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# The Supreme Court, 1996 Term: Leading Cases

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# LEADING CASES

## I. CONSTITUTIONAL LAW

### A. Commerce Clause

*Dormant Commerce Clause — Application to Nonprofit Entities.* — Over the past twenty years, the Supreme Court has struck down under the dormant commerce clause several discriminatory state tax incentive programs for businesses.<sup>1</sup> Last Term, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,<sup>2</sup> the Court held unconstitutional Maine's charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions but excluded entities serving primarily non-Maine residents.<sup>3</sup> By refusing to treat state tax exemptions for nonprofit, charitable entities differently from exemptions for for-profit, business firms, the Court wisely avoided further complicating its dormant commerce clause jurisprudence. However, the Court missed two opportunities to strengthen its opinion. First, it overemphasized the difficulty of distinguishing nonprofit from for-profit institutions and neglected to explain that this distinction is irrelevant in light of the specific purposes of the dormant commerce clause. Second, in treating the terms "nonprofit" and "quasi-governmental" as if they were coextensive, the majority failed to address the dissent's legitimate concern regarding the unique complications raised by state regulation of quasi-governmental entities. As a result, the Court ignored the fundamental constitutional tension that this case exposes — the tension between state autonomy and national union.

In April 1992, Camps Newfound/Owatonna (Camps), a Maine nonprofit corporation that operates Christian Science summer camps in the state, demanded that the Town of Harrison refund its property taxes and grant it a continuing property tax exemption under Maine's charitable tax exemption statute.<sup>4</sup> The statute exempted "benevolent

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<sup>1</sup> See, e.g., *New Energy Co. v. Limbach*, 486 U.S. 269, 274–80 (1988) (holding unconstitutional a credit against Ohio's motor fuel tax that was based principally on the quantity of Ohio-produced ethanol a company sold); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (invalidating a Hawaii liquor tax from which certain locally produced liquors were exempted); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (striking down a New York securities transfer tax that applied lower rates to transfers involving sales within New York state and that advantaged New York brokers). For a thorough study of the Court's recent dormant commerce clause treatment of state tax incentives, see Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 793–815 (1996).

<sup>2</sup> 117 S. Ct. 1590 (1997).

<sup>3</sup> See *id.* at 1595–96.

<sup>4</sup> See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 655 A.2d 876, 877 (Me. 1995).

and charitable institutions”<sup>5</sup> from property taxes but disallowed exemptions for nonprofit institutions “conducted or operated principally for” nonresidents of Maine.<sup>6</sup> The Town applied the statute to deny Camps the exemption.<sup>7</sup> The superior court granted Camps summary judgment on dormant commerce clause grounds.<sup>8</sup>

On appeal, the supreme judicial court vacated and remanded.<sup>9</sup> The Maine court first inquired whether the statute facially discriminated against interstate commerce or regulated “evenhandedly with only incidental effects on interstate commerce.”<sup>10</sup> The court determined the latter characterization to be more accurate because, rather than favoring all in-state camps over out-of-state camps, the statute simply favored, among in-state camps, those camps that served primarily Maine residents.<sup>11</sup> The court deemed legitimate the state’s desire “to relieve the charit[ies] from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide.”<sup>12</sup> In addition, it found that the statute did not impose significant burdens on interstate commerce.<sup>13</sup> Thus, the court held that Camps had failed to meet “its heavy burden of persuasion that the exemption statute [was] unconstitutional.”<sup>14</sup>

Upon review, the Supreme Court reversed.<sup>15</sup> Writing for a five-Justice majority,<sup>16</sup> Justice Stevens held that “disparate real estate tax treatment of a nonprofit service provider based on the residence of [its]

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<sup>5</sup> ME. REV. STAT. ANN. tit. 36, § 652(1)(A) (West Supp. 1996).

<sup>6</sup> *Camps*, 655 A.2d at 877 (quoting title 36, § 652(1)(A)(1)) (internal quotation marks omitted).

<sup>7</sup> *See id.* Approximately 95% of Camps’s campers were nonresidents. *See id.*

<sup>8</sup> *See id.* at 878. Camps also argued in both the Maine Superior Court and the Maine Supreme Judicial Court that the exemption statute violated the Equal Protection Clauses of Maine’s Constitution and of the Fourteenth Amendment to the United States Constitution, as well as the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. *See id.* at 879–80. Both courts denied these claims, *see id.* at 877, 879–80, and Camps did not raise them before the United States Supreme Court, *see* Brief for Petitioner at 1–2, *Camps* (No. 94-1988), available in 1996 WL 24552.

<sup>9</sup> *See Camps*, 655 A.2d at 878, 880.

<sup>10</sup> *Id.* at 878–79. Statutes that discriminate against interstate commerce on their face are subject to a “virtually per se rule of invalidity,” which may only be overcome by a showing that the regulation “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *New Energy Co. v. Limbach*, 486 U.S. 269, 278–79 (1988) (applying this test to a discriminatory tax credit program). Under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), if an evenhanded state regulation affects interstate commerce only incidentally, courts must evaluate whether the state’s interest in the statute is legitimate, and must compare the relative weight of the interstate burdens and the local benefits. *See id.* at 142. If a legitimate local purpose exists, courts should sustain the statute unless the burden on interstate commerce is “clearly excessive in relation to the putative local benefits.” *Id.*

<sup>11</sup> *See Camps*, 655 A.2d at 879.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See Camps*, 117 S. Ct. at 1595.

<sup>16</sup> Justices O’Connor, Kennedy, Souter, and Breyer joined in Justice Stevens’s opinion.

consumers” is unconstitutional under the dormant commerce clause.<sup>17</sup> The Town argued that the camp was not involved in interstate commerce because the campers were not articles of commerce and because it delivered its product entirely within the State of Maine; Justice Stevens rejected these arguments.<sup>18</sup> The court also dispensed with the Town’s argument that the dormant commerce clause was inapplicable because the statute created an exemption to taxation of real estate, an area that Congress cannot regulate.<sup>19</sup> Even assuming arguendo that Congress could not enact a national real estate tax under its Commerce Clause powers, the Court held that the dormant commerce clause still prohibits states from levying a real estate tax, just as it does any other tax, in a manner that discriminates against interstate commerce.<sup>20</sup>

Second, the Court analyzed the statute under the dormant commerce clause.<sup>21</sup> The Court likened the Maine law to statutes limiting nonresidents’ access to natural resources, statutes that the Court had found discriminatory in prior cases.<sup>22</sup> It acknowledged that the Maine statute did not create a complete ban on out-of-state access to Maine’s nonprofit entities, but it concluded that the statute did create an unconstitutional incentive, comparable to that created by the intangibles tax struck down in *Fulton Corp. v. Faulkner*,<sup>23</sup> for Maine’s charitable institutions not to do business with nonresidents.<sup>24</sup>

Third, having resolved that, “if petitioner’s camp were a profit-making entity, the discriminatory tax exemption would be impermissible,”<sup>25</sup> the Court examined whether the Maine statute would fall within any exception to the dormant commerce clause, and specifically investigated the propriety of an exception for state regulation of the nonprofit sector.<sup>26</sup> Justice Stevens noted that the Court had applied

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<sup>17</sup> *Camps*, 117 S. Ct. at 1596.

<sup>18</sup> *See id.* at 1596–97.

<sup>19</sup> *See id.* at 1597.

<sup>20</sup> *See id.* at 1597–98. Justice Stevens explained that such a rule as the Town proposed would allow states to evade the enforcement of the dormant commerce clause by enacting any discriminatory tax in the form of a tax upon the real estate used in connection with the taxed activity. *See id.* at 1598.

<sup>21</sup> *See id.*

<sup>22</sup> *See id.* at 1598–99 (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982)).

<sup>23</sup> 116 S. Ct. 848, 852 (1996) (striking down an intangibles tax, the level of which was tied to in-state operations).

<sup>24</sup> *See Camps*, 117 S. Ct. at 1599. The majority also declined to give constitutional significance to the distinction between a direct discriminatory tax on out-of-state consumers and an indirect tax imposed on those consumers through the institutions with which they do business. *See id.* at 1599–1600 (concluding that that the Maine statute “functionally serve[d] as an export tariff”).

<sup>25</sup> *Id.* at 1602.

<sup>26</sup> *See id.* at 1602–07. The Court rejected the Town’s other two arguments that the statute should withstand dormant commerce clause scrutiny. The Town argued first that the exemption should be upheld because it operated as a constitutional *subsidy* of Maine charities. *See id.* at



commercial regulation to the nonprofit sector in the past, and found no reason that the dormant commerce clause should not similarly apply.<sup>27</sup> The Court explained that nonprofit institutions constitute major forces in the competitive marketplace.<sup>28</sup> Although the Court recognized Maine's reasonable desire to encourage its nonprofit institutions to focus their charity locally, it stated that the dormant commerce clause forbids protectionism, whether targeted at nonprofit or for-profit entities.<sup>29</sup> Having found that the statute facially discriminated against interstate commerce in violation of the dormant commerce clause and that it came within no exception to that clause, the Court held the statute unconstitutional.<sup>30</sup>

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1604-05. Second, it argued that the statute fell within the "market participant" exception to the dormant commerce clause because it allowed Maine to purchase charitable services for its residents, services that the state would otherwise have to supply. *Id.* at 1604-07. Under *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), when a state enters and participates in a market, its actions that discriminate against nonresidents are not subject to dormant commerce clause review. *See Camps*, 117 S. Ct. at 1606-07; *Hughes*, 426 U.S. at 809-10.

Responding to the first of these arguments, the majority held that the exemption should not be treated as a subsidy. *See Camps*, 117 S. Ct. at 1604-05. Although the Court had earlier likened the statute to a discriminatory export tariff, *see id.* at 1600-01, here the Court saw "no reason to depart from" its strict exemption/subsidy distinction through a functional examination of the economic operation of the exemption, *id.* at 1606. Rather than inquiring more deeply into the economic effects of the Maine statute and providing a fully developed rationale to support special treatment for subsidies, the Court relied on the qualitative and "constitutionally significant difference between subsidies and tax exemptions." *Id.* at 1605; *accord id.* at 1605 nn.23, 25. Justice Stevens also noted that the recent decision in *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), and Justice Scalia's concurrence in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), turned on the exemption/subsidy distinction. *See Camps*, 117 S. Ct. at 1605-06. This posture signals that the Court will continue to avoid restricting state subsidies on dormant commerce clause principles but will continue to invalidate other discriminatory state regulations that function analogously to subsidies. The Court had a number of arguments to draw from to support its "subsidies-are-different" jurisprudence; it cited to some of them, but it did not elaborate. *See id.* at 1606.

Turning to the Town's market participant argument, the Court concluded that the state had acted in its governmental capacity to enact a tax exemption and had not acted in a proprietary capacity to enter and participate in a market; only the latter type of action is excepted from the scrutiny of the dormant commerce clause. *See id.* The majority emphasized the narrow scope of the market participant exception and warned that, if the Town's argument were to prevail, virtually any discriminatory tax exemption could fall within the exception. *See id.*

<sup>27</sup> *See Camps*, 117 S. Ct. at 1602-03 (citing, inter alia, National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100 n.22 (1984) (applying antitrust law to nonprofits), and *Associated Press v. NLRB*, 301 U.S. 103, 128-29 (1937) (applying labor law)). Justice Stevens further recognized that the dormant commerce clause had previously been applied to regulation of activities undertaken with no profit motivation. *See id.* (citing *Edwards v. California*, 314 U.S. 160, 172-73 (1941)).

<sup>28</sup> *See id.* at 1602-04 & n.18 (noting the multi-billion-dollar revenues of nonprofit nursing homes, child day care centers, and hospitals); *see also* Brief of The Christian Legal Society et al. in Support of Petitioner at 18-19, *Camps* (No. 94-1988), available in 1996 WL 243471 (describing the size of the nonprofit sector).

<sup>29</sup> *See Camps*, 117 S. Ct. at 1604.

<sup>30</sup> *See id.* at 1607-08. The Court noted that, if a need for an exception to the dormant commerce clause for nonprofits existed, Congress was empowered to and better suited to formulate it than was the Court. *See id.* at 1604.

Justice Scalia dissented.<sup>31</sup> He emphasized that the Maine statute was narrowly focused to cover only institutions serving quasi-governmental functions, and he contrasted this understanding with the majority's conception of the statute as one broadly covering the entire nonprofit sector.<sup>32</sup> Largely due to his perception that these quasi-governmental entities serve an overriding state interest, Justice Scalia argued that the statute survived dormant commerce clause scrutiny or justified a general exception to the clause for state-supported charities.<sup>33</sup>

First, Justice Scalia argued that the Maine statute did not necessarily facially discriminate against interstate commerce.<sup>34</sup> He contended that, although the statute treated entities that provide charitable services to nonresidents differently from those entities that primarily serve in-state clients, this disparity did not constitute discrimination because the two types of entities are not similarly situated — the latter type eases the state's welfare burden, whereas the former type provides virtually no such benefit to the state.<sup>35</sup> Under this view, the statute only incidentally affected interstate commerce and should have been upheld, because the local purpose of providing charitable

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<sup>31</sup> See *id.* at 1608 (Scalia, J., dissenting). Chief Justice Rehnquist, Justice Thomas, and Justice Ginsburg joined in Justice Scalia's dissent. Justice Thomas also penned a separate dissent, joined by Justice Scalia and joined in part by Chief Justice Rehnquist. See *id.* at 1614 (Thomas, J., dissenting). Justice Thomas argued that the Court's dormant commerce clause jurisprudence "was already both overbroad and unnecessary." *Id.* at 1615. He contended that the judicial role in this area should be limited to striking down discriminatory taxes and that even this power ought to be exercised under the Import-Export Clause rather than under the dormant commerce clause. See *id.* Because Justice Thomas's arguments are beyond the scope of this Comment, references to "the dissent" or "the dissenters" denote Justice Scalia's dissent and those Justices joining it.

<sup>32</sup> See *id.* at 1609 (Scalia, J., dissenting). Justice Scalia argued that the Maine statute was "designed merely to compensate or subsidize those organizations that contribute to the public fisc by dispensing public benefits the State might otherwise provide." *Id.* To support his assertion that the exemption would not be universally applicable to nonprofit organizations, Justice Scalia cited *Holbrook Island Sanctuary v. Inhabitants of Brooksville*, 214 A.2d 660 (Me. 1965), which held that a wildlife sanctuary could not receive the exemption because its prohibition on deer hunting conflicted with state game management policy. See *Camps*, 117 S. Ct. at 1610 (Scalia, J., dissenting) (citing *Holbrook Island*, 214 A.2d at 666-67).

<sup>33</sup> See *Camps*, 117 S. Ct. at 1614 (Scalia, J., dissenting).

<sup>34</sup> See *id.* at 1611.

<sup>35</sup> See *id.* Justice Scalia compared Maine's statute with the statute upheld in *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997). See *Camps*, 117 S. Ct. at 1611 (Scalia, J., dissenting). *Tracy* upheld an Ohio state use tax that exempted regulated sellers of natural gas (all of which were Ohio companies at the time of the case) but not other sellers (all of which were out-of-state companies at that time). See *Tracy*, 117 S. Ct. at 818-19. The *Tracy* Court explained that the Ohio tax structure did not violate the dormant commerce clause because the regulated entities were not similarly situated to the other fuel distributors and because the entities served other important goals. See *id.* at 823-30. In *Camps*, Justice Scalia argued that the goals that Maine's statute served were no less crucial than the goals served by the statute upheld in *Tracy*. See *Camps*, 117 S. Ct. at 1611 (Scalia, J., dissenting).

services was legitimate and the burden on interstate commerce was not excessive.<sup>36</sup>

Next, the dissent asserted that the statute should have been upheld even if it did facially discriminate against interstate commerce and was therefore subject to the “virtually per se rule of invalidity.”<sup>37</sup> Justice Scalia based this argument on the lack of reasonable nondiscriminatory alternatives available to achieve the statute’s legitimate local purpose of providing charitable services to Maine residents.<sup>38</sup> In response to the majority’s contention that a general subsidy to Maine users of charitable services would provide such a nondiscriminatory alternative, the dissent argued that a subsidy would be equally discriminatory.<sup>39</sup>

Finally, the dissent suggested that state regulation of domestic charities should be excluded from dormant commerce clause review.<sup>40</sup> Maintaining that *General Motors Corp. v. Tracy*<sup>41</sup> created a new exception to the clause, Justice Scalia argued that, in this case, the Court should likewise have looked beyond its traditional “market participant” and “subsidy” exceptions and created a “domestic charity” exception to the clause.<sup>42</sup> The dissent contended that a state’s direct or indirect provision of social welfare benefits to its own residents “implicates none of the concerns underlying our negative-commerce-clause jurisprudence.”<sup>43</sup>

Although the majority reached a prudent conclusion, two critical omissions leave its opinion unsatisfying. First, because the opinion failed to show the lack of relation between a nonprofit or for-profit

<sup>36</sup> See *Camps*, 117 S. Ct. at 1611 (Scalia, J., dissenting).

<sup>37</sup> *Id.* at 1608–11 (emphasis omitted).

<sup>38</sup> See *id.* at 1611–12. Justice Scalia analogized the exemption to regulations that limit the provision of welfare assistance and state services to residents and that constitute a discriminatory practice that courts have invariably held constitutional. See *id.* at 1612 (citing *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)). However, statutes conditioning benefits on *duration* of residency have been held unconstitutional under the Equal Protection Clause, because they abridge the right to interstate travel. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 58–65 (1982) (finding no rational basis for a law distributing benefits in proportion to duration of residency); *Shapiro v. Thompson*, 394 U.S. 618, 629–33 (1969) (finding denial of benefits based on residency requirement violative of the Equal Protection Clause and the right to travel interstate).

The dissent also asserted that the Court, in *Board of Education v. Illinois*, 203 U.S. 553 (1906), had already approved state regulation that compensated or subsidized charitable providers with the aim of indirectly providing social services to state residents. See *Camps*, 117 S. Ct. at 1612–13 (Scalia, J., dissenting) (citing *Board of Educ. v. Illinois*, 203 U.S. at 562–63 (allowing a state inheritance tax exemption for in-state charities and denying it to out-of-state charities)).

<sup>39</sup> See *Camps*, 117 S. Ct. at 1612 n.3 (Scalia, J., dissenting).

<sup>40</sup> See *id.* at 1612–13.

<sup>41</sup> 117 S. Ct. 811 (1997).

<sup>42</sup> *Camps*, 117 S. Ct. at 1614 (Scalia, J., dissenting).

<sup>43</sup> *Id.* This section of Justice Scalia’s opinion echoes Professor Donald H. Regan’s argument that discriminatory purpose ought to be the touchstone of dormant commerce clause review. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1143–60 (1986).

mission and the values protected by the dormant commerce clause, it did not adequately address the reasons that the nonprofit character of the institutions regulated by the Maine statute is irrelevant to the dormant commerce clause analysis. Second, the majority failed to confront the dissent's understanding of the Maine statute's peculiarity — that it only regulated entities providing quasi-governmental services. This omission is troubling, because it allowed the majority to skirt the most difficult issue that *Camps* presented — how to reconcile the competing constitutional impulses to allow the states to reserve some state benefits solely to residents, on the ground of state autonomy, and to prevent state favoritism of local interests, on the ground of antiprotectionism.<sup>44</sup>

The majority wisely refused to create “any categorical distinction between the activities of profit-making enterprises and not-for-profit entities”<sup>45</sup> for purposes of the dormant commerce clause. As the majority noted, the nonprofit sector has grown enormously in both size and diversity;<sup>46</sup> the increasing similarity of many nonprofit institutions to their for-profit counterparts makes the nonprofit/for-profit distinction a poor proxy for whether an entity participates in interstate commerce. The majority could have bolstered its analysis by emphasizing that any distinction between nonprofit and for-profit entities is meaningless in terms of the values that the dormant commerce clause seeks to preserve. The majority did state that “[p]rotectionism, whether targeted at for-profit entities or serving, as here, to encourage nonprofits to keep their efforts close to home, is forbidden under the dormant Commerce Clause.”<sup>47</sup> However, instead of simply rejecting the nonprofit/for-profit distinction without considering the context in which it arose, the Court should have examined the purposes of the clause to show the irrelevance of nonprofit status to the dormant commerce clause analysis.

The dominant value underlying the dormant commerce clause is the prevention of state protectionism.<sup>48</sup> One commentator has identified three objections to state protectionism: the “concept-of-union,” “resentment/retaliation,” and “efficiency” objections.<sup>49</sup> These evils of pro-

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<sup>44</sup> See Jonathan D. Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487, 490–93 (1981).

<sup>45</sup> *Camps*, 117 S. Ct. at 1603.

<sup>46</sup> See *id.* at 1603 & n.18. In 1995, the IRS noted that 1,164,789 tax-exempt organizations existed, and nonprofit organizations currently control over one trillion dollars in assets. See JOHN HAWKS, *FOR A GOOD CAUSE?* 14–15 (1997).

<sup>47</sup> *Camps*, 117 S. Ct. at 1604 (citation omitted).

<sup>48</sup> See *id.*; *New Energy Co. v. Limbach*, 486 U.S. 269, 273–74 (1988); Regan, *supra* note 43, at 1110–25.

<sup>49</sup> Regan, *supra* note 43, at 1112–16. Regan argues that the dormant commerce clause should concern protectionism alone and that the Court's dormant commerce clause jurisprudence does just that. See *id.* at 1206. Regan also restricts his theses to those cases after 1935 involving the

tectionism do not discriminate along profit lines. Excluding nonprofit institutions that provide services to residents of other states from benefits accorded to similar entities serving home-state residents undermines political and economic union in the same way as does a discriminatory tax structure concerning for-profit organizations.<sup>50</sup> Tax exemption exclusions like Maine's could also certainly engender dangerous resentment and retaliation from other states.

Finally, tax exemptions structured to exclude entities serving non-residents are inefficient in the sense that they function to shift business away from presumptively lower-cost (foreign) and toward higher-cost (local) consumers of charitable services "without any colorable justification in terms of a benefit that deserves approval from the point of view of the nation as a whole."<sup>51</sup> Assuming that all charities would be on equal economic footing without the exclusion, the exemption significantly raises the costs of charities serving foreigners by forcing these charities to pay comparatively higher taxes.<sup>52</sup> Because the statute at issue merely encouraged the transfer of resources from entities serving residents of other states to entities serving Maine residents, it lacked a colorable justification in terms of a benefit deserving national approval. Under any of the three objections to protectionism, providing nonprofit entities with tax incentives to serve principally state residents is no more constitutionally appropriate than protecting in-state for-profit businesses that similarly benefit the state and its residents.<sup>53</sup>

The second missing element of the majority's opinion is a result of the Court's treatment of the terms "nonprofit" and "quasi-govern-

movement of goods, *see id.* at 1093-94, 1098-1101, but his formulation of the values that are ill-served by protectionism may be applied more broadly.

<sup>50</sup> Tax discrimination among nonprofit institutions also implicates dormant commerce clause concerns about economic union and a national common market in exactly the same way as it does among for-profits. *See* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 43-45, 63-64 (1988).

<sup>51</sup> Regan, *supra* note 43, at 1118.

<sup>52</sup> *See* Brief of The American Council on Education et al. in Support of Petitioner at 13-17, *Camps* (No. 94-1988), available in 1996 WL 249495.

<sup>53</sup> Another justification for the dormant commerce clause, one that is little utilized in the Court's opinions, is that provided by process theorists, who argue that the clause's purpose is to provide virtual representation for the interests of foreign constituencies likely to be unrepresented in state decisionmaking processes. *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 435-74 (1982); *see also* Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 396 (1986) (describing the two main purposes of current dormant commerce clause jurisprudence to be the furtherance of free trade and the prevention of discrimination against outsiders unrepresented in the political process). *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 82-88 (1980) (describing the process theory of judicial review, from which the process theory of the dormant commerce clause emanates). Although the statute in this case regulated only Maine corporations, their potential out-of-state clients were harmed by the incentive created for charities to focus on an in-state clientele. Because these out-of-state interests have no representation in Maine, the process theory would, like the three evils of protectionism, also require dormant commerce clause review, regardless of the regulated entities' nonprofit or for-profit status.

mental” as if they were coextensive. *Camps* differed from prior discriminatory tax incentive cases, because the entities regulated were nonprofit and quasi-governmental institutions. However, an entity that possesses one of these characteristics does not necessarily possess the other. The majority and the dissent each focused on only one of these characteristics, but they failed to appreciate the consequences of each other’s emphases.

The majority focused on the difficulty of meaningfully distinguishing for-profit and nonprofit institutions in today’s economy. It stated that protectionism, regardless of the motivations of the protected institutions, is intolerable under the dormant commerce clause.<sup>54</sup> In contrast, the dissent rested its arguments on the underlying assumption that quasi-governmental institutions, which provide services that reduce the state’s burden, should be treated differently from other regulated entities for purposes of the dormant commerce clause.<sup>55</sup> The similarities of the nonprofit and for-profit sectors aside, this view contends that distribution of governmental services should be valued highly enough either to pass dormant commerce clause scrutiny or to escape review entirely.<sup>56</sup> By failing to recognize the issues raised by the dissent’s emphasis of the camp’s “quasi-governmental” character, the majority missed the opportunity to confront the dissent’s key criticism of the Court’s position and to grapple with the competing interests in state autonomy and national union that *Camps* presents.

The dissent’s position is understandable. As Justice Scalia asserted, a state’s protection of charities seems qualitatively different from its protection of local businesses.<sup>57</sup> Because states can assist charities in various ways, most notably through the structure of their tax systems, protection for in-state charities does not evoke suspicion of protectionism as strongly as does regulation sheltering for-profit business endeavors. Further, it seems anomalous to require review of a state’s incentive structure for private organizations offering aid to state residents but not to subject distribution of public assistance directly from a state to its residents to dormant commerce clause scrutiny.

However, the majority could have argued that the dissent’s position that quasi-governmental organizations should be treated differently is neither definitive under dormant commerce clause jurisprudence nor a practical approach to the problem in *Camps*. The cases upon which the dissent’s arguments rely were decided under other constitutional

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<sup>54</sup> See *Camps*, 117 S. Ct. at 1602–04.

<sup>55</sup> See *id.* at 1609–10 (Scalia, J., dissenting). The dissent argued that “there is no valid comparison between . . . the State’s giving tax relief to an enterprise devoted to the making of profit and . . . the State’s giving tax relief to an enterprise which . . . has the same objective as the State itself (the expenditure of funds for social welfare).” *Id.* at 1613 n.4.

<sup>56</sup> See *id.* at 1612–13.

<sup>57</sup> See *id.* at 1613 n.4.

analyses and are thus distinguishable.<sup>58</sup> The Court could have stated that, although many constitutional clauses attempt to balance protection of state autonomy and prohibition of discriminatory state regulation — including the dormant commerce clause, the Interstate Privileges and Immunities Clause, and the Equal Protection Clause<sup>59</sup> — it would continue to deal with these constitutional objections under separate standards.<sup>60</sup> Additionally, the Court could have relied upon its jurisprudence of limiting exceptions to the dormant commerce clause<sup>61</sup> to argue that creating an additional exception to the clause on any ground would be unwarranted. The trend of cabining exceptions to the clause includes the Court's limitation of the "subsidy" exception to formal subsidies, a rule it employed in the *Camps* opinion itself.<sup>62</sup>

Finally, the majority could have argued that a rule providing for differential dormant commerce clause treatment for nonprofit entities performing quasi-governmental functions would suffer practical limitations. First, it is very difficult to determine whether a particular function is "governmental" or "quasi-governmental," as the Court's retreat from a similar categorization exercise in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>63</sup> makes clear.<sup>64</sup> Second, it would be difficult to justify limiting differential treatment to nonprofits serving quasi-governmental functions, given that for-profit industries also perform such functions, either in partnership with or in the absence of government entities.<sup>65</sup> For these reasons, a rule that distinguished entities on the basis of their "quasi-governmental" functions would be very difficult to administer.

Noting both the nonprofit sector's magnitude and potency and the broad sweep of the dormant commerce clause's antiprotectionist man-

<sup>58</sup> See *id.* at 1612 (citing *Martinez v. Bynum*, 461 U.S. 321 (1983) (rejecting challenges under the Equal Protection Clause and the right to travel interstate), and *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976) (rejecting a challenge under the right to travel interstate)).

<sup>59</sup> See *Varat*, *supra* note 44, at 487-90.

<sup>60</sup> See *id.* at 492-93 (observing the lack of a general theory "to separate those publicly provided benefits belonging peculiarly to state residents and those to which nonresidents must be accorded equal access" and linking current dormant commerce clause and Interstate Privileges and Immunities Clause doctrine).

<sup>61</sup> See, e.g., *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984). In *South-Central*, the Court emphasized that the market participant exception must be applied by defining markets narrowly to avoid "swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry." *Id.* at 98.

<sup>62</sup> See *Camps*, 117 S. Ct. at 1604-07. The dissent would surely have challenged any "cabining" argument by the majority on the ground that last Term's decision in *General Motors Corp. v. Tracy*, 117 U.S. 811 (1997), created a new exception. See *Camps*, 117 S. Ct. at 1613-14 (Scalia, J., dissenting); *supra* note 35.

<sup>63</sup> 469 U.S. 528 (1984).

<sup>64</sup> See *id.* at 530.

<sup>65</sup> See, e.g., LESTER M. SALAMON, *PARTNERS IN PUBLIC SERVICE* 223-25, 231-39 (1995) (describing the role of for-profit institutions in providing welfare and other social services).

date, the Supreme Court wisely struck down Maine's charitable property tax exemption statute, just as it would have done "if petitioner's camp were a profit-making entity."<sup>66</sup> However, the Court could have strengthened its argument against differential treatment for regulation of nonprofits by demonstrating that the values underlying the dormant commerce clause render the nonprofit/for-profit distinction irrelevant. In addition, the Court's opinion would have been considerably more persuasive had the majority recognized that regulation of quasi-governmental institutions tests the boundaries of current dormant commerce clause jurisprudence. As the dissent understood, *Camps* stands at the crossroads of two competing constitutional interests: the federalism interest in allowing states to provide some benefits only to their residents and the national interest in preventing states from discriminating against nonresidents.<sup>67</sup> By omitting any discussion of this tension, the majority left the dissent's criticisms, as well as the most difficult issues that *Camps* raised, essentially unanswered.

### B. Constitutional Structure

1. *Federalism — Compelling State Officials to Enforce Federal Regulatory Regimes.* — Since the Supreme Court's decision in *New York v. United States*,<sup>1</sup> debate has renewed about Congress's power to enlist state officials in the execution of federal regulatory regimes. Last Term, in *Printz v. United States*,<sup>2</sup> the Court held that Congress has no such power at all, and accordingly invalidated portions of the Brady Handgun Violence Prevention Act.<sup>3</sup> Although the challenged provisions of the statute may well have been unconstitutional, the Court's bright-line rule against federal commandeering of state officials rests uncomfortably with its prior jurisprudence, and leaves lawmakers with little guidance as they address new policymaking challenges in an era of federalism.

In 1993, Congress responded to the nation's rising "epidemic of gun violence"<sup>4</sup> by passing the Brady Handgun Violence Prevention Act ("Brady Act" or "Act").<sup>5</sup> An amendment to the Gun Control Act of

<sup>66</sup> *Camps*, 117 S. Ct. at 1602.

<sup>67</sup> See Varat, *supra* note 44, at 490-93.

<sup>1</sup> 505 U.S. 144 (1992); see *id.* at 177 (invalidating a statutory provision that required states either to develop waste disposal plans or to take title to low-level radioactive waste).

<sup>2</sup> 117 S. Ct. 2365 (1997).

<sup>3</sup> Pub. L. No. 103-159, §§ 101-106, 107 Stat. 1536-44 (1993) (codified as amended at 18 U.S.C. §§ 921-925A (1994); 42 U.S.C. § 3759 (1994)).

<sup>4</sup> H.R. REP. NO. 103-344, at 8 (1993).

<sup>5</sup> §§ 101-106, 107 Stat. at 1536-44, amended by Pub. L. No. 103-322, 108 Stat. 2074 (1994).



1968,<sup>6</sup> the Brady Act gave the Attorney General until November 30, 1998, to establish a national system through which handgun distributors would conduct instant criminal background checks on prospective purchasers.<sup>7</sup> In the interim, distributors had to collect and forward information about each prospective purchaser to the chief law enforcement officer in the area (CLEO).<sup>8</sup>

Under the statutory framework, the CLEO — a state or local official — then had five business days within which “to make a reasonable effort to ascertain” whether a prospective purchaser could lawfully receive and possess a handgun.<sup>9</sup> If the applicant passed the background check, the CLEO had to destroy any record of his research.<sup>10</sup> If the applicant failed the background check, the CLEO had to provide a written explanation upon request.<sup>11</sup> However, a CLEO had no obligation to try to prevent a handgun transfer, even if he concluded that the purchaser’s receipt of the handgun would be illegal.<sup>12</sup> Moreover, the Act immunized CLEOs from liability for reaching erroneous conclusions after conducting these background checks,<sup>13</sup> and

<sup>6</sup> Pub. L. No. 90-618, 82 Stat. 1213 (codified in pertinent part as amended at 18 U.S.C. §§ 921–928). The Gun Control Act “establishe[d] a detailed federal scheme governing the distribution of firearms” to convicted felons, illegal immigrants, drug users, and other persons. *Printz*, 117 S. Ct. at 2368.

<sup>7</sup> See 18 U.S.C. § 922 note (establishing the National Instant Criminal Background Check System).

<sup>8</sup> See *id.* § 922(s)(1)(A)(i)(I)–(IV). As the *Printz* Court explained:

Under the interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from the transferee a statement (the Brady Form), containing the name, address and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers; (2) verify the identity of the transferee by examining an identification document; and (3) provide the “chief law enforcement officer” (CLEO) of the transferee’s residence with notice of the contents (and a copy) of the Brady Form. With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal.

*Printz*, 117 S. Ct. at 2368–69 (citations omitted) (citing 18 U.S.C. § 922(s)(1)(A)(i)–(ii)).

The Act provided two significant alternatives to this scheme. “A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, or if state law provides for an instant background check.” *Id.* at 2369 (citations omitted) (citing 18 U.S.C. § 922(s)(1)(C)–(D)).

<sup>9</sup> 18 U.S.C. § 922(s)(2). “[R]easonable effort” was defined to include “research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.” *Id.*

<sup>10</sup> See *id.* § 922(s)(6)(B)(i).

<sup>11</sup> See *id.* § 922(s)(6)(C).

<sup>12</sup> See Brief for Respondent at 5–6, *Printz* (Nos. 95-1478, 95-1503), available in 1996 WL 595005.

<sup>13</sup> See 18 U.S.C. § 922(s)(7). Although the Act states that any person who “knowingly violates [the Brady Act] shall be fined under this title, imprisoned for no more than 1 year, or both,” *id.* § 924(a)(5), the Justice Department has indicated that it would not apply this criminal sanction to law enforcement officials. See *Mack v. United States*, 66 F.3d 1025, 1033 (9th Cir. 1995).

fully excused CLEOs from performing checks if local conditions made them “impracticable.”<sup>14</sup>

Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, each filed a declaratory judgment action seeking to invalidate these interim enforcement measures on the ground that they impermissibly compelled state officers to execute federal law.<sup>15</sup> In each case, the federal district court found that the mandated background check violated the Tenth Amendment,<sup>16</sup> but also held that this requirement was severable from the rest of the statute, “effectively leaving a voluntary background-check system in place” until 1998.<sup>17</sup>

The Ninth Circuit reversed both decisions in a consolidated appeal.<sup>18</sup> Writing for a divided panel,<sup>19</sup> Judge Canby explained that the Supreme Court’s Tenth Amendment jurisprudence does not proscribe the federal government from enlisting the assistance of state governments in every respect.<sup>20</sup> To the contrary, the court found that the Tenth Amendment at most prevents the federal government from “coerc[ing] the States into legislating or regulating according to [its] dictates.”<sup>21</sup> Because the Brady Act’s background check requirement did not command CLEOs “to engage in the central sovereign processes of enacting legislation or regulations,” the Ninth Circuit concluded that the statute imposed duties “not different from other minor obligations that Congress has imposed on state officials”<sup>22</sup> — duties that did not conscript the states in their sovereign capacity, shackle the states with political accountability for a federal regime, or impose anything more than minimal burdens on state officers.<sup>23</sup>

<sup>14</sup> See 18 U.S.C. § 922(s)(1)(F).

<sup>15</sup> See *Mack v. United States*, 856 F. Supp. 1372, 1375 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503, 1510–11 (D. Mont. 1994).

<sup>16</sup> The Arizona District Court found that the Brady Act was void for vagueness insofar as it threatened CLEOs with criminal sanctions based on an “imprecise and indefinite” background check requirement. *Mack*, 856 F. Supp. at 1381–82. The Arizona court further found that “in enacting section 18 U.S.C. 922(s)(2), Congress exceeded its authority under Article I, section 8 of the United States Constitution, thereby impermissibly encroaching upon the powers retained by the states pursuant to the Tenth Amendment.” *Id.* at 1383–84.

The Montana District Court held that the criminal sanctions did not apply to law enforcement officers, but concluded that “[b]y requiring the states to carry out an unfunded federal mandate, Congress ha[d] substantially commandeered state executive officers and indirectly commandeered the legislative processes of the states to administer a federal program,” thereby exceeding its Article I, Section 8 powers, and violating the Tenth Amendment. *Printz*, 854 F. Supp. at 1519.

<sup>17</sup> *Printz*, 117 S. Ct. at 2369.

<sup>18</sup> See *Mack*, 66 F.3d at 1034.

<sup>19</sup> Judge Choy joined Judge Canby’s opinion.

<sup>20</sup> See *Mack*, 66 F.3d at 1030–31.

<sup>21</sup> *Id.* at 1030.

<sup>22</sup> *Id.* at 1031.

<sup>23</sup> See *id.* at 1031–32. Judge Fernandez dissented, accusing Congress of “dragoon[ing]” state officials into enforcing a federal regulatory program. See *id.* at 1035 (Fernandez, J., dissenting). Under the Brady Act, Judge Fernandez explained, state law enforcement officers would face bur-

The Supreme Court granted certiorari to resolve a conflict among the circuits,<sup>24</sup> and reversed in a 5-4 decision. Writing for the majority,<sup>25</sup> Justice Scalia began his opinion by rejecting the Government's contention that even "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws."<sup>26</sup> In the Court's view, these early laws<sup>27</sup> "establish[ed], at most, that the Constitution was originally understood to permit [the] imposition of an obligation on state *judges* to enforce federal prescriptions."<sup>28</sup> Thus, the Court observed, although the Framers probably adhered to "the natural assumption that the States would consent to allowing their [executive] officials to assist the Federal Government," nothing in the original understanding of the Constitution would have required that result.<sup>29</sup>

Justice Scalia then considered the Act in light of the federal structure mapped out by the Constitution. Under a system of dual sovereignty,<sup>30</sup> the Court explained, the states retain "residuary and inviolable"<sup>31</sup> independence from federal control.<sup>32</sup> To allow Congress to enlist the assistance of state executive officers would erode this system by distorting the division of power between the federal and state governments.<sup>33</sup> Moreover, the Court emphasized, federal commandeering would disrupt the separation of powers within the federal government

dense research and recordkeeping obligations, for which states would bear the full cost, unless they adopted a local permit system to bypass the statute. *See id.* (citing 18 U.S.C. § 922(s)(1)(C) (1994)).

<sup>24</sup> Unlike the Second and Ninth Circuits, *see Frank v. United States*, 78 F.3d 815, 830 (2d Cir. 1996), *vacated*, 117 S. Ct. 2501 (1997) (mem.); *Mack*, 66 F.3d at 1033, the Fifth Circuit concluded that the challenged provisions of the Brady Act did violate the Tenth Amendment, *see Koog v. United States*, 79 F.3d 452, 462 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2507 (1997).

<sup>25</sup> Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined Justice Scalia's opinion.

<sup>26</sup> *Printz*, 117 S. Ct. at 2370 (quoting Brief for Respondent at 8, *Printz* (Nos. 95-1478, 95-1503), available in 1996 WL 595005) (internal quotation marks omitted).

<sup>27</sup> For example, Justice Scalia referred to early congressional statutes that, collectively, required state courts to record applications for citizenship, transmit abstracts of those applications to the Secretary of State, register aliens seeking naturalization, and issue certificates of registry. *See id.*

<sup>28</sup> *Id.* at 2371.

<sup>29</sup> *Id.* at 2372. In fact, the Court noted, other than a few relatively recent federal statutes, history had recorded "almost two centuries of apparent congressional avoidance of the practice" of conscripting state executive officers in the implementation of federal regulatory regimes. *Id.* at 2376.

<sup>30</sup> *See id.* ("It is incontestable that the Constitution established a system of 'dual sovereignty.'" (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990))).

<sup>31</sup> *Id.* (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

<sup>32</sup> *See id.* at 2377 (citing *New York v. United States*, 505 U.S. 144, 161-66 (1992)).

<sup>33</sup> *See id.* at 2378. The Court further noted that the Necessary and Proper Clause could do little to validate the challenged provisions in the Brady Act because legislation violating state sovereignty is not a "proper" means of executing the Commerce Clause. *See id.* at 2378-79.

by enabling Congress to bypass the President in the execution of federal laws.<sup>34</sup>

Turning to its own jurisprudence, the Court also rejected the Government's narrow characterization of *New York v. United States*<sup>35</sup> as prohibiting only federal commandeering of state policymaking authority.<sup>36</sup> Instead, the Court described its holding in *New York* as a broad limitation on the ability of Congress to "compel the States to enact *or administer* a federal regulatory program."<sup>37</sup> The Court therefore invalidated the Brady Act's background check requirement and made clear both that "[i]t matters not whether policymaking is involved, and [that] no case-by-case weighing of the burdens or benefits is necessary" when Congress commandeers state legislative or executive officials.<sup>38</sup>

Justice Stevens dissented.<sup>39</sup> As a matter of constitutional interpretation, Justice Stevens observed first that the Commerce Clause clearly empowered Congress to regulate handguns, and second that the Necessary and Proper Clause was "surely adequate to support the temporary enlistment of local police officers" in this regulatory regime.<sup>40</sup> The Tenth Amendment raised no obstacle, Justice Stevens added, because it merely confirms that Congress has only those powers delegated to it, and imposes no limitations on "the scope or the effectiveness" of how Congress exercises its powers once delegated.<sup>41</sup>

<sup>34</sup> See *id.* at 2378.

<sup>35</sup> 505 U.S. 144 (1992).

<sup>36</sup> See *Printz*, 117 S. Ct. at 2380–81.

<sup>37</sup> *Id.* at 2380 (emphasis added) (quoting *New York*, 505 U.S. at 188) (internal quotation marks omitted). As Justice Scalia observed, the Government's proposed distinction between "policymaking" and "implementation" resembled the line between constitutional and unconstitutional congressional delegations of authority to the executive branch, with all of its attendant definitional difficulties. See *id.* at 2380–81 (citing, inter alia, David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1233 (1985)).

<sup>38</sup> *Id.* at 2384. Justice O'Connor filed a concurring opinion and noted both that state and local law enforcement officers remained free to follow the Brady Act voluntarily and that Congress was free to amend its interim program "to provide for its continuance on a contractual basis with the States." *Id.* at 2385 (O'Connor, J., concurring).

Justice O'Connor also emphasized that *Printz* did not decide "whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid." *Id.* As an example of such ministerial duties, Justice O'Connor pointed to 42 U.S.C. § 5779(a) (1994), which requires state and local law enforcement agencies to report missing children to the Department of Justice. See *Printz*, 117 S. Ct. at 2385 (O'Connor, J., concurring).

Justice Thomas filed a concurring opinion as well, writing separately to express his continuing skepticism about whether the Commerce Clause empowers Congress to regulate intrastate firearms transfers at all. See *Printz*, 117 S. Ct. at 2385 (Thomas, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring)). In any event, Justice Thomas noted, the Second Amendment might be read "to confer a *personal* right to 'keep and bear arms,' a colorable argument" that he hoped the Court eventually would consider. *Id.* at 2386 (quoting U.S. CONST. amend. II).

<sup>39</sup> Justices Souter, Ginsburg, and Breyer joined Justice Stevens's opinion.

<sup>40</sup> *Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting).

<sup>41</sup> *Id.* at 2387–88.

Considering the historical evidence, Justice Stevens criticized the Court for disregarding early statutes imposing “essentially executive duties”<sup>42</sup> on state judges and their clerks. To label these statutes irrelevant simply because “judges” were at issue, he declared, constituted “empty formalistic reasoning of the highest order.”<sup>43</sup> That some statutes merely “requested” rather than “commanded” state action also raised a distinction without a difference, according to Justice Stevens, who described this language as diplomatically chosen but not constitutionally required.<sup>44</sup>

From a structural perspective, Justice Stevens urged that federal commandeering was unlikely to trample state sovereignty because elected members of Congress presumably keep the sovereignty interests of their constituents in mind at all times.<sup>45</sup> Recent legislation restricting unfunded federal mandates demonstrated the effectiveness of these political safeguards.<sup>46</sup> Moreover, simply to prohibit all federal commandeering would necessitate “vast national bureaucracies”<sup>47</sup> — precisely what the Framers hoped to avoid.<sup>48</sup>

The Court’s prior jurisprudence hardly warranted a different conclusion, Justice Stevens added. Although *New York* prohibited the federal government from dictating state legislative choices, the Brady Act did not force CLEOs to exercise “substantial policymaking discretion on that essentially legislative scale.”<sup>49</sup> Instead, the case more closely resembled *Testa v. Katt*,<sup>50</sup> in which the Court upheld a statute requiring state judges to hear federal price control claims “regardless of how otherwise crowded their dockets might be with state law matters.”<sup>51</sup> Thus, Justice Stevens concluded, the Brady Act reflected a lawful policy judgment on the part of Congress designed to “serve the interests of cooperative federalism.”<sup>52</sup>

<sup>42</sup> *Id.* at 2392.

<sup>43</sup> *Id.* (internal quotation marks omitted).

<sup>44</sup> *See id.* at 2393.

<sup>45</sup> *See id.* at 2394.

<sup>46</sup> *See id.* at 2395. The Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C. (Supp. I 1995 & Supp. II 1996)), permits members of Congress to raise procedural objections to unfunded federal mandates, after which the mandate “may not then be enacted unless the Members make an explicit decision to proceed anyway.” *Printz*, 117 S. Ct. at 2396 (Stevens, J., dissenting).

<sup>47</sup> *Printz*, 117 S. Ct. at 2396 (Stevens, J., dissenting).

<sup>48</sup> *See id.*; *see also* THE FEDERALIST NO. 36, at 220 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The national legislature can make use of the *system of each State within that State.*”); *id.* NO. 45, at 291 (James Madison) (“The State governments may be regarded as constituent and essential parts of the federal government . . .”).

<sup>49</sup> *Printz*, 117 S. Ct. at 2398 (Stevens, J., dissenting).

<sup>50</sup> 330 U.S. 386 (1947).

<sup>51</sup> *Printz*, 117 S. Ct. at 2400 (Stevens, J., dissenting).

<sup>52</sup> *Id.* at 2401. Dissenting separately, Justice Souter argued that a straightforward reading of the Federalist Papers provided ample support for the validity of the Brady Act. *See id.* at 2402 (Souter, J., dissenting). Alexander Hamilton had observed that “the legislatures, courts and magis-

*Printz* purported to establish an absolute prohibition against federal commandeering of state legislative and executive officials. But the Court's earlier decisions had invalidated only those federal enactments that coerced state legislatures in their policymaking decisions,<sup>53</sup> overburdened state executive officials,<sup>54</sup> or otherwise saddled the states with political accountability for a federal regulatory regime.<sup>55</sup> By largely abandoning this methodology, *Printz* obscured far more than it clarified and unsettled over fifty years of Tenth Amendment jurisprudence in favor of a bright-line rule, the parameters of which remain unspecified.

Had the Court evaluated the Brady Act within the framework established by its previous decisions,<sup>56</sup> it could have found — as the Ninth Circuit did — that the ministerial act of conducting a background check does not conscript state legislatures, overburden state officials, or upset political accountability.<sup>57</sup> On its face, the statute does not require any action on the part of state legislatures, thereby distinguishing it from the regime invalidated in *New York*.<sup>58</sup> With respect to burdens on state officials, the statute makes clear that a CLEO need only make a “reasonable effort”<sup>59</sup> to determine whether a proposed handgun purchase is lawful, thereby affording the CLEO ample “discretion to tailor background checks to local conditions and resources.”<sup>60</sup> Moreover, a CLEO need not conduct background checks

trates of the respective members [of the Republic would] be incorporated into the operations of the national government as far as its just and constitutional authority extends; and [would] be rendered auxiliary to the enforcement of its laws.” THE FEDERALIST NO. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted). In Justice Souter's view, this and other historical evidence supported the conclusion that the Framers had intended the national government to have the authority, “when exercising an otherwise legitimate power (the commerce power, say), to require state ‘auxiliaries’ to take appropriate action.” *Printz*, 117 S. Ct. at 2404 (Souter, J., dissenting).

Justice Breyer also filed a separate dissent, commenting that, as an empirical matter, other nations had successfully required constituent states to implement national laws. *See id.* (Breyer, J., dissenting). In light of their experiences, Justice Breyer observed, there was “neither need nor reason to find in the Constitution an absolute principle” against federal commandeering. *Id.* at 2405.

<sup>53</sup> *See New York v. United States*, 505 U.S. 144, 161–62, 174–77 (1992).

<sup>54</sup> *See EEOC v. Wyoming*, 460 U.S. 226, 239 (1983) (indicating that a constitutional problem would arise if federal legislation imposed a burden so severe as to threaten the states' “separate and independent existence” (quoting *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976)) (internal quotation marks omitted)).

<sup>55</sup> *See New York*, 505 U.S. at 168–69, 174–77.

<sup>56</sup> *See* Brief of Handgun Control, Inc., et al. as Amicus Curiae in Support of Respondent at 5, *Printz* (Nos. 95-1478, 95-1503), available in 1996 WL 585868 (describing this framework).

<sup>57</sup> *See Mack v. United States*, 66 F.3d 1025, 1031–32 (9th Cir. 1995).

<sup>58</sup> *See id.* at 1031.

<sup>59</sup> 18 U.S.C. § 922(s)(2) (1994).

<sup>60</sup> Brief of Handgun Control, Inc., et al. as Amicus Curiae in Support of Respondent at 10, *Printz* (Nos. 95-1478, 95-1503), available in 1996 WL 585868.

at all if performance would be “impracticable,”<sup>61</sup> and in any event, the CLEO enjoys immunity from liability for background checks that he does perform.<sup>62</sup> Taken as a whole, the statute seems to impose burdens that are merely de minimis, and certainly not so extensive as to threaten the states’ “separate and independent existence.”<sup>63</sup>

In terms of accountability, the Court similarly could have concluded — as the Ninth Circuit did — that the Brady Act does not impermissibly saddle the states with political accountability, because it does not force them to make policy decisions in furtherance of a federal regime.<sup>64</sup> Indeed, the Act does not require states to pass intermediate legislation or enabling regulations,<sup>65</sup> the application that triggers the background check is “unmistakably a federal form,”<sup>66</sup> and CLEOs can inform unsuccessful applicants that their rejection was based entirely on federal law.<sup>67</sup> That the Brady Act came about after a seven-year debate “in full view of the public”<sup>68</sup> only underscores the reality that voters will blame Congress, and not CLEOs, for how the statute operates.<sup>69</sup>

On the other hand, the Court could have concluded that the Brady Act was unconstitutional through the application of its established inquiry into burdensomeness and accountability. Under this analysis, the Court could have held that the Act impermissibly burdens CLEOs

<sup>61</sup> See 18 U.S.C. § 922(s)(1)(F). The Secretary of the Treasury can certify that compliance would be impracticable when:

- (i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;
- (ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and
- (iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

*Id.* § 922(s)(1)(F)(i)–(iii).

<sup>62</sup> See *id.* § 922(s)(7).

<sup>63</sup> *EEOC v. Wyoming*, 460 U.S. 226, 239 (1983) (quoting *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976)) (internal quotation marks omitted).

<sup>64</sup> See *Mack v. United States*, 66 F.3d 1025, 1031 (9th Cir. 1995).

<sup>65</sup> See Brief of Handgun Control, Inc., et al. as Amicus Curiae in Support of Respondent at 17, *Printz* (Nos. 95-1478, 95-1503), available in 1996 WL 585868 (“It is the Act — not a state law or regulation — that requires a waiting period and a background check before purchasing a handgun.”).

<sup>66</sup> Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1064 n.241 (1995).

<sup>67</sup> See *id.* at 1064.

<sup>68</sup> Brief of Handgun Control, Inc., et al. as Amicus Curiae in Support of Respondent at 18–19, *Printz* (Nos. 95-1478, 95-1503), available in 1996 WL 585868 (quoting *New York v. United States*, 505 U.S. 144, 168 (1992)) (internal quotation marks omitted). *New York* explained that federal preemption of state policies does not implicate accountability problems because “it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.” *New York*, 505 U.S. at 168.

<sup>69</sup> See Brief of Handgun Control, Inc., et al. as Amicus Curiae in Support of Respondent at 20–21, *Printz* (Nos. 95-1478, 95-1503), available in 1996 WL 585868.

with the duty to engage in time-consuming and financially burdensome background checks,<sup>70</sup> that it unconstitutionally forces states to take the blame whenever a prospective purchaser is wrongfully denied permission to buy a handgun,<sup>71</sup> or both. This approach would have preserved the integrity of the Court's existing jurisprudence while furthering the majority's conception of "dual sovereignty"<sup>72</sup> over the dissent's competing notion of "cooperative federalism."<sup>73</sup>

Whether the Court upheld or invalidated the statute, it should have maintained the methodology that gave at least some coherence and consistency to its earlier decisions. However, *Printz* largely rejected this established approach, declaring that "no case-by-case weighing of the burdens or benefits is necessary," and that "[i]t matters not whether policymaking is involved."<sup>74</sup> Instead, the Court concluded "*categorically*"<sup>75</sup> that, under *New York v. United States*, the federal government simply cannot "compel the States to enact or administer a federal regulatory program."<sup>76</sup>

If *New York* existed in isolation, the Court's bright-line rule might raise relatively few concerns.<sup>77</sup> But a long line of cases permits Congress to enlist the aid of the states in any number of ways — by placing conditions on the grant of federal funds,<sup>78</sup> by threatening federal preemption in the absence of appropriate state regulation,<sup>79</sup> by requiring consideration of prescribed federal standards in determining state regulatory policies,<sup>80</sup> by demanding compliance with federal laws of general applicability,<sup>81</sup> and by ordering state judges to enforce federal law.<sup>82</sup> An absolute prohibition against federal commandeering is

<sup>70</sup> See Brief for Petitioner *Printz* at 4–6, *Printz* (No. 95-1478), available in 1996 WL 464182.

<sup>71</sup> See *id.* at 22 n.25. As the Court noted in its passing discussion of accountability, the fact that CLEOs enjoy discretion to tailor the extent of their background checks could suggest that they will be blamed for either overzealously or underzealously restricting handgun sales. See *Printz*, 117 S. Ct. at 2382 ("[I]t will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected.")

<sup>72</sup> *Printz*, 117 S. Ct. at 2376 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)) (internal quotation marks omitted).

<sup>73</sup> *Id.* at 2401 (Stevens, J., dissenting).

<sup>74</sup> *Printz*, 117 S. Ct. at 2384.

<sup>75</sup> See *id.* at 2383 (emphasis added).

<sup>76</sup> *Id.* (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)) (internal quotation marks omitted).

<sup>77</sup> Of course, as Justice Stevens observed, *New York* only involved legislative commandeering, therefore the language in the opinion precluding executive commandeering could have been mere dicta. See *id.* at 2398 (Stevens, J., dissenting).

<sup>78</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

<sup>79</sup> See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288–90 (1981).

<sup>80</sup> See *FERC v. Mississippi*, 456 U.S. 742, 765 (1982).

<sup>81</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 553–54 (1985).

<sup>82</sup> See *Testa v. Katt*, 330 U.S. 386, 393–94 (1947).



conspicuously absent from these cases, none of which the Court purported to overrule in *New York* or in *Printz*.

The Court's attempt to create a strict anticommandeering rule also fails even ignoring these earlier cases, in light of what *Printz* did *not* decide. As Justice O'Connor was careful to point out in her concurrence, the Court did not decide the validity of "purely ministerial reporting requirements"<sup>83</sup> — such as those in a federal statute requiring state and local law enforcement agencies to report missing children to the Department of Justice.<sup>84</sup> If those "purely ministerial" requirements remain constitutional simply because they do not "*directly* compel state officials to administer a federal regulatory program,"<sup>85</sup> then the Court's bright-line rule becomes disturbingly murky, leaving Congress and the courts with no real guidance in understanding the Tenth Amendment.

Conversely, if *Printz* meant what it said — that the federal government is categorically precluded from requiring the help of state officials in every case<sup>86</sup> — then the implications of the decision become boundless, and far more unmanageable than the Court, much less the Framers, reasonably could have intended. As Justice Stevens observed, the fact that the Framers intended to preserve *some* degree of sovereignty for the states does not necessarily mean that they intended to prohibit the federal government from enlisting state officials in even the most ministerial obligations — "such as registering young adults for the draft, creating state emergency response commissions designed to manage the release of hazardous substances, collecting and reporting data on . . . environmental hazard[s], and reporting traffic fatalities [as well as] missing children."<sup>87</sup> The states clearly enjoy "residuary and inviolable sovereignty,"<sup>88</sup> but the scope of that autonomy is far from obvious. Against the backdrop of the Court's existing Tenth Amendment jurisprudence, *Printz* did little to resolve the uncertainty.

Suppose, for example, that Congress were to amend the interim provisions in the Brady Act to require firearms dealers to forward handgun applications directly to the federal Bureau of Alcohol, Tobacco, and Firearms.<sup>89</sup> The Bureau could conduct the required back-

<sup>83</sup> *Printz*, 117 S. Ct. at 2385 (O'Connor, J., concurring).

<sup>84</sup> *See id.* (citing 42 U.S.C. § 5779(a) (1994)).

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> *See Printz*, 117 S. Ct. at 2383 ("We . . . conclude categorically, as we concluded categorically in *New York*: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.'" (quoting *New York v. United States*, 505 U.S. 144, 188 (1992))).

<sup>87</sup> *Id.* at 2394 (Stevens, J., dissenting) (citations omitted); *see also* 23 U.S.C. § 402(a) (1994) (reporting traffic fatalities); 42 U.S.C. § 5779(a) (1994) (reporting missing children); *id.* § 6991a (collecting data on underground tank leaks); *id.* §§ 11001, 11003 (creating response commissions for hazardous waste).

<sup>88</sup> THE FEDERALIST NO. 39, at 254 (James Madison) (Clinton Rossiter ed., 1961).

<sup>89</sup> The Bureau already has a statutory obligation to administer the interim provisions of the Act. *See Frank v. United States*, 78 F.3d 815, 828 (2d Cir. 1996).

ground checks, destroy the paperwork for successful applicants, and provide unsuccessful applicants with written explanations upon request. But if it were to require state assistance at all, even for the limited purpose of *obtaining* criminal history and mental health records, then the amended statute would apparently still fall afoul of a bright-line rule against federal commandeering.

*Printz* might have correctly concluded that the Brady Act exceeded congressional authority under the Tenth Amendment. But if the Court truly intended a blanket prohibition against *all* federal commandeering — a return to the 19th century view<sup>90</sup> that it overruled in *Puerto Rico v. Branstad*<sup>91</sup> — then its announcement could hardly have been more cloaked, both in light of what *Printz* left unaddressed and, especially, when the decision is read together with the Court's prior fifty years of Tenth Amendment jurisprudence. Despite its invocation of a "categorical" rule, *Printz* raised more questions than it answered and burdened Congress and the courts with the task of deciding what role, if any, the notion of cooperative federalism can continue to play in the constitutional structure.<sup>92</sup>

2. *Separation of Powers — Congressional Standing.* — After laying the foundation for the doctrine of legislative standing nearly sixty years ago,<sup>1</sup> the Supreme Court maintained a conspicuous silence, despite numerous opportunities to address the issue.<sup>2</sup> Last Term, in

<sup>90</sup> See *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107 (1861) (holding that Congress "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it").

<sup>91</sup> 483 U.S. 219 (1987). "*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development. . . . We conclude that it may stand no longer." *Id.* at 230.

<sup>92</sup> *Printz's* announcement of a "categorical" rule is unlikely to make these constitutional questions disappear, given scores of recent statutes involving similar instances of federal commandeering. See, e.g., Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. §§ 620–620j (1994) (requiring western states to reduce their exports of unprocessed timber harvested from state lands); National Voter Registration Act, 42 U.S.C. § 1973gg (1994) (requiring states to take specific measures to facilitate easy voter registration in federal elections). For a description of other statutes that compel state action, see Caminker, cited above in note 66, at 1003 n.3.

<sup>1</sup> See *Coleman v. Miller*, 307 U.S. 433, 438 (1939). The doctrine of legislative standing, which has developed in the United States Court of Appeals for the D.C. Circuit, is both complex, see Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 73–103 (1992) (summarizing the doctrinal history), and contentious, see, e.g., *Barnes v. Kline*, 759 F.2d 21, 41–71 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Moore v. United States House of Representatives*, 733 F.2d 946, 956–65 (D.C. Cir. 1984) (Scalia, J., concurring in the judgment).

<sup>2</sup> See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *McClure v. Reagan*, 454 U.S. 1025, 1025 (1981) (mem.), *aff'g* 513 F. Supp. 265 (D. Idaho 1981); *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (mem.), *vacating* 617 F.2d 697 (D.C. Cir. 1979); see also *Powell v. McCormack*, 395 U.S. 486, 516–49 (1969) (addressing the justiciability of a congressional member's suit without discussing legislative standing). *But cf.* *Pressler v. Blumenthal*, 434 U.S. 1028, 1029 (1978) (Rehnquist, J., concurring) (noting that the Court's summary affirmance "could rest as readily on

*Raines v. Byrd*,<sup>3</sup> the Court finally revisited legislative standing, and held that a nondiscriminatory, official-capacity injury to legislators confers standing only when legislators whose votes would have been sufficient to defeat or enact a specific legislative act suffer complete nullification of their votes.<sup>4</sup> Because the Court in *Raines* failed to explain how this holding is consistent with the Court's additional holding that a government official cannot claim a personal stake in official power, the law of legislative standing after *Raines* is a doctrine fraught with analytical inconsistency and uncertain boundaries. If the Court was reluctant either to reject or to endorse legislative standing categorically, the Court should have dismissed the case on the more limited ground that the defendants did not cause the plaintiffs' alleged injuries.

In 1996, Congress passed and the President signed into law the Line Item Veto Act ("Act").<sup>5</sup> The Act gives the President authority, after signing a bill into law, to "cancel" selected spending and tax benefit provisions.<sup>6</sup> One day after the Act went into effect, six members of the 104th Congress<sup>7</sup> filed suit in the United States District Court for the District of Columbia and challenged the constitutionality of the Act<sup>8</sup> in their official capacities as members of Congress.<sup>9</sup> The defendants moved to dismiss the complaint on standing and ripeness grounds, and both the plaintiffs and defendants moved for summary judgment.<sup>10</sup>

our conclusion that appellant lacked standing . . . as it could on agreement with the District Court's resolution of the merits of the question").

<sup>3</sup> 117 S. Ct. 2312 (1997).

<sup>4</sup> See *id.* at 2319.

<sup>5</sup> Pub. L. No. 104-130, 110 Stat. 1200 (codified in pertinent part at 2 U.S.C.A. §§ 691-691e (West 1997)).

<sup>6</sup> The President exercises the cancellation authority by transmitting a "special message" to Congress that identifies the dollar amount of the cancelled provisions. 2 U.S.C.A. § 691(a)(B). The cancellation takes effect upon Congress's receipt of the special message. See *id.* § 691b(a). But if Congress passes a separate "disapproval bill" that ultimately is enacted into law, pursuant either to presidential signature or a congressional override of a conventional presidential veto, *id.* § 691d(b)(3), (c)(1), the original cancellation is rendered "null and void," *id.* § 691b(a).

<sup>7</sup> The plaintiffs were Senators Robert C. Byrd, Daniel Patrick Moynihan, Carl Levin, and Mark O. Hatfield, and Representatives David E. Skaggs and Henry A. Waxman. See *Byrd v. Raines*, 956 F. Supp. 21, 27 n.1 (D.D.C. 1997). The defendants were Franklin D. Raines, Director of the Office of Management and Budget, and Robert E. Rubin, Secretary of the Treasury. See *id.* at 27.

<sup>8</sup> The plaintiffs alleged that the Act unconstitutionally expanded the President's power and violated the Constitution's Presentment Clause, U.S. CONST. art. I, § 7, cl. 2, because it gave the President the unilateral authority to cancel, and thus to repeal, provisions of enacted federal laws, see *Byrd*, 956 F. Supp. at 27.

<sup>9</sup> The plaintiffs sued under the provision of the Act that provides a cause of action for congressional members and adversely affected individuals. See 2 U.S.C.A. § 692(a)(1). The district court found that this statutory grant prevented it from invoking its "equitable discretion" to dismiss the case because of separation of powers concerns. *Byrd*, 956 F. Supp. at 33.

<sup>10</sup> See *Byrd*, 956 F. Supp. at 27.

The district court denied the defendants' motions and granted the plaintiffs' motion for summary judgment.<sup>11</sup> Acknowledging that the Supreme Court had never endorsed the D.C. Circuit's doctrine of legislative standing,<sup>12</sup> the court followed the circuit's rule that members of Congress have "standing to challenge measures that affect their constitutionally prescribed lawmaking powers."<sup>13</sup> The court then held that the plaintiffs' perception that their votes "mean something different from what they meant before"<sup>14</sup> was sufficient to confer standing, irrespective of whether the President actually exercised his cancellation authority.<sup>15</sup> Finally, the court held that the Act violated the Presentment Clause and unconstitutionally delegated legislative authority to the President.<sup>16</sup>

The Supreme Court heard the defendants' statutorily granted direct appeal on an expedited basis,<sup>17</sup> held that the legislators had no standing to sue, and vacated the district court's judgment.<sup>18</sup> Writing for the Court, Chief Justice Rehnquist<sup>19</sup> began by reviewing the central tenets of the Court's standing doctrine,<sup>20</sup> noting in particular that the plaintiff must have a "personal stake in the alleged dispute, and that the alleged injury suffered must be particularized as to him."<sup>21</sup>

<sup>11</sup> See *id.* at 38.

<sup>12</sup> See *id.* at 31.

<sup>13</sup> *Id.* at 30 (citing *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994); *Moore v. United States House of Representatives*, 733 F.2d 946, 950-53 (D.C. Cir. 1984); and *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168-71 (D.C. Cir. 1983)). Because, in the court's view, the D.C. Circuit's cases "unequivocally establish[ed] that Members have 'a personal interest . . . in the exercise of their governmental powers,'" the court ruled that an alleged injury to such powers is "sufficiently personal to create a justiciable controversy," *id.* at 31 n.6 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1382 (D.D.C.), *aff'd on other grounds sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986)).

<sup>14</sup> *Id.* at 31. The court found that the Act injured the plaintiffs by diluting their Article I voting power and fundamentally altering the "dynamics of lawmaking." *Id.*

<sup>15</sup> See *id.* The court also pointed to the ongoing nature of the plaintiffs' alleged harm in rejecting the defendants' ripeness challenge. See *id.* at 32.

<sup>16</sup> See *id.* at 33-38.

<sup>17</sup> See 2 U.S.C.A. § 692(b) (West 1997) (providing for direct appeal to the Supreme Court); *id.* § 692(c) (requiring the Supreme Court to expedite members' suits challenging the Act's constitutionality).

<sup>18</sup> See *Raines*, 117 S. Ct. at 2322-23.

<sup>19</sup> Justices O'Connor, Scalia, Kennedy, Thomas, and Ginsburg joined Chief Justice Rehnquist's opinion.

<sup>20</sup> First, the Court emphasized that standing is an element of the "bedrock requirement" that federal court jurisdiction extends only to a constitutional case or controversy. *Raines*, 117 S. Ct. at 2317 (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982)) (internal quotation marks omitted). To satisfy this requirement, a plaintiff must allege an injury "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted). Finally, the Court noted the need for an "especially rigorous," *id.*, standing inquiry in cases that might compel the Court to determine the constitutionality of a coordinate branch's act, see *id.* at 2317-18.

<sup>21</sup> *Id.* at 2317 (internal quotation marks omitted).

Turning to the specific standing question presented in *Raines*,<sup>22</sup> the Court distinguished the plaintiffs' alleged injury from Congressman Adam Clayton Powell's claim, in *Powell v. McCormack*,<sup>23</sup> that the House of Representatives had wrongly denied him his congressional seat and salary.<sup>24</sup> First, unlike Powell's claim of being "singled out for specially unfavorable treatment as opposed to other Members," the *Raines* legislators' claim of diminished legislative power was an "institutional injury" that all members shared equally.<sup>25</sup> Second, the plaintiffs alleged a loss of political power in their official capacities — not, like Congressman Powell, a deprivation of something to which they personally were entitled.<sup>26</sup> The Court held that this kind of official-capacity injury, which attaches to a member's seat, could not support standing because a member holds that seat "as trustee for his constituents, not as a prerogative of personal power."<sup>27</sup>

The Court next distinguished the plaintiffs' injuries from the injuries alleged in *Coleman v. Miller*.<sup>28</sup> In *Coleman*, a divided Court held that twenty of Kansas's forty state senators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes" against ratification of a federal constitutional amendment, and thus had standing to sue.<sup>29</sup> According to the *Raines* Court, *Coleman* standing requires a complete nullification of legislative power that is satisfied only in a suit brought by a group of legislators whose votes, absent the challenged conduct, would have been sufficient to pass or defeat a specific bill.<sup>30</sup> Because the *Raines* legislators could still pass or reject appropriations bills, vote to repeal the Act, or exempt any appropriations bill from presidential cancellation, the Act did not nullify their votes and thus did not inflict a judicially cognizable injury.<sup>31</sup>

The Court then reasoned that, if the *Raines* plaintiffs had standing based on a claimed injury to official power, numerous government officials throughout American history would have had standing to sue in "analogous confrontations" between Congress and the Executive

<sup>22</sup> The Court addressed only the constitutional standing requirements because Congress's statutory authorization of member suits eliminated prudential standing limitations on the Court's jurisdiction. *See id.* at 2318 n.3.

<sup>23</sup> 395 U.S. 486 (1969).

<sup>24</sup> *See id.* at 496.

<sup>25</sup> *Raines*, 117 S. Ct. at 2318.

<sup>26</sup> *See id.*

<sup>27</sup> *Id.*

<sup>28</sup> 307 U.S. 433 (1939); *see Raines*, 117 S. Ct. at 2318–20.

<sup>29</sup> *Coleman*, 307 U.S. at 438. Importantly, the *Coleman* legislators' votes would have been decisive but for the State Lieutenant Governor's allegedly unlawful tie-breaking vote. *See id.* at 441.

<sup>30</sup> *See Raines*, 117 S. Ct. at 2319.

<sup>31</sup> *See id.* at 2319–21. The Court therefore rejected the plaintiffs' argument that the diminished effectiveness of their votes resulting from the President's cancellation authority triggered *Coleman* standing. *See id.*

Branch.<sup>32</sup> Yet, in the Court's view, history demonstrated that no such official had ever contemplated such a suit, let alone filed one in a federal court.<sup>33</sup> The Court interpreted the historical record as evidence of a deep-rooted commitment to limit the role of Article III courts.<sup>34</sup> If, on the other hand, courts were to entertain suits by government officials claiming personal injuries to official powers, courts would become embroiled in a supervisory role over governmental operations that would be incompatible with the American constitutional regime.<sup>35</sup>

Justice Souter concurred in the judgment of the Court but questioned much of the majority's analysis.<sup>36</sup> First, Justice Souter argued that the Court's standing precedents did not recognize as dispositive the distinction between personal- and official-capacity injury.<sup>37</sup> Second, Justice Souter questioned whether the plaintiffs' alleged injuries were insufficiently concrete, noting that an injury to all members of an official body lies somewhere between an abstract injury shared by the entire citizenry and a concrete injury resulting from *Coleman* nullification.<sup>38</sup> Instead, Justice Souter would have "resolve[d] doubts about standing against the plaintiff[s]" and awaited a private litigant with clear standing to sue.<sup>39</sup>

Justice Stevens dissented and recast the plaintiffs' alleged injury as a claim of the complete denial of the "right to vote on the precise text that will ultimately become law."<sup>40</sup> In Justice Stevens's view, this characterization of the plaintiffs' injury led to the twin conclusions that the plaintiffs had standing and that the Act was unconstitutional.<sup>41</sup>

Justice Breyer also dissented, narrowing the inquiry to whether the plaintiffs' status as congressional members brought an otherwise justiciable controversy outside the scope of Article III.<sup>42</sup> He concluded that it did not, reasoning that the Constitution does not require a personal-capacity injury, and that, given the seriousness, pervasiveness,

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<sup>32</sup> *Id.* at 2321.

<sup>33</sup> *See id.* at 2321-22.

<sup>34</sup> *See id.* at 2322.

<sup>35</sup> *See id.*

<sup>36</sup> Justice Ginsburg concurred in Justice Souter's opinion.

<sup>37</sup> *See Raines*, 117 S. Ct. at 2323 (Souter, J., concurring in the judgment).

<sup>38</sup> *See id.* at 2323-24.

<sup>39</sup> *Id.* at 2325. Justice Souter reasoned that such a suit would be preferable because a private plaintiff would expose the Court to less risk of confrontation with political forces and because the necessary delay in awaiting such a plaintiff would allow the political controversy to "subside[] from a full boil." *Id.*

<sup>40</sup> *Id.* at 2326 (Stevens, J., dissenting).

<sup>41</sup> *See id.* at 2326-27. Justice Stevens also argued that his view of the alleged injuries rendered irrelevant the question whether *Coleman* applies only in cases of vote nullification. *See id.* at 2326.

<sup>42</sup> *See id.* at 2327-28 (Breyer, J., dissenting).

and immediacy of the alleged harm, *Coleman* mandated a finding of justiciability.<sup>43</sup>

The principal conundrum of *Raines*, and one that lower courts undoubtedly will face, is whether future legislators have *Coleman* standing to claim official-capacity injury<sup>44</sup> given that *Raines* also held that democratic representatives only have standing to allege personal injuries suffered in their personal capacities.<sup>45</sup> Conceding for the sake of argument that the personal-capacity injury requirement is sound as a matter of political theory,<sup>46</sup> and moreover that it is a latent requirement of Article III standing,<sup>47</sup> the requirement is facially incompatible with *Coleman* standing in particular<sup>48</sup> and with the doctrine of legislative standing in general.<sup>49</sup>

<sup>43</sup> See *id.* at 2328–29. Justice Breyer argued that the majority's distinction between vote nullification and vote dilution did not alter *Coleman*'s authority because the plaintiffs' votes, when cast as part of a majority in favor of a particular appropriation, were subject to threatened nullification by presidential cancellation. See *id.*

<sup>44</sup> See *Raines*, 117 S. Ct. at 2318–21.

<sup>45</sup> See *id.* at 2318.

<sup>46</sup> See *id.* (stating that the plaintiffs' injury "runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power"); see also E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1027–28 (1975) (noting Lockean principles of government as a trust, which prevent officeholder-trustees from asserting private dominion over public power). One possible objection to the Court's reference to representation as trusteeship, aside from the Court's reliance on noncommittal parenthetical qualification, is that it adopts as settled principle one of at least two competing models of democratic representation. See generally HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 144–67 (1967) (contrasting "mandate" and "independence" theories of democratic representation). However, this objection loses force upon recognition that neither model reasonably could justify an official's claim to a private stake in public power. See R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 26 n.157 (1986).

<sup>47</sup> The Court's interpretation of the personal injury requirement as a personal-capacity injury appears relatively novel. Previously, the Court primarily had employed the personal injury requirement to ensure that the alleged injury was particularized, and not to distinguish between personal- and official-capacity injuries. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976). But see *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543–45 (1986) (holding that an official-capacity interest is an insufficient personal stake to confer standing).

<sup>48</sup> See *Raines*, 117 S. Ct. at 2323 (Souter, J., concurring in the judgment); *id.* at 2328 (Breyer, J., dissenting); *Coleman v. Miller*, 307 U.S. 433, 469–70 (1939) (Frankfurter, J., dissenting); *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991).

<sup>49</sup> The doctrine of legislative standing is premised on the idea that a legislator has a personal interest in protecting official power. See *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974); *Synar v. United States*, 626 F. Supp. 1374, 1381 (D.D.C.), *aff'd on other grounds sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). Yet it is just such a personal stake in public power that proponents of the personal-capacity injury requirement reject. See *Barnes v. Kline*, 759 F.2d 21, 50–51 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Moore v. United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in the judgment); Dessem, *supra* note 46, at 25–26.

However, a court might proffer at least three theories to support a grant of official-capacity legislative standing under *Coleman*, notwithstanding the seemingly contradictory personal-capacity injury requirement. First, *Raines*'s limitation of *Coleman* to cases involving a complete nullification of official power may render *Coleman* standing a narrow exception to the personal-capacity injury requirement based on the concreteness of the alleged injury. Chief Justice Rehnquist provided the basis for such a theory when, in distinguishing Congressman Powell's claim of a loss of personal entitlement<sup>50</sup> from the *Raines* plaintiffs' claims of institutional injury, he noted that the former was more suitable for judicial resolution because it was more concrete.<sup>51</sup> If one thus interprets the personal-capacity injury requirement as a kind of secondary safeguard for foreclosing the litigation of abstract injuries,<sup>52</sup> then one could perhaps carve out an exception for official-capacity claims alleging the concrete injury of vote nullification — arguably the only such claims still valid after *Raines*.<sup>53</sup>

Second, a court might find *Coleman* standing in the absence of a personal-capacity injury by attaching significance to the Court's parenthetical suggestion that *Coleman* holds "(at most)" that complete vote nullification is sufficient for legislative standing.<sup>54</sup> As the Court explained in an important footnote, *Coleman* may in fact establish even less, and may apply only in cases involving state legislators or in cases originating in state court.<sup>55</sup> If so, *Coleman* standing would function as

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<sup>50</sup> See *Powell v. McCormack*, 395 U.S. 486, 496, 512-14 (1969); see also *Boehner v. Anderson*, 30 F.3d 156, 160 (D.C. Cir. 1994) (finding standing for a member of Congress who claimed that his salary was unconstitutionally increased).

<sup>51</sup> See *Raines*, 117 S. Ct. at 2318. Although it is indisputable that deprivation of a personal entitlement is more concrete than a diminution of official power, the mere fact that members of a body share an injury with other members should not itself defeat standing. See *Raines*, 117 S. Ct. at 2323-24 (Souter, J., concurring in the judgment); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50 (1989). Moreover, a rule that would treat an injury shared by all members of a body as too abstract for Article III standing purposes would be in tension with the Court's requirements for associational standing, one of which is that the association has standing to sue only if all of its members could sue as individuals. See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

<sup>52</sup> The primary safeguard is the requirement of a particularized and concrete injury. See *Lujan*, 504 U.S. at 560-61 & n.1; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226-27 (1974); *United States v. Richardson*, 418 U.S. 166, 177-78 (1974).

<sup>53</sup> See *Raines*, 117 S. Ct. at 2318-21. However, as then-Judge Scalia forcefully argued, the personal-capacity injury requirement protects separation of powers concerns that may be violated regardless of an alleged injury's degree of concreteness. See *Moore*, 733 F.2d at 957-59 (Scalia, J., concurring in the judgment). Thus, recognizing an official-capacity injury based on a concreteness exception would be unsatisfactory because the exception depends on principles that the rule, properly understood, necessarily rejects.

<sup>54</sup> *Raines*, 117 S. Ct. at 2319 (citation omitted).

<sup>55</sup> See *id.* at 2320 n.8; *id.* at 2324 n.3 (Souter, J., concurring in the judgment); *Barnes v. Kline*, 759 F.2d 21, 50-51 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Harrington v. Bush*, 553 F.2d 190, 204 n.67 (D.C. Cir. 1977). The Court explained that, because it distinguished *Coleman* as requiring vote nullification, it "need not decide whether *Coleman* may also be distinguished in other ways." *Raines*, 117 S. Ct. at 2320 n.8.



a kind of jurisdictional exception to the personal-capacity injury requirement, justified on the ground that only cases in which federal officials file claims in federal court implicate the separation of powers concerns that the personal-capacity injury requirement safeguards.<sup>56</sup>

Finally, a court might reason that the personal-capacity injury requirement presents no obstacle to *Coleman* standing because *Coleman*, after *Raines*, supports official-capacity standing only in cases in which all the members of the controlling bloc whose votes allegedly were nullified sue jointly.<sup>57</sup> If the Supreme Court were simply trying to limit *Coleman* in order to reject standing in *Raines*, the requirement of complete nullification, as applied to a handful of legislators, would have been sufficient. The Court may have imposed this curious form of legislator-specific compulsory party joinder as an additional requirement on the ground that, when a controlling bloc of legislators sue together, they sue in effect as representatives of their legislative bodies.<sup>58</sup> Because suits to protect legislative power brought by representatives of Congress, or by Congress itself, do not seek to protect a private stake in official power, upholding standing for such legislators would be fully consistent with the personal-capacity injury requirement<sup>59</sup> and would therefore appear permissible after *Raines*.

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However, because the Court's failure fully to distinguish *Coleman* contributed to *Raines*'s analytical discord, the Court seems to have misapplied the rule that a court should not decide constitutional questions if the case can be decided on other grounds. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

<sup>56</sup> See *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991); *Moore*, 733 F.2d at 959 n.1 (Scalia, J., concurring in the judgment). However, courts that choose to limit *Coleman* on this basis will have to confront a distinct set of objections. See *Raines*, 117 S. Ct. at 2329 (Breyer, J., dissenting) (arguing that the differences between state and federal legislators are not determinative in cases in which prudential standing requirements do not apply); Reply Brief for Appellees at 7-8, *Raines* (No. 96-1671) (rejecting the argument that *Coleman* found standing because the state supreme court had ruled on the federal questions involved), available in 1997 WL 269313.

<sup>57</sup> See *Raines*, 117 S. Ct. at 2319 (holding that "*Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing" (emphasis added) (citation omitted)).

<sup>58</sup> See *Dennis v. Luis*, 741 F.2d 628, 640 (3d Cir. 1984) (Adams, J., concurring in part and dissenting in part) (construing *Coleman v. Miller*, 307 U.S. 433, 438 (1939)); Brief for the Appellants at 28 n.15, *Raines* (No. 96-1671), available in 1997 WL 251415; Dessem, *supra* note 46, at 28 n.163. If this reading of *Coleman* is correct, then *Raines* implicitly rejected the D.C. Circuit's contrary interpretation. See *Kennedy v. Sampson*, 511 F.2d 430, 434-36 (D.C. Cir. 1974).

<sup>59</sup> See Dessem, *supra* note 46, at 14-18, 26-30; Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1648-49 (1977); cf. *Dornan v. United States Secretary of Defense*, 851 F.2d 450, 451 (D.C. Cir. 1988) (distinguishing between claims brought by Congress as an institution and suits brought by a "modest fraction" of Congress). Moreover, under this controlling bloc model, the fact that both congressional Houses actively opposed the *Raines* plaintiffs' suit would take on more than some doctrinally unidentified "importance." See *Raines*, 117 S. Ct. at 2322. Indeed, Congress's explicit opposition would provide strong evidence that legislators suing as a group were not the body's representatives. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986) ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take."); Brief for the Appellants at 27, *Raines* (No. 96-1671), available in 1997 WL 251415. But see RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL

Explaining the validity of official-capacity legislative standing after *Raines*<sup>60</sup> is no mere academic exercise, nor should courts shirk from offering such supplemental arguments on the ground that *Raines* implicitly found them unnecessary. In the absence of future Supreme Court clarification, a court that fails to offer some such explanation may well interpret into insignificance whichever prong of *Raines*'s divided holding that the court disfavors. For example, a court might deny legislative standing outright on the theory that Article III requires a personal-capacity injury, and that *Raines*'s severe limitation of *Coleman* effectively eviscerates the doctrine of legislative standing.<sup>61</sup> Alternatively, a court might conclude that the personal-capacity requirement is not dispositive and uphold standing on the ground that *Raines*'s refusal to overrule *Coleman* demonstrates the continuing, albeit circumscribed, validity of the legislative standing doctrine.<sup>62</sup> Fi-

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9-10 (4th ed. Supp. 1997) (questioning the Court's suggestion that Congress had not authorized the *Raines* plaintiffs' suit given the Act's explicit authorization of member suits).

<sup>60</sup> The Court also confused its personal-capacity injury requirement by suggesting that legislators "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies" have standing to sue to redress official-capacity injuries. *Raines*, 117 S. Ct. at 2318; see *id.* at 2320 n.7. Resolution of this contradiction, see *id.* at 2328 (Breyer, J., dissenting), begins with the following observation: proponents of the personal-capacity injury requirement derive that requirement from a constituent's supposed lack of standing to protect his or her representative's power, see *Barnes*, 759 F.2d at 50 (Bork, J., dissenting); Brief for the Appellants at 23-24, *Raines* (No. 96-1671), available in 1997 WL 251415. If the constituent cannot bring a claim based on a generalized interest in constitutional governance that the entire citizenry shares, the argument proceeds, courts cannot entertain suits brought by the representative either, because doing so would invest the representative with a "separate private right, akin to a property interest, in the powers of [his or her] office[.]" *Barnes*, 759 F.2d at 50 (Bork, J., dissenting). However, this reasoning is inapposite in cases of discriminatory injury to a representative's official power, because in such cases the entire citizenry does not share the constituent's interest. See *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994). Therefore, standing for the representative would not give the representative a greater stake in the office than the constituent, and thus would not be contrary to the personal-capacity injury requirement. On the other hand, if one argues that constituents whose representative suffers a nondiscriminatory official-capacity injury also would have standing to sue, see *id.* (noting that the difference between discriminatory and nondiscriminatory injuries is one of degree, and not one of kind), or if one adopts a rationale for the personal-capacity injury requirement that does not depend on the constituent's lack of standing, see *Moore*, 733 F.2d at 959 (Scalia, J., concurring in the judgment) (explaining that a representative simply has no claim of private right in public power), then this proposed reconciliation would unravel.

<sup>61</sup> Indeed, the Court's argument that the mere possibility of a legislative remedy takes a legislator's injury out of the requisite category of nullification, see *Raines*, 117 S. Ct. at 2320, seems to invalidate legislative standing in all cases in which a legislative act promotes interbranch controversy. As several commentators have noted, it is always possible for members to seek some form of legislative redress. See, e.g., Dessem, *supra* note 46, at 10; Meyer, *supra* note 1, at 69. The Court in *Raines* appears to have adopted the idea of legislative redress from the D.C. Circuit's "equitable discretion" doctrine. *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 881-82 (D.C. Cir. 1981); see also Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 261-67 (1981) (setting forth the equitable discretion doctrine that *Riegle* adopted). Importantly, however, the Court appears to have elevated this factor from an equitable guideline to a constitutional requirement.

<sup>62</sup> Moreover, even though the Court limited *Coleman* to cases of nullification, courts appear to have some latitude in extending *Coleman* to cover cases of official-capacity injuries less concrete

nally, even if a court does offer a theory that explains the validity of official-capacity standing after *Raines*, its freedom to choose which theory to invoke, and under which circumstances to invoke it, demonstrates the broad range of decisional possibilities that *Raines*'s facially inconsistent holding may produce.<sup>63</sup>

Although this doctrinal uncertainty must be assessed relative to the unchecked freedom that courts had in the doctrinal void following *Coleman*, it seems particularly unfortunate given that *Raines* easily could have been dismissed for lack of standing on the more limited,<sup>64</sup> but far more persuasive, ground that the injuries alleged were not fairly traceable to the actions of the named defendants.<sup>65</sup> By arguing that the President's mere possession of the line-item veto power inflicted injury on them, irrespective of whether the President actually exercised that authority, the plaintiffs avoided a potential ripeness barrier<sup>66</sup> only to confront the obvious objection that the Executive Branch had not caused their injuries.<sup>67</sup> Rather, those alleged injuries were

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than *Coleman* but more concrete than *Raines*. See *Raines*, 117 S. Ct. at 2320-21 (rejecting a "drastic extension" of *Coleman* to cover diminished effectiveness, but not foreclosing lesser extensions).

<sup>63</sup> Judicial uncertainty in applying *Raines* will be most acute in the D.C. Circuit — the court of appeals that most frequently hears legislators' suits. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11, at 34 (2d ed. 1984). *Raines* appears to have disturbed, without explicitly addressing, that circuit's legislative standing doctrine in at least three respects. First, the personal-capacity injury requirement that *Raines* endorsed conflicts directly with the D.C. Circuit's repeated statements that members have standing to protect their official voting power. See, e.g., *Michel*, 14 F.3d at 625; *Moore*, 733 F.2d at 952-53; *Kennedy*, 511 F.2d at 436. Second, the Court's holding that *Coleman* requires complete nullification implicitly repudiates the D.C. Circuit's rejection of the distinction between vote nullification and dilution, see *Riegle*, 656 F.2d at 880, as well as its subsequent holdings that vote dilution is a sufficient injury for legislative standing, see, e.g., *Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997); *Michel*, 14 F.3d at 625. Third, by addressing the separation of powers concerns implicated in legislators' suits as part of its standing analysis, the Court in *Raines* called into question the validity of the circuit's "equitable discretion" doctrine, the primary justification of which is that separation of powers considerations are best addressed outside the standing context. *Riegle*, 656 F.2d at 877-82.

<sup>64</sup> Cf. Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 16-18 (1996) (describing courts' interest in reducing decision and error costs as a component of judicial minimalism).

<sup>65</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that the "injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court" (alterations in original) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)) (internal quotation marks omitted)); see also *Raines*, 117 S. Ct. at 2322 n.11 (noting but not adopting this argument).

<sup>66</sup> See *Byrd v. Raines*, 956 F. Supp. 25, 32 (D.D.C. 1997).

<sup>67</sup> This objection is clearly distinct from the easily overcome objections that, because the Executive Branch had not yet taken any action when the plaintiffs filed suit, the claimed injury was too conjectural, see *Blum v. Yaretsky*, 457 U.S. 991, 1001-02 (1982) (recognizing standing before the threatened harm occurs); *Dellmus v. Bush*, 752 F. Supp. 1141, 1147 (D.D.C. 1990) (same), or that the claim was not sufficiently ripe for adjudication, see *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) (rejecting a ripeness challenge to an injury resulting from a threatened veto). In *Raines*, the plaintiffs' claimed injury, by hypothesis, existed regardless whether the Executive Branch took any action at all.

caused<sup>68</sup> by legislators who enacted the Line Item Veto Act — including the plaintiffs in *Raines* who voted against the Act.<sup>69</sup> If courts were to recognize standing in such cases, they would effectively enable losing legislators to replay political battles against their colleagues in the federal courts, which is precisely what the separation of powers concerns at the core of the Article III standing requirement<sup>70</sup> are meant to interdict.<sup>71</sup> Thus, the Court simply could have held that members' self-inflicted injuries resulting from the mere enactment of a statute cannot form the basis of a justiciable controversy against the Executive Branch.<sup>72</sup> Accordingly, the Court could have deferred addressing, and inadvertently confusing, important questions about the validity of legislative standing until the Court was prepared to resolve those questions comprehensively.

3. *Separation of Powers — Presidential Immunity.* — When it comes to separation of powers jurisprudence, hard cases involving the presidency have historically made good law.<sup>1</sup> Because of his involvement in the Watergate scandal, Richard Nixon was indirectly responsible for two landmark Supreme Court decisions concerning presidential amenability to judicial process and the scope of executive

<sup>68</sup> Admittedly, this causation analysis ultimately turns on the plaintiffs' characterization of their alleged injuries, and thus might be criticized as a formalistic distinction that reveals the manipulable nature of the Court's causation doctrine. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1463–69 (1988). However, Professor Sunstein's critique concerns the divergent standing outcomes that result from a plaintiff's ability to characterize an injury in various ways, see *id.*, and does not recommend that a court should recharacterize alleged injuries to assist plaintiffs in defeating standing challenges. But see *Raines*, 117 S. Ct. at 2326 (Stevens, J., dissenting) (recasting plaintiffs' injuries in order to establish standing).

<sup>69</sup> See *United States v. Ballin*, 144 U.S. 1, 7 (1892) (“[Congress’s] action is not the action of any separate member or number of members, but the action of the body as a whole . . .”).

<sup>70</sup> See *Allen v. Wright*, 468 U.S. 737, 752 (1984); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983). But see Sunstein, *supra* note 68, at 1469–74 (questioning the Court's use of separation of powers principles to deny standing).

<sup>71</sup> See *Allen*, 468 U.S. at 759–60 (linking the causation requirement with the idea of separation of powers); *Dennis v. Luis*, 741 F.2d 628, 638 (3d Cir. 1984) (Adams, J., concurring in part and dissenting in part) (remarking that “courts should not cut short the political process by awarding a judicial victory to a legislator who has lost . . . in the political sphere”); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973) (rejecting standing for a member of Congress because the alleged injury was “due to the contrary votes of her colleagues”).

<sup>72</sup> Such a causation rule would not invalidate standing in all cases in which members sue the Executive Branch to redress injuries resulting from an allegedly unconstitutional act, provided that the Executive Branch had some role in causing the claimed injuries. See, e.g., *Pressler v. Simon*, 428 F. Supp. 302, 304–05 (D.D.C. 1976), *aff'd mem. sub nom. Pressler v. Blumenthal*, 434 U.S. 1028 (1978); Meyer, *supra* note 1, at 124–25. Moreover, such a rule would not turn on the speculative nature of the chain of causation, see, e.g., *Allen*, 468 U.S. at 759, but rather on the threshold matter that one end of the chain (the defendant's actions) simply did not exist.

<sup>1</sup> Cf. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (“Great cases like hard cases make bad law.”).

privilege.<sup>2</sup> Perhaps the most significant separation of powers decision arising from Nixon's presidency, however, had nothing to do with Watergate. In *Nixon v. Fitzgerald*,<sup>3</sup> the Supreme Court held that Nixon could not be sued by a discharged Air Force employee, on the ground that the President had "absolute immunity from damages liability predicated on his official acts."<sup>4</sup>

Last Term, in *Clinton v. Jones*,<sup>5</sup> the Supreme Court properly refused to extend the reasoning of *Fitzgerald* to cases in which a sitting President is sued for damages arising from events that occurred before he took office.<sup>6</sup> However, the Court further ruled that the trial judge, taking into account the "high respect" owed to the presidency, could use her discretion to stay either discovery or trial proceedings.<sup>7</sup> In doing so, the Court failed to provide the trial court with adequate guidance on how to balance the complex interests of the plaintiff and the President. In particular, the Court neglected to address a number of factors that generally weigh against granting a lengthy stay in cases involving the President, especially the case at bar.

The facts of the case are in ardent dispute. According to the complaint, on May 8, 1991, Paula Corbin Jones, then an employee of the Arkansas Industrial Development Commission (AIDC), and William Jefferson Clinton, then governor of Arkansas, attended a conference in an Arkansas hotel.<sup>8</sup> While working at the conference registration desk, Jones was approached by Danny Ferguson, a state trooper working in Clinton's security detail.<sup>9</sup> Ferguson told Jones that Clinton wanted to meet her in an upstairs room.<sup>10</sup> Jones then followed Ferguson to the room, where Clinton fondled her, undressed himself, and asked her to perform a sexual act.<sup>11</sup> Jones refused and left the room.<sup>12</sup> She then suffered retaliation from her superiors at AIDC for refusing to acquiesce to Clinton's advances.<sup>13</sup> After Clinton was elected President of the United States in 1992, Ferguson and spokesmen for Clinton denied that the incident had occurred.<sup>14</sup>

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<sup>2</sup> See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977); *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>3</sup> 457 U.S. 731 (1982).

<sup>4</sup> *Id.* at 749.

<sup>5</sup> 117 S. Ct. 1636 (1997).

<sup>6</sup> See *id.* at 1644.

<sup>7</sup> *Id.* at 1650.

<sup>8</sup> See Complaint at 2-3, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. filed May 6, 1994) (on file with the Harvard Law School Library).

<sup>9</sup> See *id.* at 3.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 4-5.

<sup>12</sup> See *id.* at 5.

<sup>13</sup> See *id.* at 8-9.

<sup>14</sup> See *id.* at 9-13. Following the Supreme Court's decision on the question of immunity, and more than three years after Jones filed her complaint, Clinton filed an answer in which he denied

On May 6, 1994, Jones filed suit in federal court in Arkansas, alleging deprivation of her constitutional rights under § 1983,<sup>15</sup> conspiracy to violate her constitutional rights under § 1985,<sup>16</sup> and defamation and intentional infliction of emotional distress under Arkansas law.<sup>17</sup> Clinton moved for permission to file a motion both to dismiss the suit on the ground of presidential immunity and to defer all other pleadings or motions until the immunity issue was resolved.<sup>18</sup> Reasoning that the immunity issue could be addressed without reaching the merits of the complaint,<sup>19</sup> the district court granted his request.<sup>20</sup> The district court subsequently denied Clinton's motion to dismiss.<sup>21</sup> The court reasoned that historical evidence suggested that a President is not absolutely immune from civil suit.<sup>22</sup> However, it ruled that trial proceedings, but not discovery, could be delayed until the end of the President's term because of the necessity of avoiding litigation that might hamper the President in the performance of his duties.<sup>23</sup>

A divided Eighth Circuit panel affirmed the denial of the motion to dismiss, but reversed the order staying trial proceedings.<sup>24</sup> Writing for the majority, Judge Bowman<sup>25</sup> reasoned that the Supreme Court's decision in *Fitzgerald* did not support presidential immunity from suits arising from unofficial actions.<sup>26</sup> He concluded that "judicial case management sensitive to the burdens of the presidency and the de-

all of Jones's allegations. See Answer at 3-12, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. filed July 3, 1997) (on file with the Harvard Law School Library).

<sup>15</sup> 42 U.S.C. § 1983 (1994).

<sup>16</sup> *Id.* § 1985.

<sup>17</sup> See *Clinton*, 117 S. Ct. at 1639-40. Clinton was named as a defendant on all four counts, Ferguson on the conspiracy and defamation counts. See Complaint at 18-19, *Jones*, No. LR-C-94-290. The trial court subsequently dismissed Jones's defamation claim against Clinton, but not her analogous claim against Ferguson. See *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. Aug. 22, 1997).

<sup>18</sup> See *Jones v. Clinton*, 858 F. Supp. 902, 903 (E.D. Ark. 1994).

<sup>19</sup> See *id.* at 905.

<sup>20</sup> See *id.* at 906-07.

<sup>21</sup> See *Jones v. Clinton*, 869 F. Supp. 690, 700 (E.D. Ark. 1994).

<sup>22</sup> See *id.* at 692-98.

<sup>23</sup> See *id.* at 698-99. The district court later granted Clinton's motion to stay all proceedings pending resolution of the immunity issue on appeal. See *Jones v. Clinton*, 879 F. Supp. 86, 88 (E.D. Ark. 1995).

<sup>24</sup> See *Jones v. Clinton*, 72 F.3d 1354, 1363 (8th Cir. 1996). The panel also dismissed both Jones's appeal of the district court's postjudgment order to stay proceedings and Clinton's jurisdictional challenge to that appeal. See *id.* The Eighth Circuit, over Judge McMillian's dissent, subsequently denied Clinton's suggestion for rehearing en banc. See *Jones v. Clinton*, 81 F.3d 78, 78 (8th Cir. 1996).

<sup>25</sup> Judge Beam joined Judge Bowman's opinion and concurred specially to address three additional issues: the potential impact of a delay on Jones, the potential impact of proceeding on Clinton, and the lack of a rationale for a delay in proceeding against Ferguson. See *Jones*, 72 F.3d at 1363-67 (Beam, J., concurring specially). Judge Ross dissented, reasoning that the "language, logic and intent" of *Fitzgerald* suggested that the district court should stay both discovery and trial until the President left office. *Id.* at 1367 (Ross, J., dissenting).

<sup>26</sup> See *Jones*, 72 F.3d at 1359.

mands of the President's schedule" would alleviate any separation of powers concerns about judicial interference in executive operations.<sup>27</sup>

The Supreme Court affirmed.<sup>28</sup> Writing for a unanimous Court,<sup>29</sup> Justice Stevens asserted that no precedent existed for the proposition that a President has temporary immunity from civil damages litigation arising from events occurring before he took office.<sup>30</sup> Justice Stevens noted that, although three previous Presidents had been subject to suits of this type,<sup>31</sup> each suit either had been dismissed before the President in question took office, or was settled before it reached trial.<sup>32</sup> Regarding those cases in which the President was afforded immunity for his official actions, Justice Stevens explained that their rationale was "to avoid rendering the President 'unduly cautious in the discharge of his official duties.'"<sup>33</sup> Such a rationale, he continued, provided no support for immunity for unofficial conduct.<sup>34</sup>

Justice Stevens then turned to Clinton's argument that the text and structure of the Constitution supported a grant of temporary immunity.<sup>35</sup> He acknowledged that the presidency placed unparalleled demands on the occupant of the office.<sup>36</sup> However, according to Justice Stevens, it did not follow that allowing an action for civil damages to proceed would violate principles of separation of powers.<sup>37</sup> Justice Stevens noted that the doctrine of separation of powers was primarily concerned with "the allocation of official power" between the branches

<sup>27</sup> *Id.* at 1361.

<sup>28</sup> *See Clinton*, 117 S. Ct. at 1652.

<sup>29</sup> The Court has voted unanimously in at least one other case involving the separation of powers, *see United States v. Nixon*, 418 U.S. 683, 716 (1974), perhaps out of concern for its institutional legitimacy, *see BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHERN: INSIDE THE SUPREME COURT* 308-47 (1979) (detailing the behind-the-scenes maneuvering to secure a unanimous vote in *Nixon*).

<sup>30</sup> *See Clinton*, 117 S. Ct. at 1643.

<sup>31</sup> *See id.* at 1643 & nn.15-16 (citing *People ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904) (mem.); *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946); *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. filed Oct. 27, 1960); and *Hills v. Kennedy*, No. 757,201 (Cal. Super. Ct. filed Oct. 27, 1960)).

<sup>32</sup> *See id.* at 1643.

<sup>33</sup> *Id.* at 1644 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982)).

<sup>34</sup> *See id.* In a brief aside, Justice Stevens rejected historical evidence, introduced by Clinton, suggesting that the Founders believed that the President was immune from suit for unofficial conduct. *See id.* at 1644-45 (citing 9 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA* 168 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (diary of William Maclay); 3 *JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1563, at 418-19 (1833) (quotation from Justice Story); and 10 *THE WORKS OF THOMAS JEFFERSON* 404 n.1 (Paul Leicester Ford ed., 1905) (letter of Thomas Jefferson)). He argued that the evidence cited did not entirely support Clinton's position, *see id.* at 1645 n.23, and noted that Jones had introduced contrary evidence, *see id.* at 1645 (citing 2 *JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 480 (2d ed. 1836) (comment by James Wilson)).

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at 1646.

<sup>37</sup> *See id.* at 1647.

of the government,<sup>38</sup> particularly “encroachment or aggrandizement of one branch at the expense of the other.”<sup>39</sup> According to Justice Stevens, a court hearing a suit against the President would not be engaging in either encroachment or aggrandizement: rather than performing an executive function itself, the court would merely be exercising its explicit Article III power<sup>40</sup> to decide cases and controversies.<sup>41</sup>

In the same vein, Justice Stevens rejected Clinton’s argument that court proceedings would hinder the President in performing his official duties.<sup>42</sup> Justice Stevens reasoned that historical evidence provided little support for the proposition that a “deluge of such litigation” would engulf the presidency.<sup>43</sup> In any event, he asserted, merely burdening the presidency would not rise to the level of constitutionally impermissible impairment.<sup>44</sup> Justice Stevens noted that the Court had historically been able to impose burdens on the President in two ways.<sup>45</sup> First, the Court has long had the authority to review the constitutionality of the President’s official actions:<sup>46</sup> in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>47</sup> for example, the Court ruled that Harry Truman exceeded his constitutional authority by seizing the nation’s steel mills.<sup>48</sup> Second, courts could subject the President to judicial process:<sup>49</sup> indeed, sitting Presidents, including Clinton, had routinely responded to both judicial orders and requests for testimony.<sup>50</sup> According to Justice Stevens, it would be less burdensome to determine the legality of the President’s unofficial conduct than to review his official actions.<sup>51</sup>

Next, Justice Stevens considered the extent to which the district court had the discretion to stay proceedings in order to accommodate the President’s schedule.<sup>52</sup> Justice Stevens asserted that, although the potential burdens on the President did not rise to the level of a constitutional violation under the separation of powers,<sup>53</sup> the trial court could consider them in exercising its discretion to postpone proceedings.<sup>54</sup> Justice Stevens noted, however, that the district court’s deci-

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)).

<sup>40</sup> See U.S. CONST. art. III, § 1.

<sup>41</sup> See *Clinton*, 117 S. Ct. at 1647–48.

<sup>42</sup> See *id.*

<sup>43</sup> *Id.* at 1648; see cases cited *supra* note 31.

<sup>44</sup> See *Clinton*, 117 S. Ct. at 1648.

<sup>45</sup> See *id.* at 1649.

<sup>46</sup> See *id.*

<sup>47</sup> 343 U.S. 579 (1952).

<sup>48</sup> See *Clinton*, 117 S. Ct. at 1649.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* at 1649–50 (citing *United States v. Branscum*, No. LRP-CR-96-49 (E.D. Ark. June 7, 1996); and *United States v. McDougal*, 934 F. Supp. 296 (E.D. Ark. 1996)).

<sup>51</sup> See *id.* at 1650.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*



sion to stay trial proceedings until the President left office constituted an abuse of discretion because the court failed to take into account "the respondent's interest in bringing the case to trial."<sup>55</sup> In any event, he reasoned, the trial court could not realistically rule on the postponement of trial proceedings until the completion of discovery, when the potential burdens on the President of a trial would be clearer.<sup>56</sup>

Justice Stevens concluded by summarily addressing two additional issues discussed in the briefs: whether the Court's decision would lead to an onslaught of frivolous litigation against the President and whether the President might refuse to explain his reasons for seeking a stay on national security grounds.<sup>57</sup> On the first issue, Justice Stevens noted that courts could readily terminate frivolous litigation by dismissal or summary judgment<sup>58</sup> and could further deter it by the imposition of sanctions.<sup>59</sup> On the second issue, Justice Stevens maintained that courts had historically accommodated the President's needs, particularly on matters of national security.<sup>60</sup>

Justice Breyer concurred in the judgment.<sup>61</sup> He agreed with the Court's conclusion that the Constitution does not grant the President automatic immunity from civil suits based on his unofficial conduct.<sup>62</sup> However, he reasoned that the Constitution did bar a trial court from interfering with the President's official duties.<sup>63</sup> Once the President had demonstrated a conflict between the court proceedings and his official duties, Justice Breyer continued, the trial court was obligated to comply with this constitutional principle.<sup>64</sup>

Perhaps the most intriguing aspect of the Court's opinion in *Clinton* was its brief discussion of the extent to which the district court had the discretion to stay proceedings in order to accommodate the President's schedule. Federal district courts indisputably have some degree of discretion to stay proceedings generally: Rule 40 of the Federal Rules of Civil Procedure explicitly authorizes trial courts to establish their own scheduling rules,<sup>65</sup> and the Supreme Court has long rec-

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<sup>55</sup> *Id.* at 1651.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* at 1651 & n.42 (citing 28 U.S.C. § 1927 (1994); FED. R. CIV. P. 11; and *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991)).

<sup>60</sup> *See id.* at 1651-52.

<sup>61</sup> *See id.* at 1652 (Breyer, J., concurring in the judgment).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See* FED. R. CIV. P. 40; *see also* FED. R. CIV. P. 57 (authorizing courts to hear actions for declaratory judgment on an expedited schedule); FED. R. CIV. P. 65(b) (granting scheduling precedence to motions for preliminary injunction). *See generally* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2352, at 230-45 (2d ed. 1995) (discussing continuances under Rule 40).

ognized that trial courts have an analogous equitable power.<sup>66</sup> However, the Court has provided few guidelines on the exercise of this discretion. In *Landis v. North American Co.*,<sup>67</sup> the Court ruled that district courts should determine whether to issue a stay by balancing the “competing interests” involved.<sup>68</sup> However, the Court failed to define the interests at stake, though it did suggest that a stay of two years or more would be excessive.<sup>69</sup>

In *Clinton*, the Court correctly suggested that the district court should consider both the President’s interest in not being burdened by proceedings and the plaintiff’s interest in expediting them.<sup>70</sup> Because of the complexity of such balancing in cases involving the President, though, the Court should have provided the trial court with more specific guidance. In particular, the Court did not address five issues that the trial court should take into account in the balancing process: the limited need for the President to be heavily involved in the proceeding, the ability of the trial court to minimize the impact of the President’s involvement on the performance of his duties, the ability of the President to make time for the proceeding, the availability of appeal for scheduling decisions, and the potential injury from a stay to both the plaintiff and any other defendants. Although the trial court should undoubtedly grant great deference to the President in evaluating any request for a stay, each of these factors militates against a lengthy delay in most cases, including the case at bar.

First, the President need not be very heavily involved in the proceeding. A civil defendant is not ordinarily obligated to attend proceedings.<sup>71</sup> Indeed, while the court is hearing preliminary motions regarding issues of law, the civil defendant has little or no interest in becoming personally involved.<sup>72</sup> Although the President may find it desirable or strategically advantageous to attend some or all of the proceedings once the case goes to trial, he is no different from any other busy defendant, except in degree, in having to balance his desire to attend with other responsibilities.<sup>73</sup> Indeed, in the case at bar, the

<sup>66</sup> See, e.g., *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 381–82 (1935); *Kansas City S. Ry. Co. v. United States*, 282 U.S. 760, 763–64 (1931).

<sup>67</sup> 299 U.S. 248 (1936).

<sup>68</sup> *Id.* at 254–55; cf. *United States v. Nixon*, 418 U.S. 683, 711–12 (1974) (laying out a similar balancing test, though in more specific circumstances, for determining whether evidence sought in a criminal proceeding was protected by executive privilege).

<sup>69</sup> See *Landis*, 299 U.S. at 256.

<sup>70</sup> The party seeking a stay in proceedings bears the burden of proof. See *id.* at 255; cf. *Butz v. Economou*, 438 U.S. 478, 506 (1978) (holding that a federal official seeking absolute immunity for unconstitutional conduct bears the burden of establishing a public need for such immunity).

<sup>71</sup> See Elaine E. Bucklo, *Can a Party Be Required To Attend Trial?*, LITIG., Spring 1988, at 33, 34.

<sup>72</sup> See Brief Amicus Curiae of the American Civil Liberties Union in Support of Respondent at 20, *Clinton* (No. 95-1853), available in 1996 WL 517593.

<sup>73</sup> See Brief for Respondent at 36, *Clinton* (No. 95-1853), available in 1996 WL 509501.

President may well decide that it is not worth his while to attend the proceedings at all, despite the potential political fallout from an adverse judgment, because of the relatively small amount at stake.<sup>74</sup> This may be especially true because, as a practical matter, the President could raise the money needed to pay for high-priced lawyers or to cover any damage award against him.<sup>75</sup>

Second, even if the President does need to become personally involved in the proceeding, the trial court could minimize the impact on his ability to carry out his official duties. Courts have held that the President need only testify on matters for which no other source is available.<sup>76</sup> Should the district court find it necessary to require the President to testify, it could allow him to do so by videotape, as has been the custom in recent proceedings involving sitting Presidents.<sup>77</sup> In the instant case, given the relatively limited scope of the factual issues in dispute,<sup>78</sup> it seems unlikely that the President's testimony would be particularly time-consuming.<sup>79</sup> If the President is compelled to testify in person, he could still carry out some of his duties while attending trial<sup>80</sup> and delegate the remaining ones to other officials in the executive branch.<sup>81</sup>

<sup>74</sup> Jones seeks compensatory damages of \$75,000 and punitive damages of \$100,000 per count from Clinton and Ferguson, in addition to costs. See Complaint at 18-19, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. filed May 6, 1994) (on file with the Harvard Law School Library).

<sup>75</sup> Clinton and his wife established a legal defense fund in 1994 to cover their legal costs, both from the instant case and from the Whitewater investigation. See David Johnston, *Clintons Create Fund To Accept Gifts To Pay Their Rising Legal Costs*, N.Y. TIMES, June 29, 1994, at A18. Recent estimates put the amount of money raised for the fund at \$1.5 million. See James Warren, *Charlie Trie Depicted as Novelty Item at Defense Fund*, CHI. TRIB., July 31, 1997, § 1, at 3.

Clinton's lawyer in the case at bar, Robert S. Bennett, reportedly charges \$475 per hour. See Stuart Taylor, Jr., *Her Case Against Clinton*, AM. LAW., Nov. 1996, at 56, 62.

<sup>76</sup> See *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989); *United States v. Mitchell*, 385 F. Supp. 1190, 1193 (D.D.C. 1974).

<sup>77</sup> See *United States v. Branscum*, No. LRP-CR-96-49 (E.D. Ark. June 7, 1996) (Clinton); *United States v. McDougal*, 934 F. Supp. 296, 298 (E.D. Ark. 1996) (Clinton); *United States v. Poindexter*, 732 F. Supp. 142, 160 (D.D.C. 1990) (Ronald Reagan); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 7.1(b), at 575 (2d ed. 1992) (Jimmy Carter) (citing several instances); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (Gerald Ford).

<sup>78</sup> See Brief for Respondent at 41, *Clinton* (No. 95-1853), available in 1996 WL 509501 ("[This] case center[s] upon a short encounter between two people in a room.").

<sup>79</sup> The President's testimony may be even more narrowly confined if the trial court adopts his currently pending proposal to limit discovery to the "core issues" in the case. Reply Brief in Support of Phased Discovery Plan at 2, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. filed Aug. 15, 1997) (on file with the Harvard Law School Library).

<sup>80</sup> By way of analogy, Presidents have routinely made major decisions while on vacation: Reagan, for instance, sent American troops to Lebanon while on vacation in California. See LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 399 (1991).

<sup>81</sup> As head of the executive branch, the President commands nearly three million civilian employees and over one million military ones. See BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 345, 352 (1996). See generally CLINTON ROSSITER, THE AMERICAN PRESIDENCY 19-25 (2d ed. 1960) (chronicling the President's responsibilities as head of the executive branch).

Third, to the extent that the President's presence at trial proceedings is unavoidable, the President can make time for them. As the Court acknowledged, the burdens of the presidency are "vast and important,"<sup>82</sup> consuming a substantial amount of the President's time.<sup>83</sup> However, although the President is theoretically on call around the clock,<sup>84</sup> Presidents have always set aside time for recreation:<sup>85</sup> in the words of Chief Justice Marshall, the duties of the President are "not unremitting" and do not "demand his whole time for national objects."<sup>86</sup> In addition, much of the President's time is consumed with ceremonial or political functions:<sup>87</sup> the President could arrange for another official to stand in for him at such functions, reschedule them, or forgo them altogether. Many of the President's official duties could also be rearranged.<sup>88</sup>

Fourth, the President could appeal adverse scheduling decisions. In his brief, Clinton expressed concern that allowing suits to proceed against the President would essentially subject him to the whims of a mere trial judge, who would be empowered to review the President's priorities.<sup>89</sup> However, the President is not entirely without recourse. Although scheduling decisions are ordinarily not appealable under the final judgment rule,<sup>90</sup> the President can seek a writ of mandamus from

<sup>82</sup> *Clinton*, 117 S. Ct. at 1646.

<sup>83</sup> *See id.* ("Of all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 a.m., and there were few mornings when I didn't wake up by 6 or 6:30." (quoting LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY*, 1963-1969, at 425 (1971)) (internal quotation marks omitted)). *See generally* ROSSITER, *supra* note 81, at 15-43 (cataloging the duties of the President).

<sup>84</sup> *See* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) ("Constitutionally speaking, the President never sleeps.")

<sup>85</sup> *See* Transcript of Oral Argument, *Clinton* (No. 95-1853), available in 1997 WL 9248, at \*20-\*21 (Jan. 13, 1997) (Scalia, J.) ("[W]e see Presidents riding horseback, chopping firewood, fishing for stick fish . . . playing golf and so forth and so on."); SHEPHERD CAMPBELL & PETER LANDAU, *PRESIDENTIAL LIES: THE ILLUSTRATED HISTORY OF WHITE HOUSE GOLF* 2 (1996) (noting that all but three Presidents since William Howard Taft have been golfers).

<sup>86</sup> *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d).

<sup>87</sup> *See* Oscar Dixon, *Super Salute*, USA TODAY, May 21, 1997, at 3C (detailing visit to White House by Green Bay Packers); Valerie Lister, *Bulls Pay Visit to White House*, USA TODAY, Apr. 4, 1997, at 11C (reporting on visit to White House by Chicago Bulls).

<sup>88</sup> *See* Bill Nichols, *Clinton Home, but Schedule To Be in Flux*, USA TODAY, Mar. 17, 1997, at 1A (listing changes made in Clinton's schedule, including the cancellation of some events and the rescheduling of others, after Clinton injured his knee during a golfing vacation). Of course, unlike Clinton's knee injury, any trial proceedings would be foreseeable well in advance, thereby facilitating rescheduling.

<sup>89</sup> *See* Brief for Petitioner at 30, *Clinton* (No. 95-1853), available in 1996 WL 448096. This concern is not a novel one: Thomas Jefferson once wondered if "the executive [would] be independent of the judiciary . . . if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties." 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 34, at 404 n.1.

<sup>90</sup> *See* 28 U.S.C. § 1291 (1994).

the appeals court<sup>91</sup> and can challenge a denial of the writ before the appeals court en banc and ultimately before the Supreme Court.<sup>92</sup> The availability of such review would minimize any risk that a trial judge would make scheduling decisions adverse to the President out of improper motives: a panel of three judges or nine Justices would presumably be less likely to manifest systematic political bias, and the availability of review would deter a trial judge from unduly harassing the President.<sup>93</sup> The standard for granting mandamus review of stay decisions is somewhat unclear,<sup>94</sup> but it appears that the President could obtain mandamus by showing that the trial court's decision constituted an abuse of discretion.<sup>95</sup> Although mandamus review for *denial* of stays is relatively uncommon, a scheduling decision adverse to the President might provide the "rare" circumstances necessary to obtain such review.<sup>96</sup> In addition, the President may be able to procure a permissive interlocutory appeal under § 1292(b),<sup>97</sup> though the standard for such an appeal is somewhat higher than that for a writ of mandamus.<sup>98</sup>

Fifth, both the plaintiff and any other defendants could suffer irreparable injury from a lengthy stay in proceedings. As the Court noted, a lengthy stay could lead to a prejudicial loss of evidence, as critical witnesses, including the defendant, understandably forget about the relevant events through the passage of time.<sup>99</sup> Provided that

<sup>91</sup> See *id.* § 1651(a).

<sup>92</sup> See, e.g., *La Buy v. Howes Leather Co.*, 352 U.S. 249, 260 (1957) (affirming an appeals court's grant of writs of mandamus).

<sup>93</sup> In any event, there is no evidence to suggest that the trial judge in this case is pursuing a vendetta against the President. Indeed, the judge, Susan Webber Wright, was a student of the President's in law school. See Tom Squitieri, *Judge in Suit, Clinton Have Crossed Paths*, USA TODAY, May 30, 1997, at 6A.

<sup>94</sup> See generally 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3935.2, at 598-604 (2d ed. 1996) (discussing the standard for mandamus review of stay orders).

<sup>95</sup> A plurality of the Supreme Court has suggested that a mandamus writ for a stay order, like other types of writs, should be granted only on a showing of "clear and indisputable" right — a somewhat higher standard than abuse of discretion. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978) (plurality opinion). However, appeals courts have continued to apply the abuse of discretion standard. See, e.g., *Smith v. Pinell*, 597 F.2d 994, 997 (5th Cir. 1979).

<sup>96</sup> See 16 WRIGHT, MILLER & COOPER, *supra* note 94, § 3935.2, at 604.

<sup>97</sup> See 28 U.S.C. § 1292(b) (1994).

<sup>98</sup> To obtain permissive interlocutory review, the President would have to obtain a certification from the district court, stating that it believed that the appeal involved "a controlling question of law as to which there is substantial ground for difference of opinion" and that the appeal "may materially advance the ultimate termination of the litigation." *Id.*

<sup>99</sup> See *Clinton*, 117 S. Ct. at 1651. In addition, there is the risk that a witness could die during the intervening period. Although safeguards do exist to allow a party in a stayed case to preserve the testimony of a severely ill witness, see FED. R. CIV. P. 27(a), (c), no such protections could obtain for the testimony of a witness who dies suddenly.

Another risk is that one of the parties could die during the stay period. At least one of the plaintiff's claims would automatically be extinguished on the death of either of the parties. See ARK. CODE ANN. § 16-62-101(b) (Michie 1987) (regarding defamation claim).

proceedings against the President and any other defendants are stayed simultaneously,<sup>100</sup> the loss of evidence over time might also negatively affect the other defendants' ability to raise a successful defense.<sup>101</sup> In addition, a lengthy stay could prevent the plaintiff from receiving full compensation for her alleged injury. Although the plaintiff could obtain interest on her monetary damages as a result of any delay in proceedings,<sup>102</sup> the plaintiff arguably also has reputational interests at stake.<sup>103</sup> To the extent that a stay would prevent her from vindicating these interests, she would suffer harm analogous to that asserted by a plaintiff seeking injunctive relief.<sup>104</sup>

Ultimately, perhaps the strongest argument against granting the President a lengthy stay lies in the longstanding notion that no individual is above the law.<sup>105</sup> As one of Clinton's amici has noted, presidents are no less subject to judicial action than are ordinary citizens.<sup>106</sup> And there is something unsettling about the fact that the President has already managed to delay for over three years a substantive hearing on serious charges of sexual misconduct.<sup>107</sup> By granting the President a further lengthy stay on discretionary grounds, the trial court would undo the Supreme Court's good constitutional work. Hard cases involving the presidency may yet make bad law.

### C. Due Process and Equal Protection Clauses

I. *Physician-Assisted Suicide*. — In 1996, the U.S. Courts of Appeals for the Second and Ninth Circuits held, on the basis of the Equal Protection Clause<sup>1</sup> and the Due Process Clause<sup>2</sup> respectively, that the

<sup>100</sup> The district court stayed proceedings against the other defendant at the same time that it stayed proceedings against the President, pending appeal of its decision on immunity, on the ground that the claims against the two were "inextricably intertwined." *Jones v. Clinton*, 879 F. Supp. 86, 88 (E.D. Ark. 1995).

<sup>101</sup> The Court did not consider the potential effect of a stay on the other defendant, though Judge Beam, concurring below, briefly alluded to it. See *Jones v. Clinton*, 72 F.3d 1354, 1366-67 (8th Cir. 1996) (Beam, J., concurring specially).

<sup>102</sup> Prejudgment interest may be available for both the plaintiff's federal and state claims. See *Winter v. Cerro Gordo County Conservation Bd.*, 925 F.2d 1069, 1073 (8th Cir. 1991) (federal claims); *Wooten v. McClendon*, 612 S.W.2d 105, 106 (Ark. 1981) (state claims).

<sup>103</sup> See Complaint at 14, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. filed May 6, 1994) (on file with the Harvard Law School Library).

<sup>104</sup> See Brief Amicus Curiae of the American Civil Liberties Union in Support of Respondent at 19, *Clinton* (No. 95-1853), available in 1996 WL 517593.

<sup>105</sup> Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.")

<sup>106</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-15, at 278 (2d ed. 1988) (criticizing commentators who concluded that "the President was beyond the pale of judicial direction").

<sup>107</sup> See *supra* note 14.

<sup>1</sup> See *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

<sup>2</sup> See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc).

Constitution provides some citizens with a right to a physician's assistance in committing suicide.<sup>3</sup> Although no state court or federal appellate court had ever so ruled,<sup>4</sup> the Second and Ninth Circuits both identified this right within a period of one month. Late last Term, in *Washington v. Glucksberg*<sup>5</sup> and *Vacco v. Quill*,<sup>6</sup> two unanimous decisions issued on the same day, the Court reversed both courts of appeals.<sup>7</sup> The Court held that, on its face, Washington's ban on assisted suicide<sup>8</sup> does not violate the Due Process Clause<sup>9</sup> and that, on its face, New York's similar ban<sup>10</sup> comports with the Equal Protection Clause.<sup>11</sup> Despite the Court's foreclosure of a broadly articulated right to physician-assisted suicide, a close reading of the controlling and concurring opinions in both cases indicates that future litigators may be able to convince the Court to recognize a more limited constitutional liberty, such as the right not to suffer unmitigated physical pain when facing imminent death.

In *Compassion in Dying v. Washington*,<sup>12</sup> the district court disposition of *Glucksberg*, the court analogized the "right to die" to the right to have an abortion<sup>13</sup> and concluded accordingly that substantive due

<sup>3</sup> This Comment, like most of the relevant literature, defines assisted suicide to mean providing a patient with a prescribed, lethal drug overdose. See, e.g., Thomas J. Marzen, "Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill, 21 HASTINGS CONST. L.Q. 799, 799 n.2 (1994).

<sup>4</sup> See Yale Kamisar, *The "Right to Die": On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481, 481 (1996).

<sup>5</sup> 117 S. Ct. 2258 (1997).

<sup>6</sup> 117 S. Ct. 2293 (1997).

<sup>7</sup> Both *Glucksberg* and *Quill* stemmed from facial constitutional challenges filed in federal district courts by terminally ill patients and by physicians who treat terminally ill patients. See *Quill v. Koppell*, 870 F. Supp. 78, 79 (S.D.N.Y. 1994); *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456, 1459 (W.D. Wash. 1994). *Compassion in Dying's* plaintiff group sought both a declaratory judgment and injunctive relief. See *id.* at 1456-58. The plaintiffs challenged Washington's physician-assisted suicide ban only "insofar as it bar[red] physicians from aiding informed, mentally competent, terminally ill adults to commit suicide." *Id.* at 1459. *Quill's* plaintiff group sought a preliminary injunction against the enforcement of New York's assisted suicide ban. See *Quill*, 870 F. Supp. at 79-80.

<sup>8</sup> See WASH. REV. CODE ANN. § 9A.36.060(1)-(2) (West 1988) (stating that a person who "knowingly causes or aids another person[s]" suicide attempt is guilty of a felony).

<sup>9</sup> See *Glucksberg*, 117 S. Ct. at 2268-75.

<sup>10</sup> See N.Y. PENAL LAW §§ 120.30, 125.15(3) (McKinney 1987) (stating, respectively, that a "person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide" and that a "person is guilty of manslaughter in the second degree when . . . [h]e intentionally causes or aids another person to commit suicide").

<sup>11</sup> See *Quill*, 117 S. Ct. at 2296.

<sup>12</sup> 850 F. Supp. 1454 (W.D. Wash. 1994).

<sup>13</sup> See *id.* at 1459-61. The court cited *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which affirmed that substantive due process protects a woman's right to choose an abortion, see *id.* at 846-53. The court stated that, like abortion, assisted suicide implicates an individual's "most intimate and personal choices." *Compassion in Dying*, 850 F. Supp. at 1460 (quoting *Casey*, 505 U.S. at 851).

process protects physician-assisted suicide.<sup>14</sup> In addition, the court found the right to die to be constitutionally indistinct from the right to refuse unwanted, life-sustaining medical treatment,<sup>15</sup> and thus held that the Equal Protection Clause guarantees the right to die.<sup>16</sup> Therefore, the court granted summary judgment to the plaintiffs.<sup>17</sup>

On appeal, a divided panel of Ninth Circuit judges reversed.<sup>18</sup> The Ninth Circuit then reheard the case en banc because of its "extraordinary importance."<sup>19</sup> Writing for eight members of the eleven-member panel, Judge Reinhardt accepted the district court's due process determination<sup>20</sup> and boldly asserted that a liberty interest properly classified as a "right to die" exists.<sup>21</sup> He cited the Supreme Court's ninety-year history of using balancing tests in liberty interest cases as evidence that a state must satisfy a balancing test less restrictive than strict scrutiny but more stringent than rational basis in order to justify a significant impairment of this right.<sup>22</sup>

Judge Reinhardt catalogued five factors relevant to the balancing test.<sup>23</sup> Most notably, he emphasized the need to weigh the importance of Washington's interests in proscribing assisted suicide.<sup>24</sup> In particular, he deemed reduced, in the case of terminally ill individuals, the

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<sup>14</sup> See *Compassion in Dying*, 850 F. Supp. at 1459-60. The district court applied *Casey's* undue burden test, see *Casey*, 505 U.S. at 878, to find that Washington's statute placed a "substantial obstacle in the path" of patients who wanted to exercise their right to die. *Compassion in Dying*, 850 F. Supp. at 1464-66.

<sup>15</sup> See *Compassion in Dying*, 850 F. Supp. at 1461-62 (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990)). The *Cruzan* Court "assume[d]" that the United States Constitution . . . grant[s] a competent person a constitutionally protected right to refuse life-saving hydration and nutrition." *Cruzan*, 497 U.S. at 279. The Court has not since repudiated this assumption.

<sup>16</sup> See *Compassion in Dying*, 850 F. Supp. at 1461-62.

<sup>17</sup> See *id.* at 1467-68. The district court granted the physicians' summary judgment motion only to the extent that the physicians argued that the Washington law prohibited their *patients* from exercising their constitutional rights. See *id.*

<sup>18</sup> See *Compassion in Dying v. Washington*, 49 F.3d 586, 588 (9th Cir. 1995). Writing for the majority, Judge Noonan chided the district court for making an analytical leap in relying on *Casey* to support its decision. See *id.* at 590. Judge Noonan also took issue with the district court's failure to draw a principled distinction between assisted suicide and the refusal of life support, its interpretation of historical tradition, its use of facial invalidation with regard to the Washington statute, its consideration of Washington's interests in banning assisted suicide, and its imprecision in recognizing a right for a vaguely defined group of terminally ill patients. See *id.* at 591-94.

<sup>19</sup> *Compassion in Dying v. Washington*, 79 F.3d 790, 798 (9th Cir. 1996) (en banc).

<sup>20</sup> See *id.* at 793-94. Because the en banc panel held the statute invalid under the Due Process Clause, it did not address its validity under the Equal Protection Clause. See *id.* at 838.

<sup>21</sup> *Id.* at 799.

<sup>22</sup> See *id.* at 802-05.

<sup>23</sup> See *id.* at 816.

<sup>24</sup> See *id.* at 816-32. In the other four parts of the balancing test, Judge Reinhardt evaluated the means by which the state chose to serve its interests; reiterated that the presence of certain conditions, such as terminal illness, suffering, and freedom from coercion, strengthens an individual's liberty interests; chronicled the results of the state's burden on patients' liberty interests; and emphasized the important consequences involved in deciding the issue, regardless whether the court found for the plaintiffs or for the State. See *id.* at 832-36.



state's interests in preserving life,<sup>25</sup> preventing suicide,<sup>26</sup> and safeguarding the interests of third-party dependents of people contemplating suicide.<sup>27</sup> He ultimately determined that none of the state's interests were sufficient to justify the curtailment of the plaintiffs' liberty interests,<sup>28</sup> and concluded that Washington's ban on assisted suicide was "unconstitutional as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians."<sup>29</sup>

In contrast, the district court in *Quill v. Koppell*<sup>30</sup> narrowly interpreted *Planned Parenthood v. Casey*<sup>31</sup> and *Cruzan v. Director, Missouri Department of Health*<sup>32</sup> and referred to the nation's historical disapproval of suicide and assisted suicide in order to reject the plaintiffs' contention that physician-assisted suicide constitutes a fundamental liberty interest under the Due Process Clause.<sup>33</sup> The district court then applied a rational basis test and dismissed the plaintiffs' argument that New York law violated the Equal Protection Clause insofar as it criminalized the prescription of lethal doses of medication while allowing competent patients to "refuse medical treatment, even [when] the withdrawal of such treatment w[ould] result in death."<sup>34</sup>

On appeal, the Second Circuit reversed the district court's equal protection holding.<sup>35</sup> Discussing New York statutory law, Second Circuit precedent, and *Cruzan*, the court of appeals demonstrated that New York unquestionably permits terminally ill patients "who are on life-support systems . . . to hasten their deaths by directing the removal of such systems" even though, under the statutes at issue, "those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs."<sup>36</sup> The court quoted Justice Scalia's concurrence in *Cruzan* to support the conclusion that, in the absence of the prohibition at issue, the cause of death for each type of patient

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<sup>25</sup> See *id.* at 816-20.

<sup>26</sup> See *id.* at 820-24.

<sup>27</sup> See *id.* at 827.

<sup>28</sup> See *id.* at 837.

<sup>29</sup> *Id.*

<sup>30</sup> 870 F. Supp. 78 (S.D.N.Y. 1994).

<sup>31</sup> 505 U.S. 833 (1992).

<sup>32</sup> 497 U.S. 261 (1990).

<sup>33</sup> See *Quill*, 870 F. Supp. at 82-84.

<sup>34</sup> *Id.* at 84. In upholding the legal distinction, the court cited New York's interests in "preserving life[] and in protecting vulnerable persons." *Id.*

<sup>35</sup> See *Quill v. Vacco*, 80 F.3d 716, 727-31 (2d Cir. 1996). The court also rejected the plaintiffs' due process claim, stating that, because of the court's "position in the judicial hierarchy," it was unwilling to take the expansive position necessary to support such a claim. *Id.* at 725. Judge Calabresi's concurrence "explain[ed] his unwillingness to reach the ultimate Due Process and Equal Protection questions," *id.* at 732 (Calabresi, J., concurring), and urged a "constitutional remand" to provide New York with an opportunity to clearly assert its interests, *id.* at 738, 743.

<sup>36</sup> *Quill*, 80 F.3d at 729.

would be indistinguishable — “the suicide’s conscious decision” to end his or her life.<sup>37</sup> Therefore, the court applied a rational basis test and found no valid state concern to justify the denial of physician-assisted suicide.<sup>38</sup>

In separate unanimous decisions, Chief Justice Rehnquist led the Supreme Court in reversing both the Second and the Ninth Circuit decisions.<sup>39</sup> First, in *Glucksberg*, he articulated the question presented to be “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.”<sup>40</sup> In answering this question, the Chief Justice explained two primary features of the Court’s substantive due process analysis: the protection of fundamental rights that are firmly established in the nation’s history and tradition, and a precision in identifying and articulating asserted substantive rights.<sup>41</sup> Beginning his own analysis with a sweeping examination of the “[n]ation’s history, legal traditions, and practices,”<sup>42</sup> Chief Justice Rehnquist noted that the American colonies progressed from the common law tradition of seizing a suicide’s assets, to general condemnation of suicide, to the eventual outlaw of assisted suicide.<sup>43</sup> Unlike the Ninth Circuit, he refused to interpret either *Cruzan* to reflect more than a long tradition of recognizing forced medical treatment as a form of battery<sup>44</sup> or *Casey* to recognize more than the fact that many due process rights and liberties relate to personal autonomy.<sup>45</sup>

Chief Justice Rehnquist further departed from the Ninth Circuit’s analysis by applying a rational basis test to determine the constitutionality of the Washington statute.<sup>46</sup> He accepted Washington’s unqualified interests in preserving life and preventing suicide,<sup>47</sup> in upholding medical ethics,<sup>48</sup> in protecting vulnerable groups from undue influence,<sup>49</sup> prejudice, stereotypes, and indifference,<sup>50</sup> and in avoiding a

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<sup>37</sup> *Id.* (quoting *Cruzan*, 497 U.S. at 296–97 (Scalia, J., concurring)) (internal quotation marks omitted).

<sup>38</sup> *See id.* at 729–30. The court resisted New York’s contention that physician-assisted suicide eventually would be forced on the most vulnerable segments of the ill population. *See id.* at 730.

<sup>39</sup> *See Quill*, 117 S. Ct. at 2297; *Glucksberg*, 117 S. Ct. at 2262. Justices Scalia, Kennedy, and Thomas joined in Chief Justice Rehnquist’s opinions without separate elaboration. Justice O’Connor also joined in the opinions but filed a concurrence to explain her reasoning. Justices Stevens, Souter, Ginsburg, and Breyer concurred only in the Court’s judgments.

<sup>40</sup> *Glucksberg*, 117 S. Ct. at 2269.

<sup>41</sup> *See id.* at 2268.

<sup>42</sup> *Id.* at 2262.

<sup>43</sup> *See id.* at 2263–67.

<sup>44</sup> *See id.* at 2270.

<sup>45</sup> *See id.* at 2271.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 2272.

<sup>48</sup> *See id.* at 2273.

<sup>49</sup> *See id.* (citing *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 281 (1990)).

<sup>50</sup> *See id.*

slippery slope toward euthanasia,<sup>51</sup> and summarily labeled those interests sufficiently "important and legitimate" to reverse the en banc decision.<sup>52</sup> However, in what promises to be a much-discussed footnote, the Chief Justice emphasized that, although the Court's holding rejected the Ninth Circuit's decision with respect to the specific class of "competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors,"<sup>53</sup> the holding "does not absolutely foreclose" the possibility that a plaintiff might mount a successful challenge under circumstances different from those in *Glucksberg*.<sup>54</sup>

In *Quill*, the Chief Justice framed the question presented to be whether New York's ban on assisted suicide violated the Equal Protection Clause in light of New York's allowance of patients' refusal of life-saving medical treatment.<sup>55</sup> After first establishing the appropriateness of a rational basis test,<sup>56</sup> Chief Justice Rehnquist rejected the Second Circuit's determination that withdrawal from life support is "nothing more [or] less than assisted suicide."<sup>57</sup> In so doing, he differentiated both between the causes of death<sup>58</sup> and between the intentions of the physician and the dying person in the two types of life-ending decisions.<sup>59</sup> These distinctions proved fatal to the plaintiffs' argument.<sup>60</sup>

Justice Souter wrote a separate concurring opinion in each case.<sup>61</sup> In *Glucksberg*, his more substantial opinion, he framed the issue to be "whether the [Washington] statute set[] up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process

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<sup>51</sup> See *id.* at 2274-75.

<sup>52</sup> *Id.* at 2275.

<sup>53</sup> *Id.* (quoting *Compassion in Dying v. Washington*, 79 F.3d 790, 838 (9th Cir. 1996) (en banc)) (internal quotation marks omitted).

<sup>54</sup> *Id.* at 2275 n.24. Chief Justice Rehnquist reiterated, however, that the rational basis test would remain a major impediment to the success of such a claim. See *id.*

<sup>55</sup> See *Quill*, 117 S. Ct. at 2296.

<sup>56</sup> See *id.* at 2297.

<sup>57</sup> *Id.* at 2298 (quoting *Quill v. Vacco*, 80 F.3d 716, 729 (1996)) (internal quotation marks omitted).

<sup>58</sup> See *id.* ("[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.")

<sup>59</sup> See *id.* at 2298-99. Chief Justice Rehnquist stated that a physician clearly intends a patient's death when assisting a suicide but may only intend to respect the patient's desires or to ease pain and suffering when withdrawing or refraining from starting medical treatment. See *id.* Similarly, "a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not." *Id.* at 2299.

<sup>60</sup> See *id.* at 2302.

<sup>61</sup> See *Quill*, 117 S. Ct. at 2302 (Souter, J., concurring in the judgment); *Glucksberg*, 117 S. Ct. at 2275 (Souter, J., concurring in the judgment).

Clause.<sup>62</sup> Although the physicians' argument that the statute prohibited the exercise of their best judgment<sup>63</sup> led Justice Souter to apply "careful scrutiny [to] the State's contrary claim," he found the state's interest in "protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and nonvoluntary," dispositive and rejected the physicians' argument.<sup>64</sup>

In a single opinion, Justice O'Connor explained that she joined in the Court's opinions in both cases because she agreed "that there is no generalized right to 'commit suicide.'"<sup>65</sup> However, she posited that the respondents in both cases urged the Court to resolve a narrower question: "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."<sup>66</sup> She saw no need to answer this question, because the claims in both cases involved facial statutory challenges.<sup>67</sup> Because no party in either case claimed that the Washington or New York laws prohibited terminally ill patients experiencing great pain from obtaining medication to "alleviate [their] suffering, even to the point of causing unconsciousness and hastening death," Justice O'Connor agreed that the states' interests in protecting patients who are not competent, not terminal, or not acting voluntarily justified a prohibition against physician-assisted suicide.<sup>68</sup>

Joining in Justice O'Connor's opinion, except insofar as it joined the majority, Justice Breyer wrote a single concurrence.<sup>69</sup> He characterized the issue to be whether the nation's legal tradition provided support for a broader right than the majority discussed — the "right to die with dignity" — the core of which would provide "personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering."<sup>70</sup> However,

<sup>62</sup> *Glucksberg*, 117 S. Ct. at 2275 (Souter, J., concurring in the judgment) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

<sup>63</sup> *See id.* at 2276.

<sup>64</sup> *Id.* at 2290. Justice Souter cited conflicting accounts of the prevalence of involuntary euthanasia in the Netherlands to bolster his conclusion that Washington could rationally fear that physician-assisted suicide would create a slippery slope problem despite possible state regulations. *See id.* at 2292. In his *Quill* concurrence, Justice Souter stated that the importance of the patients' and physicians' claims required the state to offer a "commensurate justification" for its ban. *Quill*, 117 S. Ct. at 2302 (Souter, J., concurring in the judgment). He then referred to his concurrence in *Glucksberg* for an analysis of why New York's law would satisfy his conception of the equal protection test. *See id.* Justice Souter also stated that "the Equal Protection Clause . . . does essentially nothing in a case like this that the Due Process Clause cannot do on its own." *Glucksberg*, 117 S. Ct. at 2277 n.3 (Souter, J., concurring in the judgment).

<sup>65</sup> *Washington v. Glucksberg and Vacco v. Quill*, 117 S. Ct. at 2302, 2303 (1997) (O'Connor, J., concurring).

<sup>66</sup> *Id.* at 2303.

<sup>67</sup> *See id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See id.* at 2310 (Breyer, J., concurring in the judgments).

<sup>70</sup> *Id.* at 2311.

like Justice O'Connor, Justice Breyer stated that it was unnecessary for the Court to determine whether such a right was fundamental because "the avoidance of severe physical pain (connected with death) would have to comprise an essential part" of any such claim, and neither New York's nor Washington's laws had forced this pain on dying patients.<sup>71</sup>

Finally, Justice Stevens wrote separately "to make it clear that there is . . . room for further debate about the limits that the Constitution places on the power of the States to punish" assisted suicide.<sup>72</sup> He believed that the Court's holdings did "not foreclose the possibility that some applications of the statute" might well be invalid.<sup>73</sup> In particular, Justice Stevens focused on the rights of those patients for whom palliative care "cannot alleviate all pain and suffering."<sup>74</sup>

Given that the Court in *Glucksberg* and *Quill* considered an unusual number of lower court opinions and a deluge of amicus briefs,<sup>75</sup> and given that the decisions were unanimous in both cases, casual observers might conclude that the Court has completely resolved the issue of a constitutional right to assisted suicide.<sup>76</sup> However, in *Glucksberg*, the Court rejected only the specific arguments that Washington's prohibition was facially invalid or invalid "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors."<sup>77</sup> Chief Justice Rehnquist, in

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2304 (Stevens, J., concurring in the judgments). Justice Stevens stated that, "[a]lthough there is no absolute right to physician-assisted suicide, *Cruzan* makes it clear that some individuals who . . . are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs." *Id.* at 2307. Justice Stevens also discussed the Court's reasoning in *Quill*. See *id.* at 2309-10. Although he agreed with the Court's equal protection conclusion, see *id.*, he observed that "[t]he illusory character of any differences in intent or causation" is revealed in the American Medical Association's endorsement of terminal sedation, a practice of administering "sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear" that the treatment will hasten death. *Id.* at 2310.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2308.

<sup>75</sup> See, e.g., Brief of the American Medical Association et al. as Amici Curiae in Support of Petitioners, *Glucksberg* (No. 96-110), available in 1996 WL 656263; Brief Amicus Curiae of the American Hospital Association in Support of Petitioners, *Glucksberg and Quill* (Nos. 96-110, 95-1858), available in 1996 WL 656278.

<sup>76</sup> Such observers likely see support for their view in *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997), a post-*Glucksberg* and post-*Quill* case in which the Supreme Court of Florida upheld Florida's "assisting self-murder" statute against federal due process and equal protection and state privacy challenges. See *id.* at 100, 104.

<sup>77</sup> *Glucksberg*, 117 S. Ct. at 2275 (quoting *Compassion in Dying v. Washington*, 79 F.3d 790, 838 (9th Cir. 1996) (en banc)) (internal quotation marks omitted). Although Chief Justice Rehnquist stated that the Court's substantive due process analysis requires "precision" in identifying and articulating substantive rights, see *id.* at 2268, the Justices' various descriptions of the question presented indicate their imprecision in conveying a uniform characterization of the appropriate right to be considered in the assisted suicide cases. Compare, e.g., *id.* at 2269 (characterizing the appropriate question to be "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing

agreement with Justice Stevens, even acknowledged that the Court's decision does not absolutely "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge."<sup>78</sup> This admission, combined with the fact that five Justices wrote concurrences to clarify *why* they voted with the Court, indicates that a significant number of Justices may be receptive to recognizing a constitutional right to physician-assisted suicide in some circumstances.<sup>79</sup> Although some commentators argue that these concurrences leave open the possibility of a liberty interest only in the face of *legal* barriers to obtaining palliative care,<sup>80</sup> a close reading of the opinions suggests at least one scenario in which the Court might recognize such a right based on *factual* circumstances.

Four of the concurring opinions<sup>81</sup> explicitly expressed concern about a patient's ability to avoid physical pain in the face of imminent death. This concern could justify a right to assisted suicide in situations in which no other means exist for a patient to avoid pain.<sup>82</sup> Most directly and explicitly, Justice Stevens acknowledged that palliative care cannot eliminate all patients' pain and that, aware of their limited prospects for pain relief, some patients may rationally choose assisted

so"), with *Glucksberg and Quill*, 117 S. Ct. at 2303 (O'Connor, J., concurring) (characterizing the appropriate question to be "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death"). The manner in which the Justices articulate a right impacts their willingness to find the right grounded in national history and traditions and, hence, their willingness to protect it under substantive due process. Cf. Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, N.Y. REV. BOOKS, Sept. 25, 1997, at 40, 40-44 (contrasting Chief Justice Rehnquist's "historical understanding" of the Due Process Clause with Justices Stevens's, O'Connor's, Souter's, Ginsburg's, and Breyer's "interpretive view" of the Clause).

<sup>78</sup> *Glucksberg*, 117 S. Ct. at 2275 n.24 (quoting *Glucksberg and Quill*, 117 S. Ct. at 2309 (Stevens, J., concurring in the judgments)) (internal quotation marks omitted).

<sup>79</sup> See Dworkin, *supra* note 77, at 40 (arguing that the "unanimity of the vote was deceptive" because five Justices did not reject the right to assisted suicide in principle); Cass R. Sunstein, *Supreme Caution: Once Again, the High Court Takes Only Small Steps*, WASH. POST, July 6, 1997, at C1 (arguing that the five concurring opinions, especially Justice O'Connor's, signal the possible existence of a right to physician-assisted suicide in compelling circumstances). But see Yale Kamisar, *The Physician-Assisted Suicide Cases: What Did the Court Hold? What Questions Did It Leave Open?*, Remarks at U.S. Law Week's 19th Annual Conference 3 (Sept. 5, 1997) (transcript available in the Harvard Law School Library) (positing that, in *Glucksberg and Quill*, the Supreme Court addressed and rejected "almost all" of the "arguments in favor of [physician-assisted suicide]").

<sup>80</sup> See, e.g., Kamisar, *supra* note 79, at 17-18.

<sup>81</sup> Because of Justice Ginsburg's substantial agreement with Justice O'Connor's opinion, see *Glucksberg and Quill*, 117 S. Ct. at 2310 (Ginsburg, J., concurring in the judgments), this Comment includes Justice Ginsburg's concurrence among the four opinions stating a concern for patients desiring to avoid physical pain.

<sup>82</sup> The Court did not consider whether any patients suffered from unalleviated pain in either *Quill* or *Glucksberg*, because the plaintiff patients died before the Court adjudicated the cases. See *Quill*, 117 S. Ct. at 2296; *Glucksberg*, 117 S. Ct. at 2269. Given the lengthy time frame involved in litigation, this pattern is likely to repeat itself in future cases.

suicide.<sup>83</sup> According to Justice Stevens, the weight of the state's countervailing interests is reduced in such cases.<sup>84</sup>

Justice O'Connor also alluded to this right with her observation that "dying patients in Washington and New York [indisputably] can obtain palliative care, even when doing so would hasten their deaths."<sup>85</sup> In light of this fact, Justice O'Connor saw "no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives."<sup>86</sup> Justice O'Connor therefore seemed to leave open the possibility of allowing physician-assisted suicide in cases in which the patient can show that she meets a reasonable consensus definition of terminal illness, the state can provide assurances that it has accurately confirmed the voluntariness of the patient's decision, and palliative care is unavailable or ineffective.<sup>87</sup>

Although he joined in much of Justice O'Connor's opinion, Justice Breyer was more forthright in suggesting his willingness to find some form of a constitutional right to die. He indicated his receptiveness to a careful formulation of a "right to die with dignity"<sup>88</sup> and stated that "the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful [constitutional] claim."<sup>89</sup> Justice Breyer acknowledged the view of medical experts who argue that palliative care can relieve the pain of most individuals and that most patients who do not receive adequate palliative care have encountered institutional rather than legal barriers.<sup>90</sup> However, he stated that the "Court might have to revisit its conclusions" in cases in which the law would contribute to "serious and otherwise unavoidable physical pain (accompanying death)."<sup>91</sup>

In addition to the four Justices who directly alluded to a potential right to avoid physical pain, Justice Souter arguably implied that he might recognize the same right in appropriate circumstances. For Justice Souter, the possibility that the Dutch legalization of assisted suicide has led to involuntary euthanasia in the Netherlands was "dispositive of the due process claim" for the time being.<sup>92</sup> However, he also

<sup>83</sup> See *Glucksberg and Quill*, 117 S. Ct. at 2308 (Stevens, J., concurring in the judgments).

<sup>84</sup> See *id.* at 2308-09.

<sup>85</sup> *Id.* at 2303 (O'Connor, J., concurring).

<sup>86</sup> *Id.*

<sup>87</sup> See *id.* These criteria would address the two concerns that convinced Justice O'Connor to uphold the challenged statutes: "[t]he difficulty in defining terminal illness" and "the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary." *Id.*

<sup>88</sup> *Id.* at 2311 (Breyer, J., concurring in the judgments) (internal quotation marks omitted).

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* at 2311-12.

<sup>91</sup> *Id.* at 2312. Justice Breyer provided as an example a situation in which a state law prohibited palliative care. See *id.* The fact that he prefaced this illustration with "for example" indicates his receptiveness to other circumstances in which he would recognize a right to assistance.

<sup>92</sup> *Glucksberg*, 117 S. Ct. at 2292 (Souter, J., concurring in the judgment).

acknowledged that “[t]he [plaintiff patients] sought not only an end to pain . . . but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication.”<sup>93</sup> Given a factual showing that, perhaps because of the adoption of procedural safeguards, recognizing a right to avoid physician-assisted suicide would not lead to involuntary euthanasia, Justice Souter might be amenable to such a right.

Although it seems possible, then, that a majority of the Court would recognize a right to physician-assisted suicide if it were the only way for a patient to avoid severe pain,<sup>94</sup> at least two considerations render it difficult to imagine the factual circumstances that could give rise to such a case. First, the number of instances in which a patient’s pain cannot be alleviated through use of analgesics is presumably small.<sup>95</sup> In its amicus brief in *Glucksberg*, the American Medical Association asserted that pain management, if properly administered, can mitigate the physical suffering of nearly all patients.<sup>96</sup> If so, fewer people would seek assisted suicide.<sup>97</sup> However, some experts state that palliative care, no matter how well administered, cannot alleviate the pain of *all* terminally ill patients.<sup>98</sup> Justice Stevens cited this assertion as fact;<sup>99</sup> other Justices may follow suit if confronted with relevant evidence.

Second, opponents of assisted suicide question whether courts can accurately and objectively determine whether particular patients suffer from severe pain.<sup>100</sup> These commentators urge that the unverifiable nature of pain and suffering claims would force courts either to accept

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<sup>93</sup> *Id.* at 2289.

<sup>94</sup> A second circumstance under which the Court might recognize a right to physician-assisted suicide, and one that seems easier to imagine occurring and reaching the Court, is a situation in which the only way that a patient can avoid pain is through sedation. The gravity of a patient’s psychological suffering in such circumstances should not be underestimated. *See, e.g.,* Timothy E. Quill, Christine K. Cassel & Diane E. Meier, *Care of the Hopelessly Ill — Proposed Clinical Criteria for Physician-Assisted Suicide*, 327 *NEW ENG. J. MED.* 1380, 1383 (1992) (“[T]he most frightening aspect of death for many is not physical pain, but the prospect of losing control and independence and of dying in an undignified, unesthetic, absurd, and existentially unacceptable condition.”).

<sup>95</sup> *See, e.g.,* Marzen, *supra* note 3, at 819 & n.61.

<sup>96</sup> *See* Brief of the American Medical Association et al. as Amici Curiae in Support of Petitioners at 6, *Glucksberg* (No. 96-110), available in 1996 WL 656263.

<sup>97</sup> *See, e.g.,* James Bopp, Jr. & Richard E. Coleson, *The Constitutional Case Against Permitting Physician-Assisted Suicide for Competent Adults with ‘Terminal Conditions,’* 11 *ISSUES IN L. & MED.* 239, 245 (1995); Mark Strasser, *Assisted Suicide and the Competent Terminally Ill: On Ordinary Treatments and Extraordinary Policies*, 74 *OR. L. REV.* 539, 575 (1995).

<sup>98</sup> *See, e.g.,* Brief of the Coalition of Hospice Professionals as Amici Curiae for Affirmance of the Judgments Below at 6, *Quill and Glucksberg* (Nos. 95-1858, 96-110), available in 1996 WL 709342; Quill, Cassel & Meier, *supra* note 94, at 1383. Even the most steadfast opponents of assisted suicide acknowledge that some rare cases exist in which palliative care cannot alleviate pain. *See, e.g.,* Bopp & Coleson, *supra* note 97, at 245.

<sup>99</sup> *See Glucksberg and Quill*, 117 S. Ct. at 2308 (Stevens, J., concurring in the judgments).

<sup>100</sup> *See, e.g.,* Marzen, *supra* note 3, at 820.



the subjective evaluations of the patients themselves<sup>101</sup> or to draw artificial lines between indistinguishable cases.<sup>102</sup> In their opinion, courts cannot recognize a right to assisted suicide to relieve one individual's pain without extending the same right to all other individuals who claim comparable suffering.<sup>103</sup> This objection may not pose as significant an obstacle as opponents of assisted suicide suggest, however. Based on their knowledge and expertise, doctors who deal with chronic pain conditions sometimes deny requests for certain treatments when they do not agree with the patients' assessments of their conditions.<sup>104</sup> No reason exists to believe that a doctor's competence in this regard would be any less in the realm of assisted suicide. To suggest that a doctor should not be able to assist a patient whom he or she can confidently diagnose merely because another case might not provide the requisite degree of confidence runs counter to the realities of modern medicine.

Regardless of how long these or similar impediments keep a case from arising in which a dying patient seeks assistance in committing suicide because of intolerable physical pain, the Justices' varying perspectives led them in *Glucksberg* and *Quill* to issue opinions that did not definitively resolve whether some patients have a constitutional right to physician-assisted suicide. As their concurring opinions demonstrate, several Justices seem sufficiently troubled by the moral, ethical, legal, and religious implications of assisted suicide that they want to avoid taking a definitive stance on all instances of assisted suicide. Therefore, they avoided joining in an opinion that could be perceived to foreclose the right in all instances.<sup>105</sup> To some, the Court's opinions may seem unsatisfying precisely because of the questions left unanswered. To others, the Court took the most prudent course, because it left patients, doctors, and lawyers with greater ability to relitigate this important issue.

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<sup>101</sup> See, e.g., Yale Kamisar, *Against Assisted Suicide — Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 744-45 (1995). The contention that a right to assisted suicide based on unmitigated physical pain cannot, in practice or in principle, be separated from a right based on psychological suffering also underlies this argument. See, e.g., *id.*; Marzen, *supra* note 3, at 820.

<sup>102</sup> See, e.g., Kamisar, *supra* note 101, at 737.

<sup>103</sup> See, e.g., *id.* at 745.

<sup>104</sup> See Brief of the American Medical Association et al. as Amici Curiae in Support of Petitioners at 4, *Glucksberg* (No. 96-110), available in 1996 WL 656263 ("If a patient may demand and receive anything from a health care professional, individuals who practice the healing arts will cease being professionals.")

<sup>105</sup> Instead, they took a minimalist position. See Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6-7 (1996) (defining "decisional minimalism" to be "saying no more than necessary to justify an outcome, and leaving as much as possible undecided" (internal quotation marks omitted)). "[A] minimalist path usually . . . makes sense when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise)." *Id.* at 8. As Sunstein has observed, "there are complex moral issues and contested empirical questions [in the assisted suicide debate] for which courts are unlikely to have clear answers." *Id.* at 94.

2. *Right to Appeal Termination of Parental Rights.* — Among the select rights and liberties the Supreme Court has ranked “fundamental” under the Fourteenth Amendment, a parent’s interest in her relationship with her children<sup>1</sup> and an individual’s interest in access to judicial processes<sup>2</sup> are familiar refrains. At the intersection of these interests are individuals facing termination of their parental rights, who have twice won special constitutional protections before the Supreme Court.<sup>3</sup> Last Term, in *M.L.B. v. S.L.J.*,<sup>4</sup> the Court insisted again on the unique importance of termination cases and held that a state may not bar a parent from appellate review of a termination order solely because the parent is unable to pay required appellate fees.<sup>5</sup> Concerned that its opinion not be construed as granting all indigent civil litigants a broad right to state-funded appeals,<sup>6</sup> the Court took pains to limit its holding by grounding it in an amalgam of Fourteenth Amendment equality and fairness principles, ostensibly tailored to apply to termination cases alone.<sup>7</sup> Yet in seeking to limit its holding’s doctrinal impact, the Court further muddled an already complex area of jurisprudence, maintained a questionable distinction among court proceedings affecting families, and ultimately devalued what it means to possess an interest considered “fundamental.”

Melissa Brooks’s children were five and seven years old when Brooks and her husband, S.L.J., divorced in 1992.<sup>8</sup> Under the divorce agreement, S.L.J. retained custody of the children.<sup>9</sup> Within three months of the divorce, Brooks’s husband had remarried; the following

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<sup>1</sup> See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that due process and equal protection require the state to provide a biological father a hearing on his parental fitness before removing his children from his custody); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (labeling “fundamental” the right to “establish a home and bring up children”).

<sup>2</sup> See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that “due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals” seeking a divorce); *Griffin v. Illinois*, 351 U.S. 12, 17–19 (1956) (plurality opinion) (relying on both equal protection and due process in overturning an Illinois rule requiring criminal defendants to pay for a transcript of trial court proceedings before they could obtain full appellate review).

<sup>3</sup> See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (holding that the Constitution requires a “clear and convincing” standard of proof to establish grounds for terminating parental rights); *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 31–32 (1981) (holding that in parental rights termination cases of sufficient complexity, due process may require that indigent litigants be entitled to state-appointed counsel). As the Court has explained, proceedings terminating parental rights “final[ly] and irrevocabl[y]” sever a child’s legal ties to her parents, *Santosky*, 455 U.S. at 759, working a “unique kind of deprivation” that makes “parent[s]’ interest in the accuracy and justice of the decision . . . commanding,” *Lassiter*, 452 U.S. at 27.

<sup>4</sup> 117 S. Ct. 555 (1996). Melissa Brooks revealed her name to the media in interviews regarding the case. See, e.g., Joan Biskupic, *Justices Give Indigent Parents Greater Access to Civil Appeals*, WASH. POST, Dec. 17, 1996, at A2.

<sup>5</sup> See *M.L.B.*, 117 S. Ct. at 564–65, 568.

<sup>6</sup> See *id.* at 569.

<sup>7</sup> See *id.* at 566–67.

<sup>8</sup> See *id.* at 559.

<sup>9</sup> See *id.*

year, S.L.J. and his new wife, J.P.J., petitioned to adopt the two children and to terminate Brooks's parental rights.<sup>10</sup> The petition alleged that "M.L.B. had not maintained reasonable visitation" and that she had fallen behind on her child support payments.<sup>11</sup> Counterclaiming, Brooks asserted that S.L.J. had hindered her efforts to visit and requested that she be granted primary custody of the children.<sup>12</sup>

After three days of testimony, spread over several months, a Mississippi chancery court granted S.L.J.'s petition, approved the adoption, and terminated Brooks's parental rights.<sup>13</sup> Without providing any explicit reasoning or evidence, the Chancellor's order stated that there existed "clear and convincing evidence" that the relationship between Brooks and her children had "substantial[ly] ero[ded]," thereby satisfying Mississippi's statutory requirement for parental rights termination.<sup>14</sup>

In moving to appeal,<sup>15</sup> Brooks paid the required \$100 filing fee but was unable to prepay the additional \$2352.36 the state required to defray the costs of preparing the record for review.<sup>16</sup> Brooks petitioned the Mississippi Supreme Court for leave to appeal in forma pauperis.<sup>17</sup> The state high court denied Brooks's request, reiterating its prior holdings that "[t]he right to proceed in forma pauperis in civil cases exists only at the trial level."<sup>18</sup>

The Supreme Court reversed the Mississippi Supreme Court's decision and remanded the case for further proceedings.<sup>19</sup> Writing for the

<sup>10</sup> See *id.* Under Mississippi law, a court may terminate parental rights when, inter alia, "there is [a] substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's . . . unreasonable failure to visit or communicate." MISS. CODE ANN. § 93-15-103(3)(e) (1994).

<sup>11</sup> *M.L.B.*, 117 S. Ct. at 559.

<sup>12</sup> See *id.*

<sup>13</sup> See Decree of Adoption ¶ 7, *S.L.J. v. M.L.B.*, No. 93-A-006 (Miss. Ch. Ct. Dec. 14, 1996), reprinted in Petition for Writ of Certiorari app. at 11-12, *M.L.B.* (No. 95-853). As part of its decree, the court ordered that J.P.J.'s name replace Brooks's on the children's birth certificates. See *id.* ¶ 6, reprinted in Petition for Writ of Certiorari app. at 11, *M.L.B.* (No. 95-853).

<sup>14</sup> *Id.* para. 5, reprinted in Petition for Writ of Certiorari app. at 9, *M.L.B.* (No. 95-853).

<sup>15</sup> Mississippi grants all civil litigants, including those contesting termination orders, the right to appeal final judgments of lower courts. See MISS. CODE ANN. § 11-51-3 (Supp. 1994).

<sup>16</sup> See *M.L.B.*, 117 S. Ct. at 560.

<sup>17</sup> See Motion for Leave to Appeal in Forma Pauperis, *S.L.J. v. M.L.B.*, No. 93-A-006 (Miss. Ch. Ct. July 24, 1995), reprinted in Petition for Writ of Certiorari app. at 17-18, *M.L.B.* (No. 95-853). Brooks's attorney suggested alternatively that the state set up a payment schedule or allow Brooks to sign a promissory note in order to finance the costs of appeal. See Transcript of Oral Argument, *M.L.B.* (No. 95-853), available in 1996 WL 587663, at \*4 (Oct. 7, 1996). According to Brooks, the Mississippi Supreme Court is alone among the states in refusing even to consider in forma pauperis appeals in civil cases generally. See Brief for Petitioner at 26-27, *M.L.B.* (No. 95-853), available in 1996 WL 291022.

<sup>18</sup> Order, *M.L.B. v. S.L.J.*, No. 95-TS-00052 (Miss. Aug. 15, 1995) (citing, inter alia, *Nelson v. Bank of Miss.*, 498 So. 2d 365 (Miss. 1986)), reprinted in Petition for Writ of Certiorari app. at 3, *M.L.B.* (No. 95-853).

<sup>19</sup> See *M.L.B.*, 117 S. Ct. at 570.

Court,<sup>20</sup> Justice Ginsburg concluded that, under the Fourteenth Amendment's Due Process and Equal Protection Clauses, Mississippi could not "bolt the door to equal justice" to a parent whose economic circumstances would prevent her from appealing an order legally terminating her relationship with her children.<sup>21</sup>

Seeking to cabin its holding, the opinion placed *M.L.B.* at the "unique" locus of twin constitutional themes: the protected nature of the parent-child relationship<sup>22</sup> and the fundamental importance of access to "judicial processes."<sup>23</sup> Regarding the former interest, the majority noted a series of cases invalidating state requirements that criminal defendants pay certain court costs to appeal.<sup>24</sup> As extended in later cases, this principle became a "flat prohibition against making access to appellate processes . . . depend upon the [convicted] defendant's ability to pay."<sup>25</sup> In contrast, the Court had required states to waive court fees to ensure indigent *civil* litigants access to judicial processes in only a few cases, each involving domestic relations.<sup>26</sup>

Most relevant to *M.L.B.* among these cases was *Boddie v. Connecticut*,<sup>27</sup> in which the Court relied on the Due Process Clause to conclude that a state could not bar individuals, based on their inability to pay court fees, from obtaining a divorce.<sup>28</sup> *Boddie* thus involved what this Comment describes as an "access-plus" set of interests, in which the fundamental right of access to court, when joined with an addi-

<sup>20</sup> Justices Stevens, O'Connor, Souter, and Breyer joined Justice Ginsburg's opinion.

<sup>21</sup> *M.L.B.*, 117 S. Ct. at 568 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)) (internal quotation marks omitted).

<sup>22</sup> *See id.* at 564-65.

<sup>23</sup> *Id.* at 566. The opinion also invoked a third, arguably distinct theme involving the "age-old problem of [p]roviding equal justice for poor and rich . . . alike." *Id.* at 560 (alteration in original) (quoting *Griffin*, 351 U.S. at 16 (plurality opinion)) (internal quotation marks omitted). Because *M.L.B.* is grounded explicitly in the doctrine of family relations and access to court, this Comment focuses on these aspects of the decision in particular.

<sup>24</sup> *See id.* at 560-62. Justice Ginsburg's discussion focused primarily on *Griffin*, 351 U.S. at 18-19 (plurality opinion), and on *Mayer v. City of Chicago*, 404 U.S. 189 (1971), which extended the *Griffin* right to indigent defendants convicted of conduct merely "quasi criminal in nature" and sentenced to fines, rather than imprisonment, *id.* at 196 (quoting *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969)) (internal quotation marks omitted). Seeing a deep unfairness in appellate cost assessments that effectively barred indigent criminal defendants from judicial review, the Court stated that when a state has provided defendants a right to appeal, "it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such review." *M.L.B.*, 117 S. Ct. at 561 (quoting *Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring)) (internal quotation marks omitted).

<sup>25</sup> *M.L.B.*, 117 S. Ct. at 561 (second alteration in original) (citations omitted) (quoting *Mayer*, 404 U.S. at 196-97) (internal quotation marks omitted).

<sup>26</sup> *See id.* at 562-64.

<sup>27</sup> 401 U.S. 371 (1971).

<sup>28</sup> *See id.* at 380-81. The *Boddie* Court reasoned that the marriage relationship was "basic" in "this society's hierarchy of values" and that the state had "monopoliz[ed] . . . the means for legally dissolving this relationship." *Id.* at 374.

tional fundamental interest — in that case, the marriage relationship — yielded a form of heightened scrutiny of the state's legal rules.<sup>29</sup>

In an extended discussion of the other constitutional theme at stake, the Court made clear that it was this fundamental interest in "marriage, family life, and the upbringing of children"<sup>30</sup> that explained the Court's previous cases involving parental rights termination. In the decade before *M.L.B.*, the Court had held that due process requires clear and convincing evidence before parental rights can be terminated,<sup>31</sup> and in some cases entitles indigent litigants facing parental rights termination to a state-funded attorney.<sup>32</sup>

On the basis of these dual fundamental interests — the "structural" right of access to court plus the "substantive" interest in family relations<sup>33</sup> — the Court adopted *Griffin v. Illinois's* hybrid theory of Fourteenth Amendment jurisprudence, in which "[d]ue process and equal protection principles converge."<sup>34</sup> The Court concluded that the sum of these fundamental interests required balancing the strength of the individual's constitutional interests against the state's justification for its fee.<sup>35</sup>

Applying this access-plus test to the facts at hand, the Court recognized first that the stakes for Brooks were great: parental rights termination implicated an interest far greater than the "mere loss of money" accompanying criminal fines at issue in *Mayer*.<sup>36</sup> Moreover, the Court

<sup>29</sup> See *id.* at 379–80. In this respect, as the *M.L.B.* Court noted, *Boddie* differed from later holdings rejecting civil litigants' requests that court fees be waived. See *M.L.B.*, 117 S. Ct. at 563 (citing *Ortwein v. Schwab*, 410 U.S. 656, 661 (1973) (per curiam) (rejecting indigent appellants' claim that the state must waive court fees for judicial review of an administrative reduction of welfare benefits), and *United States v. Kras*, 409 U.S. 434, 445 (1973) (declining to require that a state waive court fees for civil claimants seeking bankruptcy discharge because bankruptcy does not involve a "fundamental interest").

<sup>30</sup> *M.L.B.*, 117 S. Ct. at 564.

<sup>31</sup> See *id.* at 564–65 (citing *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982)).

<sup>32</sup> See *id.* (citing *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 31–32 (1981)).

<sup>33</sup> See *id.* at 564 (listing substantive due process cases establishing marriage, procreation, and child rearing as among fundamental rights protected by the Fourteenth Amendment). Thus did the Court's analysis touch virtually the entire Fourteenth Amendment landscape: equal protection as well as both substantive and procedural aspects of due process.

<sup>34</sup> *Id.* at 566 (alteration in original) (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)) (internal quotation marks omitted). Like *Griffin* and its progeny then, *M.L.B.* implicated equal protection concerns — in that a class of litigants was denied access to appellate review solely because of an inability to pay — and due process concerns — inasmuch as such a classification called into question the "essential fairness" of the state law. *Id.* Like *Boddie*, *M.L.B.* involved "state controls or intrusions on family relationships" — a category of civil cases the Court had "consistently set apart from the mine run" of other cases. *Id.* at 563–64.

Justice Kennedy's concurring opinion departed from the majority's approach on this point alone, arguing that "due process is quite a sufficient basis" for the outcome in *M.L.B.*'s case. *Id.* at 570 (Kennedy, J., concurring) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>35</sup> See *M.L.B.*, 117 S. Ct. at 566 (citing *Bearden*, 461 U.S. at 666–67).

<sup>36</sup> *Id.* (quoting *Santosky*, 455 U.S. at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979))) (internal quotation marks omitted). As the *Santosky* Court had explained: "When the

noted that the “risk of error” was “considerable,” especially in a case, such as *M.L.B.*, in which the trial court’s order was utterly devoid of evidence or reasoning.<sup>37</sup> In contrast, the state’s purely financial interest was minimal given the small number of termination cases actually appealed.<sup>38</sup> Although insisting that it was not reforming the “general rule” that state fees garner only rationality review, the Court determined that it would be “anomalous” to waive transcript costs for appeals of mere misdemeanor convictions, but not for the “irretrievabl[y] destructiv[e]” termination of parental rights.<sup>39</sup>

Finally, the Court rejected the state’s concern that a holding for Brooks would lead to a flood of civil litigants seeking similar treatment.<sup>40</sup> Noting that it had repeatedly set parental status determinations apart from all other civil cases, the Court reiterated that because termination orders are a “unique kind of deprivation,” they are uniquely entitled to special constitutional protection.<sup>41</sup>

Justice Thomas issued a harsh dissent.<sup>42</sup> Seeking to untangle due process and equal protection theories from the majority’s jumble of Fourteenth Amendment principles, Justice Thomas argued that because neither clause alone could justify a free transcript right for Melissa Brooks, no combination of the two clauses could do so.<sup>43</sup> Justice Thomas quickly dispensed with Brooks’s due process claim. Recalling the well-settled rule that due process does not require states to provide any right to appeal, Justice Thomas averred that Brooks had

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State initiates a parental rights termination proceeding, it seeks not merely to infringe [a parent’s] fundamental liberty interest, but to end it.” *Santosky*, 455 U.S. at 759.

<sup>37</sup> *M.L.B.*, 117 S. Ct. at 566.

<sup>38</sup> *See id.* at 566–67. Justice Ginsburg’s analysis thus ultimately mirrored the familiar procedural due process test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which courts determine the level of process required by balancing the private interests at stake, the public interests promoted, and the risk of error in the procedures provided, *see id.* at 334–35. Indeed, this was the test the Court applied in previous parental rights termination cases to determine whether due process required state-appointed counsel, *see Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 27–28 (1981), or the clear and convincing evidence burden of proof, *see Santosky*, 455 U.S. at 758–70.

<sup>39</sup> *M.L.B.*, 117 S. Ct. at 566–67 (alteration in original) (quoting *Santosky*, 455 U.S. at 753) (internal quotation marks omitted). That a party facing parental rights termination might be entitled to counsel under *Lassiter*, but not to state payment of transcript costs, struck the Court as unacceptably inconsistent. *See id.* at 567.

<sup>40</sup> *See id.* at 569–70.

<sup>41</sup> *Id.* at 569 (quoting *Lassiter*, 452 U.S. at 27) (internal quotation marks omitted).

The Court additionally considered the state’s claim that Brooks sought aid to “alleviate the consequences of differences in economic circumstances that existed apart from state action.” *Id.* In response, Justice Ginsburg distinguished *M.L.B.*, in which Brooks sought defensively “to be spared from the State’s devastatingly adverse action,” *id.* at 568, from cases in which the Court had ruled against indigent parties seeking an “affirmative right to governmental aid,” *id.* (quoting *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989)) (internal quotation marks omitted).

<sup>42</sup> Justice Thomas was joined by Justice Scalia in the entirety of his dissent and by Chief Justice Rehnquist in all but Part II. Chief Justice Rehnquist also filed a brief dissent.

<sup>43</sup> *See M.L.B.*, 117 S. Ct. at 570–71 (Thomas, J., dissenting).

procedural safeguards "above and beyond" what the Court's previous termination decisions required.<sup>44</sup> Regarding equal protection, Justice Thomas rejected what he saw as the Court's attempt to make poverty a suspect class.<sup>45</sup> Such a reading of the Equal Protection Clause, Justice Thomas argued, would call into question every instance in which a state imposed a "reasonable exaction . . . for a service it provides."<sup>46</sup> A law limiting indigent parties' procedural options does not violate equal protection, Justice Thomas contended, because the clause does not require states affirmatively "to lift the handicaps flowing from differences in economic circumstances."<sup>47</sup>

Part II of the dissent departed more dramatically from the *Griffin-Mayer* line of cases, which Justice Thomas made clear he would overturn given an opportunity.<sup>48</sup> Warning that the *M.L.B.* right to transcript costs for indigent civil defendants could not be limited to this case,<sup>49</sup> Justice Thomas emphasized the longstanding distinction between civil and criminal law: although the Constitution expressly provides for various procedural protections for criminal defendants, such protections are "not available to the typical civil litigant."<sup>50</sup> The "fundamental" nature of the right at stake in parental status proceedings did not persuade Justice Thomas that *Mayer* should be extended to the civil realm.<sup>51</sup> "If all that is required to trigger the right to a free appellate transcript is that the interest at stake appear . . . as fundamental as the interest of a convicted misdemeanant,"<sup>52</sup> Justice Thomas

<sup>44</sup> *Id.* at 571-72 (noting that Brooks had received "notice and a hearing before a neutral . . . decisionmaker . . . [and] was represented by counsel — even though due process does not in every case require" counsel).

<sup>45</sup> *See id.* at 572-73.

<sup>46</sup> *Id.* at 573.

<sup>47</sup> *Id.* (quoting *Douglas v. California*, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) (quoting *Griffin v. Illinois*, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting))) (internal quotation marks omitted). Justice Thomas adhered to Mississippi's view of *Washington v. Davis*, 426 U.S. 229 (1976), in which the Court held that the Equal Protection Clause provides a remedy only against "purposeful discrimination." *M.L.B.*, 117 S. Ct. at 573 (Thomas, J., dissenting). In addition, Justice Thomas sharply criticized the majority's effort to distinguish Brooks's request for "state aid to subsidize [a] privately initiated" appeal, *id.* at 574 (quoting *M.L.B.*, 117 S. Ct. at 568) (internal quotation marks omitted), from the requests of previous petitioners for government aid to support "private" activities, *see id.* (finding no meaningful distinction between a "facially neutral rule that serves in some cases to prevent persons from availing themselves of . . . a state-funded abortion . . . which the State may, but is not required to, provide — and a facially neutral rule that prevents a person from taking an appeal" available only at the state's discretion).

<sup>48</sup> *See M.L.B.*, 117 S. Ct. at 575 (Thomas, J., dissenting).

<sup>49</sup> *See id.* at 570.

<sup>50</sup> *Id.* at 575.

<sup>51</sup> *See id.* at 575-76.

<sup>52</sup> *Id.* at 576.

posited, the variety of civil actions potentially commanding such a right appeared all but limitless.<sup>53</sup>

In the face of such concerns, the majority sought to limit the reach of its holding, both by denying that equal protection or due process alone could provide Brooks relief, and by seeking to distinguish the “tightly circumscribed category” of parental rights termination from all other civil decisions.<sup>54</sup> In the former aspect of its decision, *M.L.B.* rests on unsteady Fourteenth Amendment ground;<sup>55</sup> the decision unnecessarily blurs conventional interpretations of both the Due Process and Equal Protection Clauses. In the latter, the Court drew a line of questionable significance, particularly given the reality of child placement decisionmaking in family court. As a result of these efforts, manifest in the Court’s access-plus standard, the *M.L.B.* Court devalued the jurisprudential and practical consequences of possessing a “fundamental” right.

The Court’s refusal to name a “precise rationale”<sup>56</sup> of Fourteenth Amendment jurisprudence underpinning *M.L.B.* flowed not only from its attempt to counter the dissent’s slippery slope warnings, but also from its larger effort to constrain each clause’s independent scope. On one hand, basing its decision on standard equal protection doctrine could have signaled a return to a *Griffin*-era notion of equal protection, when it had appeared that the Court might recognize indigency as a suspect classification.<sup>57</sup> Alternatively, grounding its holding solely in an equal protection “fundamental right” of access to court might have required repudiating *Ortwein* and *Kras*, in which the Court had rejected the view that the access-to-court right alone could garner strict scrutiny for civil litigants.<sup>58</sup> On the other hand, the Court was con-

<sup>53</sup> See *id.* at 576–77. Justice Thomas questioned how the Court could reasonably distinguish the deprivation at stake in this case from other cases involving family matters, zoning, or home foreclosures. See *id.*

<sup>54</sup> *M.L.B.*, 117 S. Ct. at 566–67, 569 (citing *id.* at 576–78 (Thomas, J., dissenting), and Brief for Respondents at 27–28, *M.L.B.* (No. 95-983), available in 1996 WL 365897).

<sup>55</sup> As Justice Kennedy noted in concurrence, the *Griffin* judgment invoked both equal protection and due process ideals, but the lead opinion gained the support of just four Justices, with four others dissenting both from the holding and from the relevance of due process doctrine at all, see *id.* at 570 (Kennedy, J., concurring); *Griffin v. Illinois*, 351 U.S. 12, 13 (1956) (plurality opinion); *id.* at 26–27 (Burton & Minton, JJ., dissenting).

<sup>56</sup> *M.L.B.*, 117 S. Ct. at 566 (quoting *Ross v. Moffitt*, 417 U.S. 600, 608 (1974)) (internal quotation marks omitted).

<sup>57</sup> See, e.g., Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969). In contrast to that heady age, the post-1960s Court has limited the circumstances in which states are required to ensure the poor equal access to civil and criminal judicial processes. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-51, at 1647 (2d ed. 1988); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 91 (1983).

<sup>58</sup> These cases distinguished *Boddie v. Connecticut*, 401 U.S. 371 (1971), largely by explaining that divorce, unlike bankruptcy and welfare benefits, implicated a fundamental interest in family relations in addition to the fundamental interest in access to court. See *Ortwein v. Schwab*, 410 U.S. 656, 658–59 (1973); *United States v. Kras*, 409 U.S. 434, 444–45 (1973). *Boddie*’s other pur-



strained in its due process thinking by the clear precedent that "due process does not independently require that the State provide a right to appeal,"<sup>59</sup> and by *Lassiter*, which recognized only a limited due process right to counsel in certain, sufficiently complex cases involving termination of parental rights.<sup>60</sup> The Court thus decided to split the difference, conducting a due process-type balancing test under an "equal protection framework."<sup>61</sup> Ironically then, the Court's effort to limit the impact of its holding on Fourteenth Amendment doctrine may have opened the door to the further blurring of due process and equal protection paradigms that, apart from *Griffin*, had remained more or less doctrinally intact.<sup>62</sup>

Despite the Court's reluctance to accept this conclusion, either clause could have achieved the same result. As Justice Kennedy's brief concurrence proposed, the traditional *Mathews v. Eldridge* balancing test could support a holding for Brooks on due process grounds alone.<sup>63</sup> Alternatively, equal protection alone provides principled support for requiring a waiver of appellate costs for indigents; if getting to court is truly "fundamental" to a democratic system — more like vot-

portedly distinguishing feature, the state's monopolizing the means for divorce but not for resolving debt or obtaining food and shelter, is not convincing in the context of such family law matters as child custody, which requires a court's imprimatur for private bonds to become legally meaningful. See *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 107 (1971).

At least one scholar has suggested that the *Ortwein-Kras* access-plus requirement is related to the Court's fear of granting what might be seen as affirmative benefits to the poor. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 289-90 (1991). Klarman's view is consistent with Justice Ginsburg's efforts in *M.L.B.* to distinguish an "affirmative" right to government aid — which the Court had rejected in cases such as *Harris v. McRae*, 448 U.S. 297, 321-22, 326 (1980) — from a "defensive" right to have the state pay an indigent's court costs on appeal of an adverse state action. See *M.L.B.*, 117 S. Ct. at 568.

<sup>59</sup> *M.L.B.*, 117 S. Ct. at 566.

<sup>60</sup> See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 31 (1981).

<sup>61</sup> *M.L.B.*, 117 S. Ct. at 566 (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)) (internal quotation marks omitted).

<sup>62</sup> Although complex in application and much criticized, due process balancing under *Mathews v. Eldridge*, 424 U.S. 319 (1976), and equal protection tiered scrutiny review have become familiar tests of constitutionality. See, e.g., WILLIAM B. LOCKHART, YALE KAMISAR, JESSE H. CHOPER & STEVEN H. SHIFFRIN, *CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS* 1221-1359 (7th ed. 1991). The *M.L.B.* Court's *Griffin*-type organic view of the Fourteenth Amendment, in contrast, seems more akin to the *Griswold* Court's vision of the "penumbras" and "emanations" of the Bill of Rights, which in *Griswold* "converged" to support a right to contraception. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>63</sup> See *M.L.B.*, 117 S. Ct. at 570 (Kennedy, J., concurring). Kennedy argued that the vagaries of the Mississippi appellate system and the risk of error in such a cursory court proceeding, combined with Brooks's strong interest in maintaining her relationship with her children, far outweighed the state's mere pecuniary interest in denying her appeal. See *id.* This balance of *Mathews* factors mirrors the structure of the majority's own analysis, which the Court claimed could not be reduced to an "easy slogan[]." *M.L.B.*, 117 S. Ct. at 566 (quoting *Bearden*, 461 U.S. at 666) (internal quotation marks omitted).

ing rights<sup>64</sup> than the amorphous set of “fundamental” interests cognizable under substantive due process — then this interest alone should support a right of equal access.<sup>65</sup>

The Court’s second method of limiting its holding was to distinguish parental rights termination from all other forms of state intervention in family life.<sup>66</sup> Indeed, termination appears on its face to be the most severe step on a continuum of state intervention in the family. Yet a child’s ostensibly temporary placement — during post-divorce custody disputes or after removal from a putatively abusive or neglectful home — may play a pivotal role in determining the permanent outcome of a protracted dispute.<sup>67</sup> Thus, indigent parents’ interest in accuracy may be at least as strong, and the consequences potentially as severe, in the proceedings excluded from the Court’s ruling, which included all intermediate questions of child custody.<sup>68</sup>

<sup>64</sup> See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (describing voting as a “fundamental political right, because preservative of all rights” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)) (internal quotation marks omitted)).

<sup>65</sup> See *TRIBE*, *supra* note 57, § 16-12, at 1463. Tribe explains that the interest in access to court flows from the constitutional structure itself, which contemplates “equal participation in governmental and societal decision-making,” making the salient issue “whether the state has evenly extended . . . those rights it has *chosen* to grant.” *Id.* § 16-10, at 1460. In this respect, access to an initial court hearing and access to appellate review may be seen to implicate the same fundamental interest.

<sup>66</sup> See *M.L.B.*, 117 S. Ct. at 569-70.

<sup>67</sup> States’ decisionmaking regarding children’s “best interests” has been dramatically influenced by dual principles of child development: that a child should be raised in a stable, permanent environment, and that a child should develop a safe, steady relationship with a caregiver considered that child’s “psychological parent.” JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 18-19, 31-33 (2d ed. 1979). As one scholar explains, “the longer a child . . . is separated from a parent of origin, the greater the likelihood that the child will bond with another adult who fulfills the role of ‘psychological parent.’” Thus . . . placement decisions are in large part based on the length of time of this separation . . .” Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 *REV. L. & SOC. CHANGE* 397, 404 (1996) (citing GOLDSTEIN, FREUD & SOLNIT, *supra*, at 40-42). Courts now widely rely on this philosophy in making placement decisions. See Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-Of-Time-Out-Of-Custody Ground for Termination of Parental Rights*, 71 *N.Y.U. L. REV.* 1251, 1256-61 (1996).

<sup>68</sup> See *M.L.B.*, 117 S. Ct. at 569-70. For a child of divorce, a judgment relegating one parent to limited visitation rights may have the same practical effect on the child’s access to that parent as does a court decree making the parent a legal “stranger” to the child forever. See, e.g., Karl A.W. DeMarce, *Stepparent Adoption and Involuntary Termination of Parental Rights: When Petitioners Come to Court with Unclean Hands*, 61 *MO. L. REV.* 995, 1004-05 (1996) (describing the frequency with which custodial parents block noncustodial parents’ attempts to visit their children and subsequently argue for involuntary termination based on noncustodial parents’ “continuous neglect”); Joan B. Kelly, *The Determination of Child Custody*, *CHILDREN & DIVORCE*, Spring 1994, at 121, 131 (citing studies suggesting that infrequent contact with a noncustodial parent diminishes the parent’s importance to the child). In this sense, if at all, it is only for the parent, not for the child, that termination alone seems “irretrievabl[y] destructi[ve].” *M.L.B.*, 117 S. Ct. at 566 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)) (internal quotation marks omitted).

The access-plus limiting rationale — effectively requiring two “fundamental” rights to gain any heightened attention — obscures such awkward line-drawing,<sup>69</sup> and begs the question what it means for a right to be “fundamental.” Although defining the scope of Court-identified fundamental rights is a perpetual burden of constitutional jurisprudence, once the Court has recognized a right as fundamental, that right alone should be enough to merit balancing review.

The cursory order making Melissa Brooks a legal stranger to her children illustrates perfectly why Mississippi deemed it important that those subject to any civil order be allowed to petition for appeal. In contrast to the valuable “error-reducing” function of appellate review,<sup>70</sup> the “floodgates” interest limiting indigent litigants’ ability to appeal is primarily financial.<sup>71</sup> Yet many states already manage to provide for in forma pauperis appeals in civil cases generally; most waive court costs at least for indigent litigants facing parental rights termination.<sup>72</sup> Even accepting the Court’s access-plus constraint on realizing the fundamental interest in access to court, no principled way exists to limit the Court’s holding to termination cases alone. Only a small fraction of all custody cases are ever litigated, let alone appealed.<sup>73</sup> The state’s financial stake in parent-child proceedings generally thus seems de minimis, especially when held up against either one of Brooks’s “fundamental” interests, even narrowly construed.

A principled response to the “floodgates” concern does not require contorting Fourteenth Amendment doctrine or fashioning procrustean limits on fundamental interests involving family, effectively declaring some fundamental rights more “fundamental” than others. Instead, the Court should be true to its admirable instinct that accuracy and

<sup>69</sup> “Although overtly abstract concepts create the appearance of generality and universality, their inability to make real world distinctions must be compensated for by extremely technical, ad hoc exceptions. Those technical distinctions only highlight the degree to which the Court’s jurisprudence has lost touch with the underlying social reality.” Morton J. Horwitz, *The Supreme Court, 1992 — Foreword: The Constitution of Change and Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32, 100 (1993).

<sup>70</sup> *Santosky*, 455 U.S. at 776 n.4 (Rehnquist, J., dissenting) (noting the “error-reducing” power of such procedures as appellate review in termination cases).

<sup>71</sup> See Brief for Respondent at 27–30, *M.L.B.* (No. 95-853), available in 1996 WL 365897.

<sup>72</sup> See *M.L.B.*, 117 S. Ct. at 567 n.13 (citing state statutes). Mississippi law grants in forma pauperis appeals in only one type of civil proceeding — civil commitment hearings. See MISS. CODE ANN. §§ 41-21-83, 41-21-85 (1994).

<sup>73</sup> See, e.g., Stephen J. Bahr, Jerry D. Howe, Meggin Morrill Mann & Matthew S. Bahr, *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 254 (1994) (reporting data that only 12% of divorcing couples between 1970–1993 in Utah had formal conflicts over custody and citing studies finding similarly low ratios in other states); Alison Richey McBurney, Note, *Bitter Battles: The Use of Psychological Evaluations in Child Custody Disputes in West Virginia*, 97 W. VA. L. REV. 773, 774 (1995) (reporting estimates that 10% of children of divorce in West Virginia would be the subjects of custody disputes); see also *M.L.B.*, 117 S. Ct. at 567 (reporting the paucity of parental rights termination appeals in Mississippi) (citing Brief for Petitioner at 20, 25, *M.L.B.* (No. 95-853), available in 1996 WL 291022).

fairness require granting indigent litigants access to the same procedural safeguards as all other litigants, especially in family-related disputes.

#### D. Due Process and Ex Post Facto Clauses

*Involuntary Commitment of Violent Sexual Predators.* — Society has long struggled with the dangers posed by sexual aggression and predation. Last Term, in *Kansas v. Hendricks*,<sup>1</sup> the Supreme Court upheld Kansas's Sexually Violent Predator Act<sup>2</sup> against substantive due process, ex post facto, and double jeopardy challenges. The Court's analysis of the due process issue effectively lowered the constitutional standard for involuntary civil commitment from "mental illness" to "mental abnormality"<sup>3</sup> and paved the way for increased employment of involuntary commitment in conjunction with criminal proceedings, blurring the relationship between the civil commitment and criminal processes.

In 1994, the Kansas legislature enacted the Sexually Violent Predator Act. The Act provides for the involuntary civil commitment of persons who have been convicted of, or charged with, a "sexually violent offense" and who suffer from a "mental abnormality" or "personality disorder" that renders them "likely to engage in . . . predatory acts of sexual violence."<sup>4</sup> Kansas ostensibly passed the Act because extant procedures for civil commitment of mentally ill individuals<sup>5</sup> were inadequate in that they did not provide for the long-term care and treatment required by violent sexual predators, whose antisocial personality features render them highly likely to engage in repeat acts of sexual violence.<sup>6</sup>

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<sup>1</sup> 117 S. Ct. 2072 (1997).

<sup>2</sup> KAN. STAT. ANN. §§ 59-29a01-17 (1994). The Kansas legislature amended the Act after Leroy Hendricks's commitment in ways not relevant to the disposition of the case. See KAN. STAT. ANN. §§ 59-29a01-17 (Supp. 1996). This Comment addresses the 1994 version of the statute, under which Hendricks was committed.

<sup>3</sup> *Hendricks*, 117 S. Ct. at 2079-81. Prior to *Hendricks*, involuntary commitment proceedings could satisfy due process only if they established two preconditions by clear and convincing evidence: that the person is mentally ill, and that he poses a danger to himself or to others. See *Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992) (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

<sup>4</sup> KAN. STAT. ANN. § 59-29a02(a) (1994). Under the Act, a "mental abnormality" is a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* § 59-29a02(b). "Sexually violent offense[s]," for the purposes of the Act, include: rape; indecent liberties with a child; criminal sodomy; indecent solicitation of a child; sexual exploitation of a child; aggravated sexual battery; "an attempt, conspiracy, or criminal solicitation . . . of a sexually violent offense;" and criminal acts that have been determined beyond a reasonable doubt to have been "sexually motivated." *Id.* § 59-29a02(d)-(e).

<sup>5</sup> See KAN. STAT. ANN. § 59-2901 (1994).

<sup>6</sup> See *id.* § 59-29a01. The Act sets forth a sequence of procedures designed specifically for the small but extremely dangerous population of sexually violent predators. See *id.* §§ 59-29a03-17. Prior to release of a person who might meet the Act's criteria, the custodial agency is required to

Almost ten years prior to passage of the Act, Leroy Hendricks pled guilty to taking indecent liberties with two thirteen-year-old boys and received a sentence of five to twenty years imprisonment.<sup>7</sup> Just before his scheduled release, the district attorney filed a petition to have Hendricks committed under the Act.<sup>8</sup> At trial, the state's physician testified that, although he did not believe that Hendricks was mentally ill or that he had a personality disorder, Hendricks suffered from pedophilia, which the doctor characterized as a mental disorder under the Act.<sup>9</sup> Hendricks himself testified that he was and remains a pedophile and is unable to control his urges to engage in sexual activity with children when he gets "stressed out."<sup>10</sup> The jury unanimously concluded that Hendricks was a sexually violent predator.<sup>11</sup> Hendricks, arguing that the Act violated constitutional prohibitions against double jeopardy and ex post facto laws as well as procedural and substantive due process, appealed to the Supreme Court of Kansas.<sup>12</sup>

A sharply divided Kansas Supreme Court reversed the judgment of the trial court on the ground that the Act violated the Due Process Clause of the Fourteenth Amendment.<sup>13</sup> The court concluded that the Act violated Hendricks's substantive due process rights because it permits commitment of individuals who exhibit a mental abnormality or personality disorder; such conditions do not meet the due process

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notify the local prosecutor, who then has 45 days to file a petition in state court seeking the person's involuntary civil commitment. *See id.* §§ 59-29a03-04. Upon the filing of such a petition, a judge must determine whether probable cause exists to believe that the person is a sexually violent predator. *See id.* § 59-29a05. If such a determination is made, the person is taken into custody and provided with notice and an opportunity to appear at a hearing to contest the probable cause determination. *See id.* §§ 59-29a05-06. Once probable cause has been established, the person undergoes a professional evaluation to determine whether he is a sexually violent predator. *See id.* § 59-29a05. Following the evaluation, a trial is held at which the state must prove beyond a reasonable doubt that the individual is a sexually violent predator. *See id.* §§ 59-29a06-07. If the court or a unanimous jury determines that the person is a sexually violent predator, the person is "committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." *Id.* § 59-29a07.

<sup>7</sup> *See Hendricks*, 117 S. Ct. at 2078; *In re Care and Treatment of Hendricks*, 912 P.2d 129, 130 (Kan. 1996). Hendricks's conviction marked the end of a lengthy history of sexually abusing children: in 1955, he pled guilty to indecent exposure for exposing his genitals to two young girls; in 1957, he was convicted of lewd behavior involving a teenage girl; in 1960, he was imprisoned for molesting two young boys; in 1963, he was arrested for molesting a seven-year-old girl; in 1967, he was imprisoned for sexually assaulting a young boy and a young girl; after his 1972 release on parole, he sexually abused his stepchildren for approximately four years. *See Hendricks*, 117 S. Ct. at 2078-79; *Hendricks*, 912 P.2d at 143 (Larson, J., dissenting).

<sup>8</sup> *See Hendricks*, 117 S. Ct. at 2078.

<sup>9</sup> *See Hendricks*, 912 P.2d at 131.

<sup>10</sup> *Id.*

<sup>11</sup> *See Hendricks*, 117 S. Ct. at 2079.

<sup>12</sup> *See Hendricks*, 912 P.2d at 133.

<sup>13</sup> *See id.* at 138. The court did not address Hendricks's other claims, as it found his due process arguments dispositive. *See id.*

standard of mental illness traditionally required by the Supreme Court in analyzing civil commitment statutes.<sup>14</sup>

In a 5-4 decision, the United States Supreme Court reversed the Kansas Supreme Court's judgment, holding that the Sexually Violent Predator Act comported with due process and did not offend double jeopardy or ex post facto principles.<sup>15</sup> Writing for the majority, Justice Thomas<sup>16</sup> focused first on Hendricks's substantive due process claim.<sup>17</sup> He noted that commitment under the Act depends both on a finding that a person poses a danger to society based on that individual's history of sexually violent behavior and on evidence of a current mental condition that renders the individual likely to engage in future acts of predatory violence.<sup>18</sup> Justice Thomas acknowledged, however, that a finding of dangerousness is by itself ordinarily insufficient to justify indefinite involuntary confinement; rather, he found that the Court's precedents indicate that civil commitment statutes will be sustained only when they couple proof of dangerousness with evidence of an additional factor, such as mental illness or mental abnormality.<sup>19</sup> This second requirement limits involuntary civil commitment to "those who suffer from a volitional impairment rendering them dangerous beyond their control."<sup>20</sup> Therefore, Justice Thomas found that the Kansas Act clearly satisfied the analysis employed by the Court in the past, as the Act requires a finding both of future dangerousness and of a mental abnormality or personality disorder that makes it difficult or impossible for the individual to control his dangerous behavior.<sup>21</sup>

Justice Thomas thus rejected the argument that a finding of mental illness is a prerequisite, under the rationales of *Foucha v. Louisiana*<sup>22</sup> and *Addington v. Texas*,<sup>23</sup> for civil commitment.<sup>24</sup> He indicated that the task of defining medical terms that have legal significance has traditionally been left to legislatures.<sup>25</sup> Because Hendricks suffers from

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<sup>14</sup> See *id.* at 137-138. The court relied on *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *Addington v. Texas*, 441 U.S. 418 (1979), to define the applicable due process standard. See *Hendricks*, 912 P.2d at 138. A brief concurrence clarified the majority's reasoning, indicating that due process requires the state to "prove by clear and convincing evidence that the individual is both mentally ill and dangerous." *Id.* at 139 (Lockett, J., concurring).

<sup>15</sup> See *Hendricks*, 117 S. Ct. at 2086.

<sup>16</sup> Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy joined Justice Thomas's opinion.

<sup>17</sup> See *Hendricks*, 117 S. Ct. at 2080-81.

<sup>18</sup> See *id.* at 2080.

<sup>19</sup> See *id.* (citing *Heller v. Doe*, 509 U.S. 312, 314-15 (1993); *Allen v. Illinois*, 478 U.S. 364, 366 (1986); and *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 271-72 (1940)).

<sup>20</sup> *Id.*

<sup>21</sup> See *id.*

<sup>22</sup> 504 U.S. 71 (1992).

<sup>23</sup> 441 U.S. 418 (1979).

<sup>24</sup> See *Hendricks*, 117 S. Ct. at 2080 ("[T]he term 'mental illness' is devoid of any talismanic significance.").

<sup>25</sup> See *id.* at 2081 (citing *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983)).

pedophilia, a mental abnormality under the Act, and because the state is free to define the level of mental infirmity required for commitment as long as the definition sufficiently limits the class of persons to whom the Act applies, Hendricks's confinement under the Act comported with due process.<sup>26</sup>

After rejecting the due process claim, Justice Thomas undermined the fulcrum of Hendricks's double jeopardy and ex post facto arguments by holding that the proceeding contemplated by the Act was not a criminal proceeding and that confinement pursuant to the Act did not constitute punishment.<sup>27</sup> He noted that the Kansas legislature labeled the proceedings under the Act as "civil," and observed that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm."<sup>28</sup> In light of the professed legislative intent, Justice Thomas indicated that the Court would "reject [a] legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil."<sup>29</sup>

In Justice Thomas's view, the Act does not implicate the two principal objectives of criminal punishment: retribution and deterrence.<sup>30</sup> Unlike a criminal statute, no finding of scienter is required for commitment under the Act.<sup>31</sup> The potentially infinite duration of the commitment did not manifest a punitive purpose because no person can be committed for more than a year without another judicial proceeding.<sup>32</sup> Further, Kansas's use of procedural safeguards typically associated with criminal trials does not transform the proceedings from civil to criminal.<sup>33</sup>

Justice Thomas rejected the argument that the Act's failure to provide for any legitimate treatment made it punitive.<sup>34</sup> Justice Thomas detected a degree of ambiguity in the Kansas Supreme Court's resolu-

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<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 2081-86.

<sup>28</sup> *Id.* at 2082.

<sup>29</sup> *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)) (internal quotation marks omitted).

<sup>30</sup> See *id.* The Act is "not retributive because it does not seek to assign culpability for prior conduct"; rather, the court considers such conduct strictly for evidentiary purposes. *Id.* Furthermore, the legislature did not intend that civil commitment under the Act function as a deterrent; indeed, individuals suffering from a mental abnormality or personality disorder that prevents them from controlling their dangerous behavior are "unlikely to be deterred by the threat of confinement." *Id.* Justice Thomas made no mention of rehabilitation as an objective of the criminal justice system. See *id.* at 2076-86.

<sup>31</sup> See *id.* at 2082.

<sup>32</sup> See *id.* at 2083 (citing KAN. STAT. ANN. § 59-29a08 (1994)).

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

tion of Hendricks's treatment argument; therefore, he considered two plausible interpretations of the Kansas Supreme Court's reasoning. On the one hand, the court may have concluded that, absent a treatable mental illness, Hendricks could not be detained against his will.<sup>35</sup> Justice Thomas countered that "incapacitation may be a legitimate end of the civil law."<sup>36</sup> Thus, the Kansas Supreme Court's finding that the Act's "overriding concern" was the continued "segregation of sexually violent offenders" was consistent with the Court's conclusion that the Act establishes a civil proceeding.<sup>37</sup> On the other hand, the Kansas Supreme Court might have concluded that Hendricks's condition is treatable, but that treatment was not the state's overriding concern and that no treatment was being provided.<sup>38</sup> Justice Thomas, citing the language of the Act, countered that even if providing treatment was not the primary purpose of the Act, it was an ancillary purpose.<sup>39</sup> Therefore, the Kansas Supreme Court's second possible interpretation also did not require the conclusion that the Act was punitive.<sup>40</sup>

Putting together these arguments, Justice Thomas concluded that, because the Act is civil in nature, commencement of commitment proceedings did not constitute a second prosecution.<sup>41</sup> Because commitment under the Act is not punitive, involuntary confinement does not constitute double jeopardy even when confinement follows a prison term.<sup>42</sup> Similarly, the Act does not violate the Ex Post Facto Clause, which "forbids the application of any new punitive measure to a crime already consummated," because the Act is not a punitive measure.<sup>43</sup>

Justice Kennedy authored a brief concurrence, in which he warned "against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application."<sup>44</sup> He observed that even the dissenting Justices would validate the Act with respect to individuals who committed violent sexual offenses after its enactment, and might even validate the

<sup>35</sup> See *id.* at 2083-84.

<sup>36</sup> *Id.* at 2084 (citing *United States v. Salerno*, 481 U.S. 739, 748-49 (1987), and *Allen v. Illinois*, 478 U.S. 364, 373 (1986)).

<sup>37</sup> *Id.* (quoting *In re Care and Treatment of Hendricks*, 912 P.2d 129, 136 (Kan. 1996)) (internal quotation marks omitted).

<sup>38</sup> See *id.* (citing *Hendricks*, 912 P.2d at 136).

<sup>39</sup> See *id.* (citing KAN. STAT. ANN. § 59-29a07(a) (1994)).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 2086 (citing *Jones v. United States*, 463 U.S. 354, 370 (1984)).

<sup>42</sup> See *id.* (citing *Baxstrom v. Herold*, 383 U.S. 107, 114 (1966), and *Blockburger v. United States*, 284 U.S. 299 (1932)).

<sup>43</sup> *Id.* (quoting *California Dep't of Corrections v. Morales*, 514 U.S. 499, 505 (1995) (quoting *Lindsay v. Washington*, 301 U.S. 397, 401 (1937))) (internal quotation marks omitted). Furthermore, the Act does not have retroactive effect, as it requires for involuntary commitment a finding that the person currently suffers a mental abnormality or personality disorder and is likely to present a danger to the public. See *id.*

<sup>44</sup> *Id.* at 2087 (Kennedy, J., concurring).



Act with respect to Hendricks if a higher level of treatment were provided.<sup>45</sup> Justice Kennedy noted that although incapacitation is a goal common to the civil and criminal systems of confinement, retribution and deterrence are purposes reserved exclusively for the criminal system. If civil confinement functioned as a medium for retribution or general deterrence, or if mental abnormality constituted too imprecise a category to assure that civil detention was justified, Supreme Court precedent would not validate it.<sup>46</sup>

In dissent, Justice Breyer<sup>47</sup> argued that the Act embodied an effort to inflict further punishment upon Hendricks.<sup>48</sup> Therefore, he concluded, the Ex Post Facto Clause prohibited application of the Act to Hendricks because he committed his crimes prior to the statute's enactment.<sup>49</sup> Nevertheless, he agreed with the majority's rejection of Hendricks's due process arguments.<sup>50</sup>

Justice Breyer disputed the majority's conclusion that the Act was not punitive for the purposes of the Ex Post Facto Clause.<sup>51</sup> He began by pointing out the resemblance between the Act's ostensibly civil commitment and traditional criminal punishments.<sup>52</sup> He acknowledged that those similarities cannot prove that the purportedly civil commitment procedure was criminal, but he also argued that the label "civil" cannot by itself prove the contrary.<sup>53</sup> Because various "features of the Act point[] in opposite directions,"<sup>54</sup> Justice Breyer emphasized the factor he believed most relevant in distinguishing a punitive from a nonpunitive purpose — the law's concern for treatment.<sup>55</sup>

Justice Breyer's focus on treatment drew heavily from the Court's reasoning in *Allen v. Illinois*.<sup>56</sup> In Justice Breyer's view, the *Allen* decision viewed treatment "as a kind of touchstone helping to distinguish

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<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> Justice Breyer's opinion was joined in full by Justices Stevens and Souter, and in part by Justice Ginsburg.

<sup>48</sup> See *Hendricks*, 117 S. Ct. at 2088 (Breyer, J., dissenting).

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* at 2087–88. In Part I of his opinion, which Justice Ginsburg did not join, Justice Breyer indicated his agreement with the majority's conclusion that the Due Process Clause allows Kansas to classify Hendricks as a "mentally ill and dangerous person" for the purposes of involuntary civil commitment. *Id.* at 2088.

<sup>51</sup> See *id.* at 2090.

<sup>52</sup> See *id.* at 2090–91. These similarities included the fact that "the Act's commitment amounts to 'secure' confinement"; that "a basic objective of the Act is incapacitation"; that the Act "imposes . . . confinement . . . only upon an individual who has previously committed a criminal offense"; and that the Act accomplishes its commitment via persons, procedures, and standards "traditionally associated with . . . criminal law." *Id.*

<sup>53</sup> See *id.* at 2091.

<sup>54</sup> *Id.*

<sup>55</sup> See *id.* at 2091–97.

<sup>56</sup> 478 U.S. 364 (1986).

civil from punitive purposes.”<sup>57</sup> He pointed to several treatment-related factors considered by the *Allen* Court that suggested that the Kansas Act had a punitive purpose.<sup>58</sup> First, the Supreme Court of Kansas “held that treatment is not a significant objective of the Act.”<sup>59</sup> Second, the Act, when applied to previously convicted persons, delayed commitment, confinement, and treatment until after those persons had served their criminal sentences.<sup>60</sup> Third, the statute did not require the committing authority to consider less restrictive alternatives.<sup>61</sup> Fourth, comparable laws of other states accomplish Kansas’s civil commitment objectives without the statutory features at issue that reveal a punitive purpose.<sup>62</sup>

Justice Breyer contended that the Act imposed punishment upon Hendricks and thus violated the Ex Post Facto Clause.<sup>63</sup> He took care, however, to indicate the narrow scope of his analysis. To find a violation in Hendricks’s case would not prevent Kansas or any other state from enacting sexual predator statutes that operate prospectively, or from enacting retroactive statutes that do not operate punitively.<sup>64</sup> However, according to Justice Breyer, Kansas’s Act offended ex post facto principles because the legislature failed to tailor the statute to fit the nonpunitive civil goal of treatment.<sup>65</sup>

That the Court upheld Kansas’s Sexually Violent Predator Act, and that it did so by a slim 5–4 margin, was not unforeseeable in light of

<sup>57</sup> *Hendricks*, 117 S. Ct. at 2092 (Breyer, J., dissenting). In contrast to the majority, Justice Breyer understood the Kansas Supreme Court to find that Hendricks was treatable but untreated: “when a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive.” *Id.* at 2096.

<sup>58</sup> *See id.* at 2092–95.

<sup>59</sup> *Id.* at 2092 (citing *In re Care and Treatment of Hendricks*, 912 P.2d 129, 136 (Kan. 1996)). Indeed, the Kansas court found that, at the time of Hendricks’s commitment, the state had not provided funds for treatment, had not entered into treatment contracts, and had little qualified treatment staff. *See id.* at 2093 (citing *Hendricks*, 912 P.2d at 131, 136).

<sup>60</sup> *See id.* at 2093. “[I]t is difficult to see why rational legislators who seek treatment would write the Act in this way — providing treatment years after the criminal act that indicated its necessity.” *Id.* at 2094.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 2095. Justice Breyer analyzed 17 state statutes seeking to protect the public from mentally ill, sexually dangerous individuals via civil commitment or other mandatory treatment regimes. *See id.* Ten statutes begin treatment of an offender soon after apprehension and arrest. *See id.* Seven delay commitment and treatment until after the offender has served his criminal sentence. *See id.* Six of these seven require consideration of less restrictive measures. *See id.* The only state besides Kansas that delays commitment and does not require consideration of alternatives avoids ex post facto problems by applying the statute only prospectively. *See id.* Justice Breyer also borrowed a seven-factor test developed in the Fifth and Sixth Amendment contexts to determine if a statute is primarily punitive, and applied it to buttress his conclusion that the Act is punitive. *See id.* at 2098 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

the contentiousness of the Court's previous civil commitment pronouncements.<sup>66</sup> The decision is remarkable, however, because the majority extended the reach of its due process civil commitment jurisprudence without offering a cogent limiting principle, and three of the four dissenters acquiesced in this extension with relatively little protest.<sup>67</sup> The Court's analysis may be sufficiently anchored to the peculiar factual circumstances of Hendricks's case to permit lower courts to construe its reasoning somewhat narrowly; however, because the Court's rationale is framed in broad terms, it seems more likely that they will find that the decision provides a plausible basis for deployment of civil commitment procedures in other contexts. The decision will also further blur the relationship between the criminal and the civil commitment processes.<sup>68</sup> As the language defining the permissible standard for involuntary civil commitment stretches from "illness" to "abnormality," the risk increases that a potentially lifelong deprivation of liberty via the civil system will be imposed to serve goals traditionally and rightfully reserved for the criminal system — retribution and deterrence.<sup>69</sup>

The Court accomplished its rollback of constitutional limitations on involuntary civil commitment by sanctioning language in the Kansas Act that represented a break with Supreme Court precedent. Prior to *Hendricks*, involuntary commitment proceedings could satisfy due process only if two preconditions were established by clear and convincing evidence: that the person was mentally ill and that he posed a danger to himself or to others.<sup>70</sup> The *Hendricks* Court ratcheted down the mental illness requirement — a concept already plagued by uncertainty and debate in the psychiatric and legal literature<sup>71</sup> — to include not only the mentally ill but also those, like Leroy Hendricks, who are merely mentally abnormal.<sup>72</sup> The Court's approach to this aspect of

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<sup>66</sup> See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 83, 86, 90, 102 (1992) (holding, with Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas dissenting, that a Louisiana civil commitment statute violates due process); *Allen v. Illinois*, 478 U.S. 364, 367–69, 375 (1986) (holding, with Justices Brennan, Marshall, Blackmun, and Stevens dissenting, that proceedings under an Illinois commitment statute are civil); *Jones v. United States*, 463 U.S. 354, 370, 371, 387 (1983) (holding, with Justices Brennan, Marshall, Blackmun, and Stevens dissenting, that a District of Columbia civil commitment statute comports with the Constitution); cf. *United States v. Salerno*, 481 U.S. 739, 752, 755, 767 (1987) (holding, with Justices Brennan, Marshall, and Stevens dissenting, that a statute that provided for pretrial preventive detention did not violate due process).

<sup>67</sup> See *Hendricks*, 117 S. Ct. at 2088–90 (Breyer, J., dissenting). Only Justice Ginsburg declined to join the portion of the dissent that agreed with the majority's due process analysis.

<sup>68</sup> Cf. *id.* at 2087 (Kennedy, J., concurring) (noting the different goals of the criminal and civil systems of confinement and the dangers of using one in conjunction with the other).

<sup>69</sup> Cf. *id.* (cautioning against the use of civil confinement as a mechanism for retribution or general deterrence).

<sup>70</sup> See *Foucha*, 504 U.S. at 75–76 (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

<sup>71</sup> See, e.g., *Hendricks*, 117 S. Ct. at 2080–81 (citing *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)).

<sup>72</sup> See *id.*; see also *In re Care and Treatment of Hendricks*, 912 P.2d 129, 131 (Kan. 1996) (noting that a psychologist found Hendricks to be not "mentally ill" but "mentally abnormal").

the due process analysis has shifted dramatically since *Addington*, when the Court proceeded more cautiously with respect to due process protection of liberty: "Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."<sup>73</sup>

Although the rhetoric and the result of the Court's decision may be appealing in the context of a recidivist child molester such as Leroy Hendricks, the Court failed to offer a principle to cabin the potentially broad application of its revamped civil commitment jurisprudence. The Court's new standard of "mental abnormality" or "personality disorder" is too broad, vague, and manipulable to function meaningfully in the civil commitment context; indeed, the diagnostic manual that the Court cited to characterize pedophilia as a "serious mental disorder"<sup>74</sup> includes descriptions of "Caffeine-Induced Disorder," "Nicotine-Induced Disorder," and "Male Erectile Disorder."<sup>75</sup> The Court's own jurisprudence assumed that "illness" comprises a more restrictive category than does "abnormality." In *Addington*, the Court stated:

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emo-

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The concept of abnormality is both more encompassing and less defined than the concept of illness. See generally DAVID L. ROSENHAN & MARTIN E.P. SELIGMAN, *ABNORMAL PSYCHOLOGY* 3-15 (3d ed. 1995) (discussing the meanings and elements of abnormality); LEE WILLERMAN & DAVID B. COHEN, *PSYCHOPATHOLOGY* 6 (1990) (defining abnormality as deviation from population averages plus some maladaptation).

<sup>73</sup> *Addington*, 441 U.S. at 429. The Court also treated several other civil commitment precedents brusquely. For instance, the *Hendricks* Court upheld Kansas's statutory regime, which provides for commitment of persons who suffer from a personality disorder that makes them likely to engage in predatory acts of sexual violence. See KAN. STAT. ANN. § 59-29a02(a) (1994). In contrast, the *Foucha* Court explicitly refused to permit the continued confinement of an insanity acquittee on the basis of his antisocial personality disorder when he was no longer mentally ill. See *Foucha*, 504 U.S. at 77-83.

Similarly, the Court ventured beyond its reasoning in *Allen* by refusing to defer to state supreme courts' determinations of state legislative intent. In *Allen*, the Court affirmed the Supreme Court of Illinois's holding that "the privilege against self-incrimination was not available in sexually-dangerous-person proceedings because they are essentially civil in nature, the aim of the statute being to provide treatment, not punishment." *Allen v. Illinois*, 478 U.S. 364, 367 (1986) (internal quotation marks omitted). The *Allen* Court itself focused upon the treatment aspects of the statute at issue, noting that Illinois had "provided for the treatment of those it commits." *Id.* at 370. In *Hendricks*'s case, however, the Supreme Court of Kansas "held that treatment is not a significant objective of the Act." See *Hendricks*, 117 S. Ct. at 2092 (Breyer, J., dissenting) (citing *Hendricks*, 912 P.2d at 136). The Court, discarding the *Allen* approach once it became unavailing, substituted its judgment for that of the Kansas Supreme Court despite ample support in the record for the conclusion of that court. Cf. *id.* at 2092-93 (noting precedents deferring to lower court findings regarding the purposes underlying state officials' actions).

<sup>74</sup> *Hendricks*, 117 S. Ct. at 2081.

<sup>75</sup> Brief of the American Civil Liberties Union, the ACLU of Kansas and Western Missouri, the ACLU of Washington, the Minnesota Civil Liberties Union, the ACLU of Wisconsin and the ACLU of Northern California as Amici Curiae in Support of Respondent at 13, *Hendricks* (Nos. 95-1649, 95-9075), available in 1996 WL 471020 (citing AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 212, 244, 502 (4th ed. 1994)).

tional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement.<sup>76</sup>

The only limiting principle offered by the Court pertains to the individual's inability to control his actions:

These added statutory requirements [of "mental illness" or "mental abnormality"] serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act . . . requires a finding of future dangerousness, and then links that finding to the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior . . . . [I]t narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.<sup>77</sup>

This principle, even when coupled with the dangerousness requirement, is not a sufficient limit on the use of involuntary civil commitment procedures to deprive individuals of their liberty indefinitely. If taken literally, the Court's new standard would appear to permit application of indefinite civil commitment to recidivists of many stripes, such as drunk drivers and drug offenders.<sup>78</sup> The dissent's reasons for upholding the statute provide, at bottom, a similar set of rationales.<sup>79</sup>

Only Justice Kennedy cautioned against the dangerous implications of the Court's analysis:

If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function. . . . [W]hile incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.

On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.<sup>80</sup>

The majority's expansion of the due process civil commitment standard from mental illness to mental abnormality enables the marriage of the criminal and the civil anticipated by Justice Kennedy. By imposing an unclear constitutional limit on civil commitment, the Court has given the states the authority to lock up indefinitely anyone

<sup>76</sup> *Addington*, 441 U.S. at 426-27.

<sup>77</sup> *Hendricks*, 117 S. Ct. at 2080.

<sup>78</sup> See Mark Hansen, *Danger vs. Due Process: Deciding Who Is Mentally Abnormal Is Key to Law*, A.B.A. J., Aug. 1997, at 43; Stuart Taylor, Jr., *A Civil Libertarian's Nightmare*, LEGAL TIMES, Dec. 16, 1996, at 19.

<sup>79</sup> See *Hendricks*, 117 S. Ct. at 2088-89 (Breyer, J., dissenting).

<sup>80</sup> *Id.* at 2087 (Kennedy, J., concurring).

who is found to fall into the nearly boundless category of mentally abnormal — from the most profoundly insane to those who fall through the cracks of the criminal justice system.<sup>81</sup>

### E. Eleventh Amendment

*Ex parte Young Doctrine.* — Since the time of Edward the First, the common law has conferred immunity from suit on the sovereign.<sup>1</sup> In contrast, officers and agents of the Crown were accountable in both law and equity before the English courts.<sup>2</sup> The Supreme Court has long struggled to reconcile this heritage in attempting to balance the principles of sovereign immunity and government official accountability.<sup>3</sup> Under the Court's *Ex parte Young*<sup>4</sup> doctrine, federal courts may exercise jurisdiction over a state official alleged to be acting in violation of federal law, on the theory that the official's conduct stripped him "of his official or representative character and . . . subjected [him] in his person to the consequences of his individual conduct."<sup>5</sup> The

<sup>81</sup> Because the Act permits the commitment of people who do not meet Kansas's definition of mentally ill for the purposes of its general civil commitment statute, the Act effectively reclassifies criminals as mentally ill in order to justify their continued incarceration. See *In re Care and Treatment of Hendricks*, 912 P.2d 129, 140 (Kan. 1996) (Larson, J., dissenting) (citing *In re Personal Restraint Petition of Young*, 857 P.2d 989 (Wash. 1993), and *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995)).

<sup>1</sup> See *United States v. Lee*, 106 U.S. 196, 205 (1882); see also THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*"). See generally RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 995 (4th ed. 1996) [hereinafter HART AND WECHSLER].

<sup>2</sup> See HART AND WECHSLER, *supra* note 1, at 995–96; Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9 (1963).

<sup>3</sup> In *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907), Justice Holmes acknowledged the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Id.* at 353. Notwithstanding this broad principle, holding government officials accountable at law is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)).

<sup>4</sup> 209 U.S. 123 (1908).

<sup>5</sup> *Id.* at 160. The *Young* doctrine is sometimes referred to as an "exception" to the Eleventh Amendment, which reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. One commentator argued recently that "sovereign immunity has become a rare exception to the otherwise prevailing system of state governmental accountability in federal court." Henry Paul Monaghan, *The Supreme Court, 1996 Term — Comment: The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 103 (1996); see also Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 46 ("I see no strong basis to fear *Young's* demise."). However, the Court stated last year in *Seminole Tribe* that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which

*Young* doctrine has evolved into a grant of power to federal courts to entertain actions seeking prospective injunctive relief against state officials who violate federal law.<sup>6</sup> Last Term, in *Idaho v. Coeur d'Alene Tribe*,<sup>7</sup> the Supreme Court carved out a new exception to the *Young* doctrine when it rejected the doctrine's application to a claim brought by an Indian tribe for injunctive relief against continuing state regulation of lands to which the tribe claimed title. The Court's severing of an additional category of claims from *Young*'s scope undermines the purpose behind the *Young* doctrine and disregards the doctrine's common law roots. Moreover, the decision's narrowly drawn exception to *Young* leaves lower courts without clear guidance concerning *Young*'s remaining scope and may signal continued evisceration of the doctrine.

In 1991, the Coeur d'Alene Tribe and several of its members filed suit in federal district court against the State of Idaho, various state agencies, and several state officials, claiming title to all of the submerged lands, banks, and waters within the 1873 boundaries of the Coeur d'Alene reservation; seeking a declaratory judgment that the property was reserved for the exclusive use of the tribe and that all state laws regulating the area were invalid; and requesting an injunction forbidding state officials from further regulating the property.<sup>8</sup> Upholding the state's Eleventh Amendment immunity from suit by the tribe,<sup>9</sup> the district court dismissed the tribe's claims against the state.<sup>10</sup> It also dismissed the tribe's *Ex parte Young* action against the state officials, because it found no ongoing violation of federal law.<sup>11</sup>

On appeal, the Ninth Circuit affirmed in part and reversed in part.<sup>12</sup> Although it affirmed the district court's dismissal of the tribe's

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it confirms [ — ] that each State is a sovereign entity in our federal system." *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122 (1996) (citations omitted) (internal quotation marks omitted).

<sup>6</sup> See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (upholding the prospective application of a decree calling for the provision of remedial educational programs); *Edelman v. Jordan*, 415 U.S. 651, 664-67 (1974) (holding *Young* inapplicable to claims for retroactive or damages relief against the state treasury and limiting the doctrine to actions for prospective relief).

<sup>7</sup> 117 S. Ct. 2028 (1997).

<sup>8</sup> See *Coeur d'Alene Tribe v. Idaho*, 798 F. Supp. 1443, 1445 (D. Idaho 1992). The tribe's claims stemmed from an Executive Order ratified by Congress in 1891. See *id.* at 1451.

<sup>9</sup> The district court relied on *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), which held that under the Eleventh Amendment an Indian tribe may not sue a state without the state's consent. See *id.* at 782.

<sup>10</sup> See *Coeur d'Alene*, 798 F. Supp. at 1446-48 (finding the tribe's claim to be in effect seeking a damages award, a type of relief against states barred under the Eleventh Amendment); see also *id.* at 1447 ("What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes." (quoting *Blatchford*, 501 U.S. at 782) (internal quotation marks omitted)).

<sup>11</sup> See *id.* at 1448-49. The district court held as a matter of law that the state possessed rightful title to the submerged lands in question under the "equal footing" doctrine, which applies to lands underlying navigable waterways and treats states newly admitted to the Union on an "equal footing" with the original states. See *id.* at 1449, 1451.

<sup>12</sup> See *Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244, 1257 (9th Cir. 1994).

actions against the state,<sup>13</sup> the Ninth Circuit rejected the district court's *Young* analysis.<sup>14</sup> Applying the three-part test set forth in *Florida Department of State v. Treasure Salvors, Inc.*<sup>15</sup> to determine whether an action against state officials is barred by the Eleventh Amendment,<sup>16</sup> the court of appeals initially noted that the tribe's claim alleged a violation of federal law by state officials; thus, under *Young*, the claim could not be considered to be directed against the state.<sup>17</sup> The court then observed that the tribe had satisfied the second prong by alleging an ongoing violation of its federal right to the land.<sup>18</sup> Finally, it found that the claim for injunctive and declaratory relief was prospective; therefore, the tribe's *Young* action could go forward.<sup>19</sup>

A sharply divided Supreme Court reversed, holding 5–4 that the tribe's claim against the state officials did not fall under the rubric of *Ex parte Young*.<sup>20</sup> Writing for the Court,<sup>21</sup> Justice Kennedy described the Eleventh Amendment as a measure “enact[ing] a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction.”<sup>22</sup> In denying the applicability of *Ex parte Young* to the case at hand, Justice Kennedy emphasized: “[w]e do not . . . question the continuing validity of the *Ex parte Young* doctrine.”<sup>23</sup> Justice Kennedy went on to assert, however, that permitting *Young* to encompass all claims in which prospective declaratory and injunctive relief is sought against state officials would “undermine the principle, reaffirmed just last Term in *Seminole Tribe v. Florida*, that

<sup>13</sup> See *id.* at 1248–50. The court noted that an Idaho state court had ruled that quiet title actions were not claims against the sovereign and that the Idaho Constitution disclaimed “all right and title” to Indian lands within its borders, but nevertheless found no waiver of Eleventh Amendment immunity by the state. *Id.* at 1249 (citing *Lyon v. State*, 283 P.2d 1105, 1106 (Idaho 1955)), and quoting IDAHO CONST. art XXI, § 19).

<sup>14</sup> See *id.* at 1254.

<sup>15</sup> 458 U.S. 670 (1982) (plurality opinion).

<sup>16</sup> The test inquires first whether the suit against the state officials is functionally a suit against the state itself; second, whether the regulation at issue is an unconstitutional withholding of property or merely a tortious interference with the plaintiff's property rights; and third, whether the relief sought can be deemed prospective in nature. See *id.* at 690.

<sup>17</sup> See *Coeur d'Alene*, 42 F.3d at 1251 (citing *Ex parte Young*, 209 U.S. 123, 159–60 (1908)).

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* The Ninth Circuit found that the tribe had a “conceivable” claim to the submerged lands that was sufficient to go forward. See *id.* at 1257.

<sup>20</sup> See *Coeur d'Alene*, 117 S. Ct. at 2043.

<sup>21</sup> Justice Kennedy's opinion was joined in full by Chief Justice Rehnquist, and joined in part by Justices O'Connor, Scalia, and Thomas.

<sup>22</sup> *Coeur d'Alene*, 117 S. Ct. at 2033. The Court noted that a state can waive its Eleventh Amendment immunity. See *id.*

<sup>23</sup> *Id.* at 2034; see also *id.* (“Of course, questions will arise as to its proper scope and application. In resolving these questions we must ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law.”).



Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction."<sup>24</sup>

Next, in a section of his opinion joined only by Chief Justice Rehnquist, Justice Kennedy maintained that *Ex parte Young* grants federal courts the discretion to decide whether to allow an action to proceed.<sup>25</sup> He asserted that there are only two instances in which *Young* has been applied: first, when no available state forum existed;<sup>26</sup> and second, when a claim turned on the interpretation of federal law.<sup>27</sup> With respect to the former, Justice Kennedy remarked that *Young* takes on "special significance" when there is no available state forum,<sup>28</sup> but that when one exists, federal courts must recognize that "States have real and vital interests in preferring their own forum in suits brought against them."<sup>29</sup> With respect to the latter, Justice Kennedy cautioned against taking too expansive a view of the *Young* doctrine. He emphasized that the Supremacy Clause controlled regardless of the forum chosen and observed that "[a] doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism."<sup>30</sup> Although acknowledging that *Young* generally allows a claim for prospective injunctive relief to proceed, Justice Kennedy argued that, in light of *Seminole Tribe v. Florida*,<sup>31</sup> the decision "[w]hether the presumption in favor of federal court jurisdiction in [such] a case is controlling will depend upon the particular context" and requires a "case-by-case approach."<sup>32</sup>

Once more writing for a majority of the Court, Justice Kennedy concluded that the tribe's suit was barred by the Eleventh Amendment.<sup>33</sup> Although acknowledging that the tribe's suit could be categorized as one seeking prospective injunctive relief, the Court found its claim to be the "functional equivalent of a quiet title action[,] which implicates special sovereignty interests."<sup>34</sup> Ultimately, the Court de-

<sup>24</sup> *Id.*; see also *id.* ("The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading.")

<sup>25</sup> See *Coeur d'Alene*, 117 S. Ct. at 2038-40 (plurality opinion).

<sup>26</sup> See *id.* at 2035-36.

<sup>27</sup> See *id.* at 2036-38.

<sup>28</sup> *Id.* at 2035 (noting that no such forum existed in *Young* itself); see also *id.* at 2036 (noting that the tribe had a state forum available to it).

<sup>29</sup> *Id.* at 2036.

<sup>30</sup> *Id.* at 2037.

<sup>31</sup> 116 S. Ct. 1114 (1996). In *Seminole Tribe*, the Court held that Congress lacks authority under the Indian Commerce Clause to abrogate a state's Eleventh Amendment immunity. See *id.* at 1131.

<sup>32</sup> *Coeur d'Alene*, 117 S. Ct. at 2038, 2039 (plurality opinion). Justice Kennedy cautioned against the application of *Young* when it might disturb the balance of federal and state interests. See *id.* at 2038-40 (noting that the "range of concerns" in such an inquiry is "broad" and includes the importance of the federal right at stake).

<sup>33</sup> See *Coeur d'Alene*, 117 S. Ct. at 2040.

<sup>34</sup> *Id.* The Court distinguished *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (plurality opinion), in which the Court affirmed an order calling for the return of prop-

terminated that “the dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts.”<sup>35</sup>

Justice O’Connor concurred in part and concurred in the judgment.<sup>36</sup> Although agreeing that the tribe’s claim was the functional equivalent of an action to quiet title to the submerged lands,<sup>37</sup> Justice O’Connor wrote separately to dispute Justice Kennedy’s suggested reformulation of the *Young* doctrine into a case-specific analysis.<sup>38</sup> Her opinion distinguished the Court’s prior decisions in *United States v. Lee*<sup>39</sup> and *Tindal v. Wesley*,<sup>40</sup> which both involved property disputes, on the ground that “[i]n both *Lee* and *Tindal*, the Court made clear that the suits could proceed against the officials because no judgment would bind the State” and “[i]t was possible . . . to distinguish between possession of the property and title to the property.”<sup>41</sup> In contrast, Justice O’Connor argued, a successful action by the tribe in the present case would transfer title to the submerged lands, which are intimately tied to state sovereignty.<sup>42</sup>

erty held by state officials, on the basis that there the state officials acted in violation of state law. See *Coeur d’Alene*, 117 S. Ct. at 2040. The majority further determined that any resolution in favor of the tribe would result in “substantially all benefits of ownership and control [shifting] from the State to the Tribe,” *id.* at 2040, which was a result contrary to the historical conception of “lands underlying navigable waters [as] sovereign lands,” *id.* at 2041 (quoting Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987)) (internal quotation marks omitted). The Court relied on English common law as the foundation for the “longstanding commitment” to this principle. *Id.* at 2041–42.

<sup>35</sup> *Id.* at 2043.

<sup>36</sup> Justice O’Connor’s opinion was joined by Justices Scalia and Thomas.

<sup>37</sup> See *Coeur d’Alene*, 117 S. Ct. at 2043 (O’Connor, J., concurring in part and concurring in the judgment) (agreeing that *Young* was inapplicable because it “simply [could not] be said” that the tribe’s action to strip the state of all regulatory authority over the submerged lands “[was] not a suit against the State”).

<sup>38</sup> See *id.* at 2045 (“This approach unnecessarily recharacterizes and narrows much of our *Young* jurisprudence. The parties have not briefed whether such a shift in the *Young* doctrine is warranted. In my view, it is not.”). Justice O’Connor disagreed as well with Justice Kennedy’s contention that prior cases had turned on the absence of a state forum. See *id.* (noting that the *Young* decision relied on two cases in which a state forum was available). She asserted that the availability of a claim for prospective injunctive relief under *Young* remains the general rule. See *id.* at 2046. In addition, she disputed Justice Kennedy’s contention that the applicability of *Young* turns on an evaluation of the “importance of the federal right at stake.” *Id.* at 2047.

<sup>39</sup> 106 U.S. 196 (1882). *Lee* upheld federal jurisdiction over an action in ejectment brought against federal officers. See *id.* at 221–22.

<sup>40</sup> 167 U.S. 204 (1897). *Tindal* sustained federal jurisdiction over an action in ejectment brought against state officials. See *id.* at 222–23.

<sup>41</sup> *Coeur d’Alene*, 117 S. Ct. at 2044 (O’Connor, J., concurring in part and concurring in the judgment). Justice O’Connor went on to assert that “[a] court could find that the officials had no right to remain in possession, thus conveying all the incidents of ownership to the plaintiff, while not formally divesting the State of its title.” *Id.* She also emphasized the importance of the fact that, in such a case, the state would retain its authority to regulate the land in question. See *id.*

<sup>42</sup> See *id.* at 2044–45 (stressing “the importance of submerged lands to state sovereignty” and asserting that “[c]ontrol of such lands is critical to a state’s ability to regulate use of its navigable waters”).

Justice Souter dissented.<sup>43</sup> Finding the tribe's claim to "fall squarely within the *Young* doctrine," the dissent asserted that the action was "no more (or less) against the State than any of the claims brought in our prior cases applying *Young*."<sup>44</sup> The dissent also emphasized that the Court's reasoning, in conjunction with *Seminole Tribe*, would deprive Indian tribes with "federally derived property rights" of access to any federal forum.<sup>45</sup> Noting that *Young* has been held to apply to cases that burden a state's treasury, the dissent also argued that *Treasure Salvors* and *Lee* were indistinguishable from the case at hand because both decisions implicated a governmental claim of title to property.<sup>46</sup> Ultimately, the dissent argued, federal question jurisdiction must turn on "the responsibility of federal courts to vindicate what is supposed to be controlling federal law."<sup>47</sup>

Coming on the heels of *Seminole Tribe*, the *Coeur d'Alene* decision constitutes further evidence of an effort by members of the current Court to alter the balance between the doctrines of state sovereign immunity and *Ex parte Young*.<sup>48</sup> By shifting the balance in favor of the principle of state sovereign immunity<sup>49</sup> and circumscribing *Young*'s

<sup>43</sup> Justice Souter was joined by Justices Stevens, Ginsburg, and Breyer.

<sup>44</sup> *Coeur d'Alene*, 117 S. Ct. at 2048 (Souter, J., dissenting). In making this point, the dissent emphasized that "a government's assumption of title to property is no different from its assumption of any state authority that it may ultimately turn out not to have." *Id.* at 2049-50. Thus, the dissent argued that no significant distinction existed between a decision curtailing a state's regulatory power, such as *Young* itself, and the injunction sought by the tribe here. *See id.* at 2054.

<sup>45</sup> *Id.* at 2048.

<sup>46</sup> *See id.* at 2051-53 (noting that settling title outright would be barred by the Eleventh Amendment). Justice Souter also argued that "leaving an individual powerless to seek any federal remedy for violation of a federal right[] would deplete the federal judicial power to a point the Framers could not possibly have intended, given a history of officer liability riding tandem with sovereign immunity extending back to the Middle Ages." *Id.* at 2053.

<sup>47</sup> *Id.* at 2055.

<sup>48</sup> *Seminole Tribe* held *Young* inapplicable both because Congress had provided for an alternative statutory remedial scheme for tribes under the Indian Gaming Regulatory Act — which enables tribes to petition the Secretary of the Interior for alternative relief — and because it was not clear that Congress intended *Young* to apply. *See Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1132-33 (1996) (deeming *Young* a "narrow" exception to the Eleventh Amendment). One commentator has noted that "the Court's tortured reasoning in the *Ex parte Young* part of the [*Seminole Tribe*] opinion showed its eagerness to take liberties to accomplish quick doctrinal change in this area." Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1717 (1997); *see also* Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 535 (1997) (arguing that "the most troubling implication of *Seminole Tribe* is its recasting of *Ex parte Young* as an almost doubtful act of judicial usurpation"). *But see* Meltzer, *supra* note 5, at 46 (arguing that *Young* remains alive and well).

<sup>49</sup> Because the term "state sovereign immunity" is not mentioned in the Eleventh Amendment, many commentators have argued that it is as much of a fiction as *Young* itself. *See, e.g.*, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) (calling the principle of state sovereign immunity the product of "a hodgepodge of confusing and intellectually indefensible judge-made law"); David L. Shapiro, *The Supreme Court, 1983 Term — Comment: Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 68 (1984) (calling the doctrine of state sovereign immunity

scope,<sup>50</sup> the Court disregards the doctrine's common law roots.<sup>51</sup> Further, by depriving many parties with federal rights of access to the federal courts, the Court jeopardizes the vital role that the *Young* doctrine plays in our federal structure of preserving state officer accountability for violations of federal law.<sup>52</sup>

Moreover, *Coeur d'Alene* not only removes an entire category of claims from *Young*'s reach, but also sets the stage for additional evisceration of the doctrine by lower courts. Justice Kennedy, writing for himself and Chief Justice Rehnquist, proposed limiting *Young*'s application to a case-by-case analysis,<sup>53</sup> a completely new framework for the *Young* doctrine that would offer little guidance to lower courts and invite inconsistent results. Even though Justice O'Connor joined the dissenters in rejecting Justice Kennedy's proposed doctrinal reformulation and in asserting that the general force of *Young* remains unchanged,<sup>54</sup> she explicitly carved out a new exception to *Young*.<sup>55</sup> Her

"a judicially developed 'constitutional' rule"); *id.* at 67 (noting that "[t]he language of the eleventh amendment does not include the term 'sovereign immunity' or anything resembling it"). See generally Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1192-93 (1988) (discussing the different schools of Eleventh Amendment interpretation).

<sup>50</sup> *Young*'s breadth has been curtailed several times in recent years. See, e.g., *Green v. Mansour*, 474 U.S. 64, 71-73 (1985) (holding that *Young* does not permit notice relief or declaratory judgments that create state liability for damages relief); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984) (holding that *Young* does not apply when a claim alleges that state officials are acting in violation of state law); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (holding that *Young* does not encompass claims for retroactive damages relief running against the state treasury); cf. Jackson, *supra* note 48, at 512 ("In *Pennhurst* . . . the Court began the modern retrenchment from . . . *Young* . . .").

<sup>51</sup> Although the King in England enjoyed immunity from suit, his officers did not share this immunity. "[C]ommon-law courts, in applying the [sovereign immunity] doctrine, traditionally distinguished between the King and his agents, on the theory that the King would never authorize unlawful conduct, and that therefore the unlawful acts of the King's officers ought not to be treated as acts of the sovereign." *Pennhurst*, 465 U.S. at 142 (Stevens, J., dissenting) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*244); see also Jaffe, *supra* note 2, at 9 (explaining that in the reign of Edward I, one could sue the King's officers to recover damages and property). The Supreme Court incorporated this tradition into American jurisprudence in cases such as *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), which held that state officials may be made accountable in federal courts for traditional common law tortious conduct. See *id.* at 743-44, 870.

<sup>52</sup> See *Seminole Tribe*, 116 S. Ct. at 1180 (Souter, J., dissenting) (arguing that the *Young* doctrine is "nothing short of indispensable to the establishment of constitutional government and the rule of law" (citations omitted) (internal quotation marks omitted)).

<sup>53</sup> See *Coeur d'Alene*, 117 S. Ct. at 2039 (plurality opinion). Never before has a case-by-case inquiry been applied under *Young*; thus Justice Kennedy was unable to cite any authority to support his suggested doctrinal overhaul.

<sup>54</sup> See *Coeur d'Alene*, 117 S. Ct. at 2045 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>55</sup> See *id.* at 2047; see also *id.* at 2048 (Souter, J., dissenting) ("While there is reason for great satisfaction that Justice O'Connor's view is the controlling one, it is still true that the effect of the two opinions is to redefine and reduce the substance of federal subject-matter jurisdiction to vindicate federal rights.").

controlling opinion,<sup>56</sup> however, fails both to support her new exception convincingly and to clarify its terms. In addition, by creating such a precarious distinction, her opinion may lead to the continued evisceration of *Young* by lower courts.

Justice O'Connor's concurrence offered a far too cursory reading of the Court's earlier *Young* cases involving property disputes. Until *Coeur d'Alene*, the *Young* doctrine and the common law of officer liability from which it emerged were thought to encompass a broad range of suits affecting the use and enjoyment of property.<sup>57</sup> Justice O'Connor distinguished the Court's decisions in *Lee*, *Tindal*, and *Treasure Salvors* by claiming that they merely involved the resolution of possessory interests. But in all three cases, the Court not only adjudicated the merits of the plaintiff's claim of title to the disputed property, but also effectively divested the government, through its officers, of its authority to hold the property at issue<sup>58</sup> — a result no different from that sought by the *Coeur d'Alene* Tribe.<sup>59</sup> Thus, Justice O'Connor's treatment of these cases lays a tenuous foundation for her opinion that may well lead to a broader interpretation of her relatively narrow holding by lower courts.<sup>60</sup>

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<sup>56</sup> See *Marks v. United States*, 430 U.S. 188, 193 (1977) (establishing that the holding of a fragmented Court is the narrowest ground supporting the judgment).

<sup>57</sup> See, e.g., *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 696-97 (1982) (plurality opinion); *Tindal v. Wesley*, 167 U.S. 204 (1897); *United States v. Lee*, 106 U.S. 196 (1882); see also *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 516-17 (1839) (ordering a federal officer to turn over a fort that the United States had occupied for thirty years); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 858-59 (1824) (ordering the return of funds claimed by the State of Ohio to be part of its public funds); *Meigs v. McClung's Lessee*, 13 U.S. (9 Cranch) 11, 18 (1815) (allowing a suit to proceed against federal officers and holding that the plaintiff, who had title to land occupied by the United States military, was entitled to just compensation).

<sup>58</sup> In *Tindal*, the Court affirmed an order removing the Secretary of State of South Carolina, who asserted that the state held title to the disputed property, from the plaintiff's land, finding that the land "belong[ed] absolutely to [the plaintiff]." *Tindal*, 167 U.S. at 222. In *Treasure Salvors*, the Court affirmed an order directing state officials to return artifacts claimed to be held under state title. See *Treasure Salvors*, 458 U.S. at 697; see also *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949) (holding that an "action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property)" is not an act of the sovereign if it is beyond the officer's authority).

<sup>59</sup> Although the Court probably could not have bound the State of Idaho to any resolution in *Coeur d'Alene* without its consent, the same circumstances existed in *Lee* and *Tindal*, in which the federal government (in *Lee*) and the state government (in *Tindal*) enjoyed immunity from suit. See *Treasure Salvors*, 458 U.S. at 697; *Tindal*, 167 U.S. at 223 ("The State not being a party to the suit, the judgment will not conclude it."); *Lee*, 106 U.S. at 222. Indeed, the Court "has consistently held that a public officer's assertion of property title in the name of a government immune to suit cannot defeat federal jurisdiction over an individual's suit to be rid of interference with the property rights he claims." *Coeur d'Alene*, 117 S. Ct. at 2051 (Souter, J., dissenting). However, the question whether a state may be bound by judgments in some circumstances raises many complex issues. See HART AND WECHSLER, *supra* note 1, at 1083, 1287 n.8, 1481 n.2.

<sup>60</sup> It remains to be seen whether this new exception will be interpreted to apply to only submerged lands, to actions deemed to be the functional equivalent of quiet title actions, or to property disputes particularly implicating state sovereignty.

The Court said much more in *Lee* than Justice O'Connor chose to acknowledge in her concurrence. She argued that *Lee* (and *Tindal*) depended on several factors: first, that "no judgment would bind the State"; second, that "[a] court could find that the officials had no right to remain in possession, thus conveying all the incidents of ownership to the plaintiff, while not formally divesting the State of its title"; and third, that the state would "retain[] its authority to regulate uses of the land."<sup>61</sup> *Lee* affirmed a lower court's order removing federal officers from the Lee family's Arlington property; the officers were asserting possession over the property for taxes allegedly due on the land.<sup>62</sup> The questions posed by the *Lee* Court included whether "the *prima facie* title of the plaintiff [was] divested by the tax sale" at which the United States acquired a certificate of sale,<sup>63</sup> and the Court went on to rule on the validity of the government's alleged title to the property.<sup>64</sup> *Lee* also acknowledged that "[w]hen [a person] has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."<sup>65</sup>

Similarly, in *Tindal*, the Court asked: "if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the State is without legal foundation, may it not . . . adjudge that the plaintiff recover possession?"<sup>66</sup> In answering affirmatively and restoring the plaintiff's title to the land at issue, the Court held that the plaintiff's claim could not be deemed to be one brought against the state.<sup>67</sup>

In reading *Lee* and *Tindal* to dispose merely of the government's possessory interest in the disputed property, Justice O'Connor overlooked the Court's clear language. Ultimately, the Coeur d'Alene Tribe's claim can be factually distinguished from those brought in *Lee* and *Tindal* only because the disputed property involved submerged

<sup>61</sup> *Coeur d'Alene*, 117 S. Ct. at 2044 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>62</sup> *See Lee*, 106 U.S. at 196-99, 222-23.

<sup>63</sup> *Id.* at 199.

<sup>64</sup> *See id.* at 199-204; *see also id.* at 204 ("[W]e do not see . . . any reason to doubt that the jury were justified in finding that the United States acquired no title under the tax-sale proceedings.").

<sup>65</sup> *Id.* at 208-09.

<sup>66</sup> *Tindal v. Wesley*, 167 U.S. 204, 212 (1882).

<sup>67</sup> *See id.* at 213-19, 224 ("[A]s the record before us shows that the plaintiff owns the premises and is entitled to possession as against the defendants, the judgment must be affirmed."); *see also Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688 (1982) (plurality opinion) ("[I]t will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute." (quoting *Tindal*, 167 U.S. at 223) (internal quotation marks omitted)).

lands and the tribe's suit threatened the general regulatory authority of the state.<sup>68</sup> This distinction, however, lacks a principled basis.

Justice O'Connor's heavy reliance on one of these aspects of the tribe's claim to differentiate it from the Court's precedents — the important link between submerged lands and state sovereignty under the equal footing doctrine — is simply untenable. It is difficult to understand how submerged lands implicate state sovereign power any more than the economic regulatory authority that was at issue in *Young*,<sup>69</sup> or the federal officials' right to occupy the Arlington National Cemetery, some of our nation's most cherished public property, which was in dispute in *Lee*. Because the reasoning underlying Justice O'Connor's narrowly carved exception to *Young* can be easily extended to any number of circumstances, future courts may well apply her logic to a broad range of actions involving the use and enjoyment of property. Admittedly, the equal footing doctrine is limited to lands underlying navigable waterways; however, its premise — that such lands are intimately tied to statehood — could easily be extended to encompass a whole range of property held by states for the public benefit, such as parks, rivers, and historical landmarks.<sup>70</sup>

The Court's decision in *Coeur d'Alene* carved a new and very narrow exception to *Young* for submerged lands.<sup>71</sup> However, the opinions of Justice Kennedy and Justice O'Connor both signal that *Young*'s continuing vitality may be in question and provide lower courts with ample precedent to further diminish *Young*'s reach. The outcome of *Coeur d'Alene* demonstrates why the *Young* doctrine plays such an important role in our federal system. Now, to vindicate a contestable federally derived claim to ancient tribal lands, the Coeur d'Alene Tribe (and others after them) must either pursue their claim in state court, in which state law doctrines of state sovereign immunity may bar any recovery,<sup>72</sup> or petition the United States to sue the state on their behalf.<sup>73</sup>

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<sup>68</sup> However, *Young* itself ruled that the Attorney General of Minnesota could not assert his regulatory authority to enforce a state railroad rate statute due to its unconstitutionality. See *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

<sup>69</sup> This argument was advanced by Justice Souter in his dissent. See *Coeur d'Alene*, 117 S. Ct. at 2049–50, 2054 (Souter, J., dissenting).

<sup>70</sup> But see *United States v. Lee*, 106 U.S. 196, 217 (1882) (rejecting this argument).

<sup>71</sup> See *Coeur d'Alene*, 117 S. Ct. at 2043 (“Under these particular and special circumstances, we find the *Young* exception inapplicable.”).

<sup>72</sup> It is not clear “whether state courts must entertain certain suits against states that are barred from federal court by the Eleventh Amendment.” Jackson, *supra* note 48, at 504; see also *Coeur d'Alene*, 117 S. Ct. at 2057–59 (Souter, J., dissenting); Jackson, *supra* note 48, at 505 (noting possible differences between state and federal court treatment of such cases). But see *General Oil Co. v. Crain*, 209 U.S. 211, 226–27 (1908) (holding that a state court may be constitutionally required to provide injunctive relief necessary to uphold federal constitutional rights).

<sup>73</sup> The United States may bring a “*parens patriae*” suit on behalf of an Indian tribe. See *United States v. Minnesota*, 270 U.S. 181, 194 (1926) (“Of course the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States . . . .” (citation omitted)); see also *Montana v. United States*, 450 U.S. 544, 549 (1981) (holding the

Moreover, if *Young's* scope is further curtailed, the federal courts will be divested of jurisdiction over vital questions of federal law.<sup>74</sup> How much the Court will restrict *Young* by shifting the Eleventh Amendment balance in favor of the doctrine of state sovereign immunity remains to be seen.<sup>75</sup> But to follow this path is to pursue a course "at war with the principle that government must be accountable to the people through the courts."<sup>76</sup>

### F. Establishment Clause

*Public Funding of Special Education in Parochial Schools.* — Decisions under the Establishment Clause of the First Amendment<sup>1</sup> reflect the Supreme Court's failure to transform the Clause's underlying principles into the stuff of manageable standards, and thus are notoriously inconsistent.<sup>2</sup> Last Term, the Court added another layer of confusion to its Establishment Clause jurisprudence and seriously weakened the First Amendment's prohibition of governmental support for religion. In *Agostini v. Felton*,<sup>3</sup> the Supreme Court reversed a twelve-year-old decision that enjoined the use of federal funds to provide educational services to parochial students on the premises of parochial schools.<sup>4</sup> Under the Court's new jurisprudence, a federally funded program providing services on parochial school campuses does not run afoul of the Establishment Clause as long as instruction is supplemental to regularly provided services, the award of funding is based on neutral criteria, and the program imposes adequate safeguards to ensure that the instruction is secular.<sup>5</sup> This unprincipled reversal demonstrates the need for the Court to bring order to the doctrine and to

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same). In fact, the United States has filed suit on behalf of the tribe for title to approximately one-third of the disputed land. See *Coeur d'Alene*, 117 S. Ct. at 2033 (citing United States v. Idaho, No. 94-0328 (D. Idaho filed July 21, 1994)). However, this power can only be exercised by the federal government on behalf of tribes in a limited number of cases each year.

<sup>74</sup> See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause."); see also *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) (plurality opinion) ("If the Constitution provided no protection against such unbridled [state officer] authority, all property rights would exist only at the whim of the sovereign [state].").

<sup>75</sup> Cf. *Fallon*, *supra* note 49, at 1198 ("[T]he emerging doctrinal lines [of *Young*] are both blurry and potentially unstable.").

<sup>76</sup> *Shapiro*, *supra* note 49, at 62; cf. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1520 (1987) ("Our Federalism' perverts a structure designed to assure full remedies for constitutional wrongs into a system that regularly frustrates the remedial imperative.").

<sup>1</sup> The Establishment Clause states that "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend. I, and it applies to the states by means of the Fourteenth Amendment, see *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 210 (1948).

<sup>2</sup> See, e.g., Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 323.

<sup>3</sup> 117 S. Ct. 1997 (1997).

<sup>4</sup> See *id.* at 2003.

<sup>5</sup> See *id.* at 2016.



establish a clear line between acceptable and unacceptable state support for parochial schools. Although the Court could have conveniently drawn the line at the parochial schoolhouse gate, as Justice Souter would have done,<sup>6</sup> a line capable of relatively consistent application that better resonates with the principles of the Establishment Clause would distinguish between general welfare programs and educational assistance.<sup>7</sup>

Title I of the Elementary and Secondary Education Act of 1965<sup>8</sup> provides federal funds to local educational agencies for remedial education and guidance/job counseling for students who reside in low-income areas and who have difficulty achieving state "student performance standards."<sup>9</sup> The funds are available for both public and private school students.<sup>10</sup> After unsuccessfully providing such services to private school students on public school premises after school hours, the Board of Education of the City of New York (Board) moved its programs to private school campuses and eventually ran them during school hours.<sup>11</sup> To ensure that the nature of the programs remained secular, the Board imposed safeguards, which included making Title I teachers "accountable only to . . . public school supervisors," limiting the teachers' cooperation with private school teachers to consultations regarding students' performance, banning religious symbols from the classrooms, and monitoring the teachers' classes at least once a month.<sup>12</sup>

Twelve years ago, in *Aguilar v. Felton*,<sup>13</sup> the Supreme Court struck down New York's program on the ground that it required an "excessive entanglement of church and state in the administration of [Title I]

<sup>6</sup> See *id.* at 2019 (Souter, J., dissenting).

<sup>7</sup> Justice Marshall and Justice Black proposed such a line years ago. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 259–60 (1977) (Marshall, J., concurring in part and dissenting in part); *Board of Educ. v. Allen*, 392 U.S. 236, 252–54 (1968) (Black, J., dissenting). Justice Black's famous examples of general welfare measures include programs to pay for the costs of transportation to and from school, the provision of school lunches, and "general laws to provide police and fire protection for . . . churches and church school buildings." *Id.* at 252. In contrast, educational assistance would include, for example, funding for textbooks and instructional materials, teachers' salaries, and field trips.

<sup>8</sup> 20 U.S.C. §§ 6301–6514 (1994).

<sup>9</sup> *Agostini*, 117 S. Ct. at 2003–04.

<sup>10</sup> See *id.* at 2004. The federal government has placed certain restrictions on the use of Title I funds for private school students. See *id.* These restrictions include the prohibition of the use of funds for services that are not "secular, neutral, and nonideological," *id.* (quoting 20 U.S.C. § 6321(a)(2)) (internal quotation marks omitted), and for services that duplicate and thus replace programs already in place, see *id.* (quoting 34 C.F.R. § 200.12(a) (1996)). The federal government has further required that the relevant local educational agency maintain control over the funds and over the title to any materials used and that "public employees or other persons independent of the private school and any religious institution" provide the instruction. *Id.* (citing 20 U.S.C. § 6321(c)(1)–(2)).

<sup>11</sup> See *id.*

<sup>12</sup> *Id.* at 2004–05.

<sup>13</sup> 473 U.S. 402 (1985).

benefits.”<sup>14</sup> The Court remanded the case for the issuance of a permanent injunction prohibiting the use of Title I funds for teaching or counseling services on sectarian school premises.<sup>15</sup> As a result, the Board shifted its use of Title I funds for private school students back to off-campus sites.<sup>16</sup>

In 1995, the Board and parents of parochial school students sought to lift the injunction.<sup>17</sup> They argued that, because case law since *Aguilar* had undermined its holding — in particular, five Justices had stated their interest in overruling *Aguilar*<sup>18</sup> — relief under Federal Rule of Civil Procedure 60(b)(5)<sup>19</sup> was appropriate.<sup>20</sup> The district court dismissed the motion, because the Supreme Court had not yet overruled *Aguilar*.<sup>21</sup> The Court of Appeals for the Second Circuit affirmed.<sup>22</sup>

In a 5–4 decision, the Supreme Court reversed and remanded to the district court to vacate the injunction.<sup>23</sup> In an opinion by Justice O’Connor,<sup>24</sup> the Court found that subsequent decisions “ha[d] so undermined *Aguilar* that it [was] no longer good law,”<sup>25</sup> and held that the Establishment Clause does not prohibit the use of federal funds to provide remedial education on sectarian school campuses as long as the educational agency employs adequate safeguards, as it did here.<sup>26</sup> To determine whether the Board’s program “ha[d] the effect of advancing religion,” the Court employed a tripartite analysis that examined whether the aid led to governmental indoctrination, defined its beneficiaries in terms of religion, or led to excessive entanglement of religion and the state.<sup>27</sup>

<sup>14</sup> *Agostini*, 117 S. Ct. at 2005 (alteration in original) (quoting *Aguilar*, 473 U.S. at 414) (internal quotation marks omitted).

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See id.* at 2006.

<sup>18</sup> *See Board of Educ. v. Grumet*, 512 U.S. 687, 717–18 (1994) (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 731 (Kennedy, J., concurring in the judgment); *id.* at 750 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

<sup>19</sup> Rule 60(b)(5) allows a court to “relieve a party . . . from a final judgment, order, or proceeding [when] a prior judgment upon which it is based has been reversed or otherwise vacated, or [when] it is no longer equitable that the judgment should have prospective application.” FED. R. CRV. P. 60(b)(5).

<sup>20</sup> *See Agostini*, 117 S. Ct. at 2006.

<sup>21</sup> *See id.*

<sup>22</sup> *See Felton v. Secretary, U.S. Dep’t of Educ.*, 101 F.3d 1394 (2d Cir. 1996) (mem.).

<sup>23</sup> *See Agostini*, 117 S. Ct. at 2019.

<sup>24</sup> Justice O’Connor was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas.

<sup>25</sup> *Agostini*, 117 S. Ct. at 2007; *see id.* at 2017.

<sup>26</sup> *See id.* at 2016.

<sup>27</sup> *Id.* The Court rejected the petitioners’ arguments that changes in factual conditions and the statements of five Justices in *Board of Education v. Grumet* calling for the revisiting of *Aguilar* warranted relief under Rule 60(b)(5). *See id.* at 2007. Justice O’Connor noted that the additional costs of complying with *Aguilar* did not constitute a significant change warranting relief

With regard to the first and seemingly most important prong, the Court noted that it had changed its analysis of state indoctrination in two ways since *Aguilar*. First, it had “abandoned the presumption erected in *Meek [v. Pittenger]*<sup>28</sup> and [*School District v. Ball*]<sup>29</sup> that the placement of public employees on parochial school grounds inevitably results in state-sponsored indoctrination or constitutes a symbolic union between government and religion.”<sup>30</sup> For example, in *Zobrest v. Catalina Foothills School District*,<sup>31</sup> the Court upheld the state’s provision of a sign-language interpreter for a parochial high school student, because the interpreter’s signing did not constitute government indoctrination as long as she did not inject her own religious ideas into her translations.<sup>32</sup> Justice O’Connor characterized *Zobrest* as a decision that rejected the presumptions that a public employee at a private school would inculcate religion and that his or her presence would impermissibly link the state and religion.<sup>33</sup>

Second, the Court stated that it no longer found that “all government aid that directly aids the educational function of religious schools is invalid.”<sup>34</sup> For example, in *Witters v. Washington Department of Services for the Blind*,<sup>35</sup> the Court upheld a blind student’s use of a state tuition grant to attend a sectarian college.<sup>36</sup> The *Witters* Court’s decision turned on the facts that the criteria for receiving a grant did not distinguish between public and private institutions and that the state gave grants to students rather than directly to institutions.<sup>37</sup> Justice O’Connor argued that, as in *Zobrest*, the state aid in *Witters* really took the form of aid to a student who merely chose to use it at a sectarian school.<sup>38</sup>

Justice O’Connor then turned to the related question whether the Title I program “impermissibly finance[d] religious indoctrination,”

because the petitioners and the Court foresaw the costs at the time of the *Aguilar* decision. *See id.* Furthermore, Justice O’Connor noted that statements by Justices cannot in and of themselves overrule a decision and, thus, change the law. *See id.*

<sup>28</sup> 421 U.S. 349 (1975).

<sup>29</sup> 473 U.S. 373 (1985). *Ball*, the companion case to *Aguilar*, invalidated the Shared Time program, which was very similar to the Title I program, *see Agostini*, 117 S. Ct. at 2008, and held that the program impermissibly advanced religion because it presented the danger of “state-sponsored indoctrination,” *id.* (quoting *Ball*, 473 U.S. at 391) (internal quotation marks omitted).

<sup>30</sup> *Agostini*, 117 S. Ct. at 2010. In *Meek*, the Court invalidated a state’s provision of “instructional material and equipment,” *Meek*, 421 U.S. at 363, and “auxiliary-services” like guidance counseling and remedial instruction to parochial schools, *see id.* at 372.

<sup>31</sup> 509 U.S. 1 (1993).

<sup>32</sup> *See Agostini*, 117 S. Ct. at 2010–11 (citing *Zobrest*, 509 U.S. at 12–13).

<sup>33</sup> *See id.* at 2011.

<sup>34</sup> *Id.*

<sup>35</sup> 474 U.S. 481 (1986).

<sup>36</sup> *See id.* at 483, 489.

<sup>37</sup> *See Agostini*, 117 S. Ct. at 2011.

<sup>38</sup> *See id.* at 2011–12.

and decided that it did not.<sup>39</sup> First, the Court could not meaningfully distinguish the program from the provision of the sign-language interpreter upheld in *Zobrest*.<sup>40</sup> Second, and more importantly, any subsidy of religion resulting from Title I occurs whether instruction is supplied on or off the parochial school premises, and *Aguilar* did not question the constitutionality of providing off-campus instruction.<sup>41</sup> Justice O'Connor concluded that these changes in the Court's jurisprudence required the finding that the Board's program and the program in *Ball* did not "as a matter of law" result in impermissible indoctrination.<sup>42</sup>

With regard to the third prong,<sup>43</sup> Justice O'Connor treated the question of entanglement "as an aspect of the inquiry into a statute's effect" and rejected *Aguilar's* holding that the Title I program excessively entangled religion and the state.<sup>44</sup> She noted that the Court no longer deemed the need for administrative cooperation between the local educational agency and the school or the threat of "political divisiveness" to constitute excessive entanglement because these factors are present regardless of the location where the state provides Title I services.<sup>45</sup> Likewise, "pervasive monitoring"<sup>46</sup> of teachers to ensure the secular nature of their instruction did not support a finding of entanglement because, by "abandon[ing] the assumption that properly instructed public employees will fail to discharge their duties faithfully," the Court no longer needed to require such monitoring.<sup>47</sup>

Justice Souter dissented.<sup>48</sup> He argued that the Court in *Aguilar* emphasized the issue of excessive entanglement at the expense of two

<sup>39</sup> *Id.* at 2012.

<sup>40</sup> *See id.* Both programs awarded aid without regard to the school that a student planned to attend, and Justice O'Connor deemed insignificant the fact that signers aid single students whereas Title I instructors aid groups of students. *See id.* at 2013. Furthermore, Justice O'Connor noted that Title I aid, like aid from a signer, supplements, rather than replaces, regular courses. *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* at 2014.

<sup>43</sup> With regard to the second prong of the Court's analysis, an issue not addressed in *Aguilar* or *Ball*, Justice O'Connor briefly opined that the criteria used in allocating Title I funds did not impermissibly create incentives for students to change their religious beliefs because the criteria "neither favor[ed] nor disfavor[ed] religion" and thus were less apt to advance religion. *Id.*

<sup>44</sup> *Id.* at 2015.

<sup>45</sup> *Id.* (quoting *Aguilar v. Felton*, 473 U.S. 402, 414 (1985)) (internal quotation marks omitted).

<sup>46</sup> *Id.* (quoting *Aguilar*, 473 U.S. at 413) (internal quotation marks omitted).

<sup>47</sup> *Id.* at 2016. In a cursory fashion, the majority then concluded that the Title I program did not endorse religion for the same reasons that it did not impermissibly advance religion. *See id.* The Court also found that the principle of stare decisis did not require it to uphold *Aguilar* and *Ball*. *See id.* The Court stated that, because the case law had changed significantly since *Ball* and *Aguilar*, "[its] decision to overturn those cases rest[ed] on far more than 'a present doctrinal disposition to come out differently from the Court of [1985].'" *Id.* at 2017 (alteration in original) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992)). Finally, the Court found that the change in its Establishment Clause jurisprudence since *Aguilar* warranted relief under Rule 60(b)(5). *See id.*

<sup>48</sup> Justice Souter was joined by Justices Stevens and Ginsburg. Justice Breyer joined in part.

founding principles of Establishment Clause jurisprudence: that the “State is forbidden to subsidize religion directly and [that it] is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement.”<sup>49</sup> The programs in *Aguilar* and *Ball* contradicted these two principles in a number of ways.<sup>50</sup> Justice Souter noted that “[w]hat was so remarkable was that the [programs] in issue assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves.”<sup>51</sup> In rejecting the programs’ characterization as “supplemental” education, Justice Souter argued that it would be impossible to draw a line between the supplemental education that public funds could constitutionally provide and the general education left to the sectarian schools.<sup>52</sup> Justice Souter would instead have left intact the on/off-campus rule set forth in *Aguilar* and *Ball* as “a sensible one capable of principled adherence.”<sup>53</sup>

Justice Souter then criticized the majority’s interpretation of recent Establishment Clause case law. First, Justice Souter noted the majority’s failure to recognize the *Zobrest* decision’s limited context. According to Justice Souter, the *Zobrest* Court’s conclusion that no absolute rule exists against the use of public employees in parochial schools rested “expressly on the nature of the employee’s job . . . and the circumscribed role of the signer.”<sup>54</sup> Thus, in marked contrast to the *Agostini* majority’s claim, Justice Souter concluded that the majority’s rejection of “*Ball*’s assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs . . . is fresh law.”<sup>55</sup>

Second, Justice Souter rejected the majority’s contention that *Ball* held that all direct aid to religious schools violates the Establishment Clause. Rather, the *Ball* Court looked to whether “the effect of the proffered aid was ‘direct and substantial’ (and, so, unconstitutional) or merely ‘indirect and incidental,’ (and, so, permissible).”<sup>56</sup> Justice Souter opined that the cases cited by the majority, *Witters* and *Zobrest*, did not upset this principle. Instead, the Court in those cases recognized the narrowness of the grants, which “aid[ed] isolated individuals

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<sup>49</sup> *Agostini*, 117 S. Ct. at 2020 (Souter, J., dissenting).

<sup>50</sup> See *id.* at 2021. For example, Justice Souter noted that the programs gave public employees broad discretion in conducting themselves and provided direct aid to parochial schools instead of aid to parents. See *id.*

<sup>51</sup> *Id.*

<sup>52</sup> See *id.* at 2021–22 (internal quotation marks omitted).

<sup>53</sup> *Id.* at 2022.

<sup>54</sup> *Id.* at 2023. To support his interpretation, Justice Souter pointed to the *Zobrest* Court’s explicit statement that a signer’s duties are distinct from those of a teacher or guidance counselor in that a signer is simply a translator. See *id.* (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 2024 (quoting *School Dist. v. Ball*, 473 U.S. 373, 394 (1985)).

within a school system.”<sup>57</sup> In contrast, Justice Souter contended that the Title I program served numerous students in “core subjects” and thus “necessarily relieved a religious school of ‘an expense that it otherwise would have assumed,’ and freed its funds for other, and sectarian uses.”<sup>58</sup>

Neither the approach of the majority nor that of Justice Souter adequately safeguards the important values that the Establishment Clause protects.<sup>59</sup> The Court has traditionally applied the *Lemon* test<sup>60</sup> to determine whether a particular program violates the Clause,<sup>61</sup> and although the Court has not explicitly renounced it, this standard has fallen into disrepute.<sup>62</sup> The answer to the confusion that has plagued this area of constitutional law is not to reformulate further this vague and meaningless standard, but rather to replace the confused case law on public aid to parochial schools with one clear rule that better ensures a principled separation of church and state. The result of the Court’s current malleable jurisprudence is that Justices quibble over distinctions between sign-language interpreters and teachers, between aid directed at parents of parochial school students and aid given directly to schools. If *Agostini* signifies any trend, it is a smooth descent down the slippery slope of establishment.

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (citation omitted) (quoting *Zobrest*, 509 U.S. at 12). Justice Souter further disagreed with the majority’s decision to overrule its precedent in light of the fact that neither the law nor the facts of *Aguilar* had changed significantly since the time of *Aguilar*’s decision. *See id.* at 2025. Although he sympathized with the need to reform the administration of Title I funds, Justice Souter recognized that “constitutional lines have to be drawn.” *Id.* at 2026.

Justice Ginsburg also dissented and was joined by Justices Stevens, Souter, and Breyer. Justice Ginsburg argued that the Court had violated its own rules, which allow for a case to be reheard in a limited number of circumstances not present in this case. *See id.* (Ginsburg, J., dissenting). According to Justice Ginsburg, the district court was required to apply *Aguilar*, because the Supreme Court had yet to overrule it, and therefore the district court could not have abused its discretion in rejecting the petitioners’ motion. *See id.* at 2027. Furthermore, Justice Ginsburg argued, appellate review of a denied Rule 60(b) motion “does not bring up the underlying judgment for review.” *Id.* (quoting *Browder v. Director, Dep’t of Corrections*, 434 U.S. 257, 263 n.7 (1978)) (internal quotation marks omitted). Justice Ginsburg therefore concluded that, instead of taking this opportunity to overrule *Aguilar*, the majority should have waited until an appropriate case came before the Court. *See id.* at 2028.

<sup>59</sup> For a fuller description of some of these values, see Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1684–86 (1969).

<sup>60</sup> *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (outlining a three-part test invalidating laws that lack a secular purpose, have a primary effect of advancing or inhibiting religion, or excessively entangle the state and religion).

<sup>61</sup> *See, e.g., Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 485 (1986); *School Dist. v. Ball*, 473 U.S. 373, 382–83 (1985).

<sup>62</sup> *See Greenawalt, supra note 2*, at 359–60 (noting the current Justices’ dissatisfaction with the *Lemon* test on the ground that it provides for either too much or too little separation of church and state in particular cases). In *Agostini*, neither the majority nor the dissent applied *Lemon* directly. However, in reexamining decisions in which it had applied *Lemon*, the Court implicitly applied the test’s tenets.

The Court's approach is problematic because it fails to place meaningful constraints on public funding for parochial education. The Court opened the door to unprecedented public aid to parochial schools by departing from Establishment Clause precedent in two significant ways. First, the Court rejected the presumption that a public teacher on a parochial campus would inculcate religion.<sup>63</sup> Chief Justice Burger first articulated this presumption in *Lemon*, in which he distinguished teachers from books. He wrote that, "[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."<sup>64</sup> *Agostini's* relaxation of this presumption effectively limits violations of the Clause in parochial education cases to instances in which courts make *actual* findings that teachers have inculcated religion. This departure from precedent does not bode well for enforcement of the Establishment Clause, because parents of parochial school children have few incentives to report inappropriate inculcation of religion in the teaching of secular subjects.<sup>65</sup>

Second, the Court rejected the long-held rule that "all government aid that directly aids the educational function of religious schools is invalid."<sup>66</sup> This change threatens the separation of church and state even more seriously than does the first. The rule that direct aid to parochial education is *per se* invalid is rooted in the Court's landmark 1947 decision in *Everson v. Board of Education*.<sup>67</sup> The problem with *Agostini's* forsaking this presumption is that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian school enterprise as a whole."<sup>68</sup> Because the *Agostini* Court offered no way to separate the religious and the secular functions of a parochial school — a task the Court has previously refused to perform<sup>69</sup> — the Court in effect constitutionalized direct aid to religious enterprises.

Justice Souter's approach, in contrast, renders no further damage to the Establishment Clause and serves as a convenient yardstick for determining the permissible use of Title I funds. However, it does little

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<sup>63</sup> See *Agostini*, 117 S. Ct. at 2010.

<sup>64</sup> *Lemon*, 403 U.S. at 617.

<sup>65</sup> See *Ball*, 473 U.S. at 388–89.

<sup>66</sup> *Agostini*, 117 S. Ct. at 2011.

<sup>67</sup> 330 U.S. 1 (1947). *Everson* upheld the reimbursement of parents of children attending public and private schools for the costs of bus transportation to and from school. See *id.* at 18.

<sup>68</sup> *Meek*, 421 U.S. at 366.

<sup>69</sup> In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court refused to uphold a state law providing for the reimbursement of up to 50% of the total parochial school tuition paid. See *id.* at 780. The Court noted that "[i]ts cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education." *Id.* at 778; see also *Wolman v. Walter*, 433 U.S. 229, 250 (1977) (noting "the impossibility of separating the secular education function from the sectarian" function of instructional materials and equipment).

to provide a workable rule for other instances of state support for parochial education. Justice Souter fell back on the physical distinction between services provided on and off the parochial school campus.<sup>70</sup> This line, however, does not account for *Board of Education v. Allen*<sup>71</sup> or for *Zobrest*, which upheld respectively the loan of textbooks to and the provision of a sign-language interpreter for parochial school students. In both of these cases, the books and the interpreter were used on the parochial campuses, and Justice Souter's dissent, in which he implied that he would not bar "all state aid to religious schools for teaching standard subjects,"<sup>72</sup> seems to indicate that he would be unwilling to overrule either case.

Rather than taking the path of the majority or of Justice Souter, the Court should have adopted Justice Marshall's approach in *Wolman v. Walter*.<sup>73</sup> Justice Marshall argued that a "line . . . should be placed between [acceptable] general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and [unacceptable] programs of educational assistance."<sup>74</sup> This rule would prohibit, as directly related to the educational function of parochial schools, state-supported instructional materials and teachers;<sup>75</sup> voucher programs, scholarships, and tax subsidies for tuition costs;<sup>76</sup> and remedial instruction and guidance counseling like that provided in *Agostini*.<sup>77</sup> However, this rule would not prohibit state-funded diagnostic or health services provided on parochial school campuses, because these services are neces-

<sup>70</sup> "[I]f a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects, the *Aguilar-Ball* line was a sensible one capable of principled adherence." *Agostini*, 117 S. Ct. at 2022 (Souter, J., dissenting).

<sup>71</sup> 392 U.S. 236 (1968).

<sup>72</sup> *Agostini*, 117 S. Ct. at 2022 (Souter, J., dissenting).

<sup>73</sup> 433 U.S. 229, 256–60 (1977) (Marshall, J., concurring in part and dissenting in part).

<sup>74</sup> *Id.* at 259. Justice Black would have imposed the same line in *Allen*. See *Allen*, 392 U.S. at 252–54 (Black, J., dissenting).

<sup>75</sup> The Court invalidated the subsidy of parochial school teacher salaries in *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971), and the provision of instructional materials in *MEEK v. Pittenger*, 421 U.S. 349, 366 (1975).

<sup>76</sup> The Court upheld the provision of a state tax deduction for school fees and transportation in *Mueller v. Allen*, 463 U.S. 388, 390–91 (1983), in part because the deduction was available to parents of public and parochial school students alike, see *id.* at 398. The rule that this Comment endorses would require the reversal of *Mueller* and possibly of *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), in which the Court upheld a student's use of a state-provided scholarship at a religious college, see *id.* at 489. The Court, however, has exercised less scrutiny over public support of sectarian institutions of higher learning. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 685–86 (1971) (noting differences in the impressionability of primary and secondary school students and college students and differences in the schools' purposes).

<sup>77</sup> Unlike physical or psychological testing or treatment, "[t]hese . . . [services] are clearly intended to aid the sectarian schools to improve the performance of their students in the classroom." *Wolman*, 433 U.S. at 261 (Marshall, J., concurring in part and dissenting in part).



sary for the general welfare of children and are unrelated to the educational function of the schools.<sup>78</sup>

Of course, it is possible to define virtually any aspect of education or of student well-being as beneficial to the general welfare. For example, *Zobrest* arguably should be affirmed, because a state-provided sign-language interpreter provides aid to a physically disabled child. Instead, however, the appropriate, narrower inquiry is whether the service *also* constitutes educational assistance. Under this view, a sign-language interpreter, though a sort of treatment for a physical ailment, becomes the medium of education itself and thus falls on the impermissible side of the line.

The strongest objection to adopting Justice Marshall's rule is that it requires overturning long-established precedent.<sup>79</sup> However, the *Agostini* Court felt no such hesitancy in overturning the twelve-year-old injunction issued in *Aguilar*.<sup>80</sup> Furthermore, Justice Marshall's approach would bring needed consistency to this area of the law. The Court's decisions in *Meek* and *Wolman* have required the reversal of *Allen* for some time. In both decisions, the Court overturned the state provision of instructional materials and equipment, because their use for religious purposes could not be separated from their use for secular purposes. The textbook loans upheld in *Allen* cannot be distinguished from the materials at issue in *Meek* and *Wolman*. Nor does *Allen* survive on the basis that parents and students rather than schools received the textbooks, for in *Wolman*, the Court refused to distinguish a program on the basis of the recipient.<sup>81</sup> Characterizing *Allen* as the primary factor in "reducing the 'high and impregnable' wall between church and state erected by the First Amendment . . . to 'a blurred, indistinct, and variable barrier,'" <sup>82</sup> Justice Marshall warned that "[t]he tension between *Allen* and *Meek* indicates that we must soon either remove the platform [to greater aid] or take the plunge into new realms of state assistance to sectarian institutions."<sup>83</sup>

<sup>78</sup> The Court presumed as much in *Meek*. See *Meek*, 421 U.S. at 371 n.21. Similarly, state-funded standardized tests would still be permissible, because the state has an interest in ensuring that parochial schools meet state competency standards. See *Wolman*, 433 U.S. at 240. However, such funding would be impermissible if a test's sole purpose was to help a parochial school assess its own performance. See *id.* at 261-62 (Marshall, J., concurring in part and dissenting in part).

<sup>79</sup> For example, textbook loan programs obviously constitute educational assistance rather than general welfare programs and thus would not survive Justice Marshall's analysis. This result would require overruling *Allen* and portions of *Meek* and *Wolman*.

<sup>80</sup> As the *Agostini* majority noted, the rationale for stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, 117 S. Ct. at 2016.

<sup>81</sup> See *Wolman*, 433 U.S. at 250 (noting that, "[d]espite the technical change in legal bailee, the program in substance is the same as before").

<sup>82</sup> *Id.* at 257 (Marshall, J., concurring in part and dissenting in part) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947), and *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

<sup>83</sup> *Id.* at 259 n.3.

The time has come to remove this platform.' The benefits of adopting the general welfare/educational assistance rule are many: relative consistency of result, applicability to a broad range of issues, and strong protection against public support of religious education. The *Agostini* Court failed to render this area of the law clearer by adopting a bright-line rule. Compounding this error, the Court paved the way for public employees to assume the educational functions of religious schools, leaving the schools with more resources to devote to religious instruction. Accordingly, the Court has done a disservice to the proud and unique tradition of the separation of church and state in America. "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve."<sup>84</sup>

### G. Fourth Amendment

1. *Suspicionless Drug Testing*. — The Fourth Amendment generally prohibits government officials from conducting a search without individualized suspicion.<sup>1</sup> However, the Supreme Court has carved out certain exceptions to this general rule.<sup>2</sup> In recent years, a variety of government drug testing programs lacking individualized suspicion requirements have survived Fourth Amendment challenges.<sup>3</sup> In those cases, the Court relied on the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements and evaluated the reasonableness of the programs by balancing the governmental and privacy interests involved.<sup>4</sup>

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<sup>84</sup> *Id.* at 264 (Stevens, J., concurring in part and dissenting in part) (quoting Transcript of Oral Argument at 7, *Scopes v. State*, 289 S.W. 363 (Tenn. 1927)) (internal quotation marks omitted).

<sup>1</sup> See, e.g., *Chandler v. Miller*, 117 S. Ct. 1295, 1298 (1997); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989).

<sup>2</sup> Some examples of these exceptions include routine stops at fixed Border Patrol checkpoints, see *United States v. Martinez-Fuerte*, 428 U.S. 543, 566–67 (1976), or at sobriety checkpoints, see *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447, 455 (1990), and administrative searches in highly regulated businesses, see *New York v. Burger*, 482 U.S. 691, 703 (1987).

<sup>3</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2396 (1995) (sustaining random drug testing of high school athletes); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664 (1989) (upholding suspicionless drug testing of customs officials seeking promotion or transfer to safety-sensitive positions); *Skinner*, 489 U.S. at 634 (upholding drug testing of all railway employees involved in major train accidents).

<sup>4</sup> See *Vernonia*, 115 S. Ct. at 2391–96; *Von Raab*, 489 U.S. at 665–77; *Skinner*, 489 U.S. at 619–33. The "special needs" exception, as presented in *Von Raab*, provides that, "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665–66 (citing *Skinner*, 489 U.S. at 619–20).

Last Term, in *Chandler v. Miller*,<sup>5</sup> the Supreme Court held that a Georgia statute requiring candidates for state office to pass a drug test did not serve a special need and therefore did not effect a constitutionally permissible suspicionless search.<sup>6</sup> Although the Court reached the correct result, it misapplied the special needs inquiry by conflating the initial identification of a special need with the ultimate balancing test. The Court thus left unclear the criteria for determining whether the special needs exception is appropriate, and may guide lower courts to dispense too readily with the Fourth Amendment's traditional requirements in favor of ad hoc balancing. Instead, the Court should have articulated a more substantial threshold test that would limit the circumstances in which courts employ the special needs balancing test.

In 1990, the Georgia General Assembly enacted a law requiring all candidates for high state office to pass a urinalysis drug test in order to qualify for nomination or election.<sup>7</sup> Section 21-2-140 of the Georgia Code required each candidate to file a certificate demonstrating that he or she had tested negative for illegal drug use within thirty days prior to qualification for nomination or election.<sup>8</sup>

In 1994, three Libertarian Party nominees for state offices subject to § 21-2-140 filed suit in the United States District Court for the Northern District of Georgia.<sup>9</sup> Alleging, among other things, that the drug test requirement of § 21-2-140 violated their constitutional rights under the First, Fourth, and Fourteenth Amendments, the plaintiffs requested both declaratory and injunctive relief.<sup>10</sup> The district court determined that the law involved "special governmental needs" that were "beyond the normal need for law enforcement"<sup>11</sup> and accordingly applied the balancing test set out in *Skinner v. Railway Labor Executives' Ass'n*<sup>12</sup> and *National Treasury Employees Union v. Von Raab*.<sup>13</sup> Emphasizing the importance of Georgia's interest in having drug-free elected officials and the relative unintrusiveness of the certification procedure, the court denied the plaintiffs' motion for a preliminary in-

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<sup>5</sup> 117 S. Ct. 1295 (1997).

<sup>6</sup> See *id.* at 1298, 1303.

<sup>7</sup> See GA. CODE ANN. § 21-2-140 (1993). The offices covered by § 21-2-140 included, among others, Governor, Lieutenant Governor, Secretary of State, Attorney General, and the state judiciary and legislature. See *id.* § 21-2-140(a)(4).

<sup>8</sup> See *id.* § 21-2-140(c).

<sup>9</sup> See *Chandler*, 117 S. Ct. at 1299.

<sup>10</sup> See *id.*; *Chandler v. Miller*, 952 F. Supp. 804, 805 (N.D. Ga. 1994).

<sup>11</sup> *Chandler*, 952 F. Supp. at 806 (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619-20 (1989))) (internal quotation marks omitted).

<sup>12</sup> 489 U.S. 602 (1989).

<sup>13</sup> 489 U.S. 656 (1989). The *Skinner-Von Raab* balancing test requires weighing the government's interests in the search against the individual's privacy expectations. See *Von Raab*, 489 U.S. at 665 (citing *Skinner*, 489 U.S. at 619-20).

junction.<sup>14</sup> The district court later entered final judgment for the defendants.<sup>15</sup>

A divided Eleventh Circuit panel affirmed.<sup>16</sup> Agreeing with the district court that the Georgia law involved “[s]pecial needs,”<sup>17</sup> the Eleventh Circuit conducted its own balancing analysis under the *Skinner-Von Raab* framework and, like the district court, found that Georgia’s interests in electing drug-free officials outweighed the intrusion upon the candidates’ privacy interests.<sup>18</sup> The panel thus held that § 21-2-140, as applied to the plaintiffs, did not violate the Fourth Amendment.<sup>19</sup> Writing in dissent, Judge Barkett reasoned that, under *Von Raab*, no special need existed to justify departing from the warrant and probable cause requirements, and that, even if a special need did exist, the candidates’ privacy interests outweighed Georgia’s governmental interests.<sup>20</sup>

In an 8–1 decision, the Supreme Court reversed. Writing for the majority, Justice Ginsburg<sup>21</sup> held that the drug tests required by the Georgia law “[did] not fit within the closely guarded category of constitutionally permissible suspicionless searches.”<sup>22</sup> The Court began the constitutional analysis by noting the undisputed premise that a urinalysis drug test constitutes a search under the Fourth and Fourteenth Amendments.<sup>23</sup> Although a search generally requires individualized suspicion to pass muster under the Fourth Amendment, the Court explained, certain exceptions to this rule may be justified by “special needs, beyond the normal need for law enforcement.”<sup>24</sup> Invoking the *Skinner-Von Raab* test, the Court agreed with the courts below that, when “special needs — concerns other than crime detection —” are involved, courts must carry out a “context-specific inquiry,” balancing the government’s interests against the individual’s privacy expectations, to determine whether the search is reasonable.<sup>25</sup>

The Court then discussed the three most directly applicable precedents — *Skinner*, *Von Raab*, and *Vernonia School District 47J v. Ac-*

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<sup>14</sup> See *Chandler*, 952 F. Supp. at 806–08.

<sup>15</sup> See *Chandler*, 117 S. Ct. at 1299.

<sup>16</sup> See *Chandler v. Miller*, 73 F.3d 1543, 1544 (11th Cir. 1996).

<sup>17</sup> *Id.* at 1545.

<sup>18</sup> See *id.* at 1547. The court also noted that the state’s sovereign interest in determining qualifications for state office warranted extra deference to the state’s characterization of its own interests. See *id.* at 1545.

<sup>19</sup> See *id.* at 1547. The Eleventh Circuit also rejected the plaintiffs’ equal protection and First Amendment arguments. See *id.* at 1547–49.

<sup>20</sup> See *id.* at 1549 (Barkett, J., dissenting).

<sup>21</sup> Justices Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas, and Breyer joined Justice Ginsburg’s opinion.

<sup>22</sup> *Chandler*, 117 S. Ct. at 1298.

<sup>23</sup> See *id.* at 1300 (citing *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989)).

<sup>24</sup> *Id.* at 1301 (quoting *Skinner*, 489 U.S. at 619) (internal quotation marks omitted).

<sup>25</sup> *Id.*

ton<sup>26</sup> — in which the Court had upheld suspicionless drug testing schemes.<sup>27</sup> The Court emphasized the impracticability of the individualized suspicion requirement in each case and the gravity of the governmental purpose in having the drug tests.<sup>28</sup> With these cases as its guides,<sup>29</sup> the Court began its examination of Georgia's statute by noting that the drug testing method required by § 21-2-140 was "relatively noninvasive."<sup>30</sup> Turning next to the "core issue [whether] the certification requirement [was] warranted by a special need,"<sup>31</sup> the Court declared that Georgia had failed to show a special need that was "substantial — important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."<sup>32</sup> The Court pointed out the absence of any evidence of a "concrete danger" or a history of drug abuse by Georgia officials that might justify an exception to the general presumption requiring individualized suspicion.<sup>33</sup> Although conceding that a documented drug abuse problem among Georgia officeholders was not absolutely necessary to the validity of the statute, the Court maintained that such evidence would help to specify the precise dangers involved and thereby support the assertion of special need.<sup>34</sup>

The Court then set out to distinguish *Von Raab*, in which it had upheld a suspicionless drug test despite the absence of any demonstrated drug problem. Describing the case as "[h]ardly a decision opening broad vistas for suspicionless searches," the Court first argued that *Von Raab* involved the "unique context" of front-line drug interdiction, in which customs employees were exposed to drug-related organized crime, valuable contraband, and bribery.<sup>35</sup> Moreover, the

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<sup>26</sup> 115 S. Ct. 2386 (1995).

<sup>27</sup> See *Chandler*, 117 S. Ct. at 1301-02; cases cited *supra* note 3.

<sup>28</sup> See *Chandler*, 117 S. Ct. at 1301-02.

<sup>29</sup> Before evaluating Georgia's statute in light of these precedents, the Court rejected the argument that the special needs analysis must be conducted deferentially because § 21-2-140 involved Georgia's sovereign power under the Tenth Amendment to establish qualifications for candidates seeking state offices. See *id.* at 1302-03. A state's power to fix qualifications for state office, the Court ruled, does not abate the Fourth Amendment's constraints on state action. See *id.* at 1303.

<sup>30</sup> *Id.* The Court found that the intrusiveness of the drug test was limited because the statute allowed a candidate both to elect to produce the urine specimen at the office of his or her personal physician, and to maintain control over the disclosure of the test results. See *id.* The Court also pointed out that the statute invoked the same federal drug testing guidelines that applied to the programs upheld in *Skinner* and *Von Raab*. See *id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* The Court suggested that the statute guarded against merely hypothetical dangers and that the statute's primary defense rested on the mere incompatibility of illegal drug use with holding state office. See *id.*

<sup>34</sup> See *id.* (citing the history of drug and alcohol use by railway workers in *Skinner* and the dramatic rise in unlawful drug use by students in *Vernonia*).

<sup>35</sup> *Id.* at 1304.

Court argued, unlike customs officials, political candidates experience day-to-day scrutiny that should enable Georgia to satisfy the individualized suspicion requirement.<sup>36</sup>

The Court also evaluated the efficacy of Georgia's drug testing program and criticized the program for its inability either to identify candidates who use drugs or to deter drug users from running for office.<sup>37</sup> The Court pointed out the ability of a drug user to escape detection simply by abstaining for a certain period before the test.<sup>38</sup> And users who are too addicted to abstain, the Court reasoned, would still be caught through ordinary law enforcement once they appeared in the public limelight.<sup>39</sup>

The actual benefit of § 21-2-140, the Court maintained, was that it demonstrated Georgia's commitment to the war on drugs.<sup>40</sup> The Court noted that no evidence suggested a drug problem among Georgia's elected officials, their positions did not involve high-risk or safety-sensitive work, and the drug test did not aid in any drug interdiction effort.<sup>41</sup> In short, the Court concluded, the need addressed by the Georgia statute was symbolic, not "special."<sup>42</sup> Georgia's desire to set a good example through its political candidates, the Court declared, was not sufficient to overcome their privacy rights under the Fourth Amendment.<sup>43</sup>

Chief Justice Rehnquist dissented.<sup>44</sup> The Chief Justice took issue with the majority's assertion that the hazards addressed by the Georgia law were merely hypothetical, and argued that Georgia should not have to wait for a drug abuser to run for office before initiating a prophylactic drug testing program.<sup>45</sup> The Chief Justice went on to criticize the majority for interpreting "special needs" in a way that was inconsistent with the Court's precedents. In *Skinner* and *Von Raab*, he argued, a special need did not have to be a purpose of "especially great 'importan[ce],'"<sup>46</sup> but could be any "proper governmental purpose other than law enforcement."<sup>47</sup> The Chief Justice concluded that the privacy intrusions occasioned by § 21-2-140 were minimal and that

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<sup>36</sup> *See id.*

<sup>37</sup> *See id.* at 1303-04.

<sup>38</sup> *See id.* at 1304.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See id.* at 1305.

<sup>42</sup> *See id.*

<sup>43</sup> *See id.* The Court cautioned that it did not intend to address the constitutionality of candidate medical examinations, candidate financial disclosures, or private sector drug testing. *See id.*

<sup>44</sup> *See id.* at 1305 (Rehnquist, C.J., dissenting).

<sup>45</sup> *See id.* at 1306.

<sup>46</sup> *Id.* (quoting *Chandler*, 117 S. Ct. at 1303).

<sup>47</sup> *Id.*

some of the government interests described in *Von Raab* as "compelling" were also present in the case at hand.<sup>48</sup>

Despite reaching the correct result in *Chandler*, the Court failed to provide a much-needed clarification and fortification of the special needs framework. The Court's method of analysis, which represents a departure from the Court's previous applications of the special needs doctrine, demonstrates this need for clarification. The Court's precedents make clear that the special needs exception requires a two-step analysis.<sup>49</sup> In the first step, a court must determine whether there exists a special need, apart from the ordinary needs of law enforcement.<sup>50</sup> Identification of such a need then triggers the second step, in which the court must balance the governmental interests against the individual privacy interests to determine whether the search is reasonable.<sup>51</sup>

However, in applying the special needs framework in *Chandler*, the Court blended the two steps of the inquiry by confusing the identification of a special need with the weighing of Georgia's governmental interests.<sup>52</sup> Before determining whether a special need existed, the Court

<sup>48</sup> See *id.* at 1307. These interests include protecting "sensitive information" from individuals who might compromise the confidentiality of the information and preventing off-duty drug use by officials who are potential targets of bribery or blackmail. *Id.* (quoting *National Treasury Employees Union v. Von Raab*, 486 U.S. 656, 677 (1989)) (internal quotation marks omitted).

The Chief Justice also warned that, although the Court claimed not to rule on the constitutionality of general medical examinations of candidates, the Court's reasoning in *Chandler* suggested that it would also require individualized suspicion in that context. See *id.*

<sup>49</sup> In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), Justice Blackmun introduced the two-step "special needs" framework: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351 (Blackmun, J., concurring). The purpose of Justice Blackmun's concurrence was to articulate a distinction between the ultimate balancing of interests, which occurs whenever the Court grants an exception to the warrant and probable cause requirements, and the "crucial step" of identifying a special need that necessitates departing from the traditional requirements of the Fourth Amendment in the first place. *Id.*

<sup>50</sup> See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995) (identifying "special needs" in the public school context to preserve the "swift and informal disciplinary procedures" that help "maintain order in the schools" (quoting *T.L.O.*, 469 U.S. at 340-41)); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (describing the special need both to deter illegal drug use by customs officials seeking safety-sensitive positions and to prevent drug users from obtaining such positions); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989) (identifying a special need to regulate the conduct of railroad workers in order to promote safety).

<sup>51</sup> See, e.g., *Vernonia*, 115 S. Ct. at 2391-96; *Von Raab*, 489 U.S. at 668-77; *Skinner*, 489 U.S. at 624-33. In her dissenting opinion in the court below, Judge Barkett clearly articulated the two-stage structure of the special needs framework: "Before balancing the candidates' privacy expectations against the government's interests in conducting suspicionless drug-screening, the court must first ascertain whether this case presents a special governmental need beyond the normal need for law enforcement." *Chandler v. Miller*, 73 F.3d 1543, 1549 (11th Cir. 1996) (Barkett, J., dissenting).

<sup>52</sup> Cf. Jennifer Y. Buffaloe, Note, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 564 n.\* (1997) ("Rather than justifying its departure from the warrant and probable cause standards by first

began evaluating the intrusiveness of the drug test<sup>53</sup> — a consideration that normally would weigh in the ultimate balancing test as one factor determining the privacy interests at stake.<sup>54</sup> The Court then ventured that “the proffered special need for drug testing must be substantial — important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”<sup>55</sup> In doing so, the Court must have intended to describe not the characteristics of a special need, but rather the weight of the *governmental interest* necessary to justify a suspicionless search once the Court has reached the balancing test.

The subsequent paragraphs of the opinion confirm the Court’s meaning: to illustrate why Georgia had “failed to show . . . a special need,” the Court demonstrated how minimal the state’s governmental interest in the drug test was.<sup>56</sup> Toward this end, the Court focused both on the absence of any prior problem with illegal drug use by Georgia officeholders and on the relative ineffectiveness of the drug testing scheme<sup>57</sup> — two factors that determine the magnitude of the government’s interest in the drug test.<sup>58</sup> Furthermore, in describing Georgia’s need as ultimately “symbolic, not ‘special,’”<sup>59</sup> the Court did not truly address whether the need was normal or special, but instead essentially submitted that the weight of the government’s interest was light, not heavy.

Arguably, the Court paid inadequate attention to the first step of the special needs framework because it knew that the statute would

identifying a ‘special need,’ the [*Chandler*] Court moved directly to a balancing test to determine reasonableness . . .”).

<sup>53</sup> See *Chandler*, 117 S. Ct. at 1303.

<sup>54</sup> Dissenting in *O’Connor v. Ortega*, 480 U.S. 709 (1987), Justice Blackmun criticized the Court for making precisely this mistake: “Although the plurality mentions the ‘special need’ step, it turns immediately to a balancing test to formulate its standard of reasonableness. This error is significant because . . . no ‘special need’ exists here to justify dispensing with the warrant and probable-cause requirements.” *Id.* at 742 (Blackmun, J., dissenting) (citation omitted).

<sup>55</sup> *Chandler*, 117 S. Ct. at 1303.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* at 1303–04.

<sup>58</sup> Dissenting below, Judge Barkett warned against this mistaken mode of analysis:

The first question for the court is *not* whether the state’s interest is great enough and its chosen method effective enough to outweigh the privacy interests involved. Rather, it is whether, under *Von Raab*, the circumstances in this case give rise to a *special* governmental need beyond the ordinary needs of law enforcement in the first place.

*Chandler v. Miller*, 73 F.3d 1543, 1550 (11th Cir. 1996) (Barkett, J., dissenting).

The Chief Justice made a similar point when he chided the Court for failing to distinguish between the special need and the governmental interest, and asserted that the Court used the term “special need” in a “quite different sense” from its use in *Skinner* and *Von Raab*. *Chandler*, 117 S. Ct. at 1306 (Rehnquist, C.J., dissenting). In those cases, he maintained, “special need” referred to any “proper governmental purpose other than law enforcement,” *id.*, and did not require “especially great ‘important[ce],” *id.* (quoting *Chandler*, 117 S. Ct. at 1303).

<sup>59</sup> *Chandler*, 117 S. Ct. at 1305.



fail the balancing test anyway. However, by effectively passing over the threshold inquiry and moving directly to the balancing analysis, the *Chandler* Court left unclear the criteria that should be used to identify a special need in the first place. Admittedly, the Court decided *Chandler* against a backdrop of case law that provided few guiding principles to aid courts in the identification of a special need.<sup>60</sup> Although the precedents have stated consistently that a special need must be “beyond the normal need for law enforcement,”<sup>61</sup> they have provided little else in the way of an explicit definition.<sup>62</sup> Yet there must be more to a special need than just a purpose apart from law enforcement, for if “beyond the normal need for law enforcement” is interpreted as an exclusive definition — rather than a mere description — of a special need, then a special need can hardly be considered “exceptional.”<sup>63</sup> In the prior cases, the Court has emphasized the importance of other factors in determining the existence of a special need.<sup>64</sup> However, those factors have yet to be articulated clearly as elements of a special need, nor has the Court fully explained how courts should weigh those factors. Facing this doctrinal void, the *Chandler* Court had the opportunity to bring clarity and consistency to the principles

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<sup>60</sup> See, e.g., Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 98 (1992) (arguing that the special needs doctrine “[l]ack[s] an objective framework defining a special need”); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2498 (1996) (pointing out the “haziness of the concept of ‘special needs beyond the normal need for law enforcement’” and asking “[w]hat, after all, constitutes the ‘normal’ need for law enforcement?”).

<sup>61</sup> E.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *T.L.O.*, 489 U.S. at 351 (Blackmun, J., concurring))) (internal quotation marks omitted); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (quoting *Griffin*, 483 U.S. at 873 (quoting *T.L.O.*, 489 U.S. at 351 (Blackmun, J., concurring))) (internal quotation marks omitted). This phrase has come to mean any purpose other than criminal prosecution or crime detection. See *Chandler*, 117 S. Ct. at 1301; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989).

<sup>62</sup> See Michael S. Vaughn & Rolando V. del Carmen, “Special Needs” in *Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. CIV. RTS. L.J. 203, 216 (1993) (maintaining that the special needs exception is “a legal doctrine that is bereft of a definitional conceptual framework for lower courts to follow”); sources cited *supra* note 60.

<sup>63</sup> Cf. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (asserting that special needs justifying departure from the warrant and probable cause requirements arise only in “exceptional circumstances”). Indeed, a wide variety of imaginable government searches can be said to serve some need other than law enforcement, such as ensuring the safety or morals of the community. The Chief Justice, however, argued against a narrower understanding of special needs. See *Chandler*, 117 S. Ct. at 1306 (Rehnquist, C.J., dissenting).

<sup>64</sup> Focusing on the practicality of the warrant and probable cause requirements, the Court has historically stressed whether those requirements frustrated the government’s objective in conducting the search, see, e.g., *Skinner*, 489 U.S. at 623; *O’Connor v. Ortega*, 480 U.S. 709, 724 (1987); *T.L.O.*, 469 U.S. at 340, and whether the requirements were unsuited to the context in which the search took place, see, e.g., *Vernonia*, 115 S. Ct. at 2391 (public school system); *Griffin*, 483 U.S. at 873–74 (probation system); *T.L.O.*, 469 U.S. at 340 (public school system).

used by lower courts to identify special needs. Instead, the Court confused matters further by discussing a hodgepodge of factors that belonged in the balancing test.

Besides failing to articulate any guiding principles for the identification of special needs, the Court trivialized the first step of the special needs inquiry. By neglecting both to acknowledge and consciously to clear this threshold hurdle, the Court's opinion may serve to lower or even to eliminate that hurdle. To that extent, lower courts may feel encouraged to dispense more readily with the Fourth Amendment's traditional warrant and probable cause requirements in order to reach the balancing test.<sup>65</sup> Many commentators warn that this result is dangerous because the "free-wheeling"<sup>66</sup> balancing test is too pliable to preserve adequately the fundamental protections of the Fourth Amendment.<sup>67</sup> Lower courts have already used the special needs rationale to replace the Fourth Amendment's warrant and probable cause requirements with ad hoc balancing analyses in a variety of contexts.<sup>68</sup> Too lenient a threshold test may contribute to the uncontrolled expansion of the special needs exception, as courts continue to apply the balancing test to an ever-increasing number of circumstances.<sup>69</sup>

To eliminate the confusion in the special needs doctrine and to reverse the erosion of the threshold special needs inquiry, the Court must articulate specific and substantial criteria to determine whether a special need exists. Commentators have attempted to glean from the Court's opinions certain principles and factors that define a special need.<sup>70</sup> Previous cases, however, have found special needs in such a

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<sup>65</sup> This weakening of the threshold test may lead to liberal use of the special needs balancing analysis beyond the "exceptional circumstances" originally envisioned by the Court. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring); see also Buffaloe, *supra* note 52, at 564 n.\* (arguing that the *Chandler* Court, by using a balancing test without first identifying a special need, reinforced the concern that balancing tests are increasingly replacing the Fourth Amendment's traditional requirements of a warrant and probable cause).

<sup>66</sup> See Steiker, *supra* note 60, at 2498. In *T.L.O.*, Justice Brennan described the balancing test as "Rohrschach-like." See *T.L.O.*, 469 U.S. at 358 (Brennan, J., concurring in part and dissenting in part).

<sup>67</sup> See, e.g., Nuger, *supra* note 60, at 100; Vaughn & del Carmen, *supra* note 62, at 221; Buffaloe, *supra* note 52, at 551; see also *Skinner*, 489 U.S. at 640-41 (Marshall, J., dissenting) (bemoaning the Court's use of "a manipulable balancing inquiry under which, upon the mere assertion of a 'special need,' even the deepest dignitary and privacy interests become vulnerable to governmental incursion").

<sup>68</sup> See, e.g., *Romo v. Champion*, 46 F.3d 1013, 1016-20 (10th Cir. 1995) (searches of visitors to prisons); *Blustein v. Skinner*, 908 F.2d 451, 454-57 (9th Cir. 1990) (random drug testing of airline employees); see also Vaughn & del Carmen, *supra* note 62, at 223-24 (chronicling the lower courts' expansive application of the special needs exception); Buffaloe, *supra* note 52, at 541-42 (detailing the numerous new contexts in which courts have found special needs).

<sup>69</sup> Cf. Steiker, *supra* note 60, at 2498 ("The sheer number of circumstances in which the Court has found the existence of 'special needs' is in tension with the goal of the Warren Court that exceptions to the warrant requirement be 'few.'").

<sup>70</sup> See, e.g., *id.* at 2499 (suggesting that a possible "limiting principle" implicit in the Court's precedents is that special needs exist "when the government is acting to achieve some regulatory

variety of contexts that ascertaining general principles is a difficult task.<sup>71</sup> In addition to the principle that the need must be something other than the need to gather evidence to prosecute a crime,<sup>72</sup> an important characteristic common to the most applicable precedents is an element of exigency or difficulty in establishing individualized suspicion.<sup>73</sup> Only such cases involving the urgent press of time or the practical inability to obtain individualized suspicion give rise to a genuine need to dispense with the warrant and probable cause requirements.

If the Court were to require a special need to include exigency, or some practical difficulty in establishing individualized suspicion, it would help limit the special needs exception to circumstances that truly justify deviation from traditional Fourth Amendment analysis. Such deviation makes the most sense in circumstances in which stopping to procure a warrant, or waiting to obtain individual suspicion, would frustrate the objective of the government action.<sup>74</sup> In each of the three precedents involving suspicionless drug testing, the Court emphasized the existence of some such exigency.<sup>75</sup>

Although courts have recently included this exigency criterion implicitly in the special needs determination, the Court should explicitly incorporate it at the first opportunity. This requirement would render the initial special needs test substantial enough that only those cases that truly justify departure from the individualized suspicion require-

goal separate and distinct from its goal of enforcing the criminal laws and when it does so through governmental actors separate and distinct from criminal law enforcement personnel"); *Buffaloe*, *supra* note 52, at 544 (asserting that the Court has found special needs when some combination of these four qualities is present: the searchers are not police officers, requiring the searchers to learn the warrant and probable cause procedures would unduly disrupt the workplace, the search is not being conducted for the purpose of prosecution, and the government need is "more important" than the ordinary needs of law enforcement).

<sup>71</sup> The Court has found special governmental needs in contexts as diverse as maintaining discipline in the public schools, *see T.L.O.*, 469 U.S. at 352-53 (Blackmun, J., concurring), operating government agencies efficiently, *see O'Connor v. Ortega*, 480 U.S. 709, 722 (1987), preserving the deterrent effect of probation, *see Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987), and regulating railway safety, *see Skinner*, 489 U.S. at 620.

<sup>72</sup> *See* cases cited *supra* note 61.

<sup>73</sup> *See Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995) (noting the time-sensitive nature of informal disciplinary procedures); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989) (explaining the difficulty in detecting drug use in the customs officials' work environment); *Skinner*, 489 U.S. at 623 ("[T]he delay necessary to procure a warrant . . . may result in the destruction of valuable evidence.")

<sup>74</sup> *See T.L.O.*, 469 U.S. at 356 (Brennan, J., concurring in part and dissenting in part) ("For the most part, special governmental needs sufficient to override the warrant requirement flow from 'exigency' — that is, from the press of time that makes obtaining a warrant either impossible or hopelessly infeasible."); *see also Skinner*, 489 U.S. at 623 ("[T]he government's interest in dispensing with the warrant requirement is at its strongest when . . . 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'" (quoting *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967))); *Buffaloe*, *supra* note 52, at 563-64 (arguing that "it is absolutely necessary to limit the language of special needs to those contexts in which the warrant and probable cause requirements destroy the goal of the search").

<sup>75</sup> *See* cases cited *supra* note 73.

ment would advance to the balancing stage. Also, by clearly articulating the threshold test's requirements, the Court would help lower courts understand that the initial inquiry is a substantial hurdle meant to weed out the vast majority of cases.

Under the exigency criterion, the Court in *Chandler* was right to strike down Georgia's drug testing statute because the state demonstrated no urgency or other reason that the individualized suspicion requirement would frustrate its purpose.<sup>76</sup> In reaching its decision, however, the Court should have done more to clarify the special needs doctrine in order to help lower courts confine the special needs analysis to the most compelling of situations and to help ensure that the traditional protections of the Fourth Amendment remain intact.

2. *Traffic Stops*. — Twenty years ago, in *Pennsylvania v. Mimms*,<sup>1</sup> the Supreme Court held that a police officer may, as a matter of course, order the driver of a lawfully stopped car to exit the vehicle.<sup>2</sup> The Court reasoned that concern for the officer's safety outweighed the incremental imposition on the driver, who was already detained with probable cause.<sup>3</sup> Last Term, in *Maryland v. Wilson*,<sup>4</sup> the Court held that an officer's prerogative to order people out of vehicles during traffic stops extends to passengers as well as to drivers, without requiring either probable cause or reasonable suspicion with respect to the passenger.<sup>5</sup> By permitting seizure of a passenger absent either particularized suspicion or administrative guidelines to constrain police discretion, the Court has once more diminished the protection that the Fourth Amendment traditionally has afforded against arbitrary governmental interference.<sup>6</sup>

*Wilson* arose out of an ordinary traffic stop. On June 8, 1994, Maryland State Trooper David Hughes followed a car that was traveling at approximately sixty-four miles per hour in a fifty-five miles per hour zone.<sup>7</sup> Hughes activated his patrol car's lights and siren, but the car continued for another mile and a half, during which its two passengers repeatedly turned to look at Hughes and ducked below his sight level.<sup>8</sup> After the car pulled over, its driver appeared nervous as

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<sup>76</sup> See *Chandler*, 117 S. Ct. at 1304-05.

<sup>1</sup> 434 U.S. 106 (1977).

<sup>2</sup> See *id.* at 111.

<sup>3</sup> See *id.*

<sup>4</sup> 117 S. Ct. 882 (1997).

<sup>5</sup> See *id.* at 886.

<sup>6</sup> See *Brown v. Texas*, 443 U.S. 47, 51 (1979) (stating that "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit neutral limitations on the conduct of individual officers").

<sup>7</sup> See *State v. Wilson*, 664 A.2d 1, 2 (Md. Ct. Spec. App. 1995).

<sup>8</sup> See *Wilson*, 117 S. Ct. at 884.

he met Hughes between the two vehicles.<sup>9</sup> Upon Hughes's instruction, the driver returned to his car to retrieve his rental agreement.<sup>10</sup>

Hughes then decided to question the front-seat passenger, Jerry Lee Wilson, who also appeared nervous.<sup>11</sup> Hughes ordered Wilson out of the car; as Wilson exited, a bag containing crack cocaine fell to the ground in plain view.<sup>12</sup> Hughes arrested Wilson, who was subsequently charged with possession of cocaine with intent to distribute.<sup>13</sup>

In a pretrial motion to suppress the evidence, Wilson argued that Hughes's order to exit the car was an unreasonable seizure in violation of the Fourth Amendment.<sup>14</sup> The Circuit Court for Baltimore County ruled in Wilson's favor.<sup>15</sup> The Court of Special Appeals of Maryland affirmed, rejecting the State's contention that an officer's automatic right under *Mimms* to order a driver out of the car during a traffic stop extends to passengers as well.<sup>16</sup>

By a 7-2 vote, the Supreme Court reversed. In a brief opinion by Chief Justice Rehnquist,<sup>17</sup> the majority undertook a balancing test that, as in *Mimms*, purported to weigh the public interest in officer safety against the individual's interest in freedom from arbitrary police interference.<sup>18</sup> With regard to officer safety, the majority found the public interest to be the same whether the occupant is a driver or a passenger.<sup>19</sup> Although the majority had no empirical data concerning assaults by passengers during traffic stops, it reasoned that the presence of passengers increases the possible sources of harm to the officer.<sup>20</sup>

With regard to personal liberty, the majority conceded that a traffic violation does not provide probable cause to detain a passenger, as it does for a driver.<sup>21</sup> However, noting that the passenger is already

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<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* Trooper Hughes testified that his purpose was that he "wanted each one out at a time to speak to each individual." *Wilson*, 664 A.2d at 3.

<sup>12</sup> See *Wilson*, 117 S. Ct. at 884.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *Wilson*, 664 A.2d at 10. The Opinion for the Court of Special Appeals was written by Judge Charles Moylan, a distinguished jurist and Fourth Amendment scholar. See Brief for Respondent at 5 n.2, *Wilson* (No. 95-1268), available in 1996 WL 525546 (listing publications).

<sup>17</sup> Justices O'Connor, Scalia, Souter, Thomas, Ginsburg, and Breyer joined in the opinion.

<sup>18</sup> See *Wilson*, 117 S. Ct. at 885-86.

<sup>19</sup> See *id.* at 885.

<sup>20</sup> The majority relied on an FBI report that 5762 officers were assaulted and 11 were killed during traffic pursuits and stops in 1994. See *id.* No statistics were available to show how many of these attacks involved passengers. The majority characterized the sparsity of empirical data as "regrettable." See *id.* at 885 n.2.

<sup>21</sup> See *id.* at 886. The majority did not address the threshold question whether an order to exit a car constitutes a "seizure" under the Fourth Amendment. The question might turn on whether the purpose of the order is to secure access to the vehicle or to control the location of the passenger. For example, ordering occupants to vacate a vehicle in order to search or impound it would

stopped “as a practical matter,” the majority concluded that the additional intrusion from making the passenger wait outside the vehicle is minimal<sup>22</sup> and so held that “an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”<sup>23</sup>

In a dissenting opinion that echoed his dissent in *Mimms*, Justice Stevens criticized the majority’s reliance on undifferentiated safety statistics and argued that “the statistics are as consistent with the hypothesis that ordering passengers to get out of a vehicle increases the danger of assault as with the hypothesis that it reduces that risk.”<sup>24</sup> Justice Stevens also argued that any safety advantage would be limited to stops involving assaults by passengers and that in the “overwhelming majority” of those cases the officer would have grounds to suspect danger and could therefore issue an exit order without the majority’s per se rule.<sup>25</sup>

On the other side of the balance, Justice Stevens observed that arbitrary official commands may offend, embarrass, and provoke.<sup>26</sup> He concluded that, even though the burden of an exit order may be minimal in individual cases,<sup>27</sup> “the aggregation of thousands upon thousands of petty indignities has [a substantial] impact on freedom . . . which . . . clearly outweighs the evanescent safety concerns pressed by the majority.”<sup>28</sup> Finally, Justice Stevens expressed concern that the Court’s “unprecedented step of authorizing seizures [without] indi-

not amount to a seizure of the occupants. However, the issue was not contested in *Wilson*, because Maryland conceded that “[a] police officer’s command that a passenger alight from a vehicle, if complied with . . . , is a seizure under the Fourth Amendment.” Brief for Petitioner at 9 n.3, *Wilson* (No. 95-1268), available in 1996 WL 435917. The exit order may constitute a search as well when its purpose is to displace persons or effects in order to bring them into an officer’s view.

<sup>22</sup> *Wilson*, 117 S. Ct. at 886.

<sup>23</sup> *Id.* The Court declined to address whether an officer may forcibly detain a passenger for the duration of the stop. *See id.* at 886 n.3.

<sup>24</sup> *Id.* at 887 (Stevens, J., dissenting). Indeed, Maryland acknowledged at oral argument in *Wilson* that the usual practice to control the risk in traffic stops is to keep occupants in the car. *See* 60 Crim. L. Rep. (BNA) 3114 (Dec. 18, 1996).

<sup>25</sup> *Wilson*, 117 S. Ct. at 888 (Stevens, J., dissenting). Making conservative assumptions, Justice Stevens calculated that “only about one out of every twenty thousand traffic stops in which there is a passenger” involves an assault by the passenger. *Id.* Justice Stevens did not account for the possibility that some assaults were avoided by officers who, like Trooper Hughes, ordered passengers to exit before the Court authorized the practice.

<sup>26</sup> *See id.*

<sup>27</sup> As Justice Stevens noted, the burden may *not* be minimal in every individual case: a passenger could be “harm[ed] by exposure to inclement weather” or by improper enforcement of “an ill-advised command.” *Id.* at 888 n.6; *see also id.* at 890 (Kennedy, J., dissenting) (“When an officer commands passengers innocent of any violation to leave the vehicle and stand by the side of the road in full view of the public, the seizure is serious, not trivial.”).

<sup>28</sup> *Id.* at 888 (Stevens, J., dissenting).

visualized suspicion"<sup>29</sup> may portend a further erosion of constitutional protection of individual liberty.<sup>30</sup>

The *Wilson* Court's conclusion that a few cases of enhanced safety outweigh many instances of mere inconvenience is hard to fault on its own terms; however, the majority's comparison placed the wrong factors into the balance.<sup>31</sup> In order to reach a proper accommodation of the competing interests, the Court should have weighed the benefits to safety and the costs to liberty, attendant not on the exit order but on the Court's grant of potentially unbounded discretion, against the benefits and costs of alternatives limiting such discretion by requiring reasonable suspicion or compliance with objective standards.

The state's interest in enhanced safety does not extend to unnecessary or improper police encounters with citizens.<sup>32</sup> In most traffic stop cases, the legitimate governmental interest is limited to the safe completion of a citation.<sup>33</sup> Thus, the factor to weigh on the state's side is not the danger to the officer from a traffic stop, as the majority indicated, or even the additional risk to the officer from encountering passengers inside the car. The appropriate factor is the extent to which ordering a passenger out will facilitate safe completion of the stop.<sup>34</sup>

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<sup>29</sup> Justice Stevens traced the progressive relaxation of standards for searches, from a strict warrant requirement to probable cause, and then to reasonable suspicion based on specific and articulable facts. *See id.* at 889 & nn.10-11.

<sup>30</sup> *Id.* at 890. Justice Kennedy joined in Justice Stevens's opinion and also wrote separately to emphasize the importance of requiring a reasoned explanation for official intrusion. According to Justice Kennedy, the "insistence on principled, accountable decisionmaking in individual cases" that distinguishes our criminal justice system "can be accommodated even where officers must make immediate decisions to insure their own safety." *Id.* (Kennedy, J., dissenting).

<sup>31</sup> *See* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1194-1207 (1988). Professor Strossen argues that the Court's search and seizure balancing consistently understates costs by neglecting collective intrusion and the social interests protected by the Fourth Amendment, *see id.* at 1195-96, and overstates benefits by viewing the state's interest at a higher level of abstraction and assuming that the state's action will be uniquely effective in promoting that interest, *see id.* at 1200-02; *see also, e.g.,* *United States v. Sharpe*, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting) (stating that the Court conducts Fourth Amendment balancing with "the judicial thumb . . . planted firmly on the law enforcement side of the scales").

<sup>32</sup> *See Terry v. Ohio*, 392 U.S. 1, 32 (1968) (Harlan, J., concurring) ("[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter . . .").

<sup>33</sup> Maryland conceded that "the sole justification for the [exit] order is tied to . . . the safe completion of a lawful traffic stop." Brief for Petitioner at 16, *Wilson* (No. 95-1268), available in 1996 WL 435917. Nevertheless, traffic stops have increasingly come to be used as a tool for enforcing non-traffic laws, especially laws proscribing possession of drugs and firearms. *See, e.g., Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996) (Ginsburg, J., concurring). The Court has held that the presence of such an ulterior motive does not render an otherwise valid traffic stop unreasonable under the Fourth Amendment. *See Whren v. United States*, 116 S. Ct. 1769, 1774 (1996). However, although an investigative purpose does not invalidate the stop, the quest for evidence without ground for suspicion is not itself a proper governmental end.

<sup>34</sup> *See Strossen, supra* note 31, at 1205-06 (arguing that an accurate balancing test must assess marginal, rather than total, costs and benefits of investigative measures); *cf. Note, Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 467 (1969) ("A scale which puts in one pan

Completion of a traffic citation necessarily involves an encounter between the officer and the driver, but it does not generally require any interaction with passengers.<sup>35</sup> The facts in *Wilson* illustrate the point: Hughes safely encountered the driver outside the car and had no need to approach the car or speak with the passengers.<sup>36</sup> His desire to question them was, at best, purely collateral to his proper objective.<sup>37</sup>

The nonessential nature of an officer's encounter with a passenger is significant, as it is that encounter, and not the passenger's mere presence, that is the source of danger to the officer under the reasoning of both *Mimms* and *Wilson*.<sup>38</sup> Thus, by questioning or confronting passengers in the hope of uncovering evidence, an officer may well be amplifying the danger attendant on the stop.<sup>39</sup> A proper Fourth Amendment balancing would discount any such additional risk attributable to an officer's gratuitous encounter with a passenger.

On the individual liberty side of the balance, the passenger's interest is not only avoidance of mere inconvenience, but also freedom from the arbitrary exercise of governmental power. Neither the necessity of waiting for the officer to finish with the driver nor the assertedly minimal nature of the added intrusion occasioned by the exit order diminishes this latter interest.<sup>40</sup> Even when the inconvenience is

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the public interest in some legitimate end of government . . . rather than the interest in a particular means to that end will rarely tip in favor of competing values.”)

<sup>35</sup> See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5 (3d ed. Supp. forthcoming 1997) (observing that “[i]n most instances, the officer's legitimate business is only with the driver of the stopped vehicle”).

<sup>36</sup> Cf. *State v. Wilson*, 664 A.2d 1, 11 (Md. Ct. Spec. App. 1995) (“[T]he potential danger to police engaged in traffic enforcement could be adequately met if the police allowed passengers to remain in the stopped vehicle and instead had the driver accompany them to the police vehicle while the citation is prepared.” (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4(a) (2d ed. 1987))).

<sup>37</sup> Maryland asserted that the exit order had no investigative purpose, but it offered no explanation of how questioning a passenger would either enhance the officer's safety or further the completion of a speeding citation. See Brief for Petitioner at 16, *Wilson* (No. 95-1268), available in 1996 WL 435917.

<sup>38</sup> See *Wilson*, 117 S. Ct. at 886 (observing that “the possibility of a violent encounter stems . . . from the fact that evidence of a more serious crime might be uncovered”); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (premising its rule on “the inordinate risk confronting an officer as he approaches a person seated in an automobile” (emphasis added)).

<sup>39</sup> See LAFAVE, *supra* note 35 (arguing that keeping passengers in the vehicle “reduces the likelihood that a passenger involved in some greater criminality will conclude he must mount an attack before that fact is discovered by the officer”).

<sup>40</sup> See *Chimel v. California*, 395 U.S. 752, 767 n.12 (1969) (rejecting the notion that, “simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed”); *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (stating that permissible intrusion on a citizen's liberty is “strictly circumscribed by the exigencies which justify its initiation”). Indeed, Maryland conceded that “[e]ven a minimally intrusive seizure would be unreasonable if not done to further an important governmental interest.” Brief for Petitioner at 16, *Wilson* (No. 95-1268), available in 1996 WL 435917.



slight, a passenger has a strong liberty interest in it not being arbitrarily or discriminatorily imposed.<sup>41</sup>

Both sides of the correct balancing test — the expected contribution of an exit order toward the safe completion of a traffic stop and the consequent nonarbitrariness of the order — depend on the reasons for encountering the passenger in each particular case. The Court's substitution of the generic factors of safety and convenience is part and parcel of its adoption of a categorical bright-line test that forecloses a case-by-case assessment of reasonableness. It is the Court's eagerness<sup>42</sup> to embrace a permissive categorical test,<sup>43</sup> rather than its faulty performance of the balancing, that constitutes the most serious shortcoming of the *Wilson* decision.

In *Ohio v. Robinette*,<sup>44</sup> decided during the same Term as *Wilson*, the Court emphasized the disfavored status of categorical rules in the Fourth Amendment context: "Reasonableness . . . [under the Fourth Amendment] is measured in objective terms by examining the totality of the circumstances. In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."<sup>45</sup> The *Wilson* majority acknowledged this principle but said that the Court had not always avoided bright-line rules, and tendered *Mimms* as an example.<sup>46</sup> It offered no explanation of what considerations govern its selection of a contextual or

<sup>41</sup> The Court has repeatedly held that protection against arbitrary government action is the central purpose of the Fourth Amendment. See 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.4 (3d ed. Supp. forthcoming 1997); cf. *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (noting that motorists may find searches "especially offensive" when they are "singled out" and most others are not searched). But see *Nadine Strossen, Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 289-90 (1991) (criticizing the overemphasis on formal equality at the expense of substantive freedom).

<sup>42</sup> The Court permitted Maryland to frame the issue so as to preclude a narrower decision based on particular circumstances that may have justified the exit order. But cf. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (stating that the Court would not formulate a rule of constitutional law broader than the precise facts required).

<sup>43</sup> Cf. Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 242 (1984) (distinguishing between bright-line rules that restrict police authority and those that expand police authority).

<sup>44</sup> 117 S. Ct. 417 (1996).

<sup>45</sup> *Id.* at 421. The Court's traditional unwillingness to impose per se rules in Fourth Amendment cases essentially comprised the entire stated justification for the *Robinette* decision. See *id.*

<sup>46</sup> See *Wilson*, 117 S. Ct. at 884-85.

categorical rule in general,<sup>47</sup> or of why a per se rule is appropriate for exit orders in particular.<sup>48</sup>

Commentators have disagreed about the relative merits of bright-line categorical rules vis-à-vis ad hoc balancing tests.<sup>49</sup> Rules are thought to provide guidance to the police at the expense of precise conformity to the underlying rationales, and a reasonableness test is thought to assure full consideration of the varying circumstances at the expense of predictability. By combining the approaches to create a permissive categorical rule through a generalized reasonableness balancing test, the *Wilson* Court managed to retain only the worst features of both alternatives: its rule not only fails to take account of differing circumstances, but also fails to guide the police.<sup>50</sup>

More importantly, the adoption of a permissive categorical rule based on generalized (or idealized) circumstances invites problems associated with the grant of unreviewable discretion. Because the police will conform their conduct to the per se rule, rather than to its rationale, the unfettered discretion afforded by a permissive bright-line rule will sometimes be abused.<sup>51</sup> Hence, the *Wilson* rule will allow searches or seizures that, on their separate merits, would be deemed unreasonable and thus unconstitutional.<sup>52</sup> Few would consider it rea-

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<sup>47</sup> See generally Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. PITT. L. REV. 307, 325-26 (1982) (explaining that the appropriateness of a bright-line rule depends on whether it has clear boundaries, its results approximate application of the underlying principle, case-by-case determination has proved unworkable, and the rule is not subject to manipulation and abuse).

<sup>48</sup> One very plausible explanation for the Court's rejection of a per se rule restricting the police in *Robinette* and its acceptance of a rule that expands police discretion in *Wilson* is the Court's "preference for law enforcement over individual privacy interests." Bruce A. Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term, 70 N.C. L. REV. 373, 395 (1992); see also Alschuler, *supra* note 43, at 242 ("It may not be entirely coincidental that most of the Supreme Court's current bright line rules tell police officers, 'Yes, you may search,' rather than, 'No, you may not.'").

<sup>49</sup> Compare, e.g., Strossen, *supra* note 31, at 1184-94 (favoring the certainty afforded by categorical rules over manipulable ad hoc balancing), with, e.g., Alschuler, *supra* note 43, at 242 (arguing that categorical rules create injustice in individual cases without providing certainty in application).

<sup>50</sup> Rather than prescribing appropriate conduct, the rule merely insulates a category of police decisions from review. Telling the police that they may do as they please does not provide them with guidance.

<sup>51</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976); *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (cautioning that police "will push to the limit" of any Fourth Amendment line drawn).

<sup>52</sup> With respect to other permissive bright-line Fourth Amendment rules, one commentator has observed that the Court has "recognized" that such "prophylactic" rules "are likely to yield injustice in particular situations." Alschuler, *supra* note 43, at 229; see also, e.g., *New York v. Belton*, 453 U.S. 454, 460 (1981) (predicating a blanket rule on a "generalization" that the Court acknowledged was "not inevitably" true).

sonable for an officer, in the absence of any realistic threat, to order a mother and her baby out of a car into driving rain or snow.<sup>53</sup>

The potential for unreasonable seizures is exacerbated by the Court's recent holding in *Whren v. United States*<sup>54</sup> that an officer's subjective intent cannot invalidate an objectively permissible stop.<sup>55</sup> Combining *Wilson* with *Whren* leads to the disquieting prospect that exit orders may be upheld even though they are issued for an improper purpose, such as to harass a passenger because of her race or to coerce a driver or passenger into consenting to a search.<sup>56</sup>

The concern about police abuse of discretionary authority is, unfortunately, not merely theoretical. A growing body of empirical data suggests that race is frequently the determining factor in police decisions to make traffic stops and exit orders and to question vehicle occupants.<sup>57</sup> The *Wilson* rule validates such abuse and perpetuates it by

<sup>53</sup> Justice O'Connor posed this example during oral argument in *Wilson*, observing that the automatic right to order passengers out of cars "can be carried to extremes." Steve Lash, *Control, Safety Require That Police Be Able to Order Passengers from Vehicles During Traffic Stops, Reno Tells Court*, WEST'S LEGAL NEWS, Dec. 12, 1996, available in 1996 WL 710208.

<sup>54</sup> 116 S. Ct. 1769 (1996).

<sup>55</sup> See *id.* at 1774.

<sup>56</sup> As one commentator explained, when combined with *Whren*'s rejection of a pretextual traffic stop defense, *Wilson* "creates a powerful tool for an officer intent on abusing his or her authority," because it allows an officer to "watch for a minor traffic violation, pull a vehicle over and order all occupants out of the car to 'expand' his or her plain view in hopes of discovering contraband or of developing an increased level of suspicion to justify a further intrusion." Edwin J. Butterfoss, *In the U.S. Supreme Court: Do Police Have Automatic Right to Order Passengers from Vehicles Stopped for Routine Traffic Violations?*, WEST'S LEGAL NEWS, Dec. 11, 1996, available in 1996 WL 707978; see also, e.g., *Wilson*, 117 S. Ct. at 890 (Kennedy, J., dissenting) ("When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police.").

*Whren*'s rationale does not appear to preclude a "pretextual exit order" defense, because unlike an initial stop, an exit order lacks the probable cause that the *Whren* Court relied upon "to ensure that police discretion is sufficiently constrained." *Whren*, 116 S. Ct. at 1776; see also LAFAYE, *supra* note 43, § 1.4 ("[I]t would seem that certain pretext-type claims are still viable when . . . the case 'involves police intrusion without the probable cause that is its traditional justification.'" (quoting *Whren*, 116 S. Ct. at 1776)). However, in *Robinette*, the Court applied *Whren* to an exit order under *Mimms*, reasoning that "in light of the admitted probable cause to stop [the driver] for speeding, [the officer] was objectively justified in asking [the driver] to get out of the car, subjective thoughts notwithstanding." *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996). It offered no explanation as to why probable cause for the antecedent stop provides "objective justification" that constrains a subsequent discretionary decision to order the driver from the car. In view of the present Court's apparent antipathy toward Fourth Amendment privacy interests, it may yet conjoin the facile analyses of *Robinette* and *Wilson* to conclude that probable cause to stop a driver provides objective justification for a separate decision to make the passenger leave the car.

<sup>57</sup> See, e.g., *Florida v. Bostick*, 501 U.S. 429, 442 n.1 (1991) (Marshall, J., dissenting) (describing race-based selection of passengers for questioning in bus sweeps and noting that "the basis of the decision to single out particular passengers . . . is less likely to be inarticulable than *unspeakable*"); David A. Harris, *Whren v. United States: "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. 544, 560-69 (1997) (citing and discussing studies and examples). The *Wilson* Court failed to consider these data even as it relied uncritically upon "sparse" (and largely inapposite) safety data. See *Wilson*, 117 S. Ct. at 885 n.2.

creating another area in which police decisions are shielded from review.<sup>58</sup>

In view of the potential for the *Wilson* rule to allow unreasonable searches and seizures, and thus to burden constitutionally protected liberty interests, adherence to constitutional principles requires that its adoption be justified by some important reason. The Court's fashioning of a categorical rule that will govern police conduct and citizen rights in millions of traffic stops amounts to lawmaking. Accordingly, this rule should be held to the same standard as any other law that intrudes on fundamental rights: it should be narrowly tailored to serve a compelling governmental interest.<sup>59</sup>

The *Wilson* rule's compliance with this criterion may be measured by comparing the costs and benefits of unfettered police discretion with two alternatives that each impose a lesser burden on the right to be free from arbitrary police action: the Maryland Court of Special Appeals' rule requiring reasonable, particularized suspicion as a prerequisite to an exit order,<sup>60</sup> and a rule requiring compliance with a predetermined administrative policy prescribing circumstances under which exit orders will be issued.<sup>61</sup> The more intrusive *Wilson* rule is

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<sup>58</sup> Cf. *Bostick*, 501 U.S. at 450 n.4 (Marshall, J., dissenting) ("Insisting that police officers explain their decision to single out a particular passenger for questioning would help prevent their reliance on impermissible criteria such as race.")

<sup>59</sup> Cf. Strossen, *supra* note 31, at 1208-53 (arguing that Fourth Amendment privacy interests are entitled to the same strict scrutiny that protects other fundamental constitutional rights). *But cf.* Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (holding that generally applicable laws that incidentally burden religion need not be narrowly tailored to serve a compelling governmental interest). Unlike the criminal statute at issue in *Smith*, the *Wilson* rule is decidedly not generally applicable, and the burden on individual rights is not incidental. On the contrary, the burden results directly from the discretion that is the rule's central feature.

Professor Strossen calls for incorporation of a least intrusive alternative requirement into Fourth Amendment balancing to determine the reasonableness of searches and seizures. *See* Strossen, *supra* note 31, at 1208-53. The suggestion here is somewhat different, however. Whether or not the availability of a less intrusive alternative renders a particular search unreasonable, the Court, in selecting a categorical approach that trades off fundamental rights against other interests, should hold itself to the standard of a reasonable decisionmaker by considering alternatives that may secure desired benefits while avoiding or minimizing costs.

<sup>60</sup> Judge Moylan emphasized that the suspicion required for an exit order need only rise to the "relatively low threshold" supporting "heightened caution." *State v. Wilson*, 664 A.2d 1, 13 (Md. Ct. Spec. App. 1995).

<sup>61</sup> At oral argument, *Wilson*'s counsel proposed an administrative guideline requirement similar to that imposed on vehicle inventory searches in *Florida v. Wells*, 495 U.S. 1 (1990). *See* 60 Crim. L. Rep. (BNA) 3116 (Dec. 18, 1996). A simple guideline could take the form of a uniform practice, such as that followed by the police officer in *Mimms*. *See* *Pennsylvania v. Mimms*, 434 U.S. at 106, 109-10 (1977). Although this might increase the aggregate inconvenience, it would eliminate the problem of arbitrary, selective exit orders. Cf. Wayne R. LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases,"* 85 MICH. L. REV. 427, 453 (1986) (arguing that imposing a "standardized procedures" requirement for incidental searches and seizures would result in "a more meaningful accommodation of law enforcement and privacy interests").

justified only if the alternatives are substantially less effective in promoting the governmental interest at stake.

The *Wilson* majority's scant discussion gave no indication of what governmental interest a bright-line rule might serve. One possible justification for such a rule is its ease of application in the field.<sup>62</sup> Indeed, Maryland advanced this reason in arguing that "officers confronting the inherent dangers of traffic stops should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis."<sup>63</sup> However, the Court had already rejected the very same argument by the same party in *Maryland v. Buie*,<sup>64</sup> wherein it explained that the "reasonable suspicion" standard is "one of the relatively simple concepts embodied in the Fourth Amendment."<sup>65</sup>

It is difficult to reconcile *Wilson* with *Buie*. In *Buie*, the Court declined Maryland's request for a per se rule permitting police to "conduct a protective sweep whenever they make an in-home arrest for a violent crime,"<sup>66</sup> and held instead that such authority "is decidedly not 'automatic,' but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene."<sup>67</sup> The Court recognized the dangerous nature of a felony arrest but observed that, "despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry v. Ohio*<sup>68</sup> did not adopt a brightline rule authorizing frisks for weapons in all confrontational encounters."<sup>69</sup> The *Buie* Court concluded that, whether on the street or in a house, "the reasonable suspicion standard . . . strikes the proper balance between officer safety and citizen privacy."<sup>70</sup>

<sup>62</sup> A per se rule is also easier to apply in the courtroom and might eliminate some evidentiary challenges, but the economy afforded by eliminating judicial oversight of constitutional issues can hardly be said to justify the loss of liberty entailed thereby. Moreover, it is not clear that the *Wilson* rule will forestall court challenges so long as the viability of a pretextual exit order defense remains unresolved. See *supra* note 56.

<sup>63</sup> Brief for Petitioner at 21, *Wilson* (No. 95-1268), available in 1996 WL 435917. This argument echoes the Court's concerns in cases emphasizing the need for rules to guide police. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (finding rules "essential to guide police officers, who have only limited time and expertise" to balance state and individual interests); *id.* at 219-20 (White, J., concurring) (stating that balancing "must in large part be done on a categorical basis — not in an ad hoc, case-by-case fashion by individual police officers").

<sup>64</sup> 494 U.S. 325 (1990).

<sup>65</sup> *Id.* at 334 n.2 (quoting *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989)).

<sup>66</sup> *Id.* at 330.

<sup>67</sup> *Id.* at 336.

<sup>68</sup> 392 U.S. 1 (1968).

<sup>69</sup> *Buie*, 494 U.S. at 334 n.2.

<sup>70</sup> *Id.* at 335 n.2. It is possible to distinguish *Terry* and *Buie* based on the "special latitude [that] is given to the police in effecting searches and seizures involving vehicles and their occupants." *Wilson*, 117 S. Ct. at 890 (Kennedy, J., dissenting). *But cf.* *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("The Fourth and Fourteenth Amendments protect the 'legitimate expectations of privacy' of persons, not places."); *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979) ("Were the indi-

A second, somewhat related, possible justification for a permissive bright-line rule is the belief that an officer can more reliably protect his own safety by determining whether to order passengers out of cars based on subtle, inarticulable factors than by following a predetermined policy. However, the *Wilson* Court did not express such a belief, and it is far from obvious that all officers can better determine how to protect themselves by relying on instinct<sup>71</sup> rather than on objective circumstances and established practices.<sup>72</sup> Moreover, even if all officers had expertise in assessing the safest location for passengers, it cannot be presumed that they will always make their decision based on safety. A zealous officer vested with unfettered discretion might choose to encounter greater danger by ordering a passenger from a car when it would be more prudent to have him remain inside. Thus, the Court had no reason to expect that the *Wilson* rule will maximize police safety.

Nevertheless, the Court reached its result in *Wilson* by employing a balancing test that presumed the superior efficacy of discretionary control over less intrusive alternatives and that disregarded the costs to liberty from the inevitable abuse of the unreviewable discretion granted to police. This flawed balancing was a byproduct of the Court's adoption of a permissive categorical rule that neither protects citizens nor guides police. Absent a clear showing that unbounded discretion is more conducive to police safety in all cases, the Court should have retained the traditional safeguard of conditioning the right to undertake a seizure on particularized suspicion or compliance with a predetermined policy.

#### H. Freedom of Speech and Association Clauses

1. *Associational Rights of Political Parties.* — The American electoral system presents many barriers to effective third-party participation.<sup>1</sup> Although not precluding the rise of a viable third party,<sup>2</sup> such

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vidual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.”)

<sup>71</sup> Cf. *Terry*, 392 U.S. at 22 (cautioning that failure to require particularized suspicion or objective standards “would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches”), quoted in *Prouse*, 440 U.S. at 661.

<sup>72</sup> Cf. Strossen, *supra* note 31, at 1201–02 (criticizing the Court's tendency to assume that the challenged search or seizure will “effectively promote the law enforcement goal at issue” and “will do so to a substantially greater degree than alternative law enforcement methods” rather than to “insist[] on evidence of the comparative effectiveness”).

<sup>1</sup> See John B. Anderson & Jeffrey L. Freeman, *Taking the First Steps Towards a Multiparty System in the United States*, 21 FLETCHER F. WORLD AFF. 73, 78–81 (1997).

<sup>2</sup> Despite the existence of first-past-the-post voting and single-member districts, Britain's third party, the Liberal Democrats, received 17.2% of the vote in the 1997 elections. See Philip Webster, *It's Time for Action, Says Blair*, TIMES (London), May 3, 1997, at 1. However, the Liberal Democrats won only 46 seats (7%). See *id.* “The ‘first-past-the-post’ electoral system can

structural features as first-past-the-post voting<sup>3</sup> and single-member districts<sup>4</sup> effectively reinforce the two-party system.<sup>5</sup> One tool that third parties can use to overcome these impediments is the so-called "fusion" candidacy, in which the same candidate appears on the ballot as a nominee of more than one party.<sup>6</sup> Although fusion can increase the political strength of smaller parties,<sup>7</sup> the vast majority of states have banned it.<sup>8</sup> Last Term, in *Timmons v. Twin Cities Area New Party*,<sup>9</sup> the Supreme Court upheld the constitutionality of fusion bans against a First Amendment challenge. Although it reached the correct result, the Court, in applying its previously developed analysis regarding the associational rights of political parties, exposed the inability of that analysis to explain persuasively the constitutionality of laws structuring the electoral system, such as first-past-the-post voting and single-member districts.

In April 1994, the Twin Cities Area New Party, classified as a minor political party under Minnesota law, chose incumbent state representative Andy Dawkins as its candidate for the November 1994 election.<sup>10</sup> Although Dawkins was already the nominee of the Democratic-Farmer-Labor Party (DFL),<sup>11</sup> neither Dawkins nor the DFL objected

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produce bizarre results when more than two parties get significant shares of the vote, especially if some of them have supporters scattered throughout the country while others have solid regional strongholds." *Canada's Election Landslide*, FIN. TIMES, Oct. 27, 1993, at 17. For example, in the 1993 Canadian elections, the Progressive Conservative Party received roughly the same proportion of the vote (16%) as the regionally concentrated Reform Party (19%) and Bloc Québécois (14%), but the latter two parties took 52 and 54 seats, respectively, while the Conservatives took only two. See *The New Face of Canada*, TORONTO STAR, Oct. 27, 1993, at A3.

<sup>3</sup> In a first-past-the-post, or plurality, voting system, the candidate who receives the most votes wins the election, regardless whether that candidate receives a majority of the votes. See DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 25-28 (rev. ed. 1971).

<sup>4</sup> In single-member districts, voters elect one person from the field of candidates. In multimember districts, candidates run for two or more open slots. See *id.* at 19.

<sup>5</sup> See *id.* at 93-96.

<sup>6</sup> See Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 HARV. L. REV. 1302, 1303 (1996). A multiple nomination can be indicated in two ways: either a candidate can have multiple party designations after his name, or his name can appear on separate ballot lines, one for each party. See *id.* at 1305 & nn.17-18, 1333-34. The latter method allows for "fusion with disaggregation," through which voters can register support both for the candidate and for one of the parties represented. For simplicity, this Comment uses a dual nomination by a major and a minor party as the paradigmatic example of fusion.

<sup>7</sup> See William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 683-85 (1995).

<sup>8</sup> See Note, *supra* note 6, at 1303. Forty-three states ban fusion, whether directly, indirectly, or through laws "that could be reasonably construed as a ban." *Id.* at 1303 n.14. Of the seven other states, fusion candidacies play a significant role only in New York. See Edward Felsenthal, *Supreme Court Upholds Limits on Minor Parties' Bids for Ballot*, WALL ST. J., Apr. 29, 1997, at B6.

<sup>9</sup> 117 S. Ct. 1364 (1997).

<sup>10</sup> See *id.* at 1367-68 & n.4.

<sup>11</sup> See *id.* at 1367. The DFL, the product of a 1944 merger between Minnesota's Democratic and Farmer-Labor parties, is classed as a major political party under Minnesota law. See *id.* at 1367 n.2.

to the New Party's nomination. However, because Minnesota law prohibited fusion candidacies,<sup>12</sup> local election officials refused to accept the New Party's nominating petition.<sup>13</sup> The New Party filed suit in Minnesota federal court and claimed that the fusion ban infringed its associational rights under the First and Fourteenth Amendments.<sup>14</sup>

Applying the associational-rights test from *Anderson v. Celebrezze*,<sup>15</sup> the district court rejected the New Party's claim.<sup>16</sup> The *Anderson* test balances the "character and magnitude" of an election law's burden on First and Fourteenth Amendment rights against the state's "precise interests" justifying that burden.<sup>17</sup> Only when the burden imposed is severe must the restriction be "narrowly drawn to advance a state interest of compelling importance."<sup>18</sup> The district court found the burden on political association to be minor and the state interests to be compelling.<sup>19</sup> The Eighth Circuit reversed, holding that the burden on the New Party was severe and that the law was not narrowly tailored, regardless of the importance of the state interests.<sup>20</sup> This holding conflicted with an earlier Seventh Circuit decision upholding Wisconsin's "similar" fusion ban.<sup>21</sup>

The Supreme Court reversed. Writing for the Court,<sup>22</sup> Chief Justice Rehnquist began by recognizing the conflict between the right of parties to associate for political purposes and the interest of the state in maintaining "fair and honest and . . . order[ly]" elections.<sup>23</sup> Next, applying the *Anderson* analysis, the Chief Justice noted that "[l]esser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."<sup>24</sup> Under the burden prong of the *Anderson*

<sup>12</sup> See MINN. STAT. § 204B.04(1) (1994) (prohibiting major-party/major-party fusion); *id.* § 204B.04(2) (prohibiting major-party/minor-party fusion); *id.* § 204B.06(1)(b) (requiring candidates to affirm that they have filed no other affidavit of candidacy in the same primary or ensuing general election).

<sup>13</sup> See *Timmons*, 117 S. Ct. at 1368.

<sup>14</sup> See *id.*

<sup>15</sup> 460 U.S. 780 (1983).

<sup>16</sup> See *Twin Cities Area New Party v. McKenna*, 863 F. Supp. 988, 990-91 (D. Minn. 1994).

<sup>17</sup> *Anderson*, 460 U.S. at 789.

<sup>18</sup> *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

<sup>19</sup> See *Twin Cities*, 863 F. Supp. at 992-93.

<sup>20</sup> See *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 198-99 (8th Cir. 1996).

<sup>21</sup> See *Timmons*, 117 S. Ct. at 1368 (citing *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991)). The Seventh Circuit revisited *Swamp* in *Stewart v. Taylor*, 104 F.3d 965 (7th Cir. 1997), upholding Indiana's fusion ban. The court described *Swamp* as "the law in this circuit on involuntary fusion" and distinguished it from *McKenna* and the Third Circuit's decision in *Patriot Party v. Allegheny County Department of Elections*, 95 F.3d 253 (3d Cir. 1996), both of which "concerned voluntary, not involuntary, fusion." *Stewart*, 104 F.3d at 971-72.

<sup>22</sup> Justices O'Connor, Scalia, Kennedy, Thomas, and Breyer joined the Chief Justice's opinion.

<sup>23</sup> *Timmons*, 117 S. Ct. at 1369 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974))) (internal quotation marks omitted).

<sup>24</sup> *Id.* at 1370 (quoting *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983))) (internal quotation marks omitted).



analysis, the Court reasoned that a fusion ban, like eligibility requirements and simple individual unwillingness, might lead to "a particular individual . . . not appear[ing] on the ballot as a particular party's candidate," but maintained that such a failure to appear would not "severely burden that party's association rights."<sup>25</sup> The New Party, the Chief Justice noted, was still free to convince Dawkins to be its candidate, or to support Dawkins even though he would appear on the ballot only as the DFL candidate.<sup>26</sup> Moreover, Minnesota's ballot access laws did not "directly preclude[] minor political parties from developing and organizing" or exclude certain political parties from participating in elections.<sup>27</sup>

The Court found that fusion bans may impose two burdens on candidates, but ruled that each was insufficiently burdensome to invalidate fusion bans. First, even if fusion were essential to the creation of thriving third parties,<sup>28</sup> "the Constitution does not require States to permit fusion any more than it requires them to move to proportional-representation elections or public financing of campaigns."<sup>29</sup> Second, because ballots "serve primarily to elect candidates, not as fora for political expression," the Court rejected the New Party's assertion that it had a right to use the ballot in order to send a message both to its candidate and to the voters.<sup>30</sup> Consequently, the Court held that the burdens imposed on the New Party were not severe and that Minnesota therefore did not need either to tailor its fusion ban law narrowly or to justify it with a compelling state interest.<sup>31</sup>

Turning to the state-interest prong of the *Anderson* analysis, the Court found three state interests that justified the minimal burdens imposed on the New Party. First, the Court concluded that Minnesota legitimately could fear a proliferation of single issue parties, such as the "No New Taxes" or the "Healthy Planet" parties, that would transform the ballot "from a means of choosing candidates to a billboard for political advertising."<sup>32</sup> Second, the Court accepted Minnesota's asserted interest in ensuring that minor parties do not "bootstrap their way to major-party status" by attaching their labels to popular major-party candidates.<sup>33</sup> Finally, the Court noted that Minnesota had a valid interest in the stability of its political system that warranted en-

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<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 1370-71.

<sup>27</sup> *Id.* at 1371.

<sup>28</sup> "This is a predictive judgment which is by no means self-evident." *Id.* The Chief Justice pointed to Minnesota's Farmer-Labor Party, which prospered during the 1930s despite the existence of a fusion ban. *See id.* at 1369 & n.5, 1371 n.9.

<sup>29</sup> *Id.* at 1371.

<sup>30</sup> *Id.* at 1372 (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992), and *id.* at 445 (Kennedy, J., dissenting)).

<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at 1373.

<sup>33</sup> *Id.*

acting “reasonable election regulations that may, in practice, favor the traditional two-party system.”<sup>34</sup>

Justice Stevens dissented.<sup>35</sup> First, Justice Stevens argued that the fusion ban severely burdened the New Party’s associational rights because “the right to be on the election ballot is precisely what separates a political party from any other interest group.”<sup>36</sup> Second, Justice Stevens contended that, even if the burden were minor, Minnesota had “failed to explain how the ban actually serves [its] asserted interests.”<sup>37</sup> Justice Stevens described the possibility of single-issue parties turning the ballot into a billboard as “fantastical,”<sup>38</sup> and concluded that, “once the State has established a standard for achieving party status, forbidding an acknowledged party from putting on the ballot its chosen candidate clearly frustrates core associational rights.”<sup>39</sup> Finally, Justice Stevens rejected the comparison of fusion bans to first-past-the-post voting and single-member districts. Justice Stevens contended that the latter two do not impinge directly on associational rights and are more closely related to the acceptable goal of political stability.<sup>40</sup>

All election regulations inhibit the association of political parties to some extent,<sup>41</sup> either by prohibiting certain modes of association or by structuring the electoral system in a manner that makes some modes of association less likely to be successful. However, all elections require rules.<sup>42</sup> The Court has attempted to discern which of these rules “impose constitutionally suspect burdens on voters’ rights to associate or to choose among candidates.”<sup>43</sup> In *Anderson*, the Court recognized

<sup>34</sup> *Id.* at 1374. In separate dissents, Justices Stevens and Souter argued that the Court could not consider this rationale because Minnesota did not present this argument in its briefs and expressly rejected it at oral argument. *See id.* at 1379 (Stevens, J., dissenting); *id.* at 1381–82 (Souter, J., dissenting). *But see Timmons*, 117 S. Ct. at 1374 n.10 (disagreeing with Justices Stevens and Souter). When asked whether he was arguing that states have an interest in preserving the two-party system, petitioner’s counsel said, “I didn’t make that point, and in honesty I don’t make that point strongly.” Transcript of Oral Argument, *Timmons* (No. 95-1608), available in 1996 WL 709359, at \*26 (Dec. 4, 1996).

<sup>35</sup> Justice Ginsburg joined Justice Stevens’s dissent in full. Justice Souter joined Justice Stevens’s dissent in part, but wrote separately to state his unwillingness to follow Justice Stevens in rejecting “the majority’s ‘preservation of the two-party system’ rationale.” *Timmons*, 117 S. Ct. at 1382 (Souter, J., dissenting).

<sup>36</sup> *Id.* at 1377 (Stevens, J., dissenting).

<sup>37</sup> *Id.* at 1377–78.

<sup>38</sup> *See id.* at 1378 n.3.

<sup>39</sup> *Id.* at 1378–79.

<sup>40</sup> *See id.* at 1380 (noting that, although first-past-the-post voting may make it more difficult for third parties to win, it “does not deprive them of the right to try,” and that single-member districts protect against the factionalism normally associated with proportional representation).

<sup>41</sup> *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

<sup>42</sup> *See id.* (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

<sup>43</sup> *Id.* The *Anderson* Court stated that no “litmus-paper test” would differentiate valid from invalid restrictions, and that the analysis would require “hard judgments.” *Id.* at 789–90 (quoting *Storer*, 415 U.S. at 730) (internal quotation marks omitted). However, as the Court correctly noted in *Timmons*, an analysis of the constitutional validity of fusion bans does not require an

two categories of rules: substantially burdensome regulations, which receive strict scrutiny, and minimally burdensome regulations, which trigger a "less exacting review."<sup>44</sup> Accordingly, to uphold an election regulation under *Anderson*, a court must find either that the state's interests are compelling and that the regulation is narrowly tailored, or that the burden is minimal. In *Timmons*, however, neither of the first category's two criteria was satisfied. Therefore, for Minnesota's fusion ban to pass constitutional muster, it had to fall within the minimal burden category. However, Minnesota's fusion ban, like any other, effectively denies minor parties the opportunity to have the full measure of their support officially counted through ballot laws that permit fusion with disaggregation — a burden that is anything but minimal.<sup>45</sup>

More broadly, the *Anderson* analysis neglects a third possible category of rules: substantially burdensome regulations that are not subject to strict scrutiny. Had the Court allowed for this possibility in *Anderson*, it could have accepted in *Timmons* that fusion bans impose severe burdens on third parties and held that they are constitutional, without treating the interests that Minnesota asserted as compelling or the law as narrowly tailored. Further, fusion bans would not be the first type of severely burdensome restriction to receive less exacting scrutiny. Single-member districts and first-past-the-post voting burden political association in systematic ways, because political association must take shape in light of those rules.<sup>46</sup> However, the Court subjects neither first-past-the-post voting nor single-member districts to strict scrutiny,<sup>47</sup> and a fusion ban, as Justice Breyer noted, "doesn't go nearly as

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assessment of the "policy-based arguments concerning the wisdom of fusion." *Timmons*, 117 S. Ct. at 1375.

<sup>44</sup> *Timmons*, 117 S. Ct. at 1370.

<sup>45</sup> Admittedly, the burden that fusion bans impose differs from the burdens imposed by laws struck down in prior Supreme Court cases addressing the associational rights of political parties. See, e.g., *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 217 (1989) (regarding a California law that prohibited the governing bodies of political parties from endorsing candidates during primary elections); *Tashjian v. Republican Party*, 479 U.S. 208, 210–11 (1986) (regarding a Connecticut law that prevented voters affiliated with no party from voting in the Republican primary despite the Republican Party's willingness to allow them to vote); *Anderson*, 460 U.S. at 782–83 (regarding an Ohio law that barred independent candidates for President from appearing on the ballot if they failed to file a nominating petition by March 20 of the election year). Fusion bans, however, do significantly alter the manner in which political parties can associate. For example, fusion bans force two parties that wish to be affiliated to choose between a formal merger and an informal alliance. The parties are thus denied the opportunity to form temporary, but formal, alliances through which each party could be credited with official registered support.

<sup>46</sup> Justices Scalia and Breyer made similar points at oral argument. See Transcript of Oral Argument, *Timmons* (No. 95-1608), available in 1996 WL 709359, at \*39–\*40 (Dec. 4, 1996); see also RAE, *supra* note 3, at 93–96 (concluding that the combination of first-past-the-post elections and single-member districts is most conducive to a two-party system).

<sup>47</sup> See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 159–60 (1971). Given the variety of voting and districting systems used in stable democracies throughout the world, see Arend Lijphart & Bernard Grofman, *Choosing an Electoral System*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES

far as the single member district . . . [or] first past the post” in imposing limitations on the effective political association of third parties.<sup>48</sup>

Moreover, an examination of fusion demonstrates that the three regulations structure the electoral system in similar ways.<sup>49</sup> A right to fusion “must rely on the argument that endorsement alone is simply insufficient to effectuate a party’s right to associate with a candidate; actually listing the party’s support *on the ballot* must make the constitutional difference.”<sup>50</sup> The strongest argument for the constitutional significance of listing a party’s support of a candidate on the ballot proceeds from the benefits of disaggregation, because fusion without disaggregation is nearly worthless to minor parties and their supporters.<sup>51</sup> Without disaggregation, minor parties receive no credit toward achieving major-party status for votes cast on behalf of the fusion candidate they endorse,<sup>52</sup> or even for providing the margin of victory for the major-party candidate.<sup>53</sup> Similarly, without disaggregation, minor-party voters are disadvantaged because, by voting for a minor party’s fusion candidate with a chance of victory, they ensure that their support for their party is not officially counted.

Fusion with disaggregation removes these difficulties for minor parties and their supporters. Contrary to the Court’s suggestion,<sup>54</sup> however, fusion does not allow a minor party to bootstrap its way to major-party status. Fusion with disaggregation should actually pro-

AND ALTERNATIVES 3, 4–8 (Arend Lijphart & Bernard Grofman eds., 1984), it is far from obvious that any particular system could be characterized as advancing compelling state interests or as being narrowly tailored.

<sup>48</sup> Transcript of Oral Argument, *Timmons* (No. 95-1608), available in 1996 WL 709359, at \*46–\*47 (Dec. 4, 1996).

<sup>49</sup> *But see Timmons*, 117 S. Ct. at 1380 (Stevens, J., dissenting) (disagreeing with this argument).

<sup>50</sup> Note, *supra* note 6, at 1316. Although political speech and association are at the core of the First Amendment, *see Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2316 (1996) (plurality opinion), individuals’ rights to express their political views in the context of an election are limited, *see, e.g., Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992) (upholding Hawaii’s ban on write-in voting against a First Amendment challenge). As political parties are collections of citizens and possess associational rights only insofar as their members possess them, *see, e.g., Norman v. Reed*, 502 U.S. 279, 288 (1992); *Tashjian v. Republican Party*, 479 U.S. 208, 214–15 (1986); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986), parties’ constitutional rights of association similarly end at verbal endorsement of candidates.

<sup>51</sup> *See* Brief for Respondent at 26–30, *Timmons* (No. 95-1608), available in 1996 WL 501955. For a definition of fusion with disaggregation, *see* note 6, above.

<sup>52</sup> After the Eighth Circuit’s decision in *McKenna*, Minnesota passed a law allowing fusion. *See* Act of Apr. 2, 1996, ch. 419, 1996 Minn. Laws 979 (codified in pertinent part at MINN. STAT. §§ 200.02, 204B (1996), unless and until *McKenna* is reversed, in which case the amendments expire). Under this law, however, votes for a fusion candidate would not have been credited to the minor party in “determining whether a minor political party should become a major political party.” MINN. STAT. § 200.02(7)(2) (expired Apr. 28, 1997).

<sup>53</sup> *Cf. Kirschner, supra* note 7, at 683 (listing several famous major-party candidates who won important elections with the minor-party support they received as fusion candidates).

<sup>54</sup> *See Timmons*, 117 S. Ct. at 1373.

vide a more reliable indicator of a minor party's support because it eliminates the wasted vote dilemma, which leads some voters to support major-party candidates in order to influence the outcome of the election, rather than voting for a preferable minor-party candidate who has no chance of winning.<sup>55</sup> Therefore, fusion with disaggregation allows voters both to express their true party preference officially and to influence the outcome of the election.

Yet premising the right to fusion on the ability of disaggregation to alleviate the wasted vote problem proves too much. Many other electoral reforms, such as proportional voting or multimember districts, would also alleviate the wasted vote problem and thereby benefit third parties. Fusion cannot be distinguished from these reforms on associational grounds, because whatever burdens one could claim a fusion ban imposes on parties are also imposed on individual voters by first-past-the-post voting and single-member districts. In a system governed by these rules, both parties and voters face the choice of supporting either their second-choice candidate or the candidate that they prefer, but at the cost of not nominating anyone or wasting their vote, respectively.

Moreover, minor parties cannot claim a right to nonconsensual fusion.<sup>56</sup> Thus, a fusion ban prevents only those combinations that a major party also desires. Should the major parties find the long-term benefits of fusion — or multimember districts or proportional representation, for that matter — to outweigh any destabilization that could occur as a result of those reforms, then the state, that is, the major parties at any given time,<sup>57</sup> will enact those reforms.<sup>58</sup> Although it may seem strange that the major parties in a two-party system are constitutionally permitted to prefer a two-party democracy to a multiparty democracy,<sup>59</sup> to believe otherwise calls into question the long-accepted structure of the American electoral system.<sup>60</sup> Therefore, all three regulations substantially affect political association, because each pro-

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<sup>55</sup> See Note, *Parties, PACs, and Campaign Finance*, 110 HARV. L. REV. 1573, 1586–87 & n.75 (1997).

<sup>56</sup> The right of an individual to decline a party nomination should render bans of nonconsensual fusion wholly uncontroversial. See *Stewart v. Taylor*, 104 F.3d 965, 972 (7th Cir. 1997).

<sup>57</sup> State legislation, of course, "is enacted by men and women who have been elected to office as Republicans or Democrats." Daniel Hays Lowenstein, *Association Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1756 (1993). There is, therefore, an obvious "conflict of interest inherent in providing politicians the power to create the electoral laws by which they are elected." Benjamin D. Black, Note, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 109 (1996). Yet a multiparty democracy is no less vulnerable to this problem, because the election rules in all political systems ultimately must be enacted by those people previously elected.

<sup>58</sup> See Lowenstein, *supra* note 57, at 1790; see also *Timmons*, 117 S. Ct. at 1375 ("It may well be that, as support for new political parties increases, these [pro-fusion] arguments will carry the day in some States' legislatures.").

<sup>59</sup> See *Timmons*, 117 S. Ct. at 1374.

<sup>60</sup> See *id.* at 1371.

vides a strong incentive for political association to occur through two major parties. Yet each regulation also plays an integral part in the necessary process of ordering the conduct of elections.

The foregoing argument demonstrates an analytical limitation of the *Anderson* test and advances a modification to that test that would enable the Court to acknowledge the serious burdens imposed by fusion bans — and by first-past-the-post voting and single-member districts — without subjecting them to strict scrutiny.<sup>61</sup> However, three arguments against fusion bans, grounded in other areas of the Court's jurisprudence, remain.

First, a critic could argue that fusion bans result in the unconstitutional denial of voting cues.<sup>62</sup> In *Rosen v. Brown*,<sup>63</sup> the Sixth Circuit struck down a law that allowed Democratic and Republican candidates to be identified as such on the ballot, but prohibited placement of the designation "Independent" under a non-party-affiliated candidate's name.<sup>64</sup> Thus, major-party voters received a "cue" in the voting booth, but minor-party voters did not. Similarly, in *Lubin v. Panish*,<sup>65</sup> the Supreme Court suggested that allowing indigent candidates to run only as write-ins would not constitute a "reasonable alternative means of ballot access"<sup>66</sup> because the write-in candidate "would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot."<sup>67</sup>

The argument that fusion bans deny minor-party voters voting cues, however, misreads the constitutional interests at stake in *Lubin* and *Rosen*.<sup>68</sup> Fusion bans neither prohibit parties from securing a labeled place, nor prevent their preferred candidates from appearing, on the ballot. Instead, they simply limit each candidate to one political

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<sup>61</sup> A critic might respond that this argument merely shifts the terms of the debate from substantial-minimal to structural-nonstructural, without altering the nature of that debate. Although the line between structural and nonstructural regulations is unclear, it does exist. If first-past-the-post voting is taken as the paradigmatic example of a structural regulation, then a decision to ban the Communist Party can be seen as an equally paradigmatic example of a substantially burdensome nonstructural regulation.

<sup>62</sup> See Note, *supra* note 6, at 1316–19. For example, voting cues allow "a voter affiliated with the Democratic Party [who] walks into a voting booth [to] look for the Democratic candidate, and pull the lever." *Id.* at 1316–17. The cue eliminates the need for voters to remember a candidate's name when voting.

<sup>63</sup> 970 F.2d 169 (6th Cir. 1992).

<sup>64</sup> See *id.* at 174, 177–78.

<sup>65</sup> 415 U.S. 709 (1974).

<sup>66</sup> *Id.* at 718. *Lubin* involved a California law that prevented potential candidates who could not pay the filing fee from appearing on the ballot or running as write-in candidates. See *id.*

<sup>67</sup> *Id.* at 719 n.5.

<sup>68</sup> In *Lubin*, the Court criticized California's decision to choose "means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters." *Id.* at 718. In *Rosen*, the Sixth Circuit focused on the fact that the lack of any party designation would impair the ability to vote meaningfully, making it "virtually impossible for Independent candidates to prevail in the general election." *Rosen*, 970 F.2d at 176.

label — the candidate must choose the voting cue he prefers.<sup>69</sup> Although candidates who wish to be elected will usually choose the major-party cue, a popular candidate, such as Colin Powell or Ross Perot, might prefer a third-party candidacy to maintain his independence from the established parties.<sup>70</sup> Accordingly, fusion bans deny voting cues to minor-party voters only to the extent that candidates willing to represent both a major and a minor party prefer to appear on the ballot next to the major party's label when forced to choose between them.<sup>71</sup>

Second, a critic could point to the historical purposes underlying the enactment of fusion bans<sup>72</sup> and argue that fusion bans are among the "unreasonably exclusionary restrictions" that states may not use to support the two-party system.<sup>73</sup> The difficulty with this argument, even conceding that states enacted fusion bans to entrench one party in power,<sup>74</sup> is that the Court has upheld far more burdensome laws.<sup>75</sup>

Third, a critic could claim that fusion bans are unconstitutional paternalistic protections of "political parties from the consequences of their own internal disagreements."<sup>76</sup> However, fusion bans are more properly viewed as a solution to the problem of "time inconsistency of preference," which is found when behavior that "is desirable ex post may be undesirable ex ante — a recognition implicit in Ulysses' decision to have himself tied to the mast of his ship to avoid being tempted

<sup>69</sup> Depending on the fusion ban statute, the candidate must choose his preferred party label either before accepting one nomination or after accepting both. Compare, e.g., GA. CODE ANN. § 21-2-137 (1993) (requiring a candidate to run under the label of the first party to file a notice of candidacy), MINN. STAT. § 204B.06(1)(b) (1994) (same), and TENN. CODE ANN. § 2-5-101(f)(5) (Supp. 1995) (same), with IOWA CODE § 49.39 (1997) (allowing multiple nominations of a candidate but requiring the candidate to choose one party label to appear on the ballot), KY. REV. STAT. ANN. § 118.335 (Banks-Baldwin 1994) (same), and MO. REV. STAT. § 115.351 (1994) (same).

<sup>70</sup> See, e.g., Theodore J. Lowi, *It's Time for a Third Party. But We Won't Get One*, N.Y. TIMES, Aug. 24, 1995, at A23; Paul Tsongas, *The Center Holds Out*, N.Y. TIMES, Dec. 10, 1995, § 4, at 13.

<sup>71</sup> Considerations of electoral viability and ideological compatibility can influence both the desire for fusion, if fusion is permitted, and the choice of the major-party label, if fusion is barred. A would-be fusion candidate, for example, could feel more ideologically compatible with the major party and choose its label for that reason. Conversely, an opportunistic major-party candidate may desire fusion to get elected, but not feel any ideological connection to the minor party.

<sup>72</sup> See Peter H. Argersinger, "A Place on the Ballot": *Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 295-98 (1980) (arguing that the purpose of antifusion statutes was to protect Republican candidates against alliances between Democratic candidates and minor parties).

<sup>73</sup> *Timmons*, 117 S. Ct. at 1374.

<sup>74</sup> *But see id.* at 1368-69 (describing the history of the enactment of fusion bans as a part of the "election-related reforms" following the fraud-plagued 1888 presidential election).

<sup>75</sup> *See id.* at 1375 (citing *Storer v. Brown*, 415 U.S. 724 (1974)). *Storer* precluded "any person affiliated with a party at any time during the year leading up to the primary election . . . from appearing on the ballot as an independent or as the candidate of another party." *Id.*

<sup>76</sup> *Id.* at 1374 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 227 (1989), and *Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986)).

by the Sirens' song."<sup>77</sup> Major parties have a long-term interest in banning fusion, because third-party candidates tend to draw votes from their ideologically nearest competitors.<sup>78</sup> Therefore, even if fusion with an ideologically similar party is in a major party's short-term interest in any given election, strengthening that minor party will harm the major party more in the long term. With fusion bans, thus, the major parties are "tied to the mast" and are prevented from giving in to their short-term interest in winning the present election.<sup>79</sup>

The Court reached the correct result in *Timmons* by permitting more than forty states to maintain their fusion bans. However, the Court's analysis in *Anderson* hindered its analysis in *Timmons*, not only leading the Court erroneously to describe fusion bans as negligibly burdening political parties' associational rights, but also leading it to overstate the importance of some specious state interests.<sup>80</sup> A more nuanced variation of *Anderson* would reject any direct relationship between the amount of burden imposed and the level of scrutiny applied and instead recognize that the rules that structure the system of elections and political parties can be among the most burdensome restrictions of political association — and the most necessary.

2. *Commercial Speech — Compelled Advertising.* — Disagreements regarding content-neutrality<sup>1</sup> and the appropriate degree of protection for commercial speech<sup>2</sup> are noteworthy instances of the Supreme Court dividing over how much First Amendment protection should be given to a particular form of expression. In recent years, the Court has rarely split over whether an activity falls within the ambit of the First Amendment.<sup>3</sup> Last Term, however, in *Glickman v. Wileman Bros. &*

<sup>77</sup> Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 210 (1997).

<sup>78</sup> See Note, *supra* note 55, at 1587 & n.76.

<sup>79</sup> If a major party decides that fusion is in, or at least that fusion is not clearly against, its long-term interest, it can always change the law. See Lowenstein, *supra* note 57, at 1790.

<sup>80</sup> See *Timmons*, 117 S. Ct. at 1373 (accepting the arguments that single-issue parties might turn the ballot into a billboard and that fusion with disaggregation allows minor parties to bootstrap themselves to major-party status).

The Court, however, did not rely on the voter-confusion argument that Minnesota raised at oral argument, see *id.* at 1375 n.13. This argument is dubious given New York's considerable experience with fusion, see *supra* note 8, unless one accepts Justice Scalia's "facetious" suggestion that "New Yorkers are smarter," Transcript of Oral Argument, *Timmons* (No. 95-1608), available in 1996 WL 709359, at \*7-\*23 (Dec. 4, 1996).

<sup>1</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658-59, 676, 681 (1994) (revealing strong disagreement among the Justices regarding whether the "must-carry" provision of the 1992 Cable Act was a content-based restriction requiring strict scrutiny or merely a content-neutral measure calling for intermediate scrutiny).

<sup>2</sup> See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515-20 (1996) (Thomas, J., concurring in part and concurring in the judgment).

<sup>3</sup> But see *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 806 (1988) (Rehnquist, C.J., dissenting) (disputing the Court's application of First Amendment analysis to a statute regulating professional fundraisers).



*Elliott, Inc.*,<sup>4</sup> the Court held that a program requiring California fruit growers, handlers, and processors to pay for collective generic advertising did not implicate the First Amendment.<sup>5</sup> In order to justify placing the advertising outside the protections of the First Amendment, the majority relied on three previously unseen distinctions that are in significant tension with the Court's First Amendment jurisprudence. Although which, if any, of these three doctrinal distinctions takes hold will depend on lower court interpretations of the *Glickman* decision, the Court's insertion of these new tests leaves room for lower courts to restrict unduly the extent of First Amendment protection.

In 1987, California peach and nectarine handlers filed a petition challenging regulations contained in the marketing orders promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937.<sup>6</sup> The regulations authorized collective advertising that required contributions from each handler of certain California fruits.<sup>7</sup> The handlers challenged the regulations as compelled speech in violation of the First Amendment.<sup>8</sup> After an adverse administrative ruling, the handlers sought review in a federal district court, which granted summary judgment in favor of the Secretary of Agriculture.<sup>9</sup> The handlers, along with growers and processors of California fruits, appealed.<sup>10</sup>

The Ninth Circuit reversed in part and remanded,<sup>11</sup> holding that the forced assessments for generic advertising violated the First Amendment.<sup>12</sup> The Ninth Circuit relied principally on *Cal-Almond, Inc. v. United States Department of Agriculture*,<sup>13</sup> which was circuit precedent that interpreted *Abood v. Detroit Board of Education*<sup>14</sup> to establish that the First Amendment "includes a right not to be compelled to render financial support for others' speech."<sup>15</sup> Applying the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>16</sup> the court concluded that the forced advertising did not

<sup>4</sup> 117 S. Ct. 2130 (1997).

<sup>5</sup> See *id.* at 2142.

<sup>6</sup> See *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1372-73 (9th Cir. 1995) (citing, *inter alia*, 7 U.S.C. §§ 602(1), 609(c)(6)-(7) (1994), and 7 C.F.R. §§ 916.45, 917.39).

<sup>7</sup> See *id.* at 1372.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* at 1374.

<sup>10</sup> See *id.* at 1372.

<sup>11</sup> See *id.* at 1386.

<sup>12</sup> See *id.* at 1380. The Ninth Circuit rejected the appellants' claims that the advertising program violated the Administrative Procedure Act (APA). See *id.* at 1376-77.

<sup>13</sup> 14 F.3d 429 (9th Cir. 1993), *vacated*, 117 S. Ct. 2501 (1997).

<sup>14</sup> 431 U.S. 209 (1977). In *Abood*, the Court struck down a union's use of contributions for political purposes unrelated to collective bargaining. See *id.* at 235-36.

<sup>15</sup> *Wileman Bros.*, 58 F.3d at 1377 (citing *Cal-Almond*, 14 F.3d at 435). Although the speech at issue in *Abood* was political, see *Abood*, 431 U.S. at 229-30, the Ninth Circuit held that "[t]his is also true when commercial speech is at issue," *Wileman Bros.*, 58 F.3d at 1377.

<sup>16</sup> 447 U.S. 557 (1980).

directly advance the government's interest and was not narrowly tailored.<sup>17</sup>

In a 5-4 decision, the Supreme Court reversed and remanded.<sup>18</sup> Writing for the Court,<sup>19</sup> Justice Stevens held that the regulations did not call for First Amendment scrutiny.<sup>20</sup> The Court began by describing the Agricultural Marketing Agreement Act of 1937,<sup>21</sup> which created a regime premised on collective action within several agricultural markets.<sup>22</sup> The Court noted that the marketing orders providing for collective advertising had to be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the total volume of the product. Therefore, the Court presumed that the advertising served the fruit producers' and handlers' "common interest."<sup>23</sup>

The Court then stated that three characteristics of the case demonstrated that the dispute was "simply a question of economic policy for Congress and the Executive to resolve."<sup>24</sup> First, the Court held that the marketing orders did not limit the ability of producers to communicate any message they desired through individualized advertising.<sup>25</sup> Second, the Court proclaimed that the program did not compel any actual or symbolic speech.<sup>26</sup> Third, the regulations did not force the producers to sponsor any ideological or political viewpoints.<sup>27</sup> Further, the Court assumed — over the respondents' objections — that the handlers agreed with the "central message" of the advertising.<sup>28</sup> Characterizing the objections to the advertisements as vague, meritless, and trivial,<sup>29</sup> the Court determined that the complaints had "no bearing on the validity of the entire program."<sup>30</sup> Therefore, the Court maintained, there was no support in its First Amendment jurisprudence for applying a different level of scrutiny to the advertising regulations than that

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<sup>17</sup> See *Wileman Bros.*, 58 F.3d at 1380.

<sup>18</sup> See *Glickman*, 117 S. Ct. at 2142.

<sup>19</sup> Justices O'Connor, Kennedy, Ginsburg, and Breyer joined the majority opinion.

<sup>20</sup> See *Glickman*, 117 S. Ct. at 2137.

<sup>21</sup> 7 U.S.C. §§ 601-659 (1994).

<sup>22</sup> See *Glickman*, 117 S. Ct. at 2134.

<sup>23</sup> *Id.* at 2135.

<sup>24</sup> *Id.* at 2138.

<sup>25</sup> See *id.* The Court pointed out that, in the present case, the government did not ban any speech as it did in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and subsequent commercial speech cases. See *Glickman*, 117 S. Ct. at 2138 n.12.

<sup>26</sup> See *Glickman*, 117 S. Ct. at 2138. The Court stated that this element distinguished the case from its compelled speech precedents such as *Wooley v. Maynard*, 430 U.S. 705 (1977), and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). See *Glickman*, 117 S. Ct. at 2138 n.13.

<sup>27</sup> See *Glickman*, 117 S. Ct. at 2138.

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at 2137-39 & nn.10-11.

<sup>30</sup> *Id.* at 2137.

applicable to the other components of the anticompetitive regulatory regime governing the fruit industry.<sup>31</sup>

The Court chided the Ninth Circuit for relying on compelled speech precedent, because the regulations at issue “merely required [the respondents] to make contributions for advertising.”<sup>32</sup> However, the Court did acknowledge that “[a]lthough this regulatory scheme may not compel speech as recognized by our case law,” *Abood* was relevant because the regulations mandated financial contributions for advertising.<sup>33</sup> Yet the Court refused to read *Abood* to “announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities.”<sup>34</sup> “Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one’s ‘freedom of belief,’” which was not present in the instant case.<sup>35</sup> The Court asserted that *Abood* required the Ninth Circuit to question only whether the compelled advertising was germane to the purposes of the marketing orders.<sup>36</sup>

The Court also argued that the program’s requirement that the majority of the producers in each market had to approve the program ensured that the program furthered the producers’ interests.<sup>37</sup> “[D]ecisions that are made by the majority,” the Court stated, “if acceptable for other regulatory programs, should be equally so for promotional advertising.”<sup>38</sup>

Justice Souter dissented.<sup>39</sup> He objected both to the Court’s treatment of the program as bereft of a “discernible element of speech” and to its application of a germaneness test.<sup>40</sup> Justice Souter distinguished the components of the program involving “undoubtedly valid, non-speech elements,” which were subject only to rational basis review, from the component requiring the subsidization of speech, which was

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<sup>31</sup> See *id.* at 2138. In addition, the Court quickly disposed of the respondents’ argument that the assessments for collective advertising violated the First Amendment by limiting their ability to engage in individualized advertising. Such an argument, the Court noted, would equally apply to virtually any regulation. See *id.* at 2138–39. “The fact that an economic regulation may indirectly lead to a reduction in a handler’s individual advertising budget,” the Court explained, “does not itself amount to a restriction on speech.” *Id.* at 2139.

<sup>32</sup> *Id.* The Court noted that the advertising was attributed only to the collective association, and not to the individual dissenting growers, handlers, and producers. See *id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* at 2140.

<sup>37</sup> See *id.* at 2141–42.

<sup>38</sup> *Id.* at 2142.

<sup>39</sup> See *id.* (Souter, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined Justice Souter’s dissent. See *id.* Justice Thomas joined Justice Souter’s dissent except with respect to Justice Souter’s application of the *Central Hudson* test. See *id.* at 2155 (Thomas, J., dissenting). Justice Thomas also wrote a separate dissent. See *id.*

<sup>40</sup> *Id.* at 2142 (Souter, J., dissenting).

subject to First Amendment scrutiny.<sup>41</sup> Refusing to accept a test for compelled commercial speech different from that used for government restrictions on commercial speech, Justice Souter would have required that the assessments be “reasonably necessary” to the implementation of the government program.<sup>42</sup>

At the outset, Justice Souter set forth two “basic principles of First Amendment law.”<sup>43</sup> First, all speech is subject to some level of First Amendment protection unless it is within an unprotected category of speech, such as obscenity.<sup>44</sup> Second, “compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny.”<sup>45</sup> Further, he stated that advertising is not merely a tool to “provide objective information about a product’s availability or price.”<sup>46</sup> Rather, as Justice Souter explained, the challenged advertising was expressive and “exploit[ed] all the symbolic and emotional techniques . . . with messages often far removed from simple proposals to sell fruit.”<sup>47</sup>

Justice Souter then took issue with the majority’s reading of *Abood*.<sup>48</sup> He contended that the majority erroneously extracted a germaneness test from *Abood*, which is “not nearly so permissive.”<sup>49</sup> Justice Souter argued that the *Abood* Court upheld the use of compelled fees for nonideological union activities only because the fees were reasonably necessary to the government’s important objective of maintaining the opportunity for a union shop.<sup>50</sup> However, Justice Souter asserted, *Abood* did not imply that if “government neither forbids speech nor attributes it to an objector,” it may compel subsidization for nonideological speech.<sup>51</sup> In addition, Justice Souter disputed the Court’s finding that the respondents did not actually disagree with the challenged advertising, an assumption that he labeled as “doubtful” and “beside the point even if true.”<sup>52</sup>

Turning to the governmental interests involved, Justice Souter maintained that if the Court had applied the *Central Hudson* test, it

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2143.

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 2144. Justice Souter noted the previous statements of the Court that the “difference between compelled speech and compelled silence . . . is without constitutional significance,” *Riley v. National Fed’n of the Blind, Inc.*, 487 U.S. 781, 796–97 (1988), and that “involuntary affirmation c[an] be commanded only on even more immediate and urgent grounds than silence,” *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). *See* *Glickman*, 117 S. Ct. at 2144 (Souter, J., dissenting).

<sup>46</sup> *Glickman*, 117 S. Ct. at 2144 (Souter, J., dissenting).

<sup>47</sup> *Id.*

<sup>48</sup> *See id.* at 2145.

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 2145–46.

<sup>51</sup> *Id.* at 2147.

<sup>52</sup> *Id.* at 2147–48 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 (1943)).

would have been forced to strike down the advertising program.<sup>53</sup> He asserted that the history of the regulations showed that the advertising was not a response to an apparent need in particular markets, but was instead the product of interest group lobbying.<sup>54</sup> Justice Souter described the Act's authorization of advertising for twenty-five commodities as "so random and so randomly implemented . . . as to unsettle any inference that the Government's asserted interest is either substantial or even real."<sup>55</sup> Although responding to interest groups might generally be permissible, Justice Souter asserted that "when speech is at stake, the government fails to carry its burden of showing a substantial interest when it does nothing more than refer to a 'consensus' within a limited interest group that wants the regulation."<sup>56</sup>

The *Glickman* majority and dissent reflect two distinct approaches to First Amendment coverage. Justice Stevens's majority opinion focused on avoiding the Court's precedent by relying on factual distinctions.<sup>57</sup> In contrast, Justice Souter started with the assumption that the First Amendment protects all speech unless there are persuasive reasons for locating it within one of the narrow categories of unprotected speech.<sup>58</sup> The preferable approach to deciding First Amendment coverage, which resembles Justice Souter's, is to presume that "all communication is covered by the first amendment and exclude a subcategory of commercial advertising only if it could be *shown to be unrelated* to the purposes of a principle of freedom of speech," thus avoiding the dangers of underinclusiveness.<sup>59</sup> Unfortunately, rather than adopting this approach, *Glickman* may signal a newly restrictive approach to First Amendment coverage.

*Glickman*'s result is startling because in the 1995 Term the Court appeared to be leaning toward increasing constitutional protection for commercial speech.<sup>60</sup> Conversely, *Glickman* widens the gap between the relative protections afforded political and commercial speech, fur-

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<sup>53</sup> See *id.* at 2149-53.

<sup>54</sup> See *id.* at 2151.

<sup>55</sup> *Id.* at 2150.

<sup>56</sup> *Id.* at 2152. Even if the government could satisfy *Central Hudson*'s requirement of a substantial government interest, Justice Souter found no evidence in the record to suggest that the advertising program directly advanced the government's interest and suggested that voluntary advertising might be just as effective. See *id.* at 2153-54.

<sup>57</sup> See *Glickman*, 117 S. Ct. at 2138 & nn.12-14 (distinguishing the relevant cases).

<sup>58</sup> See *id.* at 2143 (Souter, J., dissenting) (reciting "basic principles of First Amendment law").

<sup>59</sup> Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 281 (1981). This approach requires a definition of communication. Certainly a literal interpretation of communication would be too expansive, including many acts often assumed to be beyond the scope of the First Amendment. See *id.* at 270.

<sup>60</sup> See Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 560 (1997) (stating that in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), four Justices "explicitly adopted the view that the protection given commercial speech, in most cases, would approach the stringent level of protection afforded traditional categories of expression") (footnote omitted).

ther subordinating the latter.<sup>61</sup> Although compelled speech has always been understood to be equivalent to speech restriction,<sup>62</sup> the Court has departed from this symmetry in the commercial speech context. Similarly, although *Buckley v. Valeo*<sup>63</sup> established that paying for political advertisements is a form of protected speech,<sup>64</sup> *Glickman* announced that paying for commercial advertising is not speech at all.<sup>65</sup> The Court made no attempt to explain these disjunctions.<sup>66</sup> It seems anomalous for the Court to protect advertising when government tries to restrict it, but abandon it as nonspeech when government compels it.<sup>67</sup>

To justify its decision not to apply First Amendment scrutiny, the Court introduced three new tests.<sup>68</sup> First, the Court suggested an actual disagreement test that may prove to be impractical in application. Until *Glickman*, the Court had unquestioningly accepted objecting parties' claims that they disagreed with particular speech.<sup>69</sup> The *Glickman* Court failed to recognize that belief and disagreement are inherently internal matters and that judges possess a limited ability to

<sup>61</sup> Commercial speech has generally been subject to "second-class" protection. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment).

<sup>62</sup> See *Glickman*, 117 S. Ct. at 2144 (Souter, J., dissenting) (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995); *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977); and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

<sup>63</sup> 424 U.S. 1 (1976) (per curiam).

<sup>64</sup> The *Buckley* Court stated that "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Id.* at 16 (citing *Bigelow v. Virginia*, 421 U.S. 809, 820 (1975)). Further, the Court held that both the contribution and the expenditure limits at issue in *Buckley* "implicate[d] fundamental First Amendment interests." *Id.* at 23.

<sup>65</sup> See *Glickman*, 117 S. Ct. at 2139.

<sup>66</sup> A theoretical basis is a "necessary precondition to the conclusion that any category of speech, including commercial speech, is not at the core of the First Amendment." Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1185 (1988). *Glickman's* lack of a clear theoretical underpinning is consistent with the Court's usual disposition of commercial speech cases. See Redish, *supra* note 60, at 554.

<sup>67</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-15, at 893 & n.21 (2d ed. 1988) (stating that just as *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), held that the government could not ban "For Sale" signs (a form of commercial speech), "[p]resumably, the township could not compel homeowners to show such signs" (citing *Wooley v. Maynard*, 430 U.S. 705 (1977))).

<sup>68</sup> A close examination of Justice Stevens's writings indicates that he may not have intended these distinctions to constitute new rules of First Amendment jurisprudence, but rather intended to dispose of *Glickman* based on its facts. See John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1307 (1993) (eschewing "black-letter or bright-line rules of First Amendment law" because they only "obfuscate[e] the specific facts at issue and interests at stake in a given case"). However, it is far from certain that lower courts will be either familiar with or faithful to Justice Stevens's approach.

<sup>69</sup> See *Glickman*, 117 S. Ct. at 2148 (Souter, J., dissenting) ("[T]he requirement of disagreement finds no legal warrant in our compelled-speech cases.") (citing *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 797-78 (1988)).

assess them. Such an understanding has led courts to tread lightly in assessing the sincerity of religious beliefs when adjudicating First Amendment free exercise claims.<sup>70</sup> Courts should be similarly wary about second-guessing parties' claims of disagreement in the free speech context.<sup>71</sup>

Second, in language more definite than that contained in its discussion of actual disagreement, the Court stated that compelled speech must be political or ideological to warrant First Amendment protection.<sup>72</sup> This test represents another departure from precedent. Although the Justices have at times suggested that political speech is the epitome of protected speech,<sup>73</sup> the Court had never previously identified political or ideological expression as the boundary of the First Amendment. Indeed, the Court has consistently expanded the scope of the First Amendment to embrace nonpolitical speech and expressive activities once thought to be beyond its coverage.<sup>74</sup> In contrast to *Glickman's* restriction of protection to only political or ideological expression, *Abood* stated that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."<sup>75</sup>

Another objection to *Glickman's* political or ideological test is that the line between political and commercial speech lacks clarity.<sup>76</sup> Many

<sup>70</sup> See *TRIBE*, *supra* note 67, § 14-12, at 1245 (referring to courts' inquiries into the sincerity of the beliefs of religious objectors as "extraordinarily dangerous").

<sup>71</sup> Admittedly, courts assess state of mind when they inquire into intent or motive, but they often do so by referring to objective standards.

<sup>72</sup> See *Glickman*, 117 S. Ct. at 2139.

<sup>73</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) ("[P]olitical speech occupies the highest, most protected position."); Jef I. Richards, *Politicizing Cigarette Advertising*, 45 *CATH. U. L. REV.* 1147, 1162 (1996) ("Although the First Amendment makes no explicit distinction between one form of speech and another, the Court has created a hierarchy in the protection afforded different types of speech.")

<sup>74</sup> See *Glickman*, 117 S. Ct. at 2156 n.4 (Thomas, J., dissenting) (noting that the First Amendment protects symbolic speech, including public sleeping and nude dancing); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters — to take a nonexhaustive list of labels — is not entitled to full First Amendment protection."). The Court has suggested that commercial advertising in particular possesses an expressive component that qualifies for First Amendment protection. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1504 (1996) (opinion of Stevens, J.) ("Advertising has been a part of our culture throughout our history . . . . Indeed, commercial messages played such a central role . . . [before] the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.") (citation omitted); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 n.17 (1993).

<sup>75</sup> *Abood*, 431 U.S. at 232.

<sup>76</sup> See, e.g., *Redish*, *supra* note 60, at 558 (referring to "the artificiality of the commercial speech distinction"). But see *Schauer*, *supra* note 66, at 1189 (arguing that "the lack of a clear line" between categories does not "render[] a distinction incoherent"). Despite the difficulty of drawing the distinction, the Court has often suggested that doing so is facile. See, e.g., *United*

advertisements subtly incorporate political or ideological messages<sup>77</sup> that may not be readily apparent to courts. *Glickman* would allow courts to prohibit government from compelling obviously political advertising.<sup>78</sup> In some instances, however, courts could allow compelled advertising because of the *Glickman* Court's unwillingness to look beyond the surface of "commercial" advertising and see the elements of objectionable expression interwoven with the commercial message. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,<sup>79</sup> Justice Souter wrote that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."<sup>80</sup> Lower courts could plausibly interpret the *Glickman* opinion to imply that all advertising that has a commercial "central message" lacks the requisite political or ideological content to trigger First Amendment protection. Certainly, all categories require the Court to draw lines that are indubitably vague. But the danger produced by an indeterminate line between commercial and political speech is greater when the commercial label is used not to reduce the level of First Amendment scrutiny, but to foreclose First Amendment protection altogether.

Moreover, lower courts could read *Glickman* to foreclose First Amendment protection of nonpolitical or nonideological advertising even when there is actual disagreement about the advertising's content.<sup>81</sup> Increasingly advertisers are utilizing controversial, eye-catching imagery<sup>82</sup> that — although not overtly political — may be equally objectionable. But if Justice Souter's interpretation of the majority's analysis — that the critical requirement is that speech must be political or ideological, regardless whether there is actual disagreement<sup>83</sup> —

States v. Edge Broad. Co., 509 U.S. 418, 426 (1993) (referring to the "common sense" distinction between commercial and political speech).

<sup>77</sup> See Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 711-12 (1993) (discussing advertising's coopting of patriotic sentiment and political imagery from the women's movement and the black power movement); see also *id.* at 715 (describing ads using religious imagery).

<sup>78</sup> However, *Glickman* may not ensure the prohibition of all compelled political advertising because the Court implied that in addition to being political in nature, the speech must not be germane to an otherwise legitimate program in order to be protected. See *Glickman*, 117 S. Ct. at 2145 & n.3 (Souter, J., dissenting).

<sup>79</sup> 515 U.S. 557 (1995).

<sup>80</sup> *Id.* at 569-70.

<sup>81</sup> Because of the complexity of assessing personal disagreement, courts may synthesize the actual disagreement and political or ideological tests into a per se rule that certain types of speech are too neutral to be objectionable.

<sup>82</sup> See Collins & Skover, *supra* note 77, at 738-39 (describing advertisements featuring a woman unzipping a man's pants and a man raising his middle finger in an obscene gesture).

<sup>83</sup> See *Glickman*, 117 S. Ct. at 2147 (Souter, J., dissenting) (referring to the majority's rule that government "may compel subsidization for any objectionable message that is not political or ideological").



is correct, then government may be constitutionally able to compel nonpolitical but clearly objectionable speech.

Third, in concluding that the compelled advertising was constitutional, the Court looked to the fact that the respondents were compelled to fund advertising "as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme."<sup>84</sup> Thus, the Court implied that the fact that a majority of the members of a heavily regulated industry approves of a challenged regulation may factor into the decision whether to apply the First Amendment. This conflation of speech with regulatory issues conflicts with the Court's precedents. In *Abood* and subsequent union shop cases, the Court excised the speech component by upholding regulations requiring all union employees to pay for union services related to collective bargaining, but striking down compelled contributions for objectionable expressive activities.<sup>85</sup> The Court has previously considered pervasive regulation to be indicative of a lessened expectation of privacy in the Fourth Amendment context;<sup>86</sup> *Glickman* appears to import this reasoning into First Amendment analysis.<sup>87</sup>

The preferable interpretation of the Court's references to the consensus within the industry is that the *Glickman* Court relied on that consensus solely to demonstrate that the regulations passed rational basis review. However, as Justice Souter recognized,<sup>88</sup> the Court was imprecise about this point.<sup>89</sup> The respondents argued that the majority approval requirement permitted the most powerful producers to shape the content of the advertising in a manner that promoted their individual interests to the detriment of the interests of the minority.<sup>90</sup> In fact, because the respondents' fruit was distinct from the generic fruit touted by the collective advertising, the program forced them to fund additional advertisements to counteract the messages of the col-

<sup>84</sup> *Glickman*, 117 S. Ct. at 2138.

<sup>85</sup> See, e.g., *Keller v. State Bar*, 496 U.S. 1, 13-15 (1990) (upholding the use of required contributions for "regulating the legal profession," but striking down their use for political or ideological lobbying); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232, 235 (1977) (upholding regulations requiring contributions for collective bargaining, contract administration, and grievance adjustment purposes, but striking down the use of contributions for political or ideological expression).

<sup>86</sup> See *New York v. Burger*, 482 U.S. 691, 702 (1987).

<sup>87</sup> The Court has alluded cryptically to the existence of regulation as a rationale for affording reduced constitutional protection to commercial speech. See, e.g., *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (defining commercial speech as speech "occur[ing] in an area traditionally subject to government regulation").

<sup>88</sup> Justice Souter asserted that "[c]ontrary to what the majority implies, however, the mere vote of a majority is never enough to compel dissenters to pay for private or quasi-private speech whose message they do not wish to foster; otherwise, the First Amendment would place no limitation on majoritarian action." *Glickman*, 117 S. Ct. at 2152 n.11 (Souter, J., dissenting) (citation omitted).

<sup>89</sup> In fact, the majority opinion never uses the words "rational basis."

<sup>90</sup> See Brief for Respondents Gerawan Farming, Inc., Nilmeier Farms, and George Hufert Farms at 7, *Glickman* (No. 95-1184), available in 1996 WL 554427.

lective ads.<sup>91</sup> Concerns about drowning out the voices of divergent, less powerful groups — regardless of how overwhelming the majority — reflect the essence of the First Amendment.<sup>92</sup> For instance, in *Wooley v. Maynard*,<sup>93</sup> the Court opined: “[T]hat most individuals agree with the thrust of New Hampshire’s motto is not the test . . . . The First Amendment protects the right of individuals to hold a point of view different from the majority . . . .”<sup>94</sup> Yet lower courts could interpret *Glickman*’s ambiguous references to consensus to evince a principle that the protection of counter-majoritarian factions is an inapposite concern in the context of heavily regulated industries.

Ultimately, the danger of the Court’s decision in *Glickman* is that it suggests that government may have “free rein”<sup>95</sup> to “force payment for a whole variety of expressive conduct that it could not restrict.”<sup>96</sup> The danger is that instead of taking responsibility for messages that it wishes to foster — and being held accountable by the public for using tax dollars to do so — government can surreptitiously communicate its messages through the pocketbooks of private speakers.

3. *Indecent Speech — Communications Decency Act.* — The rapid growth of the Internet over the last several years<sup>1</sup> has not been without its constitutional growing pains. For example, many observers have expressed concern about the effects of allowing children to access the Internet’s more sexually explicit content.<sup>2</sup> Some scholars have argued that speech on the Internet deserves full First Amendment protection;<sup>3</sup> others have contended that the Internet merits no more First Amendment protection than the broadcast media.<sup>4</sup> Certainly, the question of how much First Amendment protection the Supreme Court

<sup>91</sup> See *id.* at 11. This aspect distinguished the compelled advertising from other regulations incidentally reducing a fruit handler’s advertising budget. See *Glickman*, 117 S. Ct. at 2139; *supra* note 31. Unlike other regulations, the generic advertising directly impacted the respondents’ advertising decisions by promoting messages to which they felt compelled to respond.

<sup>92</sup> See *Kingsley Int’l Pictures Corp. v. Regents of the Univ.*, 360 U.S. 684, 689 (1959) (stating that First Amendment protection is “not confined to the expression of ideas that are conventional or shared by a majority”).

<sup>93</sup> 430 U.S. 705 (1977).

<sup>94</sup> *Id.* at 715.

<sup>95</sup> *Glickman*, 117 S. Ct. at 2147 (Souter, J., dissenting).

<sup>96</sup> *Id.* at 2156 (Thomas, J., dissenting).

<sup>1</sup> See *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (noting that the Internet has grown from more than one million computers in 1993 to over 9.4 million computers in 1996).

<sup>2</sup> See, e.g., Suzanne Fields, *Kids Have Easy Access to Cyberporn*, DALLAS MORNING NEWS, June 19, 1995, at 11A.

<sup>3</sup> See, e.g., E. Walter Van Valkenburg, *The First Amendment in Cyberspace*, 75 OR. L. REV. 319, 323 (1996).

<sup>4</sup> See, e.g., Robert W. Peters, *There is a Need to Regulate Indecency on the Internet*, 6 CORNELL J.L. & PUB. POL’Y 363, 376 (1997). Generally, broadcast media have received less protection than more traditional forms of speech, such as the print media or the soapbox orator. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748–51 (1978) (upholding the power of the FCC to impose sanctions on radio broadcasters for monologues that are indecent but not obscene).

would afford the Internet was open to debate before last Term, given the Court's historical tendency to create new First Amendment rules for different communications media.<sup>5</sup> Last Term, in *Reno v. ACLU*,<sup>6</sup> the Supreme Court seemed to put this issue to rest, at least in part, by holding that a federal statute criminalizing certain "indecent" speech on the Internet violated the First Amendment. Although the ruling appears to extend the fullest possible First Amendment protection to the Internet, advances in technology, coupled with the further growth of the Internet, could cause the Court to reconsider the appropriate level of scrutiny.

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996<sup>7</sup> into law.<sup>8</sup> The part of the law at issue in *Reno*, the Communications Decency Act of 1996 (CDA),<sup>9</sup> was inserted into the bill through a Senate amendment that was the subject of little debate.<sup>10</sup> Following the enactment of the law, twenty plaintiffs filed suit in the Eastern District of Pennsylvania against the Attorney General and the U.S. Department of Justice, asking both that they be enjoined from enforcing the law's "indecent transmission" and "patently offensive display" provisions<sup>11</sup> and that these provisions be declared unconstitutional.<sup>12</sup> Finding that these provisions were unconstitutionally vague, Judge Ronald Buckwalter granted a limited temporary restraining order on February 15, 1996.<sup>13</sup> The CDA contained a provision mandating that any challenges to its constitutionality be brought before a three-judge district court,<sup>14</sup> and therefore Chief Judge Dolores Sloviter of the Third Circuit convened such a court in Philadelphia.<sup>15</sup>

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<sup>5</sup> See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring))).

<sup>6</sup> 117 S. Ct. 2329 (1997).

<sup>7</sup> Pub. L. No. 104-104, 110 Stat. 56.

<sup>8</sup> See *ACLU v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996).

<sup>9</sup> Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-43.

<sup>10</sup> See *Reno*, 117 S. Ct. at 2338 & n.24.

<sup>11</sup> *Id.* at 2338. These provisions criminalized the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age" and "the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age," respectively. *Id.* The majority and Justice O'Connor disagreed as to whether the second provision was actually one provision or two. Compare *id.* at 2338 n.25 ("[W]e follow the convention of both parties below, as well the District Court's order and opinion, in describing § 223(d)(1) as one provision."), with *id.* at 2352 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("What the Court classifies as a single 'patently offensive display' provision . . . is in reality two separate provisions." (internal quotation marks omitted)).

<sup>12</sup> See *ACLU*, 929 F. Supp. at 827. An additional 27 plaintiffs subsequently filed a second suit, which was consolidated with the first. See *id.* at 827-28.

<sup>13</sup> See *id.* at 827.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* Chief Judge Sloviter appointed Judge Stewart Dalzell to serve on the panel with Judge Buckwalter and herself. See *id.*

After hearing testimony and making extensive findings of fact,<sup>16</sup> the court, finding that the provisions at issue were likely to be unconstitutional, granted the plaintiffs a preliminary injunction against enforcement of the CDA.<sup>17</sup> Although the judges were unanimous in their judgment, they used distinct analyses to explain their conclusions.<sup>18</sup> The Supreme Court noted probable jurisdiction<sup>19</sup> and affirmed the judgment of the district court.<sup>20</sup>

Writing for a 7–2 majority,<sup>21</sup> Justice Stevens first explored the nature of the Internet and the problems associated with attempting to verify the age of its users.<sup>22</sup> He then rejected the government's attempts to liken the CDA to other acts that the Court had previously upheld.<sup>23</sup> First, he distinguished the case at bar in four crucial respects from *Ginsberg v. New York*,<sup>24</sup> in which the Court upheld a New York statute prohibiting the sale of material that was obscene with respect to minors even if it was not obscene with respect to adults.<sup>25</sup> Second, he distinguished the case from *FCC v. Pacifica Foundation*,<sup>26</sup> in which the Court allowed the FCC to issue an administrative sanction for broadcasting a profanity-laden monologue during the afternoon, in part because that case involved an order that came from the FCC, an agency that had been regulating radio and television for decades.<sup>27</sup> Finally, he refused to liken the case to the adult theater zoning law upheld in *Renton v. Playtime Theatres, Inc.*,<sup>28</sup> because the “zoning” that was undertaken by the CDA encompassed all of cyberspace, rather than just small, discrete areas.<sup>29</sup> More broadly, he noted that, although other types of broadcast media had been denied full First

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<sup>16</sup> One hundred twenty-three of them, in fact. *See id.* at 830–49.

<sup>17</sup> *See id.* at 849.

<sup>18</sup> *See Reno*, 117 S. Ct. at 2340 (describing the opinions of all three judges).

<sup>19</sup> *See Reno v. ACLU*, 117 S. Ct. 554 (1996).

<sup>20</sup> *See Reno*, 117 S. Ct. at 2351.

<sup>21</sup> Justice Stevens was joined by Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

<sup>22</sup> *See Reno*, 117 S. Ct. at 2334–37.

<sup>23</sup> *See id.* at 2341–43.

<sup>24</sup> 390 U.S. 629 (1968).

<sup>25</sup> The Court reasoned that the statute in *Ginsberg* enabled children to continue to access the material if their parents wished to allow them to do so, that the statute applied only to commercial transactions, that the statute defined the banned material more narrowly, and that the statute applied to ages 16 and under, whereas the CDA applies to ages 17 and under. *See Reno*, 117 S. Ct. at 2341.

<sup>26</sup> 438 U.S. 726 (1978).

<sup>27</sup> In addition to Congress's lack of experience with regulation of the Internet, the case at bar differed from *Pacifica* because the order in *Pacifica* was not punitive and because the Internet had not historically been subject to the same sort of pervasive regulation as broadcast media. *See Reno*, 117 S. Ct. at 2342.

<sup>28</sup> 475 U.S. 41 (1986).

<sup>29</sup> Moreover, the CDA focused on the primary effects of the speech itself, whereas the statute upheld in *Renton* looked to the secondary effects of adult expression, such as crime and declining property values. *See Reno*, 117 S. Ct. at 2342.

Amendment protection, they had either historically been subject to broad government regulation, suffered from scarcity, or been seen as invasive.<sup>30</sup> Justice Stevens found the Internet to have none of these preconditions to regulation.<sup>31</sup>

Turning to the interpretation of the statute, the Court refused to consider whether the CDA was so vague that it violated the Fifth Amendment.<sup>32</sup> Instead, it held that, because of the CDA's potential chilling of free expression, "a content-based regulation of speech,"<sup>33</sup> the statute ran afoul of the First Amendment.<sup>34</sup> Although the Court acknowledged the importance of protecting children from inappropriate material, it reemphasized its past holdings that such a goal does not justify limiting the adult population to seeing only material fit for the eyes of children.<sup>35</sup> Further, the Court explicitly acknowledged that the CDA created problems that are inherent in "judg[ing]" material "by the standards of the community most likely to be offended by the message."<sup>36</sup> Because of these concerns, the Court held that "the CDA is not narrowly tailored if that requirement has any meaning at all."<sup>37</sup>

After ruling that the CDA was facially overbroad and thus presumptively invalid, the Court turned to the government's assertion that the statute could be saved through other means.<sup>38</sup> The Court rejected three narrowing principles offered by the government.<sup>39</sup> The Court also refused to hold that the defenses provided in the CDA itself saved the statute.<sup>40</sup> Finally, the Court mostly rejected the govern-

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<sup>30</sup> See *id.* at 2343.

<sup>31</sup> See *id.* at 2343-44.

<sup>32</sup> See *id.* at 2341. The possibility of a Fifth Amendment violation arose because the CDA imposed criminal sanctions. See *ACLU v. Reno*, 929 F. Supp. 824, 859 (E.D. Pa. 1996) (opinion of Buckwalter, J.).

<sup>33</sup> *Reno*, 117 S. Ct. at 2344.

<sup>34</sup> See *id.* at 2346. This conclusion was based on the premise that the indecent speech regulated by the CDA is protected by the First Amendment. See *id.* (quoting *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989)). Further, because of textual differences in provisions of the CDA, it was unclear exactly what indecent speech the statute prohibited. See *id.* at 2344.

<sup>35</sup> See *id.* at 2346 (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2393 (1996)).

<sup>36</sup> *Id.* at 2347. This difficulty arises because a nationwide audience can access virtually any information posted on the Internet. See *id.*

<sup>37</sup> *Id.* at 2348.

<sup>38</sup> See *id.*

<sup>39</sup> The government suggested that alternative channels of communication were available after the CDA ban on indecent speech, see *id.* at 2348-49; that the knowledge requirements of the statute saved it from overbreadth, a contention rejected by the Court on the ground that it would effectively give a heckler's veto to anyone who had a child with them when they entered a chat room, see *id.* at 2349; and that most of the material banned had no serious redeeming social value in any event, see *id.*

<sup>40</sup> See *id.* at 2349-50. The Court rejected a provision excepting those who took good faith actions to prevent minors from viewing the material, because it required that such actions be "effective," something that the government acknowledged was impossible given the current state of technology. See *id.* at 2349. The other defenses involved using credit card verification or adult identification. See *id.* In holding these defenses insufficient to save the statute's constitutionality,

ment's invitation to use the statute's severability clause to modify the statute and cure its constitutional infirmity.<sup>41</sup> The Court noted that, by interpreting such an "open-ended" statute in a manner that rendered it constitutional, the Court might give Congress an incentive to pass overbroad statutes with the expectation that the courts would reduce them to their proper constitutional size later.<sup>42</sup>

Justice O'Connor<sup>43</sup> concurred in the judgment in part, but dissented in part.<sup>44</sup> She rejected the majority's parsing of the statute in favor of the government's contention that § 223(d)(1) contained two separable provisions: one that criminalized displaying patently offensive or indecent material where minors could see it, and another that criminalized sending such material to a specific person known to be a minor.<sup>45</sup> Further, she viewed the CDA as merely an attempt to "zone" cyberspace into areas where adults could communicate freely in the absence of minors.<sup>46</sup> Because a transmission addressed only to minors does not implicate any adult interest in being able to receive indecent speech, she would have upheld the CDA in all situations in which the right of an adult to receive indecent speech was not at issue, such as where it was known that only minors were on the receiving end of an indecent transmission.<sup>47</sup> Additionally, she would have reached an issue that the majority avoided and decided that the CDA's ban on indecent or patently offensive speech was not an overbroad intrusion into the First Amendment rights of minors.<sup>48</sup>

The Court correctly decided to strike down the CDA. The Act could not achieve its stated purpose<sup>49</sup> because of its overbreadth and

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the Court noted the irony that this defense would be more likely to protect commercial pornographers than noncommercial entities. *See id.* at 2349 n.47.

<sup>41</sup> *See id.* at 2350-51. The Court severed the phrase "or indecent" from § 223(a), so that the law's prohibition on obscenity stood. It justified this action by reasoning that obscenity lies outside the protections of the First Amendment. *See id.* at 2350.

<sup>42</sup> The Court averred that it was necessary to discourage this practice in order to avoid serious separation of powers questions. *See id.* at 2351 n.49.

<sup>43</sup> Chief Justice Rehnquist joined Justice O'Connor's opinion.

<sup>44</sup> *See Reno*, 117 S. Ct. at 2352 (O'Connor, J., concurring in the judgment in part and dissenting in part).

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 2355-56. However, in all cases in which more than one adult was party to a conversation or transmission, Justice O'Connor felt that the CDA could not constitutionally be applied because it would infringe on the right of adults to receive indecent speech. *See id.*

<sup>48</sup> *See id.* at 2356. Justice O'Connor emphasized that there was no substantial overbreadth in denying minors access to speech that was indecent or patently offensive, yet not "harmful to minors." *Id.*

<sup>49</sup> Senator James Exon, one of the principal architects of the Act, often stated that it was designed primarily to protect children from material available on the Internet. *See, e.g.*, 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon) ("The fundamental purpose of the Communications Decency Act is to provide much-needed protection for children.").

underinclusiveness.<sup>50</sup> More generally, the Court's refusal to craft new First Amendment rules for the Internet represented a welcome departure from the Court's previous treatment of new media: the Court's decision evinces both a deep respect for the democratic promise of the Internet and an unwillingness to allow the sort of extensive regulation that has burdened the early days of other forms of new media. However, claims of victory by opponents of Internet regulation may be premature, because the Court left open the possibility that it could later reassess whether additional burdens can be placed on the Internet in the face of technological advances and the Internet's continued growth.

The *Reno* Court extended the full protection of the First Amendment to the Internet.<sup>51</sup> However, the Court explicitly based its conclusion on the district court's "findings [that] provide[d] the underpinnings for the legal issues."<sup>52</sup> Further, at least one Justice in the majority wondered during oral argument whether the CDA might be unconstitutional at the present time, yet become constitutional at some point in the future.<sup>53</sup> In her opinion, Justice O'Connor was even more explicit in suggesting that the ruling was bound by the current state of the Internet.<sup>54</sup> Although the Court is unlikely to revisit its rulings on

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<sup>50</sup> On one hand, the CDA was fatally underinclusive, most simply because of the facts that "as much as thirty percent of the sexually explicit material currently available on the Internet originates in foreign countries," *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916, 931 (S.D.N.Y. 1996), and that the CDA contains no provision for extraterritorial prosecution of its violators, *cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)) (internal quotation marks omitted)). On the other hand, the Act was overbroad in that literal terms of the CDA allowed the criminalization of material that would likely do little damage to children. *See, e.g., Reno*, 117 S. Ct. at 2348 (suggesting that parents could be prosecuted for sending information on contraception by electronic mail to their minor children in a town that considered such information to be "indecent" or "patently offensive"); Brief for Appellees at 9, *Reno* (No. 96-511), available in 1997 WL 74378 (noting that the government's own witness testified that the cover of *Vanity Fair* that featured a nude and pregnant Demi Moore could be considered indecent in some communities). The existence of indecent material on the Internet that is worthy of First Amendment protection may best be illustrated, however, by Internet sites that reprint the Appendix to the Supreme Court's *Pacifica* opinion. *See, e.g., FCC v. Pacifica Foundation: Appendix to Opinion* (visited Sept. 26, 1997) <<http://homepage.interaccess.com/~driscoll/fcc-2a.html>>. Because the Appendix contains a verbatim transcript of the monologue found by the FCC to be indecent, presumably the Appendix would be subject to prosecution under the Act. Yet it seems strange to criminalize the dissemination of the opinions of the Supreme Court via the Internet, even if the opinions contain profane language.

<sup>51</sup> *See Reno*, 117 S. Ct. at 2344.

<sup>52</sup> *Id.* at 2334.

<sup>53</sup> *See* Transcript of Oral Argument, *Reno* (No. 96-511), available in 1997 WL 136253, at \*48-49 (Mar. 19, 1997).

<sup>54</sup> *See Reno*, 117 S. Ct. at 2353 (O'Connor, J., concurring in the judgment in part and dissenting in part) (noting that her opinion dealt with issues "[a]s applied to the Internet as it exists in 1997").

scarcity and the history of regulation, it may eventually determine that its ruling on “invasiveness” is obsolete.

In granting the Internet unqualified First Amendment protection, the Court abandoned its traditionally cautious approach when confronted with new forms of media. In 1915, when the motion-picture industry was in its infancy, the Court brushed aside the argument that film should be entitled to First Amendment protection.<sup>55</sup> The Court did not reconsider this position for nearly four decades.<sup>56</sup> Even though movies are now within the ambit of the First Amendment, they are still subject to greater prior restraint of their distribution than are the print media,<sup>57</sup> although the Court has never “articulat[ed] why movies are different from books in any important respect.”<sup>58</sup>

Similarly, courts were reluctant to extend the full protections of the First Amendment to radio.<sup>59</sup> In 1932, a federal appellate court held that refusing to renew the license of a controversial radio broadcaster was “neither censorship nor previous restraint,” and that the broadcaster “may continue to indulge his strictures upon the characters of men in public office[,] . . . but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes . . . except in subordination to all reasonable rules and regulations Congress . . . may prescribe.”<sup>60</sup> Thus, the court affirmed a decision to allocate a broadcasting license on the basis of political criteria. The Supreme Court subsequently affirmed other restrictions on broadcasting under the “scarcity” rationale.<sup>61</sup> The Court eventually

<sup>55</sup> See *Mutual Film Corp. v. Industrial Comm’n*, 236 U.S. 230, 243–44 (1915) (“We immediately feel that the argument is wrong . . . which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.”), *overruled in part* by *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Although the Court’s opinion in *Mutual Film* also seemed to deny First Amendment protection to older forms of expression, such as theater, it is likely that the ease of censoring movies, which can be viewed in final form before public display is permitted, made them an easier medium to censor. Further, the Court seemed to draw a distinction between motion pictures and other media. See *id.* at 244 (referring to motion pictures’ greater capacity for evil “because of their . . . manner of exhibition”).

<sup>56</sup> See *Joseph Burstyn*, 343 U.S. at 502.

<sup>57</sup> See *Freedman v. Maryland*, 380 U.S. 51, 60–61 (1965) (sustaining against First Amendment challenge the requirement that a film be submitted to a censor before distribution, and noting that, although such a scheme might not be acceptable for books, it would be for films because “films differ from other forms of expression”).

<sup>58</sup> Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 23–24 (1976).

<sup>59</sup> See Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 267–68 (1994).

<sup>60</sup> *Trinity Methodist Church, South v. Federal Radio Comm’n*, 62 F.2d 850, 853 (D.C. Cir. 1932).

<sup>61</sup> The classic statement of this rationale for the validity of restrictions on radio broadcasting under the First Amendment is set forth in *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).



decided that broadcasting was protected under the First Amendment, but "at a lower level than . . . 'traditional' media."<sup>62</sup>

The Court's decision in *Reno* marks a welcome departure from this practice. One scholar has aptly described the problem with early decisions determining the rules that apply to a new technology: "Technical laymen, such as judges, perceive the new technology in that early, clumsy form, which then becomes their image of its nature, possibilities, and use. This perception is an incubus on later understanding."<sup>63</sup> Justice Souter recently articulated a similar concern.<sup>64</sup> Because the Internet is rapidly changing, the need to prevent the ossification of the rules that will control its use in the future is even stronger: indeed, the "facts" found by the district court in 1996 might not accurately reflect the nature of the Internet today or tomorrow.<sup>65</sup>

Several already ongoing technological developments may affect the Court's conclusions regarding whether the Internet can be constitutionally regulated. The Internet is increasingly becoming more akin to radio and television.<sup>66</sup> For example, through the development of "push" technology, it can now carry "television-like channels to broadcast news, software and corporate information directly to users' computers."<sup>67</sup> In addition, the Internet is rapidly becoming the venue for a convergence of different types of media.<sup>68</sup> The beginnings of this convergence can be seen in the use of "streaming" technology to broadcast live audio and video over the Internet.<sup>69</sup> The resulting transformation of the Internet "into a real broadcast medium like television"<sup>70</sup> might lead to greater regulation of the Internet being seen as necessary. Perhaps because of developments like these, the Court has left itself space to allow the government to impose the sorts of regulations normally

<sup>62</sup> *Corn-Revere*, *supra* note 59, at 267 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), and *National Broad. Co.*, 319 U.S. at 192).

<sup>63</sup> ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 7 (1983).

<sup>64</sup> See *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374, 2402 (1996) (Souter, J., concurring) ("In my own ignorance I have to accept the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.'" (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 *YALE L.J.* 1743, 1745 (1995))).

<sup>65</sup> See Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 *EMORY L.J.* 869, 904 (1996); Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 *HARV. J.L. & TECH.* 113, 120-21 (1996).

<sup>66</sup> This concern is likely only to be aggravated by the use of television sets to surf the Internet through digital technology. See David Bank & Dean Takahashi, *Microsoft Plans Big Digital-TV Push, Stressing Hardware and Programming*, *WALL ST. J.*, Apr. 16, 1997, at B2.

<sup>67</sup> David Bank, *Microsoft Moves To Standardize Creation of Internet Channels To Broadcast News*, *WALL ST. J.*, Mar. 12, 1997, at B7.

<sup>68</sup> Professor de Sola Pool predicted this many years ago, presciently noting that "[a] single physical means . . . may carry services that in the past were provided in separate ways." DE SOLA POOL, *supra* note 63, at 23.

<sup>69</sup> See Denise Caruso, *The Puzzle of Making the Internet into a Competitive Broadcast Medium*, *N.Y. TIMES*, Feb. 10, 1997, at D5.

<sup>70</sup> *Id.*

applied to broadcast stations on a “radio station” or “television station” that “broadcasts” solely over the Internet<sup>71</sup> through “push” or “streaming” technology, even though it does not broadcast over the airwaves.<sup>72</sup> By suggesting that speech restrictions would be upheld under strict scrutiny if no equally effective alternatives to legislation such as the CDA existed,<sup>73</sup> and by referring to “regulating some portions of the Internet . . . differently than others” as being a less restrictive alternative to the CDA, the Court renders differential regulations of various forms of communication on the Internet more plausible.<sup>74</sup>

This concern is exacerbated by the Court’s indeterminate jurisprudence of “pervasiveness” and “invasiveness,” which originated in *Pacifica*.<sup>75</sup> In *Sable Communications, Inc. v. FCC*, which limited *Pacifica*’s reach, the Court noted *Pacifica*’s use of the term “pervasive,” but instead focused on the lack of “invasiveness” of dial-a-porn.<sup>76</sup> Seven years later, although the Court had rejected the “scarcity” rationale as a justification for content-based regulation of cable broadcasting,<sup>77</sup> a plurality of the Court relied partly on the “pervasiveness” of cable broadcasting to uphold a content-based statutory provision.<sup>78</sup> Finally, in striking down the CDA, the *Reno* Court did not broach the question whether the Internet was “pervasive,” instead noting merely that it was “not as ‘invasive’ as radio or television.”<sup>79</sup> The Court has yet to indicate whether there is a legal (or real) difference between a medium’s “invasiveness” and its “pervasiveness,” but the constitutional acceptability of content-based regulation of the media appears to rest heavily on this question. Although the “pervasiveness” of a medium might not be the best inquiry to determine whether or not it is regulable,<sup>80</sup> the Court seems to take it into account in its

<sup>71</sup> Cf. *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916, 922 (S.D.N.Y. 1996) (noting that the plaintiff was “editor, publisher, and part-owner of a newspaper distributed exclusively through electronic means”).

<sup>72</sup> Cf. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding FCC regulation of cable television to the extent “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting”).

<sup>73</sup> See Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. (forthcoming).

<sup>74</sup> *Reno*, 117 S. Ct. at 2348.

<sup>75</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans.”).

<sup>76</sup> See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (“Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to dial-a-porn services is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.”).

<sup>77</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637–39 (1994).

<sup>78</sup> See *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374, 2386 (1996) (plurality opinion) (“Cable television systems, including access channels, ‘have established a uniquely pervasive presence in the lives of all Americans.’” (quoting *Pacifica*, 438 U.S. at 748)).

<sup>79</sup> *Reno*, 117 S. Ct. at 2343.

<sup>80</sup> See DE SOLA POOL, *supra* note 63, at 134 (“This aberrant approach could be used to justify quite radical censorship.”).

constitutional calculus. Given the rapidly changing nature of the Internet, it is possible that the Internet could eventually become "pervasive" enough to be constitutionally regulable.<sup>81</sup>

Another key factor in the Court's decision to grant full First Amendment protection to the Internet may have been its perception that the Internet is a tool for democracy, rather than a playground for media giants.<sup>82</sup> Many scholars would agree that providing full First Amendment protection to a medium that allows many to speak, rather than providing information offered only by a few well-financed sources, serves First Amendment "values."<sup>83</sup> As long as the Internet continues to provide an outlet for the speech of the masses, as well as for that of large corporations, public debate will flourish, and the state need not intervene in the speech market.<sup>84</sup>

Finally, the Internet has the potential to be subject to democratic ordering principles. Currently, the world of cyberspace is being transformed "from a relatively unzoned place to a universe that is extraordinarily well zoned."<sup>85</sup> The development of protocols like the Platform for Internet Content Selection<sup>86</sup> will allow different organizations to rate Internet sites: if such protocols are made available on standard browser software, as seems likely, the problem of exposing children to indecency would be eliminated. Further, the development of effective software filters for new technologies could counter any problems arising from new technologies such as "push": if no indecency can be

<sup>81</sup> Although the Court has not given a test for determining when either of the two is true, one might assume that "pervasiveness" regards the number of people who use the Internet, and "invasiveness" regards the capability or likelihood that the medium will broadcast content that is undesired by the user. The rapid growth of the Internet could increase its pervasiveness; the development of technologies like "push," its invasiveness. However, it remains unclear why only certain types of media can be invasive or pervasive; the Court has never hinted that a newspaper or other printed publication could fall into this category, or explained why the relevant inquiry should not focus on the availability of indecent material to children who seek it out.

<sup>82</sup> See *Reno*, 117 S. Ct. at 2344 ("[A]ny person . . . can become a town crier . . . [or] a pamphleteer."). In contrast, the Court has upheld restrictions on First Amendment rights to communicate indecent speech in the context of areas dominated by large corporations, like cable programming, see *Denver Area*, 116 S. Ct. at 2385-86, or radio broadcasters, see *FCC v. Pacifica Found.*, 438 U.S. 726, 750-51 (1976).

<sup>83</sup> For a description of the benefits that flow from the public's having greater control over speech and information, see Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1833-43 (1995). Although participation by the general public may seem to be a beneficial feature of the Internet, the government appeared to disagree in its brief. See Brief for Appellants at 29, *Reno* (No. 96-511), available in 1997 WL 32931 ("Because millions of people disseminate information on the Internet without the intervention of editors, network censors, or market disincentives, the indecency problem on the Internet is much more pronounced than it is on broadcast stations.").

<sup>84</sup> See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 73 (1991) ("[T]he public stands at the top and broadcasters at the bottom. The state, in the middle, executes the will of the people to insure that broadcasters provide adequate service to the realm of public debate . . .").

<sup>85</sup> Lessig, *supra* note 65, at 888-89.

<sup>86</sup> See *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916, 932 (S.D.N.Y. 1996); Nesson & Marglin, *supra* note 65, at 124.

“pushed” to a computer because of effective filtering; the media would be no more invasive or pervasive than it was before the development of “push” technology. Such a reordering could settle the problem of Internet indecency without requiring government intervention.<sup>87</sup>

Although it might be true, as some have claimed, that the Court’s decision in *Reno* represents the “legal birth certificate for the Internet,”<sup>88</sup> the Internet’s continued vitality may in some ways depend on whether it retains its unique nature.<sup>89</sup> In noting that the Internet was not as “invasive” as radio or television, the Court emphasized the finding of the district court that “communications over the Internet do not . . . appear on one’s computer screen unbidden.”<sup>90</sup> However, even if the dominant form of communication over the Internet changes, the Internet should still be granted the same level of First Amendment protection. If it has the chance to clarify the issue, the Court should finally discard the “invasive/pervasive” test for the acceptability of governmental regulation of speech on the ground that it is irreconcilable with First Amendment tradition.

4. *Speech Restrictions — Floating Buffer Zones.* — In recent years, abortion protestors have chosen increasingly forceful and violent methods for expressing their opposition to abortion, methods that have extended well beyond traditional demonstrating, picketing, and lobbying.<sup>1</sup> The escalating violence of anti-abortion protests has forced abortion rights advocates to turn to Congress and to the courts for protection.<sup>2</sup> However, government responses to these requests for protec-

<sup>87</sup> The government suggested that this could be a possible solution, but that the industry could be prodded into developing such technology faster if the CDA were left standing. See Brief for Appellants at 38, *Reno* (No. 96-511), available in 1997 WL 32931. The district court rejected this suggestion explicitly, see *ACLU v. Reno*, 929 F. Supp. 824, 857 (E.D. Pa. 1996) (opinion of Sloviter, C.J.) (“I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology to cabin the reach of the statute within constitutional bounds.”), and the Supreme Court rejected it implicitly. Ironically, it has been suggested that the use of such protocols could support the creation of a constitutional version of the CDA. See Lesig, *supra* note 65, at 893–94.

<sup>88</sup> Steven Levy with Karen Breslau, *On the Net, Anything Goes*, NEWSWEEK, July 7, 1997, at 28, 28 (quoting Bruce Ennis) (internal quotation marks omitted).

<sup>89</sup> Cf. *ACLU*, 929 F. Supp. at 876 n.19 (opinion of Dalzell, J.) (“[T]he assaultive nature of television is quite absent in Internet use. . . . [S]exually explicit content [may be] a few clicks of a mouse away from the user, but there is an immense legal significance to those few clicks.” (citation omitted)).

<sup>90</sup> *Reno*, 117 S. Ct. at 2343 (quoting *ACLU*, 929 F. Supp. at 844) (internal quotation marks omitted).

<sup>1</sup> See H.R. REP. NO. 103-306, at 700–07 (1994) (describing the “dramatically escalating violence” directed at women’s health clinics in a “nationwide campaign of blockades, invasions, vandalism, threats and other violence”); Kevin Johnson & Lori Sharn, *Abortion War Still Explosive*, USA TODAY, Jan. 23, 1997, at A1 (stating that, since 1982, 183 abortion clinics have been bombed or burned in the United States).

<sup>2</sup> See, e.g., Freedom of Access to Clinic Entrances Act (FACE) of 1994, 18 U.S.C. § 248 (1994) (providing civil and criminal penalties for the use of force or the threat of force to injure, intimi-

tion raise concerns about the First Amendment rights of abortion protestors, especially with regard to court-ordered injunctions.

Last Term, in *Schenck v. Pro-Choice Network*,<sup>3</sup> the Supreme Court again reviewed a lower court injunction against anti-abortion demonstrators and revisited its recent decision in *Madsen v. Women's Health Center, Inc.*<sup>4</sup> Applying *Madsen*, the Court upheld the use of fifteen-foot "fixed" buffer zones, which ensure access to abortion clinics, and a "cease and desist" provision, which protects patients and staff from harassment by so-called "sidewalk counselors."<sup>5</sup> However, the Court struck down the use of "floating" buffer zones, which surround individuals as they enter and exit clinics, because of the risk that such zones might burden more speech than necessary for the purposes of an injunction.<sup>6</sup> The Court deserves credit for clarifying the nature of the review of injunctions obtained under *Madsen*, and for striking the proper balance between the need to protect access to abortion services and the free speech rights of protestors; however, the Court ultimately failed to articulate explicitly a clear First Amendment principle to support its conclusion and to guide lower courts in issuing injunctions in situations in which harassing, abusive conduct may alter First Amendment rights.

In September of 1990, Pro-Choice Network of Western New York and several other parties filed a complaint against fifty individuals and three anti-abortion organizations in the Western District of New York.<sup>7</sup> The complaint asserted seven causes of action against the defendants for obstructionist protest activities and requested a preliminary injunction.<sup>8</sup> After several months of hearings, the district court granted the injunction.<sup>9</sup> The district court found that the defendants' methods of protest increased the health risks to patients entering the clinic by causing severe distress, anxiety, and delays in medical care.<sup>10</sup> Further,

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date, or interfere with persons seeking or providing reproductive health services); *United States v. Scott*, 958 F. Supp. 761, 782 (D. Conn. 1997) (upholding the constitutionality of FACE and granting an injunction against anti-abortion protestors).

<sup>3</sup> 117 S. Ct. 855 (1997).

<sup>4</sup> 512 U.S. 753 (1994). Interestingly, the Court granted certiorari in *Schenck* in the absence of any circuit conflict, as *Schenck* was the first circuit decision to apply *Madsen*. See Deborah A. Ellis & Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors' First Amendment Rights in Schenck v. Pro-Choice Network*, 62 BROOK. L. REV. 547, 551 (1996).

<sup>5</sup> *Schenck*, 117 S. Ct. at 868-70.

<sup>6</sup> See *id.* at 866-68.

<sup>7</sup> See *Pro-Choice Network v. Project Rescue W. N.Y.*, 799 F. Supp. 1417, 1421-22 (W.D.N.Y. 1992).

<sup>8</sup> See *id.* at 1422. The first cause of action alleged that the defendants had violated 42 U.S.C. § 1985(3) by conspiring "to deny women seeking abortion or family planning services the equal protection of the laws and the equal privileges and immunities of national citizenship." *Id.* The remaining six causes of action rested on New York law. See *id.*

<sup>9</sup> See *id.* at 1440.

<sup>10</sup> See *id.* at 1427-28.

the court determined that the plaintiffs would likely succeed on their allegation that the defendants had conspired to deprive women of their constitutional rights to travel and to choose to have an abortion.<sup>11</sup> The district court's injunction prohibited "demonstrating within fifteen feet from . . . doorways or doorway entrances, parking lot entrances, driveways and driveway entrances . . . , or within fifteen feet of any person or vehicle seeking access to or leaving" the medical facilities.<sup>12</sup> However, the court permitted two anti-abortion "sidewalk counselors" to position themselves within the fifteen-foot boundaries, but only for "conversation[s] of a nonthreatening nature," and only if the counselors agreed to "cease and desist" when the person to be counseled wished to walk away.<sup>13</sup> In an effort to ensure that the injunction would not violate the First Amendment rights of the protestors, the district court reviewed the provisions under the conventional time, place, and manner standard and found that the injunction was constitutional.<sup>14</sup>

While the case was on appeal to the Second Circuit,<sup>15</sup> the Supreme Court decided *Madsen v. Women's Health Center, Inc.*, which created a new standard of First Amendment scrutiny for content-neutral injunctions that restrict expressive activity.<sup>16</sup> Under *Madsen*, this new, more rigorous test for upholding a content-neutral injunction is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."<sup>17</sup> Applying *Madsen*, a divided panel of the Second Circuit reversed the district

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<sup>11</sup> See *id.* at 1429–31. The court based its assessment on *New York State National Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), which held that women seeking abortions constitute a protected class for § 1985(3) purposes. See *Pro-Choice Network*, 799 F. Supp. at 1429.

<sup>12</sup> *Pro-Choice Network*, 799 F. Supp. at 1440.

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* at 1432–37. Restrictions on the time, place, and manner of expression must be content-neutral and narrowly tailored to serve a significant government interest and must leave open ample alternative channels for communication. See *id.* at 1432 (citing *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

<sup>15</sup> During the pendency of an earlier appeal, the Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), which held that women seeking abortions did not constitute a protected class under § 1985(3), and thus overturned *Terry*. See *id.* at 269. Project Rescue then stipulated to a dismissal of the appeal from the preliminary injunction and moved to have the district court dismiss the complaint and vacate the injunction. See *Pro-Choice Network v. Project Rescue W. N.Y.*, 828 F. Supp. 1018, 1020 (W.D.N.Y. 1993). The district court dismissed *Pro-Choice Network's* § 1985(3) complaint with leave to amend but denied Project Rescue's motion to vacate the preliminary injunction. See *id.* Project Rescue then appealed again from the district court's denial of the motion to vacate. See *Pro-Choice Network v. Schenck*, 67 F.3d 359, 366 (2d Cir. 1994).

<sup>16</sup> See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

<sup>17</sup> *Id.* at 765. The Court's concern that the traditional time, place, and manner analysis was "not sufficiently rigorous" for analyzing content-neutral *injunctions* stemmed primarily from its belief that "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances." *Id.* at 764–65.

court's decision.<sup>18</sup> The Second Circuit later reheard the case en banc and affirmed the district court's decision in two separate opinions.<sup>19</sup>

The Supreme Court affirmed in part and reversed in part and remanded the case for further proceedings.<sup>20</sup> In an opinion by Chief Justice Rehnquist,<sup>21</sup> the Court applied the *Madsen* test and found that the combined interests in ensuring public safety, promoting the free flow of traffic, protecting property rights, and protecting a woman's right to seek pregnancy-related services were "certainly significant enough to justify an appropriately tailored injunction."<sup>22</sup> With these interests in mind, the Court struck down the floating buffer zones around individuals and vehicles, but upheld the injunction's fifteen-foot fixed buffer zones around clinic entrances and driveways and the cease and desist provision governing those zones.<sup>23</sup>

With regard to the floating buffer zones, the Court recognized that the record displayed a history of "physically abusive conduct" by the protestors, but it also emphasized that the floating zones around individuals prevented leafleting and normal conversation on public sidewalks, forms of communication and a location for communication that "lie at the heart of the First Amendment."<sup>24</sup> The Court further stressed that the floating nature of the buffer zone produced a "lack of certainty" that "[led] to a substantial risk that much more speech [would] be burdened than the injunction by its terms prohibit[ed]."<sup>25</sup> Declining to decide whether any situation would ever justify a zone of separation between protestors and individuals entering clinics, the Court maintained that, "because this broad prohibition on speech 'float[ed],' it [could not] be sustained on this record."<sup>26</sup>

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<sup>18</sup> See *Pro-Choice Network*, 67 F.3d at 374.

<sup>19</sup> See *Pro-Choice Network v. Schenck*, 67 F.3d 377 (2d Cir. 1995) (en banc). The Second Circuit, en banc, considered only whether the 15-foot buffer zones and the cease and desist provision impermissibly infringed the anti-abortion activists' right to freedom of speech. See *id.* at 386. Judge Oakes argued that the two provisions burdened no more speech than necessary to protect significant government interests. See *id.* at 387. Judge Winter, concurring, emphasized the broader principle that "coercive or obstructionist conduct is not protected by the First Amendment in any forum and regardless of the nature of the audience." *Id.* at 397 (Winter, J., concurring).

<sup>20</sup> See *Schenck*, 117 S. Ct. at 871.

<sup>21</sup> The Chief Justice was joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer in upholding the fixed buffer zones and the cease and desist provision. Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg joined the Chief Justice in striking down the floating buffer zones.

<sup>22</sup> *Schenck*, 117 S. Ct. at 866.

<sup>23</sup> See *id.* at 859.

<sup>24</sup> *Id.* at 867.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* The Court also struck down floating buffer zones around vehicles, on the ground that nothing in the record supported the notion that a less restrictive injunction would be insufficient. See *id.* at 868.

The Court upheld the fixed buffer zones, however, on the ground that such zones were necessary to allow patients and staff to access the clinics.<sup>27</sup> In making its assessment, the Court underscored that this need for protection stemmed from the demonstrators' obstructionist protest methods, which figured prominently in the record.<sup>28</sup> The Court further noted that the protestors' harassment of the police prevented local officials from providing adequate protection to clinic patients and staff.<sup>29</sup>

Finally, the Court addressed the constitutionality of the cease and desist provision.<sup>30</sup> The majority rejected the district court's rationale for the provision — that it was intended "to protect the right of the people approaching and entering the facilities to be left alone."<sup>31</sup> The Court emphasized that there exists no generalized right "to be left alone" on public streets.<sup>32</sup> However, the Court explained that the district court had created the exception for two "sidewalk counselors" in order to enhance the protestors' speech rights, and therefore decided to analyze the provision in that light.<sup>33</sup> The Court held that the provision was content-neutral and appropriate under the circumstances, as the cease and desist condition was "the result of [the protestors'] own previous harassment and intimidation of patients."<sup>34</sup>

As in *Madsen*, Justice Scalia, joined by Justices Kennedy and Thomas, filed a sharply worded opinion concurring in part and dissenting in part.<sup>35</sup> Justice Scalia claimed that the Court's reasoning made "a destructive inroad upon First Amendment law" and "a destructive inroad upon the separation of powers."<sup>36</sup> First, Justice Scalia denounced the Court for upholding the fixed buffer zones and the cease and desist provision.<sup>37</sup> Analyzing the language of the district court's opinion and the text of the injunction, Justice Scalia argued that the district court had clearly granted these protections based on a

<sup>27</sup> *See id.*

<sup>28</sup> *See id.* at 868–69. The Court described the aggressive techniques used by the protestors, techniques that included "follow[ing] and crowd[ing] people right up to the doorways of clinics (and sometimes beyond) and then tend[ing] to stay in the doorways, shouting at the individuals who had managed to get inside." *Id.* at 868.

<sup>29</sup> *See id.* at 868–69.

<sup>30</sup> *See id.* at 870.

<sup>31</sup> *Id.* (quoting *Pro-Choice Network v. Project Rescue W. N.Y.*, 799 F. Supp. 1417, 1435 (W.D.N.Y. 1992)) (internal quotation marks omitted).

<sup>32</sup> *Id.*

<sup>33</sup> *See id.* The Court stated that, because the district court could have banned all protestors from the protected zone based on the record, the court's "extra effort to enhance defendants' speech rights by allowing an exception to the fixed buffer zone should not redound to the detriment of respondents." *Id.* at 869 n.11.

<sup>34</sup> *Id.* at 870.

<sup>35</sup> *See id.* at 871–75 (Scalia, J., concurring in part and dissenting in part).

<sup>36</sup> *Id.* at 875.

<sup>37</sup> *See id.* at 871–72.



nonexistent “right to be left alone.”<sup>38</sup> He criticized the Court for ignoring this underlying rationale, which would have made both protections invalid, and for offering its own speculation regarding what the district court might have considered.<sup>39</sup> He also questioned the “relevance” of the Court’s assertion that allowing two “sidewalk counselors” within the buffer zone was an attempt by the district court to enhance the protestors’ speech rights and attacked the idea that the cease and desist provision should be evaluated “in that light.”<sup>40</sup> Justice Scalia emphasized that, “[i]f our First Amendment jurisprudence has stood for anything, it is that courts have *an obligation* ‘to enhance speech rights,’ and *a duty* to ‘bend over backwards to ‘accommodate’ speech rights.’”<sup>41</sup>

Second, Justice Scalia claimed that the Court had raised separation of powers concerns by relying on a “public safety” rationale; he argued that public safety judgments belong only to the Executive Branch, not to the courts.<sup>42</sup> Disagreeing with the Court’s assertion that public order, even when not an explicit concern of the plaintiffs, is a sufficient interest to uphold an injunction restricting speech, Justice Scalia declared that to follow this line of reasoning would mean that “[e]very private suit [would make] the district judge a sort of one-man Committee of Public Safety.”<sup>43</sup>

Although the Court clarified certain issues that *Madsen* left open, and struck the correct balance between the interests of women seeking pregnancy-related medical care and the interests of anti-abortion protestors, the Court bypassed an opportunity to establish explicitly a broader underlying First Amendment principle to support its result. On the positive side, the *Schenck* Court resolved some questions regarding the review of injunctions obtained under *Madsen*. The Court’s statement in *Madsen* that the failure of a prior, narrower injunction to protect clinic access should be considered in evaluating the constitutionality of the broader injunction being challenged<sup>44</sup> led some courts and commentators to believe that an earlier non-speech-

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<sup>38</sup> *Id.* at 872–73.

<sup>39</sup> *See id.*

<sup>40</sup> *Id.* at 873.

<sup>41</sup> *Id.* (quoting *Schenck*, 117 S. Ct. at 868–69 n.11).

<sup>42</sup> *See id.* at 875.

<sup>43</sup> *Id.* at 874–75. Justice Breyer, in a sole dissent from the Court’s rejection of floating buffer zones, claimed that it was not necessary to decide “the law of ‘floating bubbles’” because it was unclear how that aspect of the injunction would actually apply. *Id.* at 878 (Breyer, J., concurring in part and dissenting in part). In reviewing the lower court decisions and oral arguments, Justice Breyer found that neither the district court nor the Second Circuit panel had ever properly addressed the issue of a “floating” buffer zone. *See id.* at 875–77. He argued that the Court should have followed ordinary principles of judicial administration by first allowing the district court to determine the practical implementation and the constitutionality of floating bubbles on a case-by-case basis. *See id.* at 878.

<sup>44</sup> *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 770 (1994).

restrictive injunction was a *requirement* for the constitutionality of a broader injunction.<sup>45</sup> The *Schenck* Court quickly dismissed this contention by stating that prior injunctions are merely an additional “consideration,” not a necessity under the *Madsen* standard.<sup>46</sup> The Court’s analysis also emphasized the fact-based nature of the *Madsen* inquiry and the importance of evaluating the factual record.<sup>47</sup>

In addition to clarifying these factual points, the Court in *Schenck* also struck a sensible balance between the rights of protestors and the rights of women seeking abortion services. The unique difficulty with implementing buffer zones is that their nature as a “prophylactic measure”<sup>48</sup> precludes both protected and unprotected speech within the zone.<sup>49</sup> The Court admirably dealt with this problematic issue by allowing the use of preventive measures only when they are proven to be factually necessary.<sup>50</sup> As the Court recognized,<sup>51</sup> the types of tactics that anti-abortion protestors employ often render traditional legal remedies moot.<sup>52</sup> Post-injury remedies are frequently an ineffective and inadequate measure of protection, especially in light of the physical harm that can result to clinic patients from protestors’ tactics.<sup>53</sup> In *Schenck*, the repeated acts of obstruction and the inability of law enforcement to create safe access to the clinics without the buffer zones

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<sup>45</sup> See, e.g., Ellis & Wu, *supra* note 4, at 574; Mathew D. Staver, *Injunctive Relief and the Madsen Test*, 14 ST. LOUIS U. PUB. L. REV. 465, 492 (1995).

<sup>46</sup> See *Schenck*, 117 S. Ct. at 869.

<sup>47</sup> See *id.* at 868–69 (rejecting the petitioners’ arguments at several points because the arguments “ignore[d] the record in this case”).

<sup>48</sup> *Id.* at 869.

<sup>49</sup> See James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 533 (1996). Weinstein discusses a city ordinance that created bubble zones around health care facilities. He predicts that this type of ordinance “will effectively curb those anti-abortion protestors who want to get close to women entering abortion clinics to shout epithets at them.” *Id.* However, the “problem is that it will also impede anti-abortion activists who want to engage in quiet, civil conversation.” *Id.*

<sup>50</sup> See *Schenck*, 117 S. Ct. at 868–69.

<sup>51</sup> The Court repeatedly referred to the protestors’ violent and intimidating methods, such as “getting very close to women entering the clinics and shouting in their faces; surrounding, crowding, and yelling at women entering the clinics; [and] jostling, grabbing, pushing, and shoving women as they attempted to enter the clinics.” *Id.* at 860. The Court also emphasized that the protestors would not allow the patients or staff to avoid the unwanted speech and conduct, and noted that, during the so-called sidewalk counseling, “if the women continued toward the clinics and did not respond positively to the counselors, . . . peaceful efforts at persuasion often devolved into ‘in your face’ yelling, and sometimes into pushing, shoving, and grabbing.” *Id.*

<sup>52</sup> See H.R. REP. NO. 103-306, at 707 (1994) (describing the failure of existing legal remedies to provide adequate protection to patients and staff); Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1872 (1988) (stating that, “even under trespass, assault, or blocking ordinances, protestors legally could chase patients down sidewalks and into the streets, shouting within inches of their ears”).

<sup>53</sup> See H.R. REP. NO. 103-306, at 703-07 (1994); Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-abortion Protests — Section II*, 29 U.C. DAVIS L. REV. 1163, 1192-95 (1996).

made "a prophylactic measure . . . even more appropriate."<sup>54</sup> Because prior history ruled out more specifically tailored remedies, the Court correctly concluded that fixed buffer zones were necessary to provide adequate protection to clinic patients and staff.

The Court's rejection of floating buffer zones was also consistent with the principle of restricting the use of prophylactic remedies to instances in which they are demonstrably necessary. The Court expressed concern that, although floating zones would prevent the established pattern of abusive conduct, too much protected speech would also be lost.<sup>55</sup> Arguably, the fixed buffer zones preclude as much protected and unprotected speech as the floating buffers do *within the zone*. However, the difference with the floating buffers in this case was that "there may well [have been] other ways" to provide the required protection without creating uncertainty regarding the limits of the zone.<sup>56</sup> In other words, the floating buffers were likely more restrictive than necessary based on the record, and therefore not a permissible prophylactic measure.<sup>57</sup> By underscoring the requirement that zones of separation be proven necessary, the Court sensibly balanced the right of demonstrators to communicate their message peacefully and the right of women to safe access to abortion services.

However, the fact-specific nature of the Court's inquiry leaves unclear how narrowly or broadly it will construe "necessity" when lower courts grant prophylactic measures in future cases. Although case-by-case, fact-based analysis may be the best method for judging content-neutral speech-restrictive injunctions, a clear underlying principle is still necessary to provide guidance to lower courts and to place some limits on judicial interpretation. Neither *Madsen* nor *Schenck* specify explicitly what guiding First Amendment principle lower courts should apply when deciding whether to grant speech-restrictive injunctions.<sup>58</sup> Although it emphasized the importance of facts, the *Schenck* Court provided little direction to lower courts about how to interpret facts,<sup>59</sup>

<sup>54</sup> *Schenck*, 117 S. Ct. at 869. Citing *Burson v. Freeman*, 504 U.S. 191 (1992), the Court emphasized the need for a blanket measure. See *Schenck*, 117 S. Ct. at 869. *Burson* upheld 100-foot "no campaign" zones around polling places because "[i]ntimidation and interference laws . . . 'deal with only the most blatant and specific attempts' to impede elections." *Burson*, 504 U.S. at 206-07 (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)).

<sup>55</sup> See *Schenck*, 117 S. Ct. at 867.

<sup>56</sup> *Id.* at 867-68.

<sup>57</sup> See *id.* The Court's rejection of Justice Breyer's argument concerning the appropriateness of ruling on the constitutionality of the floating buffer zones suggests that the Court is unwilling to wait for a prophylactic measure to be proven unnecessary before rejecting the measure. Rather, the proponents of the injunctive measure bear the burden of establishing its necessity in the first instance.

<sup>58</sup> Cf. Tracy S. Craige, Note, *Abortion Protest: Lawless Conspiracy or Protected Free Speech?*, 72 DENV. U. L. REV. 445, 473-74 (1995) (stating that *Madsen* provides no guiding principle for lower courts).

<sup>59</sup> See *Schenck*, 117 S. Ct. at 869 (stating that the defendants' conduct "was indeed extraordinary" based on the record, but providing no specific comparisons to the record in *Madsen*).

and therefore created the risk that courts will grant either too much or too little protection to women seeking reproductive health services.<sup>60</sup> In contrast, the en banc Court of Appeals' concurring opinion stated expressly the broader underlying principle that the "First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs."<sup>61</sup> That language removes anything "that cannot be fairly described as an attempt at peaceful persuasion"<sup>62</sup> from First Amendment protection altogether.<sup>63</sup>

In *Schenck*, the Court only implicitly expressed a similar idea, although one not as broad in scope. In its brief discussion of the cease and desist provision, the Court suggested that the use of "harassment and intimidation," even in a traditional public forum and even without the captive audience doctrine, may not receive full First Amendment protection.<sup>64</sup> Normally, forcing proximity in order to convey a message — placing oneself physically close to an unwilling audience — could be considered protected expression.<sup>65</sup> For example, the abortion protestors' "sidewalk counseling" could be described as expressive conduct, because their forceful methods are related to the fervor of their message.<sup>66</sup> However, the Court held that, because of the protestors' "previous harassment and intimidation of patients," the protestors lost their right to condition-free expression within the fifteen-foot zone.<sup>67</sup> Implicitly then, physical harassment and intimidation as means of political expression can be subjected to a limited amount of state regulation.

This underlying idea in *Schenck* — that physical harassment and intimidation may not receive full First Amendment protection — is not in itself a "destructive inroad upon First Amendment law."<sup>68</sup> In general, the First Amendment does protect the right of citizens to communicate even to unwilling listeners,<sup>69</sup> especially in such tradi-

<sup>60</sup> Cf. Weinstein, *supra* note 49, at 485 (stating that "cases involving anti-abortion protests are prime candidates for judicial viewpoint discrimination").

<sup>61</sup> *Pro-Choice Network v. Schenck*, 67 F.3d 377, 394 (2d Cir. 1995) (en banc). Similarly, in *Madsen*, Justice Stevens argued that the First Amendment does not grant "an unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 781 (1994) (Stevens, J., concurring in part and dissenting in part).

<sup>62</sup> *Pro-Choice Network*, 67 F.3d at 396.

<sup>63</sup> See Ellis & Wu, *supra* note 4, at 570.

<sup>64</sup> *Schenck*, 117 S. Ct. at 870. The Court noted in a footnote that it need not decide whether the captive audience doctrine was implicated here because that doctrine only applied to patients inside the clinic. See *id.* at 866 n.8.

<sup>65</sup> See Note, *supra* note 52, at 1859–62.

<sup>66</sup> See *id.*

<sup>67</sup> *Schenck*, 117 S. Ct. at 870.

<sup>68</sup> *Id.* at 875 (Scalia, J., concurring in part and dissenting in part).

<sup>69</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 322 (1988) (stating that "in public debate . . . citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate 'breathing

tional public fora as streets and sidewalks.<sup>70</sup> However, the Court has also recognized that, when listeners' interests in privacy and autonomy are particularly salient, the rights of these listeners must also be considered. For example, the Court grants special protection to the home environment<sup>71</sup> and to "captive audiences,"<sup>72</sup> situations in which individuals cannot easily walk away or merely "avert[] their eyes."<sup>73</sup> Furthermore, the Court has previously upheld carefully tailored speech-restrictive injunctions when a showing was made of repeated acts of violence and threats of future violence or obstruction associated with the expression.<sup>74</sup> In fact, conduct that is intended to, and that actually does, prevent access to buildings receives no First Amendment protection.<sup>75</sup> Just as obscene or threatening expression can categorically be governmentally regulated,<sup>76</sup> precise regulation of protests that pass a certain threshold of abusive conduct is consistent with First Amendment law.<sup>77</sup> The Court could have expressly formulated a guiding principle for lower courts based on these precedents.

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space' to the freedoms protected by the First Amendment" (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

<sup>70</sup> See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) (stating that "the streets are natural and proper places for the dissemination of information and opinion").

<sup>71</sup> See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 484-88 (1988) (upholding restrictions on picketing targeted at an individual's home); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (stating that an "individual's right to be left alone [within the home] plainly outweighs the First Amendment rights of an intruder"); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) (upholding individuals' ability to restrict unwanted mailings to the home).

<sup>72</sup> See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (holding that patients inside a medical clinic are a captive audience); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (holding that persons in a streetcar are a captive audience).

<sup>73</sup> *Cohen v. California*, 403 U.S. 15, 21 (1971).

<sup>74</sup> See, e.g., *NAACP v. Claiborne*, 458 U.S. 886, 916 (1982) (striking down a broad injunction against labor protestors but noting that the First Amendment does not protect violence or threats of violence, and requiring "precision of regulation" when unprotected and protected expression occur together (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))); *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298 (1941) (upholding an injunction against labor picketing "only so long as it counteracts a continuing intimidation"); cf. *Boos*, 485 U.S. at 324-27 (discussing with approval 18 U.S.C. § 112(b)(2), which criminalizes "willful acts or attempts to 'intimidate, coerce, threaten, or harass a foreign official . . . or obstruct a foreign official in the performance of his duties'" (quoting 18 U.S.C. § 112(b)(2) (1988))).

<sup>75</sup> See, e.g., *Cameron v. Johnson*, 390 U.S. 611, 621-22 (1968) (upholding a statute that prohibited demonstrations that prevent access to buildings); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965) (stating that the First Amendment does not encompass a right to prevent access to buildings).

<sup>76</sup> See *Madsen*, 512 U.S. at 774 (stating that fighting words and threats are proscribable); *Miller v. California*, 413 U.S. 15, 23 (1973) (holding that the First Amendment does not protect obscenity); cf. Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 Nw. U. L. REV. 562, 562-63 (1989) (discussing examples of categories of speech that lie outside First Amendment coverage).

<sup>77</sup> See Joanne Neilson, Note, *Madsen v. Women's Health Center, Inc.: Protection Against Anti-Abortionist Terrorism*, 16 PACE L. REV. 325, 333-35 (1996); cf. Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 206-07 (1994) (stating that a distinction between expressive action that only offends the mind and expressive action that injures the body "is inscribed deeply in modern First Amendment law").

Although the Court declined to state explicitly the broader First Amendment principle implicit in its opinion, the Court at least attempted to clarify several questions that *Madsen* had left unanswered, and to establish the circumstances under which prophylactic measures are acceptable. However, the uncertainty caused by the fact-intensive nature of the Court's analysis will likely provoke more constitutional questions as lower courts continue to grant speech-restrictive injunctions. In addition to future court-ordered injunctions, the Court may also have to consider the constitutionality of the much-litigated Freedom of Access to Clinic Entrances Act of 1994.<sup>78</sup> The Court would then have to address directly how harassment and abusive contact alter First Amendment rights.<sup>79</sup> Furthermore, lower courts' ability to extend *Madsen* and *Schenck* to other contexts, such as labor picketing, also remains uncertain.<sup>80</sup> The unique nature of decisions that implicate abortion rights,<sup>81</sup> as well as the severity and concreteness of the harm that overzealous anti-abortion demonstrators produce, suggest that buffer zones might be restricted to abortion protests, or at least to cases involving medical privacy and health risks.<sup>82</sup> At some point, the Court will have to establish a clearer standard for determining the permissible extent of speech-restrictive injunctions.

## II. FEDERAL JURISDICTION AND PROCEDURE

### A. Class Actions

*Certification Requirements.* — In the last few decades, courts have seen an enormous increase in the number of “mass tort” cases, in which a large number of victims have been injured by the products or

<sup>78</sup> 18 U.S.C. § 248 (1994). The “FACE” Act has been litigated extensively. See Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-abortion Protests*, 29 U.C. DAVIS L. REV. 553, 571–84 (1996) (analyzing several cases adjudicating the constitutionality of FACE); Linda Greenhouse, *High Court Upholds 15-Foot Buffer Zone at Abortion Clinics*, N.Y. TIMES, Feb. 20, 1997, at A1.

<sup>79</sup> The Court might also have to address the difficult problem of defining proscribable harassment. See Brownstein, *supra* note 53, at 1164–66.

<sup>80</sup> See Joan Biskupic, *High Court to Hear Abortion Protesters' Appeal of 'Buffer Zone' Order*, WASH. POST, Oct. 15, 1996, at A8 (stating that the ruling in *Schenck* “could ultimately affect union picketers, civil rights demonstrators and advocates in numerous other controversies”).

<sup>81</sup> Cf. *Madsen*, 512 U.S. at 785 (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that the Court's abortion decisions have created an “ad hoc nullification machine”).

<sup>82</sup> *Madsen* and several earlier cases emphasize that courts must carefully consider the context in which restrictions on speech apply. See *Madsen*, 512 U.S. at 772; see also *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783–84 n.12 (1979) (noting the importance of maintaining a restful atmosphere at hospitals); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (stating that “the nature of a place [and] ‘the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable’” (quoting Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969))).

actions of a defendant or defendants.<sup>1</sup> As one commentator has recognized, although mass tort suits may be outnumbered by more "mundane" tort suits such as those concerning car accidents,<sup>2</sup> they nonetheless present special problems because they are concentrated in a few jurisdictions<sup>3</sup> and involve complicated issues of causation and liability.<sup>4</sup> Therefore, lawyers and courts alike have searched for solutions to what many scholars have described as the "crisis" of mass tort litigation.<sup>5</sup> In this search, however, the desire for innovative solutions has often collided with the limits of courts' authority to craft them. Last Term, in *Amchem Products, Inc. v. Windsor*,<sup>6</sup> the Supreme Court made clear that courts do not have the power to certify a "settlement class" that fails to meet the requirements of Federal Rule of Civil Procedure 23. Although the Court was wise to restrict courts' authority in this instance, it left a void that Congress, as the branch of government most directly accountable to the polity, should step in to fill.

In *Amchem*, the Court struck down what may have been the largest class action settlement in history.<sup>7</sup> Twenty former asbestos manufacturers, acting through the Center for Claims Resolution ("CCR"),<sup>8</sup> proposed to settle with a class consisting of persons who had not previously filed suit against a CCR defendant and who had been exposed, occupationally or through the occupational exposure of a spouse or family member, to asbestos attributable to a CCR defendant, or had a spouse or family member who had been so exposed.<sup>9</sup> This class could have numbered in the hundreds of thousands, even the millions.<sup>10</sup>

On January 15, 1993, representatives of the plaintiffs and CCR defendants presented a complaint, an answer, a proposed settlement, and a joint motion for conditional class certification to the District Court for the Eastern District of Pennsylvania.<sup>11</sup> The settlement proposal was an "exhaustive document exceeding 100 pages," which outlined in detail payment schedules, definitions of exposure and medical re-

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<sup>1</sup> See David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563 n.9 (1987).

<sup>2</sup> See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1350 n.23 (1995).

<sup>3</sup> See *id.* Coffee writes that mass torts such as asbestos have "a capacity to place logistical pressure on individual courts that is simply unequalled by any other form of civil litigation." *Id.* at 1359.

<sup>4</sup> See Rosenberg, *supra* note 1, at 563.

<sup>5</sup> See, e.g., Coffee, *supra* note 2, at 1347.

<sup>6</sup> 117 S. Ct. 2231 (1997).

<sup>7</sup> See *id.* at 2250.

<sup>8</sup> "The assets of the CCR companies, together with their insurance coverage, represent a significant portion of the funds that will ever be available to pay asbestos-related claims." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 n.1 (3d Cir. 1996).

<sup>9</sup> See *Amchem*, 117 S. Ct. at 2239.

<sup>10</sup> See *id.* at 2237.

<sup>11</sup> See *id.* at 2239.

quirements, provisions for “exceptional” claims, and other matters.<sup>12</sup> The document specified the range of damages that the plan could award for four qualifying categories of compensable diseases.<sup>13</sup> The settlement would also have imposed “case flow maximums,” limiting the number of claims payable each year.<sup>14</sup> Further, the settlement would not have fully compensated for loss of consortium of family members exposed to asbestos,<sup>15</sup> nor for the increased risk of cancer, the fear of injury, or other problems faced by “exposure-only” plaintiffs, even though the law of some states may have recognized such claims.<sup>16</sup> In general, members of the plaintiff class would have been bound by the settlement in perpetuity, but CCR defendants could have withdrawn after ten years.<sup>17</sup> A small number of class members could have rejected the settlement each year and taken their claims to court but could not have asserted claims for punitive damages or for increased risk of cancer.<sup>18</sup>

Judge Reed held that the settlement terms were fair.<sup>19</sup> He also held that adequate notice had been given<sup>20</sup> and that class certification under Rule 23(b)(3)<sup>21</sup> was appropriate.<sup>22</sup> The district court found that the requirements of numerosity, commonality, and preponderance were satisfied.<sup>23</sup> Although objectors claimed that conflicts of interest prevented class counsel and representatives from adequately representing claimants without manifest injuries, the court found that subclasses were unnecessary<sup>24</sup> and preliminarily enjoined class members from bringing suit against any CCR defendant in federal or state court.<sup>25</sup>

<sup>12</sup> *Id.* at 2240.

<sup>13</sup> *See id.* Although the settlement would have allowed for some exceptional claims and extraordinary damages, payments for these claims were also capped. *See id.*

<sup>14</sup> *Id.*

<sup>15</sup> The district court noted that loss of consortium claims, when awarded, were included in the settlement averages used to determine proper payments under the settlement proposal. *See Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 278 (E.D. Pa. 1994).

<sup>16</sup> *See Amchem*, 117 S. Ct. at 2240.

<sup>17</sup> *See id.* at 2241.

<sup>18</sup> *See id.*

<sup>19</sup> *See Georgine*, 157 F.R.D. at 325.

<sup>20</sup> *See id.* at 332–34.

<sup>21</sup> Rule 23(b)(3) allows maintenance of a class action if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy,” as long as the requirements of Rule 23(a) are met. These requirements include that

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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<sup>22</sup> *See Georgine*, 157 F.R.D. at 315.

<sup>23</sup> *See id.* at 316.

<sup>24</sup> *See id.* at 318–19.

<sup>25</sup> *See Georgine v. Amchem Prods., Inc.*, 878 F. Supp. 716, 726–27 (E.D. Pa. 1995).



The Third Circuit rejected the class certification.<sup>26</sup> The court referred to its own precedent, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*,<sup>27</sup> in holding that a class formed solely for the purpose of settlement must satisfy the requirements of Rule 23(b)(3) as if the case were going to be litigated.<sup>28</sup> The court found that common questions did not predominate because the claimants had different levels of asbestos exposure, had different severities and types of diseases, and came from states whose laws varied widely on several critical issues.<sup>29</sup> In short, the court found that the “number of uncommon issues in this humongous class action” outweighed the common issues.<sup>30</sup> The court also found that “serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement.”<sup>31</sup> The most important of these conflicts was between “exposure-only” plaintiffs and plaintiffs with manifest injuries.<sup>32</sup> The conflict problems were such that no group of representatives could be typical.<sup>33</sup> The Third Circuit ordered decertification of the class and vacated the injunction on suits against the CCR defendants.<sup>34</sup>

In a 6–2 decision, the Supreme Court affirmed.<sup>35</sup> The Court declined to reach the objectors’ first two challenges — that the settlement proceeding was not a justiciable case or controversy<sup>36</sup> and that the exposure-only claimants lacked standing to sue in the federal courts<sup>37</sup> — because it viewed the class certification issues as dispositive.<sup>38</sup>

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<sup>26</sup> See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617–18 (3d Cir. 1996). The court held that it need not consider other objections, including challenges to justiciability, subject matter jurisdiction, and adequacy of notice. See *id.* at 623.

<sup>27</sup> 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

<sup>28</sup> See *Georgine*, 83 F.3d at 625. *In re General Motors* held that “[t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.” See *In re General Motors*, 55 F.3d at 799.

<sup>29</sup> See *Georgine*, 83 F.3d at 626–30. The critical issues on which the relevant states’ laws varied included the viability of claims for future harm; the availability of causes of action for medical monitoring and increased cancer risk; the required standards of proof; the limitations period; and the availability of joint and several liability. See *id.* at 627.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 630.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* at 632.

<sup>34</sup> See *id.* at 635.

<sup>35</sup> See *Amchem*, 117 S. Ct. at 2237.

<sup>36</sup> The objectors claimed that the proceeding was not justiciable because it was non-adversarial and imposed an “administrative compensation regime” on individuals who may never manifest injury. *Id.* at 2244. In essence, the Court’s failure to reach this claim left open the question whether a so-called settlement class action could ever be certified.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

Writing for the majority, Justice Ginsburg<sup>39</sup> introduced the Court's main holding by reviewing the characteristics of class actions provided for by the Federal Rules.<sup>40</sup> She observed that, "[w]hile the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"<sup>41</sup> However, she acknowledged that "class action practice has become ever more 'adventuresome'" in reaction to "concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue."<sup>42</sup> Justice Ginsburg, addressing the circuit split regarding the impact of a proposed settlement on class certification,<sup>43</sup> overturned the Third Circuit's holding that settlement was irrelevant to the appropriateness of certification.<sup>44</sup> However, the Court's holding was extremely limited. Although a district court considering certification need not consider whether a "settlement class" would present "intractable management problems" at trial, it must pay "undiluted, even heightened, attention" to the other requirements of the Rule.<sup>45</sup> In part because the court of appeals had actually "homed in on settlement terms in explaining why it found the absentees' interests inadequately represented," the Court held that the rejection of class certification would stand.<sup>46</sup>

Justice Ginsburg warned that courts must be mindful that they must enforce the requirements as they are currently written in the Rules: they may not determine that the fairness of a settlement supersedes the need to conform with Rule 23's certification requirements.<sup>47</sup> The standards protecting absent class members prevent certifications made on the "court's gestalt judgment."<sup>48</sup> In addition, if class certification were allowed despite the impossibility of litigation, class counsel would be deprived of perhaps its biggest bargaining weapon — the threat of litigation — and the quality of settlements would suffer.<sup>49</sup> In this case, the Court found that the class did not meet the requirements

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<sup>39</sup> Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, and Thomas joined Justice Ginsburg's opinion. Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justice Stevens joined. Justice O'Connor took no part in the consideration or decision of the case.

<sup>40</sup> See *Amchem*, 117 S. Ct. at 2245-46.

<sup>41</sup> *Id.* at 2246 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

<sup>42</sup> *Id.* at 2247.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 2248.

<sup>45</sup> *Id.* (citation omitted).

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 2248-49.

<sup>48</sup> *Id.* at 2248.

<sup>49</sup> See *id.* at 2248-49.

of predominance<sup>50</sup> and adequacy of representation. The disparate questions highlighted by the Third Circuit opinion undermined class cohesion and made a finding of predominance impossible.<sup>51</sup> Similarly, representation could not be adequate because the currently injured and the exposure-only plaintiffs were included in one class.<sup>52</sup> As Justice Ginsburg pointed out, the currently injured are interested in “generous immediate payments”; exposure-only plaintiffs, in “ensuring an ample, inflation-protected fund for the future.”<sup>53</sup> In conclusion, the Court noted that a “nationwide administrative claims processing regime” may be the “most secure, fair, and efficient means of compensating victims of asbestos exposure.”<sup>54</sup> However, a court could not create such a structure under the current Rule 23.<sup>55</sup>

Justice Breyer, concurring in part and dissenting in part, agreed that settlement is relevant to class certification,<sup>56</sup> but argued that more weight should be given to settlement-related issues in determining predominance.<sup>57</sup> Because the Court’s holding that settlement was relevant to certification meant that the Third Circuit had operated under a legal standard that was no longer correct, Justice Breyer argued that the case should have been remanded for consideration under the proper standard.<sup>58</sup> He also criticized the Court for understating the importance of settling the asbestos claims,<sup>59</sup> and for implying that the settlement was unfair.<sup>60</sup> Finally, Justice Breyer noted his reluctance “to set aside the District Court’s findings without more assurance than I have that they are wrong.”<sup>61</sup>

The *Amchem* Court was justified in refusing to certify the class, because the class never could have met the requirements of Rule 23. The plaintiffs’ one shared trait — exposure to asbestos — was outweighed by the great disparities in their situations. Thus, the class could not meet the “predominance” requirement of Rule 23(b)(3). In addition, the class never would have been able to satisfy the “representativeness”

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<sup>50</sup> Specifically, the district court’s consideration, as an element of predominance, of the common “interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system,” *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 316 (E.D. Pa. 1994), was erroneous, although the Court noted that this interest was “fit for legislative consideration.” *Amchem*, 117 S. Ct. at 2249.

<sup>51</sup> See *Amchem*, 117 S. Ct. at 2250.

<sup>52</sup> See *id.* at 2250–51.

<sup>53</sup> *Id.* at 2251. The proposed settlement was not adjusted for inflation, but it did provide for payment levels to be adjusted by renegotiation after 10 years. See *Georgine*, 157 F.R.D. at 277.

<sup>54</sup> *Amchem*, 117 S. Ct. at 2252.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* (Breyer, J., concurring in part and dissenting in part).

<sup>57</sup> See *id.* at 2253.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 2252.

<sup>61</sup> *Id.* at 2254.

requirement of Rule 23(a). Although the named plaintiffs included exposure-only plaintiffs, there remained an inherent conflict of interest between the exposure-only and currently injured plaintiffs.<sup>62</sup>

The courts are not qualified to, and should not, create a new type of class action.<sup>63</sup> Nor should courts allow class action settlements based only on determinations that they are "fair." Certifying classes on this basis would undermine the rule of law and reduce certainty in future suits.<sup>64</sup> The Federal Rules of Civil Procedure were promulgated after an extensive deliberative process, involving numerous reviewers from both the legislative and judicial branches to protect all parties.<sup>65</sup> Courts are neither qualified nor empowered to presume that they can improve on such rules.

In addition, the Supreme Court should not, as some have suggested, respond to the problem of mass torts by amending Rule 23 to allow settlement classes explicitly.<sup>66</sup> As Justice Ginsburg noted, the threat of litigation may be the strongest tool plaintiffs have in settlement negotiations.<sup>67</sup> In situations in which "sweetheart settlements" are already a danger because of the lack of true monitoring by plaintiffs who may not yet be injured or who may be prone to freeriding,<sup>68</sup> it would be especially problematic to allow defendants to deal with disarmed plaintiff classes.<sup>69</sup> Other problems inherent in settlement class actions stem from the lack of available information from closed negotiations. It would be difficult for courts to tell whether the parties had improperly manipulated the scope of the class to attain settlement,<sup>70</sup> and lawyers for other potential plaintiffs would be denied the necessary information to assess the settlement.<sup>71</sup> Finally, if certifica-

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<sup>62</sup> See *Amchem*, 117 S. Ct. at 2251.

<sup>63</sup> See *id.* at 2248.

<sup>64</sup> The plaintiffs in this case (or at least their representatives) were willing to bargain away a chance at a more generous verdict for more certain, albeit possibly lower, payment under the settlement. Although it may bring certainty to the plaintiffs involved, bending the rules today would provide less future certainty and predictability.

<sup>65</sup> See *Amchem*, 117 S. Ct. at 2248.

<sup>66</sup> See Proposed Amendment to FED. R. CIV. P. 23, reprinted in 167 F.R.D. 559 (1996).

<sup>67</sup> See *Amchem*, 117 S. Ct. at 2248.

<sup>68</sup> See *Coffee*, *supra* note 2, at 1351, 1352 n.25; Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 321 (1996). Courts may also be more willing to approve settlements that are disadvantageous to "hypothetical" plaintiffs, while providing plaintiffs currently before the court with more protection. See *Coffee*, *supra* note 2, at 1362.

<sup>69</sup> Another danger is that defendants may be able to "shop" for the plaintiffs' lawyer willing to settle for the lowest amount. See *Coffee*, *supra* note 2, at 1354; Nagareda, *supra* note 68, at 321 (suggesting that settlement classes may exacerbate the competition between plaintiffs' lawyers for a position as class counsel); see also *General Motors Interchange Litig.*, 594 F.2d 1106, 1125 (7th Cir. 1979) (noting that, when there is "the danger of 'attorney-shopping,'" plaintiffs' attorneys "negotiate from a position of weakness").

<sup>70</sup> See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 787 (3d Cir. 1995).

<sup>71</sup> See *id.* at 788 (citing *General Motors*, 594 F.2d at 1125).

tion and settlement were to occur simultaneously, there is the risk that the settlement would look like a *fait accompli* to class members.<sup>72</sup>

Admittedly, courts must judge the fairness of class action settlements.<sup>73</sup> However, judges may not have the proper incentives to protect plaintiffs in these situations. Judges have a strong motivation to approve the settlement of cases that threaten to consume hundreds or thousands of hours of their time,<sup>74</sup> and one study has shown that judges are willing to approve most settlements without extensive hearings.<sup>75</sup>

The asbestos litigation illustrates many problems that defy easy resolution by the courts. One of the most serious may be inconsistent, even arbitrary, verdicts. As one Philadelphia judge observed, "[t]he asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure."<sup>76</sup> Reasonably, plaintiffs and potential plaintiffs want some certainty of result, even if it requires settling for a less generous amount. However, the court system, with the inconsistencies of individualized verdicts and the variances in state law, is unlikely to be able to provide the certainty that class action plaintiffs desire.

In addition, asbestos plaintiffs would prefer less costly payments than courts provide. Currently, less than 40% of money paid by asbestos defendants goes to victims.<sup>77</sup> With its individualized, and thus costly, system of justice, the court system is unlikely to offer a solution to this problem. Although some have argued that less expensive litigation for defendants will not necessarily translate into more compensation per plaintiff,<sup>78</sup> it likely would actually translate into compensation for a greater number of plaintiffs in the asbestos litigation because of the "fixed pie" nature of the available funds.<sup>79</sup> In addition, reducing

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<sup>72</sup> See *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 680-81 (7th Cir. 1987).

<sup>73</sup> See FED. R. CIV. P. 23(d).

<sup>74</sup> As Coffee notes:

Some judges have come perilously close to admitting that the mass tort litigation crisis is primarily a crisis of mind-numbing boredom, which requires appellate courts to approve the certification of mass tort class actions in order to relieve trial judges of "litigation 're-runs' for those who face a series of identical pending cases."

Coffee, *supra* note 2, at 1350 n.23 (quoting Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 328 (1983)).

<sup>75</sup> A study of two federal district courts found that over 85% of settlements were approved without changes and that the median length of a fairness hearing was around 40 minutes. See Coffee, *supra* note 2, at 1348 n.14.

<sup>76</sup> *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 263 (E.D. Pa. 1994) (quoting *School Dist. v. Lake Asbestos Ltd.*, 789 F.2d 996, 1001 (3d Cir. 1986)) (internal quotation marks omitted).

<sup>77</sup> See *id.*

<sup>78</sup> See, e.g., Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 325-26 (1996).

<sup>79</sup> More than a dozen asbestos manufacturers had declared bankruptcy by 1991, see *Georgine*, 157 F.R.D. at 263 (citing *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 420

the waste generated by the repetitious nature of asbestos litigation<sup>80</sup> is in the interest of society as a whole.

Such considerations suggest that, although the court system is capable of handling most classes of cases, the asbestos litigation should be handled outside the current system. Removing this exceptional class of cases would not only solve the instant problems, but also leave behind a healthier system.<sup>81</sup> If the asbestos litigation gives rise to more than a million claims, as has been suggested,<sup>82</sup> the best solution is an administrative one. A congressionally prescribed remedy would protect future claimants more than one negotiated by plaintiffs' lawyers.<sup>83</sup> Elected legislators have a duty to protect all their constituents, unlike plaintiffs' lawyers, who are more likely to protect currently injured plaintiffs at the cost of those with future injuries.

One possible model for an administrative claims structure is the black lung disease legislation, which determines the liability of coal mine operators to their former employees suffering from pneumoconiosis caused by their employment.<sup>84</sup> Although the black lung claims processing structure has been far from perfect,<sup>85</sup> it has provided a workable middle path between traditional tort law (with its individualized causation requirement) and a blanket payment system. The

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(J.P.M.L. 1991), and there are "hundreds of thousands, perhaps millions" of claimants waiting in the wings. *Amchem*, 117 S. Ct. at 2237.

<sup>80</sup> See *Asbestos Products*, 771 F. Supp. at 419 ("[T]he same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one.") (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 1-3 (Mar. 1991)). The total legal cost of asbestos litigation is estimated to be over \$1 billion. See David Rosenberg, *The Dusting of America: A Story of Asbestos — Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1693, 1694 (1986) (reviewing PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985)).

<sup>81</sup> Removing asbestos claims from the court system will allow the courts to consider other types of claims more quickly. By 1990, the backlog of asbestos cases numbered more than 70,000, and 6% of all civil cases filed in the federal courts in that year were asbestos-related. See *Georgine*, 157 F.R.D. at 264-65.

<sup>82</sup> See *Amchem*, 117 S. Ct. at 2237.

<sup>83</sup> Cf. Nagareda, *supra* note 68, at 322-23 (suggesting that one solution to the mass tort problem would be to combine the initiative of plaintiffs' lawyers with an administrative system). Although Congress may also be more susceptible to the claims of already injured plaintiffs than to the claims of the less sympathetic exposure-only plaintiffs, it should be less biased than plaintiffs' lawyers. Cf. *id.* at 323 ("[T]he wholesale perspective characteristic of regulatory agencies complements the demands for collective resolution presented by mass tort claims — even those of future claimants."). In fact, several commentators claim that the lawyers in the proposed asbestos settlement traded future claims for settlement of pending ones. See, e.g., Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1078-86 (1995); cf. *Amchem*, 117 S. Ct. at 2238-39 (outlining the negotiations that took place between the asbestos defendants and plaintiffs and the resulting settlement of the future claims).

<sup>84</sup> See 30 U.S.C. §§ 901-950 (1994); see also Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 42 (Mar. 1991) (comments of Judge Hogan) (suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation").

<sup>85</sup> See Rita A. Massie, *Modification of Benefits for Claimants Under the Federal Black Lung Benefits Program*, 97 W. VA. L. REV. 1023, 1052 (1995).

black lung legislation is not a direct analogue, yet it suggests that legislative action can provide sensible solutions to a mass tort problem.

Several congressional solutions to the asbestos problem have been proposed.<sup>86</sup> Three plans have been introduced as bills. The Senate bill, introduced in 1981, would have forced existing workers' compensation programs to reimburse workers for asbestos-related diseases.<sup>87</sup> The first House bill, introduced in the same year, would have instituted a fund to which manufacturers and importers of asbestos, as well as the tobacco industry, would contribute.<sup>88</sup> The second House bill, which followed in 1983, would have created a somewhat similar Toxic Substance Employee Compensation Insurance Pool, funded both by employers of injured workers and by enterprises involved in the production of asbestos.<sup>89</sup> Other proposals, such as the creation of new federal common law for asbestos<sup>90</sup> or a new mass tort procedure act,<sup>91</sup> have never made it to Congress.

Proposed congressional solutions have failed for several reasons. The 1981 Senate bill was seen as a bailout of the asbestos industry and thus rejected.<sup>92</sup> Although it is not exactly clear why the House bills failed, it may have been partly that both sides hoped it would all be worked out in court, or irrationally believed that the crisis would somehow fade away.<sup>93</sup> Neither of these things is likely to happen in the near future.

The best plan would be one somewhat like the 1983 House proposal, which required that contributions be determined by estimated liability.<sup>94</sup> This process would ensure fair allocations of liability without imposing the unrealistic requirement that victims identify the manufacturers directly liable for their diseases. However, the proposal needs to be modified in a few ways. Litigation history should be eliminated from the determination of liability: only the asbestos con-

<sup>86</sup> See, e.g., H.R. 3175, 98th Cong. (1983); H.R. 5524, 97th Cong. (1981); S. 1643, 97th Cong. (1981). For a more complete summary of the three bills, see Louis Treiger, Comment, *Relief for Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179, 186-91 (1983).

<sup>87</sup> See S. 1643, § 10(a); Gideon Mark, Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 903-04 (1983).

<sup>88</sup> See H.R. 5524, § 203.

<sup>89</sup> See H.R. 3175, § 11; Mark, *supra* note 87, at 904-05.

<sup>90</sup> See Patricia Zimand, Note, *National Asbestos Litigation: Procedural Problems Must Be Solved*, 69 WASH. U. L.Q. 899, 917-20 (1991).

<sup>91</sup> See Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1088-90 (1986).

<sup>92</sup> See *Suits That Are Searing Asbestos*, BUS. WK., Apr. 13, 1981, at 169, 169 ("[The bill] has little chance of success because it is viewed as an industry bailout.")

<sup>93</sup> At least one commentator has suggested that each party involved had its own reasons for blocking the bills: "The Reagan administration is not interested in any legislation calling for more federal spending in this area, labor is not interested in abridging its tort rights[,] and the insurance industry is not interested in 'federalization' of its business." Floyd H. Knowlton, *Asbestos Litigation: Which Way Out?*, THE BRIEF, Aug. 1983, at 4, 4.

<sup>94</sup> See H.R. 3175, § 11(c)(3)(B).

tent of the products of the manufacturers, the relative risk posed by the type of asbestos included in products, and the amount of exposure related to each product should be taken into account.<sup>95</sup> Litigation history should be irrelevant because it causes apportionment to depend both on variable state law (thus advantaging manufacturers whose products were used in states with defendant-friendly rules) and possibly on the speed with which workers became ill because of certain manufacturers' products. Also, to the greatest extent possible, payments from the fund should be determined by clear guidelines. Plaintiffs with the same diseases and levels of disability should receive the same payments, regardless of other factors, such as the states in which the workers reside.<sup>96</sup> The 1983 House proposal also included the most sensible means of determining entitlements to compensation — a combination of irrebuttable and rebuttable presumptions based on the type of disease and history of exposure.<sup>97</sup> Although presumptions may lead to the payment of workers whose diseases were not caused by asbestos, the cost savings from settling the issue of eligibility would likely more than make up for any losses in the accuracy of liability determinations. Rejecting the use of presumptions would reopen the causation issue and possibly make the process almost as expensive as litigation itself. Overall, such a program would capitalize on the efficiency possibilities of the administrative structure, while providing compensation for the injured and fulfilling the deterrence goals of the tort system.<sup>98</sup>

Although previous congressional proposals have failed, the Court's recent move has made the need for a congressional solution more urgent. The Court's reasoning in *Amchem* makes it unlikely that any class that includes asbestos-exposed plaintiffs who have not yet developed a disease will be certified. Therefore, to provide the certainty needed by future plaintiffs and defendants, Congress should intervene. Rather than "bailing out" the industry,<sup>99</sup> Congress should provide a considered apportionment of liability that compensates the injured while ensuring that the injurers face the consequences of their actions.

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<sup>95</sup> See *id.*

<sup>96</sup> The only other factors that should be taken into account are factors that could have caused or contributed to the plaintiff's disease, such as smoking. Payments should not necessarily be denied if these factors are present, but should be discounted to account for the fact that the contributing factor might have caused the disease. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 859 (1984).

<sup>97</sup> See H.R. 3175, § 6.

<sup>98</sup> See GUIDO CALABRESI, *THE COST OF ACCIDENTS* 68–94 (1970) (discussing the issue of "general deterrence" in lowering the cost to society of accidents).

<sup>99</sup> Cf. Rosenberg, *supra* note 80, at 1701–02 (criticizing the Senate bill as "designed to bail out the asbestos industry").



### B. Federal Rules of Evidence

*Rule 403 — Unfair Prejudice.* — The Supreme Court has seldom scrutinized Federal Rule of Evidence 403,<sup>1</sup> which allows exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice,”<sup>2</sup> despite the rule’s position as “the cornerstone” of the Federal Rules of Evidence.<sup>3</sup> While commentators have debated Rule 403’s impact on the common law of evidence,<sup>4</sup> the constitutional presumption of innocence,<sup>5</sup> and the structure of trials,<sup>6</sup> the Court has avoided providing detailed guidance as to the proper application of the rule.<sup>7</sup> Last Term, in *Old Chief v. United States*,<sup>8</sup> the Court addressed one outstanding issue under Rule 403, ruling that a trial court abuses its discretion when, in a prosecution for possession of a handgun by a felon, it admits evidence of the name or nature of the defendant’s prior conviction despite the defendant’s offer to stipulate to his or her felon status. In holding that the risk of unfair prejudice from such evidence outweighs its probative value, the Court correctly resolved one aspect of the “most frequently litigated issue under Rule 403”<sup>9</sup> and provided a useful framework for analyzing other applications of the rule. Yet the Court’s broad reaffirmation of the prosecution’s right to narrative integrity muddied the Court’s ruling.

After Johnny Lynn Old Chief took part in an altercation involving a gunshot, federal prosecutors charged him with violating 18 U.S.C. § 922(g)(1), which makes it a crime for a person “who has been convicted in any court of[] a crime punishable by imprisonment for a term

<sup>1</sup> Nine Supreme Court opinions have mentioned Rule 403 since the Federal Rules of Evidence came into effect in 1975. Search of Westlaw, SCT Database (Aug. 21, 1997).

<sup>2</sup> “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

<sup>3</sup> Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (quoting Herbert Peterfreund, *Relevancy and Its Limits in the Proposed Rules of Evidence for the United States District Courts: Article IV*, 25 REC. ASS’N B. CITY N.Y. 80, 83 (1970)) (internal quotation marks omitted).

<sup>4</sup> See Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 883–84 (1988).

<sup>5</sup> See D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 332–43 (1989).

<sup>6</sup> See David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1170, 1205–09 (1992); J. Alexander Tanford, *A Political-Choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 831, 834–40 (1989).

<sup>7</sup> The Court’s statements regarding Rule 403 have generally emphasized the rule’s grant of discretion to trial judges. See, e.g., *United States v. Abel*, 469 U.S. 45, 54 (1984).

<sup>8</sup> 117 S. Ct. 644 (1997).

<sup>9</sup> Gold, *supra* note 3, at 524 (citing 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5215 (1978)). Lower courts had long been divided on the right, *vel non*, of a defendant to stipulate to the fact of a prior conviction in a felon-in-possession case. See *Old Chief*, 117 S. Ct. at 649 (listing circuit court decisions).

exceeding one year” to “possess in or affecting commerce[] any firearm . . . or to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce.”<sup>10</sup> This “felon-in-possession” charge stemmed from Old Chief’s prior conviction for assault causing serious bodily injury.<sup>11</sup>

Prior to trial, Old Chief moved for an order preventing the prosecution from mentioning, “offering into evidence[,] or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, *except* to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year.”<sup>12</sup> Old Chief argued that his willingness to stipulate to the fact of a previous conviction made the name and details of the prior crime inadmissible under Federal Rule of Evidence 403.<sup>13</sup> The district court ruled that the prosecution was not required to accept Old Chief’s stipulation and permitted the prosecution to present the jury with details of Old Chief’s prior conviction.<sup>14</sup> Old Chief was subsequently convicted of all three charged counts.<sup>15</sup>

In a terse opinion, the Ninth Circuit affirmed.<sup>16</sup> Relying on circuit precedent,<sup>17</sup> the court stated that “the government is entitled to prove a prior felony offense through introduction of probative evidence.”<sup>18</sup> The court refused to inquire into the possible prejudicial effect on jurors that introduction of the nature of a prior conviction may produce, declaring that “[u]nder Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the FRE 403 balancing process.”<sup>19</sup>

In a 5–4 decision, the Supreme Court reversed.<sup>20</sup> Writing for the Court, Justice Souter<sup>21</sup> first rejected Old Chief’s claim that the name of his prior offense was irrelevant and thus inadmissible under Federal Rule of Evidence 402.<sup>22</sup> He noted that a record of Old Chief’s conviction would make his status as a felon “more probable than it would have been without the evidence,” and thus was relevant.<sup>23</sup>

<sup>10</sup> 18 U.S.C. § 922(g) (1994); *see Old Chief*, 117 S. Ct. at 647.

<sup>11</sup> *See Old Chief*, 117 S. Ct. at 647.

<sup>12</sup> *Id.* (internal quotation marks omitted).

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See United States v. Old Chief*, No. 94-30277, 1995 WL 325745, at \*1 (9th Cir. May 31, 1995).

<sup>17</sup> *See United States v. Breikreutz*, 8 F.3d 688, 692 (9th Cir. 1993).

<sup>18</sup> *Old Chief*, 1995 WL 325745, at \*1 (citing *Breikreutz*, 8 F.3d at 690).

<sup>19</sup> *Id.* (citing *Breikreutz*, 8 F.3d at 691–92).

<sup>20</sup> *See Old Chief*, 117 S. Ct. at 649.

<sup>21</sup> Justices Stevens, Kennedy, Ginsburg, and Breyer joined Justice Souter’s opinion.

<sup>22</sup> *See Old Chief*, 117 S. Ct. at 649. Rule 402 states that “[e]vidence which is not relevant is not admissible.” FED. R. EVID. 402. Rule 401 defines relevant evidence to be “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.

<sup>23</sup> *Old Chief*, 117 S. Ct. at 649.

Having established the pivotal issue to be whether admission of the name of Old Chief's prior conviction had been unfairly prejudicial under Rule 403, Justice Souter entered into a four-step analysis. First, he established that the prejudicial effect at issue in a felon-in-possession case — "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged" — clearly was one that Rule 403 is designed to prevent.<sup>24</sup> He noted that evidence of prior wrongdoing is rejected not because such evidence is irrelevant, but rather because such evidence is excessively persuasive; admitting such evidence might lead the jury "to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."<sup>25</sup>

Second, Justice Souter outlined two possible methods for weighing unfair prejudice against probative value: evidence may be viewed "as an island,"<sup>26</sup> or in "the full evidentiary context of the case as the court understands it when the ruling must be made."<sup>27</sup> Rejecting the former method because it would admit unfairly prejudicial evidence,<sup>28</sup> Justice Souter declared that the Advisory Committee's note to Rule 403 makes clear that "when Rule 403 confers discretion by providing that evidence 'may' be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies," but also by comparing those tendencies with "evidentiary alternatives."<sup>29</sup>

Third, the majority examined the probative value and possible prejudicial effect of evidence of "the name or nature of the prior offense" under 18 U.S.C. § 922(g)(1).<sup>30</sup> Justice Souter stated that such evidence risks being unfairly prejudicial "whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning."<sup>31</sup> Exclusion of the evidence was particularly appropriate in Old Chief's case, because Old Chief's proffered stipulation presented the district court "with alterna-

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 650–51 (quoting *Michelson v. United States*, 335 U.S. 469, 475–76 (1948)) (internal quotation marks omitted). Justice Souter noted that Rule of Evidence 404(b) explicitly bars the admission of evidence of past wrongs or crimes to prove character. *See id.* at 651.

<sup>26</sup> *Id.* When viewed as an island, the probative value and unfair prejudice of a piece of evidence are "the sole reference points in deciding whether the danger substantially outweighs the value" of the evidence. *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See id.* at 651–52. Justice Souter argued that a party might be enticed to offer prejudicial evidence because "[t]he worst [a party offering such evidence] would have to fear would be a ruling sustaining a Rule 403 objection, and if that occurred, he could simply fall back to offering substitute evidence." *Id.* at 652.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* Justice Souter noted that the risk "would be especially obvious" when the "prior conviction was for a gun crime." *Id.*

tive, relevant, admissible evidence” of a prior conviction that was “not merely relevant but seemingly conclusive evidence” of the charge.<sup>32</sup>

Fourth, the Court considered and rejected the government’s argument that the prosecution’s right to prove its case as it sees fit means that a defendant cannot compel the prosecution to accept a stipulation to felon status. Justice Souter acknowledged that evidence may have “force beyond any linear scheme of reasoning” and that a detailed narrative may build its persuasiveness not only on facts, but also on the intricate relationship between those facts.<sup>33</sup> Moreover, a stipulation may not meet the jury’s expectations. The jury, Justice Souter noted, expects stories and not syllogisms, and the introduction of a stipulation when jurors expect narrative detail may not just fail to advance the prosecution’s case; it may even undermine its case by provoking the jury’s distrust.<sup>34</sup> Thus, in general, “the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away.”<sup>35</sup> Yet Justice Souter found this general rule inapplicable to determinations of a defendant’s legal status: “Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant’s subsequent criminality” and does not “confuse or offend or provoke reproach.”<sup>36</sup> The only functional difference between Old Chief’s offered stipulation and the prior conviction record the prosecution entered into evidence was “the [prejudicial] risk inherent in the one and wholly absent from the other.”<sup>37</sup> Therefore, Justice Souter concluded, the trial court abused its discretion when it admitted the name and nature of Old Chief’s prior conviction.<sup>38</sup>

In a sharply worded opinion, Justice O’Connor dissented.<sup>39</sup> Criticizing the majority for both pronouncing “a rule that misapplies [Rule] 403” and upsetting “longstanding precedent regarding criminal prosecutions,” Justice O’Connor noted that the mere fact that evidence harms a defendant does not automatically make such evidence unfairly prejudicial under Rule 403.<sup>40</sup> Justice O’Connor argued that § 922(g)(1)’s structure demonstrates that Congress intended that jurors

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<sup>32</sup> *Id.* at 653.

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* at 654.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 655. The Court acknowledged that evidence of prior acts might be admissible under Rule 404(b) if used “to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’” *Id.* (quoting FED. R. EVID. 404(b)).

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* Justice Souter noted that the holding did not affect cases not involving proof of status: “the prosecutor’s choice [of evidence] will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.” *Id.* at 656.

<sup>39</sup> The Chief Justice and Justices Scalia and Thomas joined Justice O’Connor’s dissent.

<sup>40</sup> *Old Chief*, 117 S. Ct. at 656 (O’Connor, J., dissenting).

learn the name and nature of a defendant's prior conviction.<sup>41</sup> Relying on § 922(g)(1)'s exclusion of "certain business crimes and state misdemeanors,"<sup>42</sup> the dissent claimed that "[w]ithin the meaning of § 922(g)(1) . . . 'a crime' is not an abstract or metaphysical concept"; a defendant's prior conviction "connotes not only that he is a prior felon, but also that he has engaged in specific past criminal conduct."<sup>43</sup>

Justice O'Connor continued by critiquing the majority's analysis of Rule 404(b). Although Rule 404(b) excludes character evidence, it "expressly contemplates the admission of evidence of prior crimes for other purposes."<sup>44</sup> Introducing evidence of prior crimes directed at establishing a necessary element of the crime charged is one such purpose.<sup>45</sup> The majority's conclusion to the opposite effect, Justice O'Connor opined, "defies common sense."<sup>46</sup>

The dissent also took issue with Justice Souter's discussion of the prosecution's right to present its case in the manner that it sees fit. Justice O'Connor noted that "[a] jury is as likely to be puzzled by the 'missing chapter' resulting from a defendant's stipulation . . . as it would be by the defendant's conceding any other element of the crime."<sup>47</sup> Moreover, Justice O'Connor maintained that the constitutional requirement that the prosecution prove all elements of a charged crime beyond a reasonable doubt necessarily implies the government's prerogative to reject a defendant's offer to stipulate to an element of the charged crime.<sup>48</sup> "[A] defendant's stipulation to an element of an offense does not remove that element from the jury's consideration. . . . [T]he defendant's strategic decision to 'agree' that the Government need not prove an element cannot relieve the Government of its burden" to provide proof beyond a reasonable doubt.<sup>49</sup>

*Old Chief* serves as an important reminder that principles of fairness lie at the heart of the American criminal justice system. The Court was right to recognize that evidence of the name or nature of past crimes in § 922(g)(1) prosecutions unfairly prejudices juries

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<sup>41</sup> *See id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 656–57. Justice O'Connor added that it is fundamental to "our system of justice [that] a person is not simply convicted of 'a crime' or 'a felony,'" but rather is convicted "of a specified offense." *Id.* at 657.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* at 658. The dissent contended that a limiting jury instruction could be used to mitigate any prejudice that resulted from the introduction of evidence of prior crimes. *See id.*

<sup>47</sup> *Id.* at 659.

<sup>48</sup> *See id.*

<sup>49</sup> *Id.* (citing *Estelle v. McGuire*, 502 U.S. 62, 69–70 (1991)). The dissent also noted that to permit a defendant to compel the government to accept a stipulation "runs afoul" of Federal Rule of Criminal Procedure 23(a), which states that a defendant may not waive her right to a jury trial absent government agreement. *Id.* at 660.

against defendants.<sup>50</sup> Additionally, the Court's decision provides needed guidance to lower courts applying Rule 403 both within and beyond the context of felon-in-possession cases. Despite these positive steps, however, *Old Chief* eventually may be remembered more for its broad statements regarding the prosecution's right to prove its case as it sees fit. This broad language threatens not only to obscure the clarity offered by the Court's Rule 403 analysis, but also to increase trial courts' willingness to admit unfairly prejudicial evidence.

The decision in *Old Chief*, although limited to cases involving proof of felon status,<sup>51</sup> significantly clarifies Rule 403 jurisprudence.<sup>52</sup> The Court explicitly stated that the probative value of evidence under Rule 403 may "be calculated by comparing evidentiary alternatives."<sup>53</sup> Although the Advisory Committee's note to Rule 403 likewise suggests that a proper inquiry into probative value requires consideration of evidentiary alternatives,<sup>54</sup> prior to *Old Chief* lower courts had at times failed even to conduct the Rule 403 balancing test,<sup>55</sup> much less to compare evidentiary alternatives. The Court's mandate that lower courts weigh the probative and prejudicial values of evidentiary alternatives along with the evidence in question should add structure to trial court decisionmaking and facilitate review of such decisions.<sup>56</sup>

*Old Chief* also furthers evidence jurisprudence by using a Rule 403 balancing test to create a rule barring admission of the name of a past crime in most felon-in-possession cases,<sup>57</sup> thus erecting concrete limits to trial court discretion. Justice Souter declared that refusing to admit the name of a prior conviction "will be the general rule when proof of

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<sup>50</sup> Empirical evidence demonstrates that evidence of prior crimes is likely to bias jurors against a defendant. See Tanford, *supra* note 6, at 838. As the court in *United States v. Tavares*, 21 F.3d 1 (1st Cir. 1994), recognized, evidence of the nature of a past crime serves little purpose other than prejudicing the jury against a defendant: "there exists no reason, other than the government's desire to color the jury's perception of the defendant's character, for revealing the nature of the defendant's prior felony." *Id.* at 5.

<sup>51</sup> See *Old Chief*, 117 S. Ct. at 651 n.7.

<sup>52</sup> Cf. Gold, *supra* note 3, at 498 (noting that "the courts have generally reacted to claims of unfair prejudice on an ad hoc basis" and that "[t]he search for unfairly prejudicial evidence has thus been reduced to the often tried but seldom very true approach: 'I know it when I see it'").

<sup>53</sup> *Old Chief*, 117 S. Ct. at 652.

<sup>54</sup> See FED. R. EVID. 403 advisory committee's note.

<sup>55</sup> See Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 61-62 & nn.7-8 (1984); Tanford, *supra* note 6, at 862.

<sup>56</sup> Cf. Robert H. Aronson, *The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington*, 54 WASH. L. REV. 31, 42 (1978) ("[The] tension between the desirability of formal and nonformal evidentiary rules . . . manifests itself on at least two levels: a code versus case-by-case determination by appellate courts, and strictly defined rules . . . versus loosely defined guidelines and greater trial court discretion, reviewable only for abuse thereof."); Gold, *supra* note 3, at 500 ("Unbridled judicial discretion leads to unpredictability, inequality of treatment and elevation of individual whim over principles validated by experience as well as by the popular will.")

<sup>57</sup> Evidence of the nature of the prior crime may still be admissible under Rule 404(b). See *Old Chief*, 117 S. Ct. at 655.

convict status is at issue.<sup>58</sup> Justice Souter's use of a Rule 403 balancing test to arrive at a rule that effectively eliminates trial court discretion in felon-in-possession cases establishes that there are limits to the discretion Rule 403 grants to trial judges, and also that Rule 403 itself may be used to construct such limits. Such a formulation marks a departure from previous Rule 403 jurisprudence, because Rule 403 "was designed as a guide for handling situations for which no specific rules have been formulated."<sup>59</sup> Prior to *Old Chief*, commentators noted that appellate courts have often wrongly interpreted Rule 403 to confer an unreviewable grant of discretion to trial courts.<sup>60</sup> *Old Chief* suggests that the Court may have recognized a need for both clear boundaries to trial court discretion and new methods of creating such boundaries.

The Court did not, however, resolve all ambiguities in Rule 403 jurisprudence. The Court failed to specify whether alternative evidence must be equally probative to the evidence in question, noting only that "a mere showing of some alternative means of proof" is insufficient to show abuse of discretion.<sup>61</sup> The Court also failed to provide guidance regarding how courts should weigh probative value against unfair prejudice.<sup>62</sup> The Court's avoidance of further details of the Rule 403 balancing test may reflect a desire not to intervene too deeply in the discretion Rule 403 grants to trial courts. In fact, the Court's imposition of a rule for felon-in-possession cases may actually strengthen trial court discretion generally: by imposing a clear limit in one type of case, the Court may have signaled that within such limits appellate courts should avoid interfering with the wide discretion of trial courts. The *Old Chief* Court's failure to specify whether alternative evidence must provide all of the probativeness offered by the original evidence may limit the applicability of *Old Chief* outside the felon-in-possession context because most of the time both the original and the alternative evidence will have varying degrees of probativeness and prejudice. In the absence of clearer direction concerning the appropriate balance be-

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<sup>58</sup> *Id.* at 655-56.

<sup>59</sup> 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE app. § 403App.100[2] at 403App.-6 (Joseph M. McLaughlin ed., 2d ed. 1997).

<sup>60</sup> See 22 WRIGHT & GRAHAM, *supra* note 9, § 5223, at 316; Leonard, *supra* note 6, at 1162-63; cf. Lewis, *supra* note 5, at 343-44 ("Appellate courts apply a deferential standard of review to trial court evidentiary rulings in general and regard rulings under Rule 403 as particularly deserving of deference.").

<sup>61</sup> *Old Chief*, 117 S. Ct. at 651 n.7.

<sup>62</sup> The majority stated that evidence is unfairly prejudicial when it tends to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged," *Old Chief*, 117 S. Ct. at 650, but this statement was simply a reiteration of the Advisory Committee's statement that unfair prejudice "means an undue tendency to suggest decision on an improper basis," FED. R. EVID. 403 advisory committee's note; cf. Gold, *supra* note 55, at 60 (stating that Rule 403 "neither defines probative value or unfair prejudice, nor suggests how these seemingly noncomparable qualities of evidence should be weighed").

tween prejudicial effect and probative value, trial courts will continue to apply the open-ended balancing test they applied prior to *Old Chief*.

A more important weakness of the majority opinion was its broad reaffirmation of the prosecution's right to achieve "the full evidentiary force" of its case by using "evidence of its own choice."<sup>63</sup> The Court's conclusions regarding the role of narrative in criminal trials may lead lower courts astray. In an attempt both to respond to the dissent's criticism and to cabin the Court's holding, Justice Souter dedicated a significant portion of his opinion to explaining why the prosecution is generally entitled to prove its case as it sees fit. This analysis of narrative suffers from four flaws.

First, the Court failed to recognize that Rule 403 itself sufficiently safeguards the prosecution's interest in narrative integrity. Instead of considering the probative and prejudicial values of narrative coherence as part of the Rule 403 balancing test, the Court argued that the prosecution's interest in narrative coherence does not apply when, as in felon-in-possession cases, the evidence in question relates to a defendant's legal status.<sup>64</sup> As the dissent noted, however, the absence of evidence regarding the prior felony may confuse a jury just as much as the absence of evidence of a nonstatus element of the crime would.<sup>65</sup> Indeed, the exclusion of evidence will almost always invite jurors to fill in informational gaps.<sup>66</sup> Juror confusion alone cannot be determinative of admissibility; the relevant inquiry, in all Rule 403 contexts, is into probative value and unfair prejudice.

Second, the Court erred when it implied that the prosecution's interest in narrative integrity is inapplicable when the evidence in question "goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense."<sup>67</sup> Much evidence that is admissible pursuant to the

<sup>63</sup> *Old Chief*, 117 S. Ct. at 653.

<sup>64</sup> *See id.* at 654–55.

<sup>65</sup> *See id.* at 659 (O'Connor, J., dissenting). Jurors may infer that the prior crime was a serious crime, or they may conclude that it was unimportant. Cf. Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1060 (1978) (noting that "[juries] often develop expectations about the proof that . . . will be offered," and thus "[a] party's failure to satisfy those expectations may result in negative inferences, often unfair ones, being drawn against that party").

The *Old Chief* decision did not address whether a defendant has the right to introduce the name and nature of the prior felony when such information is beneficial to him or her. Cf. *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (arguing that permitting a defendant "to introduce evidence that his prior conviction was for a technical, non-violent or white collar crime" would be "no more appropriate than the reverse tendency").

<sup>66</sup> *See, e.g.*, William Finnegan, *Doubt*, NEW YORKER, Jan. 31, 1994, at 48, 51 (recounting that the jury the author served on "guessed and speculated about the lives and motives of the alibi witnesses, trying to put 'the evidence' into some narrative context that made sense").

<sup>67</sup> *Old Chief*, 117 S. Ct. at 655; cf. James Joseph Duane, *Stipulations, Judicial Notice, and a Prosecutor's Supposed "Right" To Prove Undisputed Facts: Oral Argument from an Amicus Curiae in Old Chief v. United States*, 168 F.R.D. 405, 437 (1996) (arguing that the distinction between



prosecution's right to prove its case with full evidentiary force — such as the introduction of photos of a murder victim — encompasses elements unrelated to the defendant's thoughts and actions.<sup>68</sup> Instead of arguing that narrative integrity was irrelevant, the Court should have acknowledged that any additional probative value that results from narrative coherence is properly considered by a district court weighing the probative and prejudicial values of evidence; narrative integrity may contribute more to prejudice than to probative value.

Third, the Court overstated the force of the “standard rule that the prosecution is entitled to prove its case by evidence of its own choice.”<sup>69</sup> The Federal Rules of Evidence limit the ways in which a prosecutor may construct a story.<sup>70</sup> The presumption of admissibility embodied in Rule 403's requirement that unfair prejudice substantially outweigh probative value is sufficient to protect the prosecution's interest in narrative integrity. The American adversarial system provides incentives for parties to introduce evidence that is helpful to their cases, rather than evidence that assists the jury in ascertaining the truth.<sup>71</sup> Rules of Evidence limitations reflect both mistrust of juries and recognition that incentives to mislead juries are built into the adversarial system. Thus, although the majority was correct to distinguish felon-in-possession cases from other cases in which Rule 403 plays an important role, the Court erred in its explanation of the distinction. The difference lies not in the role such evidence plays in the integrity of the prosecution's narrative, but rather in the fact that, due to the availability of evidence with identical probative value, the Rule 403 balancing test will almost always weigh against admitting the name and nature of the prior conviction in a felon-in-possession case.

Fourth, the Court wrongly equated the role story-creation plays in criminal trials with the prosecution's right to construct a story. Narrative is at the heart of the criminal trial process, but trials consist of

status evidence and evidence of actions and state of mind is that in the former, the issue being stipulated to is “not merely true, but [is] so clearly true that it would [be] a proper subject for judicial notice”).

<sup>68</sup> Similarly, although evidence relating to the identity of a murder victim is often relevant to proving intent or motive, even when such evidence is not relevant, almost any judge would “admit evidence of [a murder victim's name] over a defendant's objection . . . even if it was . . . a popular celebrity.” Duane, *supra* note 67, at 432; *accord Old Chief*, 117 S. Ct. at 657 (O'Connor, J., dissenting).

<sup>69</sup> *Old Chief*, 117 S. Ct. at 653; *cf.* Duane, *supra* note 67, at 435 (“[I]t is far from obvious . . . that the Government generally enjoys a right to prove any relevant facts any way it pleases . . .”).

<sup>70</sup> Mirjan Damaška argues that Anglo-American law strives “to structure the fact finders' analysis of evidence.” MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 24 (1997). Damaška characterizes the Anglo-American evidentiary system as atomistic: “The comparatively complex manner in which evidence is developed by opposing lawyers dramatically segregates information that actually may sway the factfinder's mind from permissible evidence.” Mirjan Damaška, *Atomistic and Holistic Evaluation of Evidence: A Comparative View*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW* 91, 93 (David S. Clark ed., 1990).

<sup>71</sup> See DAMAŠKA, *supra* note 70, at 77–86.

competing narratives, and the crucial story is the one that jurors create in their own minds, not the story the prosecution presents to the jury.<sup>72</sup> Tension between the Court's formulaic approach to the Rule 403 balancing test and the majority's broad statements regarding narrative reflects the structure of a criminal trial itself. American evidence law is atomistic: it lets the jury construct a story out of the myriad of information presented in a trial.<sup>73</sup> Rule 403 is one mechanism serving to filter information presented to the jurors to aid their story construction.

The Court's opinion reflects the competing values of fairness interests under Rule 403 and narrative coherence. Ensuring narrative coherence does not correspond to truth-finding.<sup>74</sup> Jurors are, however, more likely to regard coherent narratives, not nontraditional or nonlinear tales, as truthful stories. More importantly, jurors reach decisions not only on the basis of information presented at trial, but also on the basis of preexisting knowledge and world views<sup>75</sup> as well as preconceived storylines.<sup>76</sup> Rule 403 lessens the risk that such preconceptions pose to the fairness of a trial by excluding evidence that is likely to trigger bias against a defendant. Thus, rather than ensuring narrative coherence, Rule 403 restricts the manner in which stories are told.

The Court reached the correct result in *Old Chief* but engaged in a flawed discussion of the role of narrative in criminal trials. The Court's unnecessary emphasis on the prosecution's right to narrative coherence risks sending the wrong signal to lower courts. Outside the context of felon-in-possession cases, lower courts may believe that *Old Chief* instructs them not to take active roles in evidentiary questions.<sup>77</sup>

<sup>72</sup> See REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY 15* (1983) ("The trial produces 'data' . . . that the jurors have to utilize in their decision-making task."); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192, 194-95 (Reid Hastie ed., 1993) (arguing that "jurors impose a narrative story organization on trial information" from evidence that is "unwieldy and unstory-like").

<sup>73</sup> See Damaška, *supra* note 70, at 93.

<sup>74</sup> See Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 389, 500 (1996) ("[S]torytelling unavoidably limits and shapes how we determine what is real in a trial . . ."); cf. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 41 (1994) ("When truth defies certainty and becomes complex, justice requires difficult decisions on the basis of that doubt.")

<sup>75</sup> See HASTIE, PENROD & PENNINGTON, *supra* note 72, at 36 (arguing that jurors attempt to "construct[] a credible narrative by integrating trial testimony and arguments with general world knowledge"); Taslitz, *supra* note 74, at 475 ("[E]mpirical data . . . strongly suggests that jurors will rarely deviate from cultural themes."); Finnegan, *supra* note 66, at 51.

<sup>76</sup> See Sherwin, *supra* note 74, at 77 ("The array of deeply ingrained, culturally inherited, and socially instilled storylines that we carry, often subconsciously, in our heads recapitulate an equally deep sense of how truth and justice operate in the world.")

<sup>77</sup> Cf. *United States v. Cottman*, No. 96-1774, 1997 WL 340344, at \*4 (2d Cir. June 20, 1997) (stating that the *Old Chief* decision "confirms the vitality of the general rule" that the prosecution is not required to accept a stipulation to elements of a criminal offense).

If so, the Court's discussion of narrative may weaken the principles of fairness that are at the heart of the Federal Rules of Evidence, and thus may undermine an otherwise principled resolution of the issue presented in *Old Chief*.

### C. Federal Sentencing Guidelines

*Sentencing Adjustments Based on Acquitted Conduct.* — Sentencing proceedings are nothing like criminal trials. Most of the constitutional protections that shape criminal litigation do not apply to the determination of a convicted defendant's sentence.<sup>1</sup> Perhaps most crucially, a federal sentencing court is governed by a lower standard of proof than is a criminal jury;<sup>2</sup> thus, a defendant's sentence will often depend on some facts about which a reasonable doubt exists. Most recently, in *United States v. Watts*,<sup>3</sup> the Supreme Court held that a sentencing court may increase a defendant's sentence on the basis of the conduct underlying related charges of which the defendant was acquitted, as long as that conduct is established by a preponderance of the evidence.<sup>4</sup> Before *Watts*, almost every circuit had concluded that a sentencing court could increase a defendant's sentence for acquitted conduct — that is, conduct underlying a crime of which a jury found the defendant not guilty.<sup>5</sup> In order to mitigate the potential unfairness of this rule, two circuits had held that a district court may depart downward from an otherwise applicable sentencing range that takes account of acquitted conduct.<sup>6</sup> After *Watts*, this practice is still viable. *Watts* established that a sentence based in part on acquitted conduct is permissible under the Constitution, the United States Code, and the Federal Sentencing Guidelines. But even under *Watts*, a sentencing court has discretion to fashion a just sentence and not merely to calculate a permissible one.

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<sup>1</sup> See Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1219–20 (1993); cf. Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 356 (1992) (noting that the Court has taken a "laissez-faire attitude" toward factfinding at sentencing). The Due Process Clause does not require sentencing facts to be proven beyond a reasonable doubt. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91–92 (1986). At sentencing, a defendant does not have the right to a jury trial, see *id.* at 93, or the right to confront witnesses, see *United States v. Kikumura*, 918 F.2d 1084, 1102–03 (3d Cir. 1990). Sentencing courts may consider prior convictions that were obtained through unconstitutional criminal proceedings, see *Custis v. United States*, 511 U.S. 485, 497 (1994), as well as evidence seized in violation of the Fourth Amendment, see *United States v. Tejada*, 956 F.2d 1256, 1263 (2d Cir. 1992).

<sup>2</sup> See *McMillan*, 477 U.S. at 91–92.

<sup>3</sup> 117 S. Ct. 633 (1997) (per curiam).

<sup>4</sup> See *id.* at 638.

<sup>5</sup> See *id.* at 634 & n.1 (citing cases).

<sup>6</sup> See *United States v. Lombard*, 72 F.3d 170, 185 (1st Cir. 1995); *United States v. Concepcion*, 983 F.2d 369, 389 (2d Cir. 1992).

Both defendants in *Watts* were convicted of drug-related offenses. A federal jury convicted Vernon Watts of possessing cocaine with intent to distribute under 21 U.S.C. § 841(a)(1), and acquitted him of using a firearm in the course of a drug offense under 18 U.S.C. § 924(c).<sup>7</sup> Despite Watts's acquittal on the firearms charge, the district court, applying section 2D1.1(b)(1) of the Sentencing Guidelines,<sup>8</sup> increased Watts's offense level because of his firearm possession.<sup>9</sup> In an unrelated prosecution, the government indicted Cheryl Ann Putra for taking part in separate sales of one and five ounces of cocaine in violation of § 841(a)(1).<sup>10</sup> The jury returned a guilty verdict for Putra's involvement in the one-ounce sale but found her not guilty with regard to the five-ounce transaction.<sup>11</sup> The acquittal notwithstanding, the district court found by a preponderance of the evidence that Putra had taken part in both sales, and based her sentence on the total six ounces of cocaine.<sup>12</sup>

In separate appeals, two Ninth Circuit panels vacated the defendants' sentences.<sup>13</sup> Both panels reaffirmed the Ninth Circuit's holding in *United States v. Brady*<sup>14</sup> that the Sentencing Guidelines did not allow a court to increase a defendant's sentence by relying on facts that an acquitting jury had necessarily rejected.<sup>15</sup> Each panel held that the district courts in *Watts* and *Putra* had improperly reconsidered the juries' findings.<sup>16</sup> The Ninth Circuit conceded in *Putra* that the *Brady* holding constituted a "judicial limitation . . . beyond any limitation

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<sup>7</sup> See *United States v. Watts*, 67 F.3d 790, 793 (9th Cir. 1995).

<sup>8</sup> Under the Federal Sentencing Guidelines, a district court determines the range of appropriate sentences based on several factors. See generally U.S. DEP'T OF JUSTICE, PROSECUTORS HANDBOOK ON SENTENCING GUIDELINES 5-13 (1987) [hereinafter PROSECUTORS HANDBOOK] (describing the process of calculating a sentencing range). The circumstances and conduct involved in the convicted offense might increase or decrease the applicable sentencing range. Section 2D1.1(b)(1) of the Guidelines, for example, requires an upward increase in the sentencing range — an enhancement — if "a dangerous weapon (including a firearm) was possessed" during the offense of conviction. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (1997). After applying any relevant enhancements, the court must select a sentence within the Guideline range, unless a relevant departure provision permits otherwise. See, e.g., *id.* § 5K2.0; PROSECUTORS HANDBOOK, *supra*, at 13-15.

<sup>9</sup> See *Watts*, 67 F.3d at 796. Under the enhanced sentencing range, the district court imposed a sentence of 262 months imprisonment and 60 months of supervised release. See *id.* at 793.

<sup>10</sup> See *United States v. Putra*, 78 F.3d 1386, 1387 (9th Cir. 1996).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* Absent the added five ounces, Putra's sentencing range would have been 15 to 21 months. Under the six-ounce offense level, however, Putra's sentencing range was 27 to 33 months. See *id.*

<sup>13</sup> See *Putra*, 78 F.3d 1386 (9th Cir. 1996); *Watts*, 67 F.3d 790 (9th Cir. 1995).

<sup>14</sup> 928 F.2d 844 (9th Cir. 1991).

<sup>15</sup> See *Putra*, 78 F.3d at 1388-89; *Watts*, 67 F.3d at 796-97.

<sup>16</sup> See *Putra*, 78 F.3d at 1389; *Watts*, 67 F.3d at 796.

imposed by the Guidelines," but the panel insisted that its holding was not inconsistent with the Guidelines.<sup>17</sup>

The Supreme Court granted certiorari, summarily reversed the consolidated decisions, and remanded the cases to the Ninth Circuit.<sup>18</sup> The Court argued that the Ninth Circuit's unique restriction<sup>19</sup> lacked any basis in congressional legislation, the Court's prior holdings, or the Sentencing Guidelines.<sup>20</sup> The Court began by discussing 18 U.S.C. § 3661, which codified the nearly unlimited discretion of sentencing judges to consider various kinds of information.<sup>21</sup> Citing *Williams v. New York*<sup>22</sup> and *Nichols v. United States*,<sup>23</sup> the Court noted that sentencing judges have always had the power to consider past criminal behavior, even conduct that never led to a conviction.<sup>24</sup> The institution of the Federal Sentencing Guidelines, as the Court explained, had not changed "this aspect of the sentencing court's discretion."<sup>25</sup> The Court relied heavily on *Witte v. United States*<sup>26</sup> for the proposition that the related-conduct provisions of the Guidelines preserve the pre-Guidelines discretion of sentencing judges to consider all relevant conduct.<sup>27</sup> As the Court pointed out, the commentary to section 1B1.3 — the provision of the Guidelines that governs the general calculation of the sentencing range — instructs district courts to consider all of the defendant's acts committed in the course of the convicted crime, including acts that did not result in a conviction or even a formal charge.<sup>28</sup>

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<sup>17</sup> *Putra*, 78 F.3d at 1389. The Guidelines do require the aggregation of narcotics in multiple sales whether or not a conviction resulted from every sale. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 commentary at 21 (1997). The Ninth Circuit argued, however, that the Guidelines address conduct that never resulted in a formal charge and make no explicit reference to acquitted conduct. See *Putra*, 78 F.3d at 1389.

<sup>18</sup> See *Watts*, 117 S. Ct. at 638. The Court decided that the issues in *Watts* were too easily resolved to warrant briefs or oral argument. See *id.* at 634. Two concurrences and two dissents later, Justice Kennedy disagreed. See *id.* at 644 (Kennedy, J., dissenting).

<sup>19</sup> As the Court noted, all other circuits had held that sentencing courts may consider acquitted conduct. See *Watts*, 117 S. Ct. at 634 & n.1.

<sup>20</sup> See *id.*

<sup>21</sup> See 18 U.S.C. § 3661 (1994), which provides, in pertinent part, that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

<sup>22</sup> 337 U.S. 241 (1949). In *Williams*, the Court upheld a sentence increase based on the defendant's involvement in 30 burglaries for which he had never been charged. See *id.* at 246, 250-52.

<sup>23</sup> 511 U.S. 738 (1994). In *Nichols*, the Court held that a sentencing court may increase a defendant's prison sentence based on a prior uncounseled misdemeanor conviction, even though the Sixth Amendment guarantees the right to counsel for any charge that results in a prison sentence. See *id.* at 746-47.

<sup>24</sup> See *Watts*, 117 S. Ct. at 635.

<sup>25</sup> *Id.*

<sup>26</sup> 515 U.S. 389 (1995).

<sup>27</sup> See *Watts*, 117 S. Ct. at 635.

<sup>28</sup> See *id.* at 635-36 (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 background (1997)).

The Court further explained that the Ninth Circuit had misconceived “the preclusive effect of an acquittal.”<sup>29</sup> A trial court may only convict a defendant whose guilt has been proven beyond a reasonable doubt, whereas a sentencing court, the Court noted, may rely on facts established by a preponderance of the evidence.<sup>30</sup> The defendants’ acquittals, the Court explained, did not certify their innocence but merely established a reasonable doubt about their guilt.<sup>31</sup> The Court noted that “an acquittal is not a finding of any fact.”<sup>32</sup> Accordingly, the Court asserted that the sentencing courts had the authority to find by a preponderance of the evidence that Putra had been involved in the five-ounce transaction and that Watts had possessed a firearm while committing the drug offense.<sup>33</sup>

Justice Breyer filed a concurring opinion to clarify that the Court’s holding does not prevent the Sentencing Commission from amending the Guidelines to exclude acquitted conduct.<sup>34</sup> In a separate concurrence, Justice Scalia disagreed. Citing 18 U.S.C. § 3661, Justice Scalia argued that the Commission does not have the authority to prevent sentencing courts from considering acquitted conduct, or any other information, in determining sentences.<sup>35</sup>

Justice Stevens, in dissent, would have prohibited sentencing courts from considering acquitted conduct when calculating applicable sentencing ranges under the Guidelines.<sup>36</sup> Justice Stevens prefaced his opinion with the observation that the calculation of a sentencing range employs “mandatory rules”<sup>37</sup> designed to “cabin the discretion of all

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<sup>29</sup> *Id.* at 637. Citing *Witte*, the Court put to rest any concerns that Watts’s or Putra’s sentences violated the Double Jeopardy Clause. *See id.* at 636–37. In *Witte*, the defendant argued that the government had violated the Double Jeopardy Clause by charging him with crimes that had already been the basis of a sentencing increase in a prior conviction. *See Witte*, 515 U.S. at 397. The Court rejected that argument and, by its broad language, all arguments for applying the Double Jeopardy Clause to sentencing proceedings: “consideration of information about the defendant’s character and conduct at sentencing does not result in ‘punishment’ for any offense other than the one of which the defendant was convicted.” *Id.* at 401. The *Watts* Court concluded that “sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction.” *Watts*, 117 S. Ct. at 636.

<sup>30</sup> *See Watts*, 117 S. Ct. at 637 (citing U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 commentary (1997)). In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court held that the preponderance of the evidence standard for sentencing satisfies due process. *See id.* at 91–92.

<sup>31</sup> *See Watts*, 117 S. Ct. at 637. A jury acquittal, the Court noted, does not protect a defendant from relitigation of the same issues presented at trial, as long as a lower standard of proof governs the subsequent forum. *See id.* (citing *Dowling v. United States*, 493 U.S. 342, 349 (1990)).

<sup>32</sup> *Id.* (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, C.J., dissenting)) (internal quotation marks omitted).

<sup>33</sup> *See id.* at 638.

<sup>34</sup> *See id.* (Breyer, J., concurring).

<sup>35</sup> *See id.* (Scalia, J., concurring). Such a restriction on the discretion of sentencing judges, Justice Scalia concluded, would require an act of Congress. *See id.*

<sup>36</sup> *See id.* at 643–44 (Stevens, J., dissenting).

<sup>37</sup> *Id.* at 640.

judges<sup>38</sup> and thereby to curtail “an unjustifiably wide range of sentences.”<sup>39</sup> The Sentencing Commission, Justice Stevens explained, had incorporated § 3661 only into the provision governing the selection of a particular sentence within the prescribed range — section 1B1.4 — and not into the provision concerning the calculation of the range itself — section 1B1.3.<sup>40</sup> Justice Stevens posited that a sentencing judge could consider acquitted conduct only when selecting a sentence within a sentencing range; all relevant facts that the judge used to calculate the range itself would have to be established beyond a reasonable doubt.<sup>41</sup>

Justice Stevens insisted that the Court had never before addressed, much less determined, the novel issue that Watts’s and Putra’s sentencing raised: what standard of proof is required for facts used to increase a defendant’s sentencing *range*?<sup>42</sup> Both *Williams* and *McMillan v. Pennsylvania*,<sup>43</sup> Justice Stevens explained, were cases in which the consideration of uncharged conduct resulted in sentences within the range already available to the courts.<sup>44</sup> Watts’s and Putra’s sentences, in contrast, exceeded the maximum sentences that would have been available had the judge not considered their acquitted offenses.<sup>45</sup> Justice Stevens also attacked the Court’s reliance on *Witte*, which he viewed as a pure double jeopardy case that was unrelated to the rules governing the initial imposition of punishment.<sup>46</sup>

Justice Kennedy filed a brief dissent to criticize the Court for not setting the case for full briefing and oral argument.<sup>47</sup> Justice Kennedy asserted that the Court had never previously decided the precise issue of the case: a sentencing court’s treatment of “not just prior criminal history, but conduct underlying a charge for which the defendant was acquitted.”<sup>48</sup> Given the hundreds of sentencing proceedings in which the issue has arisen, Justice Kennedy reasoned, the Court should have confronted the potentially unique implications of acquitted conduct “by a reasoned course of argument, not by shrugging it off.”<sup>49</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting S. REP. NO. 98-225, at 38 (1983)) (internal quotation marks omitted).

<sup>40</sup> *See id.* Moreover, Justice Stevens maintained that § 3661 does not establish a judge’s authority to assign particular weight to certain kinds of information. *See id.* at 639.

<sup>41</sup> *See id.* at 643-44.

<sup>42</sup> *See id.* at 641-43.

<sup>43</sup> 477 U.S. 79 (1986).

<sup>44</sup> *See Watts*, 117 S. Ct. at 641-42 (Stevens, J., dissenting). As Justice Stevens observed, the *McMillan* Court had specifically noted that the state law had not increased the maximum penalty. *See id.* at 642 (citing *McMillan*, 477 U.S. at 87-88).

<sup>45</sup> *See id.* at 640-41 & n.2.

<sup>46</sup> *See id.* at 642-43.

<sup>47</sup> *See id.* at 644 (Kennedy, J., dissenting).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* Justice Kennedy urged that, if the Court could not diffuse the serious concerns about undermining jury verdicts, then it ought at least to be upfront and “acknowledge [the] theoretical contradiction” necessitated by “overriding practical considerations.” *Id.*

As Justice Kennedy's dissent suggested, lower courts should not infer too much from the Court's silence; *Watts* does not preclude a sentencing judge from taking into account a jury's decision to acquit. Before *Watts*, in fact, two circuits had held that a district court may depart from the otherwise applicable guideline range, in the interest of fairness, to temper the effects of a sentence increase based on acquitted conduct.<sup>50</sup> The Court's holding in *Watts* does not invalidate this practice: *Watts* neither restricts the use of downward departures nor requires a court to ignore a defendant's acquittal on related offenses.

Under section 5K2.0 of the Guidelines, a sentencing court retains some discretion to impose a sentence below the Guideline range when faced with mitigating circumstances that the Sentencing Commission has failed to consider.<sup>51</sup> In 1992, in *United States v. Concepcion*,<sup>52</sup> the Second Circuit required a district court to consider departing downward from a sentence that had been based in great part on an acquitted charge.<sup>53</sup> The First Circuit adopted the same approach in 1995 in *United States v. Lombard*.<sup>54</sup>

By the time the Court decided *Watts*, the Sentencing Commission appeared to have endorsed the First and Second Circuits' interpreta-

<sup>50</sup> See *United States v. Lombard*, 72 F.3d 170, 184–85 (1st Cir. 1995); *United States v. Concepcion*, 983 F.2d 369, 389 (2d Cir. 1992).

<sup>51</sup> Section 5K2.0 reads, in relevant part:

[T]he sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1997) (quoting 18 U.S.C. § 3553(b) (1988)). Departures are never mandatory: a district court will not be reversed for refusing to employ a departure from the Guidelines. See PROSECUTORS HANDBOOK, *supra* note 8, at 77–78; 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3918.8, at 576 (2d ed. 1991).

<sup>52</sup> 983 F.2d 369 (2d Cir. 1992).

<sup>53</sup> See *id.* at 389.

<sup>54</sup> 72 F.3d 170, 184–85 (1st Cir. 1995). The First Circuit suggested that a downward departure under section 5K2.0 would be appropriate only in "extreme case[s]." *Id.* at 186. In *Lombard*, for instance, a jury convicted the defendant of firearms offenses, and the sentencing court imposed a life sentence based on a related (but acquitted) murder charge. See *id.* at 172. The sentencing increase in *Concepcion* had also been "astronomical," which suggests that the Second Circuit might limit its holding to extreme cases as well. See *Concepcion*, 983 F.2d at 389.

Such a restriction on section 5K2.0, however, has probably not survived the Supreme Court's decision in *Koon v. United States*, 116 S. Ct. 2035 (1996). Under *Koon*, appellate courts decide as a matter of law what factors are permissible bases for departures under the Guidelines, but district courts retain discretion to determine whether a mitigating factor is present to a degree sufficient to justify a departure. See *id.* at 2046–47. Writing in the shadow of *Koon*, the Second Circuit in *United States v. Shonubi*, 103 F.3d 1085 (2d Cir. 1997), restated its departure rule more broadly: "This Circuit mitigates [the related-conduct provision] by permitting the sentencing judge to make a downward departure from a sentencing range calculated on the basis of acquitted conduct." *Id.* at 1089 n.2 (citing *Concepcion*, 983 F.2d at 386–89). Coincidentally, the Second Circuit decided *Shonubi* on the same day that the Supreme Court decided *Watts* — January 6, 1997.



tion of section 5K2.o. A few days before the Court handed down its decision, the Commission presented several proposals addressing the role of acquitted conduct in section 1B1.3.<sup>55</sup> One proposal would have made explicit the authority of district courts to depart downward to soften sentencing enhancements based on such conduct.<sup>56</sup> Although the proposal never came to a vote, the Commission explained that the option to depart downward was already “arguably implicit in the Relevant Conduct guideline.”<sup>57</sup> Given the First and Second Circuits’ holdings and the Sentencing Commission’s recent statements, district courts likely had a good deal of discretion before *Watts* to depart downward from a sentence that had been enhanced due to acquitted conduct.<sup>58</sup>

Critics of this practice might make at least two arguments that *Watts* curtails this application of section 5K2.o. First, under a broad reading of *Watts*, courts might conclude that a jury acquittal is entirely irrelevant for sentencing purposes. For instance, in *United States v. Shonubi*,<sup>59</sup> a district court on remand from the Second Circuit<sup>60</sup> noted that the “escape route” of section 5K2.o was “dubious in light of the Supreme Court’s opinion in *Watts*, which treats acquitted conduct the same way as any other conduct.”<sup>61</sup> Under this reading of *Watts*, a jury acquittal is simply not a mitigating factor for sentencing purposes.

This argument ignores the distinctly narrow ground for the Court’s holding. The Court focused its reasoning on an appellate court’s lack of authority to “invent a blanket prohibition against” sentencing court consideration of acquitted conduct.<sup>62</sup> *Watts* makes clear that the relevant congressional statutes do not curtail a district court’s power to review acquitted conduct at sentencing — neither do the Sentencing Guidelines, the comments to the Guidelines, the Double Jeopardy Clause, the Due Process Clause, or the preclusive effect of a jury’s

<sup>55</sup> See Sentencing Guidelines for United States Courts, 62 Fed. Reg. 152, 161–62 (1997) (proposed Jan. 2, 1997).

<sup>56</sup> See *id.*

<sup>57</sup> *Id.*

<sup>58</sup> The First and Second Circuits’ holdings also have analogical support in the Court’s recent endorsement of the use of downward departures when troubling aspects of the procedural history of a defendant’s conviction exist. See *Koon*, 116 S. Ct. at 2053 (upholding a district court’s downward departure based in part on the defendants’ successive prosecution in state and federal courts); *Witte v. United States*, 515 U.S. 389, 405–06 (1995) (encouraging the use of section 5K2.o because the defendant’s offense had already been the basis of a sentencing increase in a prior conviction).

<sup>59</sup> 962 F. Supp. 370 (E.D.N.Y. 1997).

<sup>60</sup> *United States v. Shonubi*, 103 F.3d 1085 (2d Cir. 1997).

<sup>61</sup> *Shonubi*, 962 F. Supp. at 373. The *Shonubi* district court appears to have misinterpreted Second Circuit precedent. *Watts* merely confirmed the validity of *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 180–82 (2d Cir. 1990), and did not make new law in the Second Circuit. See *Watts*, 117 S. Ct. at 634 n.1.

<sup>62</sup> *Watts*, 117 S. Ct. at 635.

verdict.<sup>63</sup> *Watts*, like *Concepcion* and *Lombard*, affirms rather than limits a sentencing court's authority under the Guidelines to consider a broad range of information to reach a just sentence.<sup>64</sup>

The purely doctrinal *Watts* opinion does not refute the attack of scores of judges and scholars that sentencing increases based on acquitted conduct are "blatant injustice."<sup>65</sup> At most, *Watts* disposes of arguments that sentencing enhancements based on acquitted conduct are somehow unconstitutional.<sup>66</sup> But *Watts* does nothing to mollify concerns that these enhancements might undermine aspirations and values inherent in the Fifth and Sixth Amendments<sup>67</sup> — such as preserving the finality of a jury's judgment,<sup>68</sup> maintaining a single trier of fact,<sup>69</sup> depriving the government of a second chance to convict,<sup>70</sup>

<sup>63</sup> See *id.* at 635–37.

<sup>64</sup> Compare *id.* at 635 ("[S]entencing courts have broad discretion to consider various kinds of information."), with *United States v. Lombard*, 72 F.3d 170, 176 (1st Cir. 1995) ("[T]here is a range of discretion left to the district courts even within the . . . Guidelines."), and *United States v. Concepcion*, 983 F.2d 369, 389 (2d Cir. 1992) (remanding "to permit the court to consider" whether a departure was permissible).

<sup>65</sup> *United States v. Baylor*, 97 F.3d 542, 549 (D.C. Cir. 1996) (Wald, J., concurring specially); accord, e.g., *United States v. Booker*, 115 F.3d 442, 445 (7th Cir. 1997) (Evans, J., dissenting) ("The law, of course, says this is perfectly cricket, but that doesn't make it fair."); *United States v. Hunter*, 19 F.3d 895, 898 (4th Cir. 1994) (Hall, J., concurring); *United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991) (insisting that sentencing enhancements for acquitted conduct "would pervert our system of justice"). Commentators have voiced similar objections. See, e.g., Barry L. Johnson, *If at First You Don't Succeed — Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 168–86 (1996); David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 455 (1993). Judges and scholars have noted that most citizens would probably be shocked to learn that sentencing courts may hold defendants accountable for conduct of which they were acquitted. See, e.g., *United States v. Putra*, 110 F.3d 705, 706 (9th Cir. 1997) (Hug, C.J., concurring); *United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (Bright, J., dissenting); Daniel L. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1714 (1992); cf. *United States v. Frias*, 39 F.3d 391 (2d Cir. 1994) (Oakes, J., concurring) ("This is jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'").

<sup>66</sup> See *Watts*, 117 S. Ct. at 636–38. A number of judges and commentators had argued that these sentencing enhancements violated the Constitution. See, e.g., *Baylor*, 97 F.3d at 550 (Wald, J., concurring specially) (suggesting "plausibl[e]" constitutional attacks based on the Double Jeopardy Clause, the right to a jury trial, and due process); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) (Fifth and Sixth Amendments) (dictum); *United States v. Silverman*, 976 F.2d 1502, 1527 (6th Cir. 1992) (Merritt, C.J., dissenting) (due process); see also, e.g., Herman, *supra* note 1, at 350–54 (double jeopardy and due process); Lear, *supra* note 1, at 1218–23 (criticizing *McMillan* and *Williams*).

<sup>67</sup> See Johnson, *supra* note 65, at 180–86.

<sup>68</sup> See, e.g., *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (describing the bar against relitigating a defendant's acquittal as "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence").

<sup>69</sup> See, e.g., *United States v. Jorn*, 400 U.S. 470, 479 (1971) (noting that, for purposes of the Double Jeopardy Clause, jeopardy attaches when a defendant is first put before the trier of fact).

<sup>70</sup> See, e.g., *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970) (noting that the Double Jeopardy Clause protects an acquitted defendant from "having to 'run the gantlet' a second time" (quoting *Green v. United States*, 355 U.S. 184, 190 (1958))).

avoiding an "impermissibly enhanced sentence,"<sup>71</sup> enabling jurors to speak for the community,<sup>72</sup> and insulating not-guilty verdicts from judicial review.<sup>73</sup> Admittedly, in light of *Watts*, these concerns do not forbid a court to consider a defendant's involvement in a crime merely because an acquittal resulted. But in light of these concerns, *Watts* does not require a sentencing court to overlook an acquittal either.

A second argument is that the First and Second Circuits' interpretation of section 5K2.0 does not survive *Watts* because *Watts*'s reading of the Guidelines implicitly forbids a downward departure based on an acquittal of related conduct. The Court emphasized that the broadly worded related-conduct provisions do include acquitted conduct in the range of conduct that sentencing courts should consider.<sup>74</sup> Under section 5K2.0, sentencing courts may not depart from the Guidelines based on any factor that has been "adequately taken into consideration by the Sentencing Commission."<sup>75</sup> A judge might conclude from *Watts* that the Sentencing Commission *has* adequately considered how a court should treat acquitted conduct: a court should *increase* the sentence. A sentencing court, the argument goes, should not be able to *decrease* a defendant's sentence for the same reason.

The implications that this argument draws from *Watts* are unfounded.<sup>76</sup> The Guidelines make no explicit reference to acquitted conduct.<sup>77</sup> The Guidelines commentary refers generally to conduct

<sup>71</sup> *Ohio v. Johnson*, 467 U.S. 493, 499 (1984).

<sup>72</sup> *See, e.g., Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

<sup>73</sup> *See, e.g., Martin Linen Supply*, 430 U.S. at 570-71.

<sup>74</sup> *See Watts*, 117 S. Ct. at 636 ("Application Note 3 explains that '[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts.'" (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 application note 3 (1997))); *id.* ("Accordingly, the Guidelines conclude that '[r]elying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses.'" (alteration in original) (emphasis added by the Court) (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 background (1997))); *id.* ("[Section 1B1.3] directs sentencing courts to consider all other related conduct, whether or not it resulted in a conviction.").

<sup>75</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1997) (quoting 18 U.S.C. § 3553(b) (1988)) (internal quotation marks omitted).

<sup>76</sup> This argument also mischaracterizes the theory underlying the departure practice sanctioned by the First and Second Circuits: the acquitted *conduct* is the basis for the related-conduct increase, whereas the *acquittal* itself is the basis for the downward departure. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (1997) (applying to "all acts and omissions committed" by the defendant), *with* *United States v. Lombard*, 72 F.3d 170, 184 (1st Cir. 1995) (citing the defendant's acquittal as a mitigating factor).

<sup>77</sup> The only instances in which the Commission has specifically addressed acquitted conduct have been proposals to amend the Guidelines. *See, e.g.,* Sentencing Guidelines for United States Courts, 62 Fed. Reg. 152, 161-62 (proposed Jan. 2, 1997); Sentencing Guidelines for United States Courts, 58 Fed. Reg. 67,522, 67,541 (proposed Dec. 21, 1993); Sentencing Guidelines for United States Courts, 57 Fed. Reg. 62,832, 62,832, 62,848 (proposed Dec. 31, 1992). However, under the section 5K2.0 determination of adequate consideration, courts may look to "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b) (1994).

that “is not an element of the offense of conviction.”<sup>78</sup> The illustrations provided in section 1B1.3 are limited to cases in which the related conduct did not even result in a formal charge, much less an acquittal.<sup>79</sup> The Guidelines, like *Watts* itself, reflect no meaningful contemplation of whether an acquittal should alter the treatment of related conduct.<sup>80</sup>

Judges and scholars opposed to *Watts* on fairness grounds should direct their criticisms to the lower courts. By failing to explore the concerns of justice and fairness that its holding raised, the *Watts* Court implicitly reserved to lower courts the task of evaluating under section 5K2.0 whether the Commission has adequately taken into consideration a defendant’s acquittal on related charges.<sup>81</sup> Under 18 U.S.C. § 3553(b), the federal courts are charged with ensuring that defendants receive just punishments,<sup>82</sup> even when the Sentencing Commission has overlooked potentially substantial factors.<sup>83</sup> The Court’s and the Guidelines’ silence on the implications of a jury acquittal should invite — rather than discourage — lower courts to question whether the Commission has adequately considered the significance of acquittals.

The practice that *Watts* has validated will continue to elicit moral objections from the legal community.<sup>84</sup> The Court has answered these

<sup>78</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 background (1997).

<sup>79</sup> See, e.g., *id.* § 1B1.3 commentary at 21.

<sup>80</sup> Many judges have argued that an acquittal is relevant at sentencing. See, e.g., *United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., dissenting from the denial of a request for rehearing en banc) (“A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal.”); *United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., concurring in part and dissenting in part) (noting “the ‘special weight’ the Supreme Court has accorded acquittals in its Double Jeopardy jurisprudence”); *United States v. Campbell*, 684 F.2d 141, 154 (D.C. Cir. 1982) (“[A] judgment of acquittal is a more final and binding determination of facts than the requisite standard of proof might at first seem to allow.”); see also Johnson, *supra* note 65, at 180–86 (arguing that an acquittal by a jury is accorded special significance under the Fifth and Sixth Amendments); cf. *Watts*, 117 S. Ct. at 644 (Kennedy, J., dissenting) (criticizing the Court for failing to address the particular implications of an acquittal for sentencing purposes).

<sup>81</sup> Cf. *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 487 (E.D.N.Y. 1993) (“Congress could not have intended such a bizarre and dangerous result when it adopted guideline sentences.”).

<sup>82</sup> See *Freed*, *supra* note 65, at 1698. The purpose of the Sentencing Guidelines, as stated by Congress, is to “provide certainty and fairness in meeting the purposes of sentencing . . . while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors.” 28 U.S.C. § 991(b)(1)(B) (1994).

<sup>83</sup> See 18 U.S.C. § 3553(b) (1994); see also *Freed*, *supra* note 65, at 1734 (arguing that Congress specifically delegated the determination of adequacy to the courts).

<sup>84</sup> After *Watts*, on remand to the Ninth Circuit, Chief Judge Hug argued that the current Guidelines “seriously undercut” the jury’s function, and urged the Sentencing Commission to amend its related-conduct provisions. *United States v. Putra*, 110 F.3d 705, 706 (9th Cir. 1997) (Hug, C.J., concurring); accord *United States v. Jones*, 863 F. Supp. 575, 578 (N.D. Ohio 1994); see also Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 550–52 (1993) (arguing that the consideration of acquitted conduct renders the jury’s verdict meaningless); Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 469–70, 481–84 (1993) (arguing that

concerns with silence and hesitation, but they need not be ignored by the judiciary altogether. As the First and Second Circuits have discovered, section 5K2.0 allows district courts to ameliorate the effects of a sentencing practice that potentially nullifies jury acquittals. Even under *Watts*, a sentencing court should act in light of, rather than in spite of, the jury's verdict.

### III. FEDERAL STATUTES AND REGULATIONS

#### A. Bankruptcy Code

*Valuation Standard for Assets in Cram Down.* — The problem of assessing value has challenged philosophers,<sup>1</sup> economists,<sup>2</sup> bankers,<sup>3</sup> and even lawyers.<sup>4</sup> In the context of bankruptcy, the circuit courts of appeal have adopted three distinct approaches to assess the value of undersecured collateral.<sup>5</sup> Last Term, in *Associates Commercial Corp. v. Rash*,<sup>6</sup> the Supreme Court resolved this confusion by specifying a uniform method of valuation for undersecured claims in a cram down proceeding. Although uniformity among the circuits is certainly welcome, the rule set forth by the Court will lead to economically inefficient transactions between creditors and bankrupt debtors. This outcome was unnecessary — the Court could have reached the economically efficient result while also remaining true to the language and meaning of the valuation provision in the Bankruptcy Code.

a sentencing court's consideration of acquitted conduct undermines the jury's ability to represent the community and to protect the defendant from judicial abuse).

<sup>1</sup> See, e.g., Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in JOHN STUART MILL, *UTILITARIANISM AND OTHER WRITINGS* 33, 33-39 (Mary Warnock ed., 1962).

<sup>2</sup> See, e.g., I KARL MARX, *CAPITAL* 125-31 (Ben Fowkes trans., Vintage Books ed. 1977) (1867).

<sup>3</sup> See, e.g., TOM COPELAND, TIM KOLLER & JACK MURRIN, *VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES* 97-100 (1990).

<sup>4</sup> See, e.g., Alemante G. Selassie, *Valuation Issues in Applying Fraudulent Transfer Law to Leveraged Buyouts*, 32 B.C. L. REV. 377, 386 (1991).

<sup>5</sup> See *Associates Commercial Corp. v. Rash* (*In re Rash*), 90 F.3d 1036, 1060-61 (5th Cir. 1996) (en banc) (adopting a foreclosure value standard); *Taffi v. United States* (*In re Taffi*), 96 F.3d 1190, 1192-93 (9th Cir. 1996) (en banc) (adopting a variation on the replacement value standard), *cert. denied*, 117 S. Ct. 2478 (1997); *Metrobank v. Trimble* (*In re Trimble*), 50 F.3d 530, 531-32 (8th Cir. 1995) (same); *Winthrop Old Farm Nurseries, Inc. v. New Bedford Inst. for Sav.* (*In re Winthrop Old Farm Nurseries, Inc.*), 50 F.3d 72, 74-76 (1st Cir. 1995) (same); *Huntington Nat'l Bank v. Pees* (*In re McClurkin*), 31 F.3d 401, 406 (6th Cir. 1994) (same); *Coker v. Sovran Equity Mortgage Corp.* (*In re Coker*), 973 F.2d 258, 260 (4th Cir. 1992) (same); *General Motor Acceptance Corp. v. Valenti* (*In re Valenti*), 105 F.3d 55, 62-63 (2d Cir. 1997) (holding that bankruptcy courts have discretion to assess value at the midpoint between replacement value and foreclosure value); *In re Hoskins*, 102 F.3d 311, 316 (7th Cir. 1996) (same).

<sup>6</sup> 117 S. Ct. 1879 (1997).

In March 1989, Elray Rash purchased a Kenworth tractor truck from Janoe Kenworth Trucks for use in his freight-hauling business.<sup>7</sup> The retail value of the truck was \$73,700.<sup>8</sup> Rash agreed to pay \$16,011 as a down payment and \$1610 per month for sixty months.<sup>9</sup> Janoe retained a lien on the truck in order to secure payment on the unpaid balance; later it assigned the lien to Associates Commercial Corporation (ACC).<sup>10</sup>

In 1991, Rash suffered a mild stroke that left him unable to drive for approximately three months.<sup>11</sup> In March 1992, Rash and his wife filed a bankruptcy petition pursuant to Chapter 13 of the United States Bankruptcy Code.<sup>12</sup> At the time of the filing, the unpaid balance on the truck loan was \$41,171.<sup>13</sup> Under the Bankruptcy Code, the Rashes could gain confirmation of their Chapter 13 plan if ACC accepted it,<sup>14</sup> if the Rashes surrendered the truck to ACC,<sup>15</sup> or if the court allowed the Rashes to invoke the cram down provision.<sup>16</sup> The Rashes invoked the cram down provision,<sup>17</sup> which allows a debtor to keep the collateral despite the objection of the creditor.<sup>18</sup> Under cram down, a debtor is required to provide the creditor with payments over the life of the bankruptcy plan that will equal the present value of the secured claim.<sup>19</sup> Because it held a valid lien on the truck, ACC was a secured creditor of Rash.<sup>20</sup> However, the Bankruptcy Code specifies that claims such as ACC's are secured only up to the value of the collateral; claims beyond that value are unsecured.<sup>21</sup>

In order to determine the extent of the secured claim, the bankruptcy court held an evidentiary hearing concerning the value of the truck.<sup>22</sup> At the hearing, the parties advocated different valuation methods. The Rashes argued that the correct value was the net

<sup>7</sup> See *Rash*, 90 F.3d at 1038-39.

<sup>8</sup> See *id.* at 1039.

<sup>9</sup> See *id.* In February 1992, Rash rescheduled this obligation so that he would pay \$1,408 per month for thirty-six months. See *Associates Commercial Corp. v. Rash (In re Rash)*, 31 F.3d 325, 327 (5th Cir. 1994).

<sup>10</sup> See *Rash*, 117 S. Ct. at 1882.

<sup>11</sup> See Brief of Respondent at 5, *Rash* (No. 96-454).

<sup>12</sup> See *Rash*, 117 S. Ct. at 1882.

<sup>13</sup> See *id.*

<sup>14</sup> See 11 U.S.C. § 1325(a)(5)(A) (1994).

<sup>15</sup> See *id.* § 1325(a)(5)(C).

<sup>16</sup> See *id.* § 1325(a)(5)(B).

<sup>17</sup> See *Rash*, 117 S. Ct. at 1883.

<sup>18</sup> See 11 U.S.C. § 1325(a)(5)(B)(i).

<sup>19</sup> See *id.* § 1325(a)(5)(B)(ii).

<sup>20</sup> See *Rash*, 117 S. Ct. at 1882.

<sup>21</sup> See 11 U.S.C. § 506(a). Secured claims typically receive post-petition interest, see *id.* § 506(b), and are entitled to protection of their security interest to ensure that their collateral does not decrease in value, see *id.* § 363(e). Unsecured claims are not entitled to post-petition interest, see *id.* § 502(b), and might be diminished by the administrative costs of the bankrupt estate, see *In re By-Rite Oil Co.*, 87 B.R. 905, 919-21 (Bankr. E.D. Mich. 1988).

<sup>22</sup> See *Rash*, 117 S. Ct. at 1883.

amount ACC would realize upon foreclosure and sale of the truck.<sup>23</sup> The Rashes' expert estimated that this "foreclosure value" was \$31,875.<sup>24</sup> ACC argued that the correct value was the price that the Rashes would have to pay to purchase a like vehicle.<sup>25</sup> ACC's expert estimated that this "replacement value" was \$41,000.<sup>26</sup>

The Bankruptcy Court for the Eastern District of Texas held that foreclosure value<sup>27</sup> was the appropriate valuation benchmark, interpreting § 506(a) of the Bankruptcy Code<sup>28</sup> to require value to be assessed from the creditor's perspective.<sup>29</sup> The court approved the Rashes' plan, and the United States District Court for the Eastern District of Texas affirmed.<sup>30</sup> On appeal, a panel of the Court of Appeals for the Fifth Circuit reversed, interpreting § 506(a) to require a replacement value approach.<sup>31</sup> On rehearing en banc, however, the Fifth Circuit affirmed the district court, holding that ACC's secured claim was limited to the foreclosure value of the truck.<sup>32</sup>

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> The bankruptcy court defined the issue in terms of "wholesale value" and "retail value," roughly analogous to the "foreclosure value" and "replacement value" used by the Fifth Circuit. See *In re Rash*, 149 B.R. 430, 432 (Bankr. E.D. Tex. 1993) ("[R]etail value reflects actual replacement cost to a debtor."); *id.* ("[W]holesale value . . . is a reasonable indication of the net proceeds [the creditor] will receive upon the disposition of the reclaimed collateral."). However, the Supreme Court threw these definitions into question by making certain adjustments to retail value in order to get to replacement value. The Court ruled that the bankruptcy court should subtract out from retail price the value of items that the debtor does not receive when he retains his vehicle, such as warranties, inventory storage, and reconditioning, as well as the value of modifications to the property to which a creditor's lien would not extend under state law, such as the addition of accessories. See *Rash*, 117 S. Ct. at 1886 n.6. The result is that "[w]hether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property." *Id.* Some commentators have expressed dismay at this new definition. See, e.g., Frank H. Easterbrook, *Bankruptcy Reform?*, Speech Before the National Bankruptcy Review Commission (July 17, 1997) (on file with the Harvard Law School library) ("Replacement value' can't be looked up. It must be litigated; and in the process the value of the asset will be paid out to the lawyers rather than to the creditors."). This Comment does not explore these questions of administrability of the new rule promulgated by the Court in *Rash*.

<sup>28</sup> Section 506(a) reads as follows:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . .

<sup>29</sup> U.S.C. § 506(a) (1994).

<sup>30</sup> See *Rash*, 149 B.R. at 433.

<sup>31</sup> See *Rash*, 117 S. Ct. at 1883.

<sup>32</sup> See *Associates Commercial Corp. v. Rash (In re Rash)*, 31 F.3d 325, 331 (5th Cir. 1994).

<sup>33</sup> See *Associates Commercial Corp. v. Rash (In re Rash)*, 90 F.3d 1036, 1061 (5th Cir. 1996) (en banc).

The United States Supreme Court granted certiorari in order to resolve a split among the circuit courts of appeal.<sup>33</sup> In an 8–1 decision, the Court reversed and remanded.<sup>34</sup> Writing for the majority,<sup>35</sup> Justice Ginsburg held that the value of property retained by a debtor under a cram down plan is the cost to the debtor of obtaining a like asset.<sup>36</sup> Justice Ginsburg began her analysis with a review of § 506(a) of the Bankruptcy Code.<sup>37</sup> Rejecting the Fifth Circuit's interpretation of this section, Justice Ginsburg found that the first sentence of § 506(a) did not compel the foreclosure value method.<sup>38</sup>

Instead, the Court looked to the second sentence of § 506(a) to shed light on the valuation question: "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . . ."<sup>39</sup> Justice Ginsburg held that only a replacement value standard gave meaning to the key words "disposition or use."<sup>40</sup> Without such a reading, a creditor's value received in foreclosure and the value received in a cram down proceeding would be the same.<sup>41</sup> Justice Ginsburg held that the value received in cram down should be higher than foreclosure value, because "[i]f a debtor keeps the property and continues to use it, the creditor obtains . . . neither the property nor its value and is exposed to double risks: The debtor may again default and the property may deteriorate from extended use."<sup>42</sup> Justice Ginsburg concluded that the replacement value standard reflects a debtor's "use" of the property.<sup>43</sup> Using this combination of statutory interpretation and law and economics analysis, the majority concluded that replacement value was the appropriate benchmark to use for valuing undersecured collateral in a cram down situation.<sup>44</sup>

Justice Stevens was the lone dissenter.<sup>45</sup> In a brief opinion, he conceded that the meaning of § 506(a) was "not entirely clear," but found that its first sentence "points to foreclosure as the proper method of

<sup>33</sup> See *Rash*, 117 S. Ct. at 1884. The Fifth Circuit applied the foreclosure value approach, while the First, Fourth, Sixth, Eighth, and Ninth circuits applied variations on the replacement cost approach. The Second and Seventh circuits split the difference between the foreclosure value and the replacement value. See *supra* note 5.

<sup>34</sup> See *Rash*, 117 S. Ct. at 1886–87.

<sup>35</sup> Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas, and Breyer joined Justice Ginsburg's opinion. Justice Scalia joined the majority except for a footnote in which the Court examined the legislative history of § 506(a). See *id.* at 1882 n.\*.

<sup>36</sup> See *id.* at 1885–86.

<sup>37</sup> See *id.* at 1884.

<sup>38</sup> See *id.* at 1884–85.

<sup>39</sup> 11 U.S.C. § 506(a) (1994), quoted in *Rash*, 117 S. Ct. at 1885.

<sup>40</sup> *Rash*, 117 S. Ct. at 1885.

<sup>41</sup> See *id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 1886.

<sup>45</sup> See *id.* at 1887 (Stevens, J., dissenting).



valuation" because the first sentence "suggests that the value should be determined from the creditor's perspective."<sup>46</sup> Justice Stevens also rejected the majority's interpretation of the second sentence of § 506(a). He argued that courts should not assign greater value in a cram down than in a repossession, because in a cram down the court can ensure that the creditor is fully compensated for the increased risk by setting a higher interest rate.<sup>47</sup> He felt that using foreclosure value would preserve the symmetry between cram down and repossession; using replacement value, in contrast, would grant a "general windfall" to undersecured creditors.<sup>48</sup>

The Court in *Rash* attempted to apply principles of economic analysis to valuations in bankruptcy but only went halfway down that track. A complete law and economics analysis of the question would have yielded the opposite conclusion — that foreclosure value promotes the optimal outcome between debtors and creditors. Instead, the Court's decision in *Rash* will promote inefficiency in transactions between debtors and creditors, and, in the long run, will hurt unsecured creditors, secured creditors, and debtors.

As a starting point, the language of § 506(a) could support either a replacement value or a foreclosure value standard.<sup>49</sup> The first sentence of § 506(a) suggests that value should be calculated from the creditor's perspective.<sup>50</sup> This sentence read in isolation points to foreclosure value as the correct standard, because that is the value that the creditor would receive through a foreclosure sale. In contrast, the "disposition or use" clause in the second sentence of § 506(a) suggests a replacement value standard, because presumably the debtor would have to replace the property in order to continue its business as a going concern.<sup>51</sup> The method of valuation adopted by a particular court depends entirely on the sentence on which the court focuses.<sup>52</sup>

<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 1887 n.\*.

<sup>48</sup> *Id.* at 1887.

<sup>49</sup> *See In re Hoskins*, 102 F.3d 311, 314 (7th Cir. 1996) ("[A] simple rule of valuation is needed. Wholesale price is one simple rule; retail price another; the midpoint of the two prices is a third. None is enacted or excluded by [§ 506(a)]."); *The Valuation Debate*, AM. BANKR. INST. J., Nov. 1996, at 1, 40.

<sup>50</sup> *See* David Gray Carlson, *Car Wars: Valuation Standards in Chapter 13 Bankruptcy Cases*, 13 BANKR. DEV. J. 1, 32 (1996).

<sup>51</sup> *See Hoskins*, 102 F.3d at 315; *see also* Isaac M. Pachulski, *The Cram Down and Valuation Under Chapter 11 of the Bankruptcy Code*, 58 N.C. L. REV. 925, 939 (1980) ("It is incongruous to value a business that is being reorganized on the basis of the price its assets could fetch on a piecemeal liquidation when the entire theory of the reorganization is that the debtor is being preserved as a going concern."). *But see The Valuation Debate*, *supra* note 49, at 41 ("[This] view of *Rash* focuses heavily on the 'or use' part of the second sentence of 506(a) and seems to all but ignore the 'proposed disposition' language of the same sentence.") (comments of Romaine S. Scott III).

<sup>52</sup> *See* Thomas E. Ray, *Valuation Issues in Chapter 13 — Is There Consistency?*, AM. BANKR. INST. J., Sept. 1995, at 16, 16.

Legislative history is also ambiguous regarding the proper interpretation of § 506(a). Although the House Report on § 506(a) seems to reject replacement value in favor of foreclosure value,<sup>53</sup> the second sentence of § 506(a), which is critical to its interpretation, did not appear in the version of the bill addressed by the report.<sup>54</sup> Instead, that sentence was inserted into the final text of the bill after the House-Senate conference.<sup>55</sup> In 1981, the Senate Judiciary Committee proposed amendments to § 506(a) that would have unambiguously declared that the replacement value method is the proper approach,<sup>56</sup> but these amendments failed to become law. As a result, the legislative history of § 506(a) is “unedifying.”<sup>57</sup> The difficulty in finding a definitive interpretation of § 506(a) is illustrated by *Rash* itself — the circuit court reversed the district court, then reversed itself, only to be reversed again by the Supreme Court, all on the basis of interpreting § 506(a).

Faced with ambiguous statutory language and a murky legislative history, the Court correctly decided to examine the incentives that each rule would create for debtors and creditors. In doing so, however, the Court reached the wrong conclusion. A more rigorous economic analysis would have revealed that foreclosure value, not replacement value, creates the correct set of incentives for both parties. Consider the general case of undersecured collateral currently in the hands of a debtor. Let *V* represent the value in use of the asset to the debtor; *R* represent the replacement cost for the debtor; and *L* represent the liquidation (foreclosure) value to the creditor. *L* diverges from *R* to the extent that assets are specific to their particular use in the debtor's hands; nonspecific assets, in theory, would have a smaller gap between *L* and *R*.<sup>58</sup> *L* must be less than *R* because if this were not the case there would be a risk-free arbitrage opportunity to buy the asset for *R* and sell the asset for *L*.<sup>59</sup> Therefore, a situation in which *L* is greater than *R* cannot be sustainable in the long run. Value in use (*V*) varies according to the particular bankruptcy situation; it can be less than *L*, between *L* and *R*, or greater than *R*.<sup>60</sup>

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<sup>53</sup> See H.R. REP. NO. 95-595, at 124 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6085.

<sup>54</sup> See H.R. 8200, 95th Cong. § 506(a) (1977).

<sup>55</sup> See 124 CONG. REC. 33,997 (1978).

<sup>56</sup> See S. 2000, 97th Cong. (1981).

<sup>57</sup> See *Rash*, 117 S. Ct. at 1886 n.4.

<sup>58</sup> Completely nonspecific assets would still have a gap between *L* and *R* due to retail costs such as the value added by the salesman or costs associated with physically moving the asset.

<sup>59</sup> This statement applies the law of one price, which states that identical assets cannot have different prices in the long term. See RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 958-63 (5th ed. 1996).

<sup>60</sup> In an efficient market, the market mechanism will equalize value in use and replacement value at the aggregate level. However, in any individual case, value in use may diverge considerably from replacement value. Cf. *id.* at 276 (illustrating scenarios in which value to a particular individual may diverge from market value).

The efficiency objective in this scenario is simple: the debtor should surrender the collateral when the creditor values the asset more (when  $L > V$ ), and the debtor should cram down a bankruptcy plan (thus retaining the collateral) when the debtor values the asset more (when  $L < V$ ). In the aggregate, consider a situation with  $N$  debtors and  $N$  creditors, with the same collateral involved in each debtor/creditor relationship. By assumption,  $L$  and  $R$  are set in the marketplace and therefore are unchanged across bankruptcy situations. If all debtors are ranked according to their value in use, the efficiency objective is illustrated by the dark line in Figure A below; the Court's decision in *Rash*, however, will lead to the value creation line in Figure B:<sup>61</sup>

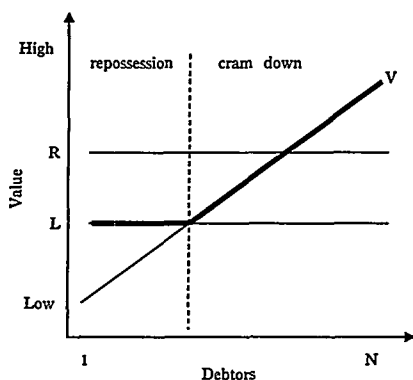


FIGURE A

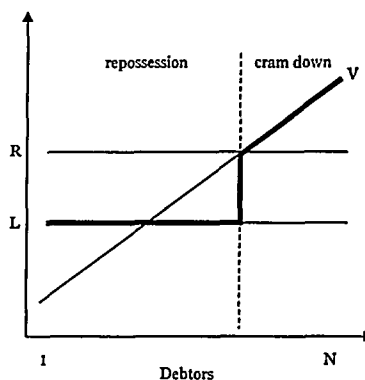


FIGURE B

Under the *Rash* rule, a debtor will allow collateral to be repossessed even when the value he attaches to it ( $V$ ) is greater than the creditor's valuation of the asset ( $L$ ), because if he were to keep the property he would have to give value to the creditor equal to  $R$ . Only when  $V$  exceeds  $R$  will the debtor keep the property and cram down a bankruptcy plan on the creditor.

Putting these two curves together reveals the deadweight loss:

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<sup>61</sup> Value in use is depicted here as a straight line but in fact can be any monotonically increasing curve. The analysis that follows assumes only that the value in use curve is monotonically increasing and does not depend on its being a straight line.

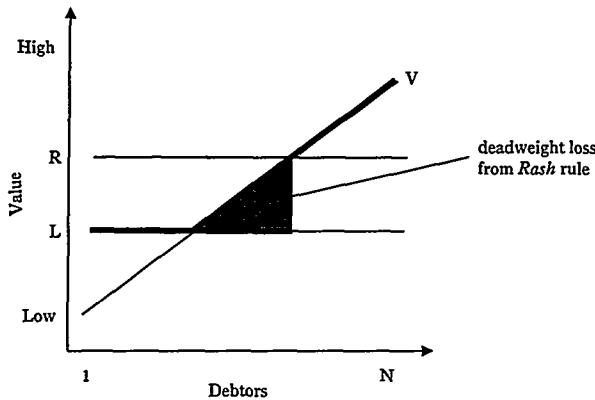


FIGURE C

The area of the triangle represents a net loss to society.<sup>62</sup> This loss exists under the *Rash* rule because assets do not go to their highest value use when  $V$  is between  $L$  and  $R$ . More intuitively, *Rash* makes cram downs more expensive relative to repossession by forcing a debtor to provide a value of  $R$  rather than a value of  $L$  in his bankruptcy plan. The net result is too many repossessions and too few cram downs relative to the socially optimal level.<sup>63</sup>

The magnitude of the deadweight loss is a function of two variables. First, the deadweight loss depends on the difference between  $L$  and  $R$ , which in turn is based on the degree of asset specificity. The greater the asset specificity, the wider the gap, and hence the greater the deadweight loss. Second, the deadweight loss depends on the slope of the value in use curve. If values in use diverge widely among debtors, the curve will be steep and the deadweight loss will be small. Classical economics suggests that nonspecific assets have a low variance in use value and therefore a low slope of the value in use curve.<sup>64</sup> Using this factor, the lower the asset specificity, the greater the deadweight loss. Combining these two factors, the net effect of asset speci-

<sup>62</sup> If a creditor repossesses the collateral and then resells it to a third party, the deadweight loss will shrink to the extent that the third party values the property more than the creditor because some value is recaptured by the subsequent resale of the collateral. However, such resale is unlikely to eliminate the deadweight loss completely if the assets were at least somewhat specific to their original use. Cf. *In re Rash*, 149 B.R. 430, 432 (Bankr. E.D. Tex. 1993) ("Unless a creditor is in the business of selling collateral of a particular type on a retail basis [it] will most likely be required to sell the goods wholesale. Accordingly, the wholesale value reflects the maximum amount that a creditor would realize as a result of its secured claim . . .").

<sup>63</sup> This conclusion is qualified somewhat by the possibility that the creditor and debtor will negotiate to the efficient result in the situation in which  $L < V < R$ . However, barriers to negotiation might prevent the parties from reaching an efficient outcome. See generally Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflicts*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993) (identifying barriers to achieving an agreement).

<sup>64</sup> See ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 91 (8th ed. 1920).

ficity on deadweight loss is ambiguous. However, from the geometry of the deadweight loss triangle, it is clear that both specific and non-specific assets can create a deadweight loss under the *Rash* rule.

This deadweight loss will be shared among debtors, secured creditors, and unsecured creditors. In the short run, unsecured creditors will be the clear losers from the Court's decision in *Rash*. The reason is that under Chapter 13, a debtor must pay both secured and unsecured creditors out of future earnings.<sup>65</sup> If the debtor retains the property as a result of cram down, less of the income produced by that property will be available to pay unsecured creditors, because secured creditors now receive replacement value rather than foreclosure value for their claim. If, on the other hand, the debtor gives up the property, the debtor will be unable to generate as much income as before to pay off unsecured creditors. In either scenario, unsecured creditors receive less than they previously did.

Medium-term effects may create an additional deadweight loss. Secured creditors will receive more value in a cram down plan, which should, in theory, lead to lower interest rates on secured debt. As described above, unsecured creditors will lose part of their claim, which should lead to higher interest rates for unsecured debt. For the debtor, these price effects will lead to an increased reliance on secured debt and a decreased reliance on unsecured debt. Anecdotal evidence suggests that secured debt involves higher transaction costs than unsecured debt.<sup>66</sup> Therefore, these new transaction costs will lead to an additional deadweight loss resulting from the *Rash* rule.

Finally, in the long run, a debtor will understand that he may rationally surrender his collateral even though he is the most efficient user of the asset. To compensate for this constrained choice, the debtor will want better terms on his secured debt. In the long run, therefore, debtors will reclaim some of the windfall that the Court has given to secured creditors.

In short, everyone loses under *Rash*: unsecured creditors receive a smaller share of the debtor's future income, debtors pay a higher cost of capital, and secured creditors receive a lower return than would otherwise be possible. There is also a societal loss because all three parties will rationally engage in inefficient transactions under *Rash*. The Court could have avoided these unfortunate results by adopting a foreclosure value standard. Under such a standard, the decision-maker (the debtor) directly compares his value in use (V) to the creditor's value in use (L). The debtor will cram down if V is greater than

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<sup>65</sup> See 11 U.S.C. § 1322(a)(1) (1994).

<sup>66</sup> See Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 659-63 (1997) (identifying information costs, documentation costs, and filing fees as potential costs of secured lending).

L and will allow repossession if V is less than L. This outcome follows the socially efficient value creation line from Figure A above.

Admittedly, efficiency should not be the Court's only goal. But here, even with a foreclosure standard, concerns for equity toward creditors are adequately met by two other provisions of the Bankruptcy Code. First, throughout the Bankruptcy Code, a debtor's plan of reorganization must be proposed in "good faith" in order to be confirmed by the bankruptcy court.<sup>67</sup> Under this clause, bankruptcy courts can assume broad authority to review debtors' filings to ensure fairness to creditors.<sup>68</sup> Second, in the Chapter 11 context, creditors can make a § 1111(b)(2) election, which protects them from an unduly low appraisal of their collateral by the bankruptcy court.<sup>69</sup> Therefore, a foreclosure value standard will not unfairly compromise creditors' rights because creditors have other protections in the bankruptcy context.

In defense of the replacement value approach, Justice Ginsburg argued that a foreclosure value standard would be inefficient because it would not compensate secured creditors for the additional risk inherent in leaving the collateral with the debtor.<sup>70</sup> This argument is flawed for two reasons. First, as Justice Stevens correctly pointed out in his dissent, any increased risk could be compensated for through a higher discount rate.<sup>71</sup> Second, even if debtors were to compensate creditors through a larger principal rather than through a higher interest rate, there is no conceptual reason to believe that replacement value rather than foreclosure value provides the appropriate "bump-up" to compensate the creditor exactly for the additional risk undertaken. More likely, replacement value either overcompensates or undercompensates creditors; either result would lead to incorrect incentives for debtors. The Court held that "more" risk requires "higher" compensation without attempting to quantify either of these terms. The Court seems to have chosen replacement value simply because it was the next rung up

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<sup>67</sup> 11 U.S.C. §§ 727(a)(9)(B)(ii), 1129(a)(3), 1325(a)(3).

<sup>68</sup> See Brief of Amicus Curiae, National Association of Consumer Bankruptcy Attorneys, Inc. in Support of Respondents at 25, *Rash* (No. 96-454).

<sup>69</sup> See Dale C. Schian, *Section 1111(b)(2): Preserving the In Rem Claim*, 67 AM. BANKR. L.J. 479, 479 (1993). Under § 1111(b)(2), a creditor may retain his secured and unsecured claims that result from bifurcation under § 506(a), or, in certain circumstances, he may elect to forego his unsecured claim and have the entire amount of his claim treated as fully secured by the collateral. See 11 U.S.C. § 1111(b)(2). See generally Steven R. Haydon, Steven R. Owens, Thomas J. Salerno & Craig D. Hansen, *The 1111(b)(2) Election: A Primer*, 13 BANKR. DEV. J. 99 (1996) (describing the mechanics of a § 1111(b)(2) election and the limitations on its application).

<sup>70</sup> See *Rash*, 117 S. Ct. at 1885.

<sup>71</sup> See *id.* at 1887 n.\* (Stevens, J., dissenting); *General Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55, 64 (2d Cir. 1997) ("[T]he [cram down] interest rate should also include a premium to reflect the risk to the creditor in receiving deferred payments under the reorganization plan.").

on the valuation ladder. Unfortunately, the Court's choice will create more inefficiencies than it eliminates.

Perhaps most disturbing about the Court's holding in *Rash* is its scope. Even though § 506(a) is invoked most commonly in the context of personal automobile loans,<sup>72</sup> nothing in the Court's opinion suggests that its rule should be limited to that context. Moreover, § 506(a) applies to all chapters of the Bankruptcy Code, not just Chapter 13.<sup>73</sup> Therefore, the Court in *Rash* has handed down a broad rule for valuing property in the bankruptcy context.<sup>74</sup> Unfortunately, the Court's opinion is based on an incomplete law and economics analysis that will often lead to inefficient transactions between creditors and debtors. By failing to focus clearly on the economic effects of its decision, the Court in *Rash* simultaneously penalized unsecured creditors, secured creditors, and debtors.

### B. Civil Rights Act

*Qualified Immunity — Privatized Governmental Functions.* — With prison populations increasing rapidly, more and more states are turning to privatization to trim their corrections budgets.<sup>1</sup> Riding the crest of this trend are the private sector prison providers,<sup>2</sup> whose combined business has grown more than fifty percent since 1996 and currently generates revenues of over a billion dollars a year.<sup>3</sup> Industry spokespeople and other advocates claim that prison privatization also benefits the taxpayer by saving states millions of dollars annually in incarceration costs.<sup>4</sup> Civil libertarians, however, fear that placing re-

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<sup>72</sup> See Carlson, *supra* note 50, at 5 ("In chapter 13, the battle is usually fought over cars."); *The Valuation Debate*, *supra* note 49, at 41.

<sup>73</sup> See *Rash*, 117 S. Ct. at 1887 (Stevens, J., dissenting) ("It is crucial to keep in mind that § 506(a) is a provision that applies *throughout* the bankruptcy code . . ."); Brief of Amici Curiae in Support of Petitioner at 3, *Rash* (No. 96-454) ("The standard of valuation under 11 U.S.C. § 506(a) affects all collateral, not just cars, and all types of bankruptcy cases, not just Chapter 13 filings.")

<sup>74</sup> See Brief for Donald and Madelaine Taffi as Amicus Curiae Supporting Respondents at 5, *Rash* (No. 96-454) ("Determination of the manner in which the amount of a secured claim is determined . . . will therefore have a significant impact on virtually every chapter 11 and chapter 13 reorganization in which a creditor is asserting a secured claim.")

<sup>1</sup> See Lisa Belkin, *Rise of Private Prisons: How Much of a Bargain?*, N.Y. TIMES, Mar. 27, 1989, at A14. At least 27 state governments, as well as the federal government and some localities, have entered into contracts with privately run prisons, which currently house over 80,000 prisoners across the country. See Fox Butterfield, *For Privately Run Prisons, New Evidence of Success*, N.Y. TIMES, Aug. 19, 1995, at A7; Nzong Xiong, *Private Prisons: A Question of Savings*, N.Y. TIMES, July 13, 1997, at C5.

<sup>2</sup> The two largest of these companies, Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation, together control about 75% of the private prisons in America. See Xiong, *supra* note 1.

<sup>3</sup> See *id.*

<sup>4</sup> See, e.g., *id.* (reporting that a Louisiana study on prison costs per prisoner found that the two private prisons in the study had per diem averages of \$22.93 and \$23.49, compared to a

sponsibility for prisoners in private hands may lead to violations of inmates' constitutional rights.<sup>5</sup>

Last Term, in *Richardson v. McKnight*,<sup>6</sup> the Supreme Court gave the civil libertarians something to cheer about by holding that private prison guards are not entitled to qualified immunity from liability under 42 U.S.C. § 1983.<sup>7</sup> Finding that competitive market forces operate to discourage private prison guards from displaying unwarranted timidity in the performance of their duties, the Court saw no need to extend qualified immunity in this case.<sup>8</sup> It did not, however, address the further question whether qualified immunity applies in the more likely situation in which private parties perform government contracts in the absence of competitive market forces. Lower courts should resist the temptation to conclude from this silence that an extension of qualified immunity is appropriate in such cases. As the private prison example — incorrectly characterized by the Court as a competitive market — illustrates, the profit motive animating private firms may mean that qualified immunity for private parties is inappropriate even, and especially, when competitive market forces do not obtain.

South Central Correctional Center (SCCC) is a 1506-bed, medium-security prison in Clifton, Tennessee, operated for the state by the Nashville-based Corrections Corporation of America (CCA).<sup>9</sup> On March 3, 1994, SCCC inmate Ronnie Lee McKnight, claiming a violation of his Eighth Amendment rights, filed an action for damages un-

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\$26.60 average at the state-run facility). *But cf. id.* (describing a G.A.O. report finding it impossible to conclude from previous studies that privatization saves money).

<sup>5</sup> See Belkin, *supra* note 1.

<sup>6</sup> 117 S. Ct. 2100 (1997).

<sup>7</sup> See *id.* at 2108. Section 1983 provides a cause of action for citizens who suffer "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" at the hands of any person acting "under color" of state law. 42 U.S.C. § 1983 (1994).

<sup>8</sup> See *Richardson*, 117 S. Ct. at 2106-07. Officials at risk of "personal liability for acts taken pursuant to their official duties . . . may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester v. White*, 484 U.S. 219, 223 (1988).

<sup>9</sup> See Kevin McKenzie, *Tennessee Considers the Pros and Cons of Prisons for Profit*, COM. APPEAL, May 25, 1997, at A1; Paula Wade, *CCA Prisons Could Save \$100 Million, Exec Tells Hearing*, COM. APPEAL, May 8, 1997, at A1. SCCC is operated by CCA pursuant to a Tennessee statute, which allows for the private operation of "only . . . one (1) medium security or minimum security facility." TENN. CODE ANN. § 41-24-103 (Supp. 1996). In the 1980s, CCA made a bid for a 99-year lease of the entire Tennessee prison system that failed after questions were raised regarding its legality. See W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 841-42 (1987). A bill currently pending in Tennessee would enable state officials to contract with private prison providers "for the operation of any or all 21 state prisons." Richard Locker, *Prison Bill Won't See Action by End of This Session: Privatization Foes Cheer Decision*, COM. APPEAL, May 23, 1997, at B1. CCA has claimed that it could run the whole state system at savings of at least \$100 million, though legislators are skeptical of this claim. See Wade, *supra*.



der § 1983 against SCCC warden John Rees<sup>10</sup> and prison guards Daryll Richardson and John Walker.<sup>11</sup> McKnight alleged that Richardson and Walker placed him in "tight restraints" during a transfer and thereby caused "serious medical injury which actually required hospitalization."<sup>12</sup> The defendants responded that, as correctional officers, they were entitled to qualified immunity from § 1983 actions, and moved to dismiss.<sup>13</sup>

The district court denied the defendants' motion, holding that "employees of a private, for-profit corporation" are not entitled to qualified immunity.<sup>14</sup> The Sixth Circuit, hearing the case on interlocutory appeal, affirmed.<sup>15</sup> The court explained that the purpose of qualified immunity is to strike a balance between "the vindication of constitutional guarantees and the furtherance of the public interest."<sup>16</sup> This balance is upset when, as was true here, the officials in question are "principally motivated" not "by a desire to further the interests of the public," but rather by a desire "to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security."<sup>17</sup> An extension of qualified immunity to the defendants in this case, the court feared, would lead privately operated correctional facilities to "cut[] corners on constitutional guarantees."<sup>18</sup>

In a 5-4 decision, the Supreme Court affirmed,<sup>19</sup> ruling narrowly that qualified immunity is unavailable to employees of private firms undertaking "a major lengthy administrative task (managing an insti-

<sup>10</sup> Rees was subsequently dismissed from the litigation. See *McKnight v. Rees*, 88 F.3d 417, 418 (6th Cir. 1996).

<sup>11</sup> See *id.*

<sup>12</sup> *Id.* at 418-19. According to McKnight, his "discomfort was so evident that other inmates on the bus implored petitioners to loosen the restraints." Brief of Respondent at 1-2, *Richardson* (No. 96-318), available in 1997 WL 58604. Richardson and Walker allegedly responded with taunts and abusive language and told McKnight that "he 'was getting what he deserved' and that he should 'suffer.'" *Id.*

<sup>13</sup> See *McKnight*, 88 F.3d at 419. In *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court extended qualified immunity to state-employed prison guards. See *id.* at 561. If the defendants in *Richardson* had been granted qualified immunity, McKnight would have had to show that their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing the standard for qualified immunity).

<sup>14</sup> *McKnight*, 88 F.3d at 419. The district court opinion was unreported and incorporated *Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D. Tenn. 1994), a prior decision denying qualified immunity to private prison guards. See Brief of Petitioners at 1, *Richardson* (No. 96-318), available in 1997 WL 10351.

<sup>15</sup> See *McKnight*, 88 F.3d at 418. Denials of qualified immunity are appealable under interlocutory order. See *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

<sup>16</sup> *McKnight*, 88 F.3d at 424.

<sup>17</sup> *Id.* In so finding, the court did not deny the significant public service performed by prison guards employed by private companies. See *id.* ("[I]t is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest . . .").

<sup>18</sup> *Id.*

<sup>19</sup> See *Richardson*, 117 S. Ct. at 2103.

tution) with limited direct supervision by the government . . . for profit and potentially in competition with other firms."<sup>20</sup> Writing for the majority,<sup>21</sup> Justice Breyer began his analysis by characterizing the recent case *Wyatt v. Cole*<sup>22</sup> as "pertinent authority."<sup>23</sup> Admitting that *Wyatt* "did not answer the legal question" precisely before the Court,<sup>24</sup> Justice Breyer interpreted the case to require the Court "to look both to history and to the purposes" of the qualified immunity doctrine to determine whether the petitioners were entitled to immunity.<sup>25</sup>

Canvassing the history of suits against private prison contractors, the Court failed to find "a 'firmly rooted' tradition of immunity applicable to privately employed prison guards."<sup>26</sup> Instead, the Court specifically noted that the common law "forbade [private] jailers to subject 'their prisoners to any pain or torment'"<sup>27</sup> and that it "authorized prisoner lawsuits to recover damages" in such cases.<sup>28</sup> Turning to policy considerations, the Court observed that the purpose of immunity doctrine is to protect the "government's ability to perform its traditional functions."<sup>29</sup> The doctrine achieves its purpose in two ways: first, by "protecting the public from unwarranted timidity [in the exercise of their duties] on the part of public officials" fearing lawsuits; and second, by "ensur[ing] that talented candidates [are] not deterred by the threat of damages suits from entering public service."<sup>30</sup>

Applying these two policy considerations to the case at hand, the Court found that neither compelled the application of immunity. With

<sup>20</sup> *Id.* at 2108. In so holding, the Court explicitly distinguished those cases involving "a private individual briefly associated with a government body, serving as an adjunct to government in an essential government activity, or acting under close official supervision." *Id.*

<sup>21</sup> Justice Breyer was joined by Justices Stevens, O'Connor, Souter, and Ginsburg.

<sup>22</sup> 504 U.S. 158 (1992). In *Wyatt v. Cole*, the Court addressed the question whether qualified immunity is available to private parties "charged with § 1983 liability for 'invoking state replevin, garnishment, and attachment statutes' later declared unconstitutional." *Richardson*, 117 S. Ct. at 2103 (quoting *Wyatt*, 504 U.S. at 159).

<sup>23</sup> *Richardson*, 117 S. Ct. at 2103.

<sup>24</sup> *Id.* at 2104. The *Wyatt* Court declined to extend qualified immunity to the petitioners in that case but "explicitly limited its holding" to the narrow question of "private persons . . . who conspire with state officials." *Id.* (quoting *Wyatt*, 504 U.S. at 168) (internal quotation marks omitted).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* The Court noted that "private contractors were heavily involved in prison management during the 19th century" and in some cases shouldered the responsibility for a state's entire prison system. *Id.* Yet, despite the fact that "[g]overnment-employed prison guards may have enjoyed a kind of immunity defense arising out of their status as public employees at common law," the Court found many cases suggesting a common law remedy for inmates against private prison contractors and no evidence of any immunity for these jailers. *Id.* at 2104-05.

<sup>27</sup> *Id.* at 2105 (quoting *In re Birdsong*, 39 F. 599, 601 (S.D. Ga. 1889)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (quoting *Wyatt*, 504 U.S. at 167) (internal quotation marks omitted).

<sup>30</sup> *Id.* The Court recalled Judge Learned Hand's warning that the threat of liability would "dampen the ardor of all but the most resolute, or the most irresponsible" public officials. *Id.* at 2106 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.))) (internal quotation marks omitted).

respect to the first prong — preserving the ability of government officials to serve the public good — Justice Breyer argued that, unlike their state-operated counterparts, private prisons are subject to “competitive market pressures” that make their employees less likely to exhibit “the most important special government immunity-producing concern — unwarranted timidity.”<sup>31</sup> According to Justice Breyer, these market pressures mean that, in order to retain their contracts, private prison operators must ensure that their employees are neither too aggressive (which would create liability for “damages that raise costs”) nor too timid (which would leave the firm vulnerable to replacement by a competing firm that had demonstrated an ability to do “both a safer and a more effective job”).<sup>32</sup> As for the second prong — the concern about deterring talented candidates from seeking public service jobs<sup>33</sup> — Justice Breyer argued that, unlike the state, private prison operators are able to shield their employees from personal liability through salary offsets or statutorily required insurance schemes and thus are able to neutralize this threat.<sup>34</sup>

In dissent, Justice Scalia<sup>35</sup> berated the majority for departing from the “settled practice of determining § 1983 immunity on the basis of the public function being performed.”<sup>36</sup> Expressly invoking this “public function” approach, Justice Scalia reviewed both recent Supreme Court precedent and case law “virtually contemporaneous with the enactment of § 1983”<sup>37</sup> and found no reason to deny relief to the petitioners, who in the performance of their duties were “indistinguishable” from state-employed guards.<sup>38</sup>

<sup>31</sup> *Id.* at 2105.

<sup>32</sup> *Id.* The Court assumed that private prisons, unconstrained by “civil-service restrictions,” are able to employ contractual incentives to pressure their employees to achieve this balance. *Id.* at 2107. Justice Breyer noted that government employees, by contrast, are subject to lower levels of accountability and to “civil service rules” that limit the ability of supervisors to reward or to penalize individual employees. *Id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See id.* Justice Breyer also addressed a third purpose of qualified immunity: to prevent the increased risk of lawsuits from “distract[ing] these employees ‘from their . . . duties.’” *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Justice Breyer argued that the Court’s qualified immunity doctrine “do[es] not contemplate the complete elimination of lawsuit-based distractions,” *id.*, and that the Tennessee legislature reserved to state officials important discretionary tasks relating to prison discipline, parole, and good time, *see id.* This latter observation seems to suggest that any increased distraction caused by the Court’s holding will not interfere with the tasks that the state deemed to be most important to the running of a prison. *See id.*

<sup>35</sup> Justice Scalia was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas.

<sup>36</sup> *Richardson*, 117 S. Ct. at 2109 (Scalia, J., dissenting). The *Richardson* Court labeled this claim a “misreading” of precedent. *See Richardson*, 117 S. Ct. at 2106. Although the majority conceded that the Court “has sometimes applied a [public function] approach in immunity cases,” it noted that such an approach was used only “to decide which type of immunity — absolute or qualified — a public officer should receive.” *Id.*

<sup>37</sup> *Id.* at 2110 (Scalia, J., dissenting) (citing *Alamango v. Board of Supervisors*, 32 N.Y. Sup. Ct. 551 (1881)).

<sup>38</sup> *See id.* at 2112.

After making clear his view that “history and not judicially analyzed policy governs this matter,”<sup>39</sup> Justice Scalia proceeded to explain why he found the Court’s arguments distinguishing private from public prisons to be “even on [their] own terms . . . unconvincing.”<sup>40</sup> First, Justice Scalia pointed out that a state’s cancellation of a prison management contract is “not a market choice,” but rather a political decision in which benign neglect or other less seemly considerations like “personal friendship, political alliances, [and] in-state ownership of the contractor” are likely to influence the result.<sup>41</sup> In fact, “short of mismanagement so severe as to provoke a prison riot,” state officials will be inclined to award contracts not to the firm with the best disciplinary record, but to the lowest bidder.<sup>42</sup> Second, rejecting the Court’s suggestion that private firms are better able to attract and keep talented candidates than are public agencies, Justice Scalia observed that nothing prevents states from insuring public employees against civil liability or from doing away with the restrictive civil service salary and seniority “encrustations” that currently prevent the use of incentives to influence employee performance.<sup>43</sup>

Having dispensed with the Court’s arguments, Justice Scalia next dismissed as “implausible” the basis for the Sixth Circuit’s affirmance<sup>44</sup> — that, because private prison guards are principally motivated by a desire to ensure the continued profitability of the firm for which they work, the extension of qualified immunity to them could lead to an increase in constitutional violations.<sup>45</sup> Criticizing the Sixth Circuit for giving “no hint” as to how a guard’s violation of inmates’ constitutional rights might lead to greater profits for the employer, Justice Scalia argued that private prison operators, “whose § 1983 damages come out of their own pockets, . . . would, if anything, be more careful in training their employees to avoid constitutional infractions.”<sup>46</sup> Justice Scalia concluded by scolding the Court for drawing an imprecise and “obscure” public/private distinction and for reaching a decision of which “[t]he only sure effect” would be to raise “artificially . . . the cost of privatizing prisons.”<sup>47</sup>

The *Richardson* Court’s silence as to whether qualified immunity ought to be available to private actors performing delegated govern-

<sup>39</sup> *Id.* at 2110.

<sup>40</sup> *Id.* at 2110–11.

<sup>41</sup> *Id.* at 2111.

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* at 2112.

<sup>44</sup> *See id.*

<sup>45</sup> *See McKnight v. Rees*, 88 F.3d 417, 424 (6th Cir. 1996).

<sup>46</sup> *Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting).

<sup>47</sup> *Id.* at 2112–13 (“Whether this will cause privatization to be prohibitively expensive, or instead simply divert state funds that could have been saved or spent on additional prison services, it is likely that taxpayers and prisoners will suffer as a consequence.”).