HARVARD LAW REVIEW APPLICATION INFORMATION

© 2021 Harvard Law Review Association

HARVARD
LAW REVIEW

April 9, 2021

Dear Student:

Welcome to the kickoff of the 2021 *Harvard Law Review* Writing Competition! The enclosed information packet is designed to provide some specific guidance about approaching the subcite and case comment portions of the Competition. Together with the two tips presentations, these materials should give you a complete picture of the Writing Competition. Please note that the sample Competition submissions included in this packet are merely representative and are by no means definitive examples.

The following materials are included in this packet:

I. WRITING COMPETITION HONOR CODE

II. WRITING COMPETITION LOGISTICS

III. SUBCITE INFORMATION
- A. An overview of the Competition subcite and a non-exhaustive list of typical subcite errors
- B. Two practice subcite exercises
- C. An excerpt of the answer key and entries from a previous Competition
- D. Answer keys to the two practice subcite exercises

IV. CASE COMMENT INFORMATION
- A. An overview of the Competition case comment and tips for writing a successful comment
- B. Sample theses from various published *Law Review* student case comments
- C. Two case comments submitted in a previous Competition by *Law Review* editors
- D. The case comment published in the *Law Review* addressing the same case discussed in the sample Competition case comments, *Carey v. Musladin*

Should you have additional questions regarding these materials, please submit an anonymous question using this form by May 1: Submission Form. Answers to questions will be posted on our website by May 10.

We hope that you find this information helpful. You are already capable of completing an outstanding Competition. If you have any questions at all, please feel free to get in touch with Sarah Sadlier (vpoutreach@harvardlawreview.org), or call the *Law Review* at (617) 495-7889.

Sincerely yours,

Hassaan Shahawy
President, Vol. 135

Jackson Hart Beard
Vice President
Treasurer, Vol. 135

Sarah Sadlier
Vice President
Coordination, Diversity & Outreach, Vol. 135

L. Ash Smith
Managing Editor, Vol. 135

THE WRITING COMPETITION HONOR CODE

(The Competition packet will contain more details.)

1. Your entry must reflect your work only. **You may not consult or collaborate with anyone in any way regarding any part of the Writing Competition.** The *Law Review* takes very seriously allegations of student dishonesty. Inappropriate conduct will be reported to the Administrative Board of the Law School, which will consider the issue a matter of academic misconduct. Students have been expelled for misconduct on the Competition. Information regarding improprieties should be reported immediately by calling the *Law Review*.

2. All entries are graded anonymously under a doubly anonymized system. We have taken every precaution to ensure that no grader will learn your identity. Do not put your name or other identifying information on any of the entry materials, except where you are specifically requested to do so.

3. Do not distribute or share Competition materials with anyone. Each packet is individualized and can be traced back to you. If the *Law Review* determines that Competition materials have been shared in any way, we will consider it a matter of academic dishonesty. Your entry will be disqualified and your conduct referred to the Law School. Academic misconduct will affect your eligibility for admission to the bar.

4. You may **NOT** conduct outside research for any part of the Competition. **Use of materials outside of the packet — including, but not limited to, Lexis, Westlaw, or blog postings — is strictly prohibited.** Thus, you may not do any outside research of any kind, including general background reading, and you may not refer to any other materials that you own or to which you may have access. This includes your first-year course texts and notes. Note that citing or referring to authorities outside the Competition packet is **strictly prohibited** and will result in disqualification from the Competition. You may make use of a dictionary, thesaurus, grammar manual, and/or style guide.

5. You may **NOT** use the online *Bluebook* website or cite to *Bluebook* rules that are not included in the Competition packet.

6. **We will enforce our Honor Code with file-tracking and anti-plagiarism technology.**

WRITING COMPETITION LOGISTICS

Registration for the 2021 *Harvard Law Review* Writing Competition will open on April 22 and will close on May 10 at 11:59 p.m. EDT. We will post the registration link on our website and email it to HLS students who are eligible to take the Competition.

The 2021 Writing Competition will begin on **Sunday, May 16**. You will receive an email with a link to download your Competition packet on Sunday, May 16, between 10 a.m. EDT and 11 a.m. EDT. You will be able to download the Competition from the time you receive the download email until 11:59 a.m. EDT on Monday, May 17.

Your entry must be submitted between 10 a.m. EDT on Friday, May 21 and 11:59 a.m. EDT on **Saturday, May 22**. The email you receive on May 16 will include information on how to submit the Competition. The submission window will only be open from 10 a.m. EDT on Friday, May 21 to 11:59 a.m. EDT on Saturday, May 22, so please be sure to submit it during that window. Any late submissions will be assessed severe penalties.

If you have an accommodation, we will provide you individualized information regarding download and submission windows.

If you would prefer to work on portions of the Competition in paper form but will find the cost of printing to be a hardship, **the *Law Review* will reimburse costs incurred in printing portions of the 2021 Competition up to $30.** You are encouraged to complete the online form you will receive in your Competition materials and submit it to the *Harvard Law Review* by **Friday, May 28 at 5 p.m. EDT**. To ensure confidentiality, this reimbursement information will be processed separately from the Competition; only permanent *Law Review* finance staff will see the form and your reimbursement check.

All participants will be notified of the Competition results by late July, and Orientation for new editors will take place virtually during the **week ofJuly 26.**

If you have any questions at all, please do not hesitate to reach out to Sarah Sadlier, Vice President/Coordination, Diversity & Outreach, at vpoutreach@harvardlawreview.org.

ACCOMMODATIONS

The Law Review is firmly committed to providing accommodations for students with disabilities and handles requests on a case-by-case basis. The Law Review is an independent entity and thus has its own accommodations system separate from Harvard Law School's Dean of Students Office. We are accepting requests submitted between Monday, March 8th until Friday, April 16th, and we will process them on a rolling basis. If you think that you may need accommodations on our six-day competition, please consider submitting to us as soon as possible so that we can provide you with the support that you need. Even if you are not completely sure that you are planning to take the competition, you should still apply now for accommodations.

Accommodations decisions happen separately from competition registration. Nothing about your accommodations application or your receipt of accommodations will be part of the Competition entry that is considered in the selection process. All Competition grading is doubly anonymized. Accommodations recommendations to HLR are made by our consultant, Dr. Loring Brinckerhoff. Jennifer Heath, a non-student permanent staff member who is not an HLS student, manages all requests, inquiries, and logistics related to accommodations for the Competition.

You can find the necessary forms and procedures on our website under the section titled, "Information for Students with Disabilities." Our FAQs on Accommodations describes the process of applying in detail. You can find the accommodations sign-up form linked on the website. Please review the documentation guidelines carefully, and if you have any questions about requesting accommodations, please reach out to Jennifer Heath at accommodations@harvardlawreview.org or 617-495-7889.

Additionally, students may request accommodations for religious observance. Students with religious conflicts during the competition, including those observing Shavuot and/or the Sabbath, should email accommodations@harvardlawreview.org to discuss accommodations as soon as possible.

OPTIONAL
HOLISTIC REVIEW & COVID-19 STATEMENTS

As part of the Competition, you may submit an optional Holistic Review statement and/or an optional COVID-19 statement. You are encouraged to write either or both of the statements before the Competition begins in order to save time. Further instructions will be provided in the Competition instruction packet.

The prompts for the optional statements are as follows:

Holistic Review Consideration Statement
Eighteen editors shall be selected through a holistic but anonymous review that takes into account all available information, including Competition score and grades but with a special emphasis on improving the inclusivity and diversity of our membership.

Applicants will have the opportunity to convey aspects of their identity, including but not limited to their racial or ethnic identity, disability status, gender identity, sexual orientation, or socioeconomic status, through the Law Review's holistic consideration process. Applicants also have the option of submitting an additional expository statement. Should they elect to write them, applicants are encouraged to draft their expository statements before the Competition week begins. The prompt for the statement is as follows:

"You may use the space below to submit a typed expository statement of no more than 300 words that identifies and describes aspects of your identity not fully captured by the categories on the previous page, including but not limited to racial or ethnic identity, socioeconomic background, disability, gender identity, and/or sexual orientation. Statements will be considered only after grading of the subcite and case comment sections of the Competition has been completed. Statements will not be evaluated for quality of writing or editing, nor will they be assigned a numerical score. No applicant will be penalized in any way for not submitting an optional statement, and all optional statements are completely confidential and read only by a small subset of Law Review editors."

You may write this statement at any point before or during the Competition. All Competition takers are encouraged to write a Holistic Review statement.

COVID-19 Statement
You may upload a statement of no more than 150 words that identifies and describes any challenges you faced during the Competition as a result of COVID-19.

THE SUBCITE PORTION OF THE COMPETITION

(40% of total competition score)

The basic task of a subcite is to identify and correct both **technical** and **substantive** errors in a written piece. As part of the Competition, you will receive a portion of text suffering from such errors. You will create a series of comments to the author of the piece, suggesting corrections. We encourage you to not neglect the subcite portion, as it is generally an opportunity to gain points.

During the Competition, checking the source materials will be essential. Finding valid and accurately characterized support for each assertion is a major part of a subcite.

In addition to editing for general substantive and technical quality, you will also be asked to apply a small subset of basic *Bluebook* rules and internal *Law Review* style guidelines. These will all be provided in the Competition materials. Keep in mind, however, that the purpose of the subcite is to measure overall editing quality and attention to detail, *not* mastery of the *Bluebook*. **You are not responsible for *Bluebook* rules that are not included in the actual Competition materials**. Studying the full *Bluebook* would likely prove to be a poor use of time.

This packet contains a non-exhaustive list of the types of errors that may appear in the subcite and the point values awarded for correcting these errors. Please remember that to receive credit for a correction, you must do all of the following:

1) identify an error,
2) briefly *explain why* it is an error, and
3) offer a *correction* of the error.

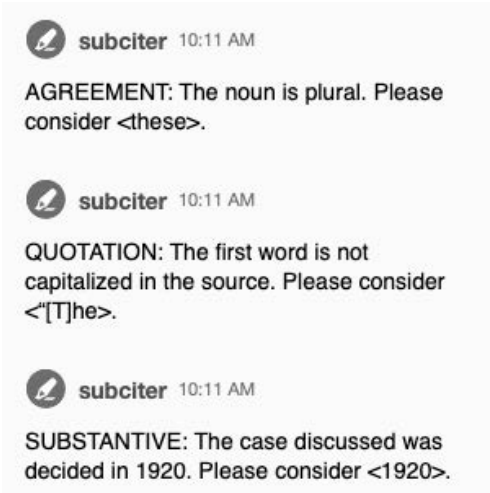
An effective suggested correction should 1) identify the error, 2) explain by pointing to a particular quotation from the text or a particular style or citation rule, and 3) offer a suggested correction in polite language, set off by angle brackets (< . . . >). The **exact text** to be replaced should be highlighted. A heading, given in ALL CAPS, should denote the type of error.

For example, if a cited **source** reads:

"In 1920, the Court decided a key case."

The following **corrections** would be appropriate:

A key development in this areas came in 1921. "The Court decided a key case."



GENERAL SUBCITE TIPS

- **Before doing anything else, save a clean copy of the subcite file in case anything happens to the file you are working in.**

- **Be sure to regularly save your work in Adobe to avoid losing corrections.**

- **Carefully read the instructions for how to leave comments in Adobe.** Be sure to use the highlighting tool, NOT the sticky note tool. For nested errors, be sure to highlight the smaller correction first, and leave a comment for the smaller correction. Then, highlight over it for the longer correction, and leave a separate comment for the longer correction.

- **Review the list of typical subcite errors in this packet.** Remember that some of the errors will be substantive; to find them, you will need to check that the statement in the text is supported by the source it cites.

- **On average, there are <u>fifteen to twenty errors per page</u>.**

- **You will not need to know any Bluebook rules beyond what is included** in the Competition packet itself. *Bluebook* rules and internal style guidelines included in the competition may be different from those that have appeared in previous years. You may find it helpful to familiarize yourself with *Bluebook* Rules that appeared frequently in your LRW course.

- **Make sure that you suggest corrections for any errors you identify**, even for simple misspellings. Comments that don't include a correction will only receive partial credit. To avoid any confusion about quotation marks, set off your suggested fix with <angle brackets>.

- You must also **label the general error type** before identifying the specific error (see next page for a non-exhaustive list of general error types).

- **Highlight the exact text to be replaced**. For example, if a punctuation mark or accompanying word is highlighted, it should also be included in your <suggested correction>.

- **We encourage you to identify only clear errors rather than points of style**. If you find yourself *consistently* flagging errors without being certain whether the error was "clear," you may be over-editing. Excessive editing may be penalized, but only in egregious cases.

- **Please use a polite tone in your comments.** Applicants who adopt an actively rude or offensive tone will be penalized. A small number of additional points are possible for thorough and polite comments.

- In the subcite text you are given, text that would be in SMALL CAPS in print (such as journal names and book titles) will be **bold** and text that would be in *italics* in print (such as article titles and textual references to case names) will be <u>underlined</u>. Your suggested corrections should follow the adjusted typeface.

- You **<u>must</u>** anonymize your subcite comments before submitting your subcite. Step-by-step instructions will be provided in the Competition instructions packet you will receive at the start of the Competition. A video tutorial is also provided on *Harvard Law Review*'s YouTube page.

TYPICAL SUBCITE ERRORS AND POINT VALUES

Note: This list is non-exhaustive.

1-POINT ERRORS

1. SPELLING
2. WORD CHOICE
3. COLLOQUIALISM (e.g., "dude," "they suck")
4. SINGULAR/PLURAL
5. SUBJECT/VERB AGREEMENT
6. THAT/WHICH
7. REDUNDANCY (simple)
8. PARALLELISM
9. PUNCTUATION (incorrect or missing)
10. QUOTATION
11. SPLIT INFINITIVE
12. TYPEFACE
13. CAPITALIZATION (incorrect or missing)
14. SPACING (missing space or too many spaces)
15. CROSS-REFERENCE (e.g., incorrect use of *supra* or *infra*)
16. CITATION FORM
17. BLUEBOOK (simple Bluebook form error; provide a reference to the rule number)
18. SUBSTANCE (simple error, e.g., wrong court, judge, disposition, year)
19. SENTENCE FRAGMENT/RUN-ON
20. VERB TENSE
21. ABBREVIATION/ ACRONYM

2-POINT ERRORS

1. LOGIC (simple error, e.g., incorrect use of words such as *additionally*, *however*, *furthermore*, *nevertheless*, *thus*)
2. REDUNDANCY
3. SUBSTANCE
4. HEADING (e.g., incorrect or misplaced section headings)
5. SUPPORT (statement lacks support or quotation needs citation; provide support from included materials)
6. DANGLING MODIFIER
7. PINCITE (provide proper page number from supporting material)
8. BLUEBOOK (complex Bluebook form error; provide a reference to the rule number)
9. CHARACTERIZATION (misstatement of source content)
10. SIGNAL ([no signal] if quotation or direct support; *see* if inferential step needed between source and statement; *see, e.g.*, if one of several directly supporting authorities; *cf.* if support by analogy; *but see* if directly opposing source; *but cf.* if opposing analogy)

3- AND 4-POINT ERRORS

1. SENTENCE PLACEMENT
2. PARAGRAPH PLACEMENT
3. (Other structural error)
4. SUBSTANCE (difficult substantive error, e.g., subtle misconstruing of source or case; grossly conclusory claim)
5. LOGIC (subtle error, e.g., conclusion does not follow from premises)
6. REDUNDANCY (subtle, e.g., virtually consecutive sentences saying virtually the same thing)
7. CHARACTERIZATION (subtle misconstruing of source content)

THE SUBCITE EXERCISE

To introduce the Competition subcite, we have provided two short excerpts for practice. These excerpts have been taken (with only minor alterations from previous Writing Competitions.

Competition takers will have to highlight the text in need of correction on Adobe and use Adobe's comment feature to make their suggested correction. In-depth instructions on how to make corrections on Adobe will be provided in the Competition packet itself. How-to videos and instructions are available on *Harvard Law Review*'s YouTube page and will be available during the Competition as well.

Before you begin, an important warning: This exercise has been designed as a learning experience only. You will be expected to use Adobe's highlight and comment functions for the subcite. During the actual Competition, do not rely on the *Bluebook* rules provided for the sample exercises that follow and instead use the *Bluebook* rules provided along with the Competition materials.

Further, our expectation is that you will *not* be able to identify, explain, and correct every error. Even in the real Competition, no one — literally ***not one person*** **— has ever found all the errors in the subcite**.

In editing the excerpt, please refer to the **list of errors** and sample rules provided in this packet. We have also provided the **source materials** relevant to this excerpt.

Please note that before the Competition was digitized, Competition takers were asked to box corrections for the subcite portion by hand. This year, you will not be asked to box corrections. Instead, using Adobe, you will highlight the text in need of correction and then use the comment feature to make a suggested correction. Please refer to our in-depth instructions on how to use Adobe for more information about highlighting text and leaving comments in Adobe.

A special note on typeface errors: Here and throughout the Competition subcite, **bold** typeface is used where LARGE AND SMALL CAPS would appear in the published version of the piece (for instance, in citations of journal titles, book authors, and book titles and underlining is used where *italics* would appear in the published version (for instance, in citations of article titles or for case names in the body text. You should mark bold typeface as an error only if you believe that large and small caps would not be appropriate, and you should mark underlining as an error only if you believe that italics would not be appropriate.

1

STRUCTURE AND USE OF CITATIONS

Provide citations to authorities so that readers may identify and find those authorities for future research. Citations are made in citation sentences and clauses (**rule 1.1**) and are introduced by signals. Signals organize authorities and show how those authorities support or relate to a proposition given in the text (**rule 1.2**). Citation sentences and clauses may contain more than one signal. Order signals according to **rule 1.3**. Within each signal, arrange authorities according to **rule 1.4**. Parentheticals may be necessary to explain the relevance of a particular authority to the proposition given in the text (**rule 1.5**). Certain additional information, specific to that authority, may also be appended according to **rule 1.6**.

Citation Sentences and Clauses in Law Reviews 1.1

Citations may be made in one of two ways: in citation sentences or in citation clauses. In law review pieces, all citations appear in footnotes appended to the portions of the text to which they refer. For an explanation of citation sentences and clauses in practitioners' documents, see **Bluepages B2**.

(a) Text. Citations to authorities that support (or contradict) a proposition made in the main text (as opposed to footnote text) are placed in footnotes. A footnote call number should appear at the end of a textual sentence if the cited authority supports (or contradicts) the entire sentence. In contrast, a call number should appear within the sentence next to the portion it supports if the cited authority supports (or contradicts) only that part of the sentence. The call number comes after any punctuation mark—such as a comma, semicolon, or period—with the exception of a dash or a colon. In addition to citation to authorities, a footnote may include textual sentences that are related to or tangential to the main text to which the footnote is appended.

1.2 Introductory Signals

(a) Signals that indicate support.

[no signal] Cited authority (i) directly states the proposition, (ii) identifies the source of a quotation, or (iii) identifies an authority referred to in the text. Use "[no signal]," for example, when directly quoting an authority or when restating numerical data from an authority.

E.g., Cited authority states the proposition; other authorities also state the proposition, but citation to them would not be helpful or is not necessary. "*E.g.*" may also be used in combination with other signals, preceded by a comma:

See, e.g.,

But see, e.g.,

Accord "*Accord*" is commonly used when two or more sources state or clearly support the proposition, but the text quotes or refers to only one; the other sources are then introduced by "*accord.*" Similarly, the law of one jurisdiction may be cited as being in accord with the law of another.

See Cited authority clearly supports the proposition. **"*See*"** is used instead of "[no signal]" when the proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports.

See also Cited authority constitutes additional source material that supports the proposition. "*See also*" is commonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed. The use of a parenthetical explanation of the source's relevance (**rule 1.5**) following a citation introduced by "*see also*" is encouraged.

T13 PERIODICALS

Always use the title of the periodical that appears on the title page of the issue you are citing, even if the title of the periodical has changed over time.

To abbreviate English language periodical titles, use **tables T13.1**, **T13.2**, and **T10**. Common institutional names (e.g., law schools, professional organizations, and geographic units commonly found in institutional names) are listed in **table T13.1**. If an institutional name is not listed in **table T13.1**, individual words should be abbreviated using **tables T13.1**, **T13.2**, and **T10**. If a word in an institutional name is not listed in these tables, use the full word in the abbreviated periodical title. Other words in the periodical title should be abbreviated using **tables T13.1**, **T13.2**, and **T10**. If a word is listed in neither **table T13.2** nor **table T10**, use the full word in the abbreviated title.

T13.2 Common Words

▸ Academ[ic, y]	ACAD.
▸ Account[ant, ants, ing, ancy]	ACCT.
▸ Administrat[ive, or, ion]	ADMIN.
▸ Advertising	ADVERT.
▸ Advoca[te, cy]	ADVOC.
▸ Affairs	AFF.
▸ Africa[n]	AFR.
▸ Agricultur[e, al]	AGRIC.
▸ Amendment	AMEND.
▸ America[n, s]	AM.
▸ Ancestry	ANC.
▸ and	&
▸ Annual	ANN.
▸ Appellate	APP.
▸ Arbitrat[ion, or, ors]	ARB.
▸ Association	ASS'N
▸ Attorney	ATT'Y
▸ Bankruptcy	BANKR.
▸ Bar	B.
▸ Behavior[al]	BEHAV.
▸ British	BRIT.
▸ Bulletin	BULL.
▸ Business	BUS.
▸ Capital	CAP.
▸ Catholic	CATH.
▸ Cent[er, re]	CTR.
▸ Central	CENT.
▸ Children['s]	CHILD.
▸ Chronicle	CHRON.
▸ Circuit	CIR.
▸ Civil	CIV.

Civil Libert[y, ies]	C.L.
Civil Rights	C.R.
College	C.
Commentary	COMMENT.
Commerc[e, ial]	COM.
Communication[s]	COMM.
Comparative	COMP.
Conference	CONF.
Congressional	CONG.
Constitution[al]	CONST.
Contemporary	CONTEMP.
Contract[s]	CONT.
Conveyancer	CONV.
Corporat[e, ion]	CORP.
Cosmetic	COSM.
Counsel[or, ors, or's]	COUNS.
Court	CT.
Courts	CTS.
Criminal	CRIM.
Defense	DEF.
Delinquency	DELINQ.
Department	DEP'T
Derecho	DER.
Development[s]	DEV.
Digest	DIG.
Diplomacy	DIPL.
Dispute	DISP.
Doctor	DR.
Econom[ic, ics, ical, y]	ECON.
Education[al]	EDUC.
Employ[ee, ment]	EMP.
English	ENG.
Entertainment	ENT.
Environment	ENV'T
Environmental	ENVTL.
Estate[s]	EST.
Europe[an]	EUR.
Faculty	FAC.
Family	FAM.
Federal	FED.
Federation	FED'N
Financ[e, ial]	FIN.
Fortnightly	FORT.
Forum	F.
Foundation[s]	FOUND.
General	GEN.
Government	GOV'T
Hispanic	HISP.

. . .

For a statement made prior to a custodial interrogation to be admissible, the familiar rule of Miranda v. Arizona[17] is that a suspect must have "voluntarily, knowingly and intelligently" waived certain rights after recieving adequate warnings and before questioning began.[18] These rights are the "right to remain silent" and the "right to the presents of an attorney, whether retained or appointed."[19] If a suspect indicates that he or she wishes to speak to an attorney or wishes not to be interrogated, the the interrogation must stop. Responding to questions or volunteering information waives the right subsequently to consult a lawyer or an attorney before choosing whether to continue the interrogation.[20]

. . .

[17] 384 U.S. 436 (1966).

[18] Id. at 444; see also Dickerson v. United States, 530 U.S. 428, 432 - 33 (2000) (summarizing Miranda).

[19] See Miranda, 384 S. Ct. at 444. Miranda also requires police to warn the suspect "that any statement he does make may be used as evidence against him" Id.

[21] Id. at 445.

Syllabus

DICKERSON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99–5525. Argued April 19, 2000—Decided June 26, 2000

In the wake of *Miranda* v. *Arizona*, 384 U. S. 436, in which the Court held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence, *id.*, at 479, Congress enacted 18 U. S. C. §3501, which in essence makes the admissibility of such statements turn solely on whether they were made voluntarily. Petitioner, under indictment for bank robbery and related federal crimes, moved to suppress a statement he had made to the Federal Bureau of Investigation, on the ground he had not received "*Miranda* warnings" before being interrogated. The District Court granted his motion, and the Government took an interlocutory appeal. In reversing, the Fourth Circuit acknowledged that petitioner had not received *Miranda* warnings, but held that §3501 was satisfied because his statement was voluntary. It concluded that *Miranda* was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the admissibility question.

Held: *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts. Pp. 432–444.

(a) *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress. Given §3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and its instruction for trial courts to consider the totality of the circumstances surrounding the giving of the confession, this Court agrees with the Fourth Circuit that Congress intended §3501 to overrule *Miranda*. The law is clear as to whether Congress has constitutional authority to do so. This Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. *Carlisle* v. *United States*, 517 U. S. 416, 426. While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, *e. g.*, *Palermo* v. *United States*, 360 U. S. 343, 345–348, it may not supersede this Court's decisions interpreting and applying the Constitution, see, *e. g.*, *City of Boerne* v. *Flores*, 521 U. S. 507, 517–521. That *Miranda* announced a constitutional rule is demonstrated, first and foremost, by the fact that both *Miranda* and two of its companion cases applied its rule to proceedings in state courts, and that the Court has consistently done

Syllabus

so ever since. See, *e. g.*, *Stansbury* v. *California*, 511 U. S. 318 *(per curiam)*. The Court does not hold supervisory power over the state courts, *e. g.*, *Smith* v. *Phillips*, 455 U. S. 209, 221, as to which its authority is limited to enforcing the commands of the Constitution, *e. g.*, *Mu'Min* v. *Virginia*, 500 U. S. 415, 422. The conclusion that *Miranda* is constitutionally based is also supported by the fact that that case is replete with statements indicating that the majority thought it was announcing a constitutional rule, see, *e. g.*, 384 U. S., at 445. Although *Miranda* invited legislative action to protect the constitutional right against coerced self-incrimination, it stated that any legislative alternative must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.*, at 467.

A contrary conclusion is not required by the fact that the Court has subsequently made exceptions from the *Miranda* rule, see, *e. g.*, *New York* v. *Quarles*, 467 U. S. 649. No constitutional rule is immutable, and the sort of refinements made by such cases are merely a normal part of constitutional law. *Oregon* v. *Elstad*, 470 U. S. 298, 306—in which the Court, in refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases, stated that *Miranda*'s exclusionary rule serves the Fifth Amendment and sweeps more broadly than that Amendment itself—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth. Finally, although the Court agrees with the court-appointed *amicus curiae* that there are more remedies available for abusive police conduct than there were when *Miranda* was decided—*e. g.*, a suit under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388—it does not agree that such additional measures supplement §3501's protections sufficiently to create an adequate substitute for the *Miranda* warnings. *Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and assure him that the exercise of that right will be honored, see, *e. g.*, 384 U. S., at 467, while §3501 explicitly eschews a requirement of preinterrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. Section 3501, therefore, cannot be sustained if *Miranda* is to remain the law. Pp. 432–443.

(b) This Court declines to overrule *Miranda*. Whether or not this Court would agree with *Miranda*'s reasoning and its rule in the first instance, *stare decisis* weighs heavily against overruling it now. Even in constitutional cases, *stare decisis* carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification. *E. g.*, *United States* v. *Inter-*

Subcite exercise #1

Syllabus

national Business Machines Corp., 517 U. S. 843, 856. There is no such justification here. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. See *Mitchell* v. *United States*, 526 U. S. 314, 331–332. While the Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings, that has not happened to *Miranda*. If anything, subsequent cases have reduced *Miranda*'s impact on legitimate law enforcement while reaffirming the decision's core ruling. The rule's disadvantage is that it may result in a guilty defendant going free. But experience suggests that § 3501's totality-of-the-circumstances test is more difficult than *Miranda* for officers to conform to, and for courts to apply consistently. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 515. The requirement that *Miranda* warnings be given does not dispense with the voluntariness inquiry, but cases in which a defendant can make a colorable argument that a self-incriminating statement was compelled despite officers' adherence to *Miranda* are rare. Pp. 443–444.

166 F. 3d 667, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 444.

James W. Hundley, by appointment of the Court, 528 U. S. 1072, argued the cause for petitioner. With him on the briefs were *Carter G. Phillips*, *Jeffrey T. Green*, and *Kurt H. Jacobs*.

Solicitor General Waxman argued the cause for the United States. With him on the briefs were *Attorney General Reno*, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, *James A. Feldman*, and *Lisa S. Blatt*.

Paul G. Cassell, by invitation of the Court, 528 U. S. 1045, argued the cause as *amicus curiae* urging affirmance. With him on the brief were *Daniel J. Popeo* and *Paul D. Kamenar*.*

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Jonathan L. Abram*, *Audrey J. Anderson*, *Steven R. Shapiro*, *Vivian Berger*, *Susan N. Herman*, and *Stephen Schulhofer*; for the House Democratic Leadership by *Charles Tiefer* and *Jonathan W. Cuneo*; for the National Association of Criminal Defense Lawyers et al. by *Paul M. Smith*, *Deanne E. Maynard*, *Lisa B. Kemler*, and *John T. Philipsborn*; for the National Legal Aid and Defender Association by *Charles D. Weisselberg* and *Michelle Falkoff*; for the Rutherford Institute by *James Joseph Lynch, Jr.*, and *John W. Whitehead*; for Griffin B. Bell by *Robert S. Litt*, *John A. Freedman*, and *Daniel C. Richman*; and for Benjamin R. Civiletti by *Mr. Civiletti, pro se*, *Kenneth C. Bass III*, and *John F. Cooney*.

Briefs of *amici curiae* urging affirmance were filed for the State of South Carolina et al. by *Charles M. Condon*, Attorney General of South Carolina, *Treva Ashworth*, Deputy Attorney General, *Kenneth P. Woodington*, Senior Assistant Attorney General, and *Travey Colton Green*, Assistant Attorney General; for the Maricopa County Attorney's Office by *Theodore B. Olson*, *Douglas R. Cox*, and *Miguel A. Estrada*; for Arizona Voices for Victims et al. by *Douglas Beloof*; for the Bipartisan Legal Advisory Group of the United States House of Representatives by *Geraldine R. Gennet*, *Kerry W. Kircher*, and *Michael L. Stern*; for the Center for the Community Interest et al. by *Daniel P. Collins*, *Kristin Linsley Myles*, and *Kelly M. Klaus*; for the Center for the Original Intent of the Constitution by *Michael P. Farris*; for Citizens for Law and Order et al. by *Theodore M. Cooperstein*; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*, *Charles L. Hobson*, and *Edwin Meese III*; for the Federal Bureau of Investigation Agents Association by *Robert F. Hoyt*; for the Fraternal Order of Police by *Patrick F. Philbin* and *Thomas T. Rutherford*; for the National Association of Police Organizations et al. by *Stephen R. McSpadden*, *Robert J. Cynkar*, and *Margaret A. Ryan*; for the National District Attorneys Association et al. by *Lynne Abraham*, *Ronald Eisenberg*, *Jeffrey C. Sullivan*, *John M. Tyson, Jr.*, *Grover Trask*, *Christine A. Cooke*, *John B. Dangler*, and *Richard E. Trodden*; for Former Attorneys General of the United States William P. Barr and Edwin Meese III by *Andrew G. McBride*; for Senator Orrin G. Hatch et al. by *Senator Hatch, pro se*; and for Manning & Marder, Kass, Ellrod, Ramirez by *Davis J. Wilson*.

Wayne W. Schmidt, *James P. Manak*, and *Bernard J. Farber* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae*.

Opinion of the Court

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in

Subcite exercise #1

evidence. In the wake of that decision, Congress enacted 18 U. S. C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Petitioner Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence, all in violation of the applicable provisions of Title 18 of the United States Code. Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received "*Miranda* warnings" before being interrogated. The District Court granted his motion to suppress, and the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. That court, by a divided vote, reversed the District Court's suppression order. It agreed with the District Court's conclusion that petitioner had not received *Miranda* warnings before making his statement. But it went on to hold that § 3501, which in effect makes the admissibility of statements such as Dickerson's turn solely on whether they were made voluntarily, was satisfied in this case. It then concluded that our decision in *Miranda* was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the question of admissibility. 166 F. 3d 667 (1999).

Because of the importance of the questions raised by the Court of Appeals' decision, we granted certiorari, 528 U. S. 1045 (1999), and now reverse.

We begin with a brief historical account of the law governing the admission of confessions. Prior to *Miranda*, we

evaluated the admissibility of a suspect's confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy. See, *e. g.*, *King* v. *Rudd*, 1 Leach 115, 117–118, 122–123, 168 Eng. Rep. 160, 161, 164 (K. B. 1783) (Lord Mansfield, C. J.) (stating that the English courts excluded confessions obtained by threats and promises); *King* v. *Warickshall*, 1 Leach 262, 263–264, 168 Eng. Rep. 234, 235 (K. B. 1783) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected"); *King* v. *Parratt*, 4 Car. & P. 570, 172 Eng. Rep. 829 (N. P. 1831); *Queen* v. *Garner*, 1 Den. 329, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Queen* v. *Baldry*, 2 Den. 430, 169 Eng. Rep. 568 (Ct. Crim. App. 1852); *Hopt* v. *Territory of Utah*, 110 U. S. 574 (1884); *Pierce* v. *United States*, 160 U. S. 355, 357 (1896). Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *Bram* v. *United States*, 168 U. S. 532, 542 (1897) (stating that the voluntariness test "is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself' "); *Brown* v. *Mississippi*, 297 U. S. 278 (1936) (reversing a criminal conviction under the Due Process Clause because it was based on a confession obtained by physical coercion).

While *Bram* was decided before *Brown* and its progeny, for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the

Subcite exercise #1

due process voluntariness test in "some 30 different cases decided during the era that intervened between *Brown* and *Escobedo* v. *Illinois*, 378 U. S. 478 [(1964)]." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 223 (1973). See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Chambers* v. *Florida*, 309 U. S. 227 (1940). Those cases refined the test into an inquiry that examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession. *Schneckloth*, 412 U. S., at 226. The due process test takes into consideration "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Ibid.* See also *Haynes*, *supra*, at 513; *Gallegos* v. *Colorado*, 370 U. S. 49, 55 (1962); *Reck* v. *Pate*, 367 U. S. 433, 440 (1961) ("[A]ll the circumstances attendant upon the confession must be taken into account"); *Malinski* v. *New York*, 324 U. S. 401, 404 (1945) ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant"). The determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Stein* v. *New York*, 346 U. S. 156, 185 (1953).

We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and *Miranda* changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In *Malloy*, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. 378 U. S., at 6–11. We decided *Miranda* on the heels of *Malloy*.

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion.[1] 384 U. S., at 445–458. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.*, at 455. We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself." *Id.*, at 439. Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.*, at 442. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as "*Miranda* rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.*, at 479.

Two years after *Miranda* was decided, Congress enacted § 3501. That section provides, in relevant part:

> "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial

[1] While our cases have long interpreted the Due Process and Self-Incrimination Clauses to require that a suspect be accorded a fair trial free from coerced testimony, our application of those Clauses to the context of custodial police interrogation is relatively recent because the routine practice of such interrogation is itself a relatively new development. See, *e. g.*, *Miranda*, 384 U. S., at 445–458.

Subcite exercise #1

MIRANDA *v.* ARIZONA.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 759. Argued February 28–March 1, 1966.—
Decided June 13, 1966.*

In each of these cases the defendant while in police custody was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. None of the defendants was given a full and effective warning of his rights at the outset of the interrogation process. In all four cases the questioning elicited oral admissions, and in three of them signed statements as well, which were admitted at their trials. All defendants were convicted and all convictions, except in No. 584, were affirmed on appeal. *Held:*

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. Pp. 444–491.

(a) The atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating and works to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. Pp. 445–458.

(b) The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial interrogation as well as in the courts or during the course of other official investigations. Pp. 458–465.

(c) The decision in *Escobedo* v. *Illinois,* 378 U. S. 478, stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege. Pp. 465–466.

(d) In the absence of other effective measures the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Pp. 467–473.

(e) If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present. Pp. 473–474.

(f) Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel. P. 475.

(g) Where the individual answers some questions during in-custody interrogation he has not waived his privilege and may invoke his right to remain silent thereafter. Pp. 475–476.

(h) The warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant. Pp. 476–477.

2. The limitations on the interrogation process required for the protection of the individual's constitutional rights should not cause an undue interference with a proper system of law enforcement, as demonstrated by the procedures of the FBI and the safeguards afforded in other jurisdictions. Pp. 479–491.

3. In each of these cases the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination. Pp. 491–499.

98 Ariz. 18, 401 P. 2d 721; 15 N. Y. 2d 970, 207 N. E. 2d 527; 16 N. Y. 2d 614, 209 N. E. 2d 110; 342 F. 2d 684, reversed; 62 Cal. 2d 571, 400 P. 2d 97, affirmed.

*Together with No. 760, *Vignera* v. *New York,* on certiorari to the Court of Appeals of New York and No. 761, *Westover* v. *United States,* on certiorari to the United States Court of Appeals for the Ninth Circuit, both argued February 28–March 1, 1966; and No. 584, *California* v. *Stewart,* on certiorari to the Supreme Court of California, argued February 28–March 2, 1966.

Subcite exercise #1

John J. Flynn argued the cause for petitioner in No. 759. With him on the brief was *John P. Frank*. *Victor M. Earle III* argued the cause and filed a brief for petitioner in No. 760. *F. Conger Fawcett* argued the cause and filed a brief for petitioner in No. 761. *Gordon Ringer*, Deputy Attorney General of California, argued the cause for petitioner in No. 584. With him on the briefs were *Thomas C. Lynch*, Attorney General, and *William E. James*, Assistant Attorney General.

Gary K. Nelson, Assistant Attorney General of Arizona, argued the cause for respondent in No. 759. With him on the brief was *Darrell F. Smith*, Attorney General. *William I. Siegel* argued the cause for respondent in No. 760. With him on the brief was *Aaron E. Koota*. *Solicitor General Marshall* argued the cause for the United States in No. 761. With him on the brief were *Assistant Attorney General Vinson*, *Ralph S. Spritzer*, *Nathan Lewin*, *Beatrice Rosenberg* and *Ronald L. Gainer*. *William A. Norris*, by appointment of the Court, 382 U. S. 952, argued the cause and filed a brief for respondent in No. 584.

Telford Taylor, by special leave of Court, argued the cause for the State of New York, as *amicus curiae*, in all cases. With him on the brief were *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Barry Mahoney* and *George D. Zuckerman*, Assistant Attorneys General, joined by the Attorneys General for their respective States and jurisdictions as follows: *Richmond M. Flowers* of Alabama, *Darrell F. Smith* of Arizona, *Bruce Bennett* of Arkansas, *Duke W. Dunbar* of Colorado, *David P. Buckson* of Delaware, *Earl Faircloth* of Florida, *Arthur K. Bolton* of Georgia, *Allan G. Shepard* of Idaho, *William G. Clark* of Illinois, *Robert C. Londerholm* of Kansas, *Robert Matthews* of Kentucky, *Jack P. F. Gremillion* of Louisiana, *Richard J. Dubord* of Maine, *Thomas B. Finan* of Maryland, *Norman H. Anderson* of Missouri, *Forrest H. Anderson* of Montana, *Clarence A. H. Meyer* of Nebraska, *T. Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *Robert Y. Thornton* of Oregon, *Walter E. Alessandroni* of Pennsylvania, *J. Joseph Nugent* of Rhode Island, *Daniel R. McLeod* of South Carolina, *Waggoner Carr* of Texas, *Robert Y. Button* of Virginia, *John J. O'Connell* of Washington, *C. Donald Robertson* of West Virginia, *John F. Raper* of Wyoming, *Rafael Hernandez Colon* of Puerto Rico and *Francisco Corneiro* of the Virgin Islands.

Duane R. Nedrud, by special leave of Court, argued the cause for the National District Attorneys Association, as *amicus curiae*, urging affirmance in Nos. 759 and 760, and reversal in No. 584. With him on the brief was *Marguerite D. Oberto*.

Anthony G. Amsterdam, *Paul J. Mishkin*, *Raymond L. Bradley*, *Peter Hearn* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae*, in all cases.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

Subcite exercise #1

We dealt with certain phases of this problem recently in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions.[1] A wealth of scholarly material has been written tracing its ramifications and underpinnings.[2]. Police and prose-

[1] Compare *United States* v. *Childress*, 347 F. 2d 448 (C. A. 7th Cir. 1965), with *Collins* v. *Beto*, 348 F. 2d 823 (C. A. 5th Cir. 1965). Compare *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361, 42 Cal. Rptr. 169 (1964) with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964).

[2] See, *e. g.*, Enker & Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1 (1965); Dowling, Escobedo and

cutor have speculated on its range and desirability.[3] We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give

Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L., C. & P. S. 143, 156 (1965).

The complex problems also prompted discussions by jurists. Compare Bazelon, Law, Morality, and Civil Liberties, 12 U. C. L. A. L. Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965).

[3] For example, the Los Angeles Police Chief stated that "If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances : . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo:* "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, *supra*, n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S. 21 (1961).

Subcite exercise #1

concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens* v. *Virginia*, 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

> "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

> questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker*, 161 U. S. 591, 596–597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems* v. *United States*, 217 U. S. 349, 373 (1910):

> ". . . our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

Subcite exercise #1

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

[4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.[5]

[5] See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)

Subcite exercise #1

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965).[7]

[Wickersham Report]; Booth, Confessions, and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich. L. Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16 (1957).

[6] *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *White* v. *Texas*, 310 U. S. 530 (1940); *Vernon* v. *Alabama*, 313 U. S. 547 (1941); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Leyra* v. *Denno*, 347 U. S. 556 (1954). See also *Williams* v. *United States*, 341 U. S. 97 (1951).

[7] In addition, see *People* v. *Wakat*, 415 Ill. 610, 114 N. E. 2d 706 (1953); *Wakat* v. *Harlib*, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier* v. *State*, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

> "To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner* v. *People*, 113 Colo. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People* v. *Matlock*, 51 Cal. 2d 682, 336 P. 2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Potts, The Preliminary Examination and "The Third Degree," 2 Baylor L. Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1965).

Subcite exercise #1

> are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.'" IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931).

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers* v. *Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.[8] These

[8] The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator 97–115 (1952). Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody 244–437, 490–521 (1965); LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11 (1962); Sterling, *supra*, n. 7, at 47–65.

texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation."[10] The efficacy of this tactic has been explained as follows:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

[9] The methods described in Inbau & Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1956), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[10] Inbau & Reid, Criminal Interrogation and Confessions (1962), at 1.

Subcite exercise #1

more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." [11]

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense,[12] to cast blame on the victim or on society.[13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

[11] O'Hara, *supra*, at 99.

[12] Inbau & Reid, *supra*, at 34–43, 87. For example, in *Leyra* v. *Denno*, 347 U. S. 556 (1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," *id.*, at 562, and again, "We know that morally you were just in anger. Morally, you are not to be condemned," *id.*, at 582.

[13] Inbau & Reid, *supra*, at 43–55.

One writer describes the efficacy of these characteristics in this manner:

"In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable." [14]

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

"Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indi-

[14] O'Hara, *supra*, at 112.

Subcite exercise #1

cation that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?" [15]

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial." [16]

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff" act:

> ". . . In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room." [17]

[15] Inbau & Reid, *supra*, at 40.

[16] *Ibid.*

[17] O'Hara, *supra*, at 104, Inbau & Reid, *supra*, at 58–59. See *Spano* v. *New York*, 360 U. S. 315 (1959). A variant on the technique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in *Malinski* v. *New York*, 324 U. S. 401, 407 (1945): "Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." [18] Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

> "The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." [19]

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent im-

[18] O'Hara, *supra*, at 105–106.

[19] *Id.*, at 106.

Subcite exercise #1

presses the subject with the apparent fairness of his interrogator." [20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over." [21]

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> "[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' " [22]

[20] Inbau & Reid, *supra*, at 111.

[21] *Ibid.*

[22] Inbau & Reid, *supra*, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." [23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[24]

[23] Inbau & Reid, Lie Detection and Criminal Interrogation 185 (3d ed. 1953).

[24] Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." N. Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N. Y. Times, Oct. 20, 1964, p. 22, col. 1; N. Y. Times, Aug. 25, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank & Frank, Not Guilty (1957).

Subcite exercise #1

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend* v. *Sain,* 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.,* at 307–310. The defendant in *Lynumn* v. *Illinois,* 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court as in those cases reversed the conviction of a defendant in *Haynes* v. *Washington,* 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney.[25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda* v. *Arizona,* the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera* v. *New York,* the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover* v. *United States,* the defendant was handed over to the Federal Bureau of Investigation by

[25] In the fourth confession case decided by the Court in the 1962 Term, *Fay* v. *Noia,* 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See *United States* v. *Murphy,* 222 F. 2d 698 (C. A. 2d Cir. 1955) (Frank, J.); *People* v. *Bonino,* 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956).

local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California* v. *Stewart,* the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda,* where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart,* in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[26] The current practice of incommunicado interrogation is at odds with one of our

[26] The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Pro-

Subcite exercise #1

Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

---

fessor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

Subcite exercise #1

Legal Ethics and the Changing Role of the Attorney General

The President's power to decline to defend statutes in court, though it dates at least to the Ford Administration, became more prominent in the 1970s.[1] Before that, this capacity has continued to evolve, as President Obama's refusal to defend the

---

[1] See, e.g., Christopher M. May, Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative, 21 **Hastings Constitutional L.Q.** 865, 940 - 43 (1994) (discussing historical examples of presidential efforts to test the constitutionality of regulation through enthusiastic advocacy, refusal to defend statutes, or explicit legal opposition).

Defense of Marriage act illustrates[2] This change has been accompanied by increased scrutiny of the Solicitor General's role in defending statues and the determination of government's litigating positions. One possible reason for this development is a rising awareness of client-focused ethical considerations among lawyers in general and government lawyers in particular.

---

[2] But see Joshua Baker & William C. Duncan, As Goes DOMA . . . Defending DOMA And The State Marriage Measures, 24 **Regent U. L. Rev.** 1, 23 - 24 (2011). However, even when administrations attempt to defend statutes, still they may continue to enforce such statutes until courts rules on their constitutionality. See Baker & Duncan, supra, at 26.

REGENT UNIVERSITY LAW REVIEW

VOLUME 24 2011–2012 NUMBER 1

CONTENTS

ARTICLES

AS GOES DOMA . . . DEFENDING DOMA AND THE STATE MARRIAGE MEASURES

Joshua Baker
William C. Duncan 1

THOMAS V. SCALIA ON THE CONSTITUTIONAL RIGHTS OF PARENTS: PRIVILEGES AND IMMUNITIES, OR JUST "SPINACH"?

David M. Wagner 49

A BETTER BEGINNING: WHY AND HOW TO HELP NOVICE LEGAL WRITERS BUILD A SOLID FOUNDATION BY SHIFTING THEIR FOCUS FROM *PRODUCT* TO *PROCESS*

Miriam E. Felsenburg
Laura P. Graham 83

TWENTY-FIFTH ANNIVERSARY COMMEMORATION

COMMEMORATIVE ADDRESS: CELEBRATING TWENTY-FIVE YEARS OF GOD'S FAITHFULNESS

Dean Jeffrey A. Brauch 109

REGENT UNIVERSITY LAW REVIEW

Volume 24 2011–2012 Number 1

AS GOES DOMA . . . DEFENDING DOMA AND THE STATE MARRIAGE MEASURES

*Joshua Baker**
*William C. Duncan***

TABLE OF CONTENTS

INTRODUCTION 1
I. DOMA: CONTENT AND CONTEXT 5
A. *DOMA's Text* 5
B. *Early Challenges to DOMA* 8
C. *A Coordinated Assault* 16
D. *The Politics of Defending DOMA* 22
II. STANDARD OF REVIEW 25
A. *What Is the Appropriate Classification?* 25
B. *Heightened Scrutiny?* 29
III. IS DOMA RATIONAL? 31
A. *A New Rationale for DOMA: Preserving the Status Quo?* 31
B. *DOMA's Rational Basis Under Congress's Original Intent* 32
C. *Evaluating DOMA's Rational Basis in Light of Successful Defenses to Similar State Marriage Measures* 34
IV. STATE SOVEREIGNTY 38
A. *Judge Tauro's "Novel" Tenth Amendment Analysis* 38
B. *Past and Present Federal Regulation of Marriage and Family* 41
CONCLUSION 47

INTRODUCTION

On April 22, 2011, a commentator posting on the *Los Angeles Times* website alleged, "DOMA forces the federal government to discriminate

* Mr. Baker is a legal analyst with the National Organization for Marriage. J.D., Oak Brook College of Law and Government Policy.

** Mr. Duncan is director of the Marriage Law Foundation. J.D., J. Reuben Clark Jr. Law School, Brigham Young University.

Subcite exercise #2

continued to defend DOMA in briefs filed in the *Smelt* case.[96] Within a few months, however, under fire from gay marriage supporters,[97] the Department of Justice disclaimed any governmental interest in DOMA related to strengthening marriage, responsible procreation, or child well-being, failing to address these reasons but instead falling back on defenses such as maintaining the status quo or taking an incremental response to new social problems.[98]

On February 23, 2011, with *Gill* and *Massachusetts* pending in the First Circuit, Attorney General Eric Holder made the controversial announcement that the Department of Justice would no longer defend DOMA in litigation based on President Obama's new position that DOMA is unconstitutional.[99] In particular, Attorney General Holder

[96] *See* Reply Memorandum in Support of Defendant United States of America's Motion to Dismiss at 2, 5–7, Smelt v. United States, No. 8:09-cv-00286-DOC-MLG (C.D. Cal. Aug. 17, 2009) (admitting the adminstration's lack of support of DOMA as a matter of policy but arguing that the plaintiffs' equal protection and due process claims in *Smelt* should be dismissed because DOMA survives rational basis review).

[97] *See* Jeremy W. Peters, *New Generation of Gay Rights Advocates March to Put Pressure on the President*, N.Y. TIMES, Oct. 12, 2009, at A12.

[98] Reply in Support of Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment at 14–16, *Gill*, 699 F. Supp. 2d 374 (No. 1:09-cv-10309-JLT).

[99] Letter from Eric H. Holder, Jr., Attorney General of the United States, to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Letter from Attorney General Holder]; Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Press Release], http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. ("After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination. Consequently, the Department will not defend the constitutionality of Section 3 of DOMA as applied to same-sex married couples in the two cases filed in the Second Circuit. . . . The Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense. At the same time, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because—as here—the Department does not consider every such argument to be a 'reasonable' one. Moreover, the Department has declined to defend a statute in cases, like this one, where the President has concluded that the statute is unconstitutional."). Earlier debates over the constitutionality of DOMA had centered around Section 2 of the statute, which provides, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C) (2006)). More recently, however, attention has been focused on the substantive definition of marriage contained in Section 3 of DOMA, which states, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *Id.*

explained that, with new litigation pending in the Second Circuit Court of Appeals, where no binding authority exists on the standard of review for sexual orientation discrimination, the administration was taking the position that sexual orientation deserves heightened scrutiny, and that DOMA is unable to survive such heightened scrutiny.[100] Attorney General Holder noted that the Department of Justice, while no longer defending DOMA in litigation, would continue to enforce the law unless or until it was repealed or struck down.[101]

But three months later, Attorney General Holder vacated a Board of Immigration Appeals ruling based on DOMA, asking the Board to reconsider deportation proceedings initiated against a man who had entered into a New Jersey civil union with an American-born partner.[102] By July 2011, the Obama administration had come full circle in its legal position on DOMA, arguing in *Golinski v. United States Office of Personnel Management* that

> Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), unconstitutionally discriminates. It treats same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under well-established factors set forth by the Supreme Court, discrimination based on sexual orientation is subject to heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.[103]

In response to the Obama administration's withdrawal, Congress has intervened through the Bipartisan Legal Advisory Group ("BLAG") in the lawsuits and other DOMA challenges to ensure the law receives a robust defense, both with respect to the standard of review and (especially) to the governmental interests in support of DOMA that would be advanced.

[100] Letter from Attorney General Holder, *supra* note 99.

[101] *Id.*

[102] Dorman, 25 I. & N. Dec. 485, 485 (Dep't of Justice April 26, 2011).

[103] Defendants' Brief in Opposition to Motions to Dismiss at vi, Golinski v. U.S. Office of Pers. Mgmt., 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 3:10-cv-00257-JSW).

Subcite exercise #2

II. STANDARD OF REVIEW

A. What Is the Appropriate Classification?

In all of the pending challenges to DOMA, plaintiffs have asserted that the law discriminates on the basis of sexual orientation. As Judge Taylor wrote in *Smelt*, however,

> On its face, DOMA does not classify based on sexual orientation. . . . It does not mention sexual orientation or make heterosexuality a requirement for obtaining federal marriage benefits. However, equal protection analysis is not invoked only by a facial classification. A facially neutral law may be subjected to equal protection scrutiny if its disproportionate effect on a certain class reveals a classification.[104]

As a facial matter, Judge Taylor is undoubtedly correct. Although many analyses overlook this reality, DOMA, in common with the marriage laws of all states, contains no mention of the "orientation" of the parties. And while gays and lesbians are clearly impacted disproportionately by the law, it is also true that at least some people who experience same-sex attraction can and do marry persons of the opposite sex. This is in keeping with the procreative purpose of marriage since such couples can and do have children as a result of their union, and these children benefit from a relationship with their own mother and father.

Additionally, the category of orientation itself can be analytically problematic,[105] in that, as will be explained further, there is no universally accepted definition of homosexuality, there is no consensus that sexual orientation is primarily genetic in origin like race or sex, and there is broad scientific agreement that individual orientation can and does change over time. In an amici curiae brief to the California Supreme Court for *In re Marriage Cases*, attorney John Stewart addressed the fact that there is no universally accepted definition of homosexuality.[106] Stewart pointed out that not only are there three different "basic definitions of sexual orientation," but also that there are "significant variations" within each definition.[107] Stewart also presented

[104] Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 874 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006).

[105] *See* William C. Duncan, *Problems of Classification*, 4 LIBERTY U. L. REV. 465, 466 (2010).

[106] Brief of Amici Curiae Jews Offering New Alternatives to Homosexuality ("JONAH"), Parents and Friends of Ex-Gays & Gays ("PFOX"), and Evergreen International, in Support of Proposition 22 Legal Defense and Education Fund at 3, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (S147999).

[107] *Id.* at 4–5 (citing EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 290–97 (1994)). The different definitions of sexual orientation are based upon "sexual behavior," "sexual attraction," or "self-ascribed social identity." Variations among

a compelling argument that there is no consensus that sexual orientation is primarily genetic in origin like race or sex, citing multiple sociological and psychological studies published in various academic journals to support his claim.[108] Drawing from the results of a recent twin study by two sociologists at Columbia University and Yale University, Stewart wrote, "[T]he efforts to establish genetic or hormonal

these three definitions raise important questions, such as if one uses a "sexual behavior" definition of sexual orientation, should any man who has had sexual relations with another man be considered gay? Based upon information from a psychological study by Edward Laumann, Stewart also asks if one should consider a certain time frame when asking this question. For example, is a man only gay if he has had sexual relations with another man in the last year? What about the past five years? Stewart highlights similar problems with the other definitions of sexual orientation. For instance, he asks whether physical or romantic attraction should be the gauge for defining sexual orientation under the "sexual attraction" definition since "attraction typically exists on a continuum with many individuals recognizing some degree of attraction to both sexes." *Id.*

[108] *Id.* at 7–10. "As two scholars recently put it, '. . . [T]he assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology.'" *Id.* at 8 (alteration in original) (quoting RICHARD C. FRIEDMAN & JENNIFER I. DOWNEY, SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE 39 (2002)). Stewart supported this argument by compiling various studies. In particular, Stewart pointed out that psychologists and sociologists have recognized these shortcomings in a recent study focusing on patterns of behaviors observed in identical twins:

> Identical twin studies, used to tease out genetic influence, suffer from some of the same recruitment problems that other "convenience" samples face. Identical twins who are more alike are more likely to volunteer for identical twin registries, for example, and several early studies rely on one twin's estimates of their other twin's orientation, reports which have been shown to be unreliable. [P]rofessors Bearman and Bruckner note that "[a]s samples become more representative, concordance on sexual behavior, attraction, and orientation, as expected, declines." . . .
>
> Concordance rates in orientation among identical twins have varied considerably from one study to the next, ranging from 13 percent to 100 percent in the eight small-scale studies (ranging in size from 5 to 71 identical twin pairs in which at least one twin was homosexual) in one recent review of the literature. . . .
>
> For example 1991 and 1993 studies, involving twin pairs recruited through gay publications, reported a concordance rate (similarity across the twins) of approximately 50 percent, which would suggest some heritable influence. . . . However, even a 50 percent concordance rate among identical twins suggests that genetic influences cannot be primary (or if one twin were gay 100 percent of other identical twins are gay, just as 100 percent of identical twins in which one twin is black or female, the other twin is black or female). Moreover, as sociologists Bearman and Bruckner note, using common heritability estimates suggests that many voluntary social actions show signs of genetic influence. They note a study that suggests "substantial heritability for caring for tropical fish (28%), and frequency of various behaviors such as purchasing folk music in the past year (46%), chewing gum (58%), and riding a taxi (38%)."

Id. at 8–10 (citations omitted).

Subcite exercise #2

HASTINGS CONSTITUTIONAL LAW QUARTERLY

VOLUME 21 SUMMER 1994 NUMBER 4

Table of Contents

DEDICATION

WILLIAM B. LOCKHART: A BRIEF BIOGRAPHY 857

TRIBUTE TO PROFESSOR WILLIAM B. LOCKHART
By Mary Kay Kane 859

BILL LOCKHART—COLLEAGUE, MENTOR, FRIEND
By Jesse H. Choper 861

ARTICLES

PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE
By Christopher N. May 865

The yet to be authorized 'line item veto' advocated by recent administrations pales in comparison to the 'absolute item veto' already wielded by an 'Imperial Presidency'. When the Executive refuses to enforce disfavored statutes, the effect is a veto without Congressional override. Can such a power be reconciled with our government scheme? A review of the Framer's intent shows that it was believed that the Constitution conferred on the Executive no general power to avoid enforcing unconstitutional statutes. Rather, the Executive must work within the parameters of its grant to achieve its objectives.

Evidence of presidential defiance can be traced through overridden vetoes, signing statements and objections to laws deemed unconstitutional. Andrew Johnson lost his presidency due to Congress' perception of noncompliance with the Tenure Act. With increasing frequency in recent years, Presidents have asserted constitutional objections in the signing statements which accompany reluctantly signed bills. George Bush's record is notable for raising the highest number of constitutional objections while enacting statutes. Woodrow Wilson chose not to comply with certain requirements in the Jones Act, yet no person had standing to adjudicate the issue. And, Jimmy Carter refused to comply with five statutes he had signed. These are among the many instances of the assertion of the absolute item veto examined in the article.

Presidential noncompliance with allegedly unconstitutional laws is proper only if four conditions are met. First, the unconstitutionality must be clearly apparent. Second, the President must have exhausted all avenues for redressing the problem through the legislative process. Third, defiance must be the best way to subject the law to judicial scrutiny. Lastly, the Executive must actively seek judicial review. Congress should encourage judicial review and deter refusals to comply. Without Congressional action, Presidents will surely continue to ignore laws with impunity.

ARTICLES

Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative

By CHRISTOPHER N. MAY*

Table of Contents

Introduction 867
I. The Framers' Conception 869
A. The Prerogative Power of Suspending the Laws 869
B. The Suspending Power and the United States Constitution of 1787 872
1. The "Take Care" Clause 873
2. Suspending the Writ of Habeas Corpus 874
3. The Rejection of an Absolute Veto 876
4. The Executive Power 881
C. The Suspending Power and the Bill of Rights 885
D. The Constitution as Higher Law 889
E. The Framers' Conception: A Summary 893
F. Presidential Invocation of the Constitution 895
G. Two Constitutions 898
II. Presidential Practice, 1789-1981 904
A. Constitutionally Based Vetoes Overridden by Congress 906
1. Franklin Pierce 908
2. Andrew Johnson 908

* James P. Bradley Professor of Law, Loyola Law School, Los Angeles. A.B. Harvard, 1965; LL.B. Yale, 1968. I am most grateful to Allan Ides, David Leonard, Lawrence Solum, Laurie Levenson and Lary Lawrence for their thoughtful comments on drafts of this Article. Two outstanding librarians, Eleanor DeLashmitt and William Mulherin, were invaluable in helping me to locate source material. I am indebted to Clark Peterson and Christoph Nettesheim for their research assistance, and to Loyola Law School for providing generous financial support through the James P. Bradley Chair. I thank my wife, Barbara, for her love and support during the years this Article was in the making.

Subcite exercise #2

amended the President's budget to include such funding,[332] but it failed to do so. As a result, Title II was not implemented until after Congress amended the Act in 1966 to delete the committee approval requirement.[333]

However, in more than half the cases where constitutionally-based signing statements were issued, Presidents ultimately confronted the issue of whether to honor the law or defy it.[334] In the vast majority of these instances (i.e., 76% of the time) the President chose compliance.[335]

In many cases where the President honored a statute about which he had constitutional doubts, he at the same time sought to resolve the problem in other ways. The Chief Executive often urged Congress to amend the law in question,[336] sometimes submitting an administration bill to this effect.[337]

On at least five occasions, Presidents complied with a law while at the same time taking steps to have the question of its constitutionality resolved by the courts. The first of these involved Franklin Roosevelt who, in July, 1943, approved an urgent deficiency appropriation bill that contained a rider prohibiting the government from continuing to

332. *See* PIOUS, *supra* note 73, at 258, 276-77; ALAN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 169-77 (1980).

333. Act of April 19, 1966, Pub. L. No. 89-404, 80 Stat. 129; *Water Resources Research: Hearings on H.R. 3606 and S. 22 Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. 6, 8, 15, 32 (1966); Office of Water Resources Research, U.S. Dep't of the Interior, *1965 Ann. Rep.* xv-xvi, 27-28 (1965); Office of Water Resources Research, U.S. Dep't of the Interior, *1966 Ann. Rep.* 3, 132, 135 (1966).

334. *See* supra Table 3.

335. Of the 103 entries in Table 3, 43 were situations where the President had no occasion to honor or defy the law, 44 involved compliance, and 15 were cases of defiance; one entry, involving two statutory provisions, involved both "no occasion" and "compliance." The President thus chose between compliance and defiance in 59.5 (44.5 + 15) or 58% of the 103 cases. The instances of compliance (44.5) comprised 75% of this group.

336. *See, e.g.*, Andrew Johnson, Message of Dec. 3, 1867, *in* 8 MESSAGES AND PAPERS, *supra* note 129, at 3760; Andrew Johnson, Message of Dec. 9, 1868, *in* 8 MESSAGES AND PAPERS, *supra* note 129, at 3871-72 (urging Congress to repeal provisions of Act of March 2, 1867, ch. 170, 14 Stat. 485, to which he had objected in March 2, 1867 signing statement (8 *id.* at 3670)); Richard M. Nixon, Statement of July 11, 1973, *in* 1973 PUB. PAPERS, 642-43 (1975).

337. *See, e.g., Defense Production Act Amendments, 1972: Hearings on S. 669 and S. 1901 Before the Subcomm. on Production and Stabilization of the Senate Comm. on Housing and Urban Affairs*, 92d Cong., 2d Sess. 1-2, 8-9 (1972) (Nixon administration submitted proposal to amend Pub. L. No. 91-379, 84 Stat. 796, the constitutionality of which Nixon had objected to in his Statement of Aug. 17, 1970, *in* 1970 PUB. PAPERS, 674-76 (1971)).

employ three named individuals after November 15.[338] In mid-September, Roosevelt issued a post-signing statement "placing on record" his view that the rider was a bill of attainder, and explaining that he had approved the measure in order "to avoid delaying our conduct of the war."[339] Roosevelt complied with the act but made sure that the men would have standing to challenge it in court.[340] When they later sued, the Justice Department refused to defend the validity of the act, a task which fell to Congress participating as an amicus curiae. After the Court of Claims found for the plaintiffs without reaching the constitutional issue,[341] the Justice Department took the case to the Supreme Court where the Attorney General successfully argued that the rider was unconstitutional.[342]

President Nixon also turned to the courts to vindicate his constitutional opposition to the Voting Rights Act Amendments of 1970 insofar as they lowered the voting age to 18 in federal, state, and local elections. In his June 22 signing statement Nixon announced that he had "directed the Attorney General to cooperate fully in expediting a swift court test of the constitutionality of the 18-year-old provision."[343] In order to produce a test case, the administration immediately undertook to enforce the law despite its opposition to it.[344] By the end of August four cases involving the constitutionality of the amendments had been filed directly in the Supreme Court.[345] In contrast to the Roosevelt administration, the Nixon Justice Department

338. Act of July 12, 1943, ch. 218, § 304, 57 Stat. 431, 450 (barring employment of the men in any capacity unless, prior to November 15, 1943, they were appointed to office by the President and confirmed by the Senate).

339. Statement of Sept. 14, 1943, *in* PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1943, *supra* note 171, at 385-86; U.S. CONST., art. I., § 9 ("No Bill of Attainder or ex post facto Law shall be passed.").

340. When one of the men, Robert M. Lovett, lost his job prior to the November 15 termination date, he was named to another post, giving him a salary claim sufficient to confer standing to challenge the validity of the rider in the Court of Claims. *See* John H. Ely, United States v. Lovett: *Litigating The Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 4-6 n.20 (1975).

341. Lovett v. United States, 66 F. Supp. 142 (Ct. Cl. 1945).

342. United States v. Lovett, 328 U.S. 303 (1946).

343. Statement of June 22, 1970, *in* 1970 PUB. PAPERS, 512-13 (1971).

344. *See* Christopher Lydon, Mitchell Gives States to Aug. 3 to Act on Vote at 18, N.Y. TIMES, July 15, 1970, at 16, col. 5; Mitchell Promises Vigorous Defense of Vote Age Suit, N.Y. TIMES, July 18, 1970, at 11, col. 4; Mitchell Sets Subpoena Rules to Allay Growing Press Fears, N.Y. TIMES, Aug. 11, 1970, at 24, col. 1; Fred P. Graham, U.S. Sues to Uphold 18 year old Vote, N.Y. TIMES, Aug. 18, 1970, at 25, col. 3; U.S. Widens Test of Vote at 18 Law, N.Y. TIMES, Aug. 20, 1970, at 27, col. 5.

345. *See* Oregon v. Mitchell, 400 U.S. 112, 117 n.1 (1970); Oregon v. Mitchell, 400 U.S. 802 (1970).

Subcite exercise #2

formally defended the Act, but its performance was "lackluster and unenthusiastic."[346] At oral argument, Solicitor General Erwin Griswold told the Justices that both the President and the Attorney General thought the voting rights amendments were unconstitutional, and conceded that in his own mind their validity was "a very close question."[347] Nixon's efforts met with partial success. On December 21, 1970, the Court sustained all of the Voting Rights Act Amendments except the one lowering the voting age in state and local elections, which was held to be unconstitutional.[348]

Two of the other three instances where Presidents complied with the law but sought to have the issue of its validity decided by the courts involved the Ford administration. In October 1974, Ford signed but expressed First Amendment reservations about amendments to the Federal Election Campaign Act,[349] which placed limits on individual contributions and candidate expenditures; however, Ford was confident "such issues [could] be resolved in the courts."[350] When a suit challenging the constitutionality of the amendments was filed, the Justice Department vigorously defended them despite the administration's doubts as to their validity.[351] The Supreme Court partially sustained Ford's position, holding some of the expenditure limits to be unconstitutional.[352]

The same 1974 Federal Election Campaign Act Amendments contained a one-House legislative veto provision which Ford did not oppose at the time.[353] During 1975 and 1976, the Ford administration acquiesced in the provision by routinely submitting proposed Federal Election Commission regulations to Congress where some of them were blocked by the House or the Senate.[354] But when the provision

346. 123 CONG. REC. 2974 (1977) (remarks of Sen. James Abourezk).

347. Fred P. Graham, U.S. Sues to Uphold 18 year old Vote, N.Y. TIMES, Aug. 18, 1970, at 25, col. 3; Fred P. Graham, New Law on Voting Rights At Age 18 is Denounced Before Supreme Court By Lawyers For Four States, N.Y. TIMES, Oct. 20, 1970, at 25, cols. 1-3; 123 CONG. REC. 2974 (1977) (transcript of oral argument).

348. Oregon v. Mitchell, 400 U.S. 112 (1970).

349. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

350. Message of Oct. 15, 1974, *in* 1974 PUB. PAPERS 303-04 (1975).

351. *See* Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975); Buckley v. Valeo, 424 U.S. 1 (1976).

352. Buckley v. Valeo, 424 U.S. 1, 6 (1976).

353. Pub. L. No. 93-443, § 209, 88 Stat. 1287-88.

354. *See* Federal Election Comm'n, *1976 Ann. Rep.* iii, 45; Federal Election Comm'n, *1977 Ann. Rep.* 6 n.*, 7; 121 CONG. REC. 32321 (1975); S. REP. NO. 94-409, 94th Cong. 1st Sess. (1975); 121 CONG. REC. 33664, 33674 (1975); H.R. REP. NO. 94-552, 94th Cong., 1st Sess. (1975).

was carried over by the Federal Election Campaign Act Amendments of 1976,[355] Ford now objected that the veto was unconstitutional. He instructed the Attorney General "to challenge the constitutionality of this provision at the earliest possible opportunity."[356] Rather than defend the disputed provision, the administration this time took the offensive by having the United States intervene as a plaintiff in a suit which former Attorney General Ramsey Clark brought against various defendants, including the Federal Election Commission.[357] However, the President failed in this effort to secure a judicial resolution of the issue, for the case was dismissed as not being ripe.[358]

Jimmy Carter likewise turned to the Judiciary, in order to determine the validity of a 1977 rider limiting the Department of Health, Education, and Welfare's authority to enforce Title VI of the 1964 Civil Rights Act.[359] The Carter administration complied with the provision by settling or dismissing proceedings HEW had filed against local school districts to compel bussing.[360] When the provision was challenged in court, the Justice Department vigorously and successfully defended it,[361] apparently satisfied that the case against its constitutionality would be argued capably by the plaintiffs.

There may have been instances where compliance with a law reflected a presidential awareness that the constitutional objection raised in a signing statement was so insubstantial as to border on the frivolous. It is difficult to imagine a President undertaking an official act in jest, yet it is hard to come up with any other explanation for Lyndon Johnson's objection to a section of the Military Construction Authorization Act for Fiscal Year 1968, which barred the Defense Department from closing the Naval Academy's dairy farm at Annapolis.[362] According to the President, "Congress, which has given the Navy Department authority over the world's most powerful fleet, has withdrawn the Department's authority over 380 cows." This, he said,

355. Pub. L. No. 94-283, 90 Stat. 475.

356. Statement of May 11, 1976, *in* 1976 PUB. PAPERS 1530 (1979).

357. Vote Law Change Sought by Clark, N.Y. TIMES, July 2, 1976, at A9, col. 5; Justice Department Opposes Veto Plan On Election Rules, N.Y. TIMES, Aug. 7, 1976, at 7, col. 4; Clark v. Valeo, 559 F.2d 642, 644 (D.C. Cir. 1977) (en banc).

358. *Clark*, 559 F.2d at 647, *aff'd sub nom.* Clark v. Kimmitt, 431 U.S. 950 (1977).

359. Statement of Dec. 9, 1977, *in* 1977 PUB. PAPERS 2087-88 (1978) (objecting to Act of Dec. 9, 1977, Pub. L. No. 95-205, 91 Stat. 1460).

360. *See* Brown v. Califano, 627 F.2d 1221, 1229 n.42, 1237-38 (D.C. Cir. 1980).

361. Brown v. Califano, 455 F. Supp. 837 (D.D.C. 1978), *aff'd*, 627 F.2d 1221 (D.C. Cir. 1980).

362. Pub. L. No. 90-110, § 810, 81 Stat. 279, 309. Pressure to close the dairy came from private local milk producers who wished to supply the Academy with dairy products. L.A. TIMES, April 16, 1989, at 19, col. 1.

Subcite exercise #2

"raise[s] questions concerning the constitutional separation of powers."[363] Questions, but not "grave" ones. The plan to sell the Naval Academy's dairy was dropped.

Presidential compliance with measures to which the President had objected was not always intentional. On two occasions, a White House attempt to defy an allegedly unconstitutional law was thwarted by subordinates in the executive branch. Both cases involved legislative veto provisions which executive officials may have been reluctant to ignore for fear that Congress might retaliate by reducing the agency's future funding level.[364] On January 8, 1963, John Kennedy issued a memorandum objecting, on the Attorney General's advice, to the validity of a committee veto provision in an appropriation act that he had signed the previous October.[365] Kennedy instructed David E. Bell, head of the Agency for International Development to whose actions the veto applied, that he was to treat the provision as a mere "request for information" on the part of the congressional committees.[366] The agency nevertheless complied with the provision during Fiscal Year 1963 when it was in effect. AID did so, said Bell, because "the Comptroller General gave an opinion that it was in the act, unconstitutional or not, and we had to abide by it as long as it was in the act . . . ."[367] It is unclear whether Kennedy ever learned that this executive agency had ignored his instruction and the advice of the Attorney General in favor of a contrary legal opinion issued by someone who was an agent of Congress.[368]

President Carter was similarly frustrated when he attempted to ignore a two-House legislative veto provision contained in the National Parks and Recreation Act of 1978. A section of the Act required the Department of Agriculture to obtain, by concurrent resolution, House and Senate approval before making certain land exchanges in Montana's Gallatin-Beaverhead National Forest, if the exchange involved over 6400 acres.[369] Carter's November 10, 1978 signing statement noted that both he and the Justice Department thought the section was unconstitutional. Carter directed the Secretary of Agriculture that while he should listen to Congress's views, he should "consummate any land exchanges covered by [the section] which are, in his opinion, otherwise authorized by statute, irrespective of the acreage involved."[370] Senator John Melcher of Montana, who had sponsored the section, took the extraordinary step of appealing the President's action to the Justice Department, persuading it that "in spite of the President's direction, the Department and the Forest Service should cooperate with him and the Congress in processing these land exchanges."[371] The Justice Department then advised the Agriculture Department that it could as a matter of policy elect to comply with the veto provision. On November 22, ten days after Carter had issued his directive to the contrary, the Department of Agriculture ordered the Forest Service "to proceed as if [the section] were applicable, that is, that proposed exchanges exceeding 6,400 acres would have to be approved by concurrent resolution of Congress."[372] The Forest Service saw the writing on the wall and suspended further consideration of the proposed exchanges.[373]

363. Statement of Oct. 21, 1967, *in* 1967 PUB. PAPERS 935 (1968). *See* JACK SWEETMAN, THE U.S. NAVAL ACADEMY: AN ILLUSTRATED HISTORY 163-64 (1979); L.A. TIMES, April 16, 1989, at 19, col. 1.

364. On the fact that executive agencies sometimes show greater loyalty to Congress than to the President, *see* FRANKLIN, *supra* note 123, at 63-64; LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 89-92 (2d ed. 1987); FISHER, *supra* note 134, at 73.

365. Act of Oct. 23, 1962, Pub. L. No. 87-872, 76 Stat. 1163, 1164; Memorandum, Jan. 8, 1963, *in* 1963 PUB. PAPERS 6 (1964).

366. Memorandum, Jan. 8, 1963, *in* 1963 PUB. PAPERS 6 (1964)

367. *Foreign Assistance and Related Agencies Appropriations for 1964: Hearings on H.R. 9499 Before the Sen. Comm. on Appropriations*, 88th Cong., 1st Sess. 312-13 (1963).

368. *See* Bowsher v. Synar, 478 U.S. 714, 727-32 (1986) (finding Comptroller General to be an agent of Congress).

4. *Presidential Noncompliance*

Table 4 shows the 12 instances in which Presidents failed to comply with laws to which they had objected in a signing or post-signing statement.[374] What is immediately striking is that a majority of these

369. National Parks and Recreation Act, Pub. L. No. 95-625, § 1301, 92 Stat. 3467, 3549; *Additions to the National Wilderness Preservation System: Hearings Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 24-26 (1979) [hereinafter *Wilderness Hearings*].

370. Statement of Nov. 10, 1978, *in* 1978 PUB. PAPERS 1999-2000 (1979).

371. *Wilderness Hearings*, *supra* note 369, at 244-45.

372. *Id.*

373. *Id.* at 35 (testimony of Bill Cunningham, Wilderness Society); *id.* at 42-47 (testimony of Tom Costen, U.S. Forest Service).

374. There are a number of well-known incidents that may be thought to involve presidential refusals to honor a law on constitutional grounds, but which do not belong in this category.

Andrew Jackson: In 1830 Jackson signed an internal improvements bill, Act of May 31, 1830, ch. 232, 4 Stat. 427, but issued a signing statement declaring that the $8,000 appropriated for the road from Detroit to Chicago could not be used to extend the road beyond the Michigan Territory (into the state of Indiana). Statement of May 30, 1830, *in* 3 MESSAGES AND PAPERS, *supra* note 129, at 1046. This reflected Jackson's view that Congress had power to provide for improvements in the territories but not within the states. *See* 3 *id.* at 1046-56, 1071-77. In this case, Jackson's concerns were purely hypothetical, for the Chicago Road was still far from the Indiana border. Contrary to later assertions, *see, e.g.*, H.R.

Subcite exercise #2

the Supreme Court in a back-and-forth struggle concerning religious land. In 1962, a strict scrutiny test for governmental action as applied to religious individuals was announced by the Supreme Court in Sherbert: no government could enforce a law in a manner that forbade the exercise of a person's religion unless enforcement of the law was the least restrictive means of achieving a compeling governmental interest.[11] Thus, the Court held that unemployment compensation benefits could not be denied to a Seventh-Day Adventist who lost his job for refusing to work on Sunday.[12] The limit of Congress's power, the Court held, was to provide remedies for the violation of constitutional rights, and not -- as RFRA apparently sought -- to redefine the scope of those rights.[13]

In 1990, the Court in Smith formally abandoned the compelling interest test and announced that

Subciter 6:43 PM

SUBTLE LOGICAL ERROR: <land use> (2)

Subciter 6:44 PM

WRONG DATE: <1963> (1)

Subciter 6:44 PM

INTERMEDIATE SUBSTANTIVE ERROR: <burdened> (2)

Subciter 6:44 PM

SPELLING: <compelling> (1)

Subciter 6:45 PM

SIMPLE SUBSTANTIVE ERROR: <her> (2)

Subciter 6:45 PM

SIMPLE SUBSTANTIVE ERROR: <Saturday> (2)

Subciter 6:46 PM

MISPLACED SENTENCE: Sentence should be moved to page 6, after (4) or before (3) "In an opinion by . . . against the states." Partial credit for noting only that the sentence is out of place (2).

Subciter 6:46 PM

SPACING: Remove space before footnote: <> (1)

Subciter 6:46 PM

OVERSTATEMENT: <sharply limited the reach of> or a similar change that moderates the statement (4). The Court did not actually abandon the test but rather limited it (as it would still apply in contexts with individualized assessments and in hybrid violations).

Sherbert was inapplicable to an otherwise valid and natural law of general applicability -- that is, to any law that was not directly targeted at a religious group.[14] The Sherbert court noted that the compelling interest test "was developed in a context that lent itself to . . . individualized governmental assessment of the reasons for the relevant conduct." Reaffirming the Sherbert test, the Court held in Wisconsin v. Yoder[15] that Wisconsin lacked a compelling reason to force Amish children to attend public high school against their religious beliefs.[16]

In response, Congress passed the Religious Freedom Restoration Act of 1993[17] (RFRA), which purported to overrule Smith and reinstate the rule of Sherbert and Yoder.[18]

In 1997, the Supreme Court invalidated RFRA as applied to state and local government, holding in City of

Subciter 6:47 PM

WRONG WORD: <neutral> (1)

Subciter 6:47 PM

WRONG CASE: <Smith> or delete altogether (1)

Subciter 6:47 PM

CAPITALIZATION: <Court> (1)

Subciter 6:47 PM

QUOTATION: remove ellipsis (1)

Subciter 6:48 PM

MISPLACED SENTENCE: Sentence should be moved to page 4, after "refusing to work on Saturday" and before "In 1990" (4). Partial credit for noting only that the sentence is out of place (2).

Subciter 6:48 PM

SUPPORT: Insert footnote: <Id. at 884.> (2)

Subciter 6:48 PM

PARAGRAPH STRUCTURE: This is a very short paragraph. Either merge with previous / following paragraph or add an appropriate sentence. (2)

Subciter 6:48 PM

SPACING: Remove extra space between the two paragraphs. (1)

Boerne v. Flores[19] that RFRA could not force state zoning authorities to give a church a permit to expand its building notwithstanding a generally applicable environmental protection ordinance.[20] In an opinion by Judge O'Connor, the Court held that RFRA exceeded Congress's power under Sec. 5 of the fourteenth amendment to enforce the Free Exercise Clause against the states.[21] The scholarly and popular reaction to the Court's abandonment of Sherbert was strongly negative.[22]

Nevertheless, Congress was determined to revive the compelling interest test in any arena in which the Court would permit it to do so. Three years after City of Boerne, siezing on the Smith dicta suggesting a loophole for "individualized governmental assessment[s]"[23] Congress in 2000 enacted RLUIPA to reinstate the Sherbert test in two arenas in which such assessments were common;

Subciter 6:49 PM
CHARACTERIZATION: <local> (2)

Subciter 6:49 PM
SIMPLE SUBSTANTIVE ERROR: <historic preservation> (2)

Subciter 6:51 PM
TITLE: <Justice> (1)

Subciter 6:51 PM
WRONG JUSTICE: <Kennedy> (1)

Subciter 6:51 PM
ABBREVIATION: <Section> or <section> (no points off for capitalization) (1)

Subciter 6:51 PM
CAPITALIZATION: <Fourteenth Amendment> (1)

Subciter 6:52 PM
MISPLACED SENTENCE: This sentence should be moved to page 5, after "governmental assessment of the reasons for the relevant conduct" and before "Accordingly, Congress passed the." It can be joined with either paragraph (ending one or beginning the next) (4). Partial credit for noting only that the sentence is out of place (2).

Subciter 6:52 PM
SUPPORT: The text in note 22 supports TAN 23 and the text in note 23 supports TAN 22. Switch footnote text accordingly. (Note: credit for edit either awarded here or in footnotes, not both.)

Subciter 6:52 PM
SPELLING: <seizing> (1)

Subciter 6:53 PM
SINGULAR/PLURAL: <dictum> (2)

Subciter 6:53 PM
PUNCTUATION: <assessment[s],"> (add missing comma) (1)

Subciter 6:53 PM
REDUNDANCY: Delete this language or "Three years after City of Boerne" at the beginning of the sentence (2)

Subciter 6:53 PM
TYPEFACE: <Sherbert> (1)

Subciter 6:54 PM
PUNCTUATION: <:> or <#--#> (1)

68 **Geo. Wash. L. Rev.** 861, 921 (2000) ("The strict scrutiny test embodied in § 2(a)(1) of RLUIPA . . . has not born fruit in previous religious land use decisions, and there is no reason to believe that this new iteration will fair any better."); but see Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 **Va. L. Rev.** 1, 24 - 26, 62 - 66 (1993) (predicting that courts would interpret the Religious Freedom Restoration Act of 1993 broadly for the exact same reasons).

[11] See Sherbert, 374 U.S. at 406 - 10.

[12] Id. at 399, 409 - 10.

[13] See City of Boerne v. Flores, 521 U.S. 507, 519 - 20 (1997) ("There must be a

Subciter 4:27 PM
MISQUOTE: <of the RLUIPA> (2)

Subciter 4:27 PM
MISSPELLING: <borne> (1)

Subciter 4:27 PM
MISQUOTE: <little> (1)

Subciter 4:27 PM
WRONG SIGNAL: <cf.> (2). Partial credit for <see> (1).

Subciter 4:27 PM
MISQUOTE: <fare> (1)

Subciter 4:27 PM
OVERSTATEMENT: <similar> or similar (2). Partial credit for deleting <the exact> but leaving "same" (1).

Subciter 4:27 PM
SIMPLE SUBSTANTIVE ERROR: <narrowly> (2)

Subciter 4:27 PM
MISSING SPACE: <11#S> (11).

Subciter 4:27 PM
SUBTLE CITATION STRUCTURE ERROR: This footnote supports a sentence that is in the wrong place. If sentence relocated correctly then <Id. at 519#-#20> or similar. (3)

NOTE: Do not deduct points for <520> only.

congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end.").

[14] See Employment Div. v. Smith, 494 U.S. 872, 878 - 79 (1990). Smith held that claimants were entitled to a religious exemption from the application of a law denying them pension benefits on account of their legal drug sales. Id. at 872.

[15] 406 U.S. 205.

[16] See id. at 234.

[17] Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

[18] 42 U.S.C. § 2000bb(a)(4), (b)(1).

[19] 521 U.S. 507 (1997).

Subciter 4:27 PM
MISQUOTE: <adopted> (1)

Subciter 4:27 PM
FORMAT: <Smith> (1)

Subciter 4:27 PM
SUBTLE LOGICAL ERROR: <were not> (2)

Subciter 4:27 PM
MISCHARACTERIZATION OF SOURCE: <unemployment compensation> or <unemployment benefits> (2)

Subciter 4:27 PM
SIMPLE SUBSTANTIVE ERROR: <illegal> (2)

Subciter 4:27 PM
MISCHARACTERIZATION OF SOURCE: <use> or similar (2)

Subciter 4:27 PM
WRONG PINCITE: <890> (1)

[20] Cf. id. at 507 - 12.

[21] See id. at 532 - 36. The Court explained that Congress had exceeded its constitutional power. Id.

[22] Employment Div. v. Smith, 494 S. Ct. 872, 884 (1990).

[23] See, e.g., Ryan, supra note 9, at 1409 - 10 (criticizing the decision); see also id. at 1410 - 11 (summarizing negative reactions).

[24] This Note confines its discussion to RFRA's land use provisions.

[25] See 42 U.S.C. § 2000cc(a)(1) (2000) (No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise

Subciter 4:27 PM

WRONG SIGNAL: <See> (2)

Subciter 4:27 PM

WRONG PINCITE: <511> (1)

Subciter 4:27 PM

REDUNDANCY: Delete because already in body text (2)

Subciter 4:27 PM

WRONG REPORTER: <U.S.> (1)

Subciter 4:27 PM

WRONG SOURCE: Text in n.22 supports TAN 23 and text in n.23 supports TAN 22. Switch text in notes accordingly. (2)

(NOTE: only award credit in one place. If credit awarded in body text, do not also award credit on footnote pages)

Subciter 4:27 PM

WRONG PINCITES: swap the pincites; <1410#-#11> should precede <1409#-#10> so that the full footnote reads: <See, e.g., Ryan, supra note 9, at 1410#-#11 (criticizing the decision); see also id. at 1409#-#10 (summarizing negative reactions).> (3); partial credit for recognizing the problem but not making preferred suggestion (2).

Subciter 4:27 PM

SIMPLE SUBSTANTIVE ERROR: <RLUIPA's> (1)

Subciter 4:27 PM

MISSING OPEN QUOTATION MARKS: <("No> (1)

the Supreme Court in a back-and-forth struggle concerning religious land. In 1962, a strict scrutiny test for governmental action as applied to religious individuals was announced by the Supreme Court in Sherbert: no government could enforce a law in a manner that forbade the exercise of a person's religion unless enforcement of the law was the least restrictive means of achieving a compeling governmental interest.[11] Thus, the Court held that unemployment compensation benefits could not be denied to a Seventh-Day Adventist who lost his job for refusing to work on Sunday.[12] The limit of Congress's power, the Court held, was to provide remedies for the violation of constitutional rights, and not -- as RFRA apparently sought -- to redefine the scope of those rights.[13]

In 1990, the Court in Smith formally abandoned the compelling interest test and announced that

Subciter 7:06 PM

SUBSTANTIVE ERROR: On my read, the back and forth struggle is not limited to religious land. Therefore, "exemptions from government laws" would be more appropriate. Please consider <exemptions from government laws>.

Subciter 7:06 PM

SUBSTANTIVE ERROR: The case was decided in 1963. Please consider <1963>.

Subciter 7:06 PM

SUBSTANTIVE ERROR: Please consider <burdened>.

Subciter 7:06 PM

SPELLING: Please consider <compelling>.

Subciter 7:07 PM

CAPITALIZATION: Please consider <Seventh-day>.

Subciter 7:07 PM

SUBSTANTIVE ERROR: The litigant was a woman. Please consider <her>.

Subciter 7:07 PM

MISPLACED SENTENCE: This sentence appears to be out of place. Please consider moving to page 6 paragraph on City of Boerne.

Subciter 7:07 PM

SUBSTANTIVE ERROR: The individual refused to work on a Saturday. Please consider <Saturday>.

Subciter 7:08 PM

MISPLACED SENTENCE: Please consider inserting the sentence from the end of next paragraph after this sentence.

Subciter 7:08 PM

LOGICAL ERROR: This is a shift in stance between paragraphs. Please consider <However, in>.

Sherbert was inapplicable to an otherwise valid and natural law of general applicability -- that is, to any law that was not directly targeted at a religious group.[14] The Sherbert court noted that the compelling interest test "was developed in a context that lent itself to . . . individualized governmental assessment of the reasons for the relevant conduct." Reaffirming the Sherbert test, the Court held in Wisconsin v. Yoder[15] that Wisconsin lacked a compelling reason to force Amish children to attend public high school against their religious beliefs.[16]

In response, Congress passed the Religious Freedom Restoration Act of 1993[17] (RFRA), which purported to overrule Smith and reinstate the rule of Sherbert and Yoder.[18]

In 1997, the Supreme Court invalidated RFRA as applied to state and local government, holding in City of

Subciter 7:08 PM

SUBSTANTIVE ERROR: Please consider <neutral>.

Subciter 7:08 PM

SUBSTANTIVE ERROR: This sentence discusses the Smith court. Please consider <Smith>.

Subciter 7:09 PM

QUOTATION: No text is omitted from the original sentence. Please consider removing the ellipsis: <>.

Subciter 7:10 PM

MISPLACED SENTENCE: On my read, this sentence appears to be out of place. Please consider moving it to the end of the previous paragraph.

Subciter 7:10 PM

CITATION NEEDED: Please consider adding the following footnote: <Smith, 494 U.S. at 884.>.

Subciter 7:10 PM

MISPLACED SENTENCE: This paragraph is very short. Please consider inserting the sentence from the end of the next paragraph here to form a longer paragraph.

Subciter 7:10 PM

SPACING: Please consider removing the extra line before this paragraph.

Boerne v. Flores[19] that RFRA could not force state zoning authorities to give a church a permit to expand its building notwithstanding a generally applicable environmental protection ordinance.[20] In an opinion by Judge O'Connor, the Court held that RFRA exceeded Congress's power under Sec. 5 of the fourteenth amendment to enforce the Free Exercise Clause against the states.[21] The scholarly and popular reaction to the Court's abandonment of Sherbert was strongly negative.[22]

Nevertheless, Congress was determined to revive the compelling interest test in any arena in which the Court would permit it to do so. Three years after City of Boerne, siezing on the Smith dicta suggesting a loophole for "individualized governmental assessment[s]"[23] Congress in 2000 enacted RLUIPA to reinstate the Sherbert test in two arenas in which such assessments were common;

Subciter 7:11 PM

SUBSTANTIVE ERROR: The case involved local zoning authorities. Please consider <local>.

Subciter 7:11 PM

SUBSTANTIVE ERROR: The ordinance related to historical preservation. Please consider <historical preservation>.

Subciter 7:11 PM

COLLOQUIALISM: Please consider <Justice>.

Subciter 7:12 PM

SUBSTANTIVE ERROR: Justice Kennedy wrote the opinion. Please consider <Kennedy>.

Subciter 7:12 PM

ABBREVIATION: Please consider <Section>.

Subciter 7:12 PM

NUMBER: Please consider <Five>.

Subciter 7:12 PM

CAPITALIZATION: Please consider <Fourteenth Amendment>.

Subciter 7:12 PM

MISPLACED SENTENCE: On my read, this sentence appears to be out of place. Please consider moving to the beginning of the last paragraph.

Subciter 7:13 PM

SPELLING: Please consider <seizing>.

Subciter 7:13 PM

PUNCTUATION: Please consider inserting a comma to set off this clause.

Subciter 7:13 PM

REDUNDANT: On my read, "in 2000" is not necessary given the earlier reference to "Three years after." Please consider <>.

Subciter 7:13 PM

PUNCTUATION: Please consider <:>.

68 **Geo. Wash. L. Rev.** 861, 921 (2000) ("The strict scrutiny test embodied in § 2(a)(1) of RLUIPA . . . has not born fruit in previous religious land use decisions, and there is no reason to believe that this new iteration will fair any better."); but see Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 **Va. L. Rev.** 1, 24 - 26, 62 - 66 (1993) (predicting that courts would interpret the Religious Freedom Restoration Act of 1993 broadly for the exact same reasons).

[11] See Sherbert, 374 U.S. at 406 - 10.

[12] Id. at 399, 409 - 10.

[13] See City of Boerne v. Flores, 521 U.S. 507, 519 - 20 (1997) ("There must be a

Subciter 5:37 PM
MISQUOTE: missing "the" before RLUIPA

Subciter 5:37 PM
MISQUOTE: quote uses "borne" not "born"

Subciter 5:37 PM
MISQUOTE: quote uses "little" not "no"

Subciter 5:37 PM
SIGNAL ERROR: "cf." not "but see" - this is support by analogizing to RFRA

Subciter 5:37 PM
SUBSTANTIVE ERROR: "narrowly" not "broadly" - article says courts will only interpret it as far as the most recent case law allows

Subciter 5:37 PM
MISCHARACTERIZATION: delete "exact" - Lupo claims only a similar interpretation

Subciter 5:37 PM
MISSING SPACE: there should be a space between the footnote number and the signal

Subciter 5:37 PM
SIGNAL ERROR: support is direct; no signal needed

Subciter 5:37 PM
MISPLACED CITATION: insert the Smolik citation from footnote 9 here, with a "but see" signal

congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end.").

[14] See Employment Div. v. Smith, 494 U.S. 872, 878 - 79 (1990). Smith held that claimants were entitled to a religious exemption from the application of a law denying them pension benefits on account of their legal drug sales. Id. at 872.

[15] 406 U.S. 205.

[16] See id. at 234.

[17] Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

[18] 42 U.S.C. § 2000bb(a)(4), (b)(1).

[19] 521 U.S. 507 (1997).

Subciter 5:37 PM

PARENTHETICAL: this sentence belongs to a parenthetical as it merely gives the holding of the case ("holding that claimants ...")

Subciter 5:37 PM

TYPEFACE: "Smith" not "Smith"

Subciter 5:37 PM

SUBSTANTIVE ERROR: Smith held that claimants "were not" entitled to an exemption.

Subciter 5:37 PM

SUBSTANTIVE ERROR: Smith denied them "unemployment" benefits, not "pension" benefits.

Subciter 5:37 PM

SUBSTANTIVE ERROR: the conduct in Smith was "illegal" not "legal"

Subciter 5:37 PM

SUBSTANTIVE ERROR: the conduct in Smith was drug "use" not "sales"

Subciter 5:37 PM

IMPROPER CITATION: the syllabus cannot be used as legal support, this citation must either cite the case in general or to page 890

Subciter 5:37 PM

SUBSTANTIVE ERROR: missing the year (1972)

[20] Cf. id. at 507 - 12.

[21] See id. at 532 - 36. The Court explained that Congress had exceeded its constitutional power. Id.

[22] Employment Div. v. Smith, 494 S. Ct. 872, 884 (1990).

[23] See, e.g., Ryan, supra note 9, at 1409 - 10 (criticizing the decision); see also id. at 1410 - 11 (summarizing negative reactions).

[24] This Note confines its discussion to RFRA's land use provisions.

[25] See 42 U.S.C. § 2000cc(a)(1) (2000) (No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise

Subciter 5:37 PM

SIGNAL ERROR: this is direct support; no "cf." necessary

Subciter 5:37 PM

CITATION ERROR: the syllabus should not be cited as legal support. The applicable opinion citation begins on page 511.

Subciter 5:37 PM

REDUNDANT: this sentence is unnecessary - the text already states that "the Court held that RFRA exceeded Congress's power..." (see page 6)

Subciter 5:37 PM

SIGNAL ERROR: no signal necessary

Subciter 5:37 PM

MISPLACED SOURCES: these 2 footnotes should be swapped - 22 should cite to Ryan, 23 to Smith

Subciter 5:37 PM

MISPLACED SOURCES: these 2 footnotes should be swapped - 22 should cite to Ryan, 23 to Smith

Subciter 5:37 PM

WRONG PAGE NUMBERS: these 2 page numbers should be swapped - 1410-11 criticizes the decision, 1409-10 summarizes negative reactions.

Subciter 5:37 PM

WRONG PAGE NUMBERS: these 2 page numbers should be swapped - 1410 - 11 criticizes the decision, 1409 - 10 summarizes the negative reactions.

Subciter 5:37 PM

SUBSTANTIVE ERROR: this Note discusses "RLUIPA" not "RFRA"

Subciter 5:37 PM

PUNCTUATION: Missing beginning quotation mark after parenthesis

the Supreme Court in a back-and-forth struggle concerning religious land. In 1962, a strict scrutiny test for governmental action as applied to religious individuals was announced by the Supreme Court in Sherbert: no government could enforce a law in a manner that forbade the exercise of a person's religion unless enforcement of the law was the least restrictive means of achieving a compeling governmental interest.[11] Thus, the Court held that unemployment compensation benefits could not be denied to a Seventh-Day Adventist who lost his job for refusing to work on Sunday.[12] The limit of Congress's power, the Court held, was to provide remedies for the violation of constitutional rights, and not -- as RFRA apparently sought -- to redefine the scope of those rights.[13]

In 1990, the Court in Smith formally abandoned the compelling interest test and announced that

Subciter 7:34 PM

CHARACTERIZATION: On my read, the back-and-forth struggle is not limited to religious land. Please consider <exemptions from governmental laws>.

Subciter 7:34 PM

WRONG DATE: The case was decided in 1963. Please consider <1963>.

Subciter 7:34 PM

REDUNDANT: On my read, given the closely following description of the Sherbert test, this clause is unnecessary. Please consider <>.

Subciter 7:34 PM

SPELLING: Please consider <compelling>.

Subciter 7:34 PM

CAPITALIZATION: Please consider <Seventh-day>.

Subciter 7:34 PM

SUBSTANTIVE ERROR: The plaintiff was a woman. Please consider <her>.

Subciter 7:35 PM

MISPLACED SENTENCE: On my read, this sentence is out of place. Please consider moving to the paragraph on pages 4-5 beginning "In 1997."

Subciter 7:35 PM

SUBSTANTIVE ERROR: The plaintiff refused to work on a Saturday. Please consider <Saturday>.

Subciter 7:35 PM

SPACING: There appears to be an extra space here. Please consider <>.

Subciter 7:36 PM

MISPLACED SENTENCE: Please consider inserting the sentence from the end of this paragraph ("Reaffirming the Sherbert test . . .") here.

Subciter 7:37 PM

CHARACTERIZATION: On my read, the Court did not formally abandon the test. Please consider <reined in> or <limited>.

Sherbert was inapplicable to an otherwise valid and natural law of general applicability -- that is, to any law that was not directly targeted at a religious group.[14] The Sherbert court noted that the compelling interest test "was developed in a context that lent itself to . . . individualized governmental assessment of the reasons for the relevant conduct." Reaffirming the Sherbert test, the Court held in Wisconsin v. Yoder[15] that Wisconsin lacked a compelling reason to force Amish children to attend public high school against their religious beliefs.[16]

In response, Congress passed the Religious Freedom Restoration Act of 1993[17] (RFRA), which purported to overrule Smith and reinstate the rule of Sherbert and Yoder.[18]

In 1997, the Supreme Court invalidated RFRA as applied to state and local government, holding in City of

Subciter 7:39 PM

SUBSTANTIVE ERROR: The Court referred to "neutral" laws. Please consider <neutral>.

Subciter 7:39 PM

SUBSTANTIVE ERROR: This quote is from the Smith Court rather than the Sherbert Court. Please consider <Smith>.

Subciter 7:39 PM

CAPITALIZATION: Please consider <Court>.

Subciter 7:39 PM

QUOTATION: No words are omitted from the source sentence, therefore no ellipsis is needed. Please consider <>.

Subciter 7:40 PM

MISPLACED SENTENCE: Please consider moving this sentence to the end of the preceding paragraph.

Subciter 7:40 PM

SUPPORT: Please consider <Smith, 494 U.S. at 884.>.

Subciter 7:40 PM

MISPLACED TOPIC SENTENCE: Please consider inserting the sentence from the end of the next paragraph ("The scholarly and popular . . .").

Subciter 7:40 PM

EXTRA LINE: Please consider removing the extra line before this paragraph.

Boerne v. Flores[19] that RFRA could not force state zoning authorities to give a church a permit to expand its building notwithstanding a generally applicable environmental protection ordinance.[20] In an opinion by Judge O'Connor, the Court held that RFRA exceeded Congress's power under Sec. 5 of the fourteenth amendment to enforce the Free Exercise Clause against the states.[21] The scholarly and popular reaction to the Court's abandonment of Sherbert was strongly negative.[22]

Nevertheless, Congress was determined to revive the compelling interest test in any arena in which the Court would permit it to do so. Three years after City of Boerne, siezing on the Smith dicta suggesting a loophole for "individualized governmental assessment[s]"[23] Congress in 2000 enacted RLUIPA to reinstate the Sherbert test in two arenas in which such assessments were common;

Subciter 7:40 PM

SUBSTANTIVE ERROR: The zoning authorities were part of the local rather than state government. Please consider <local>.

Subciter 7:41 PM

LOGICAL ERROR: The permit here was not allowed *because* of the ordinance, not in spite of the ordinance. Please consider <due to> or <in light of>.

Subciter 7:41 PM

SUBSTANTIVE ERROR: The ordinance was for historical preservation, not environmental protection. Please consider <historical preservation>.

Subciter 7:41 PM

COLLOQUIALISM: Supreme Court Justices are referred to as "Justice." Please consider <Justice>.

Subciter 7:41 PM

SUBSTANTIVE ERROR: The opinion was written by Justice Kennedy. Please consider <Kennedy>.

Subciter 7:41 PM

ABBREVIATION: This word should be written out. Please consider <Section>.

Subciter 7:41 PM

CAPITALIZATION: Please consider <Fourteenth Amendment>.

Subciter 7:42 PM

MISPLACED TOPIC SENTENCE: Please consider moving to the beginning of the last paragraph (middle of page 4).

Subciter 7:42 PM

SPELLING: Please consider <seizing>.

Subciter 7:42 PM

PLURAL: Please consider <dictum>.

Subciter 7:42 PM

PUNCTUATION: There appears to be a comma missing here. Please consider <[s],>.

Subciter 7:42 PM

REDUNDANT: This phrase is not necessary given that the sentence started with "Three years after . . ." Please consider <>.

Subciter 7:42 PM

COLON: On my read, a colon rather than a semi-colon would be helpful here to explain what the two arenas are. Please consider <:>.

68 **Geo. Wash. L. Rev.** 861, 921 (2000) ("The strict scrutiny test embodied in § 2(a)(1) of RLUIPA . . . has not born fruit in previous religious land use decisions, and there is no reason to believe that this new iteration will fair any better."); but see Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 **Va. L. Rev.** 1, 24 - 26, 62 - 66 (1993) (predicting that courts would interpret the Religious Freedom Restoration Act of 1993 broadly for the exact same reasons).

[11] See Sherbert, 374 U.S. at 406 - 10.

[12] Id. at 399, 409 - 10.

[13] See City of Boerne v. Flores, 521 U.S. 507, 519 - 20 (1997) ("There must be a

Subciter 6:22 PM
MISQUOTE: missing "the"

Subciter 6:22 PM
MISQUOTE: "borne" not "born"

Subciter 6:22 PM
MISQUOTE: "little" not "no"

Subciter 6:22 PM
SIGNAL ERROR: "cf." not "but see"

Subciter 6:22 PM
SUBSTANTIVE ERROR: "narrowly" not "broadly"

Subciter 6:22 PM
MISSING SPACE

Subciter 6:22 PM
LOGICAL ERROR: This quote is not ideal. "[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" would be better (p. 519)

congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end.").

[14] See Employment Div. v. Smith, 494 U.S. 872, 878 - 79 (1990). Smith held that claimants were entitled to a religious exemption from the application of a law denying them pension benefits on account of their legal drug sales. Id. at 872.

[15] 406 U.S. 205.

[16] See id. at 234.

[17] Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

[18] 42 U.S.C. § 2000bb(a)(4), (b)(1).

[19] 521 U.S. 507 (1997).

Subciter 6:22 PM
MISQUOTE: "adopted" not "adapted"

Subciter 6:22 PM
SUBSTANTIVE ERROR: "were not" not "were"

Subciter 6:22 PM
SUBSTANTIVE ERROR: "unemployment" not "pension" benefits

Subciter 6:22 PM
SUBSTANTIVE ERROR: "illegal" not "legal"

Subciter 6:22 PM
SUBSTANTIVE ERROR: "use" not "sales"

Subciter 6:22 PM
WRONG PAGE: "890" instead of "872"

Subciter 6:22 PM
MISSING YEAR: "(1972)"

[20] Cf. id. at 507 - 12.

[21] See id. at 532 - 36. The Court explained that Congress had exceeded its constitutional power. Id.

[22] Employment Div. v. Smith, 494 S. Ct. 872, 884 (1990).

[23] See, e.g., Ryan, supra note 9, at 1409 - 10 (criticizing the decision); see also id. at 1410 - 11 (summarizing negative reactions).

[24] This Note confines its discussion to RFRA's land use provisions.

[25] See 42 U.S.C. § 2000cc(a)(1) (2000) (No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise

Subciter 6:22 PM
SIGNAL ERROR: no "cf."

Subciter 6:22 PM
CITATION ERROR: "511" not "507"

Subciter 6:22 PM
REDUNDANT: unnecessary given statement in text

Subciter 6:22 PM
MISPLACED FOOTNOTES: swap footnotes 22 and 23.

Subciter 6:22 PM
MISPLACED PAGES: swap page citations

Subciter 6:22 PM
MISPLACED PAGES: swap page citations

Subciter 6:22 PM
SUBSTANTIVE ERROR: "RLUIPA" not "RFRA"

Subciter 6:22 PM
PUNCTUATION: missing question mark.

. . .

For a statement made prior to a custodial interrogation to be admissible, the familiar rule of Miranda v. Arizona[17] is that a suspect must have "voluntarily, knowingly and intelligently" waived certain rights after recieving adequate warnings and before questioning began.[18] These rights are the "right to remain silent" and the "right to the presents of an attorney, whether retained or appointed."[19] If a suspect indicates that he or she wishes to speak to an attorney or wishes not to be interrogated, the the interrogation must stop. Responding to questions or volunteering information waives the right subsequently to consult a lawyer or an attorney before choosing whether to continue the interrogation.[20]

. . .

[17] 384 U.S. 436 (1966).

[18] Id. at 444; see also Dickerson v. United States, 530 U.S. 428, 432 - 33 (2000) (summarizing Miranda).

[19] See Miranda, 384 S. Ct. at 444. Miranda also requires police to warn the suspect "that any statement he does make may be used as evidence against him" Id.

[21] Id. at 445.

Subcite exercise #1

Subciter 6:56 PM
SUBSTANCE: Miranda deals with custodial interrogation. Please consider <during>. (2 points)

Subciter 6:56 PM
SPELLING: Please consider <receiving>. (1 point)

Subciter 6:56 PM
QUOTATION: Please consider <presence>. (1 point)

Subciter 6:56 PM
QUOTATION: Please consider <either>. (1 point)

Subciter 6:56 PM
REPETITION: Please consider deleting second "the." (1 point)

Subciter 6:56 PM
CHARACTERIZATION: No rights are waived at this point. Please consider <does not waive> [or similar]. (1 point)

Subciter 6:56 PM
REDUNDANCY: Please consider deleting "or an attorney." (1 point)

Subciter 6:56 PM
PINCITE: Miranda is not summarized on these pages. Please consider <434–35>. (2 points)

Subciter 6:56 PM
SIGNAL: As a direct quotation, there is no signal required. Please consider [no signal]. (2 points)

Subciter 6:56 PM
REPORTER: Please consider <U.S.>. (1 point)

Subciter 6:56 PM
PUNCTUATION: Please consider <him.">. (1 point)

Subciter 6:56 PM
FOOTNOTE CALL: Please consider <20>. (1 point)

Legal Ethics and the Changing Role of the Attorney General

The President's power to decline to defend statutes in court, though it dates at least to the Ford Administration, became more prominent in the 1970s.[1] Before that, this capacity has continued to evolve, as President Obama's refusal to defend the

---

[1] See, e.g., Christopher M. May, Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative, 21 **Hastings Constitutional L.Q.** 865, 940 - 43 (1994) (discussing historical examples of presidential efforts to test the constitutionality of regulation through enthusiastic advocacy, refusal to defend statutes, or explicit legal opposition).

Subciter Apr 16
SUBSTANCE: The focus is on the Solicitor General. Please consider <Solicitor>. (2 points)

Subciter Apr 16
SUBSTANCE: The source indicates that this power was used during FDR's tenure. Please consider <Franklin D. Roosevelt> or <third Franklin D. Roosevelt>. (2 points)

Subciter Apr 16
LOGIC: The wording indicates this evolution was after that time. Please consider <Since then>. (2 points)

Subciter Apr 16
TYPEFACE: Please consider <See, e.g.,>. (1 point)

Subciter 3:52 PM
AUTHOR: The source gives the name as "Christopher N. May." Please consider <N.>. (1 point)

Subciter Apr 16
TITLE: Please consider <"Unconstitutional">. (1 point)

Subciter Apr 16
ABBREVIATION: Per Bluebook T13, "Constitutional" should be abbreviated here. Please consider <**Const.**>. (1 point)

Subciter Apr 16
CHARACTERIZATION: The source discusses testing legislation. Please consider <legislation>. (1 point)

Subciter Apr 16
CHARACTERIZATION: The source indicates the approach was not enthusiastic. Please consider <unenthusiastic>. (1 point)

Defense of Marriage act illustrates[2] This change has been accompanied by increased scrutiny of the Solicitor General's role in defending statues and the determination of government's litigating positions. One possible reason for this development is a rising awareness of client-focused ethical considerations among lawyers in general and government lawyers in particular.

---

[2] But see Joshua Baker & William C. Duncan, As Goes DOMA . . . Defending DOMA And The State Marriage Measures, 24 **Regent U. L. Rev.** 1, 23 - 24 (2011). However, even when administrations attempt to defend statutes, still they may continue to enforce such statutes until courts rules on their constitutionality. See Baker & Duncan, supra, at 26.

Subciter 6:56 PM

CAPITALIZATION: This word is part of the name of the statute. Please consider <Act>. (1 point)

Subciter 6:56 PM

PARALLELISM: Please consider <in defending statutes and determining or <in the defending of statutes and the determination of>. (1 point)

Subciter 6:56 PM

SPELLING: Please consider <statutes>. (1 point)

Subciter 6:56 PM

SIGNAL: The source offers support. Please consider <See>. (2 points)

Subciter 6:56 PM

CAPITALIZATION: Please consider <and the>. (1 point)

Subciter 6:56 PM

CHARACTERIZATION: The source describes refusal to defend statutes. Please consider <refuse>. (1 point)

Subciter 6:56 PM

AGREEMENT: Please consider <rule>. (1 point)

Subciter 6:56 PM

SHORT CITATION: Per Bluebook 4.1, because this was the last source cited, a short-form citation can be used here. Please consider <id.>. (1 point)

Subciter 6:56 PM

PINCITE: Support appears on page 24. Please consider <24>. (2 points)

THE LAW REVIEW CASE COMMENT

(60% of total competition score)

The **case comment** is a distinctive genre of legal writing. It involves reporting on a particular case and constructing a narrow argument regarding the case. For the Writing Competition, we will provide you with the case you will be writing about and the sources you can draw from in building your argument. **Absolutely no outside research is allowed.** We expect you to give a good-faith effort to follow the *Bluebook* for the case comment, but **we do not expect perfect adherence to the *Bluebook* for the case comment**. Save your *Bluebook* enthusiasm for the subcite portion of the Competition!

The Case Comment **Suggested Format** included here offers a template for designing your own case comment. Although there is no single format for a strong case comment, you should seriously consider this guidance as you begin your writing.

In particular, this information should be helpful as you construct the first half of your case comment — the **reporting section**, in which you will discuss the facts of the case and what the courts have said. The case for your Competition may be from either a U.S. Court of Appeals or a state supreme court. Because the structure of a case comment differs slightly depending upon which level of court decided the case, pay particular attention to these differences as they are described in the following pages.

The second half of the case comment — the **argument section** — permits more creativity, though, again, the guidance offered in this memo should give you a good sense of the parameters of a strong argument section. The provided sample theses are meant to represent a range of the types of arguments a case comment might make. Also included in this packet is a page of general tips for approaching the task.

In order to get a better sense of the distinctive form that case comments take, it may be worthwhile to skim a few of the **full-length case comments** ("Recent Cases") in the Harvard Law Review, which are available at https://harvardlawreview.org/category/recent-case./.

This packet also includes two sample Competition case comments as well as the case comment later published by the *Law Review* on the same topic. As may be clear, the quality of a successful Competition case comment is *not* like that of a piece ultimately published in the *Review*. Published work has been through multiple rounds of intensive editing. The Competition does not require anything approaching a publication-quality submission.

GENERAL CASE COMMENT TIPS

Formal and Stylistic Tips

- Most successful case comments adhere roughly to the suggested case comment format. **Leave originality for the substance of your argument** rather than the format of the piece.
- **DO NOT exceed the allowed number of words**. If you do, you will be penalized severely.
- Write clear, declarative sentences. Use active voice. Most published case comments do not use elaborate literary flair. **Most readers look for a straightforward argument, not soaring prose.**
- **Focus on topic sentences.** When read together, your topic sentences should provide the complete logical progression of your argument.

Substantive Tips

- **Do not neglect the facts in your argument section**. Show why the court's principles apply, or fail to apply, to these facts.
- **Do not shortchange the reporting section of the comment**. It is a precondition to a compelling argument. While you should attempt to cover all of the main issues in the opinion, it may not be necessary to devote the same amount of discussion to each factual issue. Similarly, although you should give every opinion the importance that you feel it is due, you need not spend the same amount of space discussing each opinion in each case.
- **When in doubt, confine your discussion to the doctrine and you will not go wrong**. Be sure to have the cases before you at all times. Anchor yourself to the black-letter law.
- **Do not simply reiterate one of the arguments of the opinions** (e.g. the dissent).
- **The most powerful case comments are often internal critiques**. Published *Law Review* case comments most frequently argue within a limited scope. For example, a comment might argue that the court's conclusion does not follow from its premises, that the premises are at war with one another, or that the opinion failed to recognize certain implications.
- **Make sure that your argument relates back to the case** instead of commenting solely on the doctrinal issues raised by the case. It is, after all, a *case* comment.

Tips for Forming an Argument

- **Try to choose an approach early on and then *selectively* read the materials.** Skim the source titles and text provided in order to get a sense of the themes that the case addresses. We strongly recommend that you not attempt to read all of the sources.
- **Try arranging precedents chronologically or thematically**. You may discover interesting cross-currents.
- **Focus on developing a clear, succinct, and manageable thesis that you fully grasp**. The actual writing for the Competition case comment is quite short, especially considering the fact that roughly half of your piece will be footnotes. With half of the text a description of the facts and opinions, your argument section will be quite brief.'
- **Be cautious about changing your thesis as the Competition progresses**. It is important to have enough time to finish both portions of the Competition.
- **We do *not* expect you to be familiar with the issues raised in the case**. One of the skills tested by the case comment is the ability to consider legal issues with which you have had little experience. Scan the sources for helpful introductory and background material.
- **A less ambitious but well supported argument is better than an ambitious but poorly supported argument**. The goal of the case comment is to clarify the legal issues. Don't feel pressure to contribute to the advancement of legal scholarship. You will not be able to rewrite an area of the law with only a few days and very limited sources. As you develop your argument, review whether each step of it is supported and follows logically from the previous step. Using topic sentences and an outline can help develop the flow of your argument section.

CASE COMMENT SUGGESTED FORMAT

<table>
<tr><th></th><th>STATE SUPREME COURT CASE</th><th>U.S. COURT OF APPEALS CASE</th></tr>
<tr><td rowspan="3">¶ 1</td><td colspan="2">Write a few sentences of background to the case and your argument.</td></tr>
<tr><td>Then write: “Recently, in [insert case name], the [state name] Supreme Court [insert holding].”</td><td>Then write: “Recently, in [insert case name], the [insert circuit number] Circuit [insert holding].”</td></tr>
<tr><td colspan="2">Finally, state your thesis succinctly.</td></tr>
<tr><td>¶ 2</td><td colspan="2">Set out the facts of the case, from the beginning.</td></tr>
<tr><td>¶ 3</td><td>Describe the procedural posture in the trial court or, if there is no trial court opinion, state the legal issue.</td><td>Describe the procedural posture in the trial court and explain the trial court’s reasoning.</td></tr>
<tr><td>¶ 4</td><td>Consider the procedural posture in the inferior appellate courts. If there is a relevant dissent, mention it (maybe in a footnote).</td><td>Begin discussing the Appeals court opinion. The first sentence should read: “The [insert circuit number] Circuit [insert “affirmed,” “reversed,” “vacated”].” The second sentence should read: “Writing for the panel, Judge [insert opinion author’s name] . . . .”</td></tr>
<tr><td>¶ 5</td><td>Begin discussing the Supreme Court opinion. The first sentence should read: “The [state name] Supreme Court [insert “affirmed,” “reversed,” “vacated,” etc.].” The second sentence should read: “Writing for the Court, Justice [insert opinion author’s name] . . . .”</td><td>Continue giving an account of the opinion.</td></tr>
<tr><td>¶ 6 through ~ ¶ 8</td><td>Continue discussing opinion; describe each concurring and dissenting opinion in a separate paragraph.</td><td>Describe each concurring and dissenting opinion in a separate paragraph.</td></tr>
<tr><td>~ ¶ 9</td><td colspan="2">State your thesis. There are several standard approaches editors have taken in the past, including: (a) good reasoning, unclear conclusion; (b) bad reasoning, bad conclusion; (c) good reasoning, bad conclusion; (d) bad reasoning, good conclusion; (e) good reasoning, but missed policy implication X; (f) bad reasoning that may lead to bad outcome Y, etc. You should choose any argument that you find interesting and that allows you to perform a thoughtful, engaging analysis, but make sure to choose a thesis that is about the case, not just general doctrinal or policy issues that are brought up in the case. Try to think creatively, while recognizing the realities of your time and length limitations. (Remember to look at the November issue for a better sense of the variety of possible arguments.)</td></tr>
<tr><td>¶ 10 through the end</td><td colspan="2">Flesh out your argument, drawing upon cases and source materials. For the final paragraph, create some form of a conclusion.</td></tr>
</table>

SAMPLE CASE COMMENT THESIS STATEMENTS

"The Court's dicta indicated that the answer to that question might be very different in the personal income tax realm than it is with regard to corporate income taxes, creating uncertainty about what states must do to 'fairly apportion' personal income."

- 129 Harv. L. Rev. 181

"[T]he Court's less-than-satisfying consideration of the role of consent in the separation of powers calculus will likely limit the applicability of the decision outside the Article III context."

- 129 Harv. L. Rev. 201

"[T]he decision reveals a misalignment between the test the Court applies to identify government speech and the purported rationale for the doctrine."

- 129 Harv. L. Rev. 221

"[The] Court added to the confusion around the facial versus as-applied forms of judicial review and potentially opened the door to a new generation of facial Fourth Amendment challenges with insufficient guidance to legislatures, courts, and litigants on the proper standard for such challenges."

- 129 Harv. L. Rev. 241

"Mindful that an open-ended 'reasonableness' test might sow confusion — or worse, abuse — both the majority and concurrence sought to cabin the reasonable-mistake-of-law test with additional qualifiers. Such qualifiers allay some but not all concerns over what the *Heien* test means for judicial administrability and police discretion."

- 129 Harv. L. Rev. 251

"After *Glossip*, lower courts may have difficulty justifying a flexible approach to the success-on-the-merits prong of the preliminary injunction test."

- 129 Harv. L. Rev. 271

"[T]he Court's decision will require lower courts to police redistricting plans more carefully. This development, however, pales in comparison to the great harm to voting rights in the South resulting from *Shelby County* and from the difficulty in separating race- and party-based motivations in policing gerrymandering."

- 129 Harv. L. Rev. 281

Scope of Federal Habeas Review—In 1996, Congress added its legislative voice to a long-running judicial debate over the scope of the federal courts' power to review state-court decisions in habeas proceedings.[1] With the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA),[2] Congress restricted that power to cases where the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the [U.S.] Supreme Court . . . ."[3] Four years later, in *Williams v. Taylor*,[4] the Supreme Court laid out its interpretation of this Act. It found, first, that the "contrary to" inquiry was separate from the "unreasonable application" one;[5] and second, that the latter inquiry was itself a two-step process, consisting of a "threshold"[6] inquiry into what the relevant "clearly established law" is, followed by a determination of whether the state court had reasonably applied it.[7]

Last term, in *Carey v. Musladin*,[8] the Court found that there was no relevant "clearly established" law on the question of whether spectator conduct at a trial could violate due process. By allowing the inquiry to fail at the "threshold" question, and

---

[1] *See, e.g.,* Kent S. Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-40, CC-893-99 (tracing judicial debates over habeas from the nineteenth century through 1996).

[2] 28 U.S.C. §2254(d).

[3] *Id.* at §2254(d)(1).

[4] 529 U.S. 362, CC-197 (2000).

[5] *Id.* at 412, CC-222.

[6] *Id.* at 390, CC-211.

[7] *Id.* at 407-10, CC-219-21. The Court also emphasized that "unreasonable" was different from "incorrect," and that only the holdings (not the dicta) of prior Supreme Court cases could be used in the "unreasonable application" inquiry. *Id.* at 410-12, CC-221-22.

[8] 127 S.Ct. 649, CC-1 (2006).

by using lower court opinions to analyze that question, the Court departed drastically from its prior AEDPA jurisprudence, and pointed the way to a radical constriction of the Federal habeas power.

On May 13, 1994, Mathew Musladin got into an argument with his estranged wife, Pamela, at her home.[9] When her fiancé, Tom Studer, came to her aid, Musladin shot and killed him.[10] He was later to claim, at trial, that he thought Studer was armed and that he shot in self-defense.[11] On the first day of his trial in a California court, members of Studer's family were found sitting in the front row of spectators, in plain view of the jury, wearing prominent buttons pinned to their shirts showing the dead man's picture.[12] Musladin's lawyer immediately asked the trial judge to order the buttons removed, but the judge refused.[13] The family continued to wear the buttons in court throughout the rest of the trial.[14] The jury ultimately found Musladin guilty of first degree murder.[15]

Musladin appealed to the California Court of Appeal, arguing that the presence of the buttons deprived him of his right to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution.[16] The Court of Appeal considered both Supreme Court and Ninth Circuit precedent,[17] and concluded that Federal

---

[9] *Musladin v. Lamarque*, 427 F.3d 653, 654, CC-11 (9th Cir. 2003).

[10] *Id.*

[11] *Id.* at 655, CC-12.

[12] *Id.* These buttons were "several inches in diameter" and "very noticeable." *Id.*

[13] 127 S.Ct. at 652, CC-3.

[14] 427 F.3d at 655, CC-12. At least three members were present each day. *Id.*

[15] *Id.* He was also convicted of three related offenses.

[16] 127 S.Ct. at 652, CC-3.

[17] The court considered the Supreme Court cases of *Estelle v. Williams*, 425 U.S. 501, CC-59 (1976) and *Holbrook v. Flynn*, 475 U.S. 560, CC-77 (1986), and

law did not demand reversal unless the buttons—which it found to have been an "impermissible factor" at trial—also "brand[ed Musladin] with an unmistakable mark of guilt."[18] It found that they did not,[19] and so affirmed his conviction.

Musladin then petitioned the Federal District Court for the Northern District of California for a writ of habeas corpus.[20] The district court denied his petition, but the Ninth Circuit reversed.[21] Using its own precedent as "persuasive authority"[22] in interpreting the Supreme Court's decisions in *Estelle v. Williams*[23] and *Holbrook v. Flynn*,[24] the Ninth Circuit found established Federal law to the effect that any "unacceptable risk of an impermissible factor" at trial was "inherently prejudicial," and deprived the defendant of a fair trial.[25] Again relying on its own precedent, it then found that the California Court of Appeal had unreasonably applied this law by not treating the actual presence of an "impermissible factor" as dispositive.[26] It

---

the Ninth Circuit case of *Norris v. Risley*, 918 F.2d 828, CC-283 (9th Cir. 1990). *See* 427 F.3d at 658, CC-13.

[18] *People v. Musladin*, No. H015159 at 21 (Cal.Ct.App. Dec.9, 1997) (unpublished decision) (cited in 427 F.3d at 648-49, CC-7-8).

[19] In particular, it found that the jury might have seen them merely as ordinary tokens of mourning. *See Musladin v. Lamarque*, 427 F.3d 637, 648, CC-7 (9th. Cir. 2005) (dissent from denial of rehearing en banc).

[20] 427 F.3d at 655, CC-12.

[21] *Id*. at 661, CC-15.

[22] Like the California Court of Appeal, The Ninth Circuit also relied on *Norris*, in which it had found that the presence of spectators wearing "Women Against Rape" buttons at a rape trial rendered it unfair. *See* 918 F.2d at 834, CC-286.

[23] 425 U.S. 501 (1976).

[24] 475 U.S. 560 (1986).

[25] *Id*. at 656, CC-12.

[26] *See Id*. at 661, CC-15.

thus concluded that habeas relief was permissible under AEDPA.[27] After the decision, a proposal was made for a rehearing en banc, which was ultimately denied.[28] Dissenting from that denial, Judge Kleinfeld argued, first, that the plain text of AEDPA forbade the court to consider any precedent not from the Supreme Court; and second, that the Ninth Circuit's test was not "clearly established" by *Estelle* and *Flynn*, since those cases had involved prejudicial actions by the state, rather than by individual spectators.[29]

The Supreme Court vacated and remanded.[30] Writing for a majority of six,[31] Justice Thomas began by defining "clearly established Federal law" for purposes of AEDPA as "the holdings, as opposed to the dicta, of the Supreme Court as of the time of the state-court decision."[32] He then turned to the first step of the *Williams* inquiry: the threshold question of whether any clearly established law applied to the case.[33] Examining *Estelle* and *Flynn*, Justice Thomas, like Judge Kleinfeld, found the private

---

[27] Judge Thompson dissented, on the ground that the state court's "unmistakable mark of guilt" discussion should have been read not as *modifying* the rule, but rather as *applying* it, the "mark of guilt" being a factor in determining whether an "unacceptable risk" had in fact arisen. *See* 427 F.3d at 662-63, CC-15-16.

[28] *Musladin v. Lamarque*, 427 F.3d 647 (9th Cir. 2005) (denial of rehearing en banc).

[29] 427 F.3d at 649 – 51, CC-8 – 9. Judge Bea also wrote a dissenting opinion attacking the Ninth Circuit's ruling. He argued that the Supreme Court had made it plain that the rule contained an actual as well as inherent prejudice prong. *Id*. at 652, CC-9.

[30] 127 S.Ct. at 654, CC-4.

[31] Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Alito.

[32] 127 S.Ct. at 651, CC-2. This definition echoes that in *Williams*. *See supra*, note 7.

[33] 127 S.Ct. at 653, CC-3.

character of the offending actors to be a key distinguishing factor.[34]

Justice Thomas adduced two pieces of evidence to support the significance of this factor: the first textual, the other descriptive. As a textual matter, he pointed to language in *Estelle* and *Flynn* which indicated that an "essential state interest" could justify even proscribed prejudicial conduct at trial.[35] This, he explained, suggested that the Court meant to proscribe *only* state conduct, not spectator conduct.[36] As a descriptive matter, Justice Thomas pointed out that substantial disagreement existed among those lower courts that had considered spectator-conduct claims.[37] He explained that this disagreement reflected a "lack of guidance"[38] from the Supreme Court, and was evidence that the Court's precedents could not have been very clear.[39] Thus, Justice Thomas concluded, the effect of spectator conduct on fair-trial rights remains an "open question in [Supreme Court] jurisprudence";[40] prior cases did not lay down a test that state courts were "required to apply."[41]

Having found no clearly established Federal law, the Court did not have to proceed to the second inquiry under *Williams*, and ask if the state's application of that law had been unreasonable.

---

[34] *Id.*

[35] 127 S.Ct. at 653, CC-3.

[36] *Id.*

[37] Id. at 654, CC-4 ("Some courts have applied [*Estelle*] and *Flynn* to spectators' conduct . . . . [others] have declined [to do so] . . . . and still other[s] have ruled on spectator-conduct claims without discussing [*Estelle*] or *Flynn*.")

[38] *Id.*

[39] *See Id.*

[40] Id. at 653, CC-3.

[41] *Id.* at 654, CC-4.

Justices Stevens, Kennedy and Souter individually wrote opinions concurring in the judgment.[42] All three rejected the majority's contention that no "clearly established Federal law" controlled the case.[43] All three therefore proceeded to the second *Williams* inquiry, and found the state court's decision to have been a reasonable application of Federal law.[44]

Justices Stevens and Souter found controlling "clearly established" law in *Estelle* and *Flynn* themselves.[45] They argued that those cases should be read broadly, as prohibiting any practice that creates an "unacceptable risk . . . of impermissible factors coming into play . . . ."[46] Unlike the majority, they found "no . . . reason to think"[47] that the private character of the actors in *Carey* made these precedents inapplicable. Proceeding to the reasonableness question, they found that the state court had been reasonable not to reverse Musladin's conviction, because a majority of courts to consider similar questions had done the same.[48] Justice Souter (but not Justice Stevens[49]) also felt that some First Amendment interest of the spectators might

---

[42] *Id*. at 654-658, CC-4-6.

[43] *Id*.

[44] *Id*.

[45] *See Id*. at 656-57, CC-5.

[46] *Id*. at 657, CC-5.

[47] *Id*.

[48] *Id*. at 658, CC-6. The similarity of this argument to the "descriptive" evidence adduced by the majority is obvious, but it is worth highlighting a crucial difference. Where the majority was willing to consider such evidence at the *first* step of the *Williams* analysis (to determine the applicable law), Justices Stevens and Souter reserve that consideration for the *second* step (to determine if it was reasonably applied). The implications of this are discussed below.

[49] *Id*. at 656, CC-5.

have contributed to the reasonableness of the decision.[50] Justice Stevens wrote separately to express his objection to excluding Supreme Court dicta from consideration when analyzing clearly established law at the first *Williams* step.[51]

Justice Kennedy advocated a middle ground on the question of clearly established law. Like the other concurring justices, he found that there was clearly established law that governed the case;[52] but, unlike them, he found it not in a narrow and specific test, but rather in the broad principle that trials must be free from intimidation.[53] He also hinted in dicta that he might favor creating a rule against prejudicial spectator apparel if that question ever came before the Court on direct appeal.[54]

Although it makes no ringing new doctrinal pronouncements, *Carey* represents a radical departure in the Court's habeas corpus jurisprudence. First, the decision not to find any "clearly established" governing law abandons the cautious approach of the Court's prior AEDPA decisions. Second, the Court's use of lower court decisions as evidence of *how clearly established the law is*, is unprecedented, and could result in vastly expanded deference to the state courts. If the Court follows through on this decision, therefore, the scope of Federal habeas review will be constricted as never before.

The Court's refusal to find clearly established law at the first step of the *Williams* analysis is greatly in tension with

---

[50] *Id.* at 658, CC-6.

[51] *Id.* at 655, CC-4. Justice Stevens explained that dicta were a crucial part of the Court's decisions, particularly on novel Constitutional questions, and that excluding them from Federal habeas review would discourage state courts from relying on them.

[52] *Id.* at 656, CC-5.

[53] *Id.*

[54] *See Id.* at 657, CC-5.

its prior AEDPA jurisprudence. Not only has the Court never denied habeas relief on this ground before,[55] but no concurring or dissenting opinion has ever argued that it should do so, either.[56] In past AEDPA cases, the Court has always contrived to find some principle—if necessary, a very broad one—to get it over the "threshold."[57] Where it has divided, it has done so either as the concurring opinions in *Carey* did—over whether that principle should be narrow or broad—or else over whether the state court reasonably applied the principle. In *Lockyear v. Andrade*,[58] for instance, the Court confronted a question involving its tangled Eighth Amendment jurisprudence, an area in which it admitted it "ha[d] not been a model of clarity."[59] Acknowledging that it had not laid down a "clear . . . path for courts to follow,"[60] the Court nevertheless did not deny relief for lack of clearly established law. Instead, both the majority and the dissent agreed to extract from this "thicket"[61] a very general unifying principle[62] under which the state court's reasonableness

---

[55] Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the AEDPA*, 54 CATH. U. L. REV. 747, 789, CC-414 ("the Supreme Court has not [denied] habeas under AEDPA . . . because there was no clearly established law . . . ."); see also *Mitchell v. Esparza*, 540 U.S. 12, 12-18, CC-97-100 (finding insufficiently clear Federal law for the application of the "contrary to" prong of AEDPA, but finding that same law clear enough to pass the threshold of the "unreasonable application" inquiry).

[56] See *Taylor*, 529 U.S. at 399-419, CC-215-25; *Lockyear*, 538 U.S. at 77-83, CC-92-95; *Alvarado*, 541 U.S. at 669-76, CC-235-39.

[57] 529 U.S. at 390, CC-11.

[58] 538 U.S. 63, CC-85 (2003).

[59] *Id.* at 72, CC-89.

[60] *Id.*

[61] *Id.*

[62] That a gross disproportionality test applied to sentences for terms of years. *Id.*

could be analyzed.[63] Likewise, in *Yarbrough v. Alvarado*,[64] where none of its precedents were precisely on point, the Court used a general principle as clearly established law, and proceeded to deferentially analyze the state-court decision under it.[65]

There is no reason that the same approach could not have been followed in *Carey*. Supreme Court precedent on the question at issue was at least as clear as in *Alvarado*, and much clearer than the legal "thicket"[66] in *Lockyear*. The Court's arguments in support of distinguishing *Estelle* and *Flynn* are unconvincing. Its first argument—that the "essential state interest" exception in those cases somehow meant that only state conduct was prohibited—has no logical traction. The scope of an exception does not determine the scope of the rule. The precept "it is forbidden to steal, except to feed one's starving children," for instance, does not mean that only those with children are forbidden to steal. As to the Court's other argument, from disagreement in lower courts, I will argue below that the very use of such evidence is itself a radical departure from the Court's prior jurisprudence.

Moreover, even if *Estelle* and *Flynn* do not control the facts of *Carey*, broad principles of Supreme Court jurisprudence cer-

---

[63] *Id*. at 75-76, CC-91.

[64] 541 U.S. 652, CC-227 (2004).

[65] The question in that case was whether a defendant's age was relevant to a custody determination under *Miranda*. The Court had never addressed that particular question before. Nevertheless, the majority, concurrence and dissent all unhesitatingly chose the *Mathiason* standard—"would a reasonable person have felt free to leave?"—as the controlling law, and disagreed only upon whether a reasonable judge would have *applied* that standard without taking the defendant's age into account. *Id*. *See also* Berry, *supra* note 55, at 787, CC-413 (commenting on the Court's willingness to frame issues so as to find some rule or principle of clearly established law).

[66] 538 U.S. at 72, CC-89.

tainly do. The Court has previously found that spectator conduct can render a trial unfair in some circumstances,[67] and Justice Kennedy's proposed principle that trials must be free from intimidation[68] is hardly debatable. To find an absence of clearly established law on these facts, therefore, is to deny the very core of the Court's *Lockyear-Alvarado* approach.

That previous approach to AEDPA was a sensible compromise, which had drawn scholarly applause.[69] On the one hand, it preserved the broad applicability of federal habeas review by refusing to let the habeas inquiry fail at the "threshold"; on the other, it imposed a necessary restraint on federal second-guessing of state court decisions[70] by recognizing that federal law sometimes consists of very broad principles, which may "reasonably" be applied in many different ways.[71] *Carey* marks the abandonment of that compromise. Under *Carey*, in domains where the Supreme Court has not specifically ruled, lower courts are not allowed even to consider state-court reasonableness. Thus, in such domains, state court decisions are unreviewable on habe-

---

[67] *See Sheppard v. Maxwell*, 384 U.S. 333, 333, CC-163 (1996) (finding that the actions of reporters who had been allowed to "take over" the courtroom, and create a "carnival atmosphere" therein violated the defendant's Due Process rights.)

[68] 127 S.Ct. at 657, CC-5 (Kennedy, J. concurring).

[69] Berry, *supra* note 55 at 787, 827, CC-413, 433 (arguing that the Court has been using a "sliding scale of deference to the state court's application of . . . legal principles, depending on [their breadth]", and applauding that approach).

[70] *See* Scheidegger, *supra* note 1 at 945, CC-901 (1998) (analyzing AEDPA's legislative history, and concluding that Congress meant to scale back federal review of state-court decisions through a deference standard).

[71] 541 U.S. at 664, CC-233 ("[T]he range of reasonable judgment can depend . . . on the nature of the relevant rule. . . . [It] requires consider[ation of] the rule's specificity.")

as, no matter how egregious their violation of broader federal norms. If carried forward, this approach has to potential to cripple federal habeas as a tool for enforcing Constitutional norms.[72]

Carey is also unique in another way. It represents the first time that the Court, or any member of it, has suggested using disagreement among the lower courts as evidence of what the "clearly established" law is. This innovation is problematical in two ways. First, AEDPA refers to the "law[] as determined by the Supreme Court": it arguably contradicts Congressional intent,[73] as well as the Court's holding in *Williams*,[74] to let lower court decisions control what that law is.

Second, the use of such evidence creates a deferential standard of review on this threshold question. Although the Court has applied such a standard at the *second* step of the *Williams* inquiry[75] (as even Justices Stevens and Souter were willing to do in *Carey*),[76] it has never before applied it at the *first* step. In *Lockyear*, for instance, the Court extracted its "unifying principle" from the precedential "thicket" without regard to whether lower courts had done the same.[77] Many commentators,[78] as

---

[72] *But see* Scheidegger, *supra* note 1 at 940-44, CC-899-901 (arguing that additional layers of review provide diminishing returns, and that direct review by the Supreme Court is sufficient to enforce Constitutional norms).

[73] See Scheidegger, *supra* note 1 at 947-48, CC-902-03 (concluding from the legislative history of AEDPA that Congress meant only Supreme Court precedent to count).

[74] *Supra* note 7.

[75] *See, e.g.*, 541 U.S. at 664, CC-233 (citing AEDPA's "deferential standard," and finding application reasonable because "reasonable jurists could disagree").

[76] Supra, note 48.

[77] 538 U.S. at 72, CC-89. *Accord Alvarado*, 541 U.S. at 652, CC-227.

well as some of the justices,[79] have argued that the use of a deferential standard at *any* stage of the habeas inquiry is too constrictive. *Carey's* decision to extend that standard to yet another stage of the inquiry could constrict the scope of the federal habeas power even further.

Thus, although it purports to be a narrow decision, and seems to eschew bold doctrinal pronouncements in favor of an answer to the specific question before the Court, *Carey* nevertheless represents a fundamental departure from precedent. By allowing the "unreasonable application" analysis under AEDPA to fail purely for lack of "clearly established" law, and by allowing disagreements between the lower courts to be evidence of that lack, *Carey* points the way to a radical constriction of the federal habeas power.

Yet, the decision's superficial doctrinal modesty remains important. For one thing, it goes a long way toward explaining the otherwise puzzling degree of consensus[80] among members of the Court for so radical a holding: as Prof. Sunstein has argued, courts will often agree on narrow holdings where they would disagree on more ambitious ones.[81] For another thing, and more importantly, narrow holdings are *easily deniable*. Facts can always be distinguished; explicit doctrinal statements are harder to avoid. Indeed, although it is still too early to gauge how

---

[78] *See, e.g.,* Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 117, CC-669 (1998) (arguing that AEDPA's deferential-review requirement should be interpreted narrowly, so that Federal habeas corpus remains an incentive for state courts to follow Federal law).

[79] *See, e.g.*, 529 U.S. at 377-78.

[80] It is rare, for instance, to find Justices Thomas and Ginsburg in agreement about a decision affecting the scope of the federal habeas power.

[81] Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 21, CC-983 (1996).

closely the Court will follow *Carey*, there are already signs that some of the justices are backing away from its more extreme implications. In its most recent habeas case,[82] for instance, the Court proved willing to discern a broad principle of established law in what Justice Roberts termed a "dog's breakfast"[83] of precedent, over the dissents of four justices who argued that the case should be dismissed for lack of clearly established law, and who cited the confusion of lower courts as evidence of that lack.[84] Thus, it seems likely that *Carey*'s primary effect will be, not to itself work a radical restriction in the habeas power, but rather to add a new weapon to the arsenals of those justices who want to do so.

[82] *Abdul-Kabir v. Quarterman*, No. 05-11284 (US 2007).

[83] *Id.* at CC-35 (Roberts, C.J., dissenting).

[84] *Id.*

Habeas Corpus Review - Ever since the creation of 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and its subsequent interpretation by the Supreme Court in *Williams v. Taylor*,[1] the proper scope and constitutionality of federal habeas relief for state prisoners has been a highly contested issue.[2] Codified at 28 U.S.C. § 2254(d)(1), the AEDPA placed significant constraints on the power of a federal habeas court to grant the writ where constitutional error has occurred.[3] The restrictions mandated by the AEDPA and applied by the Court illustrate the dissatisfaction with lower federal courts' general treatment of habeas petitions from state prisoners. Last Term, in *Carey v. Musladin*,[4] the Supreme Court advanced habeas restrictions a step

---

[1] 529 U.S. 362, CC-197 (2000).

[2] *See e.g.*, Joseph M. Brunner, Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy, 75 U. CIN. L. REV. 307, 315-338, CC-453-64 (2006) (commenting on the constitutionality of AEDPA and Article III concerns); Evan Tsen Lee, Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual, 51 VAND. L REV. 103, 131-32, CC-676 (1998)(discussing the constitutionality of the "Supreme Court only" clause); Adam Steinman, Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After *Williams v. Taylor*?, 2001 WIS. L. REV. 1493, 1539, CC-948 (2001) (analyzing AEDPA's standard of review and its implications).

[3] § 2254(d)(1) mandates that relief shall not be granted unless a state adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

[4] 127 S.Ct. 649 (2006) CC-1.

further. Grounding its decision on the lack of clearly established federal law concerning spectators' courtroom conduct, the Court held that the state appellate court's determination that the habeas petitioner was not inherently prejudiced when spectators wore buttons depicting the murder victim was not contrary to or an unreasonable application of clearly established law.[5] By treating the "clearly established law" inquiry as dispositive and by neglecting to analyze issues relating to the scope of the precedent under the "contrary to" and "unreasonable" application prongs of §2254(d)(1), the Court has further restricted the possibility of habeas relief for state prisoners.

On May 13, 1994, Matthew Musladin shot and killed Tom Struder outside of Musladin's estranged wife's home.[6] At trial, Musladin confessed to killing Struder, but claimed that he did so in self-defense.[7] During Musladin's trial, sitting in the front row of the spectators' gallery, members of Struder's family wore buttons containing images of the deceased.[8] Before opening statements, Musladin's council requested that the trial judge instruct the family members to cease wearing the buttons in court, but the trial court denied the motion, stating that it saw "no possible prejudice to the defendant."[9] A California jury convicted Musladin of first-degree murder.[10]

---

[5] *Id.*

[6] *See id.* at 651, CC-2.

[7] *See id.*

[8] *See id.*

[9] *See id.* at 652, CC-3.

[10] *See id.* at 651, CC-2.

On direct appeal, the California Court of Appeal upheld Musladin's conviction. Citing *Holbrook v. Flynn*[11], the court held that while they "consider[ed] the wearing of photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged," they did not believe that the buttons "branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors."[12]

Musladin filed a petition for a writ of habeas corpus in federal court pursuant to § 2254.[13] Musladin alleged that the buttons were inherently prejudicial and that the California Court of Appeals erred in concluding that his right to a fair trial was not violated.[14] The District Court denied the petition for habeas relief.[15] A divided panel of the Ninth Circuit reversed and granted the writ,[16] finding that under § 2254, the Supreme Court's decisions in *Williams* and *Flynn* clearly established a federal rule of law applicable to Musladin's

---

[11] 475 U.S. 560, 570 (1986) CC-77.

[12] *Carey*, 127 S.Ct. at 652, CC-3

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] Circuit Judge Reinhardt wrote the majority opinion and was joined by Judge Berzon. Judge Thompson dissented stating that the state court's comment that the buttons did not "brand[] defendant 'with an unmistakable mark of guilt'" should be understood as an explanation that the buttons were not "so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial.'" *Mulsadin*, 427 F. 3d at 662-63, CC-15-16 (quoting *Holbrook*, 475 U.S. at 572.) A petition for a panel rehearing was denied. *See Musladin v. Lamarque*, 427 f.3d 647 (9th Cir. 2005) CC-7

case.[17] According to the Court of Appeals, the state court unreasonably applied federal law by "imposing an additional and unduly burdensome requirement-demanding that the challenged practice cause the 'brand[ing]' of the defendant with an 'unmistakable mark of guilty' – even though the *Williams* test for finding inherent prejudice had already been met."[18] The Court of Appeals also cited its own precedent[19] as a guide in interpreting Supreme Court law and in determining whether a rule was clearly established.[20]

The Supreme Court vacated and remanded.[21] Writing for the Court,[22] Justice Thomas held that the Ninth Circuit improperly concluded that the California Court of Appeal's decision was contrary to or an unreasonable application of clearly established federal law.[23] The Court began by reiterating its statement in *Williams v. Taylor*[24] that "'clearly established Federal law' in § 2254(d) (1) 'refers to the holdings, as

---

[17] *Mulsadin,* 427 F.3d at 656-658, CC-12-13.

[18] *See id.* at 658, CC-13.

[19] Citing *Norris v. Risley*, 918 F.2d 828, CC-283(9th Cir. 1990)

[20] *See Mulsadin*, 427 F.3d at 655, CC-12 (stating that "precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine 'whether a particular state court decision is an 'unreasonable application' of Supreme Court Law and . . . what law is 'clearly established'")

[21] *Carey* 127 S.Ct. at 649, CC-1.

[22] Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, Alito.

[23] *See Carey*, 127 S.Ct. at 654, CC-4.

[24] 529 U.S. 362 (2000) CC-197.

opposed to the dicta, of th[e] Court's decisions."[25] Although the Court acknowledged that the state court of appeals had applied *Estelle v. Williams*[26] and *Flynn*[27] as the rules governing the claim, the Court nonetheless found that neither *Williams* nor *Flynn* clearly established a rule that could be applied to the specific facts of this case.[28] The Court reasoned that "[b]oth *Williams* and *Flynn* dealt with government-sponsored practices." The Court explained that this case involved spectator conduct as opposed to state-sponsored conduct and since the Court had "never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial"[29] the effect on a defendant's fair trial rights of the spectator conduct to which Musladin objects is an open question in Supreme Court jurisprudence.[30]

The Court then noted that the lower courts divergence in the treatment of defendants' spectator-conduct claims reflected the "lack of guidance" from the Court.[31] The Court reasoned that the lack of holdings from the Court concerning the potentially prejudicial effect of spectators' courtroom conduct precludes the determination that the state court 'unreasonably applied clearly established Federal law.'[32]

Justice Stevens concurred in the judgment. Justice Stevens distanced himself from the Court's interpretation that the

---

[25] *Carey*, 127 S.Ct. at 653, CC-3.

[26] 425 U.S. 501, CC-59 (1976)

[27] 475 U.S. 560, CC-77 (1986)

[28] *See id.* at 654, CC-4.

[29] *Id.* at 653, CC-3.

[30] *See Id.*

[31] *Id.* at 654, CC-4.

[32] *Id.* at 654, CC-4.

statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States" refers to the holdings, and not the dicta, of the Court's decisions.[33] Characterizing the Court's interpretation as "incorrect" and "wholly unnecessary" [34] in the present case, Justice Stevens refused to join the majority in their reasoning, but noted that he would reach the same conclusion based on reasoning similar to that of Justice Souter.[35]

Justice Kennedy also concurred in the judgment.[36] In his view, it is a fundamental principle of due process that trials

---

[33] *Id.* at 655, CC-4 (Stevens, J., concurring in the judgment).

[34] *Id.* Finding it ironic that the majority is relying on Justice O'Connor's dictum in *Williams* to preclude dictum from the 'clearly established' analysis, Justice Stevens explains that "it is quite wrong to invite state court judges to discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case." *Id.* Justice Stevens even uses Justice O'Connor's previous statements against her as he cites her concurrence in *Sheet Metal Workers v. EEOC,* 478 U.S. 421, as a comparison ("Although technically dicta, . . . an important part of the Court's rationale for the result that it reache[s] is entitled to greater weight . . .") *Id. at* 490.

[35] Justice Stevens did not agree with the suggestion that "the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding." *Id.* at 656, CC-5

[36] *Id.* at 656, CC-5 (Kennedy, J., concurring in the judgment).

must be free from a coercive or intimidating atmosphere.[37] After discounting the majority's reliance on the public/private actor distinction, Justice Kennedy argued that the Court's past decisions establish that a new trial must be ordered "when a defendant shows his conviction has been obtained in a trial tainted by an atmosphere of coercion or intimidation similar to that documented in the foregoing cases."[38] However, Justice Kennedy explained that there is no indication that the respondent's trial had an atmosphere of coercion or intimidation similar to the severe extent demonstrated in the cases the Court has previously decided. Therefore, Justice Kennedy concluded that the instant case calls for a new rule, one that can not be grounds for relief in this case until it is "established in the court system, and then established in th[e] Court."[39]

Justice Souter also filed a concurring opinion. Agreeing with Justice Kennedy that the Majority's reliance on the private nature of the spectator's acts is unfounded[40], Justice Souter

---

[37] *Id.* To support his proposition, Justice Kennedy cited *Moore v. Dempsey*, 261 U.S. 86, CC-101(1923) (where the Court remanded for fact-finding because of a coercive and intimidating atmosphere), *Sheppard v. Maxwell*, 34 U.S. 333, C-163(1996) (where the disruptive presence of the press required reversal) and *Estes v. Texas*, U.S. 532 (where the presence of cameras distracted jurors throughout the proceedings).

[38] *Carey*, 127 S.Ct. at 656, CC-5.

[39] *Id.* at 657, CC-5

[40] *Id.* (Souter, J., concurring in judgment). Justice Souter noted that it should not matter whether the State or an individual was to blame for the disturbance, but either way, the trial judge's duty is to control the courtroom and "keep it free of improper influence." *Id.*

reserved no doubt about the applicability of the *Williams-Flynn* standard.[41] However, considering that the majority of the lower courts that have considered the influence of spectator's buttons have left convictions standing and the future implications about First Amendment issues, Justice Souter concluded that the state judge's application of Supreme Court law was not unreasonable.[42]

Rather than directly confronting the complicated and relevant issues presented by AEDPA, the Court reversed the Ninth Circuit decision by focusing narrowly on what constitutes "clearly established law." Because the Supreme Court has interpreted §2254(d)(1) as limiting the source and timing of clearly established law to Supreme Court precedent,[43] by not allowing the lower courts to apply an existing Supreme Court ruling, the Court is further restricting the power of lower federal courts to grant relief. Instead of conducting the required in-depth analysis of the "unreasonable" and "contrary to" prongs, the Court haphazardly disposed of the case on the unstable grounds that there was no Supreme Court precedent governing the case. Disagreement over the scope of the precedent can have significant consequences when courts treat the clearly established law inquiry as a dispositive issue because they will not continue with the analysis under § 2254 (d)(1) to determine whether it was objectively unreasonable for the state court not to extend the rule.[44]

---

[41] *See id.*

[42] *See id.* at 658, CC-6

[43] *Williams v. Taylor*, 529 U.S. 362, 412 (2000)(O'Connor, J., delivering the opinion of the Court in part).

[44] *See* Melissa M. Berry, Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law

Although the majority viewed the Supreme Court as never having directly addressed the issue of private spectator conduct,[45] to find clearly established law, the Court does not have to previously address the identical factual circumstances at issue. Under §2254(d) (1), relief may be granted "based on an application of a governing legal principle to a set of facts different from those of the case in which the principle was announced."[46] In *Williams*, Justice Stevens recognized that "[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule."[47] General principles,

---

Under the Antiterrorism and Effective Death Penalty Act, 54 CATHOLIC U. L. REV. 747, 827, CC-433

[45] *Carry*, 127 S.Ct. at 654, CC-4 (2006) ("[g]iven the lack of holdings from th[e] Court regarding the potentially prejudicial effect of spectators' courtroom conduct . . . it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal Law'")

[46] *Lockyer v. Andrade*, 538 U.S. 63, 76, CC-91 (2003).

[47] *Williams*, 529 U.S. 362, 382 (2000) (opinion of Stevens, J.) Justices Stevens referred to Justice Kennedy's concurring opinion in *Wright v. West*, 505 U.S. 277, (1992): "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number f specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."; *see also,* Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The

similar to the one established in *Williams* and *Flynn*, may be applied in different contexts without producing a new rule or ceasing to be clearly established.[48] As Justice Kennedy noted in *Yabrough v. Alvarado*, "the difference between applying a rule and extending it is not always clear."[49] However, "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt."[50] This is such a case. In fact, prior to the Court's decision, there was no dispute that the state court correctly identified the decisions in *Williams* and *Flynn* as providing the clearly established principle that "when the consequence of a courtroom practice is that an 'unacceptable risk is presented of impermissible factors coming into play,' there is 'inherent prejudice' to a defendant's constitutional right to a fair trial."[51] The only question that remained, was whether, the state court's holding added an additional requirement to the *Williams* and *Flynn* test.[52] However, the Court ignored both the state court and the Ninth Circuit's finding that there was in fact a clearly established principle.

The Court's meager distinction between state-sponsored courtroom practices and private spectator conduct is not enough

---

Justices of Rules and Standards, 106 HARV. L. REV. 22, 69, CC-958 (1992) (describing differences between rules and standards in the Court's constitutional adjudication and stating the advantages of standards for judicial legitimacy).

[48] *See Williams*, 529 U.S. at 382, CC-207 (Stevens, J.)

[49] *Yarbrough v. Alvarado*, 541 U.S. 652, 666(2004)CC-234

[50] *Id.*

[51] *Musladin*, 427 F.3d at 656, CC-12 (citing *Flynn*, 475 U.S. at 570).

[52] *See id.*, at 661

to place *Carey* beyond the clearly established rule of *Williams* and *Flynn*. Rather than focusing on the importance of state action, the Court in *Williams* emphasized the effect prison clothes may have on the jury's judgment and the fairness of the trial.[53] The Court neglected to explore similar concerns that may have been present in *Carey*.

Even if there is a valid distinction between private and public actor cases, the majority still failed to take into account the fact that the state is responsible for establishing and maintaining fair trial conditions. Events occurring in a courtroom that are overseen and approved by a judge by their very nature attain a state action status. Therefore, the judge's denial of Musladin's counsel's request to instruct the family members to refrain from wearing the buttons in court[54] would qualify as state action.

Instead of discontinuing the analysis prematurely on such questionable grounds, the Court could have simply shifted the concern about the clarity of the law to its analysis under the unreasonable application prong of § 2254(d) (1).[55] To grant

---

[53] *Williams*, 425 U.S. at 504-05, CC-60-61 (1975).

[54] *Carey*, 127 S.Ct. at 652, CC-3.

[55] *See Lockyer v. Andrade*, 538 U.S. 63, at 72, CC-89, where the Court found that although its noncapital Eighth Amendment proportionality decisions were not a "model of clarity," the governing legal principle that a gross disproportionality principle is applicable to sentences for terms of years is still "clearly established" under § 2254(d)(1); *See also* Melissa M. Berry, Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Cleary Established" Law Under the Antiterrorism and Effective Death Penalty Act, 54 Catholic U. L. Rev. 747, 782 (2005) CC- 410 (stating that the Court was

habeas relief under § 2254(d) (1), the state court's application of clearly established law must be more than erroneous – it must be objectively unreasonable.[56] Therefore, the more general the rule, the more deference should be given to state courts in reaching outcomes based on case-by-case determinations.[57] Because the state court's ruling is consistent with a large body of jurisprudence from other jurisdictions[58], it would be difficult to declare that it is an unreasonable application of clearly

---

suggesting that "clearly established law is a spectrum running from very general to very specific principles," and "[a]s long as the petitioner identifies a principle in Supreme Court precedent, the petitioner will pass through the threshold determination, but questions about the clarity and specificity of the principle will affect the reasonableness of the state court's decision applying that principle."

[56] *Andrade*, 538 U.S. at 75, CC-91 (2003); *see also*, *Williams*, 529 U.S., at 410, CC-221; *Alvarado*, 541 U.S. 652, 665, CC-233.

[57] *Alvarado*, 541 U.S. at 644, CC-233 (2004)

[58] *See* e.g., *Buckner v. State*, 714 So.2d 384, 387, CC-242 (Fla. 1998) (*per curiam*) (jury's exposure to photographs was not prejudicial); *Davis v. State*, No. 07-03-0457-CR, 2006 WL 1211091, 16, CC-253 (Tex. App. May 3, 2006) (spectators wearing medallions with victim's picture was not prejudicial); *In re Woods*, 114 P.3d 607, 616-618, CC-259-60 (Wash. 2005) (en banc) (ribbons worn in memory of victim did not express any conclusion about the defendant's guilt or innocence); *State v. Braxton*, 477 S.E.2d 172, 176-177, CC-289 (N.C. 1996) (spectators wearing badges with victims image was not prejudicial); *State v. Speed*, 961 P.2d 113, (Kan. 1998) (spectators wearing t-shirts and buttons with victim's image was not prejudicial)

established law.[59] Even though the Court cited several cases in which the lower courts have diverged in their treatment of spectators' conduct, the majority did so only to prove that there was no clear standard not to prove that the standard followed by the state court was reasonable.

Although the Court's failure to engage in a complete § 2254 analysis may arguably be irrelevant to the outcome of this case, the Court's actions have greater policy implications that reach far beyond one specific case. Under the current ruling, there can never be any federal habeas corpus review of spectator conduct no matter how prejudicial their actions appear. Victim and spectator participation can pose serious threats to defendants' Sixth Amendment rights.[60] Trial courts should safeguard the trial process by preventing the jury from being exposed to anything that would prejudice a defendant's ability to a fair trial. However, this does not mean that the trial court's decision should be exempt from habeas review. Because fundamental liberty interests are in the balance, courts should be reluctant to draw the line at denying relief for what they feel is a lack of clearly established law.

---

[59] *See Musladin*, 127 S.Ct. at 658, CC-6 (Souter, J., concurring in the judgment) ("I am wary of assuming that every trial and reviewing judge in those cases was unreasonable as well as mistaken in failing in failing to embrace a no-risk standard") *Id.*

[60] *See, e.g.,* Christopher R. Goddu, Victim's "Rights" or a Fair Trial Wronged?, 41 BUFF. L. REV. 245, 255-66, CC-526-31 (1993) (stating that victim and spectator participation are a threat to defendants' Sixth Amendment rights to a fair trial and impartial jury).

Through the passage of AEDPA, Congress has controversially curtailed the ability of federal courts to grant habeas relief.[61] The Court's decision in *Carey* further restricts habeas courts' review of state criminal judgments. Even though a constitutional right may have been violated, the AEDPA standard, as applied in *Carey*, prevents a court from remedying that violation because the Supreme Court has not specifically recognized that violation. As a result of the Court's failure to go through the proper steps of the AEDPA analysis, more prisoners under sentence of death will now be denied access to the federal courts for the adjudication of their federal constitutional claims.

---

[61] *See, e.g., Lindh v. Murphey*, 96 F. 3d 856, 869, CC-271 (7th Cir. 1996) (analyzing the meaning of §2254(d)(1) clause "Federal law *as determined by the Supreme Court of the United States*") The Seventh Circuit stated in Lindh that the new scope of review in §2254(d)(1) "significantly interfere[s] with the judicial role and to a great extent prevents the judicial department from accomplishing its 'constitutionally assigned functions.'" 96 F. 3d at 890, CC-282; Evan Tsen Lee, Section 2254(d) of the New Habeas Statue: An (Opinionated) User's Manual, 51 VAND. L. REV. 103, 135, CC-678 (1998) (stating that Congress could simply suspend the doctrine of stare decisis in habeas corpus cases and "prohibit the stare decisis effect of circuit decisions, eliminating the law declaration function of the courts of appeals and leaving them only in the business of error correction").

Published Case Comment (not written for Competition)

III. FEDERAL STATUTES AND REGULATIONS

A. Antiterrorism and Effective Death Penalty Act

"Clearly Established Law" in Habeas Review. — Designed to promote "comity, finality, and federalism,"[1] the Antiterrorism and Effective Death Penalty Act of 1996[2] (AEDPA) sought to extricate federal courts from a tangled, "tutelary relation"[3] with state courts. Section 2254(d)(1) of AEDPA tightly circumscribes grants of habeas relief to a limited set of state court decisions: those "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[4] Last Term, in *Carey v. Musladin*,[5] the

[1] Williams v. Taylor, 529 U.S. 420, 436 (2000).

[2] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[3] Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).

[4] 28 U.S.C. § 2254(d)(1) (2000).

[5] 127 S. Ct. 649 (2006).

Supreme Court held that habeas relief was not available to a defendant who claimed that buttons worn by a murder victim's family violated his right to a fair trial.[6] The Court concluded that none of its prior holdings governed the issue; the state court, therefore, did not contravene or unreasonably apply any "clearly established law" by affirming the defendant's conviction. On its surface, *Musladin* appears to be little more than a reiteration of the Court's prior expositions of § 2254(d)(1). The unanimous outcome seems narrow and unsurprising, with the majority neatly sidestepping the substantive issue posed by the buttons. The Court's ringing affirmation of a holdings-based standard of review, however, may mask an important shift in its implementation of that standard. In defining the relevant "clearly established law" strictly and imbuing it with newfound weight, the Court effectively eliminated the question of whether such law was applied reasonably. Although the Court properly deferred to the state court decision, its truncated reasoning failed to offer a coherent justification for its deference.

In 1994, Mathew Musladin shot and killed Tom Studer, his estranged wife's fiancé.[7] Throughout Musladin's trial, members of Studer's family seated at the front of the spectators' gallery wore buttons bearing the victim's photograph.[8] The trial court denied Musladin's motion to prohibit this display, reasoning that the buttons posed "no possible prejudice to the defendant."[9] The jury convicted Musladin of first-degree murder and three related offenses.[10]

The California Court of Appeal affirmed the conviction.[11] Drawing on the "inherent prejudice" test of *Estelle v. Williams*[12] and *Holbrook v. Flynn*,[13] the court determined that the buttons were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member."[14] The court determined that Studer's photograph, while "an impermissible factor," had not "branded [the] defendant 'with an unmistakable mark of guilt' in the eyes of the jurors."[15] Musladin petitioned unsuccessfully for a writ of habeas corpus in federal district court.[16]

---

[6] *Id.* at 654.

[7] *Id.* at 651.

[8] Musladin v. Lamarque, 427 F.3d 653, 655 (9th Cir. 2005). The buttons were "very noticeable," *id.*, spanning two to four inches in diameter, *Musladin*, 127 S. Ct. at 652 n.1.

[9] *Musladin*, 127 S. Ct. at 652 (internal quotation marks omitted).

[10] *Id.* at 651.

[11] *Id.* at 652.

[12] 425 U.S. 501, 503–05 (1976).

[13] 475 U.S. 560, 570 (1986).

[14] *Musladin*, 127 S. Ct. at 652 (alteration in original) (internal quotation mark omitted).

[15] *Id.* (internal quotation marks omitted).

[16] *Id.*

The Court of Appeals for the Ninth Circuit reversed and remanded.[17] In an opinion by Judge Reinhardt, the court held that the state court had unreasonably applied Supreme Court precedent. In its view, *Estelle* and *Flynn* "clearly established" the law on spectators' courtroom conduct, and, to find a constitutional violation, required only that an impermissible factor be introduced before the jury — not that the defendant be additionally "branded . . . with an unmistakable mark of guilt."[18] The Ninth Circuit denied rehearing en banc.[19]

The Supreme Court vacated and remanded.[20] In a brief opinion for the Court, Justice Thomas[21] invoked the statement from *Williams v. Taylor*[22] that "clearly established Federal law refers to the holdings, as opposed to the dicta," of Supreme Court decisions "as of the time of the relevant state-court decision."[23] Turning to its precedents, *Estelle* and *Flynn*, the Court distilled a general principle: that "inherent[] prejudic[e]" is the touchstone for whether courtroom practices violate a defendant's fair trial rights.[24] The Court proceeded, however, to deem the *Estelle* and *Flynn* holdings inapposite. Drawing a distinction between state and private actors, Justice Thomas noted that the Court had thus far "never applied that test to spectators' conduct."[25] Justice Thomas thus contended that the effect of the Studer family's conduct on Musladin's right to a fair trial was "an open question in our jurisprudence."[26] Given the "lack of holdings" on this issue, the Court concluded that the state court's decision was neither contrary to, nor an unreasonable application of, clearly established law.[27]

Justice Souter concurred in the judgment, but challenged the majority's characterization of the governing law.[28] He interpreted *Estelle* and *Flynn* as piecing together a "clearly established" principle — albeit

---

17 Musladin v. Lamarque, 427 F.3d 653, 661 (9th Cir. 2005). Judge Thompson dissented.

18 *Id.* at 652 (internal quotation marks omitted). The court noted that its own decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), had "persuasive weight" in its determination of what constitutes "clearly established federal law." *Musladin*, 427 F.3d at 656–57.

19 Musladin v. Lamarque, 427 F.3d 647, 647 (9th Cir. 2005). Seven judges dissented from the denial of rehearing en banc.

20 *Musladin*, 127 S. Ct. at 654.

21 Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Alito.

22 529 U.S. 362 (2000).

23 *Musladin*, 127 S. Ct. at 653 (quoting *Williams*, 529 U.S. at 412).

24 *Id.* at 651.

25 *Id.* at 654. Justice Thomas also observed that the "inherent prejudice" test entailed "asking whether the practices further an essential *state* interest." *Id.* He thus asserted that *Estelle* and *Flynn* must be limited to *state-sponsored* courtroom conduct. *Id.*

26 *Id.* at 653. The Court, however, acknowledged that it had previously considered cases involving private actors in which "the proceedings were a sham or were mob dominated." *Id.* at 653 n.2 (citing Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915)).

27 *Id.* at 654.

28 *See id.* at 657 (Souter, J., concurring in the judgment).

a general one[29] — that courtroom practices must not present "'"an unacceptable risk . . . of impermissible factors coming into play"' in the jury's consideration of the case."[30] There was "no serious question," Justice Souter maintained, that the standard extended to spectators generally and to Studer's family members specifically.[31] Nonetheless, Justice Souter concluded that the risk of improper influence posed by the buttons had not clearly risen to an "unacceptable" level.[32] Additionally, he raised the possibility that the spectators might have a valid First Amendment interest in wearing the buttons.[33]

Justice Stevens filed another concurrence, taking issue with the majority's focus on holdings — to the exclusion of dicta — in construing "clearly established law."[34] In his view, the statement from *Williams v. Taylor* defining "clearly established law" as Supreme Court "holdings, as opposed to . . . dicta," was a mere "dictum about dicta."[35] Justice Stevens expressed concern that under a holdings-based standard of review, state courts could discount "explanatory language . . . intended to provide guidance to lawyers and judges in future cases," simply by characterizing it as not "strictly necessary as an explanation of the Court's specific holding."[36] He nonetheless joined in the judgment for "essentially the same reasons as Justice Souter," with the caveat that he could foresee no First Amendment protection for spectator speech in a courtroom.[37]

Justice Kennedy also concurred in the judgment. He identified a "fundamental principle of due process" that "[t]rials must be free from a coercive or intimidating atmosphere" to safeguard fair trial rights; this was a "rule settled by [Supreme Court] cases" over the past century.[38] In Justice Kennedy's view, habeas relief was theoretically available under this general principle in both state- and private-actor contexts; however, the atmosphere in Musladin's trial did not rise to a

---

[29] Based on his reading of the cases, Justice Souter found that "[t]he Court's intent to adopt a standard at this general and comprehensive level could not be much clearer." *Id.*

[30] *Id.* (omission in original) (quoting Holbrook v. Flynn, 475 U.S. 560, 570 (1986)).

[31] *Id.*; *see also id.* ("There is no suggestion in the opinions . . . that it should matter whether the State or an individual may be to blame for some objectionable sight . . . .").

[32] *Id.* at 658.

[33] *Id.* Justice Souter declined to elaborate on this possibility, however, noting "the absence of developed argument" on the issue. *Id.*

[34] *See id.* at 655 (Stevens, J., concurring in the judgment).

[35] *Id.* (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)) (internal quotation marks omitted); *see also id.* (referring to the "holdings, as opposed to the dicta" statement as "an incorrect interpretation of the statute's text").

[36] *Id.* (citing Crawford v. Washington, 541 U.S. 36 (2004); Miranda v. Arizona, 384 U.S. 436 (1966); and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), as examples of cases containing such explanatory language).

[37] *Id.* at 656.

[38] *Id.* (Kennedy, J., concurring in the judgment) (describing the rule as the "square holding" of Moore v. Dempsey, 261 U.S. 86, 91 (1923)).

sufficiently coercive or intimidating level to warrant such relief.[39] Justice Kennedy observed that any "general" or "preventative" rule governing the issue of "buttons proclaiming a message relevant to the case" had not been clearly established by Supreme Court cases to date.[40] Musladin's case thus called for a "new rule" to be "explored in the court system" as a basis for future grants of relief.[41]

Despite the fissures evident in the Court's four opinions, the decision ostensibly did little more than reaffirm an interpretation of the habeas review standard repeated thrice before.[42] The majority skirted the substantive question of whether the buttons violated Musladin's right to a fair trial, narrowing its focus to a technical discussion of the relevant AEDPA provision. This apparent straightforwardness, however, belies an unspoken shift in the Court's implementation of § 2254(d)(1). The Court reached only the first prong of a *two*-pronged inquiry;[43] although the Court asked whether any clearly established law governed the Studer family's conduct, it failed to ask whether the state court unreasonably applied the relevant law.[44] To be sure, the Court often has pragmatic or strategic reasons to stop short of addressing all the issues presented.[45] Yet *Musladin* is an instance not of the minimalist approach of "saying no more than necessary,"[46] but rather of truncating a standard of review without announcement or justification. The majority properly upheld the state court's decision, but reached the right result under the wrong prong. Rather than basing its deference on the reasonableness of the state court's application of the

---

[39] *See id.* at 657.

[40] *Id.*

[41] *Id.*

[42] *See* Yarborough v. Alvarado, 541 U.S. 652, 660–61 (2004) (citing Williams v. Taylor, 529 U.S. 362, 412 (2000), for the proposition that "clearly established law" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions"); Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (same); Tyler v. Cain, 533 U.S. 656, 664 (2001) (same).

[43] Notwithstanding some variations, the prevailing norm is to describe "clearly established law" as the first prong or step of § 2254(d)(1), and both "contrary to" and "unreasonable application of" as the second. *See, e.g.*, *Williams*, 529 U.S. at 379–84 (opinion of Stevens, J.) (using subheadings "[t]he 'clearly established law' requirement" and "[t]he 'contrary to, or an unreasonable application of,' requirement"); Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 679 (2003).

[44] A state court decision is "contrary to" clearly established law on a mixed question of law and fact if it is "diametrically different" from the precedent or "opposite in character or nature." *See Williams*, 529 U.S. at 405 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)). *Musladin*, however, does not concern whether the California decision was diametrically different or opposed to *Estelle* and *Flynn*, but rather the *applicability* of those cases.

[45] *See generally* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996).

[46] *Id.* at 6.

law, the Court rested on reasoning in tension with its prior precedents, and AEDPA's statutory text and underlying policies.

In *Williams v. Taylor*, the Supreme Court instructed that the "clearly established law" inquiry should be a "threshold question."[47] The Court thus clarified that the question should be the first one addressed; lower courts[48] and commentators,[49] however, divided over whether the question should also be dispositive. But until *Musladin*, this was effectively a non-issue: the "threshold" appeared easily met. Indeed, none of the Court's leading cases on § 2254(d)(1) turned on the lack of clearly established law.[50]

By contrast, "clearly established law" was both the beginning and end of the *Musladin* analysis. The Court's reasoning under this prong diverged from its prior approach in several ways. First, the Court used greater *specificity* in defining the relevant "clearly established law" for purposes of § 2254(d)(1). Notably, the majority pinpointed the pertinent legal principle[51]: that "inherent prejudice" is the gauge for whether courtroom practices amount to a deprivation of a defendant's fair trial rights.[52] But Justice Thomas swiftly narrowed this principle, stressing that *Estelle* and *Flynn* dealt only with *state-sponsored* practices.[53] The Court offered no explanation for the merits of this distinction — namely, for why it was "unreasonable" to extend the principle to the private-actor context. In stating simply that private actors lie

---

47 *Williams*, 529 U.S. at 390.

48 *See* Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 788–816 (2005) (citing examples of courts taking dispositive and nondispositive approaches to the "clearly established law" prong). Several lower courts addressed clearly established law at the beginning of their analyses but proceeded to consider issues about the scope of precedent under the second prong. *See, e.g.*, Lopez v. Wilson, 355 F.3d 931, 939–41 (6th Cir. 2004), *aff'd en banc*, 426 F.3d 339, 357 (6th Cir. 2005); Gilchrist v. O'Keefe, 260 F.3d 87, 97 (2d Cir. 2001); Jones v. Stinson, 229 F.3d 112, 119–20 (2d Cir. 2000).

49 *Compare* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 866–67 (1998) ("When . . . the rule governing the situation at issue was *not* established and had to be extrapolated by applying clearly established law governing *different* situations — the federal court must ascertain whether the state 'decision . . . involved an unreasonable application of [the] clearly established Federal law.'" (alteration and second omission in original)), *with* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 949 (1998) ("If there were no clearly established law governing the situation, then nothing the state court did could possibly be an unreasonable application of nonexistent law.").

50 *See* Yarborough v. Alvarado, 541 U.S. 652, 660 (2004); Lockyer v. Andrade, 538 U.S. 63, 72 (2003); *Williams*, 529 U.S. at 391.

51 Even the warden conceded that *Estelle* and *Flynn* "established a *general principle* that courtroom practices sometimes might be so inherently prejudicial as to violate the defendant's right to a fair trial," but argued that neither case was "factually similar" to Musladin's. Brief for Petitioner at 10, *Musladin*, 127 S. Ct. 649 (No. 05-785), 2006 WL 1746418 (emphasis added).

52 *Musladin*, 127 S. Ct. at 651.

53 *Id.* at 654.

outside the precedents' holdings, the Court ignored the inconsistencies riddling how broadly or narrowly precedents are construed.[54]

The Court's fine line-drawing between state and private actors lays bare this malleability. Prior to *Musladin*, the AEDPA line of cases suggested that the Court would not find a lack of clearly established law where it could discern a legal principle in Supreme Court precedent — even if that principle was general, or even manifestly unclear. In *Yarborough v. Alvarado*,[55] the Court discerned a clearly established "custody test" from a "matrix" of decisions spanning several decades.[56] In *Lockyer v. Andrade*,[57] the Court similarly gleaned a "governing legal principle" of gross disproportionality, albeit one whose "precise contours . . . [were] unclear and applicable only in the 'exceedingly rare' and 'extreme' case."[58] Moreover, the *Andrade* Court unearthed this "clearly established" principle from a "thicket" of factually distinct Eighth Amendment precedents.[59] The *Musladin* Court, however, declined even to delve into the thicket.[60] Under the Court's approach in its precedents, the "inherent prejudice" test should have satisfied the definition of "clearly established law," notwithstanding the test's lack of "precise contours" in the private spectator context.[61]

Second, the Court placed unprecedented *weight* on the "clearly established law" prong. Distinguishing the *Estelle* and *Flynn* holdings as inapplicable, the Court abruptly concluded that "[g]iven the lack of holdings from this Court regarding the potentially prejudicial effect of

---

[54] *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 (1994) (noting that "no universal agreement exists as to how to measure the scope of judicial holdings" or "how to distinguish between holdings and dicta"); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987) ("In order to assess what is a precedent for what, we must engage in some determination of the relevant similarities between . . . two events. In turn, we must extract this determination from some other organizing standard specifying which similarities are important and which we can safely ignore.").

[55] 541 U.S. 652.

[56] *Id.* at 664–65.

[57] 538 U.S. 63 (2003).

[58] *Id.* at 72–73 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

[59] *Id.*

[60] Although Justice Kennedy took pains to emphasize that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied," *Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring in the judgment) (citing Wright v. West, 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring in the judgment)), he proceeded to frame the issue in a highly fact-specific manner. Indeed, he found no case governing "whether . . . *buttons proclaiming a message relevant to the case* ought to be prohibited." *Id.* at 657 (emphasis added).

[61] The *Estelle* Court never mentioned "essential state policy" in describing the "inherent prejudice" rule, but rather in conceding an *exception* to that rule. Estelle v. Williams, 425 U.S. 501, 505–06 (1976) (discussing the inherent prejudice principle, acknowledging that the practices of shackling and gagging described in *Illinois v. Allen*, 397 U.S. 337 (1970), apparently violate that principle, and distinguishing *Allen* as a "state policy" exception).

spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[62] In effect, the Court indicated that further analysis under the "unreasonable application" prong was unnecessary once it answered the "clearly established law" prong in the negative. The lack of a sufficiently encompassing Supreme Court holding proved dispositive.[63]

The Court would have reached the same result had it adhered to the two-pronged standard of review as previously implemented. After explaining that clearly established law comprises "holdings, as opposed to the dicta," of Supreme Court precedent,[64] and that the clearly established "inherent prejudice" test comes from *Estelle* and *Flynn*,[65] the Court should have moved to the second prong: specifically, the reasonableness of application. The pivotal issue in the case — the applicability of the "inherent prejudice" test to private spectators — belonged squarely in the realm of "unreasonable application" analysis. Under the second prong, the Court should have acknowledged that the test provided only broad due process principles governing courtroom conduct generally, and therefore that the state court's finding that the buttons were merely "a sign of . . . the normal grief occasioned by the loss of [a] family member"[66] was a reasonable application of that guidance. Placing dispositive weight on the "clearly established law" prong was thus unwarranted and unnecessary to bar the Ninth Circuit from overturning the state court's decision.

If the Court's implementation of the § 2254(d)(1) standard signals a shift in direction, the trajectory deviates from the structure and policies of AEDPA. As an initial matter, construing the first prong of a two-pronged provision as the end of the review is strikingly at odds with a textualist reading of § 2254(d)(1).[67] The elevation of the "clearly established law" clause into a dispositive test also diverges from the Court's pronouncement in *Williams v. Taylor* that "[w]e must, . . . if possible, give meaning to *every clause* of the statute" to avoid

---

[62] *Musladin*, 127 S. Ct. at 654 (alterations in original) (quoting 28 U.S.C. § 2254(d)(1) (2000)).

[63] To be sure, the "clearly established law" prong might necessarily be dispositive in extreme cases in which there is no relevant law or only a principle so manifestly broad — for example, due process — that its relevance is highly attenuated. It is clear, however, that under the narrow view of "clearly established law" set forth in *Musladin*, the first prong would prove dispositive in an increasing number of cases.

[64] *Musladin*, 127 S. Ct. at 653 (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)).

[65] *See id.* at 653–54.

[66] *Id.* at 652 (alteration in original) (internal quotation mark omitted).

[67] In *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), Justice Thomas stated in his opinion for the Court that "[w]hen the words of a statute are unambiguous . . . 'judicial inquiry is complete.'" *Id.* at 254 (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)). *See generally* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

"sap[ping] [a] . . . clause of any meaning."[68] While the *Williams* Court aimed its criticism at an interpretation of "the 'contrary to' clause . . . that ensures that the 'unreasonable application' clause will have no independent meaning,"[69] it plainly viewed "clearly established law" as a separate clause with its own independent function:

> Throughout this discussion the *meaning of the phrase "clearly established Federal law*, as determined by the Supreme Court of the United States" has been put to the side. That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.[70]

The *Musladin* Court, however, collapsed the "clearly established" and "unreasonable application" clauses into one: "*Given the lack of holdings* . . . it cannot be said that the state court '*unreasonabl[y] appli[ed]* clearly established Federal law.'"[71] In short, the Court failed to heed the spirit of its own warning.

In fact, the Court risked sapping the very meaning it previously ascribed to the "unreasonable application" clause. In *Williams*, the Court explained that "unreasonable application" might connote three scenarios. A court could: identify the correct rule but unreasonably apply it to the facts; unreasonably extend a principle from precedent to a novel context; or unreasonably decline to extend a principle to a novel context where it ought to apply.[72] In *Musladin*, however, the Court stopped short of analyzing whether the California court's refusal to extend the "inherent prejudice" principle to the private-actor context was unreasonable. Placing dispositive weight on the "clearly established law" prong thus swallowed up this third category.

Indeed, "unreasonable application" review entails an inquiry quite distinct from ensuring that a rule is clearly established by Supreme Court precedent.[73] The inquiry involves effectively calibrating a sliding scale of objective reasonableness upon evaluating whether a governing rule is specific, general, or somewhere in between.[74] "The more general the rule, the more leeway courts have in reaching outcomes in

---

[68] *Williams*, 529 U.S. at 407 (emphasis added). The Court noted that questions concerning the application of federal law should be analyzed under the "unreasonable application" rather than "contrary to" clause, lest "the 'unreasonable application' clause become[] a nullity." *Id.*

[69] *Id.*

[70] *Id.* at 412.

[71] *Musladin*, 127 S. Ct. at 654 (alterations in original) (emphases added).

[72] *Williams*, 529 U.S. at 407.

[73] *See* Scheidegger, *supra* note 48, at 949 ("The 'unreasonable application' branch was purposely included and vigorously debated. It must have a meaning.").

[74] *See* Yarborough v. Alvarado, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity."); *see also* Wade v. Herbert, 391 F.3d 135, 145 (2d Cir. 2004) ("Where the Supreme Court has spoken only in general terms . . . various outcomes may be reasonable applications of the Court's precedents.").

case-by-case determinations,"[75] and the farther off the mark the state court must be to warrant reversal.[76] In preserving this independent function of the second prong, a non-dispositive reading of the "clearly established law" clause hews more closely to the text of § 2254(d)(1).

Relatedly, the Court's apparent move toward a heightened "clearly established law" threshold may come at the expense of greater guidance for lower courts.[77] "Unreasonable application" review requires judges to provide more detailed analysis than a mere recitation of the facts of factually similar or dissimilar Supreme Court precedents.[78] Such elaboration not only disciplines the Court to further explicate its ultimate conclusion, but also provides valuable guidelines as to the bounds of constitutional law.[79] When the inquiry stops at the first prong, therefore, the Court is less likely to grapple with, and elaborate on, the merits of the state court's extension or non-extension of the law in light of underlying constitutional policies — namely, what the law should say with respect to the given circumstances. If habeas courts are unlikely even to broach these second-prong questions, governing law in criminal cases will largely be made on direct review, with very little being explored — much less made — in habeas jurisprudence.

Furthermore, when the Court uses greater specificity in its search for "clearly established" precedents, highly fact-specific rules will be more readily deemed "clearly established law" for § 2254(d)(1) purposes than broad principles or standards. These narrower precedents

---

[75] *Alvarado*, 541 U.S. at 664; *see also id.* ("[T]he range of reasonable judgment can depend in part on the nature of the relevant rule.").

[76] *See, e.g.*, Mitchell v. Esparza, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); Walker v. Litscher, 421 F.3d 549, 557 (7th Cir. 2005) ("Confrontation Clause standards are very general, making it difficult to call a state court ruling in this area 'objectively unreasonable.'"); Serrano v. Fischer, 412 F.3d 292, 300 (2d Cir. 2005) ("[W]here the governing rule remains . . . roughly defined, we are less likely to conclude that a given interpretation or application of Supreme Court law is 'contrary to' or an objectively 'unreasonable application of' Supreme Court precedent for purposes of § 2254(d)(1).").

[77] State courts avoid egregious constitutional violations in part because they know that they will receive deference so long as they follow clear mandates from the Supreme Court. *See* Teague v. Lane, 489 U.S. 288, 306 (1989) (plurality opinion) ("[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)) (internal quotation mark omitted)).

[78] *See* Berry, *supra* note 47, at 805 ("The range of factual situations to which a rule may apply in each context is a question about the scope of the precedent. These questions cannot be answered at a threshold or abstract level; they must be addressed under the contrary to or unreasonable application prongs of § 2254(d)(1).").

[79] *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 398 (2000) (opinion of Stevens, J.) (deeming the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984), unreasonable because it failed to "accord appropriate weight to the body of mitigation evidence available" in assessing prejudice, and elaborating on specific pieces of mitigating evidence that might have "influenced the jury's appraisal of Williams's moral culpability").

will directly support a more limited range of lower-court decisions. A habeas regime in which primarily fact-bound holdings constitute the "clearly established law" will increasingly resemble a fact lottery: if cases fit into particular fact sets, state courts will be heavily bound; if cases fall beyond those narrow areas, state courts will enjoy greater latitude to apply standards based on judges' intuitions. The regime of broader, more generalized governing law, conversely, has constrained this arbitrary element and ensured greater uniformity in the degree and extent of state court autonomy.

The *Musladin* Court's abridged standard of review thus may hold significant — though subtle — ramifications, both doctrinally and practically. Even if the more stringent AEDPA review standard signaled by the majority opinion does not materialize in later habeas cases, the Court injected unnecessary confusion into the § 2254(d)(1) inquiry. Indeed, § 2254(d)(1) was designed to simplify and streamline the tangled morass of habeas claims. Congress sought to "prevent 'retrials' on federal habeas"[80] and "restrict the power of the lower federal courts to overturn fully reviewed state court criminal convictions."[81] With these goals in sight, however, the *Musladin* Court advanced a stricter view of what constitutes "clearly established law" and simultaneously placed inordinate emphasis on that determination. Although *Musladin* merely rearticulated prior statements about "clearly established law" comprising "holdings, as opposed to . . . dicta," the Court's truncated implementation of the AEDPA review standard threatens the tenuous relationship between federal and state courts.

B. Armed Career Criminal Act

Definition of "Violent Felony." — The Armed Career Criminal Act of 1984[1] (ACCA) imposes a mandatory minimum sentence of fifteen years for federal firearm offenders who hold three prior convictions that qualify as "serious drug offense[s]" or "violent felon[ies]."[2] The Act defines violent felonies to include burglary, arson, extortion, felonies "involv[ing] use of explosives," and a residual category of felonies "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another."[3] Federal courts have interpreted the residual clause broadly, holding that the ACCA covers a panoply of fel-

---

[80] *Id.* at 386.

[81] Musladin v. Lamarque, 427 F.3d 647, 647 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

[1] Pub. L. No. 98-473, tit. II, ch. XVIII, 98 Stat. 2185, 2185 (codified as amended at 18 U.S.C. § 924(e) (2000 & Supp. IV 2004)).

[2] 18 U.S.C. § 924(e)(1).

[3] *Id.* § 924(e)(2)(B)(ii).

HARVARD
LAW REVIEW

In the pages that follow, you will find a random sampling of the different schedules used by current *HLR* editors in approaching the digital Competition. Because last year's Competition was seven days instead of six days, these schedules will likely differ from your own. Moreover, this list is *not* exhaustive—it is intended to give you a sense of the variety of different approaches that you can take and be successful. We encourage you to think about your own work style when planning your week. And, most importantly, if you deviate from your original schedule plans, you can still be successful in taking the Competition!

Please contact Sarah Sadlier at vpoutreach@harvardlawreview.org with any questions.

SCHEDULE ONE

BEFORE WRITE-ON

In the weeks leading up to write-on, I did not do much to "prepare." I attended *Law Review* info sessions and I pestered my 2L coffee chatter with questions. I attempted the practice subcites and did horribly. I read a few "recent cases" from the *Law Review* website and found them very boring. I did my best to avoid the feeling that I was underqualified and "not academic enough" for *Law Review*, to varying levels of success.

During finals period, I focused on sleep and general wellbeing. The night before write-on, I went on a long walk with my partner, spent some time in sunshine, ate good food, and tried to get a good night's sleep.

GENERAL APPROACH

I planned to commit to consistency. I woke up every morning at 7 a.m., went for a walk, and treated myself to a cold brew. I then had a one-song dance party and got to work. Around 4 p.m. every afternoon, I took a walk. I would then work until 10 or 11 p.m. and go to sleep. For one week, I shut out the outside world and inhabited the write-on process.

Most importantly (for me), I bought in. I committed to putting my best effort into write-on and finding joy in the process. I did not want to look back on the week and wonder what might have happened if I had tried a bit harder, worked a little longer. I knew that, long term, I would feel most content if I could say that I gave my full effort, even if my full effort was not sufficient. Short-term, I did not want to spend a week being miserable. Therefore, I committed to buying in.

(Secretly—nerdily—write-on ended up being one of my favorite weeks of law school.)

SCHEDULE

Friday:

- Walk, take in sunshine, eat good food, get solid sleep

Saturday:

- Wake up early, have breakfast outside, remember to buy in.
- 12 p.m. – 4 p.m.: Read and re-read the case (including lower court opinions). Try to master the facts of the case and the logic of the opinions.
- 4 p.m.: (during walk) Reflect on the case and the opinions. Consider whether anything in particular sticks out as interesting or wrong. Try to formulate an initial argument without looking at secondary sources.
- 5 p.m. – 10 p.m.: Begin drafting reporting section, including footnotes and Bluebooking.

Sunday:

- 8 a.m. – 9 a.m.: Continue drafting reporting section while concurrently considering initial argument. (I like to start my day with writing.)
- 9 a.m. – 10 a.m.: Sort secondary materials by topic.

- 10 a.m. – 4 p.m.: Draft entire argument, reading only those sources that are relevant to argument. Incorporate secondary sources and Bluebooking throughout writing process.
- 5 p.m. – 10 p.m.: Finish reporting section.

Monday:
Prior to the competition, I heard over and over again that I should "resist the urge to change [my] topic." However, I woke up Monday morning knowing that the original thesis I had constructed was far too broad, and I was not sure how to salvage it. I made the decision to change my thesis entirely on Monday. Thankfully, I had already constructed a solid reporting section, and I felt that I had time to change course.

- 8 a.m. – 9 a.m.: Realize need to change thesis; panic.
- 9 a.m. – 4 p.m.: Pick new thesis, draft entire argument. Focus on getting argument down on paper.
- 5 p.m. – 10 p.m.: Refine argument.

Tuesday:

- 8 a.m. – 4 p.m.: Refine case comment and tighten language. Review secondary materials to see if any were overlooked and might add to argument.
- 5 p.m. – 10 p.m.: Start subcite.

Note: For the subcite, I went from the very particular to the more broad. I began with technical Bluebook edits and went rule by rule through the Bluebook rules we were given (e.g. First, is every id. italicized? Second, are all repetitious dropped in page ranges? And so on.). I then went through every Blackbook rule in the same manner. I then went through every citation and ensured that the citation provided support for the sentence to which it was footnoted. I then went to every sentence without a footnote and determined whether it needed support. I then went through the entire subcite and checked grammar rules. I then went through the entire subcite and checked for structural errors (e.g. Are any paragraphs or sections mis-ordered?). This methodical approach worked well for me.

Wednesday:
All day: remember to hunt the good stuff.

- 8 a.m. – 10 a.m.: Refine case comment and tighten language. Read all topic sentences in isolation to see if they provide full overview of argument. Realize they do not. Revise them so that they do.
- 10 a.m. – 4 p.m.: Continue subcite.
- 5 p.m. – 11 p.m.: Continue subcite.

Thursday:

- 8 a.m. – 10 a.m.: Refine case comment and tighten language. Ensure reporting section includes all major facts, even if not relevant to argument.
- 10 a.m. – 4 p.m.: Continue subcite.
- 5 p.m. – 11 p.m.: Continue subcite.

Friday:

- 8 a.m. – 10 a.m.: Refine case comment and tighten language. Check Bluebooking, now that subcite has conferred Bluebook greatness.
- 10 a.m. – 4 p.m.: Continue subcite.
- 5 p.m. – 11 p.m.: Continue subcite. Re-read entire rules packet to ensure compliance with all instructions (e.g. Did I anonymize all comments? Did I properly format my subcite comments?).

Saturday:

- 8 a.m. – 10 a.m.: Read case comment one last time. Ignore nagging feelings of inadequacy.
- 10 a.m. – 11 a.m.: Read rules one last time.
- 11 a.m. – 12 p.m.: Turn in!

SCHEDULE TWO

In general: I got at least 8 hours of sleep every night. I worked about 12 hours per day, always between the hours of 8AM and 11PM, with breaks for meals, walks, TV, etc. My biggest advice is to save more time for the subcite than for the case comment—the subcite is *slow* and you can always find more errors by spending more time on it.

Friday night (the night before the competition):

- Watch the HLR YouTube tips videos
- Read through the HLR tips packet
- Make sure you have the right version of Adobe and can make comments
- Read 2-3 "recent thing" case comments on the HLR website, to get a sense of the case comment format

Saturday - case comment

- Read the table of contents of the case comment sources packet to get a sense of what topics would be covered
- Closely read and brief the case (both the trial court and the appeals court opinions)
- Tentatively decide on an argument (without spending much time reading the packet)

Sunday - case comment

- Finalize decision on argument, and don't change it!
- Write entire reporting section of case comment

Monday - case comment

- Write entire argument section of case comment
- Finishing touches for case comment

Tuesday through Friday - subcite

- I spent all 4 of these days on the subcite. I didn't touch the case comment again, except to read it one more time later in the week to make any final tweaks. The subcite takes a long time and I recommend saving 4 full days for it and moving slowly. Read the full subcite passage before you make any edits, to get a general sense of what it's trying to argue.
- Different people approach the subcite differently. My way was to just go through it agonizingly slowly, checking support for every footnote and statement as it came along. At the very end, I skimmed through the Bluebook excerpt to see if there were some rules that I had completely neglected (e.g. the nonconsecutively paginated journal rule).
- I submitted my competition on Friday night, because I wanted to be done with it. But you can also work on this or the case comment Saturday morning.

SCHEDULE THREE

I want to caveat this by saying that we had CR/F finals, so I don't think that finals period was nearly as grueling as it was for us for our first semester, or as grueling as it will be for the folks taking them this semester. With that in mind:

Before write-on week: I read through tips packet, read a couple case comments on the website to get a sense of case comment structure, and did a coffee chat with an HLR editor and asked about HLR life and write-on. I also watched the tips session that HLR recorded and distributed to us.

During write-on: I knew I'd be pretty tired from finals, so when I got the materials on Saturday, I first read through the lower court opinions that we got so that they would at least be in the back of my mind for the first few days, then I started working on the subcite. As a general matter, I made sure that I got at least eight hours of sleep every day: my brain tends not to be functional unless I get enough sleep, so I wanted to really prioritize getting enough sleep. Also, even though the competition is "only" a week long, I think that the risk of burnout is very real, so I didn't want to start off by pulling all-nighters and kneecap myself later in the week.

Saturday through Tuesday was dedicated to the subcite: I would wake up around 8-9 AM and pretty much work on the subcite all day (until ~10 PM), with breaks for meals and to take walks to clear my head. I've edited things for grammar before, so I largely relied on grammatical rules for most of the edits in the subcite text; any citation format I made sure to double check against the Bluebook excerpt we were given. I also briefly looked through the Bluebook excerpt we were given just to make sure that there weren't any weird rules that I wouldn't have already known/to make sure that I knew to look out for that rule.

Starting Wednesday, I started working on the case comment: I read through the case, tried to see what kind of thesis I wanted to put together (the tips packet was really helpful here, since it had a bunch of sample pieces I could look at to see how they structured their piece). I worked on the summary section of the case comment, then once I figured out which substantive area of the case I wanted to talk about (since there are always a lot of different routes you can go), I started skimming the articles with titles that seemed most relevant to the argument I wanted to make. I then wrote a master document with short (2-3 sentence) summaries of each article (after skimming their intros/abstracts), so that I would have something to refer to and wouldn't have to re-read articles to remind myself what they were about. I also took a look at the cases cited in the opinions we were given and did something similar, taking brief notes on what the cases held/what the relevant portions of them said with respect to the legal issue in our assigned case. Ultimately, I ended up changing my thesis about 5 times (no exaggeration) before I finally settled on one Thursday evening; it was extremely helpful for me to have had the article and case summaries because it let me adapt to my new thesis.

While I was working on the case comment, whenever my brain started hurting I took breaks by working on the subcite— I always found new things when I had taken a break from the subcite and come back to it later. Also, at one point I printed out the subcite and cut out all of the paragraphs—this was for the higher level structure issues, so that if I thought that a paragraph

could potentially be moved to another part of the subcite, I could physically do so and read the newly organized suggestion.

I aimed to finish everything by Friday evening and to get everything in the right format for submission on Saturday. I really did not want to submit the competition late, so I had all of my documents in the right naming format and everything, and I double checked that I had filled out everything I needed to. Also, as my case comment came together, I started to spend a little more time on the subcite, since I felt like finding errors in the subcite would definitely be worth a discrete number of points, whereas tweaking my case comment a little bit might not yield those kinds of returns.

Overall, I would strongly recommend 1) getting enough sleep during write-on; 2) keeping to whatever daily rituals you might have; 3) taking breaks and talking to friends/family (especially non-competition-taker friends); and 4) trying to enjoy the process (as crazy as it sounds - I treated the subcite as kind of a game, and I felt kind of a rush every time I found a new error). The competition week is definitely grueling, but you can and should take care of yourself.

SCHEDULE FOUR

My plan was to do the case comment first (hopefully finishing the case comment by Wednesday morning), and then work on the subcite. The advice I received was that you will have more mental energy/creativity to work on the case comment if you do it first. That advice worked for me.

At this point, I don't remember all the details of my competition schedule, but the description below should be approximately accurate. I took the competition at home with my family, so I didn't need to cook my own meals (though I certainly took breaks for meals, as well as various breaks to walk around a little bit and refresh myself mentally, etc.). I didn't have other obligations during the week, so with some exceptions (see below), I worked all day, every day. My ending times varied depending on the day—some nights I worked later if I was pushing to get something done by a certain time (Wednesday night and Friday night come to mind), but I otherwise tried not to push myself too hard, especially early in the week (and especially on Thursday night), and most nights I believe I ended somewhere approximately around the 8:30-10:30 pm time range.

I downloaded the competition on Saturday morning, but I didn't begin working on the competition until mid- to late-afternoon (maybe around 3:00 or 4:00 CST). While I did not print out the entire competition, I did print out the case itself and the lower court opinions. I started by reading those materials and taking margin notes on them. I believe all that I did on Saturday was to read the case and related opinions, as well as start looking through the Table of Contents and reading secondary sources a bit to develop ideas of what to write about.

I took a break on Sunday morning for church. I then returned to the competition on Sunday afternoon, continuing to read sources and decide what kind of direction I wanted to take the piece.

If I'm remembering correctly, I began writing my reporting section on either Sunday evening or Monday, and I believe I began writing the argument section on either late Monday or on Tuesday. My goal had been to finish the argument by Tuesday night and to finish the case comment completely by Wednesday lunch, but I believe I ended up finishing the draft of my case comment somewhere around Wednesday lunch and finished editing/polishing on Wednesday night (I think around 11:00 pm—I stayed up a bit later on Wednesday because I wanted to make sure the case comment got done that day).

On Thursday and Friday, I moved on to the subcite. My process was to go through each footnote and sentence, looking for the smaller errors (technical, grammatical/spelling, characterization, etc.) and then move on to reading through the entire piece to look for the bigger structural errors. I got through about half the footnotes on Thursday, and I believe I worked until about 8:00 or 9:00 pm that day.

On Friday, I finished the footnotes and accompanying text. I believe this happened somewhere around suppertime. I then spent the evening working on the structural edits (looking for out of place sentences/paragraphs). I believe I finished with that somewhere around 10:00 or 11:00 pm.

I had planned to go over my case comment one more time on Friday to review it for errors (that was one tip I had received), but I ended up not having time to do so (though I may have taken a very quick look at it—I can't remember for sure at this point).

After I finished on Friday night, I decided to stay up later to see if I could catch more errors on the subcite. I'm normally not an all-nighter type of person, but I figured that I only had one chance to write on to the *Law Review*, so a few hours might be worth it. I ended up working until something like 3:00 am. However, I don't think that was necessary—I caught a little bit, but not that much.

On Saturday morning, I submitted! I don't think I did much of anything on it that morning—mainly triple checking that my case comment was within the word count and that I had followed all the rules. I hadn't put my name on any of the documents (other than as instructed), but I also took my name off any Properties settings on Microsoft Word/Adobe just to be on the safe side (I don't know if that was necessary or not).

SCHEDULE FIVE

Generally, my strategy was to work as much as possible while still eating, sleeping, and exercising, and also to go back and forth between working on the case comment and working on the subcite so I didn't go crazy. I got around 8 hours of sleep each night of the competition except for the last one (when I stayed up all night), and I worked out every other day. I probably averaged 10-12 hours of work on the competition every day, and then an additional 10 hours during the last night into the morning.

First few days: After I downloaded the competition packet, I started by reading each level of the case for the case comment. On the first day, I also started reading the subcite article. My goal was to read through the article to understand the argument, but also to mark any obvious errors as I read. Next, I looked through the case comment source library and grouped the sources by general topic. I read the cases in the source library that seemed most important to understanding the doctrine for the case comment. I also read the abstracts/introductions for some secondary sources, and fully read a few of them. I continued to read the subcite article. By the end of the second day, I was probably done with my first read of the subcite article and had a general idea of what I wanted to write about for my case comment.

Middle days: I wrote the reporting section of my case comment, came up with a thesis, and read all of the secondary sources that I thought would be important for my argument. I probably wrote half of my argument section during this part of the competition before realizing that my thesis had too many moving parts and that I couldn't do the argument justice in the space I had. I revised my thesis once I had a better sense of space constraints and also according to further secondary source and doctrinal reading that I had done. I drafted a new argument section. During this time, I probably also did a substantial amount of going through the subcite footnote by footnote and checking the substance of each cited source. Another thing I did around the middle of the week was print out the subcite, cut out each paragraph, and try to find any big structural errors by moving paragraphs around.

Last few days: I made one more substantial change to my argument section for the case comment, and then did some sentence-level editing. I did a quick look through potentially relevant sources that I hadn't used to see if I could add any support or footnotes. On Friday (the last full day), I did one more read of my case comment and called it done. I spent most of the day on the subcite, finishing checking the substance of each footnote and also going over the entire piece for each set of Bluebook/Blackbook rules provided in the competition. At night, I started going through the title page and table of contents for each source to make sure it matched the citation. This took me much longer than expected, and I ended up staying up all night. When I was done, I skimmed through all my subcite comments to make sure they weren't missing any elements and followed all competition rules (anonymizing, etc), and submitted the competition.

SCHEDULE SIX

General comments: Like many people (I think), I roughly split up the week into my case comment and subcite (in that order), but I certainly did not finish the case comment completely before I turned to the subcite. Though I'm sure people differ on this, I thought it was nice to be able to switch between them later in the week (as the subcite can be a slog). Still, I was careful not to spend *too* much time on the case comment, as the subcite is (almost) as important. I honestly did not do too much other than working on the competition during the week, but I did take breaks to cook/eat and exercise, with a few unrelated emails and calls thrown in, and I slept pretty well. In other words, I didn't take any full days (or mornings or afternoons) off (not that you shouldn't), but I did take a little time for myself every few hours and slept about as much as I normally do.

Before write-on: As you've probably heard by now, there isn't a ton you can do to prepare, but there are a couple little things. In the weeks beforehand, I watched the information session videos, skimmed (but certainly did not read) the packet, and read a few published case comments just to get a feel of how they were written.

Day One: Once the packet was released, I printed out the case and lower-court decisions. I took my time reading them slowly and carefully. I then started working on the reporting section of the case comment.

Day Two: I finished drafting the reporting section of the case comment. I then tried to start thinking of an argument. To do so, I opened each secondary source and skimmed part of the abstract (and sometimes just the title). I then reread the case, to try to find things that I thought were particularly odd, interesting, or wrong and think of how they could relate to an argument. Once I had an argument in mind, I began outlining the argument section of my case comment. By the end of this day, I resolved to not change my argument further, at least not in any fundamental way.

Day Three: I continued outlining my argument, trying to familiarize myself a bit with the relevant (and *only* the relevant) secondary sources. Once I thought my outline was sufficiently fleshed out (but certainly not *finished*), I drafted the argument section of the case comment.

Day Four and Five: I worked through the subcite, without really looking back at the case comment at all.

Day Six: I continued working on the subcite, but, at some point (fairly late in the day I think), I turned back to the case comment to try to tie up some loose ends in my argument and work in a few sources that I had meant to include earlier.

Day Seven: I proofread my subcite comments and did not turn back to it. With only my case comment left to finish, I cut it down to length (which took a while).

Day Eight: I had to make a few more small cuts to my case comment, and then I proofread it (including by printing it out, which was helpful). I made sure to turn everything in at least an hour or two early, in case I ran into any technical difficulties.

SCHEDULE SEVEN

Saturday, May 16 (3 hours) → read instructions, skim through bluebook and HLR rules, start reading through circuit court case and taking notes
10PM- 2AM

Sunday, May 17 (10 hours) → finish reading circuit court opinion , read district court opinion & sort promising/relevant sources into a folder, come up with thesis
11:30AM-2:30PM
4:30-6:30PM
9:30-3:30AM

Monday, May 18 (10 hours) → finish reading/skimming the promising sources & outline argument/case comment
11:30AM-2:30PM
4:30-6:30PM
8:30-3:30AM

Tuesday, May 19 (13 hours) → write ½ case comment (reporting section)
10:30AM-2:30PM
4:30-6:30PM
8:30-3:30AM

Wednesday, May 20 (13 hours) → write ½ case comment (analysis section); proofread entire case comment and check for errors
10:30AM-2:30PM
4:30-6:30PM
8:30-3:30AM

Thursday, May 21 (13 hours) → subcite ½
10:30AM-2:30PM
4:30-6:30PM
8:30-3:30AM

Friday, May 22 (14 hours) → subcite ½ ; reread through subcite and look for more errors; reread case comment + check for errors
10:30AM-2:30PM
4:30-6:30PM
8:30-2:30AM
3:00-5:00AM

Saturday, May 23
Submit & fill out forms before deadline!!!

SCHEDULE EIGHT

Before Write-on: I had an exam on the Friday before write-on started, so I was pretty exhausted. I met outside with a few friends for a socially distant celebration of 1L ending, and I am glad that I did. I then spent the night reviewing case comments from the November issue of HLR. I went to sleep around 10pm, and woke up the next day (first day of competition) around 7am.

General Schedule: I tried to sleep at least 7 hours every night, with the exception of the last night. Write-on was truly my priority for this week, so I really didn't do anything else. Normally, I workout a few days per week and am pretty social, but I did not workout at all really or see any friends. I will note that this schedule was very intense, but HLR was something that really mattered to me, and I cared a lot about. I also wake up early normally, so if waking up at 6am isn't normal for you, I don't suggest starting just for the competition. I basically treated the competition as another week of exams.

Saturday: (this was an odd situation, but my older sister was getting married on this day and it was during a pandemic in my parents' front yard.)

- ~11:00am: print entire competition, including multiple copies of subcite
- until 2pm: read carefully the instructions, court of appeals case, and district court case; annotate
- drive to my parents' house for my sister's wedding, spend afternoon with my family
- around 5pm drove back to Cambridge
- night: look through (but not read carefully) the sources provided, start to think of an argument

Sunday:

- wake up at 6am
- morning: draft reporting section
- afternoon: think about argument section, go back and forth, by late afternoon pick one
- night: begin drafting outline for argument section; bed by 10:30

Monday:

- morning: edit reporting section
- afternoon: draft argument section; by this point even though I wasn't thrilled about my argument I refused to change it, there would not be enough time
- night: edit reporting section again (checking footnotes); bed by 10:30/11

Tuesday:

- Morning: finish drafting argument section (with footnotes)
- Afternoon: start subcite—I read through entire thing once, catching any easy errors
- Night: Went rule by rule through subcite; bed by 10:30/11

Wednesday:

- Morning: subcite
- Afternoon: subcite

- Night: re-read and edit case comment; bed by 10:30/11

Thursday:
- All day: subcite
- Night: edit case comment and more subcite
    - Note: it was my best friend's birthday and she had a zoom party so I went to that for about 30 minutes, and went straight back to work; bed by 10:30/11

Friday:
- All day: subcite
- Late afternoon/early evening: re-read case comment out loud and edit
- Night: more subcite (this was probably the only time of 1L I stayed awake past midnight, but I kept finding more errors in the subcite so I stayed up very late working on it)

Saturday:
- Morning: one last read of case comment, resisting any urge to make substantive changes
- Around 11am: submit and celebrate!

It is hard to know how things would turn out if I was less strict about my schedule, but my inclination is that this was incredibly intense. I love HLR and am so glad that I did this much work, but it was a hard week. Do your best, and take care of yourself!

SCHEDULE NINE

***Before the competition*:** Last year, the competition was seven days; this year, it is six. When it was seven days long, I took the first day to rest and do exactly no work. The lack of the extra day to do the competition this year is functionally equivalent. I did no work or preparation at all that day so I could take a rest before starting the competition.

***During the competition*:** I woke up each day at 10 AM and stopped working around 12 AM midnight. I took a brief break at the end of each working day. I got some exercise by jogging three days that week a little after lunch and ate lunch and dinner with my family each day. I did the contest very linearly, spending three days on the subcite and three days on the case comment.

Day 1: Break (This day is built into the new competition schedule of only six days, leaving a day's gap between the last final and the start of the subcite.)
Day 2: Read the entirety of the *Blackbook* and *Bluebook* excerpts. Then, start the subcite.
Day 3: Continue the subcite.
Day 4: Finish subcite.
Day 5: Read the instructions on case commenting. Read the district and circuit opinions and skim sources. Start the case comment.
Day 6: Finish the reporting section draft.
Day 7: Finish the commentary section draft, edit, and *Bluebook*. Write the holistic review statement. Submit everything.

SCHEDULE TEN

Before the Write-On. I made sure to rest well throughout finals, go through all the Competition materials provided by HLR, and read one or two case comments on the website. I also decided in advance on a schedule that I would follow throughout the week. I decided to spend the first day reading through the case comment materials and deciding on a thesis, spending the next two days finishing a draft of the case comment, spending the next three days on the subcite, and returning to the case comment on the last day to edit it with fresh eyes.
During Write-On. My week went roughly as planned. I worked at 7am – 7pm every day and took the nights off to spend time with family.

- **Day 1**: I read through the case once without annotating it, then again annotating it. I then brainstormed some potential topics. I then browsed the available sources to see what might align with some ideas. By the end of the day I decided on a topic and tentative thesis.
- **Day 2**: I started second-guessing my chosen topic and thesis because I was worried it wasn't substantive enough, in that it was more about the role of judicial opinions rather than the merits of the legal issue. However, I quickly reaffirmed my choice because I'd told myself I wouldn't have time to second-guess (which in hindsight was very true) and because it was what I was most excited to write about. I spend the rest of the day working on the reporting section of the case comment.
- **Day 3**: I finished drafting the reporting section and moved to the argumentative section.
- **Day 4**: I started the subcite.
- **Day 5:** I continued the subcite.
- **Day 6:** I felt that I'd gotten most of the errors I would get except for those that might require reordering sentences or paragraphs. I'd gotten advice to do all the edits without reordering, then to go back and reorder and do more corrections that might result from reordering. Specifically to help with reordering, I'd also gotten advice to print out the full subcite and physically cut out (yes, with scissors) each sentence so that I could visually reorder things and see how they fit together. That ended up being extremely helpful to me, and I also enjoyed the 1-2 hour mental break of just cutting out sentences. I felt like I was in Kindergarten again. By the end of the day, I felt I was done with the subcite (or as done as I would ever feel).
- **Day 7**: I revisited the case comment with fresh eyes and caught some mistakes and unclear sentences. I also cleaned up the citations a bit, though did not fully *Bluebook* them as we were not expected to.