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YES: Sandra Day O’Connor, from Majority Opinion, *Hamdi v. Rumsfeld*, U.S. Supreme Court (June 28, 2004) 4

NO: Clarence Thomas, from Minority Opinion, *Hamdi v. Rumsfeld*, U.S. Supreme Court (June 28, 2004) 10

Supreme Court Justice Sandra Day O’Connor finds that the Authorization for Use of Military Force passed by Congress does not authorize the indefinite detention of a person found to be an “enemy combatant.” Justice Clarence Thomas believes that the detention of an “enemy combatant” is permitted under the federal government’s war powers.

Issue 2. Does the President Possess Constitutional Authority to Order Wiretaps on U.S. Citizens? 17

YES: U.S. Department of Justice, from “Legal Authorities Supporting the Activities of the National Security Agency Described by the President” (January 19, 2006) 19

NO: Letter to Congress, from 14 Law Professors and Former Government Attorneys to Congressional Leaders (January 2, 2006) 33

The Department of Justice argues that the Constitution gives the president the right to engage in electronic surveillance, with or without congressional approval or judicial oversight. It further claims that the NSA wiretapping program ordered by President Bush does not violate federal law, specifically the Foreign Intelligence Surveillance Act (FISA), because such surveillance falls under the auspices of the military response to the 9/11 attacks that was authorized by Congress. Several lawyers with expertise in constitutional law or experience in the federal government argue that the NSA wiretapping program violates FISA and the Fourth Amendment of the U.S. Constitution. They further argue that the president does not have any inherent ability either to engage in warrantless wiretapping or to violate federal law that limits such surveillance.

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Issue 3. Are Violent Video Games Protected by the First Amendment? 46

YES: Antonin Scalia, from Majority Opinion, *Brown v. Entertainment Merchants Association*, U.S. Supreme Court (June 27, 2011) 48

NO: Stephen Breyer, from Dissenting Opinion, *Brown v. Entertainment Merchants Association*, U.S. Supreme Court (June 27, 2011) 58

Supreme Court Justice Antonin Scalia argues that legislation creating a whole new category of speech that is banned only for children violates the First Amendment. Justice Stephen Breyer believes that the California law restricting the purchase of video games by minors is clear.

Issue 4. Is It Constitutional to Ban “Partial-Birth” Abortions Without Providing for an Exception to Protect the Health of the Mother? 71

YES: Anthony Kennedy, from Majority Opinion, *Gonzales v. Carhart*, U.S. Supreme Court (April 18, 2007) 73

NO: Ruth Bader Ginsburg, from Dissenting Opinion, *Gonzales v. Carhart*, U.S. Supreme Court (April 18, 2007) 81

Justice Anthony Kennedy rules that the federal Partial-Birth Abortion Ban Act of 2003 was constitutional even without a “health exception” for the woman. In dissent, Justice Ruth Bader Ginsburg argues that the law clearly contravenes the Court’s holding in prior cases that any regulation limiting a woman’s access to abortion, even postviability, must include a health exception.

Issue 5. Are Restrictions on Physician-Assisted Suicide Constitutional? 95

YES: William H. Rehnquist, from Majority Opinion, *Washington et al. v. Glucksberg et al.*, U.S. Supreme Court (June 26, 1997) 97

NO: Stephen Reinhardt, from Opinion for the Court, *Compassion in Dying v. State of Washington*, U.S. Court of Appeals for the Ninth Circuit (1996) 108

Former Supreme Court Chief Justice William H. Rehnquist rules that although patients have the right to refuse life-sustaining treatment, physician-assisted suicide is not constitutionally protected. Judge Stephen Reinhardt argues that forbidding physician-assisted suicide in the cases of competent, terminally ill patients violates the due process clause of the Constitution.

Issue 6. Does the Sharing of Music Files Through the Internet Violate Copyright Laws? 120

YES: Ruth Bader Ginsburg, from Concurring Opinion, *Metro-Goldwyn-Mayer Studios v. Grokster*, U.S. Supreme Court (June 27, 2005) 122

NO: **Stephen Breyer**, from Concurring Opinion, *Metro-Goldwyn-Mayer Studios v. Grokster*, U.S. Supreme Court (June 27, 2005) 127

Justice Ginsburg believes that the copyright laws are violated by a company when its software is used primarily for illegal file sharing, and lawful uses in the future are unlikely. Justice Breyer does not want the copyright laws to hinder technological innovation and is more willing to take into account the potential use of the software for lawful file sharing.

Issue 7. Is the Eighth Amendment Protection Violated If Prisoners Are Deprived of Basic Sustenance, Including Adequate Medical Care? 140

YES: **Anthony Kennedy**, from Majority Opinion, *Brown v. Plata*, U.S. Supreme Court (May 23, 2011) 142

NO: **Antonin Scalia**, from Dissenting Opinion, *Brown v. Plata*, U.S. Supreme Court (May 23, 2011) 151

Supreme Court Justice Anthony Kennedy rules that if a prison deprives prisoners of basic sustenance, including adequate medical care, the courts have a responsibility to remedy the resulting violation of the Eighth Amendment. Justice Antonin Scalia believes that a ruling that may result in the release of 40,000 prisoners is unwarranted and unprecedented.

UNIT 3 LAW AND THE STATE 161

Issue 8. Should Judges Be Elected Rather Than Appointed? 162

YES: **Michael R. Dimino, Sr.**, from “The Worst Way of Selecting Judges—Except All the Others That Have Been Tried,” *Northern Kentucky L. Rev.*, v. 32, pp. 267–304 (2005) 164

NO: **Charles Gardner Geyh**, from “Why Judicial Elections Stink,” *Ohio St. L.J.*, v. 64, pp. 43–79 (2003) 175

Professor Michael Dimino claims that electing judges is no worse than appointing them and that it is appropriate for citizens to have a say in who will be making decisions that affect them. Professor Charles Geyh criticizes the practice of electing judges and argues that it reduces judicial independence and accountability.

Issue 9. Do Religious Groups Have a Right to Use Public School Facilities After Hours? 189

YES: **Clarence Thomas**, from Majority Opinion, *Good News Club, et al., v. Milford Central School*, U.S. Supreme Court (June 11, 2001) 191

NO: **David Souter**, from Dissenting Opinion, *Good News Club, et al., v. Milford Central School*, U.S. Supreme Court (June 11, 2001) 201

Supreme Court Justice Clarence Thomas affirms the right of religious groups to use school facilities after the school day ends, maintaining that restricting such use is a violation of free speech rights. Supreme Court Justice David Souter, dissenting from the Court's opinion, contends that the use of school facilities by religious groups blurs the line between public classroom instruction and private religious indoctrination and therefore violates the Establishment Clause of the Constitution.

Issue 10. Does the First Amendment Protect Picketing a Funeral Even When It Intentionally Inflicts Emotional Distress on the Family? 209

YES: **John Roberts**, from Majority Opinion, *Snyder v. Phelps*, U.S. Supreme Court (March 2, 2011) 211

NO: **Samuel Alito**, from Dissenting Opinion, *Snyder v. Phelps*, U.S. Supreme Court (March 2, 2011) 218

Chief Justice John Roberts holds that picketing a soldier's funeral in a way that may be hurtful to those attending is still protected by the First Amendment. Justice Samuel Alito argues that intentionally inflicting severe emotional injury on private persons should not be considered to be protected speech.

Issue 11. Can a School Punish a Student for Speech at a School-Supervised Event Off of School Grounds When That Speech Could Be Viewed as Promoting Illegal Drug Use? 225

YES: **John Roberts**, from Majority Opinion, *Deborah Morse, et al., v. Joseph Frederick*, U.S. Supreme Court (June 25, 2007) 227

NO: **John Paul Stevens**, from Dissenting Opinion, *Deborah Morse, et al., v. Joseph Frederick*, U.S. Supreme Court (June 25, 2007) 236

Supreme Court Chief Justice John Roberts rules that a student's First Amendment rights are not violated by restrictions on speech that can reasonably be regarded as encouraging illegal drug use. Supreme Court Justice John Paul Stevens argues that an ambiguous reference to drugs does not justify limiting a student's speech.

Issue 12. Is a Strip Search of Middle School Students That Is Aimed at Finding Drugs Prohibited Under the Fourth Amendment? 248

YES: **David Souter**, from Majority Opinion, *Safford Unified School District, et al., v. April Redding*, U.S. Supreme Court (June 25, 2009) 250

NO: **Clarence Thomas**, from Dissenting Opinion, *Safford Unified School District, et al., v. April Redding*, U.S. Supreme Court (June 25, 2009) 258

Supreme Court Justice David Souter holds that a search in school requires a reasonable belief that evidence of wrongdoing will be found and that the search is not excessively intrusive in light of the age and sex of the student. Supreme Court Justice Clarence Thomas argues that the

Fourth Amendment was not violated when there is reasonable suspicion that the student is in possession of drugs banned by school policy and the search is in an area where small pills could be concealed.

Issue 13. Does the “Cruel and Unusual Punishment” Clause of the Eighth Amendment Bar the Imposition of the Death Penalty on Juveniles? 268

YES: Anthony Kennedy, from Majority Opinion, *Roper v. Simmons*, U.S. Supreme Court (March 1, 2005) 270

NO: Antonin Scalia, from Dissenting Opinion, *Roper v. Simmons*, U.S. Supreme Court (March 1, 2005) 276

Supreme Court Justice Anthony Kennedy holds that the Constitution prohibits the execution of a person who was under the age of 18 at the time of the offense. Supreme Court Justice Antonin Scalia believes that the Constitution does not preclude the execution of a juvenile.

Issue 14. Is a Sentence of Life in Prison for Stealing \$150 Worth of Videotapes Constitutional? 285

YES: Sandra Day O’Connor, from Majority Opinion, *Lockyer v. Andrade*, U.S. Supreme Court (March 5, 2003) 287

NO: David Souter, from Dissenting Opinion, *Lockyer v. Andrade*, U.S. Supreme Court (March 5, 2003) 295

Supreme Court Justice Sandra Day O’Connor rules that a decision in a case involving the theft of \$150 worth of merchandise that resulted in two consecutive terms of 25 years to life in prison for a “third strike” conviction was not “grossly disproportional” to the crime nor “contrary to, or an unreasonable application of, clearly established federal law.” Supreme Court Justice David Souter argues that under several prior Supreme Court decisions, the “third strike” punishment in this case was grossly disproportional to the crime committed.

Issue 15. Can Noise Coming from Inside an Apartment and Which the Police Believe Involves the Destruction of Drugs Constitute “Exigent Circumstances” That Allow Police Officers to Enter and Search a Home Without a Warrant? 301

YES: Samuel Alito, from Majority Opinion, *Kentucky v. King*, U.S. Supreme Court (May 16, 2011) 303

NO: Ruth Bader Ginsburg, from Dissenting Opinion, *Kentucky v. King*, U.S. Supreme Court (May 16, 2011) 313

Justice Samuel Alito holds that a warrant is unnecessary when “exigent circumstances” exist and the police have not created them. Justice Ruth Bader Ginsburg believes that the “exigent circumstances” must exist before the police arrive and that in this case a warrant should have been obtained before entry into the apartment.

Issue 16. Is the Fourth Amendment Search and Seizure Guaranty Violated by the Use of High-Technology Thermal Imaging Devices? 318

YES: **Antonin Scalia**, from Majority Opinion, *Danny Lee Kyllo v. United States*, U.S. Supreme Court (June 11, 2001) 320

NO: **John Paul Stevens**, from Dissenting Opinion, *Danny Lee Kyllo v. United States*, U.S. Supreme Court (June 11, 2001) 327

Supreme Court Justice Antonin Scalia maintains that thermal imaging devices reveal information “that would previously have been unknowable without physical intrusion” and that using such devices for surveillance without a warrant constitutes a violation of the Fourth Amendment. Supreme Court Justice John Paul Stevens asserts that the Court’s application of search and seizure rules to new technology is too broad and that collecting thermal imaging data from outside the home is not a violation of privacy rights.

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Issue 17. Is There a Constitutional Right to Possess a Firearm for Private Use? 338

YES: **Antonin Scalia**, from Majority Opinion, *District of Columbia, et al. v. Dick Anthony Heller*, U.S. Supreme Court (June 26, 2008) 340

NO: **John Paul Stevens**, from Dissenting Opinion, *District of Columbia, et al. v. Dick Anthony Heller*, U.S. Supreme Court (June 26, 2008) 350

Supreme Court Justice Antonin Scalia argues that the Second Amendment protects the right of a private citizen to own a handgun for self-defense. Supreme Court Justice John Paul Stevens argues that a previous case, *United States v. Miller*, held that the Second Amendment did not protect the right of a private citizen to own a handgun for self-defense.

Issue 18. Are Blanket Prohibitions on Cross Burnings Unconstitutional? 361

YES: **Sandra Day O’Connor**, from Majority Opinion, *Virginia v. Black, et al.*, U.S. Supreme Court (April 7, 2003) 363

NO: **Clarence Thomas**, from Dissenting Opinion, *Virginia v. Black, et al.*, U.S. Supreme Court (April 7, 2003) 374

Supreme Court Justice Sandra Day O’Connor argues that a Virginia statute proscribing all forms of cross burning is unconstitutional because symbolic speech can only be prohibited when done with the intent to intimidate, and such an intent cannot be inferred solely from the type of symbolic speech used. Supreme Court Justice Clarence Thomas argues that the history and nature of cross burning in the United States inextricably links the act to threatening and menacing violence and that the intent to intimidate can therefore be inferred solely from the act of cross burning itself.

Issue 19. Should Same-Sex Couples Receive Constitutional Protection? 382

YES: **Margaret Marshall**, from Majority Opinion, *Goodridge, et al., v. Department of Public Health*, Massachusetts Supreme Judicial Court (2003) 384

NO: **Robert Cordy**, from Minority Opinion, *Goodridge, et al., v. Department of Public Health*, Massachusetts Supreme Judicial Court (2003) 392

Massachusetts Supreme Judicial Court Chief Justice Margaret Marshall rules that prohibiting same-sex couples from marrying causes hardship to a segment of the population for no rational reason. Massachusetts Supreme Judicial Court Justice Robert Cordy, in dissent, holds that a statute banning same-sex marriage is a valid exercise of the state's police power.

Issue 20. Do Race-Conscious Programs in Public University Admissions Policies Violate the Fourteenth Amendment's Guarantee of Equal Protection Under the Law? 400

YES: **Clarence Thomas**, from Dissenting Opinion, *Barbara Grutter v. Lee Bollinger et al.*, U.S. Supreme Court (June 23, 2003) 402

NO: **Sandra Day O'Connor**, from Majority Opinion, *Barbara Grutter v. Lee Bollinger et al.*, U.S. Supreme Court (June 23, 2003) 409

Supreme Court Justice Clarence Thomas argues that the University of Michigan Law School's admissions policy discriminates on the basis of race and is therefore in violation of the Fourteenth Amendment's equal protection clause. Supreme Court Justice Sandra Day O'Connor holds that the admissions policy of the University of Michigan Law School, which makes race one factor among many in the process of creating a diverse student body, does not violate the Constitution's guarantee of equal protection under the law.

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