Appendix A

Rehnquist Court Decisions Rendering Federal Statutes Unconstitutional
(Organized by Constitutional Provision or Subject Matter)
1986-2001[1]

First Amendment (14)

United States v. United Foods, 533 U.S. 405 (2001).
7 U.S.C. § 6101.

The assessment provision of the Mushroom Promotion, Research, and Consumer Information Act of 1990, mandating that fresh mushroom handlers fund advertisements promoting mushroom sales, violates the First Amendment. Since the assessments were not ancillary to a more comprehensive program restricting market autonomy, the advertising itself was the principal object of the regulatory scheme**.**

Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001).
42 U.S.C. § 2996 (as conditioned by the Omnibus Consolidated Rescissions and Appropriations Act, § 504).

The Omnibus Consolidated Rescissions and Appropriations Act of 1996, enacting a funding restriction on the Legal Services Corporation, violates the First Amendment. The restriction prohibits LSC funded-attorneys from engaging in representation involving efforts to amend or otherwise challenge the validity of existing welfare laws. LSC attorneys' advice to clients and advocacy to the courts cannot be classified as governmental speech, thus the restriction is impermissible viewpoint-based discrimination.

Bartnicki v. Vopper, 532 U.S. 514 (2001).
18 U.S.C.A. §2511(1)(c).

The Omnibus Crime Control and Safe Streets Act of 1968, prohibiting the disclosure of illegally intercepted wire, electronic, and oral communications by a person that has reason to know that the communication was obtained through an illegal means, violates the First Amendment. The interests served by §2511(1)(c) do not justify its restrictions on speech; privacy concerns give way when balanced against the interest in publishing matters of public importance.

---

[1] Citations and summaries for the 2000/1 Term by the AEI Federalism Project (Kim Kosman). All other summaries and citations from THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES (Congressional Research Service, Library of Congress, 1992 edition and 2000 supplement.).

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).
47 U.S.C. § 561.

Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to designated hours when children are less likely to be watching, violates the First Amendment. The provision is content-based, and therefore can only be upheld if narrowly tailored to promote a compelling governmental interest. The measure is not narrowly tailored, since the Government did not establish that the less restrictive alternative found in section 504 of the Act—that of scrambling a channel at a subscriber's request—would be ineffective.

Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999).
18 U.S.C. § 1304.

Section 316 of the Communications Act of 1934, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station's or casino's location, violates the First Amendment's protections for commercial speech as applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is illegal.

Reno v. ACLU, 521 U.S. 844 (1997).
47 U.S.C. §§ 223(a), 223(d).

Two provisions of the Communications Decency Act of 1996—one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to anyone under 18 years of age—violate the First Amendment.

Denver Area Educ. Tel. Consortium v. FCC, 518 U.S. 727 (1996).
47 U.S.C § 532(j) and § 531 note.

Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violates the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of ''sexually explicit'' programming on public access channels, also violates the First Amendment.

Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996).
2 U.S.C. § 441a(d)(3).

The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures by a political party ''in connection with the general election campaign of a [congressional] candidate,'' violates the First Amendment when applied to expenditures

that a political party makes independently, without coordination with the candidate.

United States v. National Treasury Employees Union, 513 U.S. 454 (1995).
5 U.S.C. app. § 501.

Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS–16. The ban is limited to expressive activity and does not include other outside income, and the ''speculative benefits'' of the ban do not justify its ''crudely crafted burden'' on expression.

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
27 U.S.C. § 205(e).

The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels is inconsistent with the protections afforded to commercial speech by the First Amendment. The government's interest in curbing strength wars among brewers is substantial, but, given the ''overall irrationality'' of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

United States v. Eichman, 496 U.S. 310 (1990).
18 U.S.C. § 700.

The Flag Protection Act of 1989, criminalizing burning and certain other forms of destruction of the United States flag, violates the First Amendment. Most of the prohibited acts involve disrespectful treatment of the flag, and evidence a purpose to suppress expression out of concern for its likely communicative impact.

Sable Communications of California v. FCC, 492 U.S. 115 (1989).
47 U.S.C. § 223(b)(1).

Amendment to Communications Act of 1934 imposing an outright ban on ''indecent'' but not obscene messages violates the First Amendment, since it has not been shown to be narrowly tailored to further the governmental interest in protecting minors from hearing such messages.

*Boos v. Barr*y, 485 U.S. 312 (1988).
U.S.C.A. Const.Amends. 1, 14; D.C.Code 1981, §§ 22- 1115.

District of Columbia Code § 22–1115, prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into ''public odium'' or ''public disrepute,'' violates the First Amendment.

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).
2 U.S.C. § 441b.

Provision of Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions to a separate segregated fund violates the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union.

Federalism (11)

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001).
42 U.S.C. § 12202.

Title I of the Americans With Disabilities Act of 1990 invalidly abrogates states' Eleventh Amendment immunity from suits for money damages. Congress impermissibly abrogated the states' immunity because (1) states are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational; (2) the legislative record of the ADA fails to show that Congress identified a pattern of irrational state discrimination in employment against the disabled; (3) Congress' § 5 enforcement authority under the Fourteenth Amendment is appropriately exercised only in response to state transgressions, and not constitutional violations by units of local governments; and (4) the rights and remedies created by the ADA against the states raise concerns as to congruence and proportionality.

United States v. Morrison, 529 U.S. 598 (2000).
42 U.S.C. § 13981.

A provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate ‘‘noneconomic violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. ’’ The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, is not aimed at the conduct of state officials, but is aimed at private conduct.

Kimel v. Florida Bd. Of Regents, 528 U.S. 62 (2000).
29 U.S.C. §§ 216(b), 630(b).

The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeds congressional power under section 5 of the Fourteenth Amendment. Age is not a suspect

classification under the Equal Protection Clause, and the ADEA is ''so out of proportion to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.''

Alden v. Maine, 527 U.S. 706 (1999).
29 U.S.C. §§ 203 (x), 216(b).

Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts violates the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject non-consenting states to suits for damages in state courts.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999).
15 U.S.C. § 1122.

The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) ''under the eleventh amendment . . . or under any other doctrine of sovereign immunity,'' did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Arti-cle I powers, and the TRCA cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. The right to be free from a business competitor's false advertising is not a ''property right'' protected by the Due Process Clause.

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,
527 U.S. 627 (1999).
29 U.S.C. § 296.

The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states' sovereign immunity from patent infringement suits is invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act's provisions are ''out of proportion to a supposed remedial or preventive object.''

Printz v. United States, 521 U.S. 898 (1997).
Pub. L. No.103-159.

Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between Federal and State governments. In *New York v. United State*s, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and ''Congress cannot circumvent that prohibition by conscripting the State's officers directly.''

City of Boerne v. Flores, 521 U.S. 507 (1997).
42 U.S.C. §§2000bb to 2000bb-4.

The Religious Freedom Restoration Act, which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion, exceeds congressional power under section 5 of the Fourteenth Amendment. Congress' power under section 5 to ''enforce'' the Fourteenth Amendment by ''appropriate legislation'' does not extend to defining the substance of the Amendment's restrictions. This RFRA appears to do. RFRA ''is so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.''

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
25 U.S.C. § 2710(d)(7).

A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate States' Eleventh Amendment immunity from suit in federal court. *Pennsylvania v. Union Gas Co*., 491 U.S. 1 (1989), is overruled.

United States v. Lopez, 514 U.S. 549 (1995).
18 U.S.C. § 922q.

The Gun Free School Zones Act of 1990, which makes it a criminal offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is ''a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise.'' Possession of a gun at or near a school ''is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.''

New York v. United States, 505 U.S. 144 (1992).
42 U.S.C. § 2021e(d)(2)(C).

''Take-title'' incentives contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to encourage states to cooperate in the federal regulatory scheme, offend principles of federalism embodied in the Tenth Amendment. These incentives, which require that non-participating states take title to waste or become liable for generators' damages, cross the line distinguishing encouragement from coercion. Congress may not simply commandeer the legislative and regulatory processes of the states, nor may it force a transfer from generators to state governments. A required choice between two unconstitutionally coercive regulatory techniques is also impermissible.

Separation of Powers (3)

Clinton v. City of New York, 524 U.S. 417 (1998).
2 U.S.C. §§ 691 et seq.

The Line Item Veto Act, which gives the President the authority to ''cancel in whole'' three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President ''the unilateral power to change the text of duly enacted statutes.'' This Line Item Veto Act authority differs in important respects from the President's constitutional authority to ''return'' (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).
15 U.S.C. § 78aa-1.

Section 27A(b) of the Securities Exchange Act of 1934, as added in 1991, requiring reinstatement of any section 10(b) actions that were dismissed as time barred subsequent to a 1991 Supreme Court decision, violates the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments in private civil actions. The provision violates a fundamental principle of Article III that the federal judicial power comprehends the power to render dispositive judgments.

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).
49 U.S.C. App. § 2456(f).

The Metropolitan Washington Airports Act of 1986, which transferred operating control of two Washington, D.C., area airports from the Federal Government to a regional airports authority, violates separation of powers principles by conditioning that transfer on the establishment of a Board of Review, composed of Members of Congress and having veto authority over actions of the airports authority's board of directors.

Fifth Amendment (Takings) (3)

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).
26 U.S.C. §§ 9701-9722.

The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability

on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

Babbitt v. Youpee, 519 U.S. 234 (1997).
25 U.S.C. § 2206.

Section 207 of the Indian Land Consolidation Act, as amended in 1984, effects an unconstitutional taking of property without compensation by restricting a property owner's right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in *Hodel v. Irving* (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cures the constitutional defect.

Hodel v. Irving, 481 U.S. 704 (1987).
25 U.S.C. § 2206.

Section of Indian Land Consolidation Act providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates the Fifth Amendment's takings clause by completely abrogating rights of intestacy and devise.

Export Clause (2)

United States v. United States Shoe Corp., 523 U.S. 360 (1998).
26 U.S.C. §§ 4461, 4462.

The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5 to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125 percent of cargo value on commercial cargo shipped through the Nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used by exporters, and the tax does not, therefore, represent compensation for services rendered.

United States v. IBM Corp., 517 U.S. 843 (1996).
26 U.S.C. § 4371(1).

A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, § 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

Seventh Amendment (1)

Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998)
17 U.S.C. § 504 (c).

Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, ''in a sum of not less than $500 or more than $20,000 as the court considers just,'' does not grant the right to a jury trial on the amount of statutory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.

We-Said-So Clause (1)

Dickerson v. United States, 530 U.S. 428 (2000).
18 U.S.C. § 3501

A section of the Omnibus Crime Control and Safe Streets Act of 1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations prior to the Court's decision in *Miranda v. Arizon*a, 384 U.S. 486 (1966), is an invalid attempt by Congress to redefine a constitutional protection defined by the Court. The warnings to suspects required by *Miranda* are constitution-based rules. While the *Miranda* Court invited a legislative rule that would be ''at least as effective'' in protecting a suspect's right to remain silent, section 3501 is not an adequate substitute.