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A Primer for the Constitutionally Impaired

Marianne M. Jennings*

I. INTRODUCTION

It comes every June and I hate it. "It" is the month-long fest of U.S. Supreme Court opinions. First, you read about them in the Wall Street Journal, then Peter Jennings starts in, and finally the Home Shopping Network joins in on the merriment.

The Supreme Court gets a lot of attention for nine people who won't even consent to be on the cover of People. I know they're a fine group of folks. I just think they're overrated. They get all the credit and all the June media attention. What about those of us down in the trenches making reversible error and legislating void for vagueness laws? Where would the Supreme Court be without us?

Another problem I have with the Supreme Court is that I'm not sure they have a grasp of the criminal justice system. The notion

1. That would be a person who is deficient in constitutional law. The author does not imply that she has been declared constitutionally impaired, or impaired by the Constitution in any way in the pursuit of life, liberty, or Phoenix Suns tickets.

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2. The headlines in the WSJ are not always pro-court—something like: "Those nine jerks in muumuus once again refused to get rid of RICO."

3. The ABC headline for the case in note 2 would be: "Business was dealt yet another blow today by the U.S. Supreme Court. The Court held today that ambiguous statutes intended to regulate crosswalks could be applied to permit dismemberment of business people who continue their relentless campaigns to turn a profit."

4. "Better buy this julienne fry-maker today, before the company is indicted under RICO, because our Supreme Court just gave the go-ahead for RICO charges based on julienne fries production as the predicate offense."

5. Okay, there was that Clarence Thomas cover, but, hey, look what happened to him.

6. The only problem I ever had was Thurgood Marshall's white socks, and I know they're explained post-mortem in his recently-released papers. Also, Ruth Bader Ginsburg's T-strap, Wizard-of-Oz-like shoes seem intimidating.

7. Probably still trying to figure which spelling of "marijuana" ("marihuana") to go with. It was a split vote, one abstaining, three gave a proxy. No elaboration on possible conflict was given for the abstention. See Thurgood Marshall's papers as reported in Tony Mauro, Justice Tilted at Court's Windmills, USA Today, May 27, 1993, at 1A. And you thought this wasn't going to be a scholarly piece. By the way, the final decision was for "marijuana." For the spelling, not for indulging, legalizing, or exempting from RICO.
the Court has seems to be that Mr. Rogers is pulled over outside his neighborhood for turning right on red.\textsuperscript{8} I believe these justices need to understand that most criminal defendants, with the exceptions of Ivan Boesky and Michael Milken, look like they have hair comparable to Brillo (trademark lawyers avert your eyes) pads on their shoulder blades and things like "My Father was Satan Himself" tattooed on their arms.\textsuperscript{9}

These justices need a little training in the trenches. I was thinking that if they just tuned into \textit{Cops} on the Fox Network on Saturday evenings they could see why that \textit{Miranda v. Arizona}\textsuperscript{10} case is largely irrelevant since the crimes are committed on video tape for the Fox camera guys.\textsuperscript{11} Confessions just aren't a critical part of law enforcement, what with VCRs and all.\textsuperscript{12}

But my two biggest difficulties with the Supreme Court are its decisions: a) They're too long; and b) Mostly I don't understand them. And this is where this article comes in. This article is for people who slept through \textit{McCulloch v. Maryland},\textsuperscript{13} who can't say \textit{certiorari}\textsuperscript{14} and who think free exercise is what you get when you go to an open house for a new health club. If this were a true scholarly piece, right about here it would read: The purpose of this article is to provide, for practical application, a historical perspective

\textsuperscript{8} The author does not imply that Mr. Rogers would ever do this. Hey, I've read that New York Times v. Sullivan, 376 U.S. 254 (1964), thing, and I'm not getting into a libel suit with Mr. Rogers. Although I did hear once that King Friday shot a guy. Do puppets qualify as public figures?

\textsuperscript{9} I actually don't have first-hand knowledge about Boesky's or Milken's shoulder blades. King Friday told me.

\textsuperscript{10} 384 U.S. 436 (1966). This case was so important that two summers ago we even had to celebrate its anniversary. See, we're even into Supreme Court reruns.

\textsuperscript{11} The only problem I see is those fuzzed out or blue-spotted heads on the tape. Maybe Fox can fix that up for trial.

\textsuperscript{12} By the way, the Supreme Court has okayed taping \textit{Cops} (and any other story for that matter) in Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984). Well, they didn't say, "it's okay by us if you want to tape \textit{Cops} from Fox 15." What they said was that time-shifting (which is what we do when we record \textit{Cops} while we're at the Bruce Lee movie so that we can have a really big Saturday night) was not a copyright infringement under federal copyright law. Whew, what a relief that is! Otherwise we all surely would have been jailed for recording the Nick-at-Nite reruns of \textit{The Partridge Family} series and the \textit{Beverly Hillbillies Return}. And we would have gone to jail tattooless but with Miranda warnings.

\textsuperscript{13} 17 U.S. (4 Wheat.) 316 (1819). This would usually be the first case in your Con Law course because it is the case in which the Supreme Court ruled itself to be the Supreme Court. It's a long harangue that basically says, "We're in charge. The laws and regs stop here." They didn't say "buck" because there's something quite awful about money and judicial connections.

\textsuperscript{14} Just say "cert." You'll either get your message across or be handed a breath mint, depending upon how impaired, constitutionally speaking, those around you are.
on the U.S. Supreme Court.\textsuperscript{15}

II. \textbf{Speaking Supreme Court—Using the Language to Fool Others (They’ll Think You’re a Constitutional Wonk)}

Just think “bootstrapping.” No one has ever gone wrong\textsuperscript{16} saying something like “That’s a bootstrap argument.” Also learn to throw around terms like rational basis, strict scrutiny, medium scrutiny, rational scrutiny, reasonable scrutiny, reasonable rational, rational strict, and rational bootstrap. “Chilling” is a key term. There is, however, no such thing as chilling scrutiny. There is chilling effect and chilling willing (formal name of that cartoon penguin “Chilly Willy” who bears a remarkable resemblance to William Rehnquist).\textsuperscript{17} “Sua sponte,” which is a distant cousin to “sui generis,” is also critical for constitutional wonk discussions.\textsuperscript{18}

III. \textbf{Overview of the Constitution}

In case you’re ever on \textit{Jeopardy}, this information might come in handy. There are seven articles and twenty-seven amendments in the U.S. Constitution.\textsuperscript{19} The articles set up the three branches of government: executive, legislative and judicial.\textsuperscript{20} There’s also the Supremacy Clause,\textsuperscript{21} the Contract Clause,\textsuperscript{22} the Commerce Clause, and Senator Robert Dole.

\begin{itemize}
\item \textsuperscript{15} Translation: the highlights of Con Law for those who never use it in practicing law, and who believe the released Marshall papers depicting a bickering group of petty backstabbers pretty much confirm what they thought all along: Supreme Court Justices are as goofy as the rest of us. The author recognizes that, hailing from academe, she has a lot of nerve using “bickering,” “petty” and “backstabbers” to describe anyone outside the campus. It’s a pot calling the kettle black. Actually it’s a goofy professor calling the justices goofy. The Supreme Court is also a fine kettle of fish, a bull by the horns, and ducks in order. The author was on a simile roll and felt compelled to list all of those, however irrelevant.
\item \textsuperscript{16} Speaking only in the constitutional sense of course.
\item \textsuperscript{17} Actually known as “Willy” or “Wills” Rehnquist to close associates and in the Marshall Papers as “Silly Willy,” companion to “Bootstrap Brennan,” and “Scrutiny Scalia.”
\item \textsuperscript{18} This author notes by way of disclaimer that you should probably not say “sui” or “sua” too loudly, particularly in the Seventh and Tenth Circuits due to hog stampede risk, as those words have the opposite of a chilling effect on hogs.
\item \textsuperscript{19} If Alex Trebek gets really picky, or you hit the daily double, the Constitution was ratified by 9 of the 13 colonies that participated in drafting it in 1788.
\item \textsuperscript{20} There are, of course, now four branches of government: executive, legislative, judicial, and Senator Robert Dole.
\item \textsuperscript{21} Very easy concept: federal government wins.
\item \textsuperscript{22} Very easy concept: hasn’t been used with any real results since 1905 in Lochner v. United States, 198 U.S. 45 (1905). The concept is pretty much ignored, except in law school. It’s important to know these obscure clauses for the bar exam so that you can pass the exam and then never use the information again.
\end{itemize}
Clause, the Santa Clause, the Nina, the Pinta and the Santa Maria. The first ten amendments to the Constitution are the Bill of Rights. The Bill of Rights was the deal maker for the rest of the Constitution. Without the Bill of Rights, the Constitution would have had a substantial BTU tax in Article IV. Here's a brief overview:

First Amendment—The Right to Burn Flags.
No religion anywhere except cable television.
Second Amendment—Drafted by the NRA.
Fourth Amendment—Warrants for fun and profit.
Fifth Amendment—Taking land to build Chrysler Plants.

23. Used to be a big deal, because states once believed the federal government shouldn't regulate everything. Now if there's interstate commerce involved, Congress can regulate it. Interstate commerce is involved if the regulation relates to a chicken in Illinois and the chicken can scratch I-10 in the dirt. So Congress can regulate anything it wants to regulate (and some things it doesn't want to regulate, but it's habit-forming).

24. Inserted arbitrarily by this author as a test to see if anyone is still reading at this point. Also, should this author ever be nominated for some federal job, such as Commerce Clause Assistant Attorney General for Contracts and Supremacy, this little phrase alone should get me a Lani Guinier-type appearance on Nightline. Probably Geraldo too.

25. In the interest of academic precision, there was another boat when Columbus sailed the ocean blue in 1492, but I only learned three when I was in school and it wasn't on the bar exam. Furthermore, revisionist history has taught us that Columbus was pond scum.

26. Some writers prefer, of course, the more formal William of Rights, cousin to William of Lading, and Wills of Attainder, a cousin to Wills of Rehnquist and also Wills of Chuck and Di. Soon to be Chuck and Camilla Parker-Bowles and Di and ?.

27. Without some fundamentally interesting things like whether yelling "Fire" in a crowded theater was constitutionally protected, there was no way that all that other sleep-rendering stuff on justiciability would have garnered the necessary votes.

28. This is second-hand information from an ancestor of Senator "No-Energy-Tax" Bowen of Oklahoma.

29. Fire has long been recognized as a form of speech. See, e.g., Nero.

30. Well, mostly they want to keep it out of high schools because it causes a loss of Def Lepperd influence, and students begin to wear T-shirts that are not black with world tour notations.

31. The cable television shows with Pastor Dave (who happens to wear black leather suits) or Minister Marilyn (who does not), are permitted to counterbalance quality programs like Oprah and Donahue. This counterbalancing is subject to strict scrutiny as well as commercials.

32. The National Rifle Association (NRA) was formed at the Boston Tea Party. Some original members and weapons remain today.

33. The profit comes under the RICO statutes that allow governmental agencies to take even the Ovaltine from your cupboard when possessing property because you committed a crime; you were with Mr. Rogers when he turned right on red.

34. Known as eminent domain, the "Takings" Clause allows the government to take your land, pay you a tad, and then build a freeway off-ramp on top of your bathroom. The Fifth Amendment also contains the Due Process Clause. This means you must "do" process before you take anything away, from food stamps to California coastal property.
Sixth Amendment—Trials and other lawyer employment programs.\textsuperscript{35} The rest of the amendments are never discussed. They were giveaways in exchange for \textit{jus tertii}.\textsuperscript{36}

Now there are some amendments beyond the first ten that we've lopped\textsuperscript{37} on when things got testy. We had that drinking problem for awhile, so we cut off supplies, and then reinstated the drinking problem.\textsuperscript{38} We had that revenue problem for awhile, so we got taxes into place.\textsuperscript{39} We still have that revenue problem, but the legality of drinking seems to help.\textsuperscript{40} There is the Fourteenth Amendment\textsuperscript{41} which basically says the states have to follow the rest of the Constitution. Often called the Equal Protection Clause, the XIVth Amendment has been a basis for every lawsuit filed since 1868.\textsuperscript{42} The 14th Amendment is also the due/do process clause for states.\textsuperscript{43}

So, there you have it. The Constitution looks like the original Pong game. It was a simple game people felt comfortable with.\textsuperscript{44} But we're now up to arcades, games with steering wheels, in-home arcades, games with steering wheels, in-home

\begin{itemize}
\item Everyone gets a trial. Even those guys who confess to the camera on \textit{Cops} are entitled to a trial.
\item \textit{Jus tertii} is a form of Italian spumoni, and also is thrown around by the courts to keep third parties from suing. This way chiropractors cannot go directly to court for patients in motor vehicle personal injury cases. They still have to wait for their injured but "well-adjusted patients" to file suit.
\item Actually, the lopping is a pretty complex process. Congress has to agree on the amendment and then we have to go to the frightening halls of state legislatures to get approval from a bunch of them.
\item These are amendments XVIII and XXI. And without them there never would have been an Eliot Ness, or Tatum O'Neal's Oscar for \textit{Paper Moon}—the inspiring story of moonshining with a child in a convertible.
\item This Amendment is XVI in roman numerals. Due process is not required for taxes.
\item I've heard. No original source here. My apologies to the \textit{BLUEBOOK} Czars. The \textit{BLUEBOOK} is, of course, written by folks who enjoy constitutional law and drinking. There are no due process rights under the \textit{BLUEBOOK}. Your citation can be taken and changed without notice and without just compensation.
\item XIV for you Thomas Jefferson purists.
\item The ACLU has a 14th Amendment "Windows" icon on its computer. Actually, the 14th Amendment was never mentioned in the savings and loan lawsuits brought against auditors and directors for defunct institutions. They had a slam dunk, so it wasn't necessary to invoke the XIVth Amendment.
\item As you will see later on (formally, see notes 187-227 and accompanying text), the 14th Amendment gets us into all that rational basis stuff. From there we move to strict scrutiny. Then we plod into rational scrutiny and bootstrapping. These tests mean how closely the Supreme Court is going to eyeball state legislation and how long the opinion will be. Rational basis = "Hey, if the state wants to be this wacky, who are we to question?"
Strict scrutiny = "How are we going to evolve into historical figures if we don't chastise these states on topics like contraception?"
\end{itemize}
games and games with enough noise for a thermonuclear war.\textsuperscript{45} Now for the details.\textsuperscript{46}

IV. ARTICLE II\textsuperscript{47}

The purpose of Article II is to make sure the president doesn't get out of control.\textsuperscript{48} Presidents can negotiate treaties,\textsuperscript{49} but the Senate has to ratify them.\textsuperscript{50} Another power in Article II remains up in the air and subject to great debate, but apparently presidents can send in troops without Congressional approval.\textsuperscript{51}

Presidents can veto.\textsuperscript{52} Presidents can issue pardons,\textsuperscript{53} but they can be impeached for treason, bribery and high crimes and misdemeanors.\textsuperscript{54}

The only time anyone gets worked up about Article II is when they would kind of like to impeach someone or cause national embarrassment on Nightline. I speak, of course, of the access to presidential stuff.\textsuperscript{55} The real problem is you only get one or two of these

\textsuperscript{45} I'm not accusing the Supreme Court of being unduly noisy. However, the folks who get worked up about "do process" can be quite vocal, especially when they end up on Inside Edition.

\textsuperscript{46} This is where we get into the cases. You may regret it, but you're never going to find a better treatise, in terms of simplicity and irreverence.

\textsuperscript{47} How's that for style? The fourth segment of this article covers Article II. So, it's Part IV, Article II. Not to mention the fact that I skipped over Article I altogether. It's coming. See notes 85-110 and accompanying text. We have to define the Supreme Court's role before we can discuss its role in Article I. Bottom line: Article II precedes Article I.

\textsuperscript{48} Well, life and constitutions hold no guarantees, but Article II and the Supreme Court have seen to it over the years that presidents don't end up like Saddam Hussein—pretty much focusing on the war power and fairly oblivious to issues of due process in everything from military desertion to wives and concubines.

\textsuperscript{49} Well, they send folks like Carla Hills and Mickey Kantor to negotiate for them. Presidents are often busy in Hollywood.

\textsuperscript{50} See, e.g., NAFTA, which sat around the Senate while everyone else has just started trading. See also GATT which is still sitting around the Senate. Sometimes, our forefathers felt, you have to let people think they're in charge.

\textsuperscript{51} It's really irritating when one guy holds all the army figures.

\textsuperscript{52} Hey, but Congress can override.

\textsuperscript{53} Only for federal crimes, and former President Gerald Ford has stated that it's not as much fun as it may appear to be on the surface, ever since he lost to Jimmy Carter because he pardoned Richard Nixon.

\textsuperscript{54} One wouldn't think a Woody Allen movie would be a reason for impeachment. But our forefathers knew best, and probably also knew that Mia Farrow would someday land in one.

\textsuperscript{55} Presidential stuff would be things like 50 days of Nixon tapes on which he swears a lot. See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425 (1977). Or presidential stuff would be things like the documents sent between the president and the head of the EPA because the EPA was giving pollution breaks for cash. See, e.g., ANNE M. BURFORD, ARE YOU TOUGH ENOUGH? (1988).
cases until people get wise and quit writing stuff down and making recordings. So, the Executive Branch just cranks along and there's basically nothing new since *Marbury v. Madison*. In that case, the Supreme Court said it could review acts of Congress.

V. Article III—Hey, We'll Hear What We Want to Hear

Under Article II, the Supreme Court established that it was in charge. Not anticipating the workload of its czar status, the Court had to come up with some rules for keeping folks away — enter Article III.

Technically speaking, Article III, Section 2 says the Supreme Court is supposed to hear "cases and controversies." In the interest of keeping the work calendar running from October to May, the Court developed some fancy ways of saying, "Hit the road." The first fancy term is "justiciability." You hear it in Con Law over and over again in variations such as "justiciable-quality," "quality of justiciability" and "justifiable quality of justiciability." You hear...
about it at length, but soon discover that the last case on justiciability was in 1947.\footnote{The case was Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947), and Justice Rutledge said, “no more advisory opinions by this court because judicial restraint is important.” Judicial restraint sounds like S&M, or as if we have to chain and straight-jacket people in black robes whenever they hear U.S. Surgeon General Dr. Joycelyn Elders speak. However, it just means the Court won’t get involved unless Dr. Elders starts impeachment proceedings, or sends troops to Switzerland. Are you like me? Are you wondering what the Rescue Army was and why they were fighting (the Municipal Court no less) in Los Angeles in 1947? Look it up. It’s not my job, even in the most trying of academic pieces, to satisfy your idle curiosity.}

Now, the Court has also been quite testy about standing.\footnote{Don’t get me wrong. The Court does not have a problem with standing vs. sitting. Although I have only seen Rehnquist stand once. And the last time I saw Sandra Day O’Connor stand was on the steps of the Court with Reagan at her swearing-in, when her dress was hanging out of her robes. I saw Clarence Thomas walking around his house once before he was confirmed. And I think Ruth Bader Ginsburg was standing when Clinton announced her nomination. She’s very tiny, so it’s hard to tell.} The first part of standing says that only the folks who are actually harmed may show up to whine about constitutional issues.\footnote{Without this limitation, Ralph Nader would be unrestrained and the Supreme Court Reporter’s Plaintiff/Defendant table would look like this:

\begin{verbatim}
Nader v. Nader
Nader v. Nader
Nader v. Nader
\end{verbatim}

\footnote{67. It’s an economic theory. If you tax folks too much they give up on the whole working-for-a-living theme.}

\footnote{68. See, e.g., United States v. Richardson, 418 U.S. 166 (1974), in which the Court rejected a taxpayer’s suit because the taxpayer wanted to know how the CIA was spending its money. One thing one must wonder about these cases is what type of life and clothing these folks who trek to the Supreme Court at the drop of a hat have. I mean I can pretty much figure what the CIA expense books look like: microphones - $7 billion; shoe phones - $1 million; assassins - $10 million (several billings still pending); and Denny’s retaliation (plans pending). Then you have Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), in which the Supreme Court used the standing doctrine to avoid having to face the Vietnam War. I guess one could say the Supreme Court collectively dodged the draft, dodged the bullet and avoided a kettle of fish. Those sayings just keep on coming, eh?}}

It’s best to summarize standing as follows: taxpayers, in spite of their actual payment of funds, have not enjoyed much success.\footnote{It’s best to summarize standing as follows: taxpayers, in spite of their actual payment of funds, have not enjoyed much success. But success in the judicial sense has not come easily, because the Supreme Court’s view is this: you can be taxed, and even if your tax monies are used to help Charles pay Diana child support, there isn’t a whole lot you can do because we’re not going to supervise government spending just because you happen to be furnishing the money for the spending.} But success in the judicial sense has not come easily, because the Supreme Court’s view is this: you can be taxed, and even if your tax monies are used to help Charles pay Diana child support, there isn’t a whole lot you can do because we’re not going to supervise government spending just because you happen to be furnishing the money for the spending.\footnote{Standing is also an issue in non-taxpayer cases. In these cases the Supreme Court has ruled you have to be injured and what success in the judicial sense has not come easily, because the Supreme Court’s view is this: you can be taxed, and even if your tax monies are used to help Charles pay Diana child support, there isn’t a whole lot you can do because we’re not going to supervise government spending just because you happen to be furnishing the money for the spending.}

Standing is also an issue in non-taxpayer cases. In these cases the Supreme Court has ruled you have to be injured and what
you're suing about (your injury) must have caused your injury.\(^6\)

It is at this point that the concept of justiciability gets really good, because the Supreme Court has developed four-letter words for these portions of the whole justiciability thing: "moot" and "ripe."\(^7\) Mootness means the case is over by the time it gets to the Supreme Court.\(^7\) Mootness was used for a time to duck the abortion issue.\(^7\) But along came \textit{Roe v. Wade}\(^7\) and mootness became ripe.\(^7\)

Moot means you're too late and ripe means you're too early.\(^7\) A case is ripe if you've been fired,\(^7\) choked,\(^7\) and actually surveilled.\(^7\) The threat of firing, choking or surveillance is enough for a

\(^6\) Seems like a simple enough concept, but leave it to nine humorless eggheads to come up with exceptions: physicians have standing to sue to challenge a statute preventing Medicaid payments for abortions (the physicians weren't having the abortions, but they also weren't getting paid). Singleton v. Wulff, 428 U.S. 106 (1976); residents could challenge liability limitations for nuclear power plants even though they had no damage on a standing exception based on the following: "If there were a problem at the nuclear plant, I can guarantee you my damages would be at least \$560 million." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); and sellers who are trying to unload property with racially restrictive covenants can sue on behalf of buyers to challenge the restrictions (saves the buyers a ton in legal fees). Barrows v. Jackson, 346 U.S. 249 (1953).

\(^7\) There was also Shemp, but he was later dropped from the act for not being as funny as the other two, and Curly Joe was then added to complete the tripartite.

\(^8\) One can see why so few cases make it to an actual Supreme Court decision. Most lawyers handling the cases that get to the U.S. Supreme Court die of old age sometime between the court of appeals and cert. And these are the ones who were new members of the bar at the time of the trial (i.e., had just taken the bar exam and successfully answered the Contracts Clause question).

\(^9\) However, even with the elephant gestational period of 48 months, assuming an elephant would have standing, it was going to be tough to find a non-moot, non-pachyderm abortion case.

\(^10\) 410 U.S. 113 (1973).

\(^11\) But there was DePunis v. Odegaard, 416 U.S. 312 (1974), in which a law student's challenge to a minority admissions program was dismissed because his name was too goofy to be spoken seriously in oral argument, and because the Court figured there would always be some bored law student to pick up the gauntlet.

\(^12\) Supreme Court justiciability is a lot like bananas: there's a perfect time and little margin for error on either side.

\(^13\) See, e.g., United Public Workers v. Mitchell, 330 U.S. 75 (1947), in which federal employees said they'd be sacked if they participated in a political campaign. The Supreme Court said this: "Come see us after you've been sacked and we'll talk." It isn't an exact quote and the opinion took 30 pages to say it, but the gist is correct.

\(^14\) In a surprising foreshadowing in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), former chokehold victim and current criminal Cheeredon, in a suit brought, of course, on behalf of all potential criminals and chokeholdees, requested that an injunction be issued against the Los Angeles police, prohibiting chokeholds by police officers of said criminals and chokeholdees. In a move I'll bet they're rueing even as I work, the Supreme Court said, "Get choked first and then come see us for damages. Sooner or later L.A. will get the message." It's 1994, Rodney King is free and the injunction is looking good.

\(^15\) In Laird v. Tatum, 408 U.S. 1 (1972), the Supreme Court said the fear of surveil-
mental breakdown but not enough for Supreme Court ripeness.\textsuperscript{79}

Now, there are other times when the Supreme Court is hesitant to review things, and they throw around terms like comity.\textsuperscript{80} Also, the Supreme Court pretty much likes to stay away from political questions, except for apportionment,\textsuperscript{81} districting, gerrymandering, super majorities and a host of other voting schemes that forced Lani Guinier\textsuperscript{82} onto Nightline.\textsuperscript{83}

Now what do we learn from all this justiciability restraint? We learn that the Supreme Court can pretty much decide what it wants to decide and no one will be any wiser if the results seem inconsistent.\textsuperscript{84}

VI. ARTICLE I\textsuperscript{85}

Article I has proven to be a big help to Congress.\textsuperscript{86}

A. The Commerce Clause

Originally, the Commerce Clause\textsuperscript{87} was put into the Constitution to keep states from jamming up trade with their own picky laws. It was not anticipated that Congress would step in and take over and jam up trade on a national basis with its own picky laws.\textsuperscript{88}
Here's how the Commerce Clause works: states can't regulate anything\textsuperscript{89} and the federal government can regulate everything.\textsuperscript{90} The Commerce Clause has produced some memorable cases. There's Ollie's Barbecue in \textit{Katzenbach v. McClung}.\textsuperscript{91} Ollie, or was it McClung? or Katzenbach? found himself subject to the federal Civil Rights Act because he used out-of-state meat. The Heart of Atlanta Motel got nabbed by the feds because it permitted out-of-state guests.\textsuperscript{92} And even the loan sharks, who used only local marks and cut off only local thumbs as an enforcement mechanism, or for interest payments, are subject to federal regulation, because their cash might end up in interstate commerce.\textsuperscript{93}

States haven't had much luck in regulation. If a state regulation affects interstate commerce,\textsuperscript{94} then the state has to have a darn good reason for regulating.\textsuperscript{95} States have been peculiarly inept at coming up with good legislation or good reasons. They've tried the Constitution didn't realize it was the Feds who might get out of control.

\textsuperscript{89} It wasn't originally supposed to be that way. First, the court struggled with what commerce actually was. See e.g., \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1 (1824), which was a case involving steam boats, Robert Fulton, New York and New Jersey (sounds ugly already, eh?). In \textit{Gibbons}, the court found that running steamboats back and forth between states was commerce and Congress was in charge. The definition of commerce and interstate just kept growing from "direct and immediate effect" to "affectation," so that a teenage employee of a Sizzler in Evansville, Indiana who coughs at the salad bar ingredients (garbanzo beans) beneath the sneeze glass is, in fact, part of interstate commerce. This conclusion is reached because (a) who knows where that teenager has been; (b) the teenager owns two "10,000 Maniacs" albums and how could that group not be involved in interstate commerce; (c) the teenager's Doc Martens were purchased in Illinois; and (d) all garbanzos are \textit{sua sponte} interstate commerce.

\textsuperscript{90} It was not an easy battle evolving to this point. For example, there was that tense period during Franklin D. Roosevelt's administration where the Supreme Court was saying things like furniture factories in North Carolina were local activities, FDR's child labor laws did not apply, and that furniture sweat shops were okay by the justices. See \textit{Hammer v. Dagenhart}, 247 U.S. 251 (1918). But then FDR went ballistic and said he would just appoint more people to the Supreme Court who agreed with him and his child labor laws. It is incomprehensible that a president would stoop so low as to appoint justices who supported his agenda. Thank goodness we have evolved to a different standard today. ( Interruption: The author has just been reminded that evolution has not yet been completed). So, those clever justices began discovering that just about anything you could dream up was interstate commerce, and subject to federal regulation.

\textsuperscript{91} 379 U.S. 294 (1964).

\textsuperscript{92} Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

\textsuperscript{93} More likely to end up off a pier somewhere, really.

\textsuperscript{94} And as we learned earlier, what regulation wouldn't affect commerce?

\textsuperscript{95} "Darn good" means children will roam the streets aimlessly without this regulation. Judging from the number of children roaming aimlessly around the country it is clear that either: a) states haven't had much Supreme Court luck; or b) states are not bothering with much legislation.
train car lengths, rear fender mudguards, trailer lengths, and milk and cantaloupe packing.

Recently, the states may have hit the jackpot with toxic waste. The Supreme Court seems amenable to saying, "Hey, Commerce Clause aside, states don't have to take the rest of the world's toxic waste."

B. Taxation—A Congressional Specialty

Article I would be pretty dull if all Congress was permitted to do was slap on a few arbitrary rules here and there. Fortunately for all

96. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). This case involved the Arizona Train Limit Law, which limited train length for trains crossing Arizona to 14 passengers cars, or 70 freight cars. The traffic jams in New Mexico, Nevada, Utah and California caused by pauses for the unhooking of train cars pushed Southern Pacific into court with a lawsuit, a Commerce Clause challenge, and the following question, "What the difference does it make how long the trains are?"

97. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). This case involved an Illinois statute that required all trucks operating on Illinois roads to be equipped with rear fender mudguards. The traffic jams in Indiana, Missouri, Wisconsin and Iowa caused by trucks stopping to put on mudguards forced Navajo Freight Lines, Inc. into court with a lawsuit, a Commerce Clause challenge, and the following question, "What the difference does it make on Illinois roads if cars get a little mud on them?"

98. In Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), the state of Iowa passed a statute prohibiting the use of 65-foot double trailers on Iowa highways. The traffic jams in Kansas, South Dakota, Minnesota, Illinois and Wisconsin caused by the pauses for unhooking of trailers and rehooking to the cabs forced Consolidated Freightways Corp. into court with a lawsuit, a Commerce Clause challenge, and the following question, "What the difference does it make how long a trailer is when it's traveling across Iowa?"

99. The milk cases are abundant, rich in Vitamin D and do a body good. See e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949); and Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). The Commerce Clause challenges to state regulation in each of these basically provided the following question, "What the difference does it make where milk is pasteurized?" Pasteurization is the same in Wisconsin as it is in Illinois, West Virginia being the only possible exception.

100. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), in which an Arizona regulation required Arizona cantaloupe to be boxed in Arizona and not shipped to California for boxing. For a quick review quiz, fill in blanks for the question Church's lawsuit raised, "What difference is boxed?"

101. Not in the sense that toxic waste is good, but in the sense that they might make some Commerce Clause headway with the issue. This would be because it does make a difference where and how much toxic waste is stored in Wisconsin. New Jersey will have some difficulty with this "it does make a difference" argument, but the New Jerseyites can always store their toxic waste in 65' trailers with mudguards.

of us,\textsuperscript{103} Article I adds Congressional entertainment through the taxing power.\textsuperscript{104} Another good feature of Article I is that Congress is also given the spending power.\textsuperscript{105} States also get to tax companies that trot into or have their goods trot into their state.\textsuperscript{106}

C. Preemption or "We Were Here First"

Although you'd never guess by looking at it or by observing the legislative process, Congress has strong feelings about areas they've chosen to regulate. Once Congress is in there pitching, the states are not allowed to step in and change around the Congressional regulatory scheme.\textsuperscript{107}

Here are the questions used to decide whether Congress has preempted a field:

1) Who was here first?
2) Are the regulations detailed enough so that no one understands them?
3) Is your state's buffoonish interference likely to produce traffic jams?
4) Does the federal legislation say, "States keep out. This means you too California?"
5) Did Congress make a conscious choice for regulatory preemption?\textsuperscript{108}
6) Is the state just being more picky?\textsuperscript{109}

\textsuperscript{103} Especially tax lawyers, tax (not taxing) law professors and the Big Six accounting firms.

\textsuperscript{104} This author will not say whether Congress is entertained by it or we are entertained by having Congress use it.

\textsuperscript{105} Unfortunately, nowhere in the Constitution is it required that spending match taxing. Spending may thus exceed taxing. Not since 1913 has taxing exceeded spending.

\textsuperscript{106} In Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992), the Supreme Court held that catalog sales in North Dakota accomplished solely by mail or phone could still be taxed by North Dakota. When it was just Sears and Spiegel selling a Craftsman belt and a blouse, it was not a big deal. Once everyone from The Sharper Image to Victoria's Secret entered the catalog business, the states wanted in on the deals. The Supreme Court has been much kinder to states with their taxes than with their mudguards.

\textsuperscript{107} This rule on preemption exists because Congress would look bad if the states stepped in and did a better job. Also, it would provide some humorous moments if regulation got fragmented. See notes 96-102, in which traffic jams resulting from lengths, mud, etc. were noted.

\textsuperscript{108} This would be as opposed to an unconscious choice, which wouldn't count for preemption purposes, but would not be Congressionally unusual. (Being unconscious while legislating, that is).

\textsuperscript{109} This would be illustrated by another classic case that demonstrates state legislatures have even more time on their hands than Congress. In Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), the Supreme Court said that California could require its own minimum oil content standard for avocados even though those avocados might meet federal standards. Thus, California was constitutionally entitled to greasier avocados than the rest of us. So far it seems safe to conclude that Con Law means transportation, milk and produce.
VII. The Rest of the Body of the Constitution

Now there's Article III, which outlines the Executive Powers—war stuff, impeachment junk, vetoes, and that one Nixon case. None of this ever comes up except when we bomb Iraq and someone on the Senate Armed Forces committee says, "I believe it was a violation of the War Powers Clause." To which the rest of the country responds, "So what? It's just Iraq." If the President bombed Aspen, it might reach a constitutional showdown. But let's assume only the best is ahead for the nation's skiing, beer, and Amendment 2 capital, and move on to the William of Rights.

VIII. Those Tricky Amendments, or Who Would Have Thought Ten Afterthoughts Could Produce So Much Verbiage, Irritation and Downright Crankiness Among Otherwise Rational People

A. The First Amendment—Free Exercise and Yelling Fire

The First Amendment, through some pretty fancy language, says we have the right to mouth off about things. Now this sim-
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People concept has, of course, been expanded into twenty volumes of cases because it turns out we do need some controls on mouthing off.

1. **Subversive Speech - The Problem That Ended with the 1968 Democratic Convention**

Early on, the Supreme Court was testy about subversive speech and pretty much supported tossing folks in jail when they made speeches about conspiracy,\(^{115}\) communism,\(^{116}\) draft dodging\(^{117}\) and water buffalos.\(^{118}\) However, once we got to the Vietnam War, we pretty much got over considering protesting a subversive activity.\(^{119}\)

2. **Fighting Words**

The Supreme Court has also carved out the “fighting words” exception.\(^{120}\) You're not allowed to say in public things that would cause an “addressee”\(^{121}\) to fight.

and throwing up. However, poor Eden was brought up on racism charges. Apparently there is a little known water buffalo exception to the First Amendment. Eventually, Sheldon Hackney, the president of the University of Pennsylvania and Head of the National Endowment for the Humanities, sensed that the pummeling he was receiving from the Wall Street Journal and Rush Limbaugh was not good for any nominee (see, e.g., Zoë Baird, Kimba Wood and Lani Guinier). So, the charges were dropped. Penn Campus in Front Lines of PC Warfare, Arizona Republic, May 16, 1993, at A17. Personally, I was disappointed. I wanted to see the Supreme Court haggle over a case whose central focus was water buffalo.

Again, for you trivia buffs and potential Jeopardy contestants, Eden tells us that he is an Orthodox Jew and “water buffalo” is the translation of a Yiddish epithet bohemia which is slang for “thoughtless person.” Even to me, a non-orthodox Mormon, the water buffalo has always seemed to represent insensitivity.

\(^{115}\) See Dennis v. United States, 341 U.S. 494 (1951).


\(^{117}\) See Debs v. United States, 249 U.S. 211 (1919).

\(^{118}\) I made this up just to see if you were paying attention. Your mother smelled of elderberries. Just testing the First Amendment parameters as I write.

\(^{119}\) See Bond v. Floyd, 385 U.S. 116 (1966). Although the Supreme Court has not yet ruled on this, we did, in fact, elect a president who protested the Vietnam War. Gennifer Flowers seemed to create more difficulties for him than this First Amendment issue. A Supreme Court ruling on Gennifer Flowers and The Star would be First Amendment stuff worth reading.

\(^{120}\) The “fighting words” exception came to us in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), in which Chaplinsky called the city marshal a “damned Fascist” and a “****-damned racketeer.” (I like the use of the hyphen). Now, he didn't use “water buffalo,” but for New Hampshire them's pretty strong words.

\(^{121}\) Only the Supreme Court would call the fascist and racketeer an “addressee.” Sounds like someone faxed you a horrible note saying, “You're Roger Clinton's half-brother.” Note use of hyphen.
3. Newspapers, Public Figures and Such

The Supreme Court has also dabbled in this whole newspaper thing when newspapers report on folks who are indeed racketeers, but the racketeers get upset because they're called that instead of some more benign term like "addressee." This is where *New York Times Co. v. Sullivan* comes in. Folks who are considered public figures can't recover for being called a racketeer or Madonna fan, even if it is false, unless the public figure is able to show that the racketeer/Madonna fan statement was made knowing it was false, or with reckless disregard of whether it was true or false.

Now public figures have tried invasion of privacy and infliction of emotional distress as other means of recovery, but the Supreme Court seems committed to this whole notion of the public's right to know, chilling effect and all.

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122. 376 U.S. 254 (1964). Oddly enough the case involves a commissioner (Sullivan) from Montgomery, Alabama. It seems odd that the *New York Times* had to go all the way to Alabama to find wrong-doing among public officials.

123. Addressees, racketeers, and water buffalos.

124. Madonna, Prince, Burt Reynolds, Julia Roberts, Lyle Lovett (although only by marriage), Jackie O, Fergie and a host of others who don't have to report to some form of work everyday and seem to have time to be photographed in Aspen, Boca Raton and Montgomery, Alabama.

125. I mean really—what person could ever be established as a bona fide Madonna fan? It seems to me, based on rumors on the big *Sex* book, that Madonna and the word *bona fide* are presently worlds apart.

126. Personally, I believe there is reckless disregard for anything printed about the folks listed in footnote 124. I think if the *National Enquirer*, which by the way, has not been established as a *bona fide* newspaper, printed a story whose headline was: "Prince and Joey Buttafuco to Adopt ET Alien," not too many of us would get worked up about it. And only those folks who watch Regis and Kathie Lee would believe it anyway. Perhaps the Supreme Court could adopt a new standard—the story was printed knowing that Regis and Kathie Lee fans would believe it. Do you think David Souter knows who Regis and Kathie Lee are?

127. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); and *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Both cases involved disclosure of identities of crime victims. Apparently those who have the nerve to be victims of crimes and file police reports cannot also retain their privacy.

128. This theory was shot down in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). This was the case in which the Rev. Jerry Falwell sued because of a parody (cousin to comity, see note 80) ad in *Hustler* magazine (Sorry, I don't have the cite, as I'm relying on the Supreme Court's description. *Bluebook* aside, I do draw the line on certain forms of original research) that showed Falwell (a nationally known televangelist) in a drunken, incestuous rendezvous with his mother in an outhouse. While the Court said the speech was "outrageous," it was still speech, Falwell was still a public figure, and if Falwell won, political cartoons would fall by the wayside.

129. I love it when the Supreme Court uses "chilling effect." It's the Court's way of saying newspaper folks would read a decision in favor of a public figure and say, "Well,
4. Obscenity and Other Prurient Interests

Once we get past the defamation cases, we move on to obscenity.\textsuperscript{130} It turns out obscenity does not always enjoy First Amendment protection.\textsuperscript{131} Originally, the Supreme Court said the First Amendment protections do not extend to forms of speech "utterly without redeeming social importance."\textsuperscript{132} This standard had to be revised, because otherwise The Brady Bunch and My Mother the Car would have been ruled obscene and unconstitutional.\textsuperscript{133}

So, the Supreme Court established a three-part test:\textsuperscript{134}

\begin{itemize}
  \item Part 1: Using contemporary community standards, does the material or work appeal to the prurient interest?\textsuperscript{2135}
  \item Part 2: Does the work depict or describe in a patently offensive way sexual conduct as defined by state law?\textsuperscript{136}
  \item Part 3: Does the work, taken as a whole, lack serious literary, artistic, political or scientific value?\textsuperscript{2137}
\end{itemize}

As a result of this three-part test, the Supreme Court has been able to uphold state statutes prohibiting adult movies,\textsuperscript{138} child pornography\textsuperscript{139} and Wheel of Fortune.\textsuperscript{140} Also, there are a couple of
combination fighting words/obscenity cases.¹⁴¹ I'll leave it to your collective imaginations as to what is fightingly obscene or obscenely fighting. Or you can look them up via footnote 146 to satisfy your own prurient interests (that would be prurient, fighting interests).¹⁴²

And the First Amendment is not violated¹⁴³ when cities don't outlaw pornography but try and keep it in its place, preferably all in one place.¹⁴⁴ This would be the First Amendment's skid row policy: zoning enabling counties and cities to confine adult theaters to a section of town, into which only the most prurient would venture.¹⁴⁵

5. Radios, George Carlin and Seven or so Dirty Words

Now, the Court and the First Amendment eventually had to face radio disc jockeys, George Carlin's seven dirty words and the FCC.¹⁴⁶ The Court said the FCC could regulate “obscene, indecent, ests of children or adults? Also, I was thinking we might be able to use some of that child labor legislation FDR slammed through (see note 90) to help out if we got bogged down in this First Amendment stuff.

140. Okay, I got carried away here. But explain to me the redeeming social value of adults yelling “WHEEL-OF-FORTUNE!” However, Vanna White herself has been to the Supreme Court and won a case. White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993). It seems an ad showed a robot with a blonde wig and fancy duds turning letters around. Vanna said, and the justices agreed, that this was an appropriation of her image (that image being “blonde robot”). Are you like me? Are you thinking, “I can’t believe people get paid to write opinions about Wheel of Fortune.” Of course, I get paid for writing about people who get paid to write about Wheel of Fortune.

141. See, e.g., Cohen v. California, 403 U.S. 15 (1971), and also a tripartite of cases on fighting offensive words: Rosenfeld v. New Jersey; Lewis v. City of New Orleans; Brown v. Oklahoma, 408 U.S. 901, 913, 914 (1972) (offending the BLUEBOOK with this citation format). Are you like me? Are you thinking, “Dang, fighting offensive words are everywhere, from New Jersey to Oklahoma!”

142. Fighting prurient interests would not work here because it would sound as if you have been able to overcome your prurient interests. And we know that’s not true because if it were, we would be putting the Supreme Court out of work.

143. No prurient connotation here.


145. Interestingly, the Supreme Court has struck down an ordinance that prohibited showing films with nudity on drive-in screens because toddlers walking by would see it. I was worried more about the impact (literally and figuratively) on drivers going past the screen when the nudity showed up. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). Then-Justice Rehnquist and then-Chief Justice Burger dissented and said since you could show the films indoors, the ordinance would survive the First Amendment. No chilling effect due to a ban on outdoor nudity, eh?

or profane” language because broadcasting gets into homes and to children.\footnote{147}

6. **Commercial Speech: Lawyers, Pharmacists, and Dentists**

   **Buying Ad Space in the Penny Saver**

It used to be that states told lawyers, doctors, pharmacists, dentists and other professionals that advertising was not a good thing.\footnote{148} Then, the Supreme Court got hold of a few cases, beginning with the pharmacists\footnote{149} and moving through lawyers.\footnote{150} The Court said that the free flow of information in a free market was critical and the First Amendment was there to ensure free flow.\footnote{151}

7. **Speech Without Saying a Word — Protection Under the First Amendment (a.k.a. Symbolic Expression\footnote{152})**

   Symbolic speech includes draft card burning,\footnote{153} armbands\footnote{154} and
flag burning.\textsuperscript{155} Overall, the Supreme Court seems pretty taken with protecting symbolic speech.\textsuperscript{156}

8. \textit{Speech in Public Places—Parades, Traffic Jams}\textsuperscript{157} and Such

We all have the right to express our views in public, but the First Amendment does give way to things like quiet, and traffic control.\textsuperscript{158} This is also where we get into the solicitation things.\textsuperscript{159} Basically, the Court has held that we have to be annoyed by some soliciting, because only reasonable regulation,\textsuperscript{160} not complete bans, are tolerated under the First Amendment.\textsuperscript{161}

9. \textit{The Speech Thing Gets Out of Control}

Honestly, from the way folks go on, and the number of Supreme Court decisions, you would think this speech thing was a daily requirement. The Supreme Court has faced every issue from whether protestors could sit on the Supreme Court steps,\textsuperscript{162} to whether utility poles could be used for campaign posters,\textsuperscript{163} to limitations on campaign expenditures.\textsuperscript{164} Basically, there are very few issues that can't be turned into First Amendment issues.


\textsuperscript{156} They even struck down a federal statute passed after Johnson, preventing flag mutilation. United States v. Eichman, 496 U.S. 310 (1990).

\textsuperscript{157} Please recall, as noted in notes 87-102, that the Commerce Clause pretty much boiled down to covering traffic jams as well.

\textsuperscript{158} It is fascinating to note that an amendment that has difficulty regulating obscenity is tossed aside in the interest of traffic flow and noise reduction. See, \textit{e.g.}, Frisby v. Schultz, 487 U.S. 474 (1988); Cantwell v. Connecticut, 310 U.S. 296 (1940); and Cox v. New Hampshire, 312 U.S. 569 (1941).


\textsuperscript{160} Reasonable regulation does not include the right of the solicited (similar to addressee, see note 121) to force the solicitor onto the security check point conveyer belt.

\textsuperscript{161} Thus the Hare Krishna will live on in LAX through the eternities.

\textsuperscript{162} The justices did not let the First Amendment or the protestors come home to roost. United States v. Grace, 461 U.S. 171 (1983).

\textsuperscript{163} City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). It's hard to believe, given the way downtown Los Angeles (or anywhere Los Angeles for that matter) looks, that a campaign poster on a utility pole would get anyone worked up. I believe they should be grateful just to have utility poles still standing.

\textsuperscript{164} That tiny First Amendment went both ways on this issue in Buckley v. Valeo, 424 U.S. 1 (1976). You can spend as much as you want independently on any candidate or issue (just watch the telephone pole posters), but Congress can put limits on donations to candidates.
10. Freedom of Association — Speaking in Groups

Originally this part of the First Amendment seemed to be designed to protect political association. Now it pretty much boils down to whether women can be Elks, Moose and other animals.

11. Establishment and Free Exercise (This means religious freedom for us Constitutionally impaired types)

Here’s the infamous Establishment Clause. “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .” It requires the state to be neutral in its relations with groups of religious believers and non-believers.

Free exercise boils down to this: cities can have nativity scenes, schools can’t be required to teach creation science if they teach evolution, and tuition tax breaks for parochial schools are okay. The most recent issue is the terrible interference of religion in public schools in the form of prayers at graduation ceremonies and baccalaureate services, which, as we all know, will lead to the end of civilization.

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165. You can even do this at malls and such. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

166. See, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984). This area of cases also gets into all those loyalty oath cases where teachers get worked up if they have to sign an oath saying they won’t join up with Charles Manson. I exaggerate, but teachers have trekked to the Supreme Court a few times. See, e.g., Adler v. Board of Educ., 342 U.S. 485 (1952); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); and Baggett v. Bullitt, 377 U.S. 360 (1964). No wonder our math scores are among the lowest worldwide. All the teachers and students are busy at the Supreme Court (but not on the stairs, see note 162).

167. This was almost as good as footnote 113 and it is a nice touch having it in the body of the article, eh? Oh yes, official cite: U.S. CONST. amend. I.


171. Lee v. Weisman, 112 S. Ct. 2649 (1992). Here’s where we stand: if the students or religious folks organize a baccalaureate, it’s okay by the brethren and sisters. But, if the school district tries to force (or sneak) a prayer in sua sponte (or Catholic), then the First Amendment takes over.
B. **The Second Amendment — So Long As There is An NRA, No Worries Here**

C. **The Fourth Amendment**

Although the Fourth Amendment is part of the Constitution, fortunately for us and the assigned editors for this article, it is not part of Constitutional Law. They just toss all of that into criminal procedure.

D. **The Fifth Amendment**

1. **Miranda and Other Warning Signs**

The Fifth Amendment is a bifurcated Amendment. The criminal law section is the part that says you can't be required to spill your guts in court even if you're guilty as sin. Part of this protection includes the **Miranda** warnings, which is the Supreme Court's way of preventing you from spilling your guts before you understand that you don't have to. It's important to remember this: unless the Fox film crew's *Cops* cameras are rolling, persons charged with crimes will always whine about their Fifth Amendment rights.

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172. Are you like me? Are you just sick of the First Amendment? Are you happy to be moving along?  
173. Here's all you need to know: unless evidence falls from the sky and hits you on the head, get a warrant.  
174. Are you like me? Are you just thrilled that the Fourth Amendment was summarily dismissed? If, however, you are going to, or do, work for a public defender's office, you might consider looking into the Fourth Amendment just to see if anything relevant crops up.  
175. It is one-half criminal law and one-half constitutional law.  
176. Miranda v. Arizona, 384 U.S. 436 (1966). My favorite *Dragnet* episode is one in which Joe Friday and Bill Gannon catch two eight-year olds in the act of burglarizing a chemical lab. Joe read the eight-year olds their rights and asked, "Do you understand?" The eight-year olds then slowly but surely spilled their guts.  
177. It's too much television and too many movies. In one of my favorite *Bob Newhart Show* episodes, Bob and the Peeper are arrested (through a mix-up, of course, and a merry one at that) for solicitation. The two female undercover officers who are new to their jobs (lacking the rich experience of a Joe Friday) neglect to read Bob and the Peep their rights. Bob discovers this as he's sitting in jail (he used a call to Emily as his one phone call and Emily thought it was a Bob/Peeper usual practical joke) and demands a dismissal, which he and the Peep are given. Quiz: Must charges be dismissed just because the **Miranda** warnings are forgotten? Trivia question: Where were Bob and the Peep headed when they were
2. Takings Clause — There’s a Freeway in Our Den

The other part of the Fifth Amendment has all kinds of names, from the Takings Clause, to eminent domain, to just compensation, to “we need a freeway here so you’re moving.”

Here’s the tricky part of eminent domain. Our forefathers did not actually say, “you can take property when you need it.” They just said “nor shall private property be taken for public use without just compensation.” So, we’ve just sort of implied the whole Takings Clause. Here are the three keys to this eminent domain thing:

a. Must be a taking for a public purpose;

b. Must be a taking; and

c. Must be compensation.

That’s it—pretty easy, eh? If you take it, you pay. This is also a principle of criminal law.

arrested? Bonus question: Name the three television shows Bob Newhart starred in and his profession in each.

178. Okay, it’s never been called that, but that’s it for all intents and purposes (note plural in honor of “takings”).

179. I don’t want to get nabbed by the PC police. However, there were no foremothers drafting the Constitution. Granted there were supportive foremothers who tended the homefront and offered wording changes, but they just didn’t write this one, gang. However, out of respect to revisionist historians I offer the following: There is no question there would not have been a Constitution or Christopher Columbus if it had not been for foremothers.

180. The third real citation in 180 footnotes (see notes 113 and 167). U.S. Const. amend. V.

181. We’ve done that a lot. See, e.g., privacy and abortion, at notes 207-08.

182. The classic case here is Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), where Hawaii just decided it was sick of having 72 people owning 47% of Hawaii. So it just created a system for lessees to turn leases into ownership. Not a bad deal if the court will back you up. And it did.

183. The Court (the same Court that defined an arm band as speech) not surprisingly, has found that flights too low over chicken coops that cause the chickens to become schizo is a taking. United States v. Causby, 328 U.S. 256 (1946). Also, preventing a landowner from constructing a building on his land because it is a flood plain (presumably a good preventive measure) is a taking. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). And if you require a landlord to install a 4” x 2” cable TV box on his building (presumably another good idea), it is still a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Finally, requiring folks who own beachfront property to allow beachgoers to trot across their property is also a taking. Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987). Also, although the Supreme Court did not specifically state this, it is a darn scary thought to have California beachgoers anywhere near your property. I believe it affects your IQ. I saw that on Sightings once.

184. Cash, bucks, dinero, moola.
E. The Sixth Amendment

The Sixth Amendment is a two-part amendment, too. Half of it is covered in criminal procedure, where you learn that every person charged with a crime has a right to a trial before a jury comprised of the unemployed, or those too stupid to get out of jury duty. The other half is covered in civil procedure, where you learn that every person who brings a civil suit for over $25 is entitled to a trial before a jury composed of the unemployed, those too stupid to get out of jury duty, and those who were dismissed for cause earlier in the day by the criminal trial docket.

F. The Fourteenth Amendment: If You Think the Court Got Carried Away on the First Amendment Wait Until You Get a Load of This

The Fourteenth Amendment says several things: 1) The Bill of Rights applies to the states; 2) We all get due process in hearings; 3) We all can’t have our rights taken away by that evil end-run known as substantive due process; and 4) equal protection.

1. Due Process - The Hearing Clause

To use our forefathers’ language, you can’t be deprived of “life, liberty or property” without due process of law. Property rights

185. I was going to say “criminal” but I’d have a tough time finagling my way out of that when I get to due process.

186. Just an aside — How come I’m never chosen for jury duty? The lawyers ask me one or two questions to which I respond, “I think the death penalty is appropriate for speeding,” or “I believe most personal injury claimants are like Jack Lemmon in The Fortune Cookie.” I am summarily dismissed and referred for psychiatric help. Did you see The Fortune Cookie? Trivia question: What was Jack Lemmon’s occupation in it?

187. I believe you probably figured this after facing all those First Amendment cases where states were trying to control movies like DEBBIE DOES DALLAS and where they’re shown. Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 467 F. Supp. 366 (S.D.N.Y.), aff’d, 604 F.2d 200 (2d Cir. 1979).

188. You know, are they taking something away? If so, you get a hearing. Not necessarily a stellar jury like in note 186, but a nice hearing nonetheless.

189. Although it sounds benign, substantive due process was the issue in Skinner v. Oklahoma, 316 U.S. 535 (1942) — a gruesome case in which Oklahoma by statute was ordering mandatory sterilization of felonious habitual criminals. Talk about taking something away!

190. Where Title VII meets the Constitution and it’s not a pretty sight.

191. This part is also studied in criminal law. It means juries are required in state criminal trials as well.
have included things like welfare benefits,\textsuperscript{192} having your utilities turned off,\textsuperscript{193} retaining your driver's license\textsuperscript{194} and firing of public employees.\textsuperscript{195} So, due process pretty much consists of challenges by people who are unemployed, and unable to drive, but who are sitting around in the dark fretting about welfare.\textsuperscript{196} The type of hearing required depends on how much you have to lose, and how much the government can afford to spend on your hearing.\textsuperscript{197}

2. \textit{Substantive Due Process - Taking Rights Away in the Dark of Night}\textsuperscript{198}

Now, regular old due process can't deprive you of life, liberty or property without a hearing. But substantive due process covers a lot of made-up rights.\textsuperscript{199}

\textit{a. Family Rights, Privacy and Personal Autonomy}

This all started with the notion that marriage and the bearing and raising of children ought to be personal choices, not subject to government regulation.\textsuperscript{200} Hence we began a trot down the lanes of birth control,\textsuperscript{201} abortion,\textsuperscript{202} the right to marry,\textsuperscript{203} the right to com-

\textsuperscript{193} Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978).
\textsuperscript{195} Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); and Bishop v. Wood, 426 U.S. 341 (1976). I crafted together this credible list of footnotes 192-195, and I'll point to them and notes 113 and 167 as evidence of scholarly work.
\textsuperscript{196} And thank goodness due process is around for these folks.
\textsuperscript{197} Mathews v. Eldridge, 424 U.S. 319 (1976). Hey, due process is important but we're not going to get carried away spending a lot of money on it.
\textsuperscript{198} Or in the confusion of a legislative session. Either way it is not going to be witnessed by a lot of folks, including some of the representatives.
\textsuperscript{199} Well, the rights themselves weren't made up. Rather, they aren't specifically listed in the 14th Amendment, but the Court decided to imply that they were there and has been running with them ever since.
\textsuperscript{200} Having borne and partially raised three children, I believe the Supreme Court is out to lunch on this. There are times in my home when I could use government intervention. I was thinking that having the police in for a warrantless search (see notes 172-173) around about bed time would be a big help in the eternal parental quest to have children retire in the evening without the use of hand-grenades.
\textsuperscript{201} Griswold v. Connecticut, 381 U.S. 479 (1965).
\textsuperscript{202} Roe v. Wade, 410 U.S. 113 (1973); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); and Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992). Now, if you think we have this topic straightened around, check out the following chart on how these decisions got pieced (literally) together. Good luck, Justice Ginsburg.
mit children, and the right to die. Now it's important to understand that the Supreme Court has different tests for different rights under substantive due process. All the statutes must satisfy the rational basis test which means the laws are reasonable and non-arbitrary. However, some substantive due process challenges require that the challenged statute survive a strict scrutiny test, such as in privacy areas, which means the state has to show it has a compelling interest in regulating the area and that the

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<td>Dissent:</td>
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Chief Justice
partially concurred
partially dissented

Source: MARIANNE M. JENNINGS, BUSINESS AND ITS LEGAL, ETHICAL AND GLOBAL ENVIRONMENT 47 (1994). As hard as it may be for the reader to grasp, the author has a textbook that has performed fairly well. It's no Gunther, but it pays for gas.

203. Zablocki v. Redhail, 434 U.S. 374 (1978). In this case, Wisconsin tried to make being current on your child support obligations from your old marriage(s) a prerequisite for getting a marriage license. Not a bad idea, but the Court didn't take to the notion. Remarriage is not a collection device.


206. In constitutional law, they always act as if this is the easiest test to satisfy. However, think of some of your own state legislators. For me it is rare that the words rational or reasonable come to mind when I think of any of my legislators. After all, in Arizona, these are the people who had difficulty impeaching a governor who still used the term "pickaninny" and then labeled it a term of endearment.

207. All those familiar things I listed before. See notes 200-205.

208. It would seem that the Wisconsin statute was one in which legislators were saying, "Hey, I'll tell you a good way to get that child support current; cut off future marriages." It's a good idea but apparently child support is not compelling. Marriage is compelling. Offspring are not. Also, add "compelling" to your constitutional wonk vocabulary.
statute is drawn to only address that compelling interest.\textsuperscript{209} We can therefore conclude that no statute can survive 14th Amendment scrutiny unless it has due substance.\textsuperscript{210}

3. \textit{Equal Protection—Hey, There's Very Little That Won't Work Here}\textsuperscript{211}

Now, to begin with, equal protection is layered. Depending on what's being regulated, the Court could use a rational basis test,\textsuperscript{212} an intermediate scrutiny test\textsuperscript{213} or a strict scrutiny test.\textsuperscript{214} But it gets better. Even if you show\textsuperscript{215} that your statute addresses an evil that will prevent the end of civilization, you still have to show your statute is designed only to curb the evil mongers in your state. Now, try to understand the layers by following this excerpt from a \textit{Legalines} Con Law outline:

\textbf{TYPES OF CLASSIFICATION.} If \( Z \) represents the evil being proscribed, \( //// \) represent people who threaten the evil, and \( xxxxx \) represent people who do not threaten the evil, then the following types of classifications are possible:

1) \( //// \) All persons threatening the evil are legislated against.

2) \( //// \) Here the statute covers none of those who threaten the evil.

\textsuperscript{209} This is where the anti-abortion statutes come in and things like husband consent are broader than necessary for the compelling state interest in protection of life. Are you like me? Do you wish abortion issues could be transferred out of constitutional law? Family law would be a good place; there's not enough course material there anyway.

\textsuperscript{210} Are you like me? Are you thinking rational, smational, compelling, smelling. There are 362 law professors, Planned Parenthood, most of Hollywood, and protestors with Scud missiles who need to work this out, compelling rationality aside.

\textsuperscript{211} I saved the best for last. Equal protection is where I throw in the towel and say, “I'm never going to use this because I have no compelling need for rational, but strict substance and scrutiny in my life.”

\textsuperscript{212} The Court basically abandoned rational basis years ago. Some of you are saying, “No kidding. Rational was dropped from the Supreme Court's vocabulary during the Warren years.”

\textsuperscript{213} The gender cases go here, and there must be a substantial government interest or objective, and there must be substantial relationship between the gender classification and achievement of the state's objective. Translation: if you exclude women, you better have an awfully good reason.

\textsuperscript{214} Strict scrutiny means the law will be struck down. The recent gerrymandering case on minority districts, Shaw v. Reno, 113 S. Ct. 2816 (1993), was a race-based classification that bit the dust under strict scrutiny. You think states would catch on to the whole strict scrutiny thing and forget race-based laws, gender-based laws and fruit-based punch.

\textsuperscript{215} “You” being the state presumably defending a law that is meeting its 14th Amendment match.
Here the statute covers only a few. This is underinclusive classification.

This is an overinclusive classification. The courts are loath to uphold these types of laws since they affect innocent persons.

This type of statute is both under- and overinclusive.216

I’ll help you out by listing the suspect classifications. If a statute is based on any of these factors, it is already suspect and subject to strict scrutiny:217 race,218 racial segregation,219 gender,220 alien-age,221 illegitimacy,222 and affirmative action.223 We’re not sure on mental illness and mental retardation because the court has dodged them twice.224

But here’s the bottom line on all this Fourteenth Amendment stuff — if a statute picks on one group it will be taken to the Supreme Court by either the pickees or the other side.225 There’s also

216. Are you like me? Are you saying: “This is too hard to think about. Let’s just see if we can talk the state into surrendering?” Chart from Constitutional Law by Legalines, p. 139.

217. Translation: The statute is biting the dust.


219. Plessy v. Ferguson, 163 U.S. 537 (1896). Hey, now Plessy v. Ferguson is a famous one that everyone throws around in con law and in hifalootin’ conversations. This was a case in which a state law required separate railway cars for black citizens and white citizens. In 1896, the statute survived, but we didn’t have strict scrutiny in those days and we were basically nuts. We finally moved to Brown v. Board of Educ., 347 U.S. 483 (1954), where the Court, even without any scrutiny, held that we were nuts, and separate was not equal.

220. Frontiero v. Richardson, 411 U.S. 677 (1973). Prior to this decision, gender was not a suspect classification. There were still separate and unequal jobs for women and men. However, there is Michael M. v. Superior Court, 450 U.S. 464 (1981), in which a California rapist challenged California’s statutory rape law on 14th Amendment grounds because it only applied to men. Women could not be prosecuted for statutory rape (is this really a big problem?). However, even with strict scrutiny, the statute survived because its purpose was to prevent illegitimate pregnancy — granted, not a big problem for male statutory rape victims. Basically, the Court used those boxes and such in the figure, noted at note 216, and found the evil mongers were properly addressed.


222. Actually, I’m not really sure about the level of scrutiny here, but neither is the Court. See Levy v. Louisiana, 391 U.S. 68 (1968); and Trimble v. Gordon, 430 U.S. 762 (1977).

223. This is actually race/gender classification but I have always wanted to cite Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

224. See Schweiker v. Wilson, 450 U.S. 221 (1981); and Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). The Court has dodged the issues twice; this author does not mean to imply that the collective Court was in anyway threatened by mental deficiencies.

225. Depending of course on whether the statute helps or hurts the pickees or the other side. Like the California case where the guy challenged the statutory rape gender
a good chance the Supreme Court, using Due Process and the Fourteenth Amendment strict scrutiny rational substantive review,\textsuperscript{226} will find the state has goofed up again. I think that someday the Supreme Court should hold a contest to see which state can pass legislation based on a suspect classification and have it survive strict scrutiny.\textsuperscript{227} My money’s on Pennsylvania, since it got five out of six of the elements in its abortion law approved. If it sounds like I’m introducing parimutuel betting into Supreme Court analysis, you’re correct. But I’m limiting it strictly and rationally to Fourteenth Amendment cases.

\section*{IX. Conclusion}

Well, there it is, from the Nixon papers to birth control to rational speech. You’re never going to doubt your Constitutional IQ again. You’re going to go around saying things like “\textit{Plessy v. Ferguson},” “strict scrutiny” and “free exercise,” and assuming you’re not picked up and committed, you’ll be fine. If you are picked up and commitment proceedings are started, think Fourteenth Amendment due process, suspect classification and start burning flags. Dazzle them with your constitutional savvy and insist on a jury of the constitutionally impaired.\textsuperscript{228}

\textsuperscript{226} I don’t imply the Court would review or inhale drugs here.


\textsuperscript{228} Most likely found in Illinois and Iowa along with mudguards and very long trucks.

Answers to quizzes and trivia bonuses:

FN176. No flawed warnings here but, since the kids were released to parents, no harm done. I forget the chemical. \textit{Dragnet} is not an obsession, just a hobby.

FN177. No, charges don’t have to be dismissed, but script called for Bob and the Peep to get home, so they were. Bob and Peeper were in a bar on their way to a Loyola game. \textit{The Bob Newhart Show}—psychologist. \textit{Newhart}—innkeeper and writer. \textit{Bob}—comedy writer.

FN186. Jack Lemmon was a camera man.