

2012 UPDATE
to
***AMERICAN CONSTITUTIONAL LAW:
AN OVERVIEW, ANALYSIS,
AND INTEGRATION***

by

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TABLE OF CONTENTS

PREFACE	vi
NOTICE TO INSTRUCTORS: THE <i>INSTRUCTORS' MANUAL FOR AMERICAN CONSTITUTIONAL LAW</i> (ACL)	vii
CHAPTER 1. GETTING ORIENTED TO CONSTITUTIONAL LAW: INTRODUCTORY PERSPECTIVES AND SUGGESTIONS	1
Sec. D. Selected Supplementary Resources to Enrich the Study and Practice of Constitutional Law	1
CHAPTER 3. JUDICIAL OPINIONS ON CONSTITUTIONAL LAW ISSUES	3
Sec. D. Exercise No. 3: Analyzing a U.S. Supreme Court Case: <i>New York Times v. United States</i>	3
CHAPTER 4. THE CONTEXT FOR CONSIDERING CONSTITUTIONAL POWER QUESTIONS	4
Sec. C. Interpreting the Power Clauses	4
C.2. The Historical Approach to Interpretation	4
CHAPTER 6. CONGRESSIONAL POWERS AND FEDERALISM.....	5
Sec. B. An Introduction to Congressional Powers.....	5
B.3. Implied Powers	5
o <i>United States v. Comstock</i> , 130 S. Ct. 1949 (2010)	
Sec. C. The Commerce Power	6
C.2. The New Era of Commerce Clause Cases	6
o <i>Gonzalez v. Raich</i> , 545 U.S. 1 (2005)	
o <i>Florida ex rel. Atty. Gen. v. U.S. Dept. Of Health and Human Services</i> , 648 F.3d 1235 (11 th Cir. 2011), and other U.S. Court of Appeals cases on the constitutionality of the 2010 federal health reform legislation under the commerce clause	

Sec. D. The Taxing and Spending Powers: A Conceptual Overview.....	12
○ <i>Sabri v. United States</i> , 541 U.S. 600 (2004)	
○ <i>Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services</i> , 648 F.3d 1235 (11th Cir. 2011), and other U.S. Court of Appeals cases on the constitutionality of the 2010 federal health care reform law under the taxing and spending clause	
Sec. I. Study Suggestions.....	15
CHAPTER 7. FEDERALISTIC LIMITS ON THE EXERCISE OF STATE POWER.....	16
Sec. B. Negative Implication Cases: the Dormant Commerce Clause	16
B.2. Discriminatory State Laws.....	16
○ <i>United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority</i> , 127 S. Ct 1786 (2007)	
CHAPTER 8. EXECUTIVE POWERS AND THE SEPARATION OF POWERS.....	18
Sec. C. A Conceptual Overview of Presidential Powers	18
C.5. Domestic Affairs Versus Foreign Affairs	18
○ <i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006)	
Sec. E. Executive Branch Clashes with the Courts.....	21
○ <i>Boumediene v. Bush</i> , 533 U.S. 723 (2008)	
CHAPTER 9. THE CONTEXT FOR CONSIDERING CONSTITUTIONAL RIGHTS QUESTIONS.....	24
Sec. A. An Overview of Federal Constitutional Rights.....	24
A.4. The Second Amendment	24
○ <i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	
○ <i>McDonald v. City of Chicago</i> , 130 S. Ct. 3020 (2010)	
A.5. Economic Rights (the Takings Clause and the Contract Clause).....	26
○ <i>Kelo v. New London</i> , 545 U.S. 469 (2005)	
Sec. B. Interpreting the Individual Rights Clauses	26
B.1. Interpretive Approaches.....	26

Sec. E. Historical Timeline for the Development of Constitutional Rights.....	27
CHAPTER 10. EQUAL PROTECTION AND PRIVILEGES OR IMMUNITIES	28
Sec. D. Equal Protection and Heightened Scrutiny	28
D.2. Race Discrimination: The Paradigm Suspect Classification	28
○ <i>Johnson v. California</i> , 543 U.S. 499 (2005)	
D.7. Affirmative Action	29
○ <i>Parents Involved in Community Schools v. Seattle School District No. 1</i> , 127 S. Ct. 2738 (2007)	
Sec. F. Study Suggestions for Equal Protection	32
CHAPTER 11. DUE PROCESS	33
Sec. A. The Content of the Due Process Clauses	33
A.2. The “Incorporated” Content of Fourteenth Amendment Due Process	33
○ <i>McDonald v. City of Chicago</i> , 130 S. Ct. 3020 (2010)	
Sec. C. Substantive Due Process: A Conceptual Overview.....	34
C.2. The New Era Cases: Contraception and Abortion.....	34
○ <i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000)	
○ <i>Gonzalez v. Carhart</i> , 550 U.S. 124 (2007)	
Sec. F. Study Suggestions for Due Process	37
CHAPTER 12. FREEDOM OF EXPRESSION.....	38
Sec. B. Conceptual Overview of Freedom of Expression	38
B.3. The Mass Media and Free Press	38
○ <i>Ashcroft v. American Civil Liberties Union</i> , 542 U.S. 656 (2004)	
Sec. C. <i>Analytical Techniques for Resolving Free Expression Problems</i>	39
C.2. Non-Speech Techniques	39
C.2(1) Communicative Value.....	39

- *United States v. Stevens*, 130 S. Ct. 1577 (2010)
- Sec. D. Content-Based Restrictions on Expression.....43
 - D.3. Strict Scrutiny Review.....43
 - *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011)
 - *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010)
 - *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)
 - Sec. F. The Varied Roles of Government Vis-à-vis Free Expression 46
 - F.2. Government as Speaker 46
 - *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009)
 - F.4. Government as Employer..... 47
 - *Garcetti v. Ceballos*, 547 U.S. 410 (2006)
 - F.5. Government as Landowner: The Special Problem of the “Public Forum” 48
 - *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010)
 - Sec. G. Freedom of Association.....48
 - *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010)
 - Sec. H. Study Suggestions 50
- CHAPTER 13. FREEDOM OF RELIGION.....51**
 - Sec. C. The Free Exercise Clause: A Conceptual Overview 51
 - C.1. Identifying Burdens on Religious Belief or Practice 51
 - *Locke v. Davey*, 540 U.S. 712 (2004)
 - Sec. H. Study Suggestions 51
- CHAPTER 14. ALTERNATIVE SOURCES OF INDIVIDUAL RIGHTS52**
 - Sec. C. Congress’ Enforcement Powers 52
 - *Tennessee v. Lane*, 541 U.S. 509 (2004)
 - Sec. D. Enforcing Federal Individual Rights Statutes Against the States: The Sovereign Immunity Problem 53
 - *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006)
 - *Tennessee v. Lane*, 541 U.S. 509 (2004)
 - *United States v. Georgia*, 546 U.S. 151 (2006)

Sec. E. State Constitutional Rights 54

- *In Re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008)
- *Strauss v. Horton*, 46 Cal. 4th 364, 207 P.3d 48 (2009)

Preface

This *2012 Update to American Constitutional Law: An Overview, Analysis, and Integration* (ACL) brings the text up to date through the end of the U.S. Supreme Court's 2010-2011 term. There are also two entries, in chapter 6, on developments that extend beyond the end of the Court's term – developments regarding judicial challenges to the new federal health care reform legislation (the Patient Protection and Affordable Care Act.)

This *Update* does not cover all Supreme Court and related developments since ACL's publication in 2004. I have been selective, seeking to focus on cases with the most important social issues, cases that will have the most extensive impact on constitutional law, and cases that best support and extend the purposes, themes, and content of ACL. Since much of ACL emphasizes classical cases now firmly grounded in our constitutional ethos, and concentrates on interpretive approaches and analytical techniques that transcend any single case, the text requires less updating than do some other constitutional law resources.

My research assistants, Tom Lyden at Stetson University College of Law and Evan Hamme at Catholic University School of Law, researched recent cases and prepared case drafts under my direction. Tom Lyden also pulled together various pieces of work to construct the first draft of this *2012 Update to ACL*. At Catholic University, Donna Snyder did her usual excellent work word processing the various updates and organizing the electronic files for the project. At Stetson, Dena Capobianco word processed other updates. At Catholic University, Emily Black, reference librarian, promptly located various materials and citations at my request. For all of this essential help, I am grateful.

William Kaplin
Washington, D.C.
December 2011

Notice to Instructors: the *Instructors' Manual for American Constitutional Law (ACL)*

Simultaneously with publication of this *2012 Update to American Constitutional Law: An Introduction, Overview, and Integration (ACL)*, Carolina Academic Press is publishing an extensive *Instructors' Manual* for ACL. This *Manual* contains teaching suggestions (including suggestions on problem-based methods of instruction), Key Case lists and Study Questions for these cases, and a variety of teaching materials for the various chapters of ACL.

The “Teaching Materials” parts of the *Manual* contain the following types of materials, designed for classroom use or for independent use by students: (a) Practice Problems; (b) Review Guidelines for the Practice Problems; (c) smaller scale problems and exercises; (d) “analytical frameworks” (or “analytical pathways”) to conceptually guide problem solving for particular categories of problems; (e) other miscellaneous materials that help instructors to teach with problems, including a set of “Guidelines for Preparing Written Responses to Constitutional Law Problems”; (f) various graphic illustrations that can be displayed in class and that help students understand basic concepts and conceptual distinctions of constitutional law (*e.g.*, a graphic on “Equal Protection Tiers of Scrutiny”); and (g) outlines and timelines that instructors can display in class and that help students organize particular topics in their minds (*e.g.*, an “Outline of Analytical Techniques for Free Expression Problems”). These extensive materials are presented as separate documents, each beginning on a new page, to facilitate distribution to students and projection in the classroom.

In addition, there are two appendices in the *Manual* that contain supplementary teaching materials. Appendix A includes a prototype course syllabus and a prototype course outline for an introductory Constitutional Law course, which instructors may use in developing or revising their

own course syllabus and/or course outline. Appendix B includes five “Teaching and Learning Memos,” designed primarily for introductory courses, that instructors may distribute to their students at selected points in the course to help guide their progress.

Instructors may obtain complimentary copies of this *Manual* by contacting Carolina Academic Press or visiting their website, and may distribute selected portions of the *Manual’s* materials to their students in any course for which ACL is a required course text.

Chapter 1. Getting Oriented to Constitutional Law: Introductory Perspectives and Suggestions

Sec. D. Selected Supplementary Resources to Enrich the Study and Practice of Constitutional Law

Bibliographical changes are needed to update the following entries in this section's list of Resources:

3. The Bittker and Denning text comes with annual supplements.
4. The Farber text is now in a 3rd edition published in 2010 by Foundation Press/Thomson West. For the Smolla treatise, the correct title for the 3rd edition is SMOLLA & NIMMER ON THE FREEDOM OF SPEECH. Periodic updates for this treatise are available.
5. The Chemerinsky text is now in a 3rd edition published in 2006.
10. CONSTITUTIONAL LAW STORIES is now in a 2nd edition, published in 2009 by Foundation Press/Thomson West.
11. The McCloskey text is now in a 5th edition published in 2010.
12. The Farber and Sherry text is now in a 2nd edition, published in 2005 by Thomson West.
15. The correct citation for this text is now: Michael Gerhardt, Stephen Griffin, & Thomas Rowe, CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES (LexisNexis Matthew Bender, 3d ed., 2007).

16. The correct citation for this text is now Walter Murphy, James Fleming, Soterios Barber & Stephen Macedo, *AMERICAN CONSTITUTIONAL INTERPRETATION* (Foundation Press/Thomson West, 4th ed. 2008).

17. The Fisher and Devins text is now in a 5th edition, published in 2010 by Thomson West.

Chapter 3. Judicial Opinions on Constitutional Law Issues

Sec. D. *Exercise No. 3: Analyzing a U.S. Supreme Court Case:*

New York Times v. United States

In June 2011, on the 40th anniversary of their leak to the press, the complete Pentagon Papers report was declassified, without redactions and with all supplementary supporting documents. All the documents may be found at <http://www.archives.gov/research/pentagon-papers/>, the website of the U.S. National Archives and Records Administration.

Chapter 4. The Context for Considering Constitutional Power Questions

Sec. C. Interpreting the Power Clauses

C.2. The Historical Approach to Interpretation

In recent years, the “originalist” approach to interpreting the Constitution has focused less on the framers’ intent as such, or the original history concerning the framers’ intent, and instead has focused more on what is often called “original meaning” or “original public meaning.” The latter perspective is broader, looking to the common meaning that the people generally, at and around the time of the framing, would have attached to particular words and clauses in the Constitution, as applied to particular circumstances. *See, e.g.,* Randy Barnette, “Constitutional Clichés,” 36 *Capital U.L. Rev.* 493, 502-05 (2008).

Chapter 6. Congressional Powers and Federalism

Sec. B. *An Introduction to Congressional Powers*

B.3. Implied Powers

United States v. Comstock, 130 S. Ct. 1949 (2010), is an important modern re-play of the debate about the scope of Congress' implied powers – a debate anchored in the classic case of *McCulloch v. Maryland* (ACL pp. 48-49). *Comstock* concerned a federal statute (18 U.S.C. § 4248) authorizing the civil detention of “a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released.” The challengers contended that the statute did not execute, or did not have a sufficient connection to, any enumerated power of Congress. The Court majority, in a 7-2 decision, rejected this contention and upheld Congress' power to enact the statute. The opinions of the Justices make clear that interpretation and application of the 1819 *McCulloch* case are not all settled matters. Five Justices joined a majority opinion by Justice Breyer that is based on “five considerations, taken together” – not all of which are evident from *McCulloch*; two Justices (Kennedy and Alito) concurred in the result only in two separate opinions; and two Justices (Thomas and Scalia) dissented in an opinion by Justice Thomas.

The majority opinion relied on this test for implied powers: “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power” (citing *Sabri v. United States*; see *2011 Update to ACL*, ch. 6, sec. D), and *Gonzales v. Raich*; see *2011 Update to ACL*, ch. 6, sec. C.2). Later in the opinion, the majority re-articulated this test as whether “Congress could have reasonably concluded [that the statute]

satisfies ‘review for means-end rationality,’ i.e., that it satisfies the Constitution’s insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority.” In addition, regarding the challengers’ claim that the link between the statute and an enumerated power was “too attenuated,” the majority responded that the argument “that Congress’ authority can be no more than one step removed from a specifically enumerated power [is] irreconcilable with our precedents” (in particular *McCulloch*).

Sec. C. *The Commerce Power*

C.2. The New Era of Commerce Clause Cases

By a vote of 6 to 3, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court upheld Congress’ power, under the commerce clause, to ban the cultivation or use of marijuana—even when state law authorized its use for medicinal purposes. The opinion contrasts with the Court’s recent decisions in *U.S. v. Lopez*, 514 U.S. 549 (1995), and *U.S. v. Morrison*, 529 U.S. 598 (2000), both of which held that Congress had exceeded the scope of its authority under the commerce clause (see ACL pp. 157-58).

In this case, California residents sought medical marijuana treatment pursuant to California’s Compassionate Use Act (Cal. Health & Safety Code Ann. § 11362.5 (West Supp.2005)). The act creates an exemption from criminal prosecution for physicians, patients, and primary caregivers who possess or cultivate marijuana for medicinal purposes. The California law, however, conflicted with the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, which categorically prohibits the possession and production of cannabis. Plaintiffs therefore challenged the constitutionality of the CSA, arguing that the Act, as applied to them, could not be upheld under the commerce power, since the activity being regulated was intrastate.

In upholding the federal law, the Court relied on *Wickard v. Filburn*, 317 U.S. 111 (1942), which held that, even if an activity is local and may not itself be considered commerce, Congress may regulate that activity if it “exerts a substantial economic effect on interstate commerce” (545 U.S. at 17, quoting *Wickard* at 125). Accordingly, the Court held that the CSA’s application to medical marijuana fell within Congress’ commerce power because the production and use of marijuana under the California law would have a “substantial effect” on supply and demand for marijuana in the national market.

The majority opinion by Justice Stevens distinguished this case from *Lopez* and *Morrison* in two ways. First, unlike the statutes in *Lopez* and *Morrison*, the Court found that the CSA regulates activities that are “quintessentially economic” — namely, the lucrative interstate drug market (545 U.S. at 25-26). Second, whereas in both *Lopez* and *Morrison*, the parties asserted that a statute, in its entirety, fell outside Congress’ commerce power, the respondents in *Raich* sought to “excise individual applications of a concededly valid statutory scheme” (545 U.S. at 23). In other words, instead of challenging the entire CSA, the *Raich* respondents only challenged the marijuana prohibition component of it. This was a pivotal distinction, the Court found, because the marijuana prohibition constituted one of many “essential part[s]” of a larger regulation of economic activity (545 U.S. at 24, quoting *Lopez* at 561). Thus, the marijuana prohibition could not be separated from the general drug control scheme.

Regarding the standard of review, the Court said, “We need not determine whether [plaintiffs’] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding” (545 U.S. at 22, citing *Lopez*, 514 U.S., at 557). Applying that standard, the Court reasoned that “[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere,

21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA” (545 U.S. at 22).

Justice O’Connor wrote a dissenting opinion joined by the other two dissenters. She argued that the decision in *Raich* is irreconcilable with *Lopez* and *Morrison*. Those two cases, she wrote, stood against ““convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States”” (545 U.S. at 45, quoting *Lopez* at 567). Likewise, Justice O’Connor explained, the circumstances of *Raich* exemplified the concept of states as laboratories. California’s Compassionate Use Act was an exercise of the state’s sovereignty. Yet, O’Connor continued, the Court has extinguished that experiment by sanctioning a component of the CSA without proof of whether it is an “appropriate subject of federal regulation” (545 U.S. at 43). The result, O’Connor said, is to give Congress a “perverse incentive to legislate broadly pursuant to the Commerce Clause — nestling questionable assertions of its authority into comprehensive regulatory schemes — rather than with precision” (545 U.S. at 43).

* * * * *

The federal Patient Protection and Affordable Care Act (PPACA), 124 Stat. 119 (2010), includes various controversial provisions that have been subject to constitutional challenges in the lower federal courts, and that, at press time for this *Update*, were on their way to the U.S.

Supreme Court (cert. granted, *Florida, et al. v. Department of Health & Human Services, et al.*, 2011 WL 5515165; see also 2011 WL 5515162, and 2011 WL 5515164 (Nov. 14, 2011).

The discussion below briefly summarizes the lower court opinions in order to provide background and perspective on what the Court may say or has said on the commerce clause challenges to the PPACA.

The challengers in the lower court cases (including state attorneys general) primarily contended that certain provisions of the Act are beyond the scope of Congress' powers under the commerce clause or the taxing and spending clause. (For the taxing and spending challenges, see chapter 6, section D of this Update, below.) The provision most subject to challenge under the commerce clause was the "individual mandate" provision. It requires that individuals pay a penalty to the federal government along with their annual tax returns if they have not acquired and maintained (without a break of more than a month) insurance from a private health insurance provider. There are exemptions for people covered by Medicaid (low income) or Medicare (elderly), for those who would suffer an undue hardship (as defined by regulation), and for those who have health insurance through their employers, as well as a number of other exemptions.

Four U.S. courts of appeals had addressed the constitutionality of this Act as of Fall 2011.¹ In *Thomas More Law Center v. Obama*, ___ F.3d ___, 2011 WL 2556039 (6th Cir., 2011), the Sixth Circuit upheld the individual mandate, with each judge on the three-member panel writing an opinion. In *Florida ex rel. Atty. Gen. v. U.S. Dept. Of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011), the Eleventh Circuit struck down the individual mandate in a 2-1 vote. The majority held the mandate to be beyond Congress' commerce power but found the

¹ In addition, three other circuits considered cases challenging the "individual mandate" but dismissed for lack of standing or lack of subject matter jurisdiction. *New Jersey Physicians Assn. v. President of the U.S.*, ___ F.3d ___, 3rd Cir., Aug. 03, 2011, 2011 WL 3366340); *Liberty University v. Geithner*, ___ F.3d __ (4th Cir. 2011); and *Commonwealth of Virginia ex rel Cuccinelli v. Sebelius*, ___ F.3d __ (4th Cir. 2011).

mandate to be severable from the rest of the statute, and thus subject to invalidation without invalidating the entire law. Finally, the D.C. Circuit upheld the individual mandate as within the scope of the commerce clause by a 2-1 vote in *Susan Seven-Sky, et al. v. Holder*, ___ F.3d ___, 2011 WL 5378319 (D.C. Cir. 2011). The dissent argued that the court did not have the power to hear the case because it lacked subject matter jurisdiction.

The U.S. Supreme Court cases most discussed in these lower court cases have been *United States v. Lopez*, ACL pp. 157-58; *Morrison v. United States*, ACL pp. 157-58; *Gonzales v. Raich*, *ACL Update*, above, in this section; and *Wickard v. Filburn* (ACL p. 154, 156), which is relied on heavily by the majority in *Raich*. The Sixth Circuit in *Thomas More*, for example, noted that “Congress may . . . regulate even non-economic intrastate activity if doing so is essential to a larger scheme that regulates economic activity. . . . *Wickard v. Filburn*,” (slip op. at p. 15). The majority also cited *Raich* as merely requiring that Congress have a rational basis for determining that the challenged provision has a substantial effect on interstate commerce. More specifically, the majority characterized the regulated activity as “self-insuring for the cost of health care delivery,” which they labeled “economic” within the meaning of *Lopez* and *Morrison*. They then concentrated heavily on the facts cited by Congress in its findings to show that the individual mandate is an essential part of a broader regulatory scheme within the meaning of *Raich*. The dissent in *Thomas More* argued, however, that the status of being uninsured cannot be properly thought of as economic, and the individual mandate is beyond the scope of Congress’ power.

The Eleventh Circuit in *Florida v. U.S. Dept. of HHS* synthesized *Lopez*, *Morrison* and *Raich* into a two-factor test to determine constitutionality under the commerce clause: First, Congress’s regulation must accommodate the Constitution’s federalist structure and preserve “a

distinction between what is truly national and what is truly local.” Second, the Court has repeatedly warned that courts may not interpret the Commerce Clause in a way that would grant to Congress a general police power, “which the Founders denied the National Government and reposed in the States. *Morrison*, 529 U.S. at 618; see also *Lopez*, 514 U.S. at 584 (Thomas, J. concurring)” [648 F.3d at 1284.] This analysis turns on the view that the definition of “economic” cannot be indefinite and must take federalism concerns into view. The majority then asserted that decisions to refrain from commerce could not be considered economic because no limiting principles had been offered to identify when mandates are permissible and when not, suggesting that allowing such a mandate would amount to granting Congress a general police power (citing *Lopez* and *Morrison*). Finally, the majority asserted that health and welfare, and the insurance industry, are traditionally areas of state concern within the meaning of *Lopez*.

The dissent in the Florida case balked at the majority’s analysis, which it thought seemed quite similar to strict scrutiny review. The dissent argued that there was a rational basis for Congress to conclude that the mandate regulated economic activity because it prescribed a rule (citing Justice Marshall in *Gibbons v. Ogden* (ACL p. 153, p. 155)) by which people must finance health care services that they will inevitably but unpredictably consume.

The D.C. Circuit in *Seven-Sky* reasoned that the individual mandate issue is controlled by *Wickard v. Filburn*, which had recently been reaffirmed by *Raich*. The court, disagreeing with the Eleventh Circuit, noted that, even though the type of mandate at issue is novel, the presumption of constitutionality still attaches. Focusing on the word “regulate” in the commerce clause, the court noted that regulation included the ability “to direct” and “to order; [or] to command,” (*Seven-Sky*, slip. op. at 29) . The parties agreed that Congress could regulate the health insurance industry, and that the health insurance market is closely related to the interstate

market in health services. Furthermore, under *Wickard's* market analysis, the mandate is constitutional even though it may force people to buy from a market that they might not have ever needed to enter absent Congress' regulation.

Sec. D. The Taxing and Spending Powers: A Conceptual Overview

In *Sabri v. United States*, 541 U.S. 600 (2004), the Court upheld a federal statute, 18 U.S.C. §662(a)(2), making it a crime to bribe state or local officers that work for an agency receiving more than \$10,000 of federal funding in a given year. The Court held that the statute is a necessary and proper means to ensuring that federal funds are spent for the general welfare, rather than for private personal gain:

Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars [541 U.S. at 605].

The Court distinguished section 662(a)(2) from the law under consideration in *South Dakota v. Dole* (ACL p. 164). In *Dole*, the Court implicitly acknowledged the possibility that an exercise of the federal spending power could, at some point, become unduly coercive, leaving the state with no choice but to adapt state policies as the federal government demands. The Court saw section 662(a)(2) as fundamentally different because the criminal provisions only apply against individuals, and do not bear on state policy choices. In other words, the state's policy choices were still the state's to make, including, at least in part, how to spend the federal money; and the provision at issue does not act to influence the programs a state implements, but

merely punishes individuals who undermine the effectiveness of a federally subsidized state agency or program.

Regarding the necessary and proper clause aspects of the case, the Court cited *McCulloch v. Maryland* (ACL p. 148) for the proposition that the clause entails “review for means-ends rationality.” This matter arose again in *United States v. Comstock*, discussed in chapter 6, section B.3, of this *2012 Update* to ACL.

* * * *

The federal health reform legislation, the Patient Protection and Affordable Care Act (PPACA) (see chap. 6, sec. C.2 above in this *Update*) has also raised questions about Congress’ taxing and spending power; and these questions were also on their way to the U.S. Supreme Court as this *2011 Update* went to press. The pertinent provisions are the Medicaid expansion provisions, 42 U.S.C. § 1396a, and the individual mandate provision, 26 U.S.C. § 5000A *et seq.* States participate in Medicaid by choice, and if they do so, they receive substantial federal funding to provide disadvantaged individuals with medical care. The individual mandate provision is summarized in the discussion of PPACA in chapter 6, section C.2 above.

In *Thomas More Law Center v. Obama*, ___ F.3d ___, 2011 WL 2556039 (6th Cir. 2011), a majority of the Sixth Circuit panel (the concurring and dissenting judges) determined that the penalty associated with the individual mandate does not qualify as a tax and that, therefore, the individual mandate is not within Congress’ power under the taxing and spending clause. (The majority opinion, which upheld the individual mandate under the commerce clause, declined to reach this issue.) According to the concurrence and dissent, the mandate is a penalty and not a

tax because, *inter alia*, the statutory provisions on the mandate repeatedly use the word penalty, and the penalty's primary function is not revenue raising but behavior alteration.

In *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011), the court unanimously determined (1) that the Medicaid expansion is constitutional under the taxing and spending clause, and (2) that the individual mandate does not qualify as a "tax" and therefore cannot be justified under that clause. The court disposed of the first issue rather quickly. The plaintiffs had relied on the so-called coercion doctrine. The court refused to find undue coercion here because: (a) the states had been notified from the beginning of Medicaid that the program could be changed, (b) nearly all costs associated with the Medicaid expansion would be borne by the federal government, (c) the states have four years before expansion will be implemented, allowing time for them to adjust, and (d) the possibility of a total loss of Medicaid funding had always been a possibility since the beginning of the program.

The Court then addressed the more difficult question about the individual mandate, reaching the same conclusion as, and using similar reasoning as, the concurrence and dissent in *Thomas More*. Here, the court reasoned, the IRS' ability to actually collect the mandate payments is "toothless" because it cannot place liens, assess penalties, garnish funds, initiate criminal proceedings, or impose interest or criminal sanctions; practically, all the IRS may do is offset the amount against a tax refund (26 U.S.C. § 5000A(g)(2)(A)-(B)). This suggests that raising revenue is only secondary to the goal of altering behavior.

In *Liberty University v. Geithner*, 2011 WL 3962915 (4th Cir. 2011), the majority declined to reach the merits of the taxing and spending issues, reasoning that the Anti-Injunction Act deprived the court of jurisdiction. A concurring judge did address the taxing and spending clause *in dicta*, however, asserting that the individual mandate is a constitutional tax. In so doing, he

argued that the practical effect of the provision is to raise revenue, and that what the mandate is called (penalty or otherwise) is not sufficient by itself to disqualify it from being a tax.

Sec. I. *Study Suggestions*

In the list of FURTHER READING (ACL p. 174), add:

Brown, “Counterrevolution? – National Criminal Law after *Raich*,” 66 *Ohio State L. J.* 947 (2005), especially at pp. 957-86.

Chapter 7. Federalistic Limits on the Exercise of State Power

Sec. B. *Negative Implication Cases: the Dormant Commerce Clause*

B.2. Discriminatory State Laws

On ACL pp. 178-79:

Delete the part of the discussion of *Philadelphia v. New Jersey* that is on the last 8 lines of sec. B.2 (beginning with “The Court therefore concluded”). Substitute the following clarification:

The Court therefore concluded that New Jersey’s solid and liquid waste law was unconstitutional under the commerce clause. Such isolationist or protectionist statutes, discriminatory on their face or in their “plain effect,” are subject to “a virtually *per se* rule of invalidity” (437 U.S. at 624). A law that discriminates “against articles of commerce coming from outside the state” may escape this *per se* rule, however, if “there is some [legitimate] reason, apart from their origin, to treat [the out-of-state articles] differently.” But even these statutes will be subject to a form of heightened scrutiny. *Maine v. Taylor*, 477 U.S. 131 (1986).²

* * * *

² When the subject being regulated by the state is intoxicating beverages, the Twenty-first Amendment – which acknowledges the states’ authority to regulate the transportation and importation of liquor into their territory – provides a partial protection for the states against dormant commerce clause challenges. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). But this protection does not extend to intoxicating beverage regulations that discriminate against interstate commerce. *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005).

In *United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct 1786 (2007), the most recent of the various solid and liquid waste cases following *Philadelphia v. New Jersey* (ACL p. 178), the “flow control” ordinances of two counties were challenged. The question was whether a local government may require all solid waste within its jurisdiction to be delivered to a specific publicly (governmentally) owned waste processing facility and charge higher prices for the waste disposal than private competitors had been charging. The Court held that, because “waste disposal is both typically and traditionally a local government function, and the “Counties’ flow control ordinances . . . treat in-state private business interests the same as out-of-state ones, the ordinances do not ‘discriminate against interstate commerce’ for purposes of the dormant Commerce Clause.” To reach this result, the Court distinguished the earlier case of *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), in which the Court invalidated, as discriminatory, a flow control ordinance that required the transport of solid waste to a designated private transport station within the Town. The Court in *United Haulers* noted that the salient difference between the two cases is that here, the government required haulers to transport waste to a *publicly* owned waste processing facility, while in *Carbone* the facility was operated privately. (For more information on the *United Haulers* case, see Natalie K. Mitchell, “*United Haulers v. Oneida-Herkimer Solid Waste Management Authority*: Introducing the ‘Public Benefit’ Exception to the Dormant Commerce Clause,” 21 *Tul. Envtl. L.J.* 135 (2007).)

Chapter 8. Executive Powers and the Separation of Powers

Sec. C. *A Conceptual Overview of Presidential Powers*

C.5. Domestic Affairs Versus Foreign Affairs

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), a detainee at Guantanamo challenged the President's authority to try him by military commission. The case provides an excellent modern example of foreign affairs (vs. domestic affairs) issues that directly implicate the "war powers" jointly shared by Congress and the Executive (see ACL ch. 8, sec. A, pp. 200-01, and sec. C.2., pp. 205-06). The case is also instructive because the majority opinion and the lead concurring opinion both invoke *Youngstown* and rely in part on the 3-part analytical framework in Justice Jackson's concurring opinion (see ACL ch. 8, sec. D.1).

While American troops were in Afghanistan engaged in combat with the Taliban, the President issued a military order (the "Nov. 13 Order") delegating authority to the Secretary of Defense to establish military commissions. Hamdan, a foreign national from Yemen, was captured in Afghanistan and sent to Guantanamo to be held in detention. Subsequently, the President determined that Hamdan was covered by the Nov. 13 Order and could be tried by a military commission, which later charged him with conspiracy.

Hamdan challenged this action, asserting that the President did not have authority to establish the military commissions, that the President's action intruded on the powers of Congress, and that the commission assigned to try Hamdan for conspiracy therefore did not have authority to proceed. Hamdan did not challenge the detention itself; only the validity of the

military commission was at issue. By a vote of 5 to 3, accompanied by various splintered opinions, the Court ruled in Hamdan's favor.

The Court majority held that no Congressional statute authorized the President to establish military commissions such as that to be used for Hamdan and, more specifically, that "the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the Geneva Conventions."

Setting out its reasoning on the issue of constitutional authority, the Court declared:

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.

Exigency alone, of course, will not justify the establishment and use of penal [military] tribunals . . . unless some [part of the Constitution] authorized a response to the felt need. And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war. See [*Ex Parte Quirin*, 317 U.S. 1, 26-29 (1942)]; *IN RE YAMASHITA*, 327 U.S. 1, 11 (1946).

The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, § 2, cl. 1, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11, to "raise and support Armies," *id.*, cl. 12, to "define and punish . . . Offences against the Law of Nations," *id.*, cl. 10, and "To make

Rules for the Government and Regulation of the land and naval Forces,” *id.*, cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan* [4 Wall. 2, 18 L. Ed. 281 (1866)]:

. . . . Congress cannot direct the conduct of [military] campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.” 4 Wall., at 139-140.

Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions “without the sanction of Congress” in cases of “controlling necessity” is a question this Court has not answered definitively and need not answer today [*Hamdan*, 548 U.S. at 591-92.]

The Court then added this important footnote on the relationship between Presidential and Congressional power over military commissions:

FN 23. Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co., v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.

Sec. E. *Executive Branch Clashes with the Courts*

Boumediene v. Bush, 533 U.S. 723 (2008), arose in the context of the “war on terrorism” and the Iraq and Afghanistan wars. The case concerned not only a conflict between the courts and the executive branch, but also (and more directly) a conflict between the courts and Congress. This conflict concerned detainees held at Guantanamo – how the government determined whether they were “enemy combatants” and whether they could contest such determinations by filing habeas corpus petitions in the federal courts.

The Defense Department had set up Combatant Status Review Tribunals (CSRTs) to determine whether particular detainees at Guantanamo were “enemy combatants.” The petitioners in *Boumediene* had been so designated in CSRT proceedings and had sought review by writ of habeas corpus in the U.S. District Court for the District of Columbia. Thereafter, however, Congress passed the Military Commissions Act of 2006 (MCA), which prohibited federal courts from hearing habeas actions by any individual determined to be an enemy combatant (MCA § 7(a)).

The petitioners claimed that MCA § 7(a) interfered with their habeas corpus right under the “Suspension Clause,” Const. Art. I, § 9, cl. 2, and was therefore unconstitutional. The government responded that alien detainees determined to be enemy combatants for acts committed outside the United States were not entitled to habeas corpus protections, and that the CSRT review process, as enhanced by the Detainee Treatment Act of 2005, was a permissible alternative to habeas corpus review in an Article III court. The U.S. Supreme Court rejected the government’s arguments, holding that petitioners are entitled to the privilege of the writ of habeas corpus, and that the CSRT proceedings are not a suitable substitute for habeas corpus, since the DTA process is missing various “essentials,” such as the right to contest the CSRT’s findings, the right to supplement the record on review, and the right to request release. The Court therefore declared MCA § 7(a) to be unconstitutional.

In a closing comment on the sensitivity of issues such as the ones before it, the majority explained:

Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. . . .

We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in

extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law. [533 U.S. at 797-98.]

Chapter 9. The Context for Considering Constitutional Rights Questions

Sec. A. *An Overview of Federal Constitutional Rights*

A.4. The Second Amendment

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), a 5-4 decision, the Court struck down various District of Columbia gun control regulations, including a ban on handgun possession in the home. Based on the “right of self-defense” (554 U.S. at 628), a 5-Justice majority held that (1) the Second Amendment conferred an individual right to keep and bear arms, and (2) the right is not limited to arming militias. Specifically, the Court held: “Assuming that Heller is not disqualified from the exercise of Second Amendment rights [*e.g.*, he is not a felon or insane], the District must permit him to register his handgun and must issue him a license to carry it in the home” (554 U.S. at 635). Regarding the scope of the Second Amendment right, Justice Scalia, writing for the majority, explained:

Like most rights, the Second Amendment right is not unlimited . . . nothing in our 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. [554 U.S. at 626-27.]

Because the District of Columbia is a federal enclave, the Court in *Heller* reserved the question of whether the Second Amendment also applies as a restraint on the states under the Fourteenth Amendment.

Two years later in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court concluded, by a 5 to 4 vote, that the Second Amendment is incorporated into the Fourteenth Amendment (*see* ACL ch. 11 sec. A.2) and thus applies to the states as well as the federal government (*see* ch. 11, sec. A.2, in this *Update*). The Court remanded the case to the Seventh Circuit to resolve conflicts between the Second Amendment and various Chicago-area municipal ordinances “effectively banning handgun possession” (130 S. Ct. at 3025) that were challenged in the case. Writing for the majority, Justice Alito reaffirmed *Heller*’s assurances that “the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose’” (130 S. Ct. at 3047, quoting *Heller*, 554 U.S. at 626). Also echoing *Heller*, the Court found that the right does apply to handguns because they are “the most preferred firearm in the nation to keep and use for protection of one’s home and family” (130 S. Ct. at 3036, quoting *Heller*, 554 U.S. at 628-29).

Justice Breyer filed a dissenting opinion for himself and two other Justices. They would have reviewed the gun control regulations using an interest-balancing test akin to intermediate scrutiny, and would have upheld the regulations. According to Justice Breyer, the Court should have deferred to the local legislature based on its knowledge of local problems and should have reviewed its empirically-based decisions only “to assure that, in formulating its judgments,” the legislature “has drawn reasonable inferences based on substantial evidence” (554 U.S. at 704, quoting *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 196 (1997)).

A.5. Economic Rights (the Takings Clause and the Contract Clause)

Kelo v. New London, 545 U.S. 469 (2005), is perhaps the most important and most controversial of the modern eminent domain cases under the Fifth and Fourteenth Amendments. The case concerned an extensive economic revitalization project for New London, Conn., for which the city intended to exercise eminent domain to acquire property for economic development. Owners of certain properties challenged the city's action. Their properties were not "blighted or otherwise in poor condition;" the city was acquiring them by eminent domain only because they "happened to be in the development area" – an area in which promising private businesses that could increase the city's tax revenues and generate new jobs would replace the property owners removed via eminent domain. The property owners contended that such a use of their properties was not a "public use" as required by the takings clause, since it merely transferred private properties from one private owner to another. In a 5 to 4 decision, the Court disagreed, asserting that the city's "determination that the [development] area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."

Sec. B. *Interpreting the Individual Rights Clauses*

B.1. Interpretive Approaches

A more recent example of historical interpretation of an individual rights clause – the most instructive example since publication of *ACL* – is *District of Columbia v. Heller*, 554 U.S. 570 (2008), discussed in section A.4 above in this chapter of the *Update*. For the thrust of the debate concerning the "original" history of possessing firearms for self-defense, compare Justice Scalia's majority opinion with Justice Stevens' dissent.

Sec. E. *Historical Timeline for the Development of Constitutional Rights*

Under the entry for 1961 on ACL p. 257, add at the end:

For more on the *Mapp* case and the Warren Court's criminal procedure revolution, see Carolyn Long, *Mapp v. Ohio: Guarding against Unreasonable Searches and Seizures* (Univ. Press of Kansas, 2006).

Chapter 10. Equal Protection and Privileges or Immunities

Sec. D. *Equal Protection and Heightened Scrutiny*

D.2. Race Discrimination: The Paradigm Suspect Classification

In *Johnson v. California*, 543 U.S. 499 (2005), the Court, in a 5-3 decision, confirmed that strict scrutiny applies to all racial classifications, even in the state prison context. An inmate brought an equal protection challenge to the California Department of Corrections' unwritten policy of racially segregating prisoners upon arrival for up to 60 days. The Court refused to apply the standard from *Turner v. Safley*, 482 U.S. 78, 89 (1987), that is, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Writing for the majority, Justice O'Connor said that we "apply strict scrutiny to *all* racial classifications to 'smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool'" (543 U.S. at 506, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). In a dissenting opinion, Justice Stevens did not explicitly endorse strict scrutiny but did indicate that a heightened standard of review is appropriate instead of the *Turner* standard because of "[t]he very real risk that prejudice (whether conscious or not) partly underlies the CDC's policy" (543 U.S. at 519). Moreover, unlike the majority that remanded the case to the lower courts for further proceedings, Justice Stevens was the lone Justice willing to rule on the merits that the CDC's policy "violates the Equal Protection Clause of the Fourteenth Amendment."

* * * *

In sec. D.2, add this paragraph to the end of fn. 10 on ACL p. 274:

More recently, narrow tailoring analysis has played a leading role in the school affirmative action cases, *Grutter* and *Gratz* (ACL pp. 288-91) and the *Parents Involved* case (see sec. D.7 below in this *2011 Update*.) Regarding *Grutter* and *Gratz*, see David Crump, “The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court’s Approval in *Gratz* and *Grutter* of Race-Based Decision-Making by Individualized Discretion,” *56 Florida L. Rev.* 483 (2004).

D.7. Affirmative Action

In a later case, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), the U.S. Supreme Court considered the constitutionality of two school districts’ student assignment plans that took race into account as a means of achieving diversity in K-12 education. The Court revisited *Grutter* and *Gratz* (ACL pp. 288-91) and reaffirmed their validity, but limited their full application to higher education. Treating the K-12 student assignment plans in the same way as it would a voluntary affirmative action plan, and applying principles from pre-*Grutter* and *Gratz* cases, the Court majority held that the two plans at issue used racial classifications that violated the equal protection clause. According to the Chief Justice, both plans were subject to, and failed, strict scrutiny review – in part because the school districts’ alleged interests were essentially interests in racial balancing or racial proportionality, which are not “compelling” interests, and in part because the plans’ provisions were not “narrowly tailored” to the achievement of any compelling interest.

There were five opinions issued in the *Parents Involved* case. The lead opinion by Chief Justice Roberts speaks for a majority of five Justices in some of its parts and for a plurality of

four Justices in other parts; Justice Kennedy provided the fifth vote for the parts that speak for a majority and, in his own concurring opinion, declined to support the parts that speak only for a plurality. The other four Justices joined together in a dissenting opinion by Justice Breyer. The disagreements between the Chief Justice and Justice Kennedy are particularly revealing and may foreshadow the future of judicial struggles over affirmative action. The Roberts plurality, for example, strongly emphasizes the strictness of the strict scrutiny review applicable to student assignment plans, and voluntary affirmative action plans in general, that employ racial classifications. The mindset of these four Justices is captured in the Chief Justice's statement: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (127 S. Ct. at 2768) – a statement that suggests a disinclination to accept any use of racial classifications in voluntary affirmative action plans. Justice Kennedy, in contrast, emphasizes that the concept of a "color-blind" Constitution is "an aspiration [that] must command our assent," but that "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle" (127 S. Ct. at 2791-92). Justice Kennedy thus took pains to carve out some room for the permissible use of race in voluntary affirmative action plans: "[P]arts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The [Roberts] opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race" (127 S. Ct. at 2791).

While Justice Kennedy's opinion is consistent with the Roberts opinion in insisting on a vigorous enforcement of strict scrutiny review for voluntary admissions plans that employ racial classifications (127 S. Ct. at 2789-91; Kennedy, J., concurring), the differences between them manifest themselves in the "compelling interest" analysis that is one component of strict scrutiny

review (see ACL chap. 10. secs. C.3 & C.5). (Regarding the “narrow-tailoring” requirement of strict scrutiny review, the Kennedy opinion is consistent with the Roberts opinion, and the Kennedy analysis supplements the Roberts analysis.) Justice Kennedy is more amenable than the Chief Justice to finding compelling interests sufficient to support race conscious plans. While the Chief Justice rejected the school districts’ compelling interest claims, Justice Kennedy did not. Instead, Justice Kennedy determined that a “compelling interest exists in avoiding racial isolation [of students]” – at least for K-12 education and apparently for higher education as well; that, for K-12 education, it is “a compelling interest to achieve a diverse student population;” and that “[r]ace may be one component of that diversity” (127 S. Ct. at 2797). In these respects, Justice Kennedy is aligned with the four dissenting Justices rather than the four Justices joining in the Roberts opinion, thus apparently making the Kennedy view the majority view on these points.

Moreover, Justice Kennedy’s opinion emphasizes that, in his view, there are other “race conscious measures,” beyond the specific type of plans permitted by *Grutter* and *Gratz*, that educational institutions may use to “pursue the goal of bringing together students of diverse backgrounds and races” (127 S. Ct. at 2792). Examples that Justice Kennedy provided include: “allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race” (127 S. Ct. at 2792). According to the Kennedy opinion: “These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.” Thus, according to Justice Kennedy, although decision makers may not “treat[] each student in different fashion solely on the basis of a systematic, individual typing by race” (*id.*), decision

makers nevertheless may “with candor . . . consider[] the impact a given approach [to recruitment or allocating resources, for example] might have on students of different races” (*id.*).

The Roberts opinion makes a similar point that may be supportive of at least part of Justice Kennedy’s position (see 127 S. Ct. at 2766; Roberts, C.J. for a plurality). The Chief Justice suggests that there may be “other means for achieving greater racial diversity in schools” that are not precluded by the *Parents Involved* ruling, such as determining “which academic offerings to provide to attract students to certain schools.” Chief Justice Roberts’ suggestion seems to be that some race-conscious planning and programming may be permissible when race is not used as a criterion for making decisions about particular individuals. To the extent that Roberts and the other Justices concurring him would adopt his own suggestion, and to the extent that the Roberts reasoning is consistent with the Kennedy reasoning on these points, the latter becomes a majority view (indeed, a view that the dissenters would apparently accept as well).

Sec. F. *Study Suggestions for Equal Protection*

In the list FOR FURTHER READING (ACL p. 297), add:

Richard Aynes, “Ink Blot or Not: The Meaning of Privileges And/Or Immunities,” 11 *U. Pa. J. Const. L.* 1295 (2009).

Chapter 11. Due Process

Sec. A. *The Content of the Due Process Clauses*

A.2. The “Incorporated” Content of Fourteenth Amendment Due Process

In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), a 5-4 decision, the Court held that the Second Amendment right recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (ch. 9, sec. A.4 above in this *Update*), also applies to the states through the Fourteenth Amendment. Referencing the selective incorporation doctrine, the Court majority framed the issue as “whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan* [*v. Louisiana*, 391 U.S. 145, 149 (1968)], or as we have said in a related context, whether this right is ‘deeply rooted in this Nation’s history and tradition,’ *Washington v. Glucksberg*, [521 U.S. 702, 721(1997)]” (130 S. Ct. at 3036).

The three dissenters joining the Breyer opinion also accepted the continuing validity of the *Duncan* framework for applying the selective incorporation doctrine (130 S. Ct. at 3122-23). A total of eight Justices, therefore, reaffirmed the authority of *Duncan*. Justice Thomas qualified his support in a separate concurring opinion, however, arguing that the Fourteenth Amendment’s privileges or immunities clause, not the due process clause, was the sounder basis for incorporating Bill of Rights provisions into the Fourteenth Amendment.

Within the reaffirmed *Duncan* incorporation framework, the various Justices drew sharply divergent conclusions. The three Breyer dissenters concluded that there was no incorporation because, as they saw it, the Second Amendment right recognized in *Heller* was neither fundamental nor deeply rooted in this Nation’s history or tradition. A plurality, on the other hand, found that the due process clause of the Fourteenth Amendment incorporates the

Second Amendment right recognized in *Heller* because the right “is fundamental from an American perspective” (130 S. Ct. at 3050). Justice Thomas joined the plurality to provide the fifth vote for incorporation, but emphasized that the result should be based on the privileges or immunities clause rather than the due process clause.

Sec. C. *Substantive Due Process: A Conceptual Overview*

C.2. The New Era Cases: Contraception and Abortion

In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court considered a facial challenge to a Nebraska statute that criminalized the performance of “partial birth abortions,” unless “necessary to save the life of the mother” (530 U.S. at 921, quoting Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999)). The statute applied to all partial birth abortions—both pre- and post-viability—including “D & E” (dilation and evacuation), a procedure not reserved for late-term abortions only. By a 5-4 vote, the Court struck down the Nebraska law. Writing for the majority, Justice Breyer found the statute unconstitutional for two independent reasons.

First, the statute violated the principle established in *Roe v. Wade*, 410 U.S. 113, 163-64 (1973), and reaffirmed in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion), that a State may not prohibit a woman from making the ultimate decision to terminate her pregnancy before viability. To the contrary, the Nebraska statute prevented a woman from choosing a D & E abortion even before viability, thus placing a substantial obstacle in the path of a woman seeking to abort a nonviable fetus and “unduly burdening the right to choose abortion itself” (530 U.S. at 930, quoting *Casey*, 505 U.S. 833, 874). Significantly, the Court in *Stenberg* adopted the *Casey* plurality’s undue-burden standard, promoting it to a majority standard. Applying that standard, the majority concluded that:

[Prosecutors] may choose to pursue physicians who use D & E procedures, the most commonly used method for performing pre-viability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. [530 U.S. 914, 945-946.]

Second, the Nebraska statute was also unconstitutional because it “lacks any exception ‘for the preservation of the . . . health of the mother’” as required by *Roe*, 410 U.S. 113, 164-165. (530 U.S. at 930, quoting *Casey*, 505 U.S. 833, 879).

Seven years after *Stenberg v. Carhart*, in another 5-4 decision, the Court in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), rejected a facial challenge to a federal statute that criminalized “‘partial-birth abortions’” unless “‘necessary to save the life of the mother’” (550 U.S. at 141, quoting *Partial-Birth Abortion Ban Act of 2003*, 18 U.S.C. § 1531). Justice Kennedy, writing for the majority, reaffirmed the newly promoted undue-burden standard from *Casey* that prohibits placing “‘a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability’” (550 U.S. at 146, quoting *Casey*, 505 U.S. at 874). The Court explained, however, that *Casey* struck a balance allowing the state to “express profound respect for the life of the unborn” while still allowing a woman to make the ultimate decision to terminate her pregnancy (550 U.S. at 146, quoting *Casey*, 505 U.S. at 877).

Relying on the standard from *Casey*, the Court held that the federal act does not impose an undue burden because it permits “most D & Es in which the fetus is removed in pieces, not intact.” (550 U.S. at 151). Thus, compared to the act in *Stenberg*, which broadly prohibited all

types of D & E abortions, the federal act, the Court found, was not unduly burdensome because it only prohibits “intact D & E” and “does not prohibit the D & E procedure in which the fetus is removed in parts.” (550 U.S. at 150).

On the issue of preserving the health of the mother as required by *Roe*, the majority noted that the *Stenberg* Court was required to accept the factual findings issued by the district court. But in response to *Stenberg*, Congress made its own factual findings concluding, *inter alia*, that performing a partial birth abortion “is never medically necessary and should be prohibited.” (550 U.S. at 141).

Reviewing Congress’ findings deferentially but without granting them dispositive weight, the Court admitted that whether the partial-birth abortion ban creates significant health risks for women “has been a contested factual question,” (550 U.S. at 161). Yet the Court also asserted that “[m]edical uncertainty does not foreclose the exercise of legislative power . . .” (550 U.S. at 164). Hence, unlike *Stenberg*, where the Court said that the division of medical opinion reflects uncertainty, “a factor that signals the presence of risk, not its absence” (530 U.S. at 937), in *Gonzalez*, the Court relied on the existence of medical uncertainty to provide “a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden” (550 U.S. at 164).

Since the Court had ruled only on the facial challenge to the federal statute, the Court noted that “[t]he Act is open to a proper as-applied challenge in a discrete case” (550 U.S. at 168).

Sec. F. *Study Suggestions for Due Process*

To the list of sources under “FOR FURTHER READING” (ACL p. 339), add:

Daniel Farber, *Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have* (Basic Books 2007).

Chapter 12. Freedom of Expression

Sec. B. *Conceptual Overview of Freedom of Expression*

B.3. The Mass Media and Free Press

Replace fn. 2 on ACL p. 349 with the following:

As a successor to the Communications Decency Act (CDA) provisions struck down in *Reno v. American Civil Liberties Union*, Congress passed the Child Online Protection Act (COPA), 47 U.S.C. § 231. COPA, like the CDA, was challenged in court on First Amendment grounds. The U.S. District Court issued a preliminary injunction against enforcement of the Act, and eventually the case reached the U.S. Supreme Court. In *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), using principles like those it has applied in *Reno*, the Court determined it likely that COPA would unduly burden adults' access to communications protected by the First Amendment; and the Court therefore affirmed the preliminary injunction. On remand for trial, the district court entered a permanent injunction against enforcement of COPA. On appeal, the circuit court affirmed, also using principles similar to those in *Reno*. *American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

Sec. C. Analytical Techniques for Resolving Free Expression Problems

C.2. Non-Speech Techniques

C.2(1) Communicative Value

In *United States v. Stevens*, 130 S. Ct. 1577 (2010), a case challenging a federal law that prohibited certain depictions of animal cruelty, the Court considered whether speech depicting violence, or more specifically speech depicting animal cruelty, was a category of speech excluded from First Amendment protection. Defending the law, the Government contended “that depictions of ‘illegal acts of animal cruelty,’” as defined by the statute, “necessarily ‘lack expressive value,’ and may accordingly ‘be regulated as unprotected speech’” (Court quoting Government brief); and that the statute “necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment” (quoting Court). In rejecting this contention, the Court, in an 8-1 decision, set out its most extensive statement ever on categorical exclusion of speech from First Amendment protection:

The Government contends that “historical evidence” about the reach of the First Amendment is not “a necessary prerequisite for regulation today,” Reply Brief 12, n. 8, and that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress’s “ ‘legislative judgment that . . . depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment

protection,’ ” Brief for United States 23 (quoting 533 F.3d, at 243 (Cowen, J., dissenting)), and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.” Brief for United States 8; see also *id.*, at 12.

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.” *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803).

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often described historically unprotected categories of speech as being “

‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’ ” R.A.V., *supra*, at 383 (quoting *Chaplinsky, supra*, at 572). In *New York v. Ferber*, 458 U.S. 747 (1982), we noted that within these categories of unprotected speech, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,” because “the balance of competing interests is clearly struck,” *id.*, at 763-764. The Government derives its proposed test from these descriptions in our precedents. See Brief for United States 12-13.

But such descriptions are just that -- descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, 458 U.S., at 763. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult

actors) was de minimis. *Id.*, at 756-757, 762. But our decision did not rest on this “balance of competing interests” alone. *Id.*, at 764. We made clear that *Ferber* presented a special case: The market for child pornography was “intrinsically related” to the underlying abuse, and was therefore “an integral part of the production of such materials, an activity illegal throughout the Nation.” *Id.*, at 759, 761. As we noted, “ ‘[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.’ ” *Id.*, at 761-762 (quoting *Giboney*, *supra*, at 498). *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding. See *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (describing *Ferber* as finding “persuasive” the argument that the advertising and sale of child pornography was “an integral part” of its unlawful production (internal quotation marks omitted)); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-250 (2002) (noting that distribution and sale “were intrinsically related to the sexual abuse of children,” giving the speech at issue “a proximate link to the crime from which it came” (internal quotation marks omitted)).

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of

speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them. [130 S. Ct. at 1584-86.]

Sec. D. *Content-Based Restrictions on Expression*

D.3 Strict Scrutiny Review

The Court’s decision in *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011), provides a good example of strict scrutiny review under the free speech clause. The case concerned a California law that prohibited the sale of violent video games to minors without parental consent. In so doing, the Court addressed the status of video games as mediums of speech afforded First Amendment protection. The Court first affirmed that video games, like books, plays, and movies, and like radio and television, qualify as speech because they communicate social messages, and that this new medium deserves just as much protection as other new technological mediums that preceded it. The Court then determined that video games do not lose their First Amendment protection if they are violent and could thus be considered “speech about violence” or “depictions of violence.” In effect, the Court ruled that violent

speech is not categorically excluded from First Amendment protection. (See also *United States v. Stevens*, section C.2 (1) above in this chapter, which makes a similar point.)

Having thus established that the state statute at issue is a regulation of speech, and (implicitly) that it regulates the content of speech, the Court then subjected the statute to strict scrutiny review. The Court analyzed the statute's validity using the generic standard for strict scrutiny review: whether the statute is narrowly tailored to further a compelling government interest. The Court determined that it is not. Even if the government had a compelling interest in preventing aggressive and/or violent acts by children, the statute was not narrowly tailored to this interest. California had determined only that, under the studies it had relied on, there was a *possibility* that violent video games lead to violent conduct. The evidence showed that there were increased feelings of aggression and louder voices for a few minutes after video games were played by children. However, non-violent video games, and other media like news, pictures of guns, and morning cartoon programs, caused similar results. Also, California had not prohibited children from playing violent video games but only required parental consent. This under-inclusivity indicated that the California statute was not aimed at preventing violent acts by children but at preventing certain video games from being played by children if their parents disapproved.

* * * *

The controversial problem of election campaign expenditure limits and the First Amendment was again before the U.S. Supreme Court in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). At issue was the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. 441b, which limited corporate and union campaign expenditures from general treasury funds for communications referring to a particular

candidate. In a set of lengthy and complex opinions, the Court held that the statute (§ 441b) violated corporations' and unions' free speech rights and was facially invalid. The various opinions survey the Court's campaign expenditure cases back to *Buckley v. Valeo*, 424 U.S. 1 (1976), and the Court majority overrules two of these cases: *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (overruled in part).

It was clear to the Court in *Citizens United* that the statute prohibited political activity that was expressive in nature and would be considered highly protected "political speech." Strict scrutiny review was therefore appropriate, and the question was whether the statute restricted corporations' and unions' political speech in a way that was not narrowly tailored to the furtherance of a compelling state interest.

* * * *

In *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011), the Court strongly reaffirmed the "bedrock principle" of *Texas v. Johnson* (ACL p. 365). In this case, a religious group (Westboro Baptist Church) had picketed near a military funeral for a Marine killed in the line of duty in Iraq. A federal trial court jury had found the messages conveyed during the picketing to be "outrageous," and the U.S. Supreme Court found them to be "particularly hurtful" to many persons and to add "anguish" to the "already incalculable grief" of the Marine's father. Nevertheless, the Court held the picketing to be protected First Amendment free speech, since it took place in a public forum (see ACL pp. 379-81); the messages conveyed were matters of "public concern;" the picketing was peaceful; and, under *Texas v. Johnson's* bedrock principle, the offensiveness of the speech alone could not be a justification for regulating it.

Sec. F. *The Varied Roles of Government Vis-à-vis Free Expression*

F.2. Government as Speaker

In *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the city maintained a public park in which it displayed various permanent, privately donated monuments. A religious organization requested that the city accept and display another monument containing the “aphorisms” of the religion. When the city declined to do so, the religious organization argued that the refusal violated its free speech rights. The U.S. Supreme Court rejected the claim, determining that the city’s action “is best viewed as a form of government speech” and therefore “is not subject to the Free Speech Clause.” In so holding, the Court analyzed at length the distinction between “government speech” and “private speech,” emphasizing that:

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n.7 (1973) (Stewart, J., concurring).

* * * *

A government entity has the right to “speak for itself.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). “[I]t is entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express. See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). [*Pleasant Grove*, 555 U.S. at 460.]

The *Pleasant Grove* case thus reaffirms that, when a government entity speaks “for itself” by “delivering a government-controlled message,” the speech is not subject to the restrictions of the free speech clause -- for example, the requirement of viewpoint neutrality.

F.4. Government as Employer

The U.S. Supreme Court has added another important decision to its *Pickering/Connick* line of cases on public employee speech. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a case involving the free speech claim of a deputy district attorney, the Court held by a 5 to 4 vote that the First Amendment does not protect public employees whose statements are made as part of their official employment responsibilities. See generally Sheldon Nahmod, “Public Employee Speech, Categorical Balancing and § 1983: A Critique of *Garcetti v. Ceballos*,” 42 *U. Rich. L. Rev.* 561 (2008). The Court majority emphasized and relied on the distinction between speaking as an employee and speaking as a private citizen: “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” As the Court explained, “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”

Garcetti arguably changes the pre-existing law in a way that provides less protection to public employees. This is so because, before *Garcetti*, courts gave more emphasis to the “public concern” factor and sometimes protected employee speech, even when in the context of official duties, if the speech was on a matter of public concern.

F.5. Government As Landowner: The Special Problem of the “Public Forum”

In *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), the Court utilized analysis applicable to a limited public forum in rejecting students’ free speech challenge to a law school’s “all comers” policy that required recognized student organizations to accept all students seeking membership. The Court relied on *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (ACL pp. 377-78) and on its two-part test for regulation of speech in limited public forums: that the regulation be viewpoint neutral and that it be reasonable in light of the forum’s purposes (ACL p. 381).

The defendant was the U. of California/Hastings College of the Law. “Our decisions make clear, and the parties agree,” said the Court, “that Hastings, through its RSO program, established a *limited* public forum” (citing *Rosenberger*). “[W]e are persuaded that our limited-public-forum precedents adequately respect . . . CLS’s speech . . . rights, and fairly balanced those rights against Hastings’ interests as property owner and education institution.” Determining that the Hastings “all-comers” policy, as described in the parties’ fact stipulation, met both parts of the two-part test for regulating speech in a limited public forum, the Court upheld the policy on its face.

Sec. G. Freedom of Association

The student organization in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010) (subsection F.5 above) also asserted that the Hastings “all comers” policy for membership violated its freedom of expressive association. In rejecting this claim, the court distinguished *Boy Scouts of America v. Dale* (ACL pp. 382-85) and signaled that freedom of “expressive

association analysis may work out differently when the restriction on expression takes place in a limited public forum (as was the case in *Martinez*). In particular, the Court’s 5-Justice majority reasoned that:

First, . . . speech and expressive-association rights are closely linked. . . . When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum . . . test only to be invalidated as an impermissible infringement of expressive association.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may “reserve[e] [them] for certain groups.” *Rosenberger*, 515 U.S. at 829. . . .

Third, this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. See, *e.g.*, *Boy Scouts of America v. Dale*, 530

U.S. at 648 (regulation “forc[ed] [the Boy Scouts] to accept members it [did] not desire” (internal quotation marks omitted)); *Roberts v. United States Jaycees*, 468 U.S. at 623 (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than” forced inclusion of unwelcomed participants.)

Application of the less-restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition. [130 S. Ct. at 2985–86 (footnotes and some citations omitted).]

Sec. H. *Study Suggestions*

The Farber text – entry no. 2 in “FOR FURTHER READING” on ACL p. 386 – is now in a 3rd edition, published in 2010 by Foundation Press/Thomson West.

Chapter 13. Freedom of Religion

Sec. C. The Free Exercise Clause: A Conceptual Overview

C.1. Identifying Burdens on Religious Belief or Practice

Locke v. Davey (ACL p. 401, fn. 5) has been decided by the U.S. Supreme Court (540 U.S. 712 (2004)). The Court upheld the State of Washington's exclusion of students seeking theology degrees from a state scholarship program. In the process, the Court probed the relationship between the First Amendment's free exercise and establishment clauses, as well as the relationship between these two clauses and the religion clauses in state constitutions.

Sec. H. Study Suggestions

To the list of sources under "FOR FURTHER READING" (ACL p. 410), add: *Daniel Conkle, Constitutional Law: The Religion Clauses*, 2nd (Foundation Press 2009). Also, in this same list, the Farber text is now in a 3rd edition published in 2010 by Foundation/Thomson West.

Chapter 14. Alternative Sources of Individual Rights

Sec. C. Congress' Enforcement Powers

On ACL p. 417, delete fn. 2 on p. 417, and in its place add this new paragraph to the end of the text on p. 417.

In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court addressed the validity of Title II of the Americans with Disabilities Act as an exercise of Congress' power under Section 5 of the Fourteenth Amendment. The *Lane* case was different from earlier cases (e.g. *Garrett*) in two respects: (1) the plaintiff asserted that a particular application of the statute was within the scope of Congress' enforcement power, rather than asserting that the entire statute (or Title of the statute), on its face, was within Congress' power; and (2) the plaintiff claimed that the particular application of the statute sought to be upheld was enforcing the due process clause of the Fourteenth Amendment rather than the equal protection clause. Accepting the pertinence of these two distinctions and the plaintiff's reliance on them, the Court for the first time permitted plaintiffs to assert that a particular application of a statute, or a particular "class of cases" within a statute, are within Congress' enforcement power, rather than relegating plaintiffs to the more difficult argument that the entire statute is within Congress' power. In addition, the Court made clear that, when asserting that a particular application of a statute is enforcing the Fourteenth Amendment, a plaintiff may rely on any clause of the Amendment that fits the context of the statute and the plaintiff's claim – whether it be the equal protection clause, the due process clause, or any Bill of Rights clause incorporated into the due process clause.

Sec. D. *Enforcing Federal Individual Rights Statutes Against the States:*

The Sovereign Immunity Problem

In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Court reconsidered its suggestion in the *Seminole Tribe* case (ACL p. 419; see also ACL pp. 169-70) that the Eleventh Amendment prohibits Congress from abrogating state sovereign immunity from suit in federal bankruptcy cases. Focusing on various unique factors that distinguish the bankruptcy power from other Congressional powers under Article I of the Constitution, the Court (by another 5 to 4 vote) held that Congress did have authority, under its bankruptcy power, to abrogate state sovereign immunity from bankruptcy suits.

* * * *

On ACL p. 420: (a) delete fn. 4; then (b) insert the material below into the text immediately after footnote superscript 4 in the text, beginning with a new paragraph; and then (c) begin another new paragraph with the phrase “In addition . . .” in the text at the bottom of p. 420.

In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court opened an additional avenue by which plaintiffs may sometimes avoid a state entity’s sovereign immunity claim by asserting that Congress has abrogated the immunity. This avenue is described in the additional discussion of *Lane* in this *2011 Update* to ACL, chapter 14, section C, immediately above.

* * * *

In *United States v. Georgia*, 546 U.S. 151 (2006), another case involving a claim under Title II of the Americans With Disabilities Act, the Court reaffirmed the approach it had taken in *Tennessee v. Lane*. In addition, the Court emphasized and clarified the most basic of approaches for substantiating a Congressional abrogation of sovereign immunity under Title II or other statute that Congress enacts under its Section 5 power:

While the Members of this Court have disagreed regarding the scope of Congress’s “prophylactic” enforcement powers under § 5 of the Fourteenth Amendment . . . , no one doubts that § 5 grants Congress the power to “enforce . . . the provisions” of the Amendment by creating private remedies against the States for *actual* violations of those provisions This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity. [546 U.S. at 158-59 (emphasis in original).]

Sec. E. *State Constitutional Rights*

Since publication of ACL, challenges to state prohibitions on same-sex marriage have been litigated in various states beyond the three discussed on ACL pp. 421-22. There have been

state appellate court opinions in these other states that have continued to illustrate the importance of state constitutional rights.

In California, for example – the site of the most visible and controversial litigation—the state supreme court invalidated state statutes defining marriage as a relationship between one man and one woman. *In Re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008), the court determined that sexual orientation is a suspect classification under the state constitution’s equal protection clause and that the right of same-sex couples to marry was a fundamental privacy interest under the state constitution’s right to privacy clause. Strict scrutiny therefore applied to the contested statutory provisions. Holding that these provisions are not necessary to the accomplishment of any compelling state interest, the court declared them to be unconstitutional under the state constitution.

Shortly thereafter, however, California voters approved “Proposition 8” which added a provision to the state constitution that recognized only marriages between a man and a woman, thereby in effect overturning the California Supreme Court’s decision in *In Re Marriage Cases*. Opponents of Proposition 8 then brought suit to contest the validity of the Proposition, with the plaintiffs asserting various technical arguments concerning the appropriate role of propositions under California constitutional law. In *Strauss v. Horton*, 46 Cal. 4th 364, 207 P.3d 48 (2009), the California Supreme Court upheld the validity of Proposition 8 as to all marriages performed after its effective date.

For other recent cases on same-sex marriage, see *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (2007) (applying rational basis review to uphold state’s prohibition on same-sex marriages); *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008) (applying intermediate scrutiny to invalidate state’s prohibition on same-sex marriage); *Varnum*

v. *Brien*, 763 N.W. 2d 862 (Iowa 2009) (applying heightened scrutiny to invalidate state's statute reserving marriage for heterosexual couples.)