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Lauren K. Gralnik

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## THE SELF-INCRIMINATION CLAUSE: RAISING THE BAR FOR THOSE BEHIND BARS

*McKune v. Lile*, 122 S. Ct. 2017 (2002)

*Lauren K. Gralnik*\* \*\*

Petitioner's Sexual Abuse Treatment Program<sup>1</sup> required participating inmates to admit responsibility for past crimes, thereby subjecting themselves to potential criminal prosecution.<sup>2</sup> The rehabilitative program was aimed at reducing recidivism upon an inmate's release and promoting public safety.<sup>3</sup> Nonparticipation resulted in an inmate's immediate housing transfer and automatic loss of certain privileges.<sup>4</sup> Respondent challenged the program, alleging that it violated his Fifth Amendment right against self-incrimination.<sup>5</sup> The district court held that the consequences for not participating in the program amounted to coercion in violation of the Fifth Amendment.<sup>6</sup> Petitioner appealed the decision and the appellate court affirmed, holding that the consequences were penalties constituting

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\* From the bottom of my heart, I would like to thank Ryan Courson for always walking by my side, rain or shine.

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1. Petitioner, the warden of the Kansas Department of Corrections, requires inmates participating in its Sexual Abuse Treatment Program to complete an "Admission of Responsibility" form, thus accepting responsibility for the crime for which they have been sentenced. *McKune v. Lile*, 122 S. Ct. 2017, 2025 (2002). Participants must also fill out a sexual history form, detailing prior sexual activities, which may include uncharged criminal offenses. *Id.* at 2023. Information provided is verified by a polygraph examination, and discussed in group therapy sessions. *Id.* at 2023, 2025.

2. *Id.* at 2025. Information obtained from prisoners is not privileged, and may be used against them in future criminal proceedings. *Id.* Additionally, state law requires program staff to report any uncharged sexual offenses involving minors to appropriate authorities. *Id.* at 2023.

3. *Id.* at 2024. The Court noted that convicted sex offenders reentering society "are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.*

4. *Id.* at 2023. Respondent's refusal to participate in the program would result in an immediate housing transfer from a medium-security unit to a maximum-security unit, where his movement would be more limited; he would reside in a four-person cell rather than a two-person cell, and generally be in a more dangerous environment. *Id.* As a result of the automatic reduction in privilege status from Level III to Level I, Respondent's visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, and television access would be limited. *Id.*

5. *Id.* The Fifth Amendment Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

6. *Lile v. McKune*, 24 F. Supp. 2d 1152, 1157 (D. Kan. 1998).

compulsion.<sup>7</sup> The Supreme Court granted certiorari,<sup>8</sup> and in reversing the appellate court's decision, HELD, that offering prisoners incentives to participate in the program did not amount to compulsion prohibited by the Fifth Amendment.<sup>9</sup>

The Fifth Amendment Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."<sup>10</sup> Courts analyze self-incrimination claims by assessing whether a consequence of invoking the privilege is severe enough to constitute compulsion.<sup>11</sup> Typically, the use made of the invocation and the timing of its consequences aid in determining whether one has been unconstitutionally compelled.<sup>12</sup>

In *Baxter v. Palmigiano*,<sup>13</sup> the Court considered whether the Fifth Amendment prohibited drawing adverse inferences against an inmate for his failure to testify at a prison disciplinary hearing.<sup>14</sup> The Court stated that an adverse inference drawn from an inmate's silence must be balanced with other factors.<sup>15</sup> Accordingly, the Court assessed the consequence imposed on the inmate, based on his silence and independent evidence of his guilt, and held that no constitutional violation had occurred.<sup>16</sup>

The Court added that an inmate's mere invocation of the privilege would not justify an automatic penalty.<sup>17</sup> The Court also noted that the State could avoid a constitutional violation by offering an inmate use immunity, thereby waiving prosecution in exchange for desired

7. *Lile v. McKune*, 224 F.3d 1175, 1189 (10th Cir. 2001).

8. 532 U.S. 1018 (2001). The Court stated that the issue was whether Petitioner's program and the consequences imposed for nonparticipation combine to create unconstitutional compulsion. *McKune*, 122 S. Ct. at 2025.

9. *McKune*, 122 S. Ct. at 2032.

10. U.S. CONST. amend. V.

11. *See, e.g., McKune*, 122 S. Ct. at 2025 (discussing whether the consequence of invocation of the self-incrimination privilege created a compulsion that encumbered a constitutional right).

12. *See id.* at 2037-40 (Stevens, J., dissenting) (surveying prior self-incrimination cases).

13. 425 U.S. 308 (1976).

14. *Id.* at 316.

15. *See id.* at 318. This balancing considered the granting of use immunity for self-incriminating statements, the possibility of a consequence that does not automatically follow from invocation of the privilege, and independent evidence to sustain a conviction. *See id.*

16. *Id.* at 320. The Court further remarked that prior to the disciplinary hearing, the inmate was given copies of the Inmate Disciplinary Report and the superior's investigation report, containing the charges and evidence against him. *Id.* at 320 n.4. The fact that the inmate chose to remain silent at the hearing, the two reports, and supplementary reports were factors given equal weight in the Disciplinary Board's decision to place him in punitive segregation for thirty days. *See id.*

17. *Id.* at 317; *see also* *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y.*, 392 U.S. 280, 283 (1968) (holding that dismissal of public employees solely for invoking their constitutional right against self-incrimination violated the Constitution).

testimony.<sup>18</sup> However, the Court did not define a precise test to identify the consequences that compel self-incrimination in a prison environment.<sup>19</sup>

Subsequently, in *Sandin v. Conner*,<sup>20</sup> the Court formulated a standard to determine the constitutionality of prison regulations under the Due Process Clause.<sup>21</sup> The Court analyzed whether state prison regulations<sup>22</sup> or the Due Process Clause itself afforded inmates a liberty interest in remaining free from solitary confinement.<sup>23</sup> Holding that neither provided the inmate with a protected liberty interest,<sup>24</sup> the Court enunciated a framework for analyzing prisoners' due process rights.<sup>25</sup>

The Court recognized a constitutional violation as one that "imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."<sup>26</sup> The Court found that the consequence imposed on the inmate did not markedly differ from aspects of ordinary prison confinement.<sup>27</sup> Therefore, the Court held that the inmate's due

18. *Baxter*, 425 U.S. at 318. Use immunity prevents the State from using an inmate's own words against him in a subsequent prosecution. See *McKune v. Lile*, 122 S. Ct. 2017, 2044 (2002) (Stevens, J., dissenting). Alternatively, transactional immunity prevents the State from prosecuting an inmate altogether. See *id.* (Stevens, J., dissenting).

19. See *Baxter*, 425 U.S. at 325-40 (Brennan, J., dissenting) (comparing prior Fifth Amendment cases to the Court's holding).

20. 515 U.S. 472 (1995).

21. *Id.* at 484. The Due Process Clause states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

22. The text of the regulation read:

Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. *A finding of guilt shall be made where:*

- (1) The inmate or ward admits the violation or pleads guilty.
- (2) *The charge is supported by substantial evidence.*

*Sandin*, 515 U.S. at 477 n.3 (alteration in original) (quoting Haw. Admin. R. § 17-201-18(b)(2) (1983)).

23. *Id.* at 477. The Court recognized that states may, under certain circumstances, create liberty interests protected by the Due Process Clause. *Id.* at 484. However, the Court also stated that these interests would generally be "limited to freedom from restraint [that] imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.*

24. *Id.* at 486.

25. *Id.*

26. *Id.* at 484.

27. *Id.* at 486. The Court explained that disciplinary segregation mirrored the conditions imposed upon inmates in administrative segregation and protective custody, and that inmates in the general population received "significant amounts of 'lockdown time.'" *Id.* Hence, the Court noted that thirty days in solitary confinement did not significantly alter the inmate's actual sentence. See

process rights were not violated because no liberty interest was implicated.<sup>28</sup>

Despite the available test set forth in *Sandin*, the Court in *Ohio Adult Parole Authority v. Woodard*<sup>29</sup> used *Baxter* to evaluate whether prison clemency procedures violated an inmate's Fifth Amendment right against self-incrimination.<sup>30</sup> The Court observed that, because the inmate's participation in the clemency interview was voluntary, adverse inferences drawn from his silence would not amount to compulsion.<sup>31</sup> Likewise, any pressure the inmate felt to speak to improve his chances for clemency would not make the interview compelled.<sup>32</sup>

The Court noted that, although the State did not grant immunity for statements made during the interview, the inmate's silence would not necessarily result in prosecution for other crimes or a denial of clemency.<sup>33</sup> Rather, the clemency board retained the discretion to draw adverse inferences against the inmate.<sup>34</sup> The Court balanced the inmate's choice with the possible consequence of his participation and held that the clemency procedures did not violate the Self-Incrimination Clause.<sup>35</sup>

Although the plurality in the instant Court acknowledged the factors discussed in *Baxter* and *Woodard*, it applied the *Sandin* analysis to determine whether Petitioner's program violated Respondent's right against self-incrimination.<sup>36</sup> Conceding that *Sandin* did not provide a precise parallel to determine whether a consequence of invoking the privilege amounted to compulsion, the instant Court nonetheless stated that *Sandin* provided useful instruction.<sup>37</sup> The instant Court held that the

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*id.*

28. *Id.* at 486.

29. 523 U.S. 272 (1998).

30. *Id.* at 286. The Court first determined that the inmate's due process was not violated by the State's clemency procedures before addressing the self-incrimination claim. *Id.* at 275.

31. *See supra* note 15 and accompanying text.

32. *Woodard*, 523 U.S. at 286.

33. *See id.* The inmate's choice to answer questions during the clemency interview could possibly subject him to the risk of incrimination because of concurrent post-conviction proceedings. *See id.* at 285.

34. *See id.* at 286. Because the inmate retained a choice in participating in the interview, any consequence flowing from his decision was possible, but not automatic. *See id.* Although the adverse inferences drawn from the inmate's silence could ultimately lead to his execution, the Court noted that the use made of an inmate's refusal to answer questions was unclear. *See id.*

35. *See id.* The Court likened the inmate's choice to participate in the clemency interview to the choices criminal defendants must routinely make. *Id.*

36. *McKune v. Lile*, 122 S. Ct. 2017, 2027-28 (2002).

37. *Id.* at 2026-27. The Court used *Sandin* to support its assertion that a convicted felon's life in prison differs from that of an ordinary citizen. *Id.* at 2027. Furthermore, the Court stated that in the prison context, the Fifth Amendment-compulsion inquiry must consider the significant restraints already inherent in prison life. *Id.*

consequences Respondent faced for his silence did not constitute unconstitutional compulsion.<sup>38</sup>

Furthermore, the plurality noted that the compulsion inquiry must consider the significant restraints already inherent in prison life balanced against the State's interests in rehabilitation and prison procedures.<sup>39</sup> Consequently, the instant Court upheld the program's automatic sanctions.<sup>40</sup> The instant Court classified participation in the program as voluntary, and viewed the consequences of nonparticipation as incidental to the program's legitimate penological purpose.<sup>41</sup> Moreover, the instant Court did not consider the consequences that Respondent faced as penalties.<sup>42</sup>

Applying *Sandin's* atypical and significant hardship standard, the plurality characterized Petitioner's program as offering incentives to participants.<sup>43</sup> The instant Court noted that inmates regularly experienced the types of consequences imposed on non-participants.<sup>44</sup> Thus, the instant Court held that Petitioner's program, and the automatic consequences following the choice not to participate, did not violate Respondent's Fifth Amendment right against self-incrimination.<sup>45</sup>

Concurring in the final judgment, Justice O'Connor stated that the *Sandin* standard was inappropriate for evaluating a self-incrimination claim.<sup>46</sup> Although noting that the instant case involved burdens rather than benefits, Justice O'Connor concluded that the penalties imposed were not harsh enough to constitute compulsion under any reasonable test.<sup>47</sup> Justice O'Connor further stated that the proper analysis should recognize that the

38. *Id.* at 2030.

39. *See id.* at 2027.

40. *Id.* at 2030. Immediate sanctions included a housing transfer to a more restrictive unit, limited mobility within that unit, and a reduction in privilege status. *Id.* at 2023.

41. *See id.* at 2027.

42. *See id.* at 2028-30. The Court noted that "[t]here is no indication that the [program] is an elaborate attempt to avoid the protections offered by the privilege against compelled self-incrimination." *Id.* at 2028. Further, the Court suggested that the State's legitimate interests trumped the program's incidental burden on an inmate's right to remain silent. *See id.*

43. *See id.* at 2032. The Court defined the choice to participate as deciding between losing prison privileges and accepting responsibility for past crimes. *Id.* at 2030. The Court then de-emphasized any distinction Respondent might make between offering a reward for participation and imposing a penalty for nonparticipation. *See id.* at 2031.

44. *See id.* Labeling Respondent's medium-security housing as an "illusory baseline," the Court gave a detailed example to illustrate the random nature of prison housing assignments. *See id.*

45. *Id.* at 2032.

46. *See id.* at 2035 (O'Connor, J., concurring).

47. *Id.* at 2034-35 (O'Connor, J., concurring).

risk of punishment may be great, so long as the actual punishment is imposed through a fair criminal process.<sup>48</sup>

In a lengthy dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, argued that the plurality improperly appraised the program's mandatory sanctions as minimal incentives.<sup>49</sup> Moreover, Justice Stevens disagreed with the notion that Respondent's consequences for invoking the privilege were not significant enough to compel self-incrimination.<sup>50</sup> Specifically, Justice Stevens discussed the dignitary and reputational harms imposed by a housing transfer and loss of privileges.<sup>51</sup> Justice Stevens asserted that Respondent's consequential burden should be gauged by his settled expectations regarding the conditions of his confinement.<sup>52</sup> Furthermore, Justice Stevens suggested that the plurality disregarded prior precedent, using Respondent's prisoner status to require a heightened showing of compulsion.<sup>53</sup>

By upholding Petitioner's program using the *Sandin* analysis, the instant Court narrows the scope of prisoners' constitutional rights as recognized by prior Fifth Amendment jurisprudence.<sup>54</sup> Although mentioning *Baxter* and *Woodard* in its analysis, the instant Court emphasizes extrinsic factors in determining that Petitioner's program does not unconstitutionally compel self-incrimination.<sup>55</sup> Particularly, the instant

48. See *id.* at 2035 (O'Connor, J., concurring) (citing *McGautha v. California*, 402 U.S. 183, 213 (1971)).

49. *Id.* at 2036 (Stevens, J., dissenting).

50. *Id.* at 2040 (Stevens, J., dissenting).

51. See *id.* at 2040-41 (Stevens, J., dissenting). Justice Stevens noted that the loss of privileges imposed on nonparticipating inmates was also imposed on inmates for serious disciplinary infractions. *Id.* at 2040 (Stevens, J., dissenting). Petitioner's Internal Management Policy and Procedure 11-101 provides that an inmate

shall be automatically reduced to Level I for any of the following: (1) Termination from a work or program assignment for cause; (2) Refusal to participate in recommended programs at the time of placement; (3) Offenses committed in which a felony charge is filed with the district or county prosecutor; (4) Disciplinary convictions for: (a) Theft; (b) Being in a condition of drunkenness, intoxication, or a state of altered consciousness; (c) Use of stimulants, sedatives, unauthorized drugs, or narcotics, or the misuse, or hoarding of authorized or prescribed medication; (d) Sodomy, aggravated sodomy, or aggravated sexual act; (e) Riot or incitement to riot; (f) Arson; (g) Assault; (h) Battery; (i) Inmate Activity (limitations); (j) Sexual Activity; (k) Interference with Restraints; (l) Relationships with Staff; (m) Work Performance; or (n) Dangerous Contraband.

*Id.* at 2040 n.8 (Stevens, J., dissenting).

52. *Id.* at 2041 (Stevens, J., dissenting).

53. *Id.* at 2038 (Stevens, J., dissenting).

54. See *id.* at 2043 (Stevens, J., dissenting).

55. See *id.* at 2027-30. The Court initially used *Baxter* to illustrate its contention that

Court stresses the uncertain nature of prison life and the vital State interests in rehabilitating prisoners and maintaining prison authority to reach its decision.<sup>56</sup>

The instant Court gives minimal weight to *Baxter*'s requirement that granting use immunity in exchange for desired self-incriminating information is necessary to avoid violating the Fifth Amendment.<sup>57</sup> Under *Baxter*, Petitioner's program should afford participants the requisite protection in exchange for their mandatory confessions.<sup>58</sup> The instant Court arguably ignores this requirement, focusing on the program's legitimate penological purpose rather than the risk of prosecution imposed on participants.<sup>59</sup>

Furthermore, the instant Court minimizes the immediacy of the housing transfer and loss of privilege status upon an inmate's invocation of the privilege.<sup>60</sup> The instant Court labels the transfer to maximum security as incidental to the program's needs,<sup>61</sup> rather than as punitive.<sup>62</sup> Referring to the *Sandin* axiom that inmates must expect fewer privileges than free citizens,<sup>63</sup> the instant Court avoids fully analyzing the factors considered in *Baxter*.<sup>64</sup> A more thorough analysis of *Baxter* would likely lead the instant Court to reach a different conclusion.<sup>65</sup>

In *Baxter*, temporary punitive segregation was imposed only after independent evidence of the inmate's guilt was presented and weighed

incarceration places limitations on a prisoner's exercise of the privilege against self-incrimination. *See id.* at 2027. Furthermore, the Court stated that the automatic nature of Respondent's consequences for nonparticipation is not a sufficient reason to ignore *Woodard* and *Baxter*, where the consequences imposed did not automatically follow the inmate's invocation of the privilege. *See id.* at 2030.

56. *See id.* at 2028.

57. *See id.* at 2032; *see also* *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

58. *See supra* note 18 and accompanying text. The State offered two reasons for not granting immunity to participants of Petitioner's program. *McKune*, 122 S. Ct. at 2025. First, the State wants participants to accept full responsibility for their past actions, thus accepting that those actions carry consequences. *Id.* Second, the State confirms its valid interest in deterrence by keeping open the option to prosecute a particularly dangerous offender. *Id.* The Court noted that although incriminating evidence had never been disclosed under the program, state law requires the program staff to report any uncharged sexual offenses involving minors to law enforcement authorities. *Id.* at 2023.

59. *See id.* at 2027. *But cf. id.* at 2043 (Stevens, J., dissenting) (arguing that because State interests in law enforcement and rehabilitation are ever-present, using them to justify infringing on an inmate's Fifth Amendment right would do away with the right itself).

60. *See id.* at 2027.

61. *Id.* The Court explained that inmates who choose not to participate in the program are moved out of the facility where the programs are held to make room for participating inmates. *Id.*

62. *See supra* note 51 and accompanying text.

63. *See McKune*, 122 S. Ct. at 2027.

64. *See id.* at 2030.

65. *See id.* at 2039, 2044-45 (Stevens, J., dissenting).

equally with an adverse inference drawn from his silence.<sup>66</sup> Arguably, a permanent transfer to maximum security imposed immediately upon invoking the privilege against self-incrimination is a more severe consequence.<sup>67</sup> However, the instant Court overemphasizes Respondent's inmate status and concludes that he should be accustomed to housing transfers and changes in privileges,<sup>68</sup> thus minimizing the rights that *Baxter* recognizes.<sup>69</sup>

The instant Court departs not only from the reasoning of *Baxter*, but also from the reasoning of *Woodard*.<sup>70</sup> Comparing Respondent's loss of privileges with the possible execution in *Woodard*, the instant Court determines that Respondent's consequences are too mild to constitute compulsion.<sup>71</sup> It is debatable whether the instant Court fully accounts for the certainty of Respondent's consequences in its analysis.<sup>72</sup>

Although Respondent faced an automatic reduction in privileges and an immediate housing transfer for invoking the privilege, the instant Court emphasizes the voluntary nature of Petitioner's program.<sup>73</sup> The instant Court likens Respondent's decision to participate in the program to the inmate's choice to participate in the clemency interview in *Woodard*.<sup>74</sup> The instant Court seemingly strays from *Woodard's* analysis, couching its conclusion in terms of choices rather than consequences.<sup>75</sup>

In the instant case, Respondent was guaranteed to automatically lose his privilege status and be transferred to a maximum-security unit upon refusal to participate in Petitioner's program.<sup>76</sup> The instant Court describes the hardships Respondent faced for nonparticipation as *de minimus* harms, and disregards the dangerousness of the maximum-security unit.<sup>77</sup> Hence, the instant Court seems complacent, permitting more than the allowable

66. See *supra* note 16 and accompanying text.

67. See *supra* note 17 and accompanying text.

68. See *McKune*, 122 S. Ct. at 2031.

69. See *supra* note 18 and accompanying text.

70. See *supra* notes 16 & 35 and accompanying text.

71. See *McKune*, 122 S. Ct. at 2030.

72. See *id.* at 2029-30.

73. See text accompanying note 41. The language of the Court in labeling Petitioner's program as voluntary is particularly illustrative of its reasoning: "If respondent was not compelled to participate in the [program], his participation was voluntary in the only sense necessary for our present inquiry." See *McKune*, 122 S. Ct. at 2030.

74. See *id.*

75. See *id.*

76. See *supra* note 4 and accompanying text.

77. See *McKune*, 122 S. Ct. at 2028-29. Respondent explained that in the maximum-security unit, more gang activity occurs, reported and unreported rapes of inmates are more prevalent, and sex offenders are seen as targets for rape and physical and mental assaults. *Id.* at 2041 n.9 (Stevens, J., dissenting).

adverse inferences of *Baxter* and *Woodard* to be drawn against an inmate confronted with the choice to participate in Petitioner's program.<sup>78</sup>

Additionally, *Woodard*, a post-*Sandin* decision, indicates that the *Sandin* standard was meant to apply only to due process claims and not to self-incrimination cases.<sup>79</sup> In *Woodard*, the inmate brought a due process claim and a self-incrimination claim.<sup>80</sup> The Court discussed each claim separately, noting *Sandin* only in its due process analysis.<sup>81</sup> Had *Sandin* been intended to offer a broad framework to analyze inmates' constitutional claims, logic would dictate that the Court apply the atypical and significant hardship standard to both claims raised in *Woodard*.<sup>82</sup> Justice O'Connor's concurrence and Justice Stevens' dissent in the instant case also demonstrate that five of nine Supreme Court justices agree that *Sandin* is not the appropriate test for evaluating self-incrimination claims.<sup>83</sup>

Thus, the plurality in the instant case presumably utilized *Sandin* only to convey that inmates do not have as many constitutional rights as free citizens.<sup>84</sup> Focusing on the State's interests in reducing recidivism, increasing public safety, and strengthening prison administration, the instant Court discounts the factors applied in prior self-incrimination cases.<sup>85</sup> It is questionable whether Petitioner's program would be held constitutional applying existing Fifth Amendment jurisprudence.<sup>86</sup> Hence, the instant Court's holding may be interpreted as being clouded by a policy judgment favoring a stronger prison system.<sup>87</sup> The instant Court's reluctance to follow its own precedent dangerously broadens the scope of *Sandin* and jeopardizes inmates' constitutional rights.<sup>88</sup>

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78. *See id.* at 2036 (Stevens, J., dissenting).

79. *See supra* note 30 and accompanying text.

80. *See supra* note 30 and accompanying text.

81. *See supra* note 30 and accompanying text.

82. *See McKune*, 122 S. Ct. at 2038 (Stevens, J., dissenting).

83. *See supra* notes 46 & 53 and accompanying text.

84. *See McKune*, 122 S. Ct. at 2027.

85. *See id.* at 2036 (Stevens, J., dissenting) (arguing that "the plurality's policy judgment does not justify the evisceration of a constitutional right").

86. *See id.* (Stevens, J., dissenting) (describing the plurality's analysis as a "meandering attempt to justify its unprecedented departure from a rule of law that has been settled since the days of John Marshall").

87. *See* Gina Holland, *Court Reviews Sex Offenders Rights*, WASH. POST, Nov. 28, 2001, available at <http://www.washingtonpost.com/ac2/wp-dyn/A30141-2001Nov28?language=printer> (stating that the Bush administration and other states want the Supreme Court justices to use the instant case to extend prison authority).

88. *See id.* (suggesting that other states will expand their sex offender treatment programs in response to the instant Court's holding).

