court. In the similar case of *Davis v. Federal Election Comm’n*,⁶⁷⁷ the law at issue provided that “if a candidate for the United States House of Representatives spent more than \$350,000 of his personal funds,” limits on contributions to opponents’ campaigns trebled from \$2300 to \$6900.⁶⁷⁸ “If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well.”⁶⁷⁹ If anything, the differences between the laws made “the Arizona law *more* constitutionally problematic, not less.”⁶⁸⁰

The first difference was that while “the penalty in *Davis* consisted of raising the contribution limits for one of the candidates,” the benefited candidate “still had to go out and raise” that money.⁶⁸¹ “Second, depending on the specifics of the election at issue,

⁶⁶⁸ *Id.* at 980. (Thomas, J., concurring in part and dissenting in part). Some opponents of California’s Proposition 8 on banning same-sex marriage “compiled contributors’ information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result.” *Id.*

⁶⁶⁹ *Id.* at 981.

⁶⁷⁰ *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

⁶⁷¹ *Id.* at 2814.

⁶⁷² *Id.*

⁶⁷³ *Id.*

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.*

⁶⁷⁶ *Id.* at 2815-16.

⁶⁷⁷ *Davis v. Federal Election Comm’n*, 554 U.S. 724, 729 (2008).

⁶⁷⁸ *Bennett*, 131 S. Ct. at 2817.

⁶⁷⁹ *Id.* at 2818.

⁶⁸⁰ *Id.*

⁶⁸¹ *Id.*

the matching funds provision can create a multiplier effect” as each dollar spent could fund multiple publicly funded candidates.⁶⁸² Third, all spending by independent groups, “whether such support was welcome or helpful – could trigger matching funds.”⁶⁸³ This “disparity in control—giving money directly to a publicly financed candidate . . . is “a substantial advantage for the publicly funded candidate.”⁶⁸⁴

Consequently, “the burdens that this regime places on independent expenditure groups are akin to those imposed on the privately financed candidates themselves.”⁶⁸⁵ Like the privately financed candidate, “spending one dollar can result in the flow of dollars to multiple candidates the group disproves of.”⁶⁸⁶ However, “[i]n some ways, the burden the Arizona law imposes on independent expenditure groups is “worse than the burden it imposes on privately financed candidates.”⁶⁸⁷ A candidate “at least has the option of taking public financing” unlike independent expenditure groups.⁶⁸⁸

The Court rejected the State’s argument that “the matching funds provision actually results in more speech.”⁶⁸⁹ Instead, “[a]ny increase in speech resulting from the Arizona law is “of one kind and one kind only—that of publicly financed candidates.”⁶⁹⁰ This increase came at the expense of “privately financed candidates and independent expenditure groups” as the law decreased their speech.⁶⁹¹ The Court has “rejected government efforts to increase the speech of some at the expense of others.”⁶⁹² Chief Justice Roberts continued: “It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic,” but the manner of that funding “in direct response to the political speech of privately financed candidates and independent expenditure groups.”⁶⁹³

As the law “imposes a substantial burden on the speech,” it must be “ ‘justified by a compelling state interest.’ ”⁶⁹⁴ Arizona argued that the law was designed to “ ‘level the playing field.’ ”⁶⁹⁵ However, *Buckley* declared that “limits on overall campaign expenditures could not be justified by a purported government ‘interest in equalizing the financial resources of candidates.’ ”⁶⁹⁶ Moreover, “even if the ultimate objective of the matching funds provision is to combat corruption—and not ‘level the playing field’—the burdens that the matching funds provision imposes on protected political speech are not justified.”⁶⁹⁷

⁶⁸² *Id.* at 2819.

⁶⁸³ *Id.*

⁶⁸⁴ *Id.*

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.*

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.*

⁶⁸⁹ *Id.* at 2820.

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.* at 2821.

⁶⁹² *Id.*

⁶⁹³ *Id.* at 2824.

⁶⁹⁴ *Id.*

⁶⁹⁵ *Id.* at 2825.

⁶⁹⁶ *Buckley v. Valeo*, 424 U.S. 1, 56 (1976).

⁶⁹⁷ *Bennett*, 131 S. Ct. at 2826.

Lastly, the Court made clear that it was not calling “into question the wisdom of public financing.”⁶⁹⁸ However, the way government “chooses to encourage participation in its public funding system matters.”⁶⁹⁹

Justice Kagan dissented, joined by Justices Ginsberg, Breyer, and Sotomayor. “Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system. If an officeholder owes his election to wealthy contributors, he may act for their benefit alone, rather than on behalf of all” constituents.⁷⁰⁰

That is why nearly “one-third of the States have adopted some form of public financing.”⁷⁰¹ Congress viewed public financing for presidential elections as the only way to eliminate the “danger of corruption, while still ensuring that a wide range of candidates had access to the ballot.”⁷⁰² The presidential public financing system involves a “lump-sum grant at the beginning of the election cycle,” and *Buckley* declared that scheme constitutional.⁷⁰³ Justice Kagan noted that “the dynamic nature of our electoral system makes *ex ante* predictions about campaign expenditures almost impossible. And that creates a chronic problem for lump-sum public financing programs.”⁷⁰⁴ Thus, the Arizona “program’s designers found the Goldilocks solution, which produces the ‘just right’ grant to ensure that a participant in the system has the funds needed to run a competitive race.”⁷⁰⁵ Moreover, in response to the majority opinion that the Act inhibits expenditure groups, Justice Kagan noted that “expenditures by these groups have risen by 253% since Arizona’s law was enacted.”⁷⁰⁶

Under the Arizona scheme, “[o]nce the publicly financed candidate has received three times the amount of the initial disbursement, he gets no further public funding, and remains “barred from receiving private contributions, no matter how much more his privately funded opponent spends.”⁷⁰⁷ But still, the Arizona statute “subsidizes and so produces *more* political speech.”⁷⁰⁸ Thus, “what petitioners demand is essentially a right to quash others’ speech through the prohibition of a (universally available) subsidy program.”⁷⁰⁹

In upholding “the presidential public financing system,” *Buckley* rejected the principal challenge to that system which “came from minor-party candidates not eligible for benefits.”⁷¹⁰ The Court “rejected that attack in part because we understood the federal

⁶⁹⁸ *Id.* at 2828.

⁶⁹⁹ *Id.*

⁷⁰⁰ *Bennett*, 131 S. Ct. at 2830 (Kagan, J., dissenting).

⁷⁰¹ *Id.*

⁷⁰² *Id.* at 2831.

⁷⁰³ *Id.*

⁷⁰⁴ *Id.* at 2832.

⁷⁰⁵ *Id.*

⁷⁰⁶ *Id.* at 2834. (Footnote 5 of the dissent)

⁷⁰⁷ *Id.* at 2832-33.

⁷⁰⁸ *Id.* at 2833.

⁷⁰⁹ *Id.* at 2835.

⁷¹⁰ *Id.* at 2836.

program as supporting, rather than interfering with, expression.”⁷¹¹ The “very notion that additional speech constitutes a ‘burden’ is odd and unsettling.”⁷¹² The Court has “never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden.”⁷¹³

The District Court had found that “petitioners had presented only ‘vague’ and ‘scattered’ evidence of the law’s deterrent impact.”⁷¹⁴ Even the lump-sum system upheld in *Buckley* “may deter speech.”⁷¹⁵ Moreover, this Court has repeatedly upheld “disclosure and disclaimer requirements” despite their deterrent effects on campaign speech.⁷¹⁶ Furthermore “[a]ny burden that the Arizona law imposes does not exceed the burden associated with contribution limits, which we have also repeatedly upheld.”⁷¹⁷ Thus, “the Court errs in holding that the government action in this case substantially burdens speech,” and besides, “[p]reventing corruption or the appearance of corruption is a compelling government interest.”⁷¹⁸

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

In *Davenport v. Wash. Educ. Ass’n*,⁷¹⁹ 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.*⁷²⁰ *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*,⁷²¹ 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

⁷¹¹ *Id.*

⁷¹² *Id.*

⁷¹³ *Id.* at 2837.

⁷¹⁴ *Id.* at 2837. (Footnote 6 of dissent)

⁷¹⁵ *Id.* at 2838.

⁷¹⁶ *Id.*

⁷¹⁷ *Id.*

⁷¹⁸ *Id.* at 2841.

⁷¹⁹ 127 S. Ct. 2372 (2007).

⁷²⁰ 431 U.S. 209 (1977).

⁷²¹ 126 S. Ct. 2479 (2006).

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.⁷²² 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.”⁷²³

First, Justice Breyer relied on *Buckley v. Valeo*⁷²⁴ 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 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”⁷²⁵ contribution limits. Fourth, the contribution limits were not indexed for inflation. Fifth, no “special justification”⁷²⁶ legitimates these low contribution limits. Therefore, the plurality found that the statute was not “narrowly” tailored and “disproportionately burden[ed] numerous First Amendment interests.”⁷²⁷ The plurality concluded that severing part of the limits from the statute was not possible.⁷²⁸

Four Justices concurred in the judgment but disagreed with various parts of the

⁷²² 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.

⁷²³ *Id.*

⁷²⁴ 424 U.S. 1 (1976).

⁷²⁵ *Randall*, 126 S. Ct. at 2498.

⁷²⁶ *Id.* at 2499.

⁷²⁷ *Id.* at 2500.

⁷²⁸ 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.*

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 struck down expenditure limits as Justice White's dissent in *Buckley* recognized, "it is quite wrong to equate money and speech."⁷²⁹ 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 646: [Insert the following before *Brown v. Hartlage*]

*Ysursa v. Pocatello Educ. Ass'n*⁷³⁰ upheld a law allowing a public employee to direct his employer to deduct funds from his wages for remittance as union dues, but prohibiting deductions for the union's political action committee. The state law also prohibited "payroll deductions for political activities."⁷³¹ Chief Justice Roberts found the law did not affect political speech, but rather declined to promote it "by allowing public employee checkoffs for political activities."⁷³²

Justice Ginsburg concurred in part and concurred in the judgment. Justice Breyer dissented, noting that stopping one avenue of funding at least indirectly affected speech. Justice Souter also dissented, citing a "reasonable suspicion of viewpoint discrimination"⁷³³ against union speech. Justice Stevens dissented on statutory grounds.

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

In *Davis v. Federal Election Commission*,⁷³⁴ 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-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

⁷²⁹ *Id.* at 2508.

⁷³⁰ 129 S. Ct. 1093 (2009).

⁷³¹ *Id.* at 1096.

⁷³² *Id.* at 1096.

⁷³³ *Id.* at 1109.

⁷³⁴ 128 S. Ct. 2759 (2008).

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*.⁷³⁵ Even those limits, however, must be “‘closely drawn’ to serve a ‘sufficiently important interest.’”⁷³⁶ 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”⁷³⁷ 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.⁷³⁸ 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 BCRA simply reduced the inequality between non-self-financing candidates and their self-financing opponents. In his *Buckley* dissent, Justice White explained that such

⁷³⁵ 424 U.S. 1 (1976).

⁷³⁶ *Davis*, 128 S. Ct. at 2770.

⁷³⁷ *Id.* at 2772.

⁷³⁸ *Id.* at 2775.

limitations are comparable to “time, place, and manner regulations,” rather than direct limitations on speech.⁷³⁹ Justice Stevens noted that quantity limitations are common in other situations involving “high-value speech,”⁷⁴⁰ 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*.

§ 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*,⁷⁴¹ 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”⁷⁴² 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

⁷³⁹ *Buckley*, 424 U.S. at 264.

⁷⁴⁰ *Davis*, 128 S. Ct. at 2779.

⁷⁴¹ 546 U.S. 47 (2006)

⁷⁴² *Id.* at 51.

that “judicial deference . . . is at its apogee when Congress legislates under its authority to raise and support armies.”⁷⁴³ 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.’”⁷⁴⁴ 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.”⁷⁴⁵ *United States v. O’Brien*⁷⁴⁶ 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 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*,⁷⁴⁷ 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.

§ 16.04 COMMERCIAL SPEECH

[1] Protection for Commercial Speech: General Principles

Page 671: Insert the following after *Thompson v. Western States Medical Center*

⁷⁴³ *Id.* at 56.

⁷⁴⁴ *Id.* at 61 (Quoting *Wooley v. Maynard*, 430 U.S. 705 (1977)).

⁷⁴⁵ 547 U.S. at 66.

⁷⁴⁶ 391 U.S. 367 (1968).

⁷⁴⁷ 530 U.S. 640 (2000).

In *Sorrell v. IMS Health, Inc.*,⁷⁴⁸ the Court invalidated a Vermont statute that “restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors.”⁷⁴⁹ Absent the prescriber’s consent, this “prescriber-identifying information” could “not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers.”⁷⁵⁰

Writing for the majority, Justice Kennedy found that a clear purpose behind the statute was to combat the marketing practice of “detailing.” Detailing entails the sale of prescriber-identifying information, which pharmaceutical manufacturers use for marketing their brand-name drugs. The Vermont statute possessed an evident “counter-detailing” intent, which sought “to promote the use of generic pharmaceuticals.”⁷⁵¹ The legislative findings “confirm that the law’s express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs” because “detailers, in particular those who promote brand-name drugs, convey messages that ‘are often in conflict with the goals of the state.’”⁷⁵²

Vermont’s statute “disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers.”⁷⁵³ Consequently, the statute “ ‘goes even beyond mere content discrimination, to actual viewpoint discrimination.’”⁷⁵⁴

The Court rejected the State’s justifications for the law under both a heightened judicial scrutiny and a less restrictive commercial speech test. Under the more lenient commercial speech standard, “the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.”⁷⁵⁵ The purpose behind “these standards ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.”⁷⁵⁶

The State tried to justify the statute based on “medical privacy” and “improved public health and reduced healthcare costs.”⁷⁵⁷ Although it can be understood that “physicians have an interest in keeping their prescription decisions confidential,” Vermont’s law fails “to serve that interest.”⁷⁵⁸ The statute “permits insurers, researchers, journalists, the State itself, and others” to use prescriber-identifying information for any purpose besides marketing.⁷⁵⁹ Moreover, the State did not argue “that detailing is false or misleading.”⁷⁶⁰

⁷⁴⁸ 131 S. Ct. 2653 (2011).

⁷⁴⁹ *Id.* at 2659.

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.* at 2660-61.

⁷⁵² *Id.* at 2661.

⁷⁵³ *Id.* at 2663.

⁷⁵⁴ *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).

⁷⁵⁵ *Id.* at 2667-68.

⁷⁵⁶ *Id.* at 2668.

⁷⁵⁷ *Id.*

⁷⁵⁸ *Id.*

⁷⁵⁹ *Id.*

⁷⁶⁰ *Id.* at 2672.

Technology’s ability to “find and publish personal information” inevitably creates “serious and unresolved” privacy and dignity issues.⁷⁶¹ The State may have had a better argument if the “statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances.”⁷⁶² Vermont “has burdened a form of protected expression that it found too persuasive.”⁷⁶³

Justice Breyer dissented, joined by Justices Ginsburg and Kagan. Justice Breyer would uphold Vermont’s statute because its “effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise.”⁷⁶⁴ Heightened scrutiny was not warranted because free speech precedent “offers considerably less protection to the maintenance of a free marketplace for goods and services.”⁷⁶⁵ Consequently, Justice Breyer would “defer significantly to legislative judgment—as the Court has done in cases involving the Commerce Clause or the Due Process Clause.”⁷⁶⁶ Failure to do so risked, as Justice Rehnquist once said, a “ ‘retur[n] to the bygone era of *Lochner v. New York.*’ ”⁷⁶⁷

Justice Breyer also expressed concern that the majority would extend the same heightened standard to other government regulators, such as the Food and Drug Administration (FDA). Prescriber-identifying information only exists because Vermont’s regulations required it. Before this decision, the Court had “*never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate.”⁷⁶⁸

Many regulatory lines are based on content. Never before had the Court “justified greater scrutiny” on commercial regulations for “ ‘content-based’ ” or “ ‘speaker-based’ ” restrictions.⁷⁶⁹ “The Federal Reserve Board regulates the content of statements, advertising, loan proposals, and interest rate disclosures, but only when made by financial institutions.”⁷⁷⁰ Likewise, “the FDA oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture.”⁷⁷¹

Vermont’s statute would withstand scrutiny under both “*Central Hudson*’s ‘intermediate’ commercial speech standard as well as any more limited ‘economic regulation’ ” standard.⁷⁷² Applying the *Central Hudson* test, Justice Breyer found that the interests of “ ‘protecting the public health’ ” and “ ‘the privacy of prescribers’ ” as well as ensuring “ ‘unbiased information’ ” and low cost, are both “ ‘substantial’ ” and content neutral. Regulating public health lies within the state’s traditional “police powers.”⁷⁷³ Detailing involves “diverting attention from scientific research about a

⁷⁶¹ *Id.*

⁷⁶² *Id.*

⁷⁶³ *Id.*

⁷⁶⁴ *Id.* at 2673.

⁷⁶⁵ *Id.* at 2674.

⁷⁶⁶ *Id.* at 2674-75.

⁷⁶⁷ *Id.* at 2675.

⁷⁶⁸ *Id.* at 2677.

⁷⁶⁹ *Id.*

⁷⁷⁰ *Id.*

⁷⁷¹ *Id.*

⁷⁷² *Id.* at 2679.

⁷⁷³ *Id.* at 2682.

drug's safety and effectiveness, as well as its cost.”⁷⁷⁴ Consequently, “Vermont’s attempts to ensure a ‘fair balance’ of information is no different from the FDA’s similar requirement.”⁷⁷⁵

Vermont’s law “works no more than modest First Amendment harm; the prohibition is justified by the need to ensure unbiased sales presentations, prevent unnecessarily high drug costs, and protect the privacy of prescribing physicians.”⁷⁷⁶ The “regulatory context” here is very important. “At best the Court opens a Pandora’s Box of First Amendment” claims.⁷⁷⁷ “At worst, it reawakens *Lochner’s* pre-New Deal threat of substituting judicial for democratic decisionmaking” in regards to “ordinary economic regulation.”⁷⁷⁸

[2] Lawyer Advertising

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

In *Tennessee Secondary School Athletic Assn. v. Brentwood Academy*,⁷⁷⁹ 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.”⁷⁸⁰ There was a “difference of constitutional dimension” between general advertising to the public and in-person solicitation “in a coercive setting.”⁷⁸¹ The Court relied on *Ohralik v. Ohio State Bar Assn.*,⁷⁸² 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.”⁷⁸³ 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

⁷⁷⁴ *Id.*

⁷⁷⁵ *Id.* at 2682-83.

⁷⁷⁶ *Id.* at 2685.

⁷⁷⁷ *Id.*

⁷⁷⁸ *Id.*

⁷⁷⁹ 127 S. Ct. 2489 (2007).

⁷⁸⁰ *Id.* at 2493.

⁷⁸¹ *Id.*

⁷⁸² 436 U.S. 447 (1978).

⁷⁸³ *Brentwood*, 127 S. Ct. at 2495.

rights,”⁷⁸⁴ 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.

§ 16.05 Obscenity

[1] The Constitutional Standard

Page 1165: Insert the following after *Ashcroft v. The Free Speech Coalition*

In *Brown v. Entertainment Merchants Association*,⁷⁸⁵ the Court invalidated a California law which prohibited “the sale or rental of ‘violent video games’ to minors, and require[d] their packaging to be labeled ‘18.’”⁷⁸⁶ The law included games which involve “ ‘killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted’ in a manner that ‘[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,’ that is ‘patently offensive to prevailing standards in the community as to what is suitable for minors,’ and that ‘causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.’”⁷⁸⁷ Violators could receive civil fines of up to \$1,000.

Justice Scalia wrote for the Court. Resembling “the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).”⁷⁸⁸ Historically, “ ‘esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government’ to decree.”⁷⁸⁹ Even with today’s “ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”⁷⁹⁰ Most fundamentally, “ ‘government has no power to restrict expression because of its message, its ideas, its subject matter, or its content’ ” with the exception of a “ ‘few limited areas,’ ” such as, obscenity, incitement, and fighting words.⁷⁹¹

In *United States v. Stevens*,⁷⁹² the Court invalidated the statute at issue as an “impermissible content-based restriction on speech” as there was “no American tradition of forbidding the *depiction* of animal cruelty—though States have long had laws against

⁷⁸⁴ *Id.*

⁷⁸⁵ 131 S. Ct. 2729 (2011).

⁷⁸⁶ *Id.* at 2732.

⁷⁸⁷ *Id.* at 2732-33.

⁷⁸⁸ *Id.* at 2733.

⁷⁸⁹ *Id.*

⁷⁹⁰ *Id.*

⁷⁹¹ *Id.*

⁷⁹² 130 S. Ct. 1577 (2010).

committing it.”⁷⁹³ Moreover, “[b]ecause speech about violence is not obscene,” it was “of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York*.”⁷⁹⁴ However, unlike the law at issue in *Ginsberg*, the California Act sought “to create a wholly new category of content-based regulation that is permissible only for speech directed at children.”⁷⁹⁵ Minors have “a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar” material from being disseminated to them.⁷⁹⁶ Perhaps the law “would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence,” but no such tradition exists.⁷⁹⁷

California asserted that “video games present special problems because they are ‘interactive,’ in that the player participates in the violent action on screen and determines its outcome.”⁷⁹⁸ However, Justice Scalia noted that this “is nothing new” as “readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to.”⁷⁹⁹ While the “degree” of video game violence may be disgusting, “disgust is not a valid basis for restricting expression.”⁸⁰⁰

As the Act restricted “the content of protected speech, it [was] invalid unless California [could] demonstrate” that the Act was “justified by a compelling government interest” and “narrowly drawn to serve that interest.”⁸⁰¹ However, California could not “show a direct causal link between violent video games and harm to minors.”⁸⁰² The State’s research was “ ‘based on correlation, not evidence of causation.’ ”⁸⁰³ Moreover, the State’s expert admitted that the effects of “violent video games are ‘about the same’ ” as the effects of “exposure to violence on television.”⁸⁰⁴ Therefore, the Court held that California’s “regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it.”⁸⁰⁵

The Act was also “underinclusive in another respect.”⁸⁰⁶ The State was “perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK.”⁸⁰⁷ Moreover, the Court doubted “that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental

⁷⁹³ *Brown*, 131 S. Ct. at 2734.

⁷⁹⁴ *Id.* at 2735 (quoting *Ginsberg v. New York*, 390 U.S. 629 (1968)).

⁷⁹⁵ *Id.*

⁷⁹⁶ *Id.*

⁷⁹⁷ *Id.* at 2736.

⁷⁹⁸ *Id.* at 2737-38.

⁷⁹⁹ *Id.* at 2738.

⁸⁰⁰ *Id.*

⁸⁰¹ *Id.*

⁸⁰² *Id.*

⁸⁰³ *Id.* at 2739.

⁸⁰⁴ *Id.*

⁸⁰⁵ *Id.* at 2740.

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.*

authority.”⁸⁰⁸ That would “largely vitiate the rule that ‘only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors].’”⁸⁰⁹

Moreover, the “video-game industry has in place a voluntary rating system,” which encourages retailers “to rent or sell ‘M’ rated games to minors only with parental consent.”⁸¹⁰ Consequently, “filling the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.”⁸¹¹ Also, the Act was “vastly overinclusive” since not all of the childrens’ parents “care whether they purchase violent video games.”⁸¹²

Justice Alito, joined by Chief Justice Roberts, concurred in the judgment. Because of today’s “new and rapidly evolving technology, this Court should proceed with caution.”⁸¹³ Also, there is an important distinction between “[s]pending hour upon hour controlling the actions of a character who guns down scores of innocent victims” and “reading a description of violence in a work of literature.”⁸¹⁴

Justice Alito considered the Act “impermissibly vague,” and thus did not “reach the broader First Amendment issues addressed by the Court.”⁸¹⁵ For California to comply with *Miller v. California*,⁸¹⁶ it would need to target “a narrower class of graphic depictions.”⁸¹⁷ For example, “the California Legislature could have made its own judgment regarding the kind and degree of violence that is acceptable in games played by minors (or by minors in particular age groups). Instead, the legislature relied on undefined societal or community standards,”⁸¹⁸ and included the “terms ‘deviant’ and ‘morbid’ [which] are not defined in the statute.”⁸¹⁹ At the time of *Miller*, “obscenity had long been prohibited, and this experience had helped to shape certain generally accepted norms concerning expression related to sex.”⁸²⁰ No such history exists “regarding expression related to violence.”⁸²¹ And, the “California law draws no distinction between young children and adolescents.”⁸²²

On the broader free speech issues, Justice Alito did not consider *Stevens* controlling. First, unlike the law in *Stevens*, “[t]he California law does not regulate the sale or rental of violent games by adults,” or regulate adults renting or purchasing such games for children.⁸²³ Second, *Stevens* did not apply strict scrutiny but instead merely

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.*

⁸¹⁰ *Id.*

⁸¹¹ *Id.* at 2741.

⁸¹² *Id.*

⁸¹³ *Id.* at 2742 (Alito, J., concurring).

⁸¹⁴ *Id.*

⁸¹⁵ *Id.* at 2743-43.

⁸¹⁶ 413 U.S. 15 (1973).

⁸¹⁷ *Id.* at 2745.

⁸¹⁸ *Id.*

⁸¹⁹ *Id.*

⁸²⁰ *Id.* at 2746.

⁸²¹ *Id.*

⁸²² *Id.*

⁸²³ *Id.* at 2747.

“rejected the Government’s contention that depictions of animal cruelty were categorically outside the range of *any* First Amendment protection.”⁸²⁴ After “today’s decision, a State may prohibit the sale to minors of what *Ginsberg* described as ‘girlie magazines,’ but a State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable.”⁸²⁵ In addition, “*Stevens* expressly left open the possibility that a more narrowly drawn statute” might be constitutional.⁸²⁶

“[T]he California law reinforces parental decisionmaking in exactly the same way as the New York statute upheld in *Ginsberg*.”⁸²⁷ The “video-game industry’s voluntary rating system” was adopted “in response to the threat of federal regulation, a threat that the Court’s opinion may now be seen as largely eliminating.”⁸²⁸ Moreover, compliance with the voluntary rating system left “much to be desired.”⁸²⁹ For example, “[a] 2004 Federal Trade Commission Report showed that 69 percent of unaccompanied children ages 13 to 16 were able to buy M- rated games.”⁸³⁰

The majority also failed to grasp the realism of the video games that the regulation impacts. Victims are “dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy.”⁸³¹ Some games allow players to reenact the “murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters.”⁸³²

Justice Thomas dissented. “The practices and beliefs of the founding generation establish that ‘the freedom of speech,’ as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.”⁸³³ While “the original public understanding” of the Constitution does not always match “modern sensibilities,” the idea “that parents have authority over their children and that the law can support that authority persists today.”⁸³⁴ As the law allows a minor to obtain “a violent video game with his parent’s or guardian’s help,” it principally regulates “speech that bypasses a minor’s parent.”⁸³⁵

Justice Breyer also dissented. Under *Stevens*, “[a] facial challenge to this statute based on the First Amendment can succeed only if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’ ”⁸³⁶ Also, “it is more difficult to mount a facial First Amendment attack on a statute that seeks to regulate activity that involves action as well as speech.”⁸³⁷

⁸²⁴ *Id.*

⁸²⁵ *Id.*

⁸²⁶ *Id.*

⁸²⁷ *Id.*

⁸²⁸ *Id.* at 2747-48 (citations omitted).

⁸²⁹ *Id.* at 2748.

⁸³⁰ *Id.* at n.6.

⁸³¹ *Id.*

⁸³² *Id.*

⁸³³ *Id.* at 2751 (Thomas, J., dissenting).

⁸³⁴ *Id.* at 2769.

⁸³⁵ *Id.* at 2761.

⁸³⁶ *Id.* at 2762 (Breyer, J., dissenting).

⁸³⁷ *Id.*

Upholding the statute would not “create a ‘new categor[y] of unprotected speech,’ ” as the majority suggested.⁸³⁸ “No one here argues that depictions of violence, even extreme violence, *automatically* fall outside the First Amendment.”⁸³⁹ As in *Ginsberg*, California advanced the “compelling” interest of “(1) the ‘basic’ parental claim ‘to authority in their own household to direct the rearing of their children,’ ” and “(2) the State’s ‘independent interest in the well-being of its youth.’ ”⁸⁴⁰ Nowadays, “5.3 million grade-school-age children of working parents are routinely home alone.”⁸⁴¹ Some video games are used to help soldiers train. Predictably, “ ‘meta-analyses,’ *i.e.*, studies of all the studies, have concluded that exposure to violent video games ‘was positively associated with aggressive behavior, aggressive cognition, and aggressive affect,’ and that ‘playing violent video games is a *causal* risk factor for long-term harmful outcomes.’ ”⁸⁴²

This evidence is sufficient “for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children.”⁸⁴³ Moreover, there is “no ‘less restrictive’ alternative to California’s law that would be ‘at least as effective.’ ”⁸⁴⁴ The evidence supports the argument that extreme violence “can prove at least as, if not more, harmful to children as photographs of nudity.”⁸⁴⁵

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

In *United States v. Williams*,⁸⁴⁶ the Court upheld a federal statute that criminalized the “pandering or solicitation of child pornography.”⁸⁴⁷ In addressing *Williams*’ overbreadth challenge, Justice Scalia construed the statute at issue. First, *New York v. Ferber*⁸⁴⁸ 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.⁸⁴⁹

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.⁸⁵⁰ Although less obvious than “advertises”

⁸³⁸ *Id.*

⁸³⁹ *Id.*

⁸⁴⁰ *Id.* at 2767.

⁸⁴¹ *Id.*

⁸⁴² *Id.* at 2768.

⁸⁴³ *Id.* at 2770.

⁸⁴⁴ *Id.*

⁸⁴⁵ *Id.* at 2771.

⁸⁴⁶ 128 S. Ct. 1830 (2008).

⁸⁴⁷ *Id.* at 1835.

⁸⁴⁸ 458 U.S. 747 (1982).

⁸⁴⁹ *Williams*, 128 S. Ct. at 1838.

⁸⁵⁰ *Id.*

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.”⁸⁵¹ 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.”⁸⁵²

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 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.”⁸⁵³

Page 682: [Insert the following after *United States v. Williams*]

In *United States v. Stevens* the Court invalidated a law prohibiting depictions of animal cruelty as “substantially overbroad.”⁸⁵⁴ The statute was aimed at prohibiting “‘crush videos,’ ” which depict the “‘intentional torture and killing of helpless animals.’ ”⁸⁵⁵ The Government urged that “‘depictions of animal cruelty’ ” be a new category of unprotected speech, but the Court declined to “carve out” such depictions from First Amendment protection.⁸⁵⁶

Writing for the Court, Chief Justice Roberts addressed a facial challenge to the statute. Typical analysis would require “‘no set of circumstances’ ” under which an act would be constitutional.⁸⁵⁷ However, in free speech cases a facial challenge can invalidate a statute “as overbroad if ‘a substantial number of its applications are

⁸⁵¹ *Id.* at 1836, 1841.

⁸⁵² *Id.* at 1842.

⁸⁵³ *Id.* at 1854.

⁸⁵⁴ 130 S. Ct. 1577, 1592 (2010).

⁸⁵⁵ *Id.* at 1583.

⁸⁵⁶ *Id.* at 1585-86.

⁸⁵⁷ *Id.* at 1587.

unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’ ”⁸⁵⁸ This statute was alarmingly overbroad. For example, depiction of conduct not considered illegal in one state would become criminal if it is later found in a state where the conduct is illegal.

Its “exceptions clause” did not save the statute.⁸⁵⁹ The clause exempted “ ‘any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.’ ”⁸⁶⁰ However, “[m]ost of what we say to one another” does not fit within any of these categories and is nevertheless protected speech.⁸⁶¹ The market for constitutionally permissible depictions, like hunting magazines and videos, which are prohibited by the statute, dwarfs the market for impermissible depictions. The Court did not “decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.”⁸⁶²

Justice Alito dissented, arguing that invalidation based on overbreadth should be “ ‘a last resort.’ ”⁸⁶³

⁸⁵⁸ *Id.*

⁸⁵⁹ *Id.* at 1590.

⁸⁶⁰ *Id.*

⁸⁶¹ *Id.* at 1591.

⁸⁶² *Id.* at 1592.

⁸⁶³ *Id.* at 1593 (Alito, J., dissenting).

Chapter 17

GOVERNMENT AND RELIGIOUS FREEDOM

§ 17.03 Government Support for Religious Practices

Page 732: [Insert the following after *Capitol Square Review Board v. Pinette*]

In *Salazar v. Buono*, the Court overturned an injunction that barred a congressional statute that transferred federal land displaying a Latin cross war memorial to a private party.⁸⁶⁴ Congress had enacted the statute following an initial injunction under the Establishment Clause against the government’s permitting the display of the privately-erected cross on federal land.

The original district court injunction “permanently forbade the Government ‘from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.’”⁸⁶⁵ While the appeal of the injunction was pending, Congress enacted a law “directing the Secretary of the Interior to transfer to the VFW (Veterans of Foreign Wars) the Government’s interest in the land that had been designated a national memorial. In exchange, the Government was to receive land elsewhere in the preserve” from two private citizens. The District Court “permanently enjoined the Government from implementing” the land-transfer statute.

Writing for a plurality, Justice Kennedy set aside the injunction against the land-transfer statute because the land-transfer represented a change in circumstances from the original injunction. Justice Kennedy also stated that placement of the cross on federal land “was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.”⁸⁶⁶ Moreover, the cross had grown “entwined in the public consciousness,” having “stood on Sunrise Rock for nearly seven decades before the statute was enacted.”⁸⁶⁷ There is also no other World War I national memorial.

Justice Kennedy noted that the original injunction was assumed proper for purposes of the opinion, and cautioned that the opinion should not be read to suggest agreement with the original injunction. “The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society. Rather, it leaves room to accommodate divergent values.”⁸⁶⁸

The “ ‘reasonable observer’ ” test is generally not applied to displays on private

⁸⁶⁴ 130 S. Ct. 1803 (2010).

⁸⁶⁵ *Id.* at 1812.

⁸⁶⁶ *Id.*

⁸⁶⁷ *Id.*

⁸⁶⁸ *Id.*

land.⁸⁶⁹ Even if this standard were proper, the cross satisfied it by evoking the image of “thousands of small crosses in foreign fields marking the graves of Americans who fell in battles,” which is far more than a religious meaning.⁸⁷⁰

The District Court should have considered “less drastic relief than complete invalidation of the land-transfer statute,” such as requiring signs indicating that the VFW owned the land. The case was remanded, as the District Court is best able to analyze the “highly-fact specific” nature of this issue.

Chief Justice Roberts concurred. Justice Alito concurred in part and concurred in the judgment. He disagreed with remanding the case because the “facts are sufficiently clear to allow the statute to be implemented.”⁸⁷¹ Also, demolishing the monument would be interpreted as government hostility to religion, not neutrality. Justice Scalia, joined by Justice Thomas, concurred in the judgment. They found that Buono lacked standing as the District Court’s order expanded the original injunction.

Justice Stevens dissented, joined by Justices Ginsburg and Sotomayor. To any reasonable observer the appearance of government endorsement of the cross will continue after the land transfer, regardless of the changed name on the title to the “small patch of underlying land. This is particularly true because the Government has designated the cross . . . as a national memorial.”⁸⁷² Secondly, the purpose of the land transfer is to preserve the display. The “reasonable observer would still think that government is endorsing a sectarian message.”⁸⁷³

Justice Breyer filed a separate dissent, arguing that the law of injunctions offers a district court “considerable leeway to interpret the meaning and application of its own injunctive order.” The District Court did not abuse its discretion here.

§ 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”)⁸⁷⁴, 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.”⁸⁷⁵ Additionally, the Controlled Substances Act allows for such exemptions. Congress allowed courts to find exemptions to the Act, and made an

⁸⁶⁹ *Id.*

⁸⁷⁰ *Id.*

⁸⁷¹ *Id.* (Alito, J., concurring in part and in the judgment).

⁸⁷² *Id.* (Stevens, J., dissenting).

⁸⁷³ *Id.*

⁸⁷⁴ 126 S. Ct. 1211 (2006).

⁸⁷⁵ *Id.* at 1220.

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*.”⁸⁷⁶

⁸⁷⁶ *Id.* at 1225.