

The Supreme Court, 1995 Term

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# THE SUPREME COURT

## 1995 TERM

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# THE SUPREME COURT 1995 TERM

## FOREWORD: LEAVING THINGS UNDECIDED

*Cass R. Sunstein*

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## FOREWORD: LEAVING THINGS UNDECIDED

*Cass R. Sunstein\**

[W]e know too little to risk the finality of precision . . . .

Denver Area Educational Telecommunications Consortium, Inc.  
v. FCC,  
116 S. Ct. 2374, 2403 (1996) (Souter, J., concurring).

Because we need go no further, I would not here undertake the question whether the test we have employed since *Central Hudson* should be displaced.

44 Liquormart, Inc. v. Rhode Island,  
116 S. Ct. 1495, 1522 (1996)  
(O'Connor, J., concurring in the judgment).

This Court has begun to make a habit of disclaiming the natural and foreseeable jurisprudential consequences of its pathbreaking (*i.e.*, Constitution-making) opinions. Each major step in the abridgment of the people's right to govern themselves is portrayed as extremely limited or indeed *sui juris* . . . . The people should not be deceived.

Board of County Commissioners v. Umbehr,  
116 S. Ct. 2342, 2373 (1996) (Scalia, J., dissenting).

The case most relevant to the issue before us today is not even mentioned . . . .

Romer v. Evans, 116 S. Ct. 1620,  
1631 (1996) (Scalia, J., dissenting).

### I. DECISIONAL MINIMALISM

Frequently judges decide no more than they have to decide. They leave things open. They make deliberate decisions about what should be left unsaid. This practice is pervasive: doing and saying as little as necessary to justify an outcome.<sup>1</sup>

We might describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided,

\* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago. I am grateful to Bruce Ackerman, Joshua Cohen, Richard Craswell, Elizabeth Garrett, Amy Gutmann, Daniel Kahan, Louis Kaplow, Martha Nussbaum, C.J. Peters, Richard Posner, David Strauss, Kathleen Sullivan, and Edna Ullmann-Margalit, and also to participants in a work-in-progress lunch at the University of Chicago for helpful comments on a previous draft. I am also grateful to Christopher Houston for excellent research assistance.

<sup>1</sup> Of course there can be disagreement about how much it is necessary to say; some maximalists think that it is necessary to say a good deal. For the moment I bracket that point and rest content with ordinary intuitions.

as "decisional minimalism."<sup>2</sup> One of my principal goals in this Foreword is to explain the uses of minimalism by the Supreme Court and to explore the circumstances under which minimalism is justified. I do so by pointing to the importance of reducing the costs of decision and the costs of mistake and also by examining the relationship between judicial minimalism and democratic deliberation. Thus minimalism can be evaluated by attending to such factors as the need for private and public planning, the costs of decision, and the costs of error. I hope in the process to illuminate a range of old ideas: courts should not decide issues unnecessary to the resolution of a case; courts should deny certiorari in areas that are not "ripe" for decision; courts should avoid deciding constitutional questions; courts should respect their own precedents; courts should, in certain cases, investigate the actual rather than hypothetical purpose of statutes; courts should not issue advisory opinions; courts should follow prior holdings but not necessarily prior dicta; courts should exercise the passive virtues associated with doctrines involving justiciability.

All of these ideas involve the *constructive uses of silence*. Judges often use silence for pragmatic or strategic reasons or to promote democratic goals. Of course it is important to study what judges say; but it is equally important to examine what judges do not say, and why they do not say it.

I offer two large suggestions about a minimalist path. The first suggestion is that minimalism can be democracy-forcing, not only in the sense that it leaves issues open for democratic deliberation,<sup>3</sup> but also and more fundamentally in the sense that it promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors. Sometimes courts say that Congress, rather than the executive branch, must make particular decisions; sometimes courts are careful to ensure that legitimate reasons actually underlie challenged enactments. In so doing, courts are minimalist in the sense that they leave open the most fundamental and difficult constitutional questions; they also attempt to promote democratic accountability and democratic deliberation. I am thus suggesting a form of

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<sup>2</sup> This is a rough, preliminary definition. Complexities are discussed below in Part II. Of course minimalists do not endorse opinions that are obscure or obfuscating, or that reflect deliberate coyness. Minimalists enthusiastically respect the obligation to offer reasons; they attempt to offer reasons of an unambitious kind.

<sup>3</sup> Democratic deliberation should not be identified with simple majoritarianism. Reliance on democracy, for purposes of an understanding of constitutional law, must specify the relevant conception of democracy, and not rely on the word itself. See RONALD DWORKIN, *FREEDOM'S LAW* 15–19 (1996). On the deliberative conception of democracy, consult, for example, AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 1 (1996); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 274–86, 304–28 (William Rehg trans., 1996) (1992); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17–39, 123–61 (1993); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 17 (Alan Hamlin & Philip Pettit eds., 1989).

minimalism that is self-consciously connected with the liberal principle of legitimacy.<sup>4</sup>

As we will see, democratic ideas associated with minimalism help explain many ideas in the cases. Consider, for example, the void-for-vagueness and nondelegation doctrines; the requirement that Congress issue a "clear statement" in order to bring about certain results; rationality review under the Due Process and Equal Protection Clauses; the requirement that certain laws be defended by reference to their "actual" rather than hypothetical purpose; the (largely implicit but still vibrant) doctrine of desuetude, banning enforcement of anachronistic law. All of these doctrines are connected with the basic foundations of the system of deliberative democracy.<sup>5</sup> They serve to ensure against outcomes reached without sufficient accountability and reflecting factional power instead of reason-giving in the public domain.

My second suggestion is that a minimalist path usually — not always, but 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). The complexity may result from a lack of information, from changing circumstances, or from (legally relevant)<sup>6</sup> moral uncertainty. In such cases, minimalism makes sense first because courts may resolve the relevant issues incorrectly, and second because courts may be ineffective or create serious problems even if their answers are right. Courts should try to economize on moral disagreement by refusing to challenge other people's deeply held moral commitments when it is not necessary for them to do so.<sup>7</sup>

The two points can be linked by the suggestion that courts should adopt forms of minimalism that can improve and fortify democratic processes.<sup>8</sup> Many rules of constitutional law attempt to promote politi-

<sup>4</sup> See generally GUTMANN & THOMPSON, *supra* note 3, at 52–94 (discussing "deliberative reciprocity"); JOHN RAWLS, *POLITICAL LIBERALISM* 137 (2d ed. 1996) (discussing the liberal principle of legitimacy).

<sup>5</sup> Also consult ROBERT BURT, *THE CONSTITUTION IN CONFLICT* 19 (1994), which similarly sees courts as part of a process of dialogue among branches and expresses wariness about judicial foreclosure.

<sup>6</sup> Some moral considerations are a legitimate part of constitutional argument and others are not. By "legally relevant" I mean to refer only to the former.

<sup>7</sup> On economizing on moral disagreement, consult GUTMANN & THOMPSON, *supra* note 3, at 84–85: "[C]itizens should seek the rationale that minimizes rejection of the position they oppose. . . . [T]his form of magnanimity tells citizens to avoid unnecessary conflict in characterizing the moral grounds or drawing out the policy implications of their positions."

<sup>8</sup> Professor Michelman's famous *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986), is also concerned with deliberative democracy. Michelman urges that a self-consciously deliberative Supreme Court can "model" (and perhaps promote) a society with republican virtues. *See id.* at 16–17. The foundations of this Foreword — in deliberative democracy — are very close to the foundations of Michelman's. And it is possible that on certain assumptions about the likely nature of various institutions, Michelman's view is correct. I am suggesting a more modest and cautious judicial role, one focused on pro-

ical accountability and political deliberation. Minimalism need not be democracy-forcing by its nature; but it is most interesting when it promises to enhance accountability and deliberation in this way.

I apply these ideas to a number of issues of current controversy. I suggest that the Court took a reasonable route in the most controversial and highly publicized case of last Term, *Romer v. Evans*.<sup>9</sup> The Court's puzzling and opaque opinion is not satisfying from the theoretical point of view; but this is not the only possible point of view. *Romer* combined a degree of caution and prudence with a good understanding of the fundamental purpose of the Equal Protection Clause and a firm appreciation of law's expressive function. Thus understood, *Romer* was a masterful stroke — an extraordinary and salutary moment in American law. It was a masterful stroke in part because it left many issues open. Thus *Romer* provides an especially fruitful case for an exploration of the uses of minimalism.

I compare *Romer* with *United States v. Virginia*,<sup>10</sup> in which the Court invalidated the operation of a single-sex military college. *United States v. Virginia* contains a number of ambitious pronouncements about sex equality and produced a self-conscious shift in the applicable standard of review. But the decision was nonetheless minimalist in two ways. First, it addressed not single-sex education in general, but

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moting legislative deliberation, perhaps because of different assessments of the likely capacities of different institutions, and because of a belief that self-government, as Michelman understands it, coexists uneasily with the role for the Court that he appears to envisage.

There is also an obvious connection between what I am saying here and what is said in ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962). Here are some points of commonality: appreciation of passive virtues, endorsement of the doctrine of desuetude for the "privacy" cases, and an insistence on the need for the Court to think strategically and pragmatically about whether the nation is ready for the principles that the Court favors. But there are important differences as well. My argument finds its foundations in the aspiration to deliberative democracy, with an insistence that the principal vehicle is the legislature, not the judiciary; the judiciary is to play a catalytic and supplementary role. For Bickel, the Court was the basic repository of principle in American government; because of its insulation, it was the central deliberative institution. *See id.* at 30–50, 200–207. In addition, Bickel's belief in "prudence" was based on a generalized fear of political backlash, and not on social scientific evidence. We now know that it may be counterproductive for the Court to insist on social reform even if the Court is right. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE 107–56 (1991). In his conception of the division of labor between courts and legislatures and in his absence of attention to empirical issues, Bickel is in his own way under the influence of the Warren Court. In brief, my treatment is more skeptical of judges and less so of majoritarian institutions. It is also in a sense more prudential and strategic (for better or for worse): Bickel was focussed on the decline of jurisdiction, with the apparent thought that, once assumed, jurisdiction should result in the most principled and full of opinions. *See BICKEL, supra*, at 130, 235–43. I am suggesting that opinions should be self-consciously narrow and shallow, at least some of the time.

Finally, there is an evident resemblance between what is said here and what is suggested in Guido Calabresi, *The Supreme Court, 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 80–86 (1991). *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982).

<sup>9</sup> 116 S. Ct. 1620 (1996).

<sup>10</sup> 116 S. Ct. 2264 (1996).

single-sex education in the distinctive circumstances of Virginia Military Institute (VMI). Second, the Court found that Virginia did not establish or maintain VMI to diversify educational opportunities within the state, and in that sense the Court emphasized the absence of an actual purpose of promoting diversity and equality of opportunity. Because it stresses that sex discrimination at VMI is connected with second-class citizenship for women, *United States v. Virginia* is a natural sibling to *Romer v. Evans*. Both cases show a willingness to look behind enactments in order to see if they rest on constitutionally unacceptable "animus."

More briefly, I discuss several cases from the 1995 Term that raise questions about how much to say and how much to leave open. I suggest that a majority of the Justices erred in reaching broad new conclusions about the First Amendment in *44 Liquormart, Inc. v. Rhode Island*,<sup>11</sup> a major case involving the regulation of commercial advertisements. I endorse a surprising and tentative decision in which the Court — for the first time in its history — struck down an award of punitive damages.<sup>12</sup> I suggest that the unanimous Supreme Court was probably wrong to uphold the imposition of the death penalty on the basis of an open-ended grant of power from Congress to the President.<sup>13</sup> In several places I indicate that the Court acted reasonably in offering a narrow rather than broad judgment about Congress's power to regulate speech in the emerging communications media.<sup>14</sup> What is important, however, is not the particular conclusions, but the uses of minimalism in all these contexts.

I conclude by exploring three large issues for the future: affirmative action, the right to die, and same-sex marriages. These areas are the focus of intense political debate and in that sense are especially promising areas for minimalism. Thus I urge that the Court should continue Justice Powell's narrow, fact-specific approach in the area of affirmative action;<sup>15</sup> that in cases involving the right to die, courts shall not invoke a still-new and highly abstract "right to privacy;" and that the Court should, in the near future, stay away from the issue of same-sex marriage, whatever it may think about the merits of the underlying constitutional claims. It should leave that issue undecided.

## II. BASIC CONCEPTS

While this lack of focus does not deprive this Court of jurisdiction to consider a facial challenge to the Party Expenditure Provision as over-

<sup>11</sup> 116 S. Ct. 1495 (1996).

<sup>12</sup> See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996).

<sup>13</sup> See *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996).

<sup>14</sup> See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2381 (1996).

<sup>15</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315–20 (1978) (opinion of Powell, J.).

broad or as unconstitutional in all applications, it does provide a prudential reason for this Court not to decide the broader question, especially since it may not be necessary to resolve the entire current dispute.

Colorado Republican Federal Campaign Committee v. Federal Election Commission,  
116 S. Ct. 2309, 2320 (1996).

I think that the *Buckley* framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it . . . .

Colorado Republican Federal Campaign Committee v. Federal Election Commission,  
116 S. Ct. 2309, 2328 (1996)  
(Thomas, J., concurring in the judgment in part and dissenting in part).

#### A. Theories

What is the relationship among the Supreme Court, the Constitution, and those whose acts are subject to constitutional attack? It is easy to identify some theoretically ambitious responses. Perhaps the simplest one is *originalist*.<sup>16</sup> On this view, the Court's role is to invoke an actual historical judgment made by those who ratified the Constitution. The *Dred Scott*<sup>17</sup> case is a vigorous early statement of this approach.<sup>18</sup> Justices Scalia and Thomas have been enthusiasts for originalism, at least most of the time.<sup>19</sup> Here the Court tries to bracket questions of politics and morality and embarks on a historical quest.

The second response stems from the perceived need for judicial deference to plausible judgments from the executive and legislative branches of government. On this view, courts should uphold such judgments unless those judgments are outlandish or clearly mistaken. James Bradley Thayer's great article, advocating a *rule of clear mis-*

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<sup>16</sup> The most well-known defense of originalism is ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

<sup>17</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>18</sup> See Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37, 46–54 (1993).

<sup>19</sup> See generally *MacIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring in the judgment) (urging an originalist interpretation of the First Amendment); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (preferring the originalist to the nonoriginalist approach to interpretation). Both make exceptions for certain areas of law. For Justice Thomas, commercial speech clearly merits an exception. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (Thomas, J., concurring in part and concurring in the judgment). Affirmative action and campaign finance laws are exceptions for both. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2323 (1996) (Thomas, J., dissenting in part, and concurring in the judgment); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2101, 2118 (1995).

*take*, is the classic statement of this position.<sup>20</sup> The position can be found as well in the writings of Justice Holmes,<sup>21</sup> the first Justice Harlan,<sup>22</sup> Justice Frankfurter,<sup>23</sup> and, most recently, Chief Justice Rehnquist.<sup>24</sup> Innumerable post-New Deal cases involving social and economic regulation have roots in Thayer.<sup>25</sup>

The third response is that the Supreme Court should make *independent interpretive judgments* about constitutional meaning, based not on historical understandings, but instead on the Court's own view of what interpretation makes best sense of the relevant provision.<sup>26</sup> When the Court struck down maximum hour and minimum wage legislation in the early part of the twentieth century, it spoke in these terms.<sup>27</sup> It did the same thing when it created and vindicated a "right of privacy,"<sup>28</sup> as well as when it struck down bans on commercial advertising and restrictions on campaign spending.<sup>29</sup> Ronald Dworkin — Thayer's polar opposite in the American legal culture — is the most prominent advocate of this approach to constitutional law insofar

<sup>20</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 139–52 (1893).

<sup>21</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

<sup>22</sup> See *id.* at 65 (Harlan, J., dissenting).

<sup>23</sup> See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597–98 (1940).

<sup>24</sup> See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result); *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

<sup>25</sup> See, e.g., *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240–43 (1984) (discussing the need for judicial deference to the legislature's determination of "public use" and the proper approach to achieving the legislature's purpose); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175–76 (1980) (refusing to strike down legislation under the Equal Protection Clause when the legislation is simply "unwise" or "unartfully" drafted); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (observing that the Court will not find a Due Process violation merely because a law is unwise).

<sup>26</sup> See generally DWORKIN, *supra* note 3, at 3 (discussing the Court's "moral reading" of the Constitution). There are many complexities in Dworkin's position and I do not claim that this thumbnail sketch is adequate to those complexities. An interesting contrast is provided by BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34–57 (1991). Ackerman urges courts to "synthesize" constitutional moments; thus the meaning of the equality principle in the late twentieth century comes from an understanding of the relationship between the Civil War and the New Deal. See *id.* Doubtless ideas of the sort urged by Ackerman help account for some aspects of Supreme Court decisions, and the theoretical underpinnings of large-scale social developments do have an impact on constitutional law. But thus far Ackerman has not discussed the weaknesses of the judiciary in thinking in such abstract terms, and an understanding of those weaknesses must play a role in any evaluation of the idea that courts are to synthesize constitutional moments. At least most of the time, constitutional law is narrower, shallower, more incremental, and based on analogies.

<sup>27</sup> See *Adkins v. Children's Hosp.*, 261 U.S. 525, 545–46 (1923); *Lochner v. New York*, 198 U.S. 45, 53 (1905). Consult RICHARD A. EPSTEIN, *TAKINGS* (1985), for a modern statement and defense.

<sup>28</sup> See *Roe v. Wade*, 410 U.S. 113, 153–54 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 482–86 (1965).

<sup>29</sup> See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766–70 (1976); *Buckley v. Valeo*, 424 U.S. 1, 143–44 (1976) (per curiam).

as he stresses the value of integrity, which calls for principled consistency across cases.<sup>30</sup>

The fourth response characterizes one understanding of the Warren Court era.<sup>31</sup> It is represented by the most famous footnote in all of constitutional law: footnote four in the *Carolene Products* case.<sup>32</sup> On this view, the Court should act to improve the democratic character of the political process itself. It should do so by protecting rights that are preconditions for a well-functioning democracy, and by protecting groups that are at special risk because the democratic process is not democratic enough. Insofar as it stressed the need to protect political outsiders from political insiders, *McCulloch v. Maryland*<sup>33</sup> is probably the earliest statement of the basic position; more recent examples include *Baker v. Carr*,<sup>34</sup> *Reynolds v. Sims*,<sup>35</sup> and *Shaw v. Hunt*.<sup>36</sup> This conception of the judicial role, defended by John Hart Ely,<sup>37</sup> is based on the notion of *democracy-reinforcement*.

As an institution, the Supreme Court has not made an official choice among these four approaches. Even individual Supreme Court Justices can be hard to classify. Consider the current Court. Justices Scalia and Thomas are outspokenly originalist,<sup>38</sup> and certainly neither can fairly be accused of rampant inconsistency. But in last Term's *44 Liquormart* case, Justice Thomas interpreted the First Amendment with little reference to history. Indeed his opinion looked like a form of independent interpretive argument. Justice Scalia's views on campaign finance regulation and affirmative action do not appear to result from extended historical inquiry.<sup>39</sup> Chief Justice Rehnquist has often endorsed the rule of clear mistake, and he is probably the most consistent proponent of this view in recent decades. But in cases involving affirmative action,<sup>40</sup> the Chief Justice speaks in quite different terms; here his method is more like a form of independent interpretive judgment.

<sup>30</sup> See DWORKIN, *supra* note 3, at 10–11.

<sup>31</sup> See JOHN HART ELY, DEMOCRACY AND DISTRUST 4–7 (1980).

<sup>32</sup> United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

<sup>33</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>34</sup> 369 U.S. 186 (1962).

<sup>35</sup> 377 U.S. 533 (1964).

<sup>36</sup> 116 S. Ct. 1894 (1996).

<sup>37</sup> See ELY, *supra* note 31, at 4–5. A variation on the same theme can be found in HABERMAS, cited above in note 3, at 261–86.

<sup>38</sup> See *supra* note 19.

<sup>39</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520–28 (1989) (Scalia, J., concurring in the judgment).

<sup>40</sup> Note Chief Justice Rehnquist's votes against the constitutionality of affirmative action programs in, for example, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476 (1989); *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 657 (1987); and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 269 (1986).

No one need be charged with hypocrisy here. Perhaps different constitutional provisions are best treated differently. Thus the rule of clear mistake might make sense for the Due Process Clause, whereas the idea of democracy-reinforcement is appropriate for the First Amendment and the Equal Protection Clause. Indeed, the idea of democracy-reinforcement creates a great deal of space for the rule of clear mistake in those cases in which no democratic defect is at stake.<sup>41</sup> Or the Court might adopt a presumption in favor of originalism but look elsewhere when history reveals gaps or ambiguities.<sup>42</sup>

### B. Against Theories, Against Rules

To resolve these abstract debates, a judge must take a position on some large-scale controversies about the legitimate role of the Supreme Court in the constitutional order. But let us notice a remarkable fact. Not only has the Court as a whole refused to choose among the four positions, or to sort out their relations, but many of the current justices have refused to do so in their individual capacities. Consider Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. These Justices — the analytical heart of the current Court — have adopted no “theory” of constitutional interpretation. It is not even clear that any of them has rejected any of the four approaches I have described. The most that can be said is that none of the Justices is an originalist in the sense of Justices Scalia and Thomas, and that none of them believes that any of these approaches adequately captures the whole of constitutional law.

In their different ways, each of these justices tends to be *minimalist*. I understand this term to refer to judges who seek to avoid broad rules and abstract theories,<sup>43</sup> and attempt to focus their attention only on what is necessary to decide particular cases. Minimalists emphatically believe in reason-giving, but they do not like to work deductively; they do not see outcomes as reflecting rules or theories laid down in advance. They also tend to think analogically and by close reference to actual and hypothetical cases. I believe (though I cannot

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<sup>41</sup> The *Caroline Products* Court thought that *Caroline Products* was itself such a case. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). But see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (arguing against *Caroline Products*).

<sup>42</sup> See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring in part and concurring in the judgment) (writing that the absence of developed historical evidence compels him to follow existing precedent).

<sup>43</sup> There are intrapersonal parallels, quite outside the context of law. Sometimes people try to make narrow and shallow decisions in personal matters and to leave the broader and more deeply theoretical questions for another day. See Edna Ullmann-Margalit, *Opting*, in THE 1985 YEARBOOK OF THE WISSENSCHAFTSKELLEG ZU BERLIN (discussing this phenomenon). Sometimes people try to leave things undecided because they seek to avoid the responsibility of decision or because they know that any decision, even the right decision, will cause injury to self or others. A great deal of work remains to be done on this important topic.

prove) that all of the justices named above understand themselves as minimalists in this sense, and that they have chosen to be minimalist for reasons that are, broadly speaking, of the sort discussed here.

Minimalism contrasts with maximalism, understood as an effort to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes. At the opposite pole from maximalism is reasonlessness, as in a denial of certiorari, and close to reasonlessness is what might be called "subminimalism," found in decisions that are conclusory and opaque, and that offer little in the way of justification or guidance for the future. It is possible to imagine a rough continuum of this sort:

reasonlessness/silence —>subminimalism —>minimalism —>ambitiousness —>maximalism (complete rules/full theoretical grounding)

Of course, there can be much dispute over what is necessary to defend a decision. Maximalists might argue that minimalists consistently say less than necessary precisely because they avoid the full range of relevant theoretical arguments and the full range of hypothetical cases.<sup>44</sup> Minimalists, by contrast, seek to deal only with the closest of precedents and the most obvious of hypotheticals; they avoid dicta; they try to find grounds on which people can converge from diverse theoretical positions. Let me explain these ideas in more detail.

### C. Narrow Rather Than Wide

Minimalists try to decide cases rather than to set down broad rules; they ask that decisions be *narrow rather than wide*. They decide the case at hand; they do not decide other cases too unless they are forced to do so (except to the extent that one decision necessarily bears on other cases).<sup>45</sup> Of course, narrowness is relative, not absolute. A decision that discrimination against the mentally retarded will face rational basis review<sup>46</sup> is narrow compared to a decision that discrimination on all grounds other than race will face rational basis review. But it is broad compared to a decision that holds for or against the mentally retarded without announcing a standard of review. Of course, narrowness may run into difficulty if it means that similarly situated people are being treated differently; this very fact can press the Court in the direction of breadth.<sup>47</sup>

Currently, there is by no means a consensus that minimalism is the appropriate way for a court to proceed. Justice Scalia, for example, is

<sup>44</sup> This can be understood as the thrust of RONALD DWORKIN, LAW'S EMPIRE 5–30, 219–24 (1985).

<sup>45</sup> For an especially illuminating discussion, see Joseph Raz, *The Relevance of Coherence, in ETHICS IN THE PUBLIC DOMAIN* 261, 279–303 (1994).

<sup>46</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

<sup>47</sup> Cf. DWORKIN, *supra* note 44, at 219–24 (1985) (discussing consistency).

no minimalist.<sup>48</sup> On the contrary, he is close to a maximalist, sharply opposing self-consciously narrow decisions. Justice Scalia has prominently argued that courts should create rules, because rulelessness violates rule of law values.<sup>49</sup> There is much force to his argument. It would be foolish to be a thoroughgoing minimalist; the case for breadth is strong in too many cases.<sup>50</sup> Indeed, the Supreme Court grants certiorari only when the issue has a high degree of national importance, so that the decision in the case at hand will affect other cases too.<sup>51</sup>

But this is only part of the story.<sup>52</sup> Judges who refuse to set down broad rules can minimize both the burdens of making decisions and the dangers of erroneous decisions. Perhaps the Court will set out a rule that is wrong as applied to other cases not before the Court;<sup>53</sup> perhaps it would be too time-consuming and difficult to generate a decent rule. Hence it is best to decide the case on the narrowest possible ground. This idea is closely associated with the ban on advisory opinions, a ban that promotes minimalist goals by leaving things undecided and greatly reducing the occasions for judicial judgment.

As a first approximation, we might try to systematize the inquiry and the resulting disputes in the following way: good judges try to minimize the sum of decision costs and error costs.

1. *Decisions and Decision Costs.* — Decision costs are the costs of reaching judgments. Human beings incur these costs in all contexts, and they adopt a range of devices to reduce them.<sup>54</sup> In the legal setting, decision costs are faced by both litigants and courts. If, for example, a judge in a case involving the "right to die" attempted to generate a rule that would cover all imaginable situations in which

<sup>48</sup> Although Justice Scalia favors applying rules to subsequent cases, this preference is part of his maximalism, that is his effort to prevent highly particularistic, case-by-case judgments. Interestingly, Justice Scalia does not appear to believe in rigid principles of stare decisis. See, e.g., *United States v. Virginia*, 116 S. Ct. 2264, 2292–93 (1996) (Scalia, J., dissenting) (questioning much of the law of equal protection); *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting) (arguing in favor of overruling *Roe v. Wade*, 410 U.S. 113 (1973)). Justice Thomas may be the most consistent maximalist on the Court. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring in part and concurring in the judgment) (advocating the abandonment of the "commercial speech/political speech" distinction).

<sup>49</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989). Rule of law values include predictability, control of official discretion, and minimization of arbitrariness.

<sup>50</sup> See *infra* pp. 28–33.

<sup>51</sup> See ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, *SUPREME COURT PRACTICE* 165–67 (7th ed. 1993).

<sup>52</sup> Justice Scalia himself seems to recognize this point. See Scalia, *supra* note 49, at 1186–89.

<sup>53</sup> The need for caution is one of the central arguments of Justices Breyer and Souter in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*. See 116 S. Ct. 2374, 2388–89 (1996) (opinion of Breyer, J.); *id.* at 2402–03 (Souter, J., concurring).

<sup>54</sup> See John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669, 682–83 (1996) (discussing heuristics and other techniques).

that right might exist, it is likely that the case would take a very long time to decide. Perhaps these costs would be prohibitive. The high costs might arise from a sheer lack of information, or because of the pressures faced by a multi-member court consisting of people who are unsure or in disagreement about a range of subjects. Such a court may have a great deal of difficulty in reaching closure on broad rules. Undoubtedly, the narrowness of many decisions is a product of this practical fact. *Romer v. Evans*, failing to mention *Bowers v. Hardwick*<sup>55</sup> and otherwise leaving things undecided, is a recent example; the opinion may well be a product of the difficulty of achieving consensus among six diverse Justices. It is important to distinguish between cases in which minimalism is a practical necessity and those in which minimalism is affirmatively desirable because it reflects a court's appropriate modesty about its own capacity.

Quite apart from the pressures of inadequate information and internal disagreement, minimalism might make special sense when circumstances will change in large and relevant ways in the near future.<sup>56</sup> Facts and values can go in unanticipated directions, thus rendering anachronistic a rule that is well-suited to present conditions.<sup>57</sup>

All of these points suggest that minimalism may be desirable because of the high costs of decision. But an inquiry into decision costs will not always support minimalism. A court that economizes on decision costs for itself may in the process "export" decision costs to other people, including litigants and judges in subsequent cases who must give content to the law. The aggregate decision costs associated with the court's narrow decision could be very high. When law is uncertain, decision costs can proliferate, as people invest in activities designed both to find out the content of law and to press the law's content in certain directions.<sup>58</sup> High decision costs are especially pernicious when planning is important; it is for this reason that stare decisis and broad rules are extremely valuable in cases involving the need to plan.<sup>59</sup>

There is one group of people who will predictably do well when decision costs are high: lawyers. But high decision costs can be a

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<sup>55</sup> 478 U.S. 186 (1986).

<sup>56</sup> I am focusing here on the use of minimalism to reduce decision costs, but there are other strategies. Courts might, for example, rely on presumptions to say that, in the face of uncertainty, a case will be resolved favorably to one or another side.

<sup>57</sup> See *Denver Area*, 116 S. Ct. at 2402 (Souter, J., concurring) ("[B]ecause we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.").

<sup>58</sup> See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 564 (1992).

<sup>59</sup> The Supreme Court made a controversial statement to this effect in *Payne v. Tennessee*, 501 U.S. 808, 827–30 (1991).

disaster from the standpoint of society as a whole. It is probably for this reason that the ban on advisory opinions is relaxed in cases when uncertainty impedes necessary planning.<sup>60</sup>

2. *Errors and Error Costs.* — Error costs are the costs of mistaken judgments as they affect the social and legal system as a whole. It is possible, for example, that any decision involving the application of the First Amendment to new communications technologies, including the Internet, should be narrow,<sup>61</sup> because a broad decision rendered at this time would be likely to go wrong. A more evolutionary approach, involving the accretion of case-by-case judgments, could produce fewer mistakes on balance, because each decision would be appropriately informed by an understanding of particular facts. Lack of information is thus a crucial argument for decisional minimalism. Changed circumstances argue in the same direction; imagine the difficulties of designing good rules for a changing telecommunications market.<sup>62</sup> The common law process prizes minimalism partly in order to reduce the error costs associated with incomplete information and changing circumstances; analogical reasoning, as distinct from rule-bound judgment, is a crucial part of the process.<sup>63</sup>

On the other hand, a broad rule, even if over-inclusive or under-inclusive, may be better than a narrow judgment, because lower courts and subsequent cases would generate an even higher rate of error. Perhaps a broad rule would be privately adaptable and thus allow adjustments across circumstances, as in the basic rules of contract and tort.<sup>64</sup> Perhaps a refusal to issue rules now would seem “wise” or “prudent” but leave subsequent judgments to district courts whose decisions cannot be entirely trusted. Perhaps a maximalist Court can later change the rules if the rules turn out to be wrong. In this light it would be foolish to suggest that minimalism is generally a good strategy, or that minimalism is generally a blunder. Everything depends on contextual considerations.<sup>65</sup> The only point that is clear even in the abstract is that sometimes the minimalist approach is the best way to minimize the sum of error costs and decision costs, because the costs of producing even a plausibly accurate rule can be prohibitive. What

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<sup>60</sup> Cf. William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 710–13 (1994) (describing the usefulness of advisory opinions in reducing the costs of legal errors).

<sup>61</sup> See *Denver Area*, 116 S. Ct. at 2402–03 (Souter, J., concurring); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1744–45 (1995).

<sup>62</sup> Some of these difficulties might, however, be reduced with rules that allow private adaptation. See RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD *passim* (1995); Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 1016–20 (1995).

<sup>63</sup> See *Denver Area*, 116 S. Ct. at 2386–87 (opinion of Breyer, J.); *id.* at 2402 (Souter, J., concurring).

<sup>64</sup> See EPSTEIN, *supra* note 62, at xii–xiii, 307–12; Sunstein, *supra* note 62, at 972–75.

<sup>65</sup> See FREDERICK SCHAUER, *PLAYING BY THE RULES* 157 (1991).

seems especially important is that with an appreciation of this point, we can see links among seemingly disparate ideas and debates: the ban on advisory opinions, the rules-standards debate, the use of the passive virtues, the decision whether and when to grant certiorari, the question whether to rule broadly or narrowly, and the use of "clear statement" principles in statutory construction.

3. *Metrics*. — We can find these ideas useful without understanding the idea of "costs" in a fully economicistic manner. The various consequences of decisions or errors cannot easily be monetized or aligned along a single metric. Decision costs are qualitatively different from error costs, and the ingredients of both are qualitatively distinct. Consider the risk that a certain rule in constitutional law will produce excessive restrictions on political speech. This risk may be less well understood if we see it as a "cost" like all other costs. It is valuable to think about minimizing the sum of decision costs and error costs, but we should not proceed as if these various costs are qualitatively indistinguishable, or as if there is some metric along which they can be assessed.

4. *Democracy*. — One of the major advantages of minimalism is that it grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems.<sup>66</sup>

Suppose, to return to our example, that the Supreme Court is asked to decide whether a certain attempt to regulate the Internet violates the First Amendment. This claim raises complex issues of value and fact, and it is important for the Court to have some information on both values and facts before it lays down a broad rule. A narrow decision, pointing to a range of factors in a particular case, is a way of allowing some breathing space for participants in the democratic process.<sup>67</sup> Similarly, the Court might (if it can) strike down a law as unconstitutionally vague and in the process refuse to decide exactly how much regulation would be acceptable under a sufficiently clear law. As another example, suppose that the Court is asked to hold that the Equal Protection Clause requires states to recognize same-sex mar-

<sup>66</sup> Insofar as the minimalist project stresses this goal, it is continuous with the post-New Deal, neo-Thayerian effort to limit the role of judges in political processes and forms part of the project of Justices Brandeis and Frankfurter. See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1447–52 (1988). This effort was democracy-permitting. But as I will suggest, certain forms of minimalism that I mean to approve here are democracy-forcing, and in that way continuous with *Carolene Products* footnote four, rather than with the Thayer-Brandeis-Frankfurter strand of constitutional law. And as noted above, some minimalists attempt to avoid theoretical disputes of this kind.

<sup>67</sup> See, e.g., *Denver Area*, 116 S. Ct. at 2385–86. Of course there are many different conceptions of democracy, and the word itself cannot justify deference to majorities. See DWORKIN, *supra* note 3, at 15–20; GUTMANN & THOMPSON, *supra* note 3, at 27–33.

riages. The Court might want to leave that issue undecided not only because it 1) cannot reach a consensus or 2) lacks relevant information, but also because it 3) is unsure about the (legally relevant) moral commitments, 4) thinks that people have a right to decide this issue democratically, or 5) believes that a judicial ruling could face intense political opposition in a way that would be counterproductive to the very moral and political claims that it is being asked to endorse.

In sum, minimalism can promote democracy because it allows democratic processes room to maneuver. Judges should allow such room because their judgments might be wrong and, even if right, their judgments may be counterproductive.

This democratic argument helps explain some prominent objections to *Roe v. Wade*<sup>68</sup> as it was originally written. In the Court's first confrontation with the abortion issue, it laid down a set of rules for legislatures to follow. The Court decided too many issues too quickly.<sup>69</sup> The Court should have allowed the democratic processes of the states to adapt and to generate sensible solutions that might not occur to a set of judges.<sup>70</sup> In this way, the democratic argument for minimalism invokes the need for prudence, social adaptation over time, and humility in the face of limited judicial capacities and competence.

#### D. Shallow Rather Than Deep

In addition to deciding the cases at hand narrowly, minimalists generally try to avoid issues of basic principle and instead attempt to reach *incompletely theorized agreements*.<sup>71</sup> Such agreements may involve either particulars or abstractions. Participants in public life may thus unite behind a particular outcome when they disagree on abstractions, or they may accept an abstraction when they disagree on particular outcomes. The latter strategy is dominant in constitution-making, as people accept the principles of "freedom of speech" or "equality" despite their uncertainty or disagreements about what these principles specifically entail. In a parallel process, judges may adopt a standard in the form of a "reasonableness" test<sup>72</sup> instead of deciding on the appropriate rule.

Here I emphasize the possibility of concrete judgments backed by unambitious reasoning on which people can converge from diverse foundations. Judges who disagree or who are unsure about the foundations of constitutional rights, or about appropriate constitutional

<sup>68</sup> 410 U.S. 113 (1973).

<sup>69</sup> See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985).

<sup>70</sup> See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 48–51 (1987).

<sup>71</sup> For a more detailed treatment of this idea, see CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35–61 (1996).

<sup>72</sup> See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996).

method, might well be able to agree on how particular cases should be handled. For example, they might think that whatever they believe about the most complex free speech issues, a state cannot ban people from engaging in acts of political protest unless there is a clear and present danger. Thus judges who have different accounts of what the Equal Protection Clause is all about can agree on a wide range of specific cases. There can be little doubt, for example, that the Justices who joined the Court's opinion in *Romer v. Evans* did so from different theoretical perspectives. Agreements on particulars and on unambitious opinions are the ordinary stuff of constitutional law; it is rare for judges to invoke first principles. Avoidance of such principles helps enable diverse people to live together — thus creating a kind of *modus vivendi* — and also shows a form of reciprocity or mutual respect.

Incompletely theorized agreements are by no means unaccompanied by reasons. On the contrary, judicial decisions infrequently resolve foundational questions, and they are nonetheless exercises in reason-giving. Recall that minimalism is an effort to decide cases with the least amount necessary to justify the decision. Reasoned but theoretically unambitious accounts are an important part of that effort. Of course it is true that people sometimes hold to their commitments to particular cases more tenaciously than they hold to their theories. Sometimes it is the particular judgments that operate as "fixed points" for analysis. All I am suggesting is that when theoretical disagreements are intense and hard to mediate, the Justices can make progress by putting those disagreements to one side and converging on an outcome and a relatively modest rationale on its behalf.

In this way, minimalists try to make decisions *shallow rather than deep*.<sup>73</sup> They avoid foundational issues if and to the extent that they can. By so doing the Court can both model and promote a crucial goal of a liberal political system: to make it possible for people to agree when agreement is necessary, and to make it unnecessary for people to agree when agreement is impossible. Judicial minimalism is well-suited to this goal.

#### E. Kadi Justice and Anglo-American Analogues

Reasons are by their nature abstractions.<sup>74</sup> Any reason is by its nature more abstract than the case for which it is designed, and any

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<sup>73</sup> Like narrowness, shallowness is a matter of degree. The clear and present danger test is shallow compared to a judgment that the First Amendment is rooted in a conception of autonomy. But it is deep compared to a judgment that, whatever the appropriate test, a political protest by members of the Ku Klux Klan is protected by the First Amendment.

<sup>74</sup> See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635, 665 (1995).

reason, if it is binding, will extend beyond that case.<sup>75</sup> From this point we can imagine the most extreme legal system: all judgments are unaccompanied by reasons, and no judgment has stare decisis effects. In such a system, the costs of decision would be quite low. In such a system, the error costs may be high if subsequent courts go wrong, but at least we can see that the decision in one case cannot possibly produce errors in subsequent cases.

An extreme system of this sort — what Max Weber called “Kadi justice”<sup>76</sup> — would undoubtedly seem a kind of bizarre nightmare world, the stuff of Kafka, Orwell, science fiction, Mao’s China. But the idea is not as unfamiliar to American law as it may seem, for there are important contexts in which a decision or an agreement is unaccompanied by any rationale at all.<sup>77</sup> This is typically a jury’s practice in giving a verdict. It is also the Court’s usual<sup>78</sup> practice when denying certiorari. Denials are reasonless. They are entirely rule-free and untheorized. Outcomes unaccompanied by reasons do not foreclose different outcomes in other cases. They also take relatively less time to produce, since it can be far easier to come up with a decision than to come up with an explanation. This is one reason for the Court’s usual failure to explain its decisions to deny certiorari. An unexplained denial has a practical advantage too, since judges with divergent rationales can converge on the outcome without converging on an account. These ideas also help account for the (controversial) practices of producing unpublished opinions and of affirming lower court decisions without comment.

Somewhere on the continuum between minimalist decisions and reasonless decisions are those that offer a rationale that is not, on reflection, adequate to justify the outcome. Dissenting opinions, of course, always make this claim, but sometimes opinions seem so conclusory that the accusation of subminimalism has force. As we will see, this is the accusation of Justice Scalia about the Court’s opinion in *Romer v. Evans*.<sup>79</sup> Opinions of this sort violate norms associated with legal craft. If an opinion is supposed to do anything, it is supposed to explain the outcome of the case. But if outcomes unaccompanied by any reasons have social uses, then outcomes accompanied by

<sup>75</sup> For a discussion of reasons and decisions from the standpoint of social psychology, with interesting implications for law, see Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, 49 COGNITION 11 (1993).

<sup>76</sup> See MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 976–78 (1968).

<sup>77</sup> See Schauer, *supra* note 74, at 634.

<sup>78</sup> See the revealing and unusual comments of Justice Ginsburg in connection with the denial of certiorari in *Hopwood v. Texas*, No. 95-1773 (U.S. July 1, 1996) (Westlaw, SCT database) (memorandum opinion of Ginsburg, J., with whom Souter, J., joins). See also *Hopwood v. Texas*, 116 S. Ct. 2581 (1996).

<sup>79</sup> See 116 S. Ct. 1620, 1629–30 (1996) (Scalia, J., dissenting).

subminimalist reasons might also have social uses. As we shall see, this is a possible response to Justice Scalia's complaint in *Romer*.

#### F. Shallow and Narrow, Deep and Wide

There are many possible interactions along the dimensions of depth and width. Consider the following table:

	NARROW	WIDE
SHALLOW	1 — denial of certiorari; <i>Romer v. Evans</i> , <sup>80</sup> <i>United States v. Lopez</i> , <sup>81</sup> <i>Denver Area Educational Telecommunications Consortium, Inc. v. FCC</i> <sup>82</sup>	2 — <i>Brandenburg v. Ohio</i> (clear and present danger test); <sup>83</sup> <i>Roe v. Wade</i> <sup>84</sup>
DEEP	3 — <i>44 Liquormart, Inc. v. Rhode Island</i> (plurality opinion); <sup>85</sup> <i>United States v. Virginia</i> <sup>86</sup>	4 — <i>Reynolds v. Sims</i> , <sup>87</sup> <i>Dred Scott v. Sandford</i> , <sup>88</sup> Dworkin's Hercules <sup>89</sup>

A denial of certiorari is as narrow as can be — it does not affect any other case — and it is also entirely untheorized and hence as shallow as possible. The Supreme Court's decision in *Romer v. Evans* can be understood as very narrow, since it does not purport to touch other possible cases,<sup>90</sup> and also as shallow, since its rationale need not be taken to extend much further than its holding. *United States v. Lopez* was emphatically both narrow and shallow. It turned on a set of factors, not on a broadly applicable rule, and it gave no deep account of federalism.<sup>91</sup> The same can be said of the *Denver Area* case, where the Court, emphatic about the complexity of new telecommunications technologies,<sup>92</sup> left many issues open and gave no deep account of the underlying First Amendment principles.

<sup>80</sup> 116 S. Ct. 1620 (1996).

<sup>81</sup> 115 S. Ct. 1624 (1995).

<sup>82</sup> 116 S. Ct. 2374 (1996).

<sup>83</sup> 395 U.S. 444 (1969).

<sup>84</sup> 410 U.S. 113 (1973).

<sup>85</sup> 116 S. Ct. 1495 (1996).

<sup>86</sup> 116 S. Ct. 2264 (1996).

<sup>87</sup> 377 U.S. 533 (1964).

<sup>88</sup> 60 U.S. (19 How.) 393 (1857).

<sup>89</sup> Hercules is an idealized judge embodying Dworkin's conception of law as integrity. He is intended as a thought experiment and not as a real-world judge. See DWORKIN, *supra* note 44, at 239–40, 264–66.

<sup>90</sup> See *Romer*, 116 S. Ct. at 1629.

<sup>91</sup> See *United States v. Lopez*, 115 S. Ct. 1624, 1630–32 (1995).

<sup>92</sup> See *Denver Area Educ. Telecomm. Consortium v. FCC*, 116 S. Ct. 2374, 2385 (1996) (opinion of Breyer, J.).

We can also imagine decisions that are both deep and wide. *Reynolds v. Sims*, announcing the one-person-one-vote rule,<sup>93</sup> was very broad<sup>94</sup> and also fairly deeply theorized. The one-person-one-vote idea applied to many cases and depended on an account of political representation. Similarly, the *Dred Scott* case generated a broad ruling that rested on an exceptionally ambitious account of the Constitution's posture toward slavery and African-Americans.<sup>95</sup> For purposes of understanding legal reasoning, Ronald Dworkin has described an idealized judge, Hercules, who seeks to offer the "best substantive interpretation" of past legal practices.<sup>96</sup> This is Dworkin's notion of law as integrity.<sup>97</sup> For present purposes what is important is that Hercules is ambitious along both dimensions, attempting to make theoretically deep judgments while understanding how those judgments square with many other actual and hypothetical decisions.<sup>98</sup> Although real-world judges rarely seek both width and depth, it is possible to understand the claim that this is an appropriate aspiration for law.<sup>99</sup>

Some judgments are shallow but wide. In *Brandenburg v. Ohio*, the Court adopted a form of the clear and present danger test that is very wide in the sense that it is used in a great range of cases. But the Court did not give a deep theoretical grounding for the test. It did not, for example, try to root its test in a conception of democratic deliberation, or explore the link between the interest in autonomy and the right to free expression.<sup>100</sup> The same can be said about *Roe v. Wade*.<sup>101</sup> That decision was wide in the sense that it settled a range of issues relating to the abortion question. But it did not give a deep account of the foundations of the relevant right.

It is hardest to imagine cases in cell 3: those that are deeply reasoned but also narrow. A deep account will in all likelihood have applications other than that before the Court. If a court says that the Equal Protection Clause is rooted in a principle involving the (constitutionally relevant) immorality of using skin color as a basis for public decisions, its

<sup>93</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568–71 (1964).

<sup>94</sup> The decision need not have been so broad. See *Reynolds*, 377 U.S. at 588–89 (Stewart, J., concurring in the judgment) (agreeing with the majority's finding that the apportionment violated the Equal Protection Clause on the ground that allocation of voting authority was random and lacked the support of any intelligible principle).

<sup>95</sup> See *infra* pp. 48–49.

<sup>96</sup> DWORKIN, *supra* note 44, at 225.

<sup>97</sup> See *id.* at 240.

<sup>98</sup> See, e.g., *id.* at 313–54 (exploring Hercules's application of law as integrity to statutory construction).

<sup>99</sup> Cf. *id.* at 265 (explaining that Hercules serves as an ideal judge who has the opportunity to engage in more thorough self-reflection and to aim for a more comprehensive theory of law than does an ordinary judge).

<sup>100</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 444–49 (1969) (per curiam) (adopting a version of the clear and present danger test).

<sup>101</sup> 410 U.S. 113 (1973).

decision will be wide as well as deep, or more precisely wide because deep. But we can find some examples from the 1995 Term. The plurality's opinion in *44 Liquormart* may well be an example of a cell 3 decision, one that has depth without much width. There five Justices appeared to associate the First Amendment with a conception of autonomy, according to which it is illegitimate to regulate speech on the ground that people might be persuaded by it.<sup>102</sup> But the five Justices did not suggest that this autonomy principle would alter the law in cases not involving regulation of truthful advertising of prices.<sup>103</sup> An even clearer example is *United States v. Virginia*. There the Court was careful to limit its decision to VMI, a "unique" institution. But the Court also ventured some ambitious remarks about the nature of the equality guarantee in the context of gender.<sup>104</sup>

We are now able to see some complexities in the idea of minimalism. Suppose, for example, that the Court is asked to strike down a law regulating sexually explicit speech on the Internet on First Amendment grounds. Suppose that the Court says that the law is impermissibly vague, and in that way brackets the question whether sexually explicit speech on the Internet receives the same kind of protection as sexually explicit speech in the print media. The Court says, in other words: "We do not say exactly what speech is protected when it is found on the Internet. But this law is so unacceptably vague that it is unconstitutional whatever the standard." In an important sense, this is precisely the kind of democracy-forcing minimalism that I mean to endorse here. It is democracy-forcing because it requires legislatures to speak with clarity. It is minimalist in the sense that it leaves key questions open. But it is nonminimalist in some crucial ways, for a vagueness doctrine may also be broad (if the vagueness constraint applies to many contexts) and deep (if the doctrine depends on an articulated account of, for example, the rule of law). It may itself be generative of many other outcomes. Some opinions are minimalist in some ways but maximalist in others. Decisions are not usually minimalist or nonminimalist; they are minimalist *along certain dimensions*.

#### G. Of *Stare Decisis* and Clear, Democracy-Reinforcing Backgrounds

The effect of width and depth is not merely a function of what the Court says. It will depend a great deal on the applicable theory of stare decisis. If precedents receive little respect, even a wide and deep opinion will not control future cases. The familiar distinction between holding and dicta thus has everything to do with the extent of minimalism. A legal system that insists on this distinction will drive prior cases in the direction of minimalism, whatever courts say in the

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<sup>102</sup> See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996) (plurality opinion).

<sup>103</sup> See *id.*

<sup>104</sup> See *infra* pp. 72-79.

initial cases. Courts that attempt to be maximalist may be quite surprised by the conduct of subsequent courts, which characterize their language as "dicta." Thus if subsequent courts have a great deal of discretion to recharacterize holdings, they can effectively turn any prior decision into a minimalist opinion. But if subsequent courts perceive themselves as bound to take precedents as they were written, minimalism will be a creation of the court that decides the case at hand. Here are some possibilities:

	MINIMALIST OPINIONS	MAXIMALIST OPINIONS
STRONG STARE DECISIS	1 — Common law (conventional picture)	2 — <i>United States v. Darby</i> <sup>105</sup> ; <i>Erie Railroad Co. v. Tompkins</i> <sup>106</sup>
WEAK STARE DECISIS	3 — Administrative adjudication	4 — Warren Court caricature

Cell 2 contains the strongest rule-like constraints. The great transformative opinions of the New Deal era are key examples. Cell 3 is the most rule-free. Administrative adjudication sometimes has this character. Cells 1 and 4 are the most interesting. Cell 1 probably captures the most ordinary picture of Anglo-American common law; courts narrowly decide the cases presented to them, but their decisions are given enormous weight in subsequent proceedings. Cell 4 is akin to caricatures of the Warren Court. Decisions in this cell set out broad and deep pronouncements that have little weight in subsequent cases. Although this approach may seem irresponsible, it can have certain advantages in promoting planning while, at the same time, allowing change if prior decisions go wrong. Of course we can see, on the two relevant dimensions, a continuum rather than a sharp division.

Stare decisis has dimensions of both breadth and strength. A legal system will move in the direction of minimalism if previous (maximalist) decisions will be abandoned when they seem plainly wrong. But it will also move in that direction if subsequent courts have flexibility to disregard justificatory language as "dicta" or to recharacterize previous holdings. A Supreme Court that is reluctant to overrule past decisions can accomplish much of the same thing through creative reinterpretation. Because courts have the power to recharacterize past decisions, they can turn originally minimalist decisions into maximalist decisions. *Reed v. Reed*,<sup>107</sup> for example, invalidated a law on grounds of sex discrimination<sup>108</sup> in a minimalist opinion, but subsequent courts have recharacter-

<sup>105</sup> 312 U.S. 100, 114–15 (1941) (upholding broad congressional powers under the Commerce Clause to regulate interstate commerce, regardless of the motive or purpose of the regulation).

<sup>106</sup> 304 U.S. 64, 78 (1938) (denying the existence of federal common law and holding that federal courts sitting in diversity must apply the statutory and decisional law of the forum state).

<sup>107</sup> 404 U.S. 71 (1971).

<sup>108</sup> See *id.* at 76–77.

ized this case as embodying a broad principle. The Court has begun to transform *Shaw v. Hunt*<sup>109</sup> in a similar way, broadening this narrowly written decision. The ultimate meaning of *Romer v. Evans* and *United States v. Virginia* — possible one-way tickets, possible seminal cases — will depend on the future.

More generally, courts deciding cases will have only limited authority over the subsequent reach of their opinions. A court that is determined to be maximalist may fill its opinion with broad pronouncements, but those pronouncements may subsequently appear as "dicta" and be disregarded by future courts. The converse phenomenon is also familiar. A court may write a self-consciously minimalist opinion, but subsequent courts may take the case to stand for a broad principle that covers many other cases as well.

A strong theory of stare decisis, especially in statutory cases, can create desirable incentives for participants in the democratic process. If courts do not alter their interpretation of statutes, even when their interpretation is wrong, Congress will have an especially clear background against which to work, knowing that Congress itself must correct any mistake. Thus a strong theory of stare decisis is part of a range of devices designed to create good incentives for democracy by providing a clear background for Congress. Consider the "plain meaning" rule in statutory interpretation, the refusal to consider legislative history, the unwillingness to "imply" private rights of action, and the refusal to impose constraints on jury awards of punitive damages. All of these devices can be understood as democracy-promoting, at least in aspiration.

This idea unites much of Justice Scalia's work; it provides a strong connection between his opinions and the ideal of deliberative democracy. The traditional response is that Congress's agenda is too loaded to support the view that congressional inaction, as against clear backgrounds, reflects considered judgments by Congress. On this view, more particularized judgments can lead to results that Congress would reach if it could consider every issue, or at least such judgments can give rationality and fairness the benefit of the doubt.<sup>110</sup> This debate is hard to resolve in the abstract, but it points to a set of tractable, largely empirical issues on which progress might be made in the future.

There is a related point. The reception of a Supreme Court opinion may matter as much as the applicable theory of stare decisis. Public officials may take an opinion as settling a range of issues despite the

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<sup>109</sup> 116 S. Ct. 1894 (1996).

<sup>110</sup> See generally HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1344–65 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (collecting cases on interpreting legislative silence and discussing their implications); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 438 (arguing that the institutional reality of Congress is not captured either by the view that legislative silence implies consent or by the view that the burden of making new law rests on those who propose it).

Court's effort to proceed narrowly; or such officials may take an opinion to be narrow, or distinguishable, despite the Court's effort at breadth. A full understanding of the topic of minimalism would have to extend far outside the judicial domain to the reaction of other branches to Supreme Court decisions.

Finally, there is a large difference between, on the one hand, forming a broad and deep judgment and, on the other hand, making that judgment public. Thus far I have treated the two cases as if they were the same. But we can readily imagine a situation in which a judge, or a majority on a multimember court, has decided (whether tentatively or not) in favor of a rule or a deep justification for an outcome, but nonetheless refuses to state the rule or justification in public. Judges might be publicly silent for a variety of reasons — for example, because they are not sure that they are right, because they fear public reaction, or because no majority can be obtained in favor of a rule or deep justification.

### III. THE LIMITS OF MINIMALISM

Reviewing speech restrictions under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.

Denver Area Educational Telecommunications Consortium, Inc. v.  
FCC,  
116 S. Ct. 2374, 2401 (1996) (Souter, J., concurring).

#### A. *Against Minimalism*

A great deal can be said against minimalist judgments. Minimalism is appropriate only in certain contexts. It is hardly a sensible approach for all officials, or even all judges, all of the time.

As we have seen, the minimalist claims to reduce costs of decision and costs of error. The minimalist also claims to facilitate democratic deliberation in the period between the case at hand and future cases, a benefit because new facts and perspectives may come to light. But there may well be reasons to doubt these claims. The decision costs of issuing a narrow, shallow judgment in case *A* may be low for the judge in that case, but lead to dramatically increased decision costs for judges in cases *B* through *Z*.<sup>111</sup> Thus the minimalist judge may be "exporting" costs from her own court to others. Lowered decision costs on the Supreme Court may entail huge expenditures by lawyers and judges to resolve the unanswered questions later. Consider, for example, the contexts of homosexual rights and punitive damages, in which

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<sup>111</sup> See Scalia, *supra* note 49, at 1178–83 (criticizing judicial reliance on the "totality of the circumstances" test).

the absence of clear standards will produce enormous complexity in subsequent cases.

Moreover, a narrow judgment in case *A* might not reduce aggregate error costs. Perhaps the Court in case *A* will be able to generate a rule or a decent and relatively elaborate account of its judgment. A minimalist judgment in case *A* might produce a range of mistakes in cases *B* through *Z*, because the lower courts will struggle unsuccessfully to make sense of case *A*. And if the rule in case *A* is a pretty good one, and if we lack confidence in the capacity of other institutions to produce a better one, we will get fewer rather than more errors through the maximalist route. This observation may help justify the rule-bound approaches of *Miranda v. Arizona*,<sup>112</sup> *Miller v. California*, and *Roe v. Wade*.

For similar reasons, minimalism may produce unfairness through dissimilar treatment of the similarly situated. It is true that rules may be unfair if they place diverse situations under a single umbrella. But it may be even worse to allow cases to be decided by multiple district court judges thinking very differently about the problem at hand. Minimalism might also threaten rule of law values; by impeding planning it does not ensure that decisions are announced in advance. It is often more important for people to know what the law is than for the law to have any particular content. When planning is necessary, minimalism may be a large mistake. Legislatures and agencies often do and should avoid minimalism for this reason. Indeed, courts may be minimalist largely because the adversary system limits judges' information to individual controversies; if so, minimalism is something for the law to avoid if lawmakers can possibly obtain the necessary information.

The minimalist's claim to advance democratic legitimacy may also be questioned. Notwithstanding the democracy-forcing consequences of forms of minimalism discussed below, the question remains whether increased democratic capacity is always desirable. The disputed issue may be ill suited to democratic choice, either because it should be off-limits to politics or because democratic deliberation is not functioning well. For example, well-organized interest groups might frustrate deliberative processes by taking advantage of collective action problems faced by their adversaries.<sup>113</sup> This phenomenon may be especially true with constitutional issues relating to punitive damages, commercial advertising, and homosexual rights; in all these contexts, powerful groups may be producing unreasonable legislation or blocking desirable

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<sup>112</sup> See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 196 (1988) (noting that a justification for *Miranda*'s prophylactic rule is that the absence of clear rules creates a danger of impermissible official action and might make it difficult for a reviewing court to detect such action).

<sup>113</sup> See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 36–37, 72 (1991).

change. And if we are concerned only about the substance — about getting things right — minimalism may be a mistake; it is possible that participants in democratic processes will merely stumble their way toward the rule that courts could have adopted long ago, in some instances never arriving at the correct rule at all. The argument that minimalism is preferable when it promotes democratic deliberation is weakened if the deliberative process delays realization of desirable rules, or precludes those rules altogether.

It seems clear that we cannot decide in the abstract whether and how much minimalism is appropriate. The choice between minimalism and the alternatives depends on an array of pragmatic considerations and on judgments about the capacities of various institutional actors. We could be confident in rejecting minimalism if the Supreme Court were excellent at developing both rules and theories, and if lower courts and other officials were very poor at both. Similarly, if democratic processes were not deliberative and failed at compiling and using information, the courts might be less reluctant to intrude into them. On the other hand, minimalism would be the right course if the Court were generally error-prone, and other institutions, deciding what the Court leaves undecided, were much better. But none of these general conclusions can claim much support. We need to answer more particular questions.

### B. When Minimalism? When Maximalism?

From these observations we cannot come up with an algorithm to decide when minimalism makes sense, but some generalizations may be helpful. Anglo-American judges usually speak as if minimalism is the appropriate presumption, and of course if minimalism is the only possible route for a multimember tribunal, then minimalism will be inevitable. Minimalism becomes more attractive if judges are proceeding in the midst of factual or (constitutionally relevant) moral uncertainty and rapidly changing circumstances, if any solution seems likely to be confounded by future cases, or if the need for advance planning is not insistent. But the argument for a broad and deep solution becomes stronger if diverse judges have considerable confidence in the merits of that solution, if the solution can reduce costly uncertainty for other branches, future courts, and litigants (and hence decision costs would otherwise be high), or if advance planning is important. An inquiry of this kind can help us to assess decision costs and error costs in an intuitive way.

In any event, the case for minimalism is not separable from an evaluation of underlying substantive controversies. If judges are rightly convinced that same-sex schools always violate the Constitution, there will be little problem with a broad and deep judicial judgment to this effect. The cautious approach in *United States v.*

*Virginia* is more sensible if judges believe that same-sex schools may well be constitutional when they promote equal opportunity and educational diversity. If we examine the considerations referred to above, it is at least reasonable to think, for example, that *Roe* was a blunder insofar as it resolved so much so quickly; that *Loving v. Virginia* was wrong insofar as it rested on substantive due process as an alternative ground to the (sufficient and correct) equal protection holding; and that *Brown v. Board of Education* was right because it was hardly the Court's first encounter with the problem and the Court could have great confidence in its judgment.

Justice Breyer's opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*<sup>114</sup> is a helpful illustration. One of the issues on which the Court split was whether Congress could (through section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992) grant cable operators "permission" to exclude indecent programming from the airwaves. Justice Thomas would have resolved this issue via simple rule: because the relevant First Amendment rights are those of the operators, of course Congress could do this; Congress was merely giving operators permission that they would have had without government regulation.<sup>115</sup> Justice Kennedy also urged a simple rule: strict scrutiny should apply to any content-based law, and section 10(a) should be invalidated.<sup>116</sup> The issue was tricky, and both of these approaches seem unsatisfactory. Even if Justice Thomas's premise is correct, it does not follow that any content-based permission is constitutionally acceptable: if Congress had granted cable operators the authority to exclude programming critical of the Congress, it would have been acting unconstitutionally. And contrary to Justice Kennedy's apparent suggestion, some content-based measures are unobjectionable; imagine a law that gives a bonus of some kind to educational programming. Instead of adopting any simple rules, Justice Breyer emphasized a set of factors.<sup>117</sup> The regulation was based on content but not on viewpoint. It was designed to protect children, an important interest. It was reminiscent of a regulation banning indecent material that the Court upheld in *FCC v. Pacifica Foundation*,<sup>118</sup> and thus was supported by an analogy. The regulation was permissive rather than mandatory. In any case it was relevant, even if not decisive, that without a regulatory system, programmers would have no guaranteed access to the operators' systems.<sup>119</sup>

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<sup>114</sup> 116 S. Ct. 2374 (1996).

<sup>115</sup> See *id.* at 2424–25 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>116</sup> See *id.* at 2404–05 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>117</sup> See 116 S. Ct. at 2386–87.

<sup>118</sup> 438 U.S. 726 (1978).

<sup>119</sup> Strictly speaking this point is false. Some regulatory system is necessary to create property rights. Without a regulatory system of some kind, operators would have no right to exclude any-

Thus Justice Breyer avoided any rule and proceeded via a somewhat unruly set of factors. Was this a mistake? The answer depends largely on whether the Court could have confidence in a more rule-bound opinion; such an opinion could conceivably have lower aggregate decision costs (because it would leave less uncertainty for future judges) and much lower error costs (because future judges would be left with less room to make mistakes and the rule-bound opinion would be by hypothesis pretty good), while at the same time promoting planning, as Justice Kennedy indicated.<sup>120</sup> But Justice Breyer's position was quite reasonable. This is not an area where an absence of a clear rule seriously interferes with private planning; it is not as if the fundamental rules of contract and property are unclear. Some uncertainty at the margins about constitutional requirements is not likely to be devastating to cable operators and to lawmakers grappling with novel issues. In any case, regulation of "indecent" programming in the new electronic media raises issues for which old analogies may be treacherous.<sup>121</sup> Rapid change in technology may produce less restrictive alternatives than a total ban, such as parental screening devices. In addition, we may soon have more information on how children are being affected by programming. It is sensible to think that the Court should at this early stage be cautious about possible rules.

But let me venture a more general hypothesis. The case for minimalism is especially strong if the area involves a highly contentious question that is currently receiving sustained democratic attention. In such areas, courts should be aware that even if they rely on their deepest convictions, they may make mistakes;<sup>122</sup> *Dred Scott* and *Lochner* are simply the most famous illustrations. A mistake of this kind is hardly innocuous. As the two illustrations suggest, its consequences could be disastrous and hard to correct. Even if the question is not one of constitutionally relevant morality, it may involve informational deficits that should prompt the Court to proceed incrementally.

Of course the Court's resolution may be right, in the sense that the Court identifies the just result. But democratic self-government is one of the rights to which people are entitled, and unless the democratic process is not functioning well, judicial foreclosure may represent not a vindication of rights but a controversial choice of one right over an-

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one. As stated, Justice Breyer's point is off the mark, and for this reason Justice Thomas's opinion is especially confused; operators have no natural or pre-legal right to exclude anyone from cable programming. Any right of exclusion is a creation of law.

<sup>120</sup> See *Denver Area*, 116 S. Ct. at 2406 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>121</sup> See Lessig, *supra* note 61, at 1752–55.

<sup>122</sup> I am speaking here against maximalist invalidations; maximalist validations, of the sort frequently favored by Justice Scalia, raise distinctive issues, partly because they are intended to spur democracy (as in the context of punitive damages). See *supra* pp. 26–27.

other. And even if the Court's resolution is right, things may go badly wrong. The Court may not produce social reform even when it seeks to do so.<sup>123</sup> It may instead activate forces of opposition and demobilize the political actors that it favors.<sup>124</sup> It may produce an intense social backlash, in the process delegitimating both the Court and the cause it favors. More modestly, it may hinder social deliberation, learning, compromise, and moral evolution over time.<sup>125</sup> A cautious course — refusal to hear cases, invalidation on narrow grounds, democracy-forcing rulings — will not impair this deliberative process and should improve it.

These observations describe possibilities, or at most probabilities, and not by any means certainties. We can imagine cases in which one side in a moral debate is so palpably right from the constitutional point of view that the Court properly takes sides. We can imagine cases in which the Court is entitled to have confidence in its own account. The interest in democratic deliberation may itself push the Court away from minimalism and inspire the Court to decide highly contentious issues,<sup>126</sup> perhaps even more issues than it must. But such cases are rare. It is notable that the "official story" of Anglo-American adjudication is a minimalist one,<sup>127</sup> though the courts' actual practice is more complex, embodying, roughly speaking, a rebuttable presumption in favor of minimalism. The notion of a rebuttable presumption is cruder and less fine-grained than the inquiry I have suggested here; but it is a useful way of simplifying that inquiry and orienting judicial attitudes in light of the limited place of courts in a democratic constitutional order. A presumption in favor of minimalism might be rebutted when planning calls for breadth or depth,<sup>128</sup> when democracy is functioning poorly, or when a court is entitled to special confidence in its judgment.<sup>129</sup>

#### IV. THE PLACE OF MINIMALISM IN LEGAL CULTURE

Mr. James' philosophy took shape as a deliberate protest against the monisms that reduced everything to parts of one embracing whole . . .

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<sup>123</sup> See ROSENBERG, *supra* note 8, at 336–43.

<sup>124</sup> This happened in the abortion context. See *id.* at 185–202.

<sup>125</sup> See, e.g., GLENDON, *supra* note 70, at 24–50 (comparing the American and West German experiences over abortion as an illustration of this hindering effect).

<sup>126</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1968) (holding that an Ohio statute, which prohibited advocacy or assembly for the purpose of advocacy of lawless actions, was unconstitutional under the First and Fourteenth Amendments, and reversing the conviction of a Ku Klux Klan group leader under that statute).

<sup>127</sup> See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 3–8 (1948).

<sup>128</sup> See Landes & Posner, *supra* note 60, *passim*.

<sup>129</sup> Possible examples include *Brown*, see *infra* pp. 50–51, and *United States v. Virginia*, along the dimension of depth, see *infra* pp. 75–79. The examples show that it is not possible to separate an assessment of minimalism from an assessment of the underlying substantive issues.

His was the task of preserving . . . respect for the humble particular . . . against the pretentious rational formula.

John Dewey, *William James*,  
69 INDEPENDENT 533 (1910).<sup>130</sup>

We address specifically and only an educational opportunity recognized . . . as ‘unique,’ . . . an opportunity available only at Virginia’s premier military institute, the State’s sole single-sex public university or college.

United States v. Virginia,  
116 S. Ct. 2264, 2276 n.7 (1996) (citation omitted).

[A]ware as we are of the changes taking place in the law, the technology, and the industrial structure, relating to telecommunications, . . . we believe it unwise and unnecessary definitely to pick one analogy or one specific set of words now . . .

[W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.

Denver Area Educational Telecommunications Consortium v. FCC,  
116 S. Ct. 2374, 2385–89 (1996)  
(plurality opinion) (Breyer, J.).

In this Part I discuss the role of minimalism in the practice of law and in debates over the proper outcomes of adjudication. Two points are of particular interest: the relationship between minimalism and case-by-case judgment; and the role of minimalism in making room for, and spurring, democratic deliberation.

#### A. Case Analysis and Analogies

It is a hallmark of legal reasoning to proceed by reference to actual and hypothetical cases.<sup>131</sup> In constitutional and common law, a recurring question is how the case at hand compares with those cases that have come before it. Thus constitutional law has crucial analogical dimensions; most of the important constraints on judicial discretion come not from constitutional text or history, but from the process of grappling with previous decisions.<sup>132</sup> This process is nonminimalist

<sup>130</sup> Reprinted in 6 JOHN DEWEY: THE MIDDLE WORKS, 1899–1924, at 91, 95 (Jo Ann Boydston ed., 1978).

<sup>131</sup> See LEVI, *supra* note 127, at 1–7; SUNSTEIN, *supra* note 71, at 62–100; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 983–1017 (1996); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741–49, 759–67 (1993). There is a detailed literature on the role of exemplars and prototypes, and judgments of similarity, in cognition generally. See, e.g., MASSIMO PIATELLI-PALMARINI, INEVITABLE ILLUSIONS 147–60 (1994); Edward E. Smith, Eldar Shafir & Daniel Osherson, *Similarity, Plausibility, and Judgments of Probability*, 49 COGNITION 67, 67–93 (1993).

<sup>132</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905–13 (1996).

because the combined roles of stare decisis and analogical reasoning ensure that cases, once decided, will have a certain impact on the future.

This process is not, however, incompatible with the fundamental project of minimalism, because it reduces the need for theory-building and for generating law from the ground up by creating a shared and relatively fixed background against which diverse judges can work. The process of case analysis also allows judges to proceed incrementally when appropriate. The distinction between holding and dicta, and the power to recharacterize holdings, give subsequent courts the discretion to hold that earlier cases, properly understood, left many issues undecided. And the process of case analysis allows greater flexibility than the process of rule-following, and in that way absorbs the minimalist's concerns about the burdens of decision, the risks of error, and the need for latitude over time and changing conditions.

Even rule-interpretation has a large element of case analysis. People frequently understand rules by reference to the prototypical or exemplary cases that the rules call to mind.<sup>133</sup> When the case at hand differs significantly from the prototypical or exemplary cases, the project of rule-interpretation can become very difficult, and the process of rule-interpretation in these settings may well involve analogical reasoning. For example, a recent case involved legislation imposing a mandatory minimum sentence on any person who "uses or carries" a firearm "in relation" to a drug offense.<sup>134</sup> In *Smith v. United States*,<sup>135</sup> the Court held that this statute covered the sale of a firearm for drugs.<sup>136</sup> The Court responded affirmatively, in part because of its judgment that the use of a firearm as an object of barter raised the same problems created by the use of a firearm as a weapon.<sup>137</sup> In other words, the Court said that the use of the gun by Smith was relevantly similar to the use of the gun in the paradigm cases.

But another issue arose this Term in *Bailey v. United States*.<sup>138</sup> Police officers found a loaded pistol in the trunk of the defendant's car after they arrested him for possession of cocaine.<sup>139</sup> The circuit court held that the defendant had used the gun in relation to a drug trafficking crime.<sup>140</sup> The Supreme Court disagreed, holding that the statute required a demonstration of "active employment" of the firearm.<sup>141</sup> It supported its conclusion partly by reference to the text of the statute

<sup>133</sup> See SUNSTEIN, *supra* note 71, at 62–100.

<sup>134</sup> 18 U.S.C. § 924(c)(1) (1994).

<sup>135</sup> 508 U.S. 223 (1993).

<sup>136</sup> See *id.* at 237–38.

<sup>137</sup> See *id.* at 239.

<sup>138</sup> 116 S. Ct. 501 (1995).

<sup>139</sup> See *id.* at 503–04.

<sup>140</sup> *United States v. Bailey*, 36 F.3d 106, 115–18 (D.C. Cir. 1994), *rev'd*, 116 S. Ct. 501 (1995).

<sup>141</sup> See *Bailey*, 116 S. Ct. at 508–09.

and its legislative history,<sup>142</sup> and partly by reference to an extended series of examples beginning with the obvious, defining cases of "use," and drawing lines based on analogy and disanalogy from those cases.<sup>143</sup> In this way, the Court gave meaning to the statutory rule by using a process similar to that of common law courts.<sup>144</sup>

Case analysis has a large hold on the judicial mind partly because of the minimalism of this way of thinking.<sup>145</sup> Judges who rely on cases can reduce decision costs. Case analysis is generally far less time-consuming than efforts to uncover the deep foundations of various areas of law. Emphasis on cases can reduce error costs as well. A predetermined rule may not be well-suited to new circumstances, and case-by-case decisionmaking maintains flexibility for the future. Courts can distinguish past cases if they believe that these decisions are wrong as applied to new circumstances. In the abstract, it cannot be determined whether reliance on cases is better than the alternatives from the standpoint of reducing decision and error costs. We need to know about the alternatives and about the capacities of various social institutions.

### B. Minimalism and Democracy, Spurs and Prods

In discussing the connection between minimalism and democracy, we must be maximalist in an important sense, for a full understanding of minimalism cannot itself be minimalist in character. We can imagine minimalists who seek to avoid theoretical controversies of any kind; I have suggested that some minimalists try to do precisely that. But let us explore the possibility of linking certain forms of minimalism with democratic aspirations, and thus of connecting minimalism with the project of *Caroleen Products*, broadly understood.

The American constitutional system should be understood to signal an aspiration not to aggregation of "preferences" but to a system of deliberative democracy.<sup>146</sup> Electoral control is an important part of

<sup>142</sup> See *id.* at 506–08.

<sup>143</sup> See *id.* at 505–06, 508–09.

<sup>144</sup> The lesson extends well beyond law. Human reasoning often works by reference to prototypical cases; human beings, lacking comprehensive rationality, approach new situations by comparing them with those that come most readily to mind. Goldman notes:

The exemplar theory suggests . . . that what moral learning consists in may not be (primarily) the learning of rules but the acquisition of pertinent exemplars or examples. This would accord with the observable fact that people, especially children, have an easier time assimilating the import of parables, myths, and fables than abstract principles.

Alvin I. Goldman, *Ethics and Cognitive Science*, 103 ETHICS 337, 341 (1993); accord GUTMANN & THOMPSON, *supra* note 3, at 204 ("By asking to what extent other violations of liberty resemble the paradigm cases, we seek to determine the extent to which they should count as basic and thereby enjoy the priority granted to basic liberty.").

<sup>145</sup> Cf. Itzhak Gilboa & David Schmeidler, *Case-Based Decision Theory*, 110 Q.J. ECON. 605, 609–12 (1995) (discussing minimalism of case-based decisions).

<sup>146</sup> See JOSEPH BESSETTE, THE MILD VOICE OF REASON 6–39 (1995); GUTMANN & THOMPSON, *supra* note 3, at 199–229; HABERMAS, *supra* note 3, at 287–328.

the system; representatives are to be accountable to the public. But the system also places a premium on the exchange of reasons among people having different information and diverse perspectives. A heterogeneous society welcomes deliberation precisely because of that pluralism.<sup>147</sup> In the absence of pluralism, deliberation would not be pointless; but it would have much less of a point.

Thus democracy is no mere statistical affair. It embodies a commitment to political (not economic) equality and to reason-giving in the public domain. For the deliberative democrat, political outcomes cannot be supported solely by self-interest or force. Legitimate reasons must be offered. Legislation cannot be supported on purely religious grounds, because citizens who contest the validity of those grounds do not consider them to be justificatory.<sup>148</sup> Nor can legislation be justified on grounds that deny the fundamental equality of human beings.<sup>149</sup> These constraints are part of the liberal conception of legitimacy; they embody an ideal of reciprocity, in which citizens are aware of and responsive to one another's interests and claims.<sup>150</sup> The relevant reasons should be offered publicly and subjected to processes of democratic deliberation.

Courts committed to deliberative democracy could support that commitment in nonminimalist ways. They could, for example, endorse some ambitious understandings of the First Amendment and the Equal Protection Clause, and use those understandings to push political processes in particular directions. They could also use rationality review to ensure that all decisions are supported by reasons of the right kind. Ideas and actions of this sort have an honorable place in American law; *United States v. Virginia* is the most recent example. If judges can converge on theoretically ambitious positions that are both correct (by the relevant criteria, whatever they may be) and possible to implement, it is hard to find a reasonable basis for complaint.

We can thus imagine a deeply theorized approach to judicial review, one that would call for minimalism in some areas and emphatically reject it in others. From the standpoint of deliberative democracy, however, courts should avoid foreclosing the outcomes of political deliberation if the preconditions for democratic deliberation have been met. In addition, courts should provide spurs and prods when either democracy or deliberation is absent. Some minimalist decisions reflect the Court's own desire to economize on moral disagreement, by refusing to rule off-limits certain deeply held moral

<sup>147</sup> See SUNSTEIN, *supra* note 3, at 18–25.

<sup>148</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Those who reject the controversial *Lemon* “test” can nevertheless endorse the ban on legislation supported solely on religious grounds; another, less stringent test could certainly lead to the same ban.

<sup>149</sup> See RAWLS, *supra* note 4, at 430–31.

<sup>150</sup> See GUTMANN & THOMPSON, *supra* note 3, at 55.

commitments when it is not necessary to do so to resolve a case. Other minimalist decisions attempt to promote democracy and deliberation. It is thus possible to distinguish among democracy-forcing, democracy-foreclosing, and democracy-permitting outcomes. To avoid foreclosure and allow democratically accountable bodies to function, a court may either decline to hear a case or rule narrowly. Such democracy-permitting outcomes are especially desirable when considerations of democracy do not themselves call for a broad ruling. This is one reason why courts should act cautiously when they are in the midst of a "political thicket." Courts know that they may be wrong; they know too that even if they are right, a broad, early ruling may have unfortunate systemic effects. It may prevent the kind of evolution, adaptation, and argumentative give-and-take that tend to accompany lasting social reform.<sup>151</sup>

In contrast, some decisions are democracy-forcing because they trigger or improve processes of democratic deliberation. A deliberative democrat may also be a maximalist in the sense that he deems an aggressive judicial posture necessary to promote the goals of deliberative democracy. Maximalism can thus be democracy-forcing.<sup>152</sup> But courts can also use minimalism to provide spurs and prods so as to promote democratic deliberation itself. For example,

- A court might strike down vague laws precisely because they ensure that executive branch officers, rather than elected representatives, will set the content of the law.<sup>153</sup>
- A court might use the nondelegation doctrine to require legislative rather than executive judgments on certain issues.<sup>154</sup>
- A court might interpret ambiguous statutes in such a way as to keep them away from the terrain of constitutional doubt, on the theory that constitutionally troublesome judgments ought to be made by politically accountable bodies, and not by bureaucrats and administrators.<sup>155</sup>

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<sup>151</sup> This point helps to explain the minimalism of *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996) (opinion of Breyer, J.), *United States v. Virginia*, 116 S. Ct. 2264 (1996), and *Romer v. Evans*, 116 S. Ct. 1620 (1996).

<sup>152</sup> Recall, as well, that a form of maximalism that broadly validates legislative outcomes can be urged on democratic grounds. *See supra* pp. 29–31.

<sup>153</sup> *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168–70 (1972) (holding that an imprecise vagrancy ordinance placed too much discretion in the hands of the police).

<sup>154</sup> *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 537 (1935) (holding that the "Live Poultry Code" resulted from an unconstitutional delegation of legislative power to the executive branch).

<sup>155</sup> *See, e.g.*, *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (construing a statute narrowly to deny that legislative powers were delegated to the executive in the first place, while refusing to reach the constitutional issue). This "clear statement" idea is the post-New Deal version of the nondelegation doctrine; it shows that the doctrine is not really dead but is used in a more modest and targeted way to ensure that certain decisions are made by Congress rather than the executive branch.

- A court might invoke the doctrine of desuetude to require more in the way of accountability and deliberation.<sup>156</sup>
- A court might require discrimination to be justified by reference to actual rather than hypothetical purposes, thus leaving open the question of whether certain justifications would be adequate if actually offered and found persuasive in politics.<sup>157</sup>
- A court might attempt to ensure that all decisions are supported by public-regarding justifications rather than by power and self-interest; it might in this way both model and police the system of public reason.<sup>158</sup>

All of these ideas call for approaches that are at least comparatively narrow and that leave open many of the largest questions. Thus we should contrast maximalists who are deliberative democrats with minimalists who proceed from the same foundation but prefer void-for-vagueness doctrines, as applied rather than facial challenges,<sup>159</sup> and the like.

At this point we should notice that minimalism can interact in diverse ways with the judicial validation or invalidation of statutes. In order to understand the relation between minimalism and democracy, consider the following table:

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<sup>156</sup> See *infra* pp. 95–96 (discussing right to die).

<sup>157</sup> See *infra* pp. 71–79 (discussing *United States v. Virginia*, 116 S. Ct. 2264 (1996)); see also *Califano v. Goldfarb*, 430 U.S. 199, 212–17 (1977) (holding that an examination of the actual purposes behind the relevant statute contradicted the hypothetical justifications for gender-based discrimination).

<sup>158</sup> See RAWLS, *supra* note 4, at 231–40.

<sup>159</sup> The debate over when statutes may be challenged “on their face” is another example of a debate about minimalism. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 609–16 (1973) (holding that where conduct is involved, a statute’s overbreadth must be real and substantial before a facial challenge may be permitted).

	VALIDATION	INVALIDATION
MAXIMALIST	1 — Scalia on punitive damages; <i>Hawaii Housing Authority v. Midkiff</i> <sup>160</sup> ; <i>Ferguson v. Skrupa</i> <sup>161</sup> and other post- <i>Lochner</i> cases on economic due process (democracy-promoting rationale: clear background against which legislature and citizens can work)	2 — <i>Miranda v. Arizona</i> <sup>162</sup> ; <i>Loving v. Virginia</i> <sup>163</sup> on substantive due process; <i>Roe v. Wade</i> <sup>164</sup> ; Scalia on affirmative action; <i>New York Times v. Sullivan</i> <sup>165</sup> ; Justice Thomas on commercial advertising
MINIMALIST	3 — Early punitive damages cases; <i>Denver Area Educational Telcommunications Consortium v. FCC</i> <sup>166</sup> ; <i>Rostker v. Goldberg</i> <sup>167</sup> ; <i>Korematsu v. United States</i> <sup>168</sup>	4 — <i>Romer v. Evans</i> <sup>169</sup> ; <i>United States v. Lopez</i> <sup>170</sup> ; <i>Kent v. Dulles</i> <sup>171</sup> ; <i>Hampton v. Mow Sun Wong</i> <sup>172</sup> ; <i>City of Cleburne v. Cleburne Living Center, Inc.</i> <sup>173</sup> ; Powell on affirmative action; White on contraception; <i>United States v. Virginia</i> <sup>174</sup>

The maximum scope for democratic judgment emerges from cell 1: rule-bound decisions that broadly validate possible practices. Such decisions also have the advantage of giving a clear signal to other branches and of pressuring them to make corrections as necessary.<sup>175</sup> Of course from the standpoint of deliberative democracy, cell 1 outcomes may be nothing to celebrate, since the measures that are upheld may be problematic from the standpoint of deliberative democracy itself. The best defense of cell 1 involves the incentives it creates: a “clear background” against which legislatures and relevant interests can work. Thus cell 1 has been especially appealing to Justice Scalia, largely on democracy-

<sup>160</sup> 467 U.S. 229 (1984).

<sup>161</sup> 372 U.S. 726 (1963).

<sup>162</sup> 384 U.S. 436 (1966).

<sup>163</sup> 388 U.S. 1 (1967).

<sup>164</sup> 410 U.S. 113 (1973).

<sup>165</sup> 376 U.S. 254 (1964).

<sup>166</sup> 116 S. Ct. 2374 (1996).

<sup>167</sup> 453 U.S. 57 (1981).

<sup>168</sup> 323 U.S. 214 (1944).

<sup>169</sup> 116 S. Ct. 1620 (1996).

<sup>170</sup> 115 S. Ct. 1624 (1995).

<sup>171</sup> 357 U.S. 116 (1958).

<sup>172</sup> 426 U.S. 88 (1976).

<sup>173</sup> 473 U.S. 432 (1985).

<sup>174</sup> 116 S. Ct. 2264 (1996).

<sup>175</sup> This is an important part of Justice Ginsburg's argument in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1614–17 (1996) (Ginsburg, J., dissenting).

reinforcing grounds. This argument often seems attractive, but whether cell 1 outcomes can be justified as democracy-reinforcing depends on some contextual factors: Is there a structural obstacle to democratic deliberation in the context at hand? Does the legislature's failure to respond reflect interest-group pressures, myopia, or blockages of certain kinds? Is there a constitutional commitment that broad validation overlooks?<sup>176</sup>

Cases that fall in cell 3 leave issues undecided, but not in a way that increases democratic space as much as cell 1. This is because cell 1 cases uphold a wide range of practices, whereas cell 3 cases leave room for invalidation. From the standpoint of closing off democratic processes, maximalists are simultaneously the best and the worst — the worst because cell 2 forecloses political deliberation. Thus among current Justices, Justice Scalia is the most generous to majoritarian processes in some settings and the least generous in others, like all consistent maximalists.<sup>177</sup> The rules are very clear, but often democratic processes find themselves broadly foreclosed. The foreclosure may be justified; *Miranda* may very well have made sense in light of the difficulty of proceeding case-by-case. But the foreclosure may also cause trouble. In *Loving v. Virginia*, for example, the Court ruled not only that the ban on racial intermarriage violated the Equal Protection Clause but also that — in an unnecessary, contentious, and potentially confusing alternative ground — it violated substantive due process by invading a fundamental “freedom to marry.”<sup>178</sup>

In cases in cell 4, courts attempt to promote two distinct goals of a deliberative democracy: political accountability and reason-giving. The goal of accountability is fostered by ensuring that officials with the requisite political legitimacy make relevant decisions. Hence the nondelegation and void-for-vagueness doctrines ensure legislative rather than executive law-making. Attempts to prevent continued rule by old judgments “frozen” by political processes belong in the same general category. Reason-giving, a central part of political deliberation, is associated with the control of factional power and self-interested representation, the

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<sup>176</sup> Thus, for example, the case for a maximalist validation of punitive damage awards would be strongest if (a) it seems clear that legislatures will attend to the problem if it is a serious one, (b) the legislature's failure to attend to the problem is rightly taken to suggest that there is no problem at all, and (c) the due process clause cannot plausibly be brought to bear on extreme awards. On the other hand, a minimalist invalidation would be better if such an invalidation might spur legislative attention or if legislative inaction is a product of political blockages of some kind rather than a considered judgment on behalf of the status quo.

<sup>177</sup> Justice Black was a consistent maximalist. *Compare Griswold v. Connecticut*, 381 U.S. 479, 509–13 (1965) (Black, J., dissenting) (cell 1 view), *with Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952) (cell 2 view). In a similar vein, Justice Black's view that the Fourteenth Amendment includes the Bill of Rights, and nothing but the Bill of Rights, may be understood as an effort to increase the rule-bound nature of Fourteenth Amendment doctrine.

<sup>178</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (citation omitted)).

framers' dual concerns.<sup>179</sup> Much of administrative law consists of an effort to ensure reason-giving by agencies, partly because of a fear that they lack sufficient political accountability and may be subject to factional influences.<sup>180</sup> Democracy-promoting minimalism can be understood in similar terms. Thus many judge-made doctrines are an effort to ensure reason-giving,<sup>181</sup> and are, in the process, an effort to ensure that decisions are based upon legitimate reasons.<sup>182</sup> The 1994 Term's controversial minimalist decision, *United States v. Lopez*,<sup>183</sup> may be most important as a signaling device to Congress. After *Lopez*, Congress must focus on the fact that the national government is one of enumerated, rather than plenary, powers. As a result, *Lopez* is likely to play a continuing role in executive and legislative deliberations about whether there is really a need for national action.

### C. Beyond Rules and Standards

There is an established literature on the choice between legal rules and legal standards.<sup>184</sup> In the familiar formulation, a rule says that no one may drive over sixty-five miles per hour; a standard says that no one may drive at an excessive speed. A rule therefore operates as a full or nearly full *ex ante* specification of legal outcomes.<sup>185</sup> A standard leaves a great deal of work to be done at the moment of application.

This is an illuminating distinction, and often courts do choose between rules and standards. But the distinction captures only part of the picture. It is better to distinguish between minimalism and maximalism, and better yet to specify the ways in which rules and standards may fall in either camp. A standard is a good way to keep things open for the future, but things can be left undecided in other ways too. Consider, for example, a rule that has a narrow scope. Such a rule ("all people born on September 21, 1954, must obey a 55-mile-per-hour speed limit," or "Colorado's Amendment 2 is unconstitutional") does not resolve many cases. A rule unsupported by reasons

<sup>179</sup> See SUNSTEIN, *supra* note 3, at 17-39.

<sup>180</sup> See Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 185-86.

<sup>181</sup> We shall see such efforts being made in connection with *Romer v. Evans*, 116 S. Ct. 1620 (1996), and *United States v. Virginia*, 116 S. Ct. 2240 (1996).

<sup>182</sup> See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414-20 (1996) (discussing judicial attempts to ensure that legitimate reasons are given in the First Amendment context).

<sup>183</sup> 115 S. Ct. 1624 (1995).

<sup>184</sup> See, e.g., Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 *passim* (1974); Kaplow, *supra* note 58, *passim*; Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 *passim* (1992).

<sup>185</sup> See Kaplow, *supra* note 58, *passim*; see also Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 271 n.25 (1993) (setting forth some qualifications).

may have narrow coverage. And the goal of leaving things undecided may be accomplished not via a standard or a narrow rule but by a denial of certiorari, or a holding that a case is moot. So too with a decision accompanied by reasons that are both narrow and shallow. Those reasons may take rule-like form, and yet still have a limited domain. In fact, rules generally may leave a great deal undecided. Thus a court might hold that the sixty-five mile-per-hour speed limit applies to people trying to get to an important meeting on the job, without saying whether it also applies to police officers, ambulance drivers, or people who are speeding to the nearest hospital.

The range of devices for avoiding breadth and depth is very wide. Thus the considerations that underlie the rules-standards debate — the need for predictability, the value of flexibility, limits in information, the desire to maintain space for the future — may be brought to bear on a wide range of issues not ordinarily understood in these terms.

#### *D. True Believers and the Spirit of Liberty*

Those who favor narrow decisions and incompletely theorized agreements tend to be humble about their own capacities. They are not by any means skeptics;<sup>186</sup> but with respect to questions of both substance and method, they are not too sure that they are right.<sup>187</sup> They know that their own attempts at theory may fail; they know that both law and life may outrun seemingly good rules and seemingly plausible theories. It is for this reason that many judges have not settled on any general approach to constitutional law. Because of these doubts, many judges have not generated an "account" of the First Amendment, the Equal Protection Clause, the Takings Clause, and other provisions that form the staple of the Court's constitutional work.

To be sure, and importantly, cases cannot be decided without some understanding of the purpose or point of the legal provisions at issue. Reasons are by their very nature abstractions, and cases that depend on reasons will necessarily rest on an account of some kind. But some Justices attempt to decide cases in the hope and with the knowledge that several different conceptions of the point will facilitate convergence on a particular outcome. Their attempts stem from their understanding that some of their convictions may not be right and from

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<sup>186</sup> Skepticism is not a coherent position in this context, because it would not lead to a commitment to any position at all. See Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 89–94 (1996).

<sup>187</sup> See Elliot L. Richardson, *The Spirit of Liberty Is Skeptical*, 75 B.U. L. REV. 231 (1995) (reviewing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1995)).

their effort to accommodate reasonable disagreement. Minimalism is thus rooted in a conception of liberty amidst pluralism.<sup>188</sup>

## V. MINIMALISM IN ACTION: PROBLEMS AND PROSPECTS

Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.

Denver Area Educational Telecommunications  
Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2402 (1996)  
(Souter, J., concurring).

The plurality opinion . . . is adrift. . . . [I]t applies no standard, and by this omission loses sight of existing First Amendment doctrine.

Denver Area Educational Telecommunications  
Consortium v. FCC, 116 S. Ct. 2374, 2404 (1996)  
(Kennedy, J., concurring in part, concurring  
in the judgment in part, and dissenting in part).

### A. Four Cases

Let us now consider some prominent examples of minimalism in law.

1. — In *Kent v. Dulles*,<sup>189</sup> the Supreme Court was confronted with the Secretary of State's denial of a passport to someone who had long been a believer in Communism.<sup>190</sup> The relevant statute said that the "Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States."<sup>191</sup> Several opinions would have been simple to write.

<sup>188</sup> There is an obvious and close relationship between what I am exploring here and the notion of an overlapping consensus as set out in RAWLS, POLITICAL LIBERALISM, cited above in note 4, at 133–72. Rawls's conception of liberalism is designed to bracket "comprehensive views" and to allow people to converge on liberal principles from diverse starting points. *Id.* In a crucial respect, political liberalism also leaves things undecided. There is, however, a difference. Political liberalism hopes to ensure convergence on a set of abstractions — the set of abstractions that constitute political liberalism. Narrow and shallow decisions often put abstractions of that kind to one side and attempt to ensure, for example, that political liberals and their adversaries can converge on a certain outcome. Cf. GUTMANN & THOMPSON, *supra* note 3, at 5 ("In politics the need is to find some basis on which to justify collective decisions here and now in the *absence* of foundational knowledge of the sort that would (presumably) tell us whether the fundamental premises of utilitarianism or contractarianism are correct."). Thus those who seek shallow decisions try to take the aspirations of political liberalism a bit further by bracketing (if they can) the very dispute between political liberalism and other conceptions of liberalism.

<sup>189</sup> 357 U.S. 116 (1958).

<sup>190</sup> See *id.* at 117–18.

<sup>191</sup> *Id.* at 123 (alteration in the original) (quoting Act of July 3, 1926, 44 Stat., Part 2, 887 (codified as amended at 22 U.S.C. § 211a (1994))) (internal quotation marks omitted).

The Court could have invalidated the statute as an open-ended delegation of authority to the executive. It could have said that the denial of the passport violated the right to travel or the right to free speech. Or it could have said that the statute was valid and plainly authorized the Secretary's decision. The Court did none of these things. It refused to construe the statute, despite its open-ended language, in a way that would enable the Secretary to limit Kent's right to travel.<sup>192</sup> The Court did not reach the question whether Congress could constitutionally empower the Secretary to limit this right. Proceeding in minimalist fashion, it merely said that a clear statement from Congress would be required.

2. — In *Griswold v. Connecticut*,<sup>193</sup> the Court posited a broad "right of privacy,"<sup>194</sup> the most controversial of modern constitutional rights. The dissenters thought that to find this right required implausible constitutional creativity.<sup>195</sup> Rejecting both the majority opinion and the dissents, Justice White wrote in very narrow terms.<sup>196</sup> He agreed with the dissents that a prohibition on premarital or extramarital activity would be legitimate.<sup>197</sup> He doubted, however, that the ban on the use of contraceptives within marriage "in any way reinforce[d] the state's ban on illicit sexual relationships."<sup>198</sup> Thus he concluded that the real problem with the law lay in the weak relationship between the state's justification and the particular prohibition at issue.<sup>199</sup>

In so saying, Justice White suggested that the weakness of the connection between means and ends showed that the statute in fact rested on something other than the state's asserted justification. The statute was invalid because the statute's end did not justify the statute's means.<sup>200</sup> In all likelihood, the belief that actually supported the statute when it was passed was that nonprocreative sex was immoral even within marriage (though Justice White did not press that point). That belief helped produce the enactment of the statute and probably helped ensure against its repeal. But the belief no longer reflected anything like the considered judgment of the Connecticut citizenry and hence would not support criminal prosecutions.<sup>201</sup> In essence, Justice White's opinion reflects both a refusal to speak about a broad right to privacy and a decision to focus narrowly on the actual absence of a

<sup>192</sup> See *id.* at 127–30.

<sup>193</sup> 381 U.S. 479 (1965).

<sup>194</sup> *Id.* at 484–86.

<sup>195</sup> See *id.* at 508–10 (Black, J., dissenting); *id.* at 530 (Stewart, J., dissenting).

<sup>196</sup> See *id.* at 502–07 (White, J., concurring in the judgment).

<sup>197</sup> See *id.* at 505.

<sup>198</sup> *Id.*

<sup>199</sup> See *id.* at 505–07.

<sup>200</sup> See *id.* at 506–07.

<sup>201</sup> See *id.* at 505 ("There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself . . . .").

plausible connection between the state's justification and the statutory prohibition. Justice White's opinion was both shallow and narrow.

3. — Justice Powell's famous opinion in *Regents of the University of California v. Bakke*<sup>202</sup> provides a more recent example of minimalism in action. In *Bakke*, four Justices thought that the Constitution required government color-blindness,<sup>203</sup> whereas four other Justices thought that affirmative action programs should be upheld as efforts to undo the continuing effects of past discrimination.<sup>204</sup> Justice Powell rejected both positions. His opinion rested instead on a close analysis of the relationship between the particular affirmative action program at issue and the justifications invoked on its behalf.<sup>205</sup> In his view, the most important justification involved the medical school's need to ensure a racially diverse student body, not because racial diversity was an end in itself, but because racial diversity could promote the educational mission of the school.<sup>206</sup> Justice Powell found the latter justification legitimate and significant, but concluded that the University of California program was not necessary to promote that interest. A system that treated race as a "plus," rather than a rigid, two-track admissions system, would have been adequate for the University's purposes.<sup>207</sup> Thus Justice Powell rejected the view that all affirmative action programs would be illegitimate (essentially the view of Justice Stevens) and also the view that all such programs should be upheld as a response to past discrimination (not far from the view of the four

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<sup>202</sup> 438 U.S. 265 (1978).

<sup>203</sup> See *id.* at 416–18 (Stevens, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Burger and Justices Stewart and Rehnquist).

<sup>204</sup> See *id.* at 355–79 (Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part).

<sup>205</sup> See *id.* at 305–20 (opinion of Powell, J.).

<sup>206</sup> See *id.* at 311–20.

<sup>207</sup> See *id.* at 316–19.

remaining Justices).<sup>208</sup> In this way Justice Powell's opinion was very narrow; it left many questions open.<sup>209</sup>

4. — In *Hampton v. Mow Sun Wong*,<sup>210</sup> the Court addressed a constitutional challenge to a Civil Service Commission regulation barring most aliens from civil service positions.<sup>211</sup> The plaintiffs, five legal, Chinese aliens, urged that the ban violated the equal protection component of the Due Process Clause.<sup>212</sup> The government responded that it had several important interests in reserving positions in the federal civil service for American citizens.<sup>213</sup>

The Supreme Court rejected both positions. It left open the possibility that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."<sup>214</sup> But it noticed that the ban had been issued by the Civil Service Commission, not by the President or the Congress.<sup>215</sup> The ban therefore faced a legitimacy deficit.<sup>216</sup> This was especially true insofar as the Civil Service Commission could be said to have relied on the interests in providing aliens an incentive to become naturalized and in allowing the President an expendable token for treaty negotiation.<sup>217</sup> These interests were far afield from the ordinary mission and competence of the Commission.<sup>218</sup>

The Court said that if a class of people were going to be deprived of federal employment, it had to be as a result of a decision by politically accountable officials acting within their ordinary competence, and not by a decision of bureaucrats invoking considerations beyond

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<sup>208</sup> Consider in this regard intriguing findings on people's "extremeness aversion," and what might therefore be seen as the perils of seeking to be "moderate." See, e.g., Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Judgment*, 25 J. LEGAL STUD. 287, 287–95 (1996). When presented with two polar options, people like to avoid the extremes and hence to appear moderate. But whether they are moderate is intensely sensitive to framing effects. Whatever the options are, people try to be moderate as between them. But this may not be moderate in any normatively appealing sense, if the options are terrible, and if the most extreme option (say, the total abolition of slavery, as compared with continued slavery in the states that currently allow it) is much better on the merits. The search for moderation can thus be understood as a heuristic device that allows people to escape the normative issues and to "split the difference" between reasonable people. But this heuristic device can produce big mistakes when the people who frame the poles are not reasonable.

Minimalism should not be confused with moderation. Note also that minimalists are always minimalist in relation to some assumed background that has rule-ish features. This is certainly true for Justice Powell in *Bakke*.

<sup>209</sup> It was not at the same time shallow, because it offered a number of relatively abstract judgments about the legitimate grounds for affirmative action programs.

<sup>210</sup> 426 U.S. 88 (1976).

<sup>211</sup> See *id.* at 90–92.

<sup>212</sup> See *id.* at 96.

<sup>213</sup> See *id.* at 103–04.

<sup>214</sup> *Id.* at 100.

<sup>215</sup> See *id.* at 103–05.

<sup>216</sup> See *id.*

<sup>217</sup> See *id.* at 105.

<sup>218</sup> See *id.*

their expertise.<sup>219</sup> In so saying, the Court declined to decide whether the President or Congress could make precisely the same decision.<sup>220</sup> Thus the Court's decision was exceedingly narrow. And because the Court did not give much of a theoretical account of its judgment, the decision was shallow as well.

These examples have a great deal in common. They involve narrow judgments that leave the largest questions for another day. They also involve judgments on which people with diverse views may — certainly need not, but may — converge. They are highly particularistic. And they all have democracy-forcing functions. This point is most conspicuously true for *Kent v. Dulles* and *Hampton v. Mow Sun Wong*, for in both instances the Court's judgment was expressly founded on the idea that publicly accountable bodies should make the contested decision that was challenged in the case. But democratic considerations underlie Justice White's *Griswold* concurrence as well. We do not need to venture far from the text of Justice White's opinion to see that the poor match between articulated means and ends suggested that an unarticulated end, one that no longer matched public convictions, actually underlay the enactment under review. The fact that no democratically accountable body had in the recent past offered a reflective endorsement of the Connecticut law links *Griswold* closely with *Kent* and *Mow Sun Wong*. Justice White's opinion is centrally concerned with the absence of sufficient democratic support for the relevant statute.

Justice Powell's *Bakke* opinion was also influenced by some of these concerns. In particular, Justice Powell noted that the program in *Bakke* had received no democratic endorsement.<sup>221</sup> The narrowness of his opinion left the democratic process ample room to maneuver, adapt, and generate further information and perspectives. Thus Justice Powell's opinion can be understood as an effort to promote both democracy and deliberation.

### B. Three Maximalist Decisions

It is useful to compare the preceding cases with three of the most important cases in American constitutional law, all of which reject minimalism. One of them, *Dred Scott v. Sanford*,<sup>222</sup> ranks among the most vilified decisions in the Court's history; another, *Brown v. Board of Education*,<sup>223</sup> may well be the most celebrated; and a third, *Roe v.*

<sup>219</sup> See *id.* at 114–17.

<sup>220</sup> In fact, following *Mow Sun Wong*, the President issued an Executive Order doing what the Commission had done, and a lower court upheld the President's decision. See *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978).

<sup>221</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978) (Opinion of Powell, J.).

<sup>222</sup> 60 U.S. (19 How.) 393 (1857).

<sup>223</sup> 347 U.S. 483 (1954).

*Wade*,<sup>224</sup> is one of the most sharply contested. In saying a few words about the three cases here, I do not, of course, mean to offer full evaluations of the Court's opinions. My goal is to draw attention to the sheer ambitiousness of the three decisions and to see how that ambitiousness might be evaluated.

In *Dred Scott*, the Court decided several crucial issues about the relationship between the Constitution and slavery. Most importantly, the Court struck down the Missouri Compromise,<sup>225</sup> which abolished slavery in the territories, and ruled that freed slaves could not qualify as citizens for purposes of the Diversity of Citizenship Clause of Article III.<sup>226</sup> Of course the Court's decision was a disaster, helping to fuel the Civil War. But let us put the substance to one side. One of the notable features of the case was that far from deciding only those issues that were necessary for disposition, the Court decided every issue that it was possible to decide. If the Court had wanted to do so, it could have avoided the controversial issues entirely. After concluding that it lacked jurisdiction under Article III, the Court could have refused to discuss Congress's power to abolish slavery in the territories. Or the Court could have rested content — as it had first voted to do<sup>227</sup> — with a narrow judgment holding that Missouri law controlled the question of Scott's legal status. In either event, the large issues in the case would have been left alone, and the *Dred Scott* decision would have been an unimportant episode in American law. Notably, the Court itself rejected its initial minimalist approach because it wanted to take the slavery issue out of politics and to resolve it once and for all time.<sup>228</sup> This attempted course was a disaster, partly because of the moral judgment itself and partly because of the futility of the Court's attempt in light of the Court's limited institutional role. We cannot draw firm inferences from single cases. But the Court's abysmal failure in this regard is certainly a cautionary note. It is a cautionary note because it shows the possible unreliability of moral judgments from the Court, and also because it shows that judicial efforts to resolve large questions of political morality may well be futile.

In *Roe v. Wade*, the Court addressed for the first time whether a constitutional right of "privacy" protected the decision to have an abortion. An inspection of the pleadings in *Roe*, however, reveals a potentially important aspect of the case: Roe alleged that she had been raped. Of course *Roe* is known for the elaborate trimester system it established and for the complex body of rules and standards contained in that system. A minimalist court would have said more simply that the state may not forbid a woman from having an abortion in a case

<sup>224</sup> 410 U.S. 113 (1973).

<sup>225</sup> See *Dred Scott*, 60 U.S. (19 How.) at 404–06, 452–54.

<sup>226</sup> See *id.*

<sup>227</sup> See BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 113 (1993).

<sup>228</sup> See *id.* at 114.

involving rape.<sup>229</sup> Such a decision would have left the constitutional status of the abortion right to be determined by lower courts and democratic judgments. As noted earlier, the appeal of such a minimalist approach cannot be evaluated without analyzing the underlying issues of constitutional substance. Perhaps the *Roe* outcome was correct as a matter of substantive constitutional theory; perhaps an inquiry into decision costs and error costs would support the *Roe* opinion. But at least it seems reasonable to think that the democratic process would have done much better with the abortion issue if the Court had proceeded more cautiously and in a more dialogic and interactive way.<sup>230</sup>

*Brown* appears to be the strongest argument against the claim that I mean to defend here: that minimalism is the appropriate course for large-scale moral or political issues on which the nation is sharply divided. *Brown* may require the thesis to be qualified, perhaps for the most compelling cases in which the underlying judgment of constitutionally relevant political morality is insistent.<sup>231</sup> As I have indicated, the choice between minimalism and the alternatives depends on an array of contextual considerations, and it would be extravagant to say that minimalism is always better.

But before taking *Brown* as an exception to the general thesis, let us notice two important features of the *Brown* litigation. The *Brown* decision did not come like a thunderbolt from the sky. Along this dimension, it was entirely different from *Dred Scott* and *Roe*. The *Brown* outcome had been presaged by a long series of cases testing the proposition that "separate" was "equal," and testing that proposition in such a way as to lead inevitably to the suggestion that "separate" could not be "equal."<sup>232</sup> In short, *Brown* was the culmination of a series of (more minimalist) cases, not the first of its kind.

There is a further point. *Brown* itself was not self-implementing; it said nothing about remedy. *Brown II*, the remedy case, had a minimalist dimension insofar as it allowed considerable room for discussion and dialogue via the "all deliberate speed" formula.<sup>233</sup> *Brown II* made clear that immediate implementation would not be required. In this way it had much in common with *Kent v. Dulles* and *Hampton v. Mow Sun Wong*. It left some crucial matters undecided. It allowed

<sup>229</sup> Cf. Ginsburg, *supra* note 69, at 376, 382, 385–86 (arguing that the Court should have simply invalidated the state statute in question because it improperly made all forms of abortion absolutely criminal).

<sup>230</sup> See *id.* at 381–82.

<sup>231</sup> I do not think it is promising to suggest that judgments of political morality can be left aside in favor of a purely historical inquiry into constitutional meaning. In any case, such an inquiry would not support *Brown*, despite the valiant, recent effort of Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1131–40 (1995) (defending *Brown* on historical grounds).

<sup>232</sup> See GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL CASES 520–23 (3d ed. 1996).

<sup>233</sup> *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

those matters to be taken up by other officials in other forums. *Brown* was thus more minimalist than *Dred Scott* both because it was the culmination of a long line of cases and because it left a good deal of room for future debate at the level of implementation.

There are of course reasons to question this degree of flexibility on both strategic and moral grounds.<sup>234</sup> I do not mean to answer these questions here. Of course *Brown II* ended up placing courts in charge of complex implementation questions, and thus required managerial judgments for which courts are ill-suited.<sup>235</sup> But it is at least relevant to the evaluation of *Brown* that the Court did not impose its principle all at once, and that it allowed room for other branches to discuss the mandate and to adapt themselves to it.<sup>236</sup>

### C. The Passive Virtues

The project of the minimalist judge is easily linked with the project of exemplifying the "passive virtues," a project that is associated with a court's refusal to assume jurisdiction.<sup>237</sup> Sometimes judges do not want to decide cases or issues at all, and even the minimal amount necessary to resolve a conflict seems to require them to say too much. A denial of certiorari might well be based on this understanding. Perhaps it is premature for the Court to participate in a certain controversy. Perhaps the Court wants to receive more information, is so divided that it could not resolve the case in any event, or is attuned to strategic considerations stemming from the likelihood of destructively adverse public reactions. In all these situations it may be prudent to wait. Of course a denial of certiorari reduces decision costs for the Court. It may reduce error costs as well, if the Court is not in a good position to produce a judgment about which it has confidence, or if the Court thinks that additional discussion, in lower courts and nonjudicial arenas, is likely to be productive. Thus the denial of certiorari can be seen as a form of minimalism and evaluated by reference to the criteria I have previously discussed.

Of course principles of justiciability — mootness, ripeness, reviewability, standing — can be understood as ways to minimize the judicial presence in American public life. It may be tempting to see these principles as rooted in positive law and as allowing no room for dis-

<sup>234</sup> See ELLIOT ARONSON, THE SOCIAL ANIMAL 340–42 (6th ed. 1995) (offering the strategic objection).

<sup>235</sup> See DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

<sup>236</sup> For a contrasting approach, refer to *Reynolds v. Sims*, 377 U.S. 533, 587–88 (1964) (Clark, J., concurring in the affirmance), which announced the "one person/one vote" rule. Justice Stewart offered the more minimalist approach, *see id.* at 588–89 (Stewart, J., concurring), saying that the apportionment system at issue was irrational. Justice Stewart did not claim that "one person/one vote" was constitutionally mandated. The problem with Stewart's approach is that it would be less administrable than the "one person/one vote" rule.

<sup>237</sup> See BICKEL, *supra* note 8, at 127–33.

cretionary judgments about when courts properly intervene.<sup>238</sup> But realistically speaking, justiciability doctrines are used prudentially and in response to considerations of the sort I am discussing here.<sup>239</sup> Thus, for example, a judgment that a complex issue is not ripe for decision may minimize the risk of error and preserve room for continuing democratic deliberation about the issue. It should not be surprising to find some pressure to find otherwise borderline cases “not ripe” or “moot” precisely because of the costs associated with deciding the substantive question.

The Supreme Court’s general unwillingness to resolve questions involving sexual orientation may well stem from concerns of this sort. The same can be said about its caution until just this term about using the Due Process Clause to control the award of punitive damages. My suggestion is that the notion of the “passive virtues” can be analyzed in a more illuminating way if we see that notion as part of judicial minimalism, closely associated with the rules-standards debate, and regard it as an effort to permit more democratic choice and to reduce costs.

I now try to explore some of these points in detail through a discussion of several cases from the 1996 Term. My principal vehicles are *Romer v. Evans* and *United States v. Virginia*; I discuss *44 Liquormart*, *BMW of North America*, and *Loving* as well. I conclude that *Romer v. Evans* is unsatisfactorily reasoned but that it is a legitimate and in many ways salutary exercise in judicial minimalism. *Romer* is especially salutary insofar as it connects with a correct and longstanding understanding of the function of the Equal Protection Clause. *United States v. Virginia* was theoretically ambitious, but it was also narrow rather than broad. The depth of the opinion was justified in light of the context and the Court’s own experience; the narrowness makes sense in light of the diversity of same-sex programs in education.

More briefly, I endorse the narrow outcome of the *BMW* case, but criticize *44 Liquormart* for unnecessarily renovating the law governing commercial advertising and, in the process, overruling recent precedent. I suggest that *Loving* might well have been treated as a modern-day *Kent v. Dulles*. The Court should have said that if the federal government is going to impose the death penalty on a member of the

<sup>238</sup> See Gerald Gunther, *The Subtle Vices of the “Passive Virtues” — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 1, 5 (1964).

<sup>239</sup> See, e.g., *Poe v. Ullman*, 367 U.S. 497, 508–09 (1961) (dismissing appeals concerning the dismissal of the complaints because the issues were inappropriate for the Supreme Court’s decision, and because the “actual hardship” to the petitioners of denied relief was minimal); *Naim v. Naim*, 350 U.S. 985, 985 (1956) (per curiam) (denying motions to recall the mandate, to set the case down for argument, and to amend the mandate and noting the lack of a federal question); *Naim v. Naim*, 350 U.S. 891, 891 (1955) (per curiam) (refusing to consider the Virginia statute on miscegenation because the record inadequately addressed the relationship of the parties to the state).

United States military, it must do so pursuant to standards laid down by Congress. In the course of discussing these cases, it will be necessary to investigate the underlying substantive law and thus to venture afield from the particular issue of minimalism.

## VI. MINIMALISM, ANIMUS, AND EQUAL PROTECTION: *ROMER V. EVANS*

### A. The Case

Amendment 2 to the Colorado Constitution provided:

Neither the State of Colorado . . . nor any of its agencies . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall be the basis of or entitle any person or class of persons to have or claim any minority status, quotas preferences, protected status or claim of discrimination.<sup>240</sup>

In *Romer v. Evans*, the Court was asked to determine whether this provision violated the Equal Protection Clause. The Court had various obvious options:

— It could have concluded that the statute's prohibition was not a form of discrimination and hence that there was no equal protection issue.

— It could have concluded that the provision was a form of discrimination against homosexuals, but that this type of discrimination would be subject to "rational basis" review, and that Amendment 2, like almost all forms of discrimination subject to rational basis review, should be upheld.

— It could have concluded that discrimination on the basis of sexual orientation should be subject to special judicial scrutiny, like discrimination on the basis of race and sex, and that therefore Amendment 2 should be invalidated.

— It could have emphasized that some of the amendment was targeted not against conduct at all but against status, and that Amendment 2 was unconstitutional because it created a kind of status offense.

— It could have said that the amendment was unconstitutional because it involved a disability in the political process, as the Colorado Supreme Court had concluded.<sup>241</sup>

The Court adopted none of these options. Instead it claimed that Amendment 2 violated rational basis review because it was based not on a legitimate public purpose but on a form of "animus," with the apparent suggestion that statutes rooted in "animus" represent core offenses against the equal protection guarantee.<sup>242</sup> This claim is more minimalist

<sup>240</sup> COLO. CONST. art. II, § 30(b).

<sup>241</sup> See *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) (en banc).

<sup>242</sup> See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

than any of the options listed above, but it also raises more complex issues.

The Court began its analysis by rejecting the view that Amendment 2 merely puts homosexuals in the same position as everyone else.<sup>243</sup> It said that by enacting a special prohibition against any protective measures, the Amendment actually put homosexuals in a distinctive and disadvantaged position: "The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."<sup>244</sup> Understood as a special disability, the amendment, in the Court's view, failed "rationality" review because it did not bear a rational relation to a legitimate statutory end.<sup>245</sup> The Court offered two different (but evidently overlapping) explanations.

First, it said that Amendment 2 "is at once too narrow and too broad,"<sup>246</sup> because it defines people by "a single trait and then denies them protection across the board."<sup>247</sup> Thus the state failed to show an adequate connection between the classification and the object to be attained. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."<sup>248</sup> A measure that disqualifies a class of people "from the right to seek specific protection from the law"<sup>249</sup> violates the requirement of impartiality.

Second, the Court said that the law is too broad to be justifiable by reference to the reasons the State invoked on its behalf. Hence it "seems inexplicable by anything but animus toward the class it affects."<sup>250</sup> Amendment 2, "in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that can be claimed for it."<sup>251</sup> The state invoked its desire to respect the associational liberty of other citizens, including employers and landlords; but this interest was too broad to justify Amendment 2.<sup>252</sup> The state also expressed concern that it wanted to

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<sup>243</sup> See *id.* at 1624–27.

<sup>244</sup> *Id.* at 1625. The Court suggested that Amendment 2 might extend further, but for purposes of decision the Court assumed a relatively narrow reach; that is, it assumed that Amendment 2 would not prevent homosexuals from taking advantage of general civil and criminal law. See *id.* at 1626. This assumption undermines the argument of "per se" violation of equal protection, discussed below at pages 55–56.

<sup>245</sup> See *id.* at 1627.

<sup>246</sup> *Id.* at 1628.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 1627.

<sup>251</sup> *Id.* at 1628–29.

<sup>252</sup> See *id.* at 1629.

conserve its resources to prevent other forms of discrimination.<sup>253</sup> But Amendment 2 was far too broad to be justified by reference to that purpose. Thus it stands, and falls, as “a status-based . . . classification of persons undertaken for its own sake.”<sup>254</sup>

### B. Preliminary Evaluation

At first glance, neither of the Court’s two arguments is convincing. If rationality review is the appropriate standard, Amendment 2 seems constitutional, as an effort either to discourage the social legitimization of homosexuality or to conserve scarce enforcement resources and protect associational privacy. The first interest may seem of doubtful legitimacy — I will discuss this possibility below — but rationality review by itself does not have the resources to declare it illegitimate; the legitimacy or illegitimacy of government interests is an independent issue. Colorado did not, to be sure, advance the interest in discouraging homosexuality, but under existing law that is not relevant to a rationality challenge.<sup>255</sup> The second and third interests do seem to be crudely connected to the measure itself — they are both over-inclusive and under-inclusive. But this does not doom a statute under rational basis review; over-inclusive and under-inclusive legislation is perfectly acceptable, indeed quite common.<sup>256</sup>

The Court’s first argument — involving the elimination of “protection” — is a confusing amalgam of an argument based on means-ends scrutiny and an argument based on the “literal” meaning of the words “equal protection.” The means-ends concern seems identical to the Court’s second argument, to be taken up shortly, so let us focus on the Court’s suggestion<sup>257</sup> to the effect that Amendment 2 is a “literal” denial of equal protection of the law. What does this mean? Perhaps Amendment 2 could be characterized as akin to a law declaring certain people to be *outlaws* — as in a provision that murderers, the elderly, felons, or people with blue eyes cannot claim the protection of the laws. Such a law would — it might be urged — amount to a per se or “literal” violation of the Equal Protection Clause, because it deprives some people of the power to seek state protection through the laws.

But there are serious problems with this argument. It is not at all clear that Amendment 2 is really akin to the hypothesized law. The amendment does not declare homosexuals to be outlaws. They continue to be protected by the ordinary civil (contract, tort, property)

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<sup>253</sup> See *id.*

<sup>254</sup> *Id.*

<sup>255</sup> See *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

<sup>256</sup> See e.g., *id.* at 487–89.

<sup>257</sup> The Court’s approach is a variation on one offered in an ingenious amicus brief of Laurence H. Tribe, John Hartley, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as *Amici Curiae* in Support of Respondents, *Romer* (No. 94-1039).

and criminal law. Amendment 2 says instead that homosexuals cannot claim the (unusual, in a sense "special") protection of antidiscrimination law simply by virtue of their status as homosexuals;<sup>258</sup> it added the (unusual, in a sense "special" and admittedly somewhat bizarre) provision preventing homosexuals from getting such protection without amending the state constitution. But such provisions do not make anyone into an outlaw. If Colorado enacted a constitutional amendment saying that unwed mothers, or unwed mothers who refuse work, or unwed mothers who live with a man out of wedlock, may not claim the protection of the welfare statutes, Colorado would not be committing a literal or *per se* violation of the Equal Protection Clause. The fact that some people do not get statutory protection, while others do, is not decisive. To know whether there has been a violation of the right to "equal" protection, we must know about the grounds for differential treatment. The technical question would be whether the provision faced rational basis review or heightened scrutiny, and whether it was valid or invalid under the appropriate standard of review.

In other words, an act of this sort appears to be akin to one that makes certain people (constitutionally) unable to invoke the protection of laws granting welfare benefits. If the analogy is correct, the claim of "literal" denial of equal protection is really a kind of verbal trick, a play on the word "protection." It is a pun, not an argument. I conclude that the Court's first argument adds nothing and that the real argument is the second.

The state had two possible responses to the Court's second argument. The state could say:

1. "The interest in conserving enforcement resources is, to be sure, crudely connected to Amendment 2. But there is some connection. We believe that if a locality is spending its time on preventing discrimination against homosexuals, it will spend less of its time on preventing discrimination against blacks and women, which we think are more important concerns. In any case, many people have strong religious or other reasons to discriminate on grounds of sexual orientation. We want to respect their convictions. Amendment 2 may be imperfectly matched to our goals — we acknowledge that it covers many contexts in which those goals are not involved — but if rationality review is the appropriate standard, we think we have said more than enough."

2. "We do not want to legitimate homosexuality as a social practice. We are not tyrants, and we do not seek to subject homosexual acts to criminal punishment (as we are permitted to do under *Bowers v. Hardwick*). But we do want to make a statement that homosexuality is not officially sponsored. That is, homosexuals do not, as such, qualify for legal protection from discrimination. We are trying to express a

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<sup>258</sup> See *supra* note 243 (discussing the reach of Amendment 2).

widely held moral commitment that homosexuality is not to be approved even if it is to be tolerated. We choose to express that view through a prohibition on special protections against discrimination. True, our law applies to people with homosexual tendencies who do not engage in homosexual activity; but people with tendencies are likely to engage in acts. We do not punish through criminal law the tendencies alone; hence we think our basic goal is well enough matched to our amendment."

The Court did not offer much of a response to these possible arguments. The most troubling minimalism of the opinion lies in this failure; I will return to the problem below. Let us now turn to a question that received particular attention in the case: Was Amendment 2 a unique disability, or a denial of special privileges? And how, if at all, is this a relevant question?

### C. Special Benefits and Unique Disabilities

We find nothing special in the protections Amendment 2 withdraws. These are protections taken for granted by most people either because they already have them or do not need them . . . .

Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

The Court thought that Amendment 2 was a unique disability because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."<sup>259</sup> Justice Scalia thought that Amendment 2 forbade the creation of special privileges because most characteristics are not bases for statutory protection from discrimination. In Justice Scalia's view, Amendment 2 restored the *status quo ante*, in which only a few groups receive that protection.<sup>260</sup>

There is a sense in which both sides were right. Most group-based characteristics are not bases for statutory protection against discrimination. Short people, tall people, movie-makers, singers, horse-riding people, dog owners — all these and innumerable others receive no special legal protection against discrimination. In this sense it is fair to say that Amendment 2 simply restored homosexuals to a status like that of nearly everyone else. On the other hand, there is another sense in which Amendment 2 imposed on homosexuals a unique disability. Short people, tall people, movie-makers, singers, horse riders, dog owners — all these can petition relevant legislatures for protection against discrimination. Homosexuals are subject to a unique disability in the sense that only they are required to amend the Colorado Constitution to obtain such protection. In this sense there is indeed discrimination.

Thus Justice Scalia and the Court are both in a sense right. The weakness of Justice Scalia's opinion is that it does not see or come to

<sup>259</sup> *Romer*, 116 S. Ct. at 1625.

<sup>260</sup> See *id.* at 1629 (Scalia, J., dissenting).

terms with the respect in which Amendment 2 puts homosexuals at a special disadvantage. In the striking quotation at the beginning of this section, the Court seemed to embrace a baseline of nondiscrimination. But this special disadvantage is not necessarily fatal to the legislation. If, for example, Colorado said — in, say, Amendment 3 — that no governmental body may allow cigarette smokers to claim minority status, quota preferences, or protected status for any claim of discrimination, it would probably be acting constitutionally.<sup>261</sup> Amendment 3 would be constitutional because a state could legitimately decide that it wants to prevent itself and its subdivisions from giving special safeguards to smokers. It could make that decision because it is legitimate to think that smokers create serious risks to themselves and to others. It is possible that some localities would reject this position and want to treat smokers as the functional equivalent of blacks and women. But a state could reasonably choose to override this view. It seems clear that smokers thus disadvantaged would face a unique disability. This burden would not, however, fail rationality review, because it would be reasonably related to the state's legitimate interest in decreasing risks to life and health. It follows that a finding that Amendment 2 imposes a unique disability is not fatal to its constitutionality. The amendment's constitutionality will depend on whether there is a public-regarding justification for the imposition of the disability.

The only possible distinction between *Romer* and the smokers' case is that there is no legitimate reason to constitutionalize a judgment that homosexuals should not be protected from discrimination, perhaps because there is no legitimate reason to think that homosexuals pose a risk in the way that smokers do. Thus, the case does not turn on whether there is removal of a special benefit or imposition of a unique disability, but instead on whether the state has legitimate reasons for its action. An understanding of this kind seems to underlie the Court's suggestion that Amendment 2 is unconstitutional because it is undergirded by a "bare . . . desire to harm a politically unpopular group."<sup>262</sup>

On this point, however, Justice Scalia has a seemingly powerful response. In this context, the "bare desire to harm" can be translated into one side in a "culture war."<sup>263</sup> Those who take this side believe that the state should not approve homosexuality through antidiscrimination law, and "surely it is rational to deny special favor and protection to those

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<sup>261</sup> At least this assertion would be true if Amendment 3 were understood in the narrow way the Supreme Court was willing to understand Amendment 2. See 116 S. Ct. at 1626–27 (stating that Amendment 2 is unconstitutional even if construed not to prevent ordinary operation of the criminal and civil law).

<sup>262</sup> *Id.* at 1628 (alteration in original) (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

<sup>263</sup> *Id.* at 1629 (Scalia, J., dissenting) (quoting *Romer*, 116 S. Ct. at 1628) (internal quotation marks omitted). "The Court has mistaken a Kulturkampf for a fit of spite." *Id.* Admittedly, "Kulturkampf" is a puzzling term of (apparent) approval.

with a self-avowed tendency or desire to engage in the conduct.”<sup>264</sup> The relevant animus here is not a bare desire to harm but a product of a widespread “moral disapproval of homosexual conduct.”<sup>265</sup> In Justice Scalia’s eyes, this kind of animus is not objectionable from the constitutional point of view.

The majority must be saying the opposite: that any such animus is illegitimate at least if it is the source of an unusual, blunderbuss prohibition on antidiscrimination measures. Here, then, is the crux of the *Romer* case.

#### D. The Moreno-Cleburne-Romer Trilogy

[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.

*Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

[T]he deliberative conception of democracy . . . restricts the reasons citizens may use in supporting legislation to reasons consistent with the recognition of other citizens as equals. Here lies the difficulty with arguments for laws supporting discrimination. . . . The point is that no institutional procedure without such substantive guidelines for admissible reasons can cancel the maxim “garbage in, garbage out.”

JOHN RAWLS, POLITICAL LIBERALISM  
430–31 (2d ed. 1996).

In a handful of cases, rationality review has actually meant something.<sup>266</sup> Each of these cases has been minimalist in character. The Court has found an inadequate connection between statutory means and ends; in doing so, it has attempted to “flush out” impermissible purposes.

A number of the key cases have involved issues of federalism.<sup>267</sup> The Court has struck down state statutes that purport to protect public-regarding goals but actually seem to reflect protectionism — a desire to protect in-staters at the expense of out-of-staters. If the federal system is understood to ban protectionism, these cases are not at all hard to understand. The Court looks beyond the articulated justifications, which typically bear a weak though not wholly implausible relation to the classification. These cases are not entirely minimalist — they depend on an account of a prohibited end, an account that leads to a degree of width and depth — but they tend toward the minimalist end of the continuum. They offer narrow, targeted bans on certain kinds of reasons for law.

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<sup>264</sup> *Id.* at 1632.

<sup>265</sup> *Id.* at 1633.

<sup>266</sup> See, e.g., *Romer*, 116 S. Ct. at 1629; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985); *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973).

<sup>267</sup> See, e.g., *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); *Zobel v. Williams*, 457 U.S. 55, 63 (1982).

But there is a more puzzling set of cases; we may now refer to them as the "*Moreno-Cleburne-Romer* trilogy." In these cases, the Court ruled off-limits a constitutionally unacceptable "animus" not involving federalism or discrimination on the basis of race or sex. The difficulty lies in identifying the impermissible goal that links the three cases. What precisely is "animus"?

The problem in *United States Department of Agriculture v. Moreno*<sup>268</sup> arose from Congress's decision to exclude from the food stamp program any household containing any individual who was unrelated to any other member of the household.<sup>269</sup> The Court said that the articulated justification — minimizing fraud in the food stamp program — seemed only weakly connected to the statutory classification.<sup>270</sup> The Court noted that the legislative history suggested a congressional desire to exclude "hippies" and "hippie communes."<sup>271</sup> To this, the Court said, in words echoed in *Romer*: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest . . ."<sup>272</sup> Then-Judge Rehnquist dissented on the ground that Congress could reasonably decide that it wanted to support, with taxpayer funds, only those units that are a "variation on the family as we know it."<sup>273</sup> Justice Rehnquist's strategy — like Justice Scalia's in *Romer* — was to describe what the majority characterized as the "bare . . . desire to harm"<sup>274</sup> as an effort to promote a moral commitment by funding traditional rather than untraditional families.<sup>275</sup>

In *City of Cleburne v. Cleburne Living Center, Inc.*, a city in Texas denied a special use permit for the operation of a group home for the mentally retarded.<sup>276</sup> The Court rejected the view that discrimination against the mentally retarded people should be subject to "heightened scrutiny."<sup>277</sup> But applying rational basis review, it nonetheless found the city's requirement of the permit unacceptable.<sup>278</sup> It appeared to think

<sup>268</sup> *Moreno*, 413 U.S. at 528.

<sup>269</sup> See Food Stamp Act of 1964, Pub. L. No. 91-671, § 3(e), 84 Stat. 2048 (1971) (current version at 7 U.S.C. § 2012 (i) (1994); *Moreno*, 413 U.S. at 529.

<sup>270</sup> See *Moreno*, 413 U.S. at 536-37 (expressing "considerable doubt" that the "amendment could rationally have been intended to prevent" fraud).

<sup>271</sup> *Id.* at 534 (citing H.R. CONF. REP. NO. 91-1793, at 8 (1970), and 116 CONG. REC. 44,439 (1970) (statement of Sen. Holland)).

<sup>272</sup> *Id.*; accord *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

<sup>273</sup> *Moreno*, 413 U.S. at 546 (Rehnquist, J., dissenting).

<sup>274</sup> *Romer*, 116 S. Ct. at 1628 (quoting *Moreno*, 413 U.S. at 534).

<sup>275</sup> See *id.* at 1636 (Scalia, J., dissenting) (characterizing the amendment as "a reasonable effort to preserve traditional American moral values"); *Moreno*, 413 U.S. at 546 (Rehnquist, J., dissenting) ("This unit provides a guarantee . . . that the household exists for some purpose other than to collect federal food stamps.").

<sup>276</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985).

<sup>277</sup> See *id.* at 442-47.

<sup>278</sup> See *id.* at 450.

that the requirement was imposed on the basis of prejudice, or animus, rather than any legitimate public purpose.<sup>279</sup> The city had pointed to the fears of elderly residents, the negative attitudes of property owners, the concern that students nearby might harass the residents, the size of the home and the number of people who would occupy it, and the fact that the home would be located on a floodplain.<sup>280</sup> Unquestionably these concerns would satisfy ordinary rationality review as traditionally formulated. For purposes of that standard, it is not decisive — nor even relevant — that there was a poor fit between these ends and the means chosen by Cleburne.<sup>281</sup> But the *Cleburne* Court signaled its concern that something illegitimate underlay the city's decision when it admonished that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for" unequal treatment.<sup>282</sup> Thus the Court concluded that the discriminatory action under review was based "on an irrational prejudice."<sup>283</sup>

Each case in the *Moreno-Cleburne-Romer* trilogy partakes of decisional minimalism. None of the cases establishes a new "tier" of scrutiny. *Cleburne* and *Romer* are notable for having failed to do so. All three cases reflect the possible use of rationality review as a kind of magical trump card, or perhaps joker, hidden in the pack and used on special occasions. In these cases, rationality review, traditionally little more than a rubber stamp, is used to invalidate badly motivated laws without refining a new kind of scrutiny. In this way too, they are minimalist; they need have no progeny.

The trilogy is also linked with the federalism cases, for both sets of cases involved judicial disapproval of a constitutionally illicit purpose. But there is a substantial difference. In the federalism cases, the illicitness of the purpose (disfavoring citizens of other states) is easy to understand. But what is constitutionally illicit about the purposes in the trilogy? This is the question pressed by Justice Scalia in *Romer*. If the Court was to offer a theoretically adequate opinion, Justice Scalia should have received a better answer.

In both *Cleburne* and *Romer*, the Court was concerned that a politically unpopular group was facing discrimination as a result of irrational hatred and fear. As with homosexuality, many people appear to think that mental retardation is contagious and frightening for that reason. Antipathy toward the retarded is frequently rooted in an absence of empathetic identification, a belief that they are not entirely human and should be avoided and sealed off. The Court's invalidation of the law under rationality review depended on its explicit belief that irrational

<sup>279</sup> See *id.* (expressing the belief that the city's position "rest[ed] on an irrational prejudice").

<sup>280</sup> See *id.* at 448–49.

<sup>281</sup> See, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592 (1979); *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

<sup>282</sup> *Cleburne*, 473 U.S. at 448.

<sup>283</sup> *Id.* at 450.

fear was likely to be at work.<sup>284</sup> And if *Cleburne* is to make sense, it must be because the state cannot discriminate against the mentally retarded simply because people are afraid of them.

But we have seen enough to be able to say that hatred and fear can always be translated into public-regarding justifications. Thus in *Cleburne* the city was able to point to neutral-sounding grounds, such as a potential drop in property values.<sup>285</sup> Thus in *Romer* it might have been said that the state was attempting to protect associational liberty or not to legitimate homosexual behavior, just as in *Moreno*, the state was attempting not to promote nontraditional living arrangements. Along this dimension the trilogy cases are very close. In all three cases, there were poorly fitting but probably rational justifications (property values in *Cleburne*, discouragement of fraud in *Moreno*, conservation of resources and protection of association in *Romer*) and also well-fitting justifications whose legitimacy was in doubt (response to private fears in *Cleburne*, desire to exclude nontraditional families in *Moreno*, desire to avoid legitimizing homosexuality in *Romer*).

With this we come close to the heart of the matter. The underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior. The state must justify discrimination on some other, public-regarding ground. The underlying concern must be that a measure discriminating against homosexuals, like a measure discriminating against the mentally retarded, is likely to reflect sharp "we-they" distinctions and irrational hatred and fear, directed at who they are as much as what they do. Note that Amendment 2 involved status as well as conduct, a point emphasized by the Court.<sup>286</sup> It would be hard to imagine a similar measure directed against polygamists, adulterers, or fornicators. Polygamists, adulters, and fornicators are punished through law or norms because of what they do; homosexuals are subject to a deeper kind of social antagonism, connected not only with their acts but also with their identity. It is this status feature that links discrimination on the basis of sexual orientation with discrimination on the basis of race or sex. Here, as with the mentally retarded, we can find a desire to isolate and seal off members of a despised group whose characteristics are thought to be in some sense contaminating or corrosive.<sup>287</sup> In its most virulent forms, this desire is rooted in a belief that members of the relevant group are not fully

<sup>284</sup> See *id.* ("[R]equiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . .").

<sup>285</sup> See *id.* at 448–50.

<sup>286</sup> See *Romer v. Evans*, 116 S. Ct. 1620, 1625 (1996).

<sup>287</sup> Justice Scalia's references to political power, *see id.* at 1634 (Scalia, J., dissenting), are not responsive. Blacks and women can elect people too. The real question is not whether members of the group have some electoral power (they always do), but whether illicit motives are likely to be at work.

human.<sup>288</sup> On this count, *Cleburne* and *Romer* are at one. And because the proffered justifications were so weakly connected with the measures at issue, the Court was right to do what it did in both cases.

*Moreno* is a harder case, because there was less reason to believe that hatred and fear were at work. But the reference to "hippie communes," seen in the context of the time, may be taken to suggest a similar kind of "we-they" antagonism. Taken in these terms, the three cases are linked not only with each other, but also with the defining case of discrimination against the newly free slaves. *Moreno*, *Cleburne*, and *Romer* reflect an understanding that other groups, not only African-Americans, may be subject to unreasoning hatred and suspicion. Hence the *Romer* Court's opening reference to Justice Harlan's dissenting opinion in *Plessy v. Ferguson*.<sup>289</sup>

With this point we can see that the outcome in *Romer* was not minimalist in the less controversial way that *Kent v. Dulles*<sup>290</sup> and *Hampton v. Mow Sun Wong*<sup>291</sup> were minimalist. *Romer* turned on a substantive judgment about what grounds for state law are legitimate. For this reason we can understand Justice Scalia's complaint that *Romer* did not promote but instead usurped democratic deliberation.<sup>292</sup> If *Romer* is to be defended, it must be because the grounds for Amendment 2 are, in a deliberative democracy, properly ruled off-limits, because the Amendment reflects a judgment that certain citizens should be treated as social outcasts. This argument for *Romer* associates Amendment 2 with measures like those in *Plessy* and *Bradwell v. Illinois*<sup>293</sup> (which is not to suggest that the harms of Amendment 2 are the same in degree). *Romer* thus embodies a ban on laws motivated by a desire to create second-class citizenship, a point that connects the outcome with *United States v. Virginia*<sup>294</sup> as well. This was the forbidden motivation that the Court described as "animus."

Should the Court have been clearer on these points? From the standpoint of traditional judicial craft, the answer is yes. Such an opinion would be more coherent. It need not be very broad, though it would be more deeply theorized. We could certainly imagine an opinion saying that if the government is going to discriminate against homosexuals, it must do so on some ground other than its dislike of homosexuals and

<sup>288</sup> See, e.g., Avishai Margalit & Gabriel Motzkin, *The Uniqueness of the Holocaust*, 25 PHIL. & PUB. AFF. 65, 70 (1996) (explaining that the Nazis "denied the shared humanity of humankind").

<sup>289</sup> See *Romer*, 116 S. Ct. at 1623 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

<sup>290</sup> 357 U.S. 116 (1958).

<sup>291</sup> 426 U.S. 88 (1976).

<sup>292</sup> See *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting) ("Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means . . . . This Court has no business imposing upon all Americans the resolution [it favors] . . . .").

<sup>293</sup> 83 U.S. 130 (1873) (upholding the exclusion of women from the practice of law).

<sup>294</sup> 116 S. Ct. 2264 (1996).

homosexuality. We could certainly imagine an opinion linking this form of discrimination with discrimination on the basis of sex<sup>295</sup> and race. If the argument I am offering is correct, it would be hard to object to its judicial adoption. But perhaps at this stage, it makes sense for the Court to have been even more minimalist than that — to have rendered an opinion lying somewhere between a denial of certiorari and a fully articulated defense. It may have made sense to do what the Court did partly because of the simple practical difficulties in obtaining a more ambitious majority opinion; partly because of the Justices' lack of confidence in their own understandings of exactly what the Constitution requires in this setting; and partly because of strategic considerations having to do with the timing of judicial interventions into politics.

What the Court did had the vice of its own distinctive brand of minimalism — the failure even to do what is minimally necessary for self-defense. This is a genuine vice. But if we consider the entire context, it may also be an act of statesmanship, reflecting a prudent awareness of the need for democratic rather than judicial conclusions on this topic. The narrow and shallow decision may turn out to be broader and deeper; ultimately analogical reasoning and principles of stare decisis will determine its scope. *Romer* imposes unusually few constraints on its own interpretation. One of the central issues here has to do with the fate of *Bowers v. Hardwick*.<sup>296</sup>

#### E. The Dog That Didn't Bark, or Equal Protection vs. Due Process

If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.

*Romer v. Evans*, 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting).

I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.

44 Liquormart, Inc. v. Rhode Island,  
116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring  
in part and concurring in the judgment).

We have not yet explored a central, indeed obvious question: What about *Hardwick*? Astonishingly, the Court did not discuss or even cite *Hardwick*.<sup>297</sup> Its failure to do so is remarkable in light of the fact that *Hardwick* seemed to belie the argument just offered. That is, *Hardwick* seemed to say that it is legitimate for the state to express disapproval of

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<sup>295</sup> Cf. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 202 (1994) (treating discrimination on the basis of sexual orientation as a form of sex discrimination).

<sup>296</sup> 478 U.S. 186 (1986).

<sup>297</sup> The Court's omission is made only slightly less astonishing by the fact that Colorado did not invoke *Hardwick* either.

homosexual conduct, indeed that it is legitimate for the state to express that disapproval via the criminal law. If it is acceptable for the state to criminalize homosexual activity, why does it not follow that it is acceptable for the state to prohibit legal protections against discrimination against homosexuals? Criminal punishment is a far more severe response to moral opprobrium than a ban on antidiscrimination claims.

An important aspect of the Court's minimalism — indeed, sub-minimalism — consists in its failure to answer the question just posed, or indeed to say anything about how *Romer* and *Hardwick* fit together. We might even say that the Court's silence on *Hardwick* is under ordinary circumstances an unacceptable exercise of judicial power. An apparently relevant precedent ought to receive at least some discussion, especially if it is raised seriously in dissent.<sup>298</sup>

Why, as a matter of fact, did the Court say nothing about *Hardwick*? I speculate that the Court's silence about *Hardwick* stemmed from the fact that a majority could not be gotten to (a) distinguish *Hardwick*, (b) approve *Hardwick*, or (c) overrule *Hardwick*. If each of these options was unavailable, silence was the only alternative. The Court's silence probably resulted from the multimember tribunal's inability to converge on any rationale, a common explanation for minimalism.

But what, then, is the current status of *Hardwick*? This is a pressing question. Justice Scalia is correct to suggest that there is tension between the two cases. The tension lies in the fact that *Hardwick* says that disapproval of homosexual sodomy is a sufficient reason for criminal prohibition,<sup>299</sup> whereas *Romer* denies that disapproval of homosexuality is a sufficient reason to bar use of antidiscrimination law.

If the *Romer* Court had chosen to address *Hardwick*, five alternative approaches were available. The Court could have (1) overruled *Hardwick* because it was wrongly decided; or it could have distinguished *Hardwick* because it involved (2) a due process challenge rather than an equal protection challenge; (3) a narrowly targeted prohibition on a particular act rather than a broad, blunderbuss ban aimed at a group; (4) a traditional, rather than a novel, legal rule; and/or (5) conduct (sodomy) rather than status (homosexuality).

Argument (4) is inadequate. The Court did refer to the novelty of Amendment 2, with the apparent thought that the novelty helped signal that something odd and perhaps untoward was at work. But novelty is not synonymous with unconstitutionality. Although tradition helps give content to the Due Process Clause, and although novelty may give rise to suspicion, tradition does not have the cross-constitutional weight that argument (4) attempts to give it.<sup>300</sup> In any case the Court's emphasis on the unusual nature of Amendment 2 was doubtful. Only very recently have localities begun to forbid discrimination on the basis of sexual ori-

<sup>298</sup> See *Romer*, 116 S. Ct. at 1629 (Scalia, J. dissenting).

<sup>299</sup> See *Hardwick*, 478 U.S. at 196.

<sup>300</sup> See Cass R. Sunstein, *Against Tradition*, 13 SOC. PHIL. & POL'Y 207, 226–27 (1996).

entation; tradition is hardly inconsistent with such discrimination; and thus Colorado might have said that it was restoring the traditional status quo ante by undoing those laws.

Argument (3) is more plausible. The law in *Hardwick* was hardly over- or under-inclusive, and this was the Court's objection to Amendment 2.<sup>301</sup> Hence it could be said that *Romer*, invalidating a badly fitting law, falls in the protectionism-*Moreno-Cleburne* line of equal protection cases, whereas *Hardwick*, upholding a nicely fitting law, is like any case upholding a statute against substantive due process attack. This is not an unreasonable position, but it seems unconvincing. The key question, uniting *Hardwick* and *Romer*, is whether it is permissible for the state to try to delegitimate, or to decide not to legitimate, homosexual relations. If it is, *Hardwick* is right and *Romer* is wrong, even if Amendment 2 was over- and under-inclusive. Thus it seems that argument (3) does not work unless it is accompanied by argument (2) or (5).

Argument (5) does connect with some of the Court's statements in *Romer*. Amendment 2 had the most peculiar feature of targeting people regardless of their actions.<sup>302</sup> *Hardwick* says that government can legitimately act against homosexual sodomy; but it does not follow that it can punish mere homosexual status. It would certainly be unconstitutional to make "homosexual status" a crime.<sup>303</sup> But it is not clear that this is sufficient to support *Romer* and distinguish *Hardwick*. There was no criminal ban in *Romer*. The Court's opinion did not principally stress the status offense issue; if it had, it might well have invalidated Amendment 2 only insofar as it targeted the mere status of homosexual orientation, and preserved it insofar as it targeted homosexual conduct.

In any case, Justice Scalia argued that it follows from *Hardwick* not that government can make homosexual status a crime, but that government can prohibit the use of the antidiscrimination law to protect people who have an inclination to engage in conduct it disfavors.<sup>304</sup> In other words, it is not clear that a government that is disabled from creating "status offenses" is also disabled from saying that people inclined to engage in disfavored activity cannot, because of that inclination, seek the protection of antidiscrimination laws. Consider a law defining as addicts people inclined to heavy drinking and smoking, and prohibiting them from claiming the protection of antidiscrimination laws. This form of discrimination would be status-based, in a sense, but it is not obviously unconstitutional. Now let us turn to argument (2), which points in promising directions.

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<sup>301</sup> See *Romer*, 116 S. Ct. at 1628 ("It is at once too narrow and too broad.").

<sup>302</sup> The point is stressed by Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. (forthcoming Oct. 1996).

<sup>303</sup> Cf. *Robinson v. California*, 370 U.S. 660, 666 (1962) (holding unconstitutional a California law that made the status of narcotics addiction a crime).

<sup>304</sup> See *Romer*, 116 S. Ct. at 1631–32 (Scalia, J., dissenting).

The Equal Protection and Due Process Clauses have very different offices, and *Hardwick* is not in tension with *Romer* so long as those different offices are kept in mind. The *Hardwick* Court was careful to say that plaintiffs had raised no equal protection challenge, and this is important, for the category of legitimate state interests is provision-specific rather than Constitution-general.<sup>305</sup> Perhaps the rights protected by the Due Process Clause must grow out of longstanding practices. But as it has come to be understood, the Equal Protection Clause is tradition-correcting, whereas the Due Process Clause is generally tradition-protecting.<sup>306</sup> The Equal Protection Clause sets out a normative ideal that operates as a critique of existing practices; the Due Process Clause safeguards rights related to those long-established in Anglo-American law. In view of the different constitutional provisions at issue, *Romer* leaves *Hardwick* untouched, simply because different provisions were at issue. And on this view, Justice Scalia is wrong to think it anomalous that the state can prohibit homosexual sodomy while being barred from enacting Amendment 2. The validity of state action depends on the particular constitutional challenge being mounted and the particular provision being invoked. For example, the Equal Protection Clause makes animus against African-Americans constitutionally unacceptable, even though there is nothing specifically objectionable about that animus under the Due Process and Contracts Clauses.<sup>307</sup>

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<sup>305</sup> It is notable that the *Hardwick* Court explicitly created a distinction between heterosexuals and homosexuals. The plaintiffs attacked the sodomy law in a way that was neutral with respect to sexual orientation. It was the Supreme Court that made the distinction, by upholding the law as applied to homosexuals (while, in good minimalist fashion, leaving undecided its status as applied to heterosexuals). See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). Because the Court in *Hardwick* discriminated on the basis of sexual orientation, it may seem odd to suggest that the Equal Protection Clause draws discrimination on the basis of sexual orientation into doubt. The best response is that *Hardwick* did not involve an equal protection claim. See *id.* at 196 n.8. The Court gave the minimal answer necessary to decide the due process attack. It should not seem terribly odd if the Court's distinction turns out to raise problems when an equal protection challenge is raised. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174–76 (1988).

<sup>306</sup> See *United States v. Virginia*, 116 S. Ct. 2264, 2269 (1996) (holding that the maintenance of an all-male military college violated the Equal Protection Clause); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (holding that requiring a home for the mentally retarded to obtain a special use permit violated the Equal Protection Clause); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (holding that segregation based on race violated the Equal Protection Clause). Interestingly, Justice Scalia contends in his dissenting opinion in *United States v. Virginia* that the Equal Protection Clause should be understood by reference to tradition. See *United States v. Virginia*, 116 S. Ct. at 2291–92 (Scalia, J., dissenting).

The historical understanding of due process has long roots. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J. concurring); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Murray's Lessee v. Hoboken*, 59 U.S. (18 How.) 272, 277 (1855).

<sup>307</sup> Consider as an illustration the maximalist opinion in *Loving v. Virginia*, 388 U.S. 1 (1967), in which a ban on miscegenation was struck down on both equal protection and due process grounds. If the ban had been upheld against due process attack in *Loving*, it would not have followed that an equal protection challenge would have been unavailable. Indeed, if the *Loving*

Thus *Romer* might be seen to hold that the Equal Protection Clause forbids states from discriminating against homosexuals as a class (regardless of their behavior), unless the discrimination can be linked to some goal other than the bare desire to discourage homosexuality. *Romer* stands for the proposition that any discrimination against homosexuals must rest on a public-regarding justification; the goal of preventing or delegitimizing homosexual behavior is not by itself sufficient to support discrimination. This holding leaves open questions involving discrimination in education or the military. On this view, it remains possible that the Due Process Clause allows states to punish homosexual behavior. In view of the reasonable distinction identified in argument (2), especially when linked with argument (5), it was appropriate for the Court to reject argument (1) and decline to overrule *Hardwick* at this stage. And if the distinction between equal protection and due process is maintained, *Romer* may be right even if *Hardwick* remains good law.

Notwithstanding what I have just said, it may well be that *Hardwick* is now very fragile and that eventually argument (1) will prevail. We could certainly imagine worse outcomes than the overruling of *Hardwick*, a casually written (subminimalist) opinion and one of the most vilified decisions since World War II.<sup>308</sup> But the Court should be cautious about overruling its own decisions, even those a majority thinks wrong, and perhaps *Hardwick* is not so egregiously wrong as to be overruled ten years later. On the other hand, there is good reason to think that *Hardwick* was indeed wrong; at least it is unlikely that the present Court would uphold a law imposing an actual jail sentence on someone for engaging in consensual sexual activity. Probably *Hardwick* should have been decided (if it was to be decided by the Court at all<sup>309</sup>) the other way and very narrowly — as a case involving the old and nicely minimalist idea, with democratic foundations, of desuetude.<sup>310</sup> A challenge of this sort was not raised or passed on by the Court, and hence that challenge could be accepted without overruling *Hardwick*'s substantive due process holding.

To summarize a lengthy discussion, a minimalist (as opposed to subminimalist) opinion in *Romer* would have said the following:

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Court had held that the Due Process Clause is purely procedural, the equal protection attack would not have been affected in the least.

<sup>308</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 250 n.31 (1996); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 770, 799–801 (1989); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 52 U. CHI. L. REV. 648, 655–56 (1987).

<sup>309</sup> The thoroughgoing minimalist would want the Court to have dismissed that case as moot. Although I have not defended thoroughgoing minimalism here, I do think that dismissal would have been best, all things considered.

<sup>310</sup> See *infra* p. 96. In his curious concurring opinion, Justice Powell characteristically groped toward a minimalist solution. See *Hardwick*, 478 U.S. at 197 (Powell, J., concurring) (suggesting that a jail sentence for Hardwick might violate the Cruel or Unusual Punishment Clause).

*Hardwick* held only that the ban on homosexual sodomy did not violate the Due Process Clause, whose content has been defined at least partly by reference to tradition. This case involves the Equal Protection Clause, which was not at issue in *Hardwick*. The content of the Equal Protection Clause is not given by tradition; that Clause is rooted in a principle that rejects many traditional practices and in any case subjects them to critical scrutiny. Our narrow conclusion today is that when the state discriminates against homosexuals, the Equal Protection Clause requires that the discrimination must be rational in the sense that it must be connected with a legitimate public purpose, rather than fear and prejudice or a bare desire to state public opposition to homosexuality as such. In this case, Colorado has been unable to show any such connection. Its reference to associational liberty is an implausible justification for its broad ban, a judgment fortified by Amendment 2's reference to 'orientation' as well as 'conduct.' To reach this conclusion, it is unnecessary for us to say whether and when other, less unusual forms of discrimination on the basis of sexual orientation are connected with legitimate public purposes.

#### F. A Note On Meaning and the Expressive Function of Law

Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that can be claimed for it.

Romer v. Evans, 116 S. Ct. 1620,  
1628-29 (1996).

[T]he constitutional claim before us ultimately depends for its success on little more than speculative judicial suppositions about the societal message that is to be gleaned from race-based districting.

Shaw v. Hunt, 116 S. Ct. 1894, 1910  
(1996) (Stevens, J., dissenting).

It is sometimes observed that the Supreme Court's decisions have educative effects.<sup>311</sup> The nature and extent of these effects raise serious empirical questions. But short of an empirical investigation, it can at least be said that Supreme Court decisions have short-term effects in communicating certain messages containing national judgments about what is and is not legitimate. Official pronouncements about law — from the national legislature and the Supreme Court — have an expressive function.<sup>312</sup> They communicate social commitments and may well have major social effects just by virtue of their status as communication. Consider, for example, recent debates about whether the Constitution should be amended to allow criminalization of flag-burning, or whether universities should be permitted to regulate "hate" speech. Such mea-

<sup>311</sup> See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 962 (1992).

<sup>312</sup> See Amar, *supra* note 302 (discussing the social meaning of Amendment 2).

sures are debated largely because of their expressive effects, rather than their more direct consequences. By communicating certain messages, law may affect social norms. It may also humiliate people, or say that people may not be humiliated.

Much of the debate about measures relating to equality, or about "animus," concerns the law's expressive function. We do not get an adequate handle on such debates by asking about the empirically observable consequences of the law. There are, for example, vigorous debates about the impact of *Brown v. Board of Education* and the Civil Rights Act of 1964.<sup>313</sup> These debates are extremely illuminating, but part of the importance of *Brown* and the Civil Rights Act of 1964 lay in their expressive effects. When *Brown* was announced, it had an immediate impact on the attitude of black Americans toward the nation and their role in it. Similarly, the Civil Rights Act of 1964 had immediate importance for what it said, quite apart from what it did, or from what it would turn out to do. This is not to say that "statements" are most of what matters, or that law should be celebrated if it makes good statements regardless of what else it does. But one of the things that law does is to make statements, and these statements matter, partly because of their potential effects on social norms and partly because of their immediate effects on both self-esteem and self-respect.

What did the *Romer* Court mean by its assertion that the "general announcement" in Amendment 2 inflicts on gays and lesbians "immediate, continuing, and real injuries"?<sup>314</sup> The answer may well lie in the expressive content of the amendment. How could the injuries otherwise be an "immediate" function of the mere "announcement"? And if the Court is understood in this way, *Romer* is important in large part because of its own expressive effects, which are directly counter to those of Amendment 2. This observation explains the immediate, intense public reaction to *Romer*.<sup>315</sup>

Similarly, the importance of *Bowers v. Hardwick* does not lie in its direct effects on the criminal law. The decision probably has not spurred many prosecutions of homosexuals. But it can be counted as one of the few genuinely humiliating decisions in American constitu-

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<sup>313</sup> See, e.g., ROSENBERG, *supra* note 8, at 49–106 (arguing that *Brown* did not desegregate the schools); John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2603–10 (1994); John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1715–22 (1991) (discussing the impact of the Civil Rights Act of 1964 and other federal civil rights policies).

<sup>314</sup> *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996).

<sup>315</sup> See Barbara Vobejda, *Gay Rights Ruling Highlights Society's Fault Lines*, WASH. POST, May 22, 1996, at A13; George F. Will, "Terminal Silliness", WASH. POST, May 22, 1996, at A21; Editorial, *The Supreme Court Overreaches*, CHI. TRIB., May 21, 1996, §1, at 16.

tional law,<sup>316</sup> joining *Plessy v. Ferguson*<sup>317</sup> and *Bradwell v. Illinois*.<sup>318</sup> At least in the short run, the importance of *Romer v. Evans* may lie more in its expressive function than in its concrete effects on law and policy.<sup>319</sup> It says something large about the place of homosexuals in society. Whatever the doctrinal complexities, it claims, and is understood to claim, that they are citizens like everyone else. In fact this may be the meaning of the Court's stunning first sentence: "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'"<sup>320</sup> Attention to the expressive function of law thus shows how even a minimalist opinion may have social effects by "making statements" about the legitimacy or illegitimacy of certain widespread social attitudes and practices.<sup>321</sup>

Acknowledgement of the *Romer* decision's beneficial expressive effects does not imply approval of its technical analysis. Perhaps the Court should have made clearer that a state may not defend discrimination solely by reference to a desire to discourage, to delegitimate, or not to legitimate homosexuality. But some sort of minimalist approach seems right in this context. Indeed, the Court's inadequate treatment of the technical issue may actually be a virtue. An adequate treatment would have required the Court to write with a breadth and a depth that could not easily have commanded a majority opinion, and that may have foreclosed democratic debate about a series of issues currently engaging the nation and deserving, broadly speaking, a democratic rather than judicial solution.

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<sup>316</sup> See AVISHAI MARGALIT, THE DECENT SOCIETY 9–27 (1996). Of course, there are many complexities in the term "humiliation." To be usable for purposes of political or legal theory, the term must depend on a substantive account of some sort, not just on people's subjective feelings. *See id.* at 9–10.

<sup>317</sup> 163 U.S. 537 (1896), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>318</sup> 83 U.S. (16 Wall.) 130 (1873).

<sup>319</sup> *See* Adam Nagourney, *Affirmed by the Supreme Court*, N.Y. TIMES, May 26, 1996, § 4, at 4.

<sup>320</sup> *Romer*, 116 S. Ct. at 1623.

<sup>321</sup> At this point it is worthwhile to say something about the tone of Justice Scalia's dissenting opinion. His opinion in *Romer*, like others in this and recent Terms, has not merely a harsh quality but a high degree of sarcasm and contempt. *See, e.g.*, O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353, 2361 (1996) (Scalia, J., dissenting); Board of County Comm'r's v. Umbehr, 116 S. Ct. 2342, 2361–62 (1996) (Scalia, J., dissenting); J.E.B. v. Alabama, 114 S. Ct. 1419, 1436 (1994) (Scalia, J., dissenting). Thus Justice Scalia accuses the majority opinion of "terminal silliness" and says that the Court's analysis is "nothing short of preposterous," "nothing short of insulting," "facially absurd," and (for that matter) "ridiculous." *Romer*, 116 S. Ct. at 1630, 1634, 1637 (Scalia, J., dissenting). Aggressive dissenting opinions are of course nothing new. But Justice Scalia has on occasion resorted to something new and different, often amounting to an attack on his colleagues' motives and competence. *See id.* Civic magnanimity, however, is an important democratic virtue: "Citizens who respect one another as moral agents are less inclined toward the moral dogmatism, and its accompanying attitude of arrogance, that is common among those who take moral opposition as a sign of ignorance or depravity." GUTMANN & THOMPSON, *supra* note 3, at 80. It is a judicial virtue as well.

## VII. VMI AND “ACTUAL PURPOSE”

There is no caste here.

Plessy v. Ferguson, 163 U.S. 537,  
559 (1896) (Harlan, J., dissenting)<sup>322</sup>

It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms “widow” and “dependent surviving spouse.” . . . I am therefore persuaded that this discrimination . . . is merely the accidental byproduct of a traditional way of thinking about females.

Califano v. Goldfarb, 430 U.S. 199, 222–23 (1977)  
(Stevens, J., concurring in the judgment).

It will certainly be possible for this Court to write a future opinion that ignores the broad principles of law set forth today, and that characterizes as utterly dispositive the opinion’s perceptions that VMI was a uniquely prestigious all-male institution, conceived in chauvinism, etc., etc. I will not join that opinion.

United States v. Virginia, 116 S. Ct. 2264,  
2307–08 (1996) (Scalia, J., dissenting).

At first glance, the Court’s decision in *United States v. Virginia*<sup>323</sup> seems to be at the opposite pole from *Romer*. In *Virginia*, the Court said a great deal about the appropriate approach to sex equality and the foundations of sex equality doctrine. But *United States v. Virginia* had distinctive minimalist dimensions, and it can be understood as democracy-forcing as well.

### A. What the Court Said

The Virginia Military Institute (VMI) was the only single-sex school among Virginia’s public colleges and universities. After the Fourth Circuit found that VMI’s single-sex organization violated the Constitution,<sup>324</sup> Virginia proposed to create a parallel program for women. The Supreme Court held that the operation of VMI as a single-sex school was unconstitutional, and [that] the parallel program would be an inadequate remedy.<sup>325</sup>

The Court’s opinion, written by Justice Ginsburg, came in three simple steps. First, the Court said that those who seek to defend gender-based discrimination must show an “exceedingly persuasive justification.”<sup>326</sup> Before *Virginia*, it had seemed well settled that gender discrimination would face “intermediate scrutiny,”<sup>327</sup> that is, the state

<sup>322</sup> Overruled by *Brown v. Board Of Educ.*, 347 U.S. 483 (1954).

<sup>323</sup> 116 S. Ct. 2264 (1996).

<sup>324</sup> See *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992).

<sup>325</sup> See *United States v. Virginia*, 116 S. Ct. at 2287.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 2293 (Scalia, J., dissenting) (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

would have to show that the classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."<sup>328</sup> *Virginia* heightens the level of scrutiny and brings it closer to the "strict scrutiny" that is applied to discrimination on the basis of race.<sup>329</sup> The Court said that the state must at least meet the requirements of intermediate scrutiny, and it placed a great emphasis on the need for an "exceedingly persuasive justification,"<sup>330</sup> which seems to have become the basic test for sex discrimination.

Second, the Court said that the state could not justify VMI's exclusion of women by pointing to the educational benefits of single-sex schooling or to the unique VMI "adversative" approach and its suitability for men alone.<sup>331</sup> In perhaps the most interesting part of the opinion, the Court acknowledged that "[s]ingle sex education affords pedagogical benefits to at least some students."<sup>332</sup> The Court, however, emphasized that it was the state's burden to show that it had actually sought to promote this purpose.<sup>333</sup> The Court's historical inquiry revealed no evidence that the state had this intention.<sup>334</sup> The Court observed that the state initially considered higher education too "dangerous for women,"<sup>335</sup> a sentiment that reflected "widely held views about women's proper place."<sup>336</sup> With respect to Virginia, "the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation."<sup>337</sup> Despite its rejection of Virginia's assertions, the Court suggested that a self-conscious effort to promote educational diversity through same-sex schools, at least if it was committed to equality of opportunity, could be constitutional.<sup>338</sup>

After assuming for the purposes of the decision that most women would not choose VMI's adversative method of training,<sup>339</sup> the Court also rejected Virginia's argument that the adversative method is in-

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<sup>328</sup> *Id.* at 2294 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted).

<sup>329</sup> *See id.* at 2292–96.

<sup>330</sup> 116 S. Ct. at 2287.

<sup>331</sup> *See id.* at 2276–82. An illuminating discussion of the VMI culture may be found in Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189, 218–68 (1996).

<sup>332</sup> *United States v. Virginia*, 116 S. Ct. at 2276.

<sup>333</sup> *See id.* at 2277–79.

<sup>334</sup> *See id.*

<sup>335</sup> *Id.* at 2277.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 2278.

<sup>338</sup> *See id.* at 2276–78.

<sup>339</sup> *See id.* at 2280.

compatible with the presence of women.<sup>340</sup> In reaching this conclusion, the Court pointed to the absence of sufficient evidence to support that argument.<sup>341</sup> The Court added that the same argument historically has been made in a number of other contexts, including admission of women to the practices of law and medicine.<sup>342</sup> Thus the Court referred to past “‘self-fulfilling prophesy’ once routinely used to deny rights or opportunities” to women.<sup>343</sup> Even if many women were ill-suited to the VMI method, the same would be true for many men, and VMI would have to rely on individualized assessments about applicants, not on sex-based classifications.<sup>344</sup>

Third, the Court rejected Virginia’s remedial plan.<sup>345</sup> The parallel program would be inferior in academic offerings, methods of education, and financial resources.<sup>346</sup> The Court especially criticized Virginia’s decision to exclude the adversative method from the sister school, dismissing Virginia’s stereotypical generalization that women are ill-suited for that method.<sup>347</sup> The Court concluded that the new program would be separate and unequal and thus inadequate.<sup>348</sup>

The continued existence of an all-male military school in Virginia may have been more significant for its expressive effects than for the actual deprivation of educational opportunities. The public debate over the case becomes more intelligible if we examine the debate in its expressive capacity, as raising questions about the extent to which nature prescribes gender roles. And the outcome of the case, together with its language, is important in large part because of the general statements the Court made about the relationship between government and sex-role stereotyping. By invalidating a practice rooted in old stereotypes rather than contemporary convictions, the Court can be taken to have promoted democratic deliberation, indicating that single-sex institutions must be rooted in an effort to promote educational diversity and equal opportunity.

### B. Deep But Narrow

In several ways, *Virginia* is an ambitious opinion. First, it offers a distinctive understanding of sex equality. The problem with the Virginia system was not that the state noticed a difference between men and women, but that it turned that difference into a disadvantage.<sup>349</sup>

<sup>340</sup> See *id.* at 2279–82.

<sup>341</sup> See *id.* at 2280.

<sup>342</sup> See *id.* at 2280–82.

<sup>343</sup> *Id.* at 2280 (alteration in original) (citation omitted) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)) (internal quotation marks omitted).

<sup>344</sup> See *id.* at 2280–82.

<sup>345</sup> See *id.* at 2282–87.

<sup>346</sup> See *id.*

<sup>347</sup> See *id.* at 2284.

<sup>348</sup> See *id.* at 2285–86.

<sup>349</sup> See *id.*

"Inherent differences remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."<sup>350</sup> The Court understood the equality principle to mean that the state cannot use gender as a basis for deprivation of educational opportunities.<sup>351</sup> Similarly, the Court noticed that some "differences" may be a product of past practices, and thus sometimes differences become a kind of "self-fulfilling prophecy."<sup>352</sup>

Second, the Court did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny. After *United States v. Virginia*, it is not simple to describe the appropriate standard of review. States must satisfy a standard somewhere between intermediate and strict scrutiny.<sup>353</sup>

By setting out an ambitious account of equality along with this new standard, the Court said more than it needed in order to justify its decision in the case (while the *Romer* Court said less than it needed for that purpose). This new standard, however, is not a dramatic innovation. The revision of the standard of review is unlikely to produce different results from those that would have followed under the intermediate scrutiny standard, which has operated quite strictly "in fact." The Court has deepened the foundations of sex equality law by giving a clearer sense of its basic purpose, but what it said is broadly consistent with what has been said in the recent past.<sup>354</sup>

What is the reach of *Virginia*? It would be incorrect to conclude, as Justice Scalia does in his dissent, that the Court has by its rationale committed future courts to invalidation of all educational programs, public and private, that separate the sexes.<sup>355</sup> The Court was careful to base its decision on Virginia's failure to prove that it had been attempting to promote educational diversity and that its programs provided equality of opportunity.<sup>356</sup> Significantly, the Court left open the possibility that a new legislature, acting on the basis of a concern for the well-being of both men and women, could separate the sexes so long as it provided equal opportunity.<sup>357</sup>

In this way *Virginia* shares a common theme with both *Romer* and *Kent*. It is linked with *Romer* insofar as it harbors skepticism about the state's articulated justification for single-sex education and seeks to discover the actual, illegitimate motivation — here, the state's belief that it can regard women as a class as less well-suited for certain educational practices than men. *Virginia* is linked with *Kent* insofar as it requires a current legislative judgment — here, that same-sex educa-

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<sup>350</sup> *Id.* (internal quotations omitted).

<sup>351</sup> *See id.*

<sup>352</sup> *Id.* at 2280 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)).

<sup>353</sup> *See id.* at 2286–87.

<sup>354</sup> *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

<sup>355</sup> *See United States v. Virginia*, 116 S. Ct. at 2305–09 (Scalia, J., dissenting).

<sup>356</sup> *See* 116 S. Ct. at 2276–79, 2282–86.

<sup>357</sup> *Cf. infra* note 487 (noting that the VMI case might even be seen as one of desuetude).

tion is necessary to promote educational diversity. *Virginia* certainly does not invalidate the state's decision to separate men and women in the interest of ensuring equal opportunity. Such a separation may well promote, rather than undermine, equal opportunity. If the state reached its decision deliberatively and without infection from stereotypes about gender roles, and the decision promoted rather than undermined equal opportunity, the Court might uphold the program. It follows that federal funding of private, same-sex educational institutions may well be constitutional after *Virginia*. A general funding program may itself be neutral and therefore nondiscriminatory even if some funded institutions discriminate.<sup>358</sup> Even if private institutions are for statutory reasons subject to constraints parallel to those imposed by the Equal Protection Clause, it is not clear that they must admit both men and women. In particular, educational institutions for women alone have potential benefits for women, benefits that are connected with the promotion of equality.<sup>359</sup>

For these reasons, the Court's decision is far more minimalist than it seems, and properly so. The Court did not decide a number of future questions about same-sex programs; in view of the diversity and possible legitimacy of such programs, it was right to leave things open. The decision is also democracy-forcing insofar as it makes "actual purpose" crucial to the legitimacy of sex discrimination.

### C. Depth Defended

The depth of the Court's opinion in *United States v. Virginia* can be found in the Court's understanding of the principle of gender equality. The Court emphasized that there are indeed biological and social differences between men and women, and that these differences are to be "celebrat[ed]," not turned into a source of inequality.<sup>360</sup> The opinion suggests that the problem of gender inequality is a problem of second-class citizenship, in which the state uses women's differences from men as a justification for prescribing gender roles in a way that deprives women of equal opportunity.<sup>361</sup> Significantly, this conception of gender equality avoids a claim that women are not biologically or socially different from men. It also avoids a claim that those differ-

<sup>358</sup> Cf. *Washington v. Davis*, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justifications, if in practice it benefits or burdens one race more than another . . . would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes that may be more burdensome . . . to the average black than to the more affluent white."). But see *Norwood v. Harrison*, 413 U.S. 455, 463–68 (1973) ("A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.").

<sup>359</sup> See *United States v. Virginia*, 116 S. Ct. at 2276 & n.7 (citing Brief for Twenty-Six Private Women's Colleges as *Amici Curiae* 5).

<sup>360</sup> See *id.* at 2276.

<sup>361</sup> See *id.*

ences justify unequal treatment. Finally, it avoids a claim that equal treatment is necessarily required in all contexts. In short, the Court left open the possibility that it would uphold a law that promotes both educational diversity and equal opportunity.

Would it be possible to criticize the Court for adopting a controversial understanding of the equality principle when a less controversial understanding would have sufficed? A thorough-going minimalist would certainly support this criticism. And if we think that the Court's understanding was misconceived, we might also think that it was hubristic for the Court to announce it. But a deep understanding of a constitutional provision is nothing to lament when diverse Justices can converge on it and when they (and we) have good reason to believe that it is correct. Both of these conditions were met in *Virginia*. This was hardly the first constitutional case involving sex discrimination; after so many encounters with so many such cases, the Court was entitled to have confidence in its understanding of the point of the equality guarantee. The particular situation of a wholesale exclusion of women from a top-flight military academy provided a good occasion on which to announce that point. This was a relatively rare occasion when it was appropriate to give an ambitious account of the underlying constitutional principle. It is parallel to *Brown v. Board of Education*, when the Court also spoke ambitiously after encountering the underlying problem for a period of years; the difference is that *Virginia* was properly narrow, while *Brown* was properly broad in view of the differences between sex and race segregation in education.

#### D. Equal Protection Now

It should be clear by this point that the 1995 Term has modified traditional equal protection doctrine. *Romer* suggests that rationality review will not always result in validation; its form of rationality review is far more like the intermediate variety. *Virginia* suggests that intermediate scrutiny no longer applies in cases involving gender discrimination, and it moves closer to a strict scrutiny standard. Finally, last year's decision in *Adarand Constructors, Inc. v. Pena*<sup>362</sup> holds that strict scrutiny is not "fatal in fact"<sup>363</sup> and in that way treats strict scrutiny as if it were similar to intermediate scrutiny. The hard edges of the tripartite division have thus softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests.

This development is reminiscent of Justice Marshall's famous argument in favor of a "sliding scale" rather than a tiered approach to equal protection issues,<sup>364</sup> and of Justice Stevens's reminder that there

<sup>362</sup> 115 S. Ct. 2097 (1995).

<sup>363</sup> *Id.* at 2117.

<sup>364</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting).

is "only one Equal Protection Clause."<sup>365</sup> But a general movement in the direction of balancing would be nothing to celebrate. The use of "tiers" has two important goals. The first is to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work. "Strict scrutiny" is based on a presumption of distrust, to be rebutted only in the extreme cases. By contrast, "rational basis" review is rooted in a presumption of good faith, rebutted only in rare instances. The second goal of a tiered system is to discipline judicial discretion while promoting planning and predictability for future cases. Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities. The Chancellor's foot is not a promising basis for antidiscrimination law.

Understood in this way, a tiered approach has all of the advantages and disadvantages of rule-bound law, while balancing has the corresponding vices and virtues of open-ended standards. If the Court simply were to balance all relevant factors in all equal protection cases, the rule of law would be at excessive risk. To avoid this risk, we should understand the recent cases in the following ways. *Romer* is part of the *Moreno-Cleburne* line, using rationality review "with bite" when prejudice and hostility are especially likely to be present. *Adarand* recognizes that some affirmative action programs are supported by sufficient public-regarding justifications. *Virginia* is a vigorous insistence, generally consistent with prior law, that if a government draws lines between men and women, it ought not to be perpetuating old stereotypes about appropriate roles. Thus conceived, the three cases have limited applications and do not mark a general movement in the direction of open-ended balancing. They retain the basic structure of "tiers" with modest modifications, allowing rationality review occasional "bite," modestly strengthening scrutiny of sex discrimination, and recognizing that affirmative action poses special questions.

One issue remains: What is the substantive evil at which the Equal Protection Clause is aimed? There is an answer in the conception of "animus"<sup>366</sup> in *Romer* and the concern about sex-role stereotyping in *Virginia*. Both cases seem inspired by Justice Harlan's suggestion in *Plessy v. Ferguson* that "[t]here is no caste here,"<sup>367</sup> an idea recalled explicitly by the opening words of *Romer*<sup>368</sup> and implicitly by the *Virginia* Court's discussion of "volumes of history" demonstrating "official action denying rights or opportunities based on sex."<sup>369</sup> In the case of

<sup>365</sup> *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451–55 (1985) (Stevens, J., concurring)).

<sup>366</sup> See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

<sup>367</sup> 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>368</sup> See *Romer*, 116 S. Ct. at 1623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

<sup>369</sup> *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996).

homosexuals, "animus" typically takes the form of hatred and fear, whereas the motivation for discrimination against women has more often been a kind of "chivalry" associated with perceptions of women's appropriate role.<sup>370</sup> In both cases, however, the central equality concern is that government ought not to be permitted to turn a morally irrelevant characteristic into a basis for second-class citizenship. This was the basic problem in both *Romer* and *Virginia*; in the end it unites the two cases.

### VIII. PUNITIVE DAMAGES, COMMERCIAL ADVERTISING, AND DEATH

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.

Pacific Mutual Life Insurance v. Haslip,  
499 U.S. 1, 18 (1991)<sup>371</sup>

This section pursues the theme of minimalism by focusing on three cases from the 1995 Term. The cases involve constitutional limits on punitive damages, the constitutional status of commercial advertising, and the interaction between death penalty law and the nondelegation doctrine.

#### A. Punitive Damages

In recent years, the Court has been asked to set aside punitive damages awards as inconsistent with the Due Process Clause.<sup>372</sup> Although the Court refused to do so, it left open the possibility that in an extreme case an award could be constitutionally unacceptable.<sup>373</sup> In short, the Court refused to endorse the rule, proposed by Justice Scalia,<sup>374</sup> that the Constitution imposes no constraints on a jury's punitive damages award.

In *BMW of North America, Inc. v. Gore*,<sup>375</sup> the plaintiff sought punitive damages because BMW failed to inform him that it had repainted his new automobile prior to sale.<sup>376</sup> The jury granted an

<sup>370</sup> The significance of this difference should not be overstated; fears of contamination and contagion play a role in both settings and indeed help explain the forms of discrimination in both *Romer* and *Virginia*. See Koppelman, *supra* note 295, at 267–70.

<sup>371</sup> Quoted in *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1602 (1996) and in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993).

<sup>372</sup> See *TXO*, 509 U.S. at 446; *Pacific Mut.*, 499 U.S. at 7–8. The author is now engaged in an empirical study of punitive damages awards, with Daniel Kahneman and David Schkade. The study is funded but not subject to restrictions by Exxon Corporation. The purpose of the study is to test the sources of variability in jury judgments.

<sup>373</sup> See *TXO*, 509 U.S. at 458; *Pacific Mut.*, 499 U.S. at 18.

<sup>374</sup> See *BMW of N. Am., Inc.*, 116 S. Ct. at 1610–11 (Scalia, J., dissenting).

<sup>375</sup> 116 S. Ct. 1589 (1996).

<sup>376</sup> See *id.* at 1593.

award of punitive damages that was one thousand times the compensatory damages awarded in the case.<sup>377</sup> Presented with this disparity, the Court ruled for the first time that a grossly excessive award of punitive damages violated the Due Process Clause.<sup>378</sup> There was, however, a sharp division within the Court. The opinion of the five-member majority, written by Justice Stevens, spoke in terms of a form of "substantive due process."<sup>379</sup> Justice Breyer's concurring opinion was procedurally oriented; it involved the lack of constraint on jury discretion. Four Justices seemed to believe that no punitive damage award could ever violate the Due Process Clause.<sup>380</sup> One of the purposes of these opinions was to provide incentives for the democratic branches of government to confront the issue of punitive damages.<sup>381</sup>

In finding the award grossly excessive, the Court emphasized three points: the degree of reprehensibility of the nondisclosure, the disparity between the harm incurred and the punitive damages award, and the difference between the remedy and the civil penalties assessed in comparable cases.<sup>382</sup> First, the Court held that nothing about BMW's behavior was particularly reprehensible or egregious.<sup>383</sup> The presale refinishing of the car had no effect on performance or safety, and "BMW evinced no indifference to or reckless disregard for the health and safety of others."<sup>384</sup> Second, the ratio of punitive damages to compensatory damages was especially high: over five hundred to one.<sup>385</sup> Third, the civil and criminal penalties that could be imposed for comparable misconduct were far more limited; for example, the maximum civil penalty authorized by Alabama law for deceptive trade practices was two thousand dollars.<sup>386</sup> The punitive damage award was thus inconsistent with judgments about the relevant conduct in other areas of the law.<sup>387</sup>

In his concurrence, Justice Breyer stressed some different points. He suggested that the most serious problem was not the sheer excess-

<sup>377</sup> See *id.* at 1593–94.

<sup>378</sup> See *id.* at 1604.

<sup>379</sup> See *id.* at 1611–12.

<sup>380</sup> See *id.* at 1610–14 (Scalia, J., dissenting, joined by Thomas, J.); *id.* at 1614–18 (Ginsburg, J., dissenting, joined by Rehnquist, C.J.).

<sup>381</sup> Compare this goal to the idea of a "penalty default" in the law of contracts and statutory construction. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87–95 (1989). Maximalist validation (cell 1 in the table on page 40 above) can be understood as part of the same family of rules designed to impose good incentives on the other branches of government. Minimalist invalidation can also be understood as part of this family of rules. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116–17 (1976); *Kent v. Dulles*, 357 U.S. 116, 129–30 (1958).

<sup>382</sup> See *BMW of N. Am., Inc.*, 116 S. Ct. at 1598–99.

<sup>383</sup> See *id.* at 1599.

<sup>384</sup> *Id.*

<sup>385</sup> See *id.* at 1602.

<sup>386</sup> See *id.* at 1603.

<sup>387</sup> See *id.*

siveness of the award but the absence of legal standards that could minimize decisionmaker caprice.<sup>388</sup> Here the relevant standards were "vague and open-ended to the point where they risk[ed] arbitrary results."<sup>389</sup> Justice Breyer noted that the jury had not operated under a statute with standards distinguishing among permissible punitive damage awards.<sup>390</sup> The jury had not applied the seven factors used to constrain punitive damage awards in a way that actually constrained the decision-making process.<sup>391</sup> Finally, the state courts had not made any effort to discipline the use of those factors in such a way as to generate a legally constraining standard.<sup>392</sup> According to Justice Breyer, the problem lay in the violation of the rule of law.<sup>393</sup> Understood in this way, Justice Breyer's opinion connected *BMW of North America, Inc.* both with void-for-vagueness cases<sup>394</sup> and with the constitutional attack on the death penalty in *Furman v. Georgia*.<sup>395</sup> A central problem lies in unconstrained discretion; *BMW of North America, Inc.* is not best understood simply by reference to excessiveness.

Both the Stevens approach and the Breyer approach are minimalist. They depend on a range of variables, not on a rule. They set aside an extreme outcome but do not provide much guidance for future cases. Both approaches are shallow and narrow, though Justice Breyer's is deeper insofar as it recalls the aspirations of the rule of law. In short, both opinions leave a great deal undecided. The very fact that Justice Breyer's argument is so different from the Court's adds to the rule-free quality of the outcome.

With respect to punitive damages, a minimalist approach of some kind is probably the wisest course for the present time. The appropriate constraints on such awards are very hard to announce in advance, for it is still not clear what factors should be relevant to a judgment of excessiveness. Certainly there is reason to consider the relationship between compensatory damages and punitive damages, and an enormous disparity between the two is a signal that something may have gone wrong. But punitive damages may justifiably be awarded for deterrence purposes in situations in which the probability of detection is low; when this probability is low, it makes economic and legal sense to

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<sup>388</sup> See *id.* at 1605 (Breyer, J., concurring).

<sup>389</sup> *Id.*

<sup>390</sup> See *id.*

<sup>391</sup> See *id.* at 1606.

<sup>392</sup> See *id.* at 1607.

<sup>393</sup> See *id.* at 1609.

<sup>394</sup> See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169–71 (1972).

<sup>395</sup> 408 U.S. 238, 255 (1972). The *Furman* approach is a form of minimalism as compared with the Brennan-Marshall approach, and, insofar as it is designed to require legislative clarity, it is of a piece with *Kent v. Dulles*, 357 U.S. 116 (1958), and the nondelegation doctrine.

award punitive damages that far exceed compensatory damages.<sup>396</sup> In view of the complexity of the underlying issues, it is best for the Court to pursue a minimalist course in which it invalidates only the most extreme outcomes. To return to our basic theme, minimalism can be seen as a way of reducing decision costs and error costs, and the Court is not now in a good position to generate anything like clear rules to constrain punitive damages.

If this is right, Justice Breyer's approach seems best of all. It centers the inquiry on some procedural questions, avoids judicial judgments about substance, and thus links the due process inquiry with its most time-honored and uncontentious function, the control of discretion through procedural safeguards. Because of its procedural character, Justice Breyer's approach can be connected with many of the cases discussed thus far, including *Kent v. Dulles* and *Hampton v. Mow Sun Wong*. Most importantly, it requires state officials to set out criteria on their own and is in that way democracy-forcing. Like the void-for-vagueness doctrine, it is intended to catalyze and improve, rather than to preempt, democratic processes.

### B. Commercial Advertising

Until recently, commercial advertising was not thought to be protected by the First Amendment. Since its 1976 ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>397</sup> the Court has analyzed restrictions on commercial advertising in a highly minimalist, rule-free fashion.<sup>398</sup> Clear guidelines have yet to emerge.

The question in the 44 *Liquormart* case seemed very narrow: whether Rhode Island could bar the advertisement of retail liquor prices except at the place of sale.<sup>399</sup> The guiding legal standard came from *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>400</sup> which suggested a kind of balancing test for evaluating restrictions on commercial advertising.<sup>401</sup> But the most obvious precedent was *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*,<sup>402</sup> where the Court had upheld a ban on advertisements for casino gambling. In *Posadas* the Court reasoned that the state's greater

<sup>396</sup> See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 160–63 (1987).

<sup>397</sup> 425 U.S. 748 (1976).

<sup>398</sup> See, e.g., *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376 (1995); *United States v. Edge Broad. Co.*, 113 S. Ct. 2696, 2703 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 552, 566 (1980); *Virginia State Bd. of Pharmacy*, 425 U.S. at 770–71.

<sup>399</sup> See 44 *Liquormart*, Inc. v. Rhode Island, 116 S. Ct. 1495, 1501 (1996).

<sup>400</sup> 447 U.S. 557 (1980).

<sup>401</sup> *Central Hudson* provided that a state must assert a substantial interest in regulating commercial communication that is neither misleading nor related to illicit conduct. Moreover, the regulation must be directly related to the state interest, *see id.* at 564, and “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive,” *id.*

<sup>402</sup> 478 U.S. 328 (1986).

power — to ban the sale — included the lesser power to ban advertisements for the underlying product.<sup>403</sup> Also necessary to the Court's decision was its judgment that the state had a substantial interest in preventing an increase in casino gambling.<sup>404</sup> *Posadas* suggested that the government had broad power to prevent advertising for products that it deemed harmful — gambling, drinking, tobacco smoking, and more.<sup>405</sup>

Despite *Posadas*, the Court unanimously struck down the Rhode Island law. The most remarkable and characteristically nonminimalist opinion came from Justice Thomas.<sup>406</sup> Writing for only himself, Justice Thomas rejected the balancing test set out in *Central Hudson*<sup>407</sup> and announced instead that government may never regulate truthful, nonmisleading commercial advertising.<sup>408</sup>

It is worthwhile pausing over Justice Thomas's opinion. In just a few pages, he would (a) abandon the First Amendment distinction between commercial and noncommercial speech, a breathtakingly large step,<sup>409</sup> (b) reject the *Central Hudson* test,<sup>410</sup> used by the Court in many cases and not questioned in *44 Liquormart* by any of the parties, and (c) overrule *Posadas* even though this did not appear necessary to the outcome in the case. It is possible that Justice Thomas was ultimately right on all three points. But because his opinion proposes to do so much so quickly, and in a case in which none of this was necessary, it is fair to say that his is a most surprising opinion. There are many historical and philosophical reasons for distinguishing between commercial and noncommercial speech.<sup>411</sup> Perhaps none of them is convincing, but before they are rejected, the Court should give them attention in a case that genuinely presents them.<sup>412</sup> Certainly an originalist should investigate the historical record.

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<sup>403</sup> See *id.* at 345–46.

<sup>404</sup> See *id.* at 341.

<sup>405</sup> Cf. *id.* at 346 (agreeing that legislatures may respond to harmful products by restraining the stimulation of demand for them).

<sup>406</sup> See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515–20 (1996) (Thomas, J., concurring).

<sup>407</sup> See *id.* at 1515–16.

<sup>408</sup> See *id.* at 1520. In Justice Thomas's view, government may never "suppress information in order to manipulate the choices of consumers." *Id.* at 1517.

<sup>409</sup> "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 1518.

<sup>410</sup> See *id.* at 1515–16.

<sup>411</sup> See generally C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 197–206 (1989) (claiming that commercial speech is disconnected from the individual liberty and self-realization that are essential to constitutional freedom of speech); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (arguing that the values of the First Amendment are not threatened by regulation of commercial speech).

<sup>412</sup> Justice Thomas's opinion in *44 Liquormart* parallels his opinion in *Colorado Republican*, which called on the Court to overrule *Buckley* even though that issue had not been briefed or

At the opposite pole was Justice O'Connor's concurring opinion, in which she spoke for four Justices.<sup>413</sup> Justice O'Connor argued that the statute failed the *Central Hudson* test and was invalid for that simple reason.<sup>414</sup> The Rhode Island restriction was more intrusive than necessary to promote the state's interest. The state invoked the goal of keeping prices high in order to keep consumption low. But the less restrictive way to promote this goal would be through mandatory minimum prices or increased sales taxes.<sup>415</sup> Although Justice O'Connor acknowledged that the Court had employed a far less stringent level of scrutiny in *Posadas*, she observed that post-*Posadas* cases<sup>416</sup> had looked more carefully at the state's justification.<sup>417</sup> That more careful look, signalled by *Central Hudson* itself, was sufficient to doom the Rhode Island law.

The most distinctive feature of Justice O'Connor's argument is its narrowness. The opinion answers only those questions that are necessary to the disposition of the case. It leaves First Amendment law very much as it was. And unlike the opinion in *Romer v. Evans*, Justice O'Connor's opinion answers the questions it raises.

Justice Stevens's plurality opinion steered a course between Justice O'Connor and Justice Thomas. It did signal an important departure from previous understanding: in the plurality's view, a flat ban on truthful commercial messages — if that ban is imposed for reasons unrelated to the preservation of a fair bargaining process — should henceforth meet rigorous judicial review.<sup>418</sup> The plurality explained that commercial speech generally receives less protection because of the state's interest in protecting consumers against commercial harms.<sup>419</sup> The Rhode Island law, however, was unrelated to consumer protection.<sup>420</sup> And when consumer protection is not at stake, the government is likely to be acting "on the offensive assumption that the public will respond 'irrationally' to the truth."<sup>421</sup> The state was therefore required to demonstrate that the advertisement ban would advance a legitimate state interest "to a material degree."<sup>422</sup> (The Court did not address and in that sense left open important questions about

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argued, and the case could be decided without addressing it. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2323 (1996).

<sup>413</sup> Chief Justice Rehnquist and Justices Souter and Breyer joined Justice O'Connor's opinion.

<sup>414</sup> "Because Rhode Island's regulation fails even the less stringent standard set out in *Central Hudson*, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation." *44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring).

<sup>415</sup> See *id.* at 1521–22.

<sup>416</sup> See, e.g., *Florida Bar v. Went for It, Inc.*, 115 S. Ct. 2371, 2376 (1995); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1590 (1995).

<sup>417</sup> See *44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring).

<sup>418</sup> See 116 S. Ct. at 1508.

<sup>419</sup> See *id.*

<sup>420</sup> See *id.*

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 1509 (citation omitted).

protection of children and teenagers, or protection of a large class of people including children and teenagers.)

The Rhode Island law did not pass the rigorous scrutiny that the plurality demanded. There was no evidence that the speech prohibition would have a *significant* effect on marketwide consumption,<sup>423</sup> the stated goal of the advertisement ban. In any case, alternative means of regulation that did not suppress speech could promote this goal.<sup>424</sup> The plurality also rejected *Posadas*: “[A] state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes . . .”<sup>425</sup> The plurality appears to have adopted what David Strauss has called the “persuasion principle”: the principle that the government may not regulate speech solely on the ground that it will persuade some people to engage in conduct that the government sees as harmful.<sup>426</sup>

In *Posadas*, the Court had reasoned that because the state had the greater power to ban casino gambling within its borders, it must also have the lesser power to ban the advertisement. The *44 Liquormart* Court responded that such reasoning ignores the command of the First Amendment:

The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.<sup>427</sup>

But as Justice O’Connor’s opinion illustrates, and as the plurality itself seems to concede,<sup>428</sup> it was not necessary to reject any aspect of the *Posadas* opinion. The Court might have preserved the greater-includes-the-lesser principle in this context but kept that principle in check with a “substantial interest” and “reasonable fit” test.

In sum, the plurality opinion is narrow and deep; Justice Thomas offers an approach that is both broad and deep; Justice O’Connor’s is

<sup>423</sup> See *id.*

<sup>424</sup> See *id.* at 1510.

<sup>425</sup> *Id.* at 1511.

<sup>426</sup> David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991).

<sup>427</sup> *44 Liquormart*, 116 S. Ct. at 1512–13.

<sup>428</sup> See *id.* at 1510–11.

narrow and shallow. Should the plurality have signed Justice O'Connor's narrower opinion? If we have full confidence in the plurality's reasoning, and full confidence that *Posadas* was wrong, the judicial adoption of the reasoning should not be cause for alarm. But if the reasoning seems questionable in particular applications, and if *Posadas* seems plausibly correct, the reasoning should not have been announced in a case that did not require its announcement.<sup>429</sup>

For the moment let us rest with some simple suggestions. Even truthful and technically nondeceptive commercial advertising may mislead people. The real question is whether many people will be misled by it and whether many more people will not be.<sup>430</sup> Moreover, the idea that commercial speech should be treated the same as political speech is historically unsupported. It is also doubtful in principle. The protection of commercial speech has a great deal in common with the protection of market arrangements in the *Lochner* era, and it has similar pitfalls.<sup>431</sup> In this light, the Court's general caution has made a great deal of sense, and in *44 Liquormart* the best course was Justice O'Connor's. The plurality's broader principle may create difficulties for the future, as in easily imaginable cases involving protection of teenagers from cigarette advertising or violent programming.<sup>432</sup> In *44 Liquormart*, there was no reason for the Court to create this risk.

### C. Death and Delegation

Dwight Loving killed two taxi drivers.<sup>433</sup> Because he was in the Army, he was tried for murder under Article 118 of the Uniform Code of Military Justice (UCMJ).<sup>434</sup> He was subject to the death penalty because the court-martial found that aggravating factors were present.<sup>435</sup> What made his case complicated was the fact that the set of aggravating factors had been identified not by Congress but by the President. The relevant statute said only that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by" the Code.<sup>436</sup>

<sup>429</sup> Justice Stevens conceded that the Court could have reached the same decision without applying the stricter standard laid out in the plurality opinion: "[E]ven under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal." *Id.* at 1510.

<sup>430</sup> See Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 681–82 (1985).

<sup>431</sup> Cf. Jackson & Jeffries, *supra* note 411, at 25–40 (arguing that notions of economic liberty do not justify according commercial speech full First Amendment protection).

<sup>432</sup> See, e.g., 21 C.F.R. § 897.25 (West, WESTLAW through Oct. 1, 1996).

<sup>433</sup> See *Loving v. United States*, 116 S. Ct. 1737, 1740 (1996).

<sup>434</sup> 10 U.S.C. § 918(1), (4) (1994).

<sup>435</sup> The court-martial found three aggravating factors: (1) premeditated murder committed during a robbery; (2) triggerman in a felony murder; and (3) two murders rather than one. See *Loving*, 116 S. Ct. at 1740.

<sup>436</sup> 10 U.S.C. § 856 (1994).

Loving contended that the death penalty was unconstitutional in his case because it had been issued under an unconstitutional delegation of legislative power to the President.<sup>437</sup> The Court rejected the contention. It reasoned that the Commander-in-Chief Clause entrusted the President with the authority to superintend the military, and that the delegated duty applied in an area that the Constitution already had assigned to the President.<sup>438</sup> Congress had authority to delegate to the President broad discretion to prescribe conditions on the use of capital punishment in military courts.<sup>439</sup>

*Loving* is a useful foil to the cases discussed thus far; it is a minimalist validation that might have been better as a minimalist, democracy-promoting invalidation. The Court could have issued a minimalist opinion ensuring that the death penalty would be imposed on American soldiers only pursuant to decisions made by Congress, not (realistically speaking) by bureaucrats. Viewed through the perspective afforded by three lines of precedent, the *Loving* case seems much harder than the Court acknowledged.

The first set of cases imposes stringent procedural protections on the imposition of the death sentence. In *Furman v. Georgia*,<sup>440</sup> the key opinions came from Justices who were not willing to strike down the death penalty in its entirety, but who followed the more minimalist path of requiring constraints on jury arbitrariness. They required a death penalty process that would limit discretion in imposing death sentences.<sup>441</sup> The second set of cases involves the delegation of discretionary authority to the executive branch. In two cases in 1935, most prominently *Schechter Poultry Corp. v. United States*, the Court struck down delegations that it considered open-ended.<sup>442</sup> These cases say that Congress may delegate its legislative powers to other officers only when such delegation is restrained by meaningful guidelines.<sup>443</sup>

In the third and in some ways most interesting line of cases, the Court has narrowly construed statutes in order to avoid constitutional questions.<sup>444</sup> These cases have become especially controversial in light

<sup>437</sup> See *Loving*, 116 S. Ct. at 1743–44.

<sup>438</sup> See *id.* at 1750–51.

<sup>439</sup> See *id.* at 1751.

<sup>440</sup> 408 U.S. 238 (1972) (per curiam).

<sup>441</sup> See, e.g., *id.* at 240–57 (Douglas, J., concurring); *id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring).

<sup>442</sup> See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 414–20 (1935).

<sup>443</sup> See *Schechter Poultry*, 295 U.S. at 529–31; *Panama Ref.*, 293 U.S. at 421–30. The nondelegation doctrine has played a modest but explicit role in a few more recent cases, if only in the context of statutory construction. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 645 (1980) (construing an act that delegated to the Secretary of Labor authority to promulgate occupational safety and health standards).

<sup>444</sup> See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988); *American Petroleum Inst.*, 448 U.S. at 645–46; *Kent v. Dulles*, 357 U.S. 116, 129–30 (1958).

of claims that they authorize courts to "bend" statutes even though there may be no constitutional defect.<sup>445</sup> But we can make more sense of such cases if we see that they reflect a concern about the exercise of open-ended executive discretion produced by an absence of congressional guidance on important questions. Such cases suggest that the nondelegation doctrine is not entirely dead; on the contrary, these cases are (modest and targeted) nondelegation cases, vindicating the doctrine where it is most important. They require a "clear statement" from Congress, thus prohibiting Congress from delegating to the executive, through ambiguously drafted statutes, the power to invade constitutionally sensitive domains. Congress itself must make that decision in a focused and particularized way. Thus *Kent v. Dulles* is directly related to *Schechter Poultry*.<sup>446</sup>

There is an additional point. A minimalist court is reluctant to reject focused and deliberate congressional judgments that a certain course is constitutionally acceptable. A court may uphold such judgments because of principles of deference and, in that way, "under-enforce" the Constitution. In the "clear statement" cases, the Supreme Court has recognized a domain in which it might not invalidate a deliberative congressional judgment but in which a broad delegation of authority will pose constitutional problems.<sup>447</sup> By steering ambiguous statutes away from that domain, the Court informs Congress that any intrusion will have to be supported by a focused legislative judgment, and not by an ambiguous delegation of discretionary authority to the President.<sup>448</sup>

When combined, the three lines of cases support the following argument on Loving's behalf. The Court will ordinarily allow Congress to grant a considerable amount of discretionary authority to the President; the modern delegation cases prove the point. But the death penalty decisions show that special procedural safeguards are necessary in capital sentencing. The factors that justify a decision of death should be chosen by the legislature, not by the President (in this context, bureaucrats of some kind, realistically speaking). Congress may not grant open-ended discretion to impose the death sentence to someone who is not, under the constitutional regime, the national law maker.

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<sup>445</sup> See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74.

<sup>446</sup> Compare *Schechter Poultry*, 295 U.S. at 529–42 (invalidating an overly broad delegation of authority), with *Kent*, 357 U.S. at 129–30 (narrowly construing an ambiguous delegation of congressional power).

<sup>447</sup> See, e.g., *Kent*, 357 U.S. at 129 (holding that all delegations of power to regulate the right to travel will be narrowly construed).

<sup>448</sup> Frederick Schauer offers a valuable criticism of the approach I am suggesting here. See Schauer, *supra* note 445, at 71. Schauer suggests that clear statement principles often operate to foreclose congressional judgments without requiring the Court to take on the responsibility associated with a constitutional ruling. See *id.* at 87–88, 94–96. The dangers of an excessive judicial role via principles requiring clear statements from Congress are real. But in the above cases, the application of the "clear statement" approach was guided by a genuine constitutional preference for nondelegation and thus was, I think, legitimate.

The authority for this proposition comes from the clear statement cases, which show that there is a problem from the standpoint of legitimacy when certain constitutionally sensitive decisions are made by the executive.

It therefore makes sense to say that if death is to be imposed on a member of the United States military, it must be as a result of a deliberate and specific decision by Congress, rather than by the President and his subordinates pursuant to a standardless, open-ended grant of power. Nothing in the Commander in Chief Clause compels otherwise, for nothing in that clause authorizes the President to impose criminal penalties without statutory authority.<sup>449</sup> The *Loving* case was not simple. But the Court might have done better to have issued a modern equivalent of *Kent v. Dulles*.

## IX. THE FUTURE

What is not ready for decision ought not to be decided.

Quill v. Vacco, 80 F.3d 716, 732  
(2d Cir. 1996) (Calabresi, J., concurring in the result).<sup>450</sup>

Rather than seeking an analogy to a category of cases, . . . we have looked to the cases themselves.

Denver Area Educational Telecommunications  
Consortium v. FCC, 116 S. Ct. 2374, 2388 (1996)  
(plurality opinion) (Breyer, J.).

This section attempts to apply the central ideas of this Foreword to three subjects of unusual importance with which future courts will inevitably grapple. These subjects are affirmative action, the right to die, and same-sex marriages. I do not mean to settle these issues here. Instead I mean to suggest, in a tentative way, how the project of leaving things undecided might bear on judicial treatment of these controversies. In all three contexts, I will be arguing for an approach that is narrow and shallow. The central factors in the first two cases are (1) the existence of a currently vibrant democratic debate, (2) the informational deficit faced by the courts, and (3) the wide variety of situations for which a simple constitutional rule makes little sense. In the case of same-sex marriage, unlike the first two, strategic or tactical considerations are especially important.

### A. Affirmative Action

The nation is in the midst of a large debate over race-conscious programs. Although much of this debate is occurring in democratic

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<sup>449</sup> See U.S. CONST. art. II, § 2, cl. 1.

<sup>450</sup> Cert. granted, 65 U.S.L.W. 3218 (U.S. Oct. 1, 1996) No. 95-1858).

arenas,<sup>451</sup> many people have vigorously urged the Supreme Court to resolve the controversy by invalidating such programs on constitutional grounds.<sup>452</sup> For the most part, the Court has taken a narrow and incompletely theorized course.<sup>453</sup> Very recently, the Supreme Court has been more ambitious, construing the Equal Protection Clause to require the most careful judicial scrutiny of any race-conscious program.<sup>454</sup> But the Court said that this form of scrutiny would not lead to automatic invalidation. It would not be "strict in theory, but fatal in fact."<sup>455</sup>

1. *Case-by-Case Analysis vs. Rules.* — Despite this cautionary note, it might be concluded, as the Fifth Circuit recently did in *Hopwood v. Texas*,<sup>456</sup> that the Court has come to understand the Equal Protection Clause to embody a principle of race neutrality.<sup>457</sup> All affirmative action programs might well be held to violate this principle,<sup>458</sup> including those in the educational system. In its remarkable decision striking down an affirmative action plan for the University of Texas Law School, the court of appeals held that race consciousness was acceptable only to remedy present effects of past discrimination.<sup>459</sup> Otherwise public universities must proceed on a race-neutral basis. Through Title VI, this view may extend to private universities as well.<sup>460</sup>

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<sup>451</sup> In November, 1996, Californians will vote on Proposition 209, which would change and largely eliminate many affirmative action programs. See *California Ballot Pamphlet: General Election November 5, 1996* (visited Oct. 26, 1996) <<http://Vote96.ss.ca.gov/Vote96/html/BP>>, see also S.26, 104th Cong. (1996) (sponsored by Sen. Helms) (seeking to amend the Civil Rights Act of 1964 to make preferential treatment based on race, color, sex, religion, or national origin an unlawful employment practice); H.R. 3190, 104th Cong. (1996) (sponsored by Rep. Franks) (seeking to prohibit federal agencies from requiring or encouraging preferences based on race, sex, or ethnic origin in connection with federal contracts).

<sup>452</sup> See, e.g., William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 778 (1979).

<sup>453</sup> See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 556–57, 589, 598 (1990) (upholding an FCC policy of awarding a "plus" for minority ownership in comparative proceedings for new licenses where the FCC considered six additional race-neutral factors, and upholding an FCC policy allowing licensees to transfer their licenses without a hearing to FCC-approved minority enterprises where the policy was not a fixed quota and applied to only a small fraction of licenses), *overruled in part* by *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 277–78, 283–84 (1986) (holding that societal discrimination alone was insufficient to justify a race-conscious state layoff policy, where there was no evidence of prior discrimination in hiring practices and where other less drastic means were available); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–20 (1978) (holding that a state university could not totally exclude nonminorities from a percentage of seats in an entering class, but that a race-conscious admissions process was not per se unconstitutional).

<sup>454</sup> See *Adarand*, 115 S. Ct. at 2113.

<sup>455</sup> *Id.* at 2117 (citation omitted).

<sup>456</sup> 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

<sup>457</sup> See *id.* at 939–40.

<sup>458</sup> See *Adarand*, 115 S. Ct. at 2118–19 (Scalia, J., concurring).

<sup>459</sup> See *Hopwood*, 78 F.3d at 949.

<sup>460</sup> See 42 U.S.C. §§ 2000d to 2000d–4a.

A court opinion outlawing affirmative action would invalidate the largely voluntary practices of thousands of educational institutions. What would be the basis for such an outcome? There are two possibilities. First, originalists might urge that an actual historical decision<sup>461</sup> should be used to foreclose democratic experimentation with race-conscious programs. The legacy of the Civil War, historically understood, is a ban on governmental use of race as a basis for the distribution of benefits and burdens.

Second, a general principle ("color blindness") might be rooted not in history but in an independent judicial judgment about constitutional meaning. On this view, the ban on race consciousness does not reflect a specific judgment of the Framers. Indeed, the Supreme Court opinions most antagonistic to affirmative action have not purported to be originalist, but instead have reflected a judicial understanding of the moral principle for which the Constitution is best taken to stand.<sup>462</sup> Such opinions are far removed in form and substance from the narrower, fact-intensive, minimalist approach characteristic of Justice Powell in the *Bakke* case.<sup>463</sup>

The conclusion that emerges from the discussion thus far is that this is a context in which the Supreme Court would be singularly ill-advised to issue a broad ruling. There are many kinds of affirmative action programs. These programs are exceptionally diverse, and from the standpoint of both policy and principle, some are far better than others. A blanket ban would make little sense. This is especially so in light of the fact that this is an area in which democratic institutions are far from inattentive. On the contrary, the nation has embarked on a large-scale debate about such programs.<sup>464</sup> That debate raises complex issues of both morality and fact. In this way the affirmative action problem is quite similar to the problem raised by single-sex programs. In both instances the wide range of potentially relevant issues is hard to handle through a simple, rule-like constitutional decree.

<sup>461</sup> There is, however, no evidence that the Equal Protection Clause was intended to stop affirmative action, and considerable evidence to the contrary. In fact, those who ratified the Fourteenth Amendment engaged in race-conscious remedial programs. See generally Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–88 (1985) (discussing the legislative history of the race-conscious programs of the Reconstruction era). It would be refreshing if some of the originalist Justices on the Court, who tend to oppose affirmative action on constitutional grounds, would either invoke some historical support for their views or acknowledge that although they do not approve of affirmative action in principle, they find no constitutional judgment that prohibits it.

<sup>462</sup> See, e.g., *Adarand*, 115 S. Ct. at 2112–13; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 631–33 (1990) (Kennedy, J., dissenting), overruled in part by *Adarand*, 115 S. Ct. 2097 (1995); *Fullilove v. Klutznick*, 448 U.S. 448, 522–26 (1980) (Stewart, J., dissenting).

<sup>463</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>464</sup> Cf. *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (arguing that the Court should not determine whether gender is a suspect classification, because submitting the Equal Rights Amendment to the states for ratification had created an opportunity for the issue to be decided via democratic institutions).

Ultimately the place of affirmative action programs should and will be decided democratically, not judicially. The history does not support an originalist attack on race-conscious programs.<sup>465</sup> And in view of the diversity of affirmative action programs, no clear-cut principle of (constitutionally relevant) political morality dooms all race consciousness. It would be an extraordinary form of judicial hubris for courts to invoke the Equal Protection Clause to require color blindness.

2. *The Passive Virtues*. — In the 1995 Term, the Court declined an opportunity to settle a significant part of the affirmative action controversy by refusing to hear the University of Texas's appeal in *Hopwood*. In an unusual concurring opinion, Justice Ginsburg, joined by Justice Souter, explained the grounds for denying certiorari.<sup>466</sup> Justice Ginsburg said that the University of Texas Law School had changed its admissions procedures from those involved in the case and that it did not seek to defend the program that the lower courts had invalidated.<sup>467</sup> The University of Texas complained not of the court of appeals' judgment but of its rationale. This was insufficient: "[W]e must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."<sup>468</sup>

Was the Court correct to deny certiorari in *Hopwood*? The answer is not simple. On the one hand, because the issue of affirmative action is not clearly settled by constitutional history or principle and is at the center of current political deliberations,<sup>469</sup> the Court does well to avoid an authoritative judicial ruling. On the other hand, the lower court's opinion appears to foreclose a range of possible programs in a large part of the country. Perhaps the Court should have taken the case to make clear that race neutrality is not required. But Justice Ginsburg was correct to say that it would have been inappropriate for the Court to confront the question in a context in which the very program at issue was not being defended.<sup>470</sup>

The broader point is that some of the Justices have undoubtedly been aware of the difficulty and variousness of the affirmative action problem and have chosen a minimalist approach for this reason. When it confronts race-conscious admissions policies in education, the Court should continue in this way. It should look for guidance to Justice Powell's *Bakke* opinion. It should proceed narrowly, looking

<sup>465</sup> See Schnapper, *supra* note 461, at 785–88. The constitutional attack on affirmative action programs by Justices Scalia and Thomas, without any investigation of history on their part, is one of the most disturbing features of their purported originalism.

<sup>466</sup> See *Texas v. Hopwood*, No. 95-1773 (U.S. July 1, 1996) (Westlaw, SCT database) (memorandum opinion of Ginsburg, J., with whom Souter, J., joined).

<sup>467</sup> See *id.*

<sup>468</sup> *Id.*

<sup>469</sup> See *supra* note 451.

<sup>470</sup> The *Hopwood* context is a good one for recalling the ban on advisory opinions. Because the University of Texas would not be defending its own program, any judgment by the Court would have an advisory quality.

closely at the details. It should economize on moral disagreement, refusing to resolve large-scale moral issues unless it is necessary to do so. This proposition does not suggest any particular outcome in any particular case. What it does suggest is that it would be a democratic disaster if the Court were to issue a broad ruling that foreclosed democratic debate.

### B. *The Right to Die*

We are in the midst of a constitutional attack on laws that forbid physician-assisted suicide.<sup>471</sup> But the right to die debate is in one sense significantly different from the debate over affirmative action. In the former context, the relevant laws have been on the books for a long time, and in some states they have not been revisited by recently elected officials.<sup>472</sup>

Do such laws invade a constitutional "right to privacy"? Many people and some courts think so.<sup>473</sup> Under *Roe v. Wade*, it might be urged that the government cannot legitimately interfere with self-regarding choices about what people should do "with their bodies," and that therefore the choice is for the individual, not for the state. Several courts have recently gone in this direction.<sup>474</sup>

Thus stated, the argument for a constitutional right to die raises many questions. For familiar reasons, the idea of substantive due process is textually awkward.<sup>475</sup> Even if there is a right to "substantive due process," it is not clear that this right encompasses or should encompass a right to die. Of course the individual interest can be very strong. But the situations in which a right to die might be asserted are widely variable, and legitimate considerations argue against recognizing a constitutional right. Perhaps some people choosing death would be confused, panicked, or myopic. Perhaps they would, in a relevant number of cases, choose irrationally, and in a way that reflects predictable short-term pressures. Perhaps some doctors would overbear their patients; the most appealing cases for physician-assisted suicide might be unrepresentative. Perhaps some families could not entirely be trusted, especially in view of possible conflicts of interest

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<sup>471</sup> See, e.g., *Quill v. Vacco*, 80 F.3d 716, 727 (2d Cir. 1996), cert. granted, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996) (No. 95-1858); *Compassion in Dying v. Washington*, 79 F.3d 790, 837 (9th Cir. 1996), cert. granted, 64 U.S.L.W. 3785 (U.S. Oct. 1, 1996) (No. 96-110).

<sup>472</sup> See *Quill*, 80 F.3d at 732, 735 (Calabresi, J., concurring).

<sup>473</sup> Cf. *Compassion in Dying*, 79 F.3d at 838-39 (stating that the liberty interest, which has roots in the privacy cases, prohibits the government from intruding into realms integral to personal autonomy).

<sup>474</sup> See *id.* at 801, 838-39; see also *Quill*, 80 F.3d at 727 (describing the longstanding right to refuse medical treatment in New York).

<sup>475</sup> See generally *ELV, supra* note 31, at 14-20 (arguing that the Supreme Court has erroneously invested the Due Process Clause with substantive content).

among family members.<sup>476</sup> Perhaps a prohibition on doctor-assisted death would have desirable effects on the norms of the medical profession, by inculcating the strongest possible pro-life culture. In any case, there are complex moral issues and contested empirical questions for which courts are unlikely to have clear answers.<sup>477</sup>

In view of the difficulty of the underlying issues — our now-familiar theme — courts should be extremely reluctant to resolve this issue with any broad rule. At this stage of the debate, they lack the necessary factfinding expertise and policymaking competence. Recent court decisions announcing a large-scale “right to die” are versions of the *Hopwood* case — a form of judicial hubris.<sup>478</sup> They contrast sharply with the Court’s own minimalist approach in the *Cruzan* case, where the Court, proceeding in good common law fashion, refused to do more than was necessary to resolve the concrete controversy.<sup>479</sup>

Does this mean that courts should leave the question to politics? Perhaps; that would hardly be an unreasonable view. This is probably an area for democracy-allowing maximalism or instead use of the passive virtues through a refusal by the Court to become involved. But there is an alternative, and it bears on the principal difference between the affirmative action controversy and the controversy over the right to die. Recall the claim that a court charged with making a constitutional decision in the midst of a highly charged issue of political morality should attempt not to preempt but instead to improve and catalyze democratic deliberation. In this context, Judge Calabresi has suggested an inventive solution<sup>480</sup> in a self-conscious attempt to promote a kind of dialogue between courts and the public. With Judge Calabresi, let us notice first that some of the relevant laws were enacted long ago. They were designed not to prevent doctor-assisted termination of certain medically hopeless cases but instead to prevent people from being accessories to suicide.<sup>481</sup> In the relevant period, sui-

<sup>476</sup> Consider the recent vote of the American Medical Association to continue its policy opposing doctor-assisted suicides. See *AMA Keeps Its Policy Against Aiding Suicide*, N.Y. TIMES, June 26, 1996, § C, at 9.

<sup>477</sup> For a good discussion, see RICHARD A. POSNER, AGING AND OLD AGE 235–61 (1995).

<sup>478</sup> It is therefore revealing that in *Compassion in Dying*, the court refers to Justice Brandeis’s dissenting opinion in *Olmstead v. United States* as “the second most famous dissent in American jurisprudence,” with a footnote saying that “[t]he most famous dissent, of course, was that of the first Justice Harlan in *Plessy v. Ferguson*. ” *Compassion in Dying*, 79 F.3d at 800 & n.12 (citation omitted) (citing *Olmstead v. United States*, 277 U.S. 438 (1928)). The ranking seems odd, as does the “of course”; Justice Holmes’s attack on substantive due process in *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting), vies with Justice Harlan’s opinion for the most honored position, and Justice Holmes’s opinion — “[t]he 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics” — raises questions about substantive due process as used in *Compassion in Dying*.

<sup>479</sup> See *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 277–78 (1990).

<sup>480</sup> See *Quill v. Vacco*, 80 F.3d 716, 743 (2d Cir. 1996) (Calabresi, J., concurring).

<sup>481</sup> See *id.* at 732 (suggesting that it is unclear whether these laws addressed physicians).

cide was genuinely considered a crime.<sup>482</sup> But this reason for the statutes no longer holds much weight, since enforcement of the anti-suicide laws has fallen into near-desuetude.<sup>483</sup> In any event, the current right to die cases are not simple cases of suicide, and human technology has developed a great deal, making possible forms of euthanasia that would have been unimaginable when the laws were first enacted.<sup>484</sup>

The central point, for those interested in democratic deliberation, is that in some states there may have been no recent or thorough legislative engagement with the underlying moral and technological issues. Does this bear on the constitutional question? It may well. A court might decide not to invalidate any and all legislative efforts to interfere with private choice, but to say more modestly that a state invoking old laws has not demonstrated an adequate reason to interfere with a private choice of this kind — unless and until a recent legislature is able to show that there is a sufficiently recent commitment to this effect to support fresh legislation.

Understood in this way, some imaginable right to die cases are reminiscent of *Griswold v. Connecticut*,<sup>485</sup> as that case is seen through the minimalist's lens. Recall that in *Griswold* the Court embarked on the task of taking large-scale positions on matters of political morality by speaking of the constitutional "right of privacy."<sup>486</sup> That right is both highly controversial and notoriously difficult to define. Instead, the Court in *Griswold* might have taken a very narrow approach. It might have said that laws that lack real enforcement and that appear (for that reason) no longer to reflect current political convictions cannot be used against private citizens with respect to decisions of this kind. A Court could so conclude without resolving the question whether a recent democratic judgment, supported by more than episodic or discriminating enforcement efforts, would be unconstitutional. In the fashion of *Kent v. Dulles*, *Hampton v. Mow Sun Wong*, and even *United States v. Virginia*, it could leave that question undecided.

The underlying, time-honored principle involves desuetude.<sup>487</sup> That principle has strong democratic foundations. It means that when an old law is practically unenforced because it does not receive sufficient public approval, ordinary citizens are permitted to violate it. In that way, they are permitted to call democratic attention to the space between the law as popularly conceived and approved and the law as it exists on the books.

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<sup>482</sup> See *id.* at 732–33.

<sup>483</sup> See *id.* at 734–35.

<sup>484</sup> See RICHARD A. POSNER, AGING AND OLD AGE 235–37 (1995).

<sup>485</sup> 381 U.S. 479 (1965).

<sup>486</sup> *Id.* at 485.

<sup>487</sup> See BICKEL, *supra* note 8, at 148–56.

I have suggested that in this way *Griswold* and the desuetude question can be linked with *Hampton v. Mow Sun Wong*. As we have seen, the problem in that case was the absence of sufficiently demonstrated public support for the enactment at issue; hence the Court effectively remanded the question to the President and Congress for fresh consideration. In other words, the Court objected to a legitimacy deficit; the solution consisted of an insistence that a decision of this kind, to be valid, required the support of a democratically accountable body. The same thing can be said for the question of desuetude. Here of course the problem is temporal rather than bureaucratic; it involves the absence of recent support rather than the absence of decision by a democratically accountable institution. But the basic problem — the legitimacy deficit — is the same.<sup>488</sup>

It is not at all clear that the idea of desuetude is well-suited to the right-to-die context; New York and Washington, for example, have grappled with the issue in the recent past. But the general idea has much potential.<sup>489</sup> It does not involve judicial prohibition. It puts the burden of deliberation on representative bodies accountable to the people. Probably the right to physician-assisted suicide should be rejected, but the notion of desuetude, if inapplicable on the facts, might be held in reserve for an appropriate occasion.

### C. Same-Sex Marriage

Does *Romer v. Evans* have implications for the current debate over same-sex marriage? Should courts pursue a minimalist path? As a practical matter, it is surely more likely that the Court would overrule *Hardwick* than that it would take the dramatic (and maximalist) step of saying that same-sex marriages must be allowed under the Equal Protection Clause. But after *Romer*, it is not altogether clear how a court should deal with an equal protection challenge.

To press especially hard on the institutional issues, let us make some very controversial assumptions. Let us assume that an equal protection challenge to the ban on same-sex marriages has a great deal of force.<sup>490</sup> Let us assume that *Romer v. Evans*, rightly understood

<sup>488</sup> Thus understood, the right to die cases can be closely linked with "actual purpose" review in *United States v. Virginia*. Recall that the central problem there was the absence of a showing that a recent legislature, acting without discriminatory motivations, had produced single-sex education for educational purposes. The Court refrained from deciding how it would handle a similar policy adopted by a legislature with an actual educational purpose in mind. By doing so, *United States v. Virginia* attempts to promote democratic deliberation in a way that is closely connected with the notion of desuetude; as I have noted, the case can even be understood as one of desuetude. A general discussion is Cass R. Sunstein, *The Right to Die*, 107 YALE L.J. (forthcoming Jan. 1997).

<sup>489</sup> See *Quill v. Vaco*, 80 F.3d 716, 734–35 (2d Cir. 1996) (noting recent discussions in New York); *Compassion in Dying v. Washington*, 49 F.3d 586, 590 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3785 (U.S. Oct. 1, 1996) (No. 96-110).

<sup>490</sup> For a general discussion, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 128–33 (1996).

and supplemented by the due process and equal protection holdings in *Loving v. Virginia*,<sup>491</sup> gives a great deal of support to such a challenge.<sup>492</sup> Of course this is not a necessary assumption. Perhaps the Court would say that the prohibition on same-sex marriage is certainly rational because it has been so longstanding. Perhaps the Court would say that marriage is legitimately reserved for relations between men and women. But let us assume that all of these responses are not, simply as a matter of substantive argument, convincing on the merits. If this is so, should the Court endorse the constitutional attack on the ban on same-sex marriages? There is a large question whether it should — not (we are now assuming) because the Court should be uncertain about the underlying principle, and not because the plurality of possible contexts confounds any simple rule, but because of the need for prudence in asserting even a correct principle against a democratic process that is not ready for it.<sup>493</sup>

As it operates in the courts, constitutional law is a peculiar mixture of substantive theory and institutional constraint.<sup>494</sup> Even if judges find the challenge to the ban on same-sex marriages plausible in substance, there is much reason for caution on their part. Immediate judicial invalidation of same-sex marriages could well jeopardize important interests. It could galvanize opposition and (predictably) lead to a strong movement for a constitutional amendment overturning the Court's decision. It could weaken the antidiscrimination movement itself as that movement is operating in democratic arenas.<sup>495</sup> It could provoke increased hostility and even violence against homosexuals. It would certainly jeopardize the authority of the judiciary.

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<sup>491</sup> 388 U.S. 1 (1967).

<sup>492</sup> Congress has recently enacted a Defense of Marriage Act, S. 1740, 142 Cong. Rec. H7480-05, which allows states to deny recognition to same-sex marriages consummated in other states. The Act raises many issues. See *Hearing on S. 1740 Before the Senate Comm. of the Judiciary*, 102d Cong. (1996) (statement of Cass R. Sunstein, Professor of Law, University of Chicago). For present purposes the most interesting issue involves the reach of *Romer v. Evans*. Congress has never enacted a statute authorizing states not to recognize marriages made in other states; in fact Congress has never enacted a statute allowing states not to recognize any judgments of other states. The issue of marriage has been sorted out by traditional common law principles, allowing states to deny recognition in certain circumstances on the basis of their own policy judgments. Congress's decision to allow nonrecognition here — unaccompanied by a decision to allow nonrecognition in other contexts including marriages involving minors or incestuous marriages — appears to be a form of impermissible selectivity of the sort found in *Romer*. A minimalist Court could reach this conclusion without concluding that same-sex marriages must be recognized under the Equal Protection Clause. See also Letter from Laurence H. Tribe to Sen. Edward Kennedy (May 24, 1996), in 142 CONG. REC. S5931 (1996) (regarding constitutionality of Defense of Marriage Act).

<sup>493</sup> To be sure, the Court might have difficulty in making the predictive judgments. Those judgments depend on speculative assessments of evolving social norms, and courts have no special expertise in making those assessments. But some cases raise clear concerns, and this observation is sufficient support for the argument that I am making here.

<sup>494</sup> See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1263 (1978).

<sup>495</sup> Cf. ROSENBERG, *supra* note 8, at 182-89 (discussing the reaction to *Roe v. Wade*).

Is it too pragmatic and strategic, too obtusely unprincipled, to suggest that judges should take account of these considerations?<sup>496</sup> Surely not. Prudence is not the only virtue; it is certainly not the master virtue. But it is a virtue nonetheless. At a minimum, courts should generally use their discretion over their dockets to limit the timing of intrusions into the political process. It also seems plausible to suggest that courts should be reluctant to vindicate even good principles when the vindication would compromise other interests, especially if those interests include, ultimately, the principles themselves. It would be far better for the Court to do nothing — or better yet, to start cautiously and to proceed incrementally.

Following *Romer v. Evans*, the Court might find — as some lower courts have done<sup>497</sup> — that government cannot rationally discriminate against people of homosexual orientation, without showing that those people have engaged in acts that harm any legitimate government interest. Following *Romer*, the Court might look with some care to test whether something other than hostility and animus are the basis for discrimination. Narrow rulings of this sort would allow room for public discussion and debate<sup>498</sup> before obtaining a centralized national ruling that preempts ordinary political process.

We can go much further. Constitutional law is not only for the courts; it is for all public officials. The framers' original understanding was that deliberation about the Constitution's meaning would be part of the function of the President and legislators.<sup>499</sup> Of course the Court's judgments are final in litigated cases, but all officials have a duty to maintain fidelity to the founding document. The post-Warren Court identification of the Constitution with the decisions of the Supreme Court has badly disserved the traditional American commitment to deliberative democracy. And in that system, elected officials should have a degree of interpretive independence from the judiciary, certainly outside of the context of litigated cases. They should sometimes fill the institutional gap created by the courts' inferior factfinding ability and policymaking competence.<sup>500</sup> For this reason, the Court may go less far than other branches even if all branches are acting in the name of the Constitution. Similarly, other branches may

<sup>496</sup> See Marc Fajer, *With All Deliberate Speed? A Reply to Professor Sunstein*, 70 IND. L.J. 39, 39–40 (1994).

<sup>497</sup> See *Steffan v. Aspin*, 8 F.3d 57, 67 (D.C. Cir. 1993); *Watkins v. United States Army*, 875 F.2d 699, 728–29 (9th Cir. 1989).

<sup>498</sup> Of course, discussion and debate can be promoted by maximalist decisions that broadly foreclose majoritarian outcomes. A public outcry often follows such decisions. Consider the responses to *Dred Scott*, *Lochner v. New York*, *Brown v. Board of Education*, and *Roe v. Wade*. The public deliberation that followed such decisions might provide a reason for applauding the decisions on democratic grounds. See DWORKIN, *supra* note 3, at 344–46 (discussing Learned Hand). But in such cases the discussion is by hypothesis futile, and for deliberative democrats, deliberation is best when accompanied by the power of decision.

<sup>499</sup> See SUNSTEIN, *supra* note 3, at 9–10.

<sup>500</sup> See Sager, *supra* note 494, at 1263–64.

conclude that practices are unconstitutional even if the Court would uphold them. In the area of same-sex marriages, this would be a good way to proceed.

### CONCLUSION

The upshot of appreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious. . . . Justice Breyer wisely reasons by direct analogy rather than by rule . . . .

Denver Area Educational Telecommunications  
Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2402 (1996)  
(Souter, J., concurring).

In this Foreword, I have explored the practice of minimalism in law. Minimalism is best understood as an effort to leave things open by limiting the width and depth of judicial judgments. Minimalist judges try to keep their judgments as narrow and as incompletely theorized as possible, consistent with the obligation to offer reasons. They are enthusiastic about avoiding constitutional questions; they like to use doctrines of justiciability, and their authority over their docket, to limit the occasions for judicial intervention into politically contentious areas; the ban on advisory opinions guides much of their work. They try to reduce the burdens of judgment for Supreme Court justices, to minimize the risks of error introduced by broad rules and abstract theories, and to maximize the space for democratic deliberation about basic political and moral issues. Minimalist courts also respond to the sheer practical problem of obtaining consensus amidst pluralism. This problem can produce minimalism in the form of incompletely-specified abstractions and incompletely-theorized, narrow rulings.

The question whether to leave things undecided helps to unite a number of seemingly disparate issues and problems in public law. Examples include doctrines of justiciability; the grounds for granting certiorari; the rules-standards debate; the "tiers" of constitutional scrutiny; "clear statement" principles in statutory construction; the void-for-vagueness and nondelegation doctrines; the uses of dicta; and so-called balancing vs. so-called absolutism. In each of these areas, minimalists and maximalists sharply diverge, in part because of different assessments of which route is most likely to minimize both the mistakes and the burdens of decision, in part because of competing judgments about what is required by democracy, properly understood.

Sometimes minimalism is a blunder; sometimes it can produce great unfairness. Whether minimalism makes sense cannot be decided in the abstract. The answer has a great deal to do with costs of decisions and costs of error. The case for minimalism is strongest when courts lack information that would justify confidence in a comprehensive ruling; when the need for planning is not especially insistent; when the decision

costs of an incremental approach do not seem high; and when minimalist judgments do not create a serious risk of unequal treatment. Thus minimalism is usually the appropriate course when circumstances are changing rapidly or when the Court cannot be confident that a broad rule would make sense in future cases.

There were important instances of minimalism in the 1996 Term. *Romer v. Evans* was insistently minimalist; the case may have planted a seed for future development, but it may not have. The Court's stated prohibition on measures based on "a bare desire to harm a politically unpopular group"<sup>501</sup> raises many questions, but it gets at the heart of what was wrong with Amendment 2. This idea also links the *Moreno-Cleburne-Romer* trilogy with a reasonable understanding of the Equal Protection Clause, one that bans state efforts to create a form of second-class citizenship. But the Court left this idea incompletely theorized, not least because the Court did not mention *Bowers v. Hardwick*. For the future, the best approach may well be to ground the Due Process Clause in tradition and the Equal Protection Clause in a tradition-correcting norm of civic equality. If things are understood this way, *Hardwick* was not overruled by *Romer v. Evans*. And if *Hardwick* was wrong, it is because it was a case of desuetude, and in that sense linked with *Kent v. Dulles* and *Hampton v. Mow Sun Wong*.

With this idea we can see an important strand in constitutional doctrine and an important form of minimalism: decisions that are not simply democracy-foreclosing or democracy-authorizing, but instead democracy-forcing. Such decisions promote both reason-giving and accountability. Implementing the liberal principle of political legitimacy, they attempt to model and to police the system of public reason. This idea connects the "clear statement" cases, the concern with desuetude, the void for vagueness and nondelegation doctrines, rationality review, and the requirement that certain forms of discrimination be justified by actual rather than hypothetical purposes.

With respect to affirmative action, the right to die, and same-sex marriages, the Court should eschew broad rules and proceed in a way that complements and does not displace democratic processes.<sup>502</sup> The Court should certainly avoid a broad rule of "color blindness"; this would be a singular form of judicial hubris. Nor should the Court at this stage create a broad-ranging right to die or say that same-sex mar-

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<sup>501</sup> *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1995) (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

<sup>502</sup> It may be tempting to think that democracy-forcing invalidation is an oxymoron. Invalidation might appear undemocratic by its very nature. As I have suggested, however, we should not identify outcomes of political processes with democracy, properly understood. For example, the process may have lacked sufficient accountability, *see Hampton v. Mow Sun Wong*, 426 U.S. 88, 103–05 (1976); *Kent v. Dulles*, 357 U.S. 116, 130 (1958), or sufficient deliberation and reason-giving, *see United States v. Virginia*, 116 S. Ct. 2264, 2276–82 (1996); *Romer v. Evans*, 116 U.S. 1620, 1628–29 (1996).

riages must be recognized. Instead it should proceed cautiously and incrementally.

Nothing I have said here denies that rules may make a good deal of sense and that in some cases diverse judges can and should converge on theoretically ambitious abstractions. These are some of the most glorious moments in any nation's legal culture. An inquiry into decision costs and error costs will sometimes argue against minimalism. I am stressing a narrower point. When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation. It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary. But the Court can certainly increase the likelihood that those solutions will be good ones. Sometimes the best way for the Court to do this is by leaving things undecided.

# COMMENT

## THE SOVEREIGN IMMUNITY “EXCEPTION”

*Henry Paul Monaghan\**

### I. INTRODUCTION

*Seminole Tribe v. Florida*<sup>1</sup> is the 1995 Term’s illustration of the importance that a narrow, but solid, five-Justice majority<sup>2</sup> of the Supreme Court attaches to the constitutional underpinnings of “Our Federalism.”<sup>3</sup> In *Seminole Tribe*, this majority declared that Congress lacks authority under its Article I, Section 8 regulatory powers to subject unconsenting states to suits initiated in federal court by private persons.<sup>4</sup> The very same majority had previously made clear its intention to implement the original constitutional understanding of a national government of limited powers,<sup>5</sup> especially when the national government attempted to “commandeer” state legislative and administrative processes.<sup>6</sup> This aversion to federal commandeering of state organs of government<sup>7</sup> moved the *Seminole Tribe* Court to build on its decision in *United States v. Lopez*<sup>8</sup> and further curb Congress’s Com-

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<sup>1</sup> 116 S. Ct. 1114 (1996).

<sup>2</sup> The majority consisted of the Chief Justice and Justices O’Connor, Scalia, Kennedy, and Thomas. It has broken ranks only once. In *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995), Justice Kennedy provided the fifth vote for a holding that states could not impose term limits or any qualifications for congressional office other than those set forth in the Constitution. See *id.* at 1852–66, 1872–75; see also Kathleen M. Sullivan, *The Supreme Court, 1994 Term — Comment: Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 78–81 (1995) (arguing that both the majority and the dissent in *Thornton* resorted to structural default rules regarding the balance of power between the states and the federal government because such rules act as a needed tiebreaker between an ambiguous text and history).

<sup>3</sup> *Younger v. Harris*, 401 U.S. 37, 44–45 (1971) (explaining that the concept of “Our Federalism” represents a system in which the national government seeks to vindicate and protect federal rights and interests in ways that do “not unduly interfere with the legitimate activities of the States”).

<sup>4</sup> See *Seminole Tribe*, 116 S. Ct. at 1122, 1128 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

<sup>5</sup> See *United States v. Lopez*, 115 S. Ct. 1624, 1626, 1634 (1995).

<sup>6</sup> See *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)) (internal quotation marks omitted).

<sup>7</sup> Again, the same majority assembled in *Seminole Tribe* as in *New York* (although this time minus Justice Souter) and those Justices were understandably concerned with Congress’s direction to a state governor “to bargain in good faith.” See *infra* p. 109.

<sup>8</sup> See *Lopez*, 115 S. Ct. at 1630–33 (holding that the Gun-Free School Zones Act, which prohibited possession of a gun in a school zone, exceeded Congress’s Commerce Clause authority because the proscribed activity did not substantially affect interstate commerce).

merce Clause power<sup>9</sup> — this time by withdrawing federal court remedial avenues for enforcement of a federal right against an unconsenting state.<sup>10</sup>

This Comment argues that, although *Seminole Tribe* inflates the rhetoric of “inherent state sovereignty,” the majority in fact left firmly in place the fundamental reality of state accountability in federal court for violation of federal law. After a brief overview of Eleventh Amendment doctrine and a review of the statute involved and the opinions in the case, this Comment presents other, more plausible rationales that the Court could have followed in *Seminole Tribe* and that could have led to either affirming or reversing the court of appeals. Next, the Comment outlines why I believe that the Court chose to forgo these admittedly easier possible avenues and instead based its decision on “background postulates” of state sovereign immunity from federal court suit. Essentially, I argue that *Seminole Tribe* reflects the Court’s desire to confront the federal-state relation question directly and to make a statement about state autonomy. Finally, I argue that, despite this symbolic statement to the contrary, little has changed after the *Seminole Tribe* decision because the rule of *Ex parte Young*<sup>11</sup> remains in full force. In suits for prospective relief, states are still accountable in federal court — through their officers — for the violation of federal law. In that sense, sovereign immunity has become a rare exception to the otherwise prevailing system of state governmental accountability in federal court for violations of federal law, an exception that many, including this author, find difficult to justify.

## II. SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT

The origin and development of the doctrine of state sovereign immunity have been presented many times.<sup>12</sup> It seems more helpful here to survey briefly the peaks and valleys of the legal landscape when *Seminole Tribe* reached the Eleventh Circuit and the Supreme Court.

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<sup>9</sup> Although *Seminole Tribe* arose under the Indian Commerce Clause, rather than the Interstate Commerce Clause, its effects clearly apply to both because it overruled *Union Gas*.

<sup>10</sup> See *Seminole Tribe*, 116 S. Ct. at 1134 (Stevens, J., dissenting) (noting that the majority’s decision not only precluded a federal remedy for the statute at issue, but also prevented Congress from providing a federal forum in a broad range of actions against the states). *But see Seminole Tribe*, 116 S. Ct. at 1131 nn.14 & 16 (pointing to three alternative methods of ensuring the states’ compliance with federal law).

<sup>11</sup> 209 U.S. 123 (1908).

<sup>12</sup> There seem to be nearly as many accounts as there are legal historians. For an excellent survey of the entire subject, including the relevant literature, see RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 994–1105 (4th ed. 1996) [hereinafter HART & WECHSLER], and RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 16–50 (Supp. 1996) [hereinafter HART & WECHSLER SUPPLEMENT].

### A. The Text of the Eleventh Amendment

The Eleventh Amendment provides: "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."<sup>13</sup> On its face, the amendment says nothing about sovereign immunity at all. In essence, it reads as a restriction on Article III's grant of jurisdiction to the federal courts.<sup>14</sup> Some have read this restriction to foreclose all Article III jurisdiction if a citizen of another state sues a state, even if the suit is prosecuted under federal rather than state law. Others take a "diversity" view: the amendment simply repeals pro tanto one of the original grants of diversity jurisdiction.<sup>15</sup> For them, the amendment is simply a limitation on party-based (state/noncitizen, state/alien) federal jurisdiction under Article III.<sup>16</sup> Under neither interpretation does the text support the notion that a state cannot be sued *by its own citizens* in federal court.

### B. *Hans v. Louisiana*

*Hans v. Louisiana*<sup>17</sup> held that a private person could not assert federal rights against a state *eo nomine* in the federal court without its consent — even if the plaintiff wished to sue his own state.<sup>18</sup> Depend-

<sup>13</sup> U.S. CONST. amend. XI.

<sup>14</sup> See U.S. CONST. art. III, § 2.

<sup>15</sup> See, e.g., David L. Shapiro, *The Supreme Court, 1983 Term — Comment: Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 67 (1984); see also *Seminole Tribe*, 116 S. Ct. at 1150 n.8 (Souter, J., dissenting) (endorsing the "diversity" view); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 286 (1985) (Brennan, J., dissenting) ("Those who have argued that the Eleventh Amendment was intended to constitutionalize a broad principle of state sovereign immunity have always elided the question of why Congress would have chosen the language of the Amendment as enacted to state such a broad principle."). See generally HART & WECHSLER, *supra* note 12, at 1052–55 (discussing the "diversity" interpretation of the Eleventh Amendment as reflected in *Atascadero* and *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987)).

<sup>16</sup> The origins of this approach extend back to *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). After holding that the Eleventh Amendment did not bar appellate jurisdiction over the case before it, the Court stated that should the Court "be mistaken [in this], the error does not affect the case" because the action, involving Virginians suing their *own* state, was outside the scope of the Amendment. *Id.* at 412. *Hans v. Louisiana*, 134 U.S. 1 (1890), rejected this analysis as dicta. See *id.* at 20.

<sup>17</sup> 134 U.S. 1 (1890).

<sup>18</sup> See *id.* at 15. The *Hans* doctrine, however, does not bar the Supreme Court's appellate jurisdiction over suits initiated in state courts, a rule that has its origin in *Cohens*, see 19 U.S. at 405–11. In fact, even prior to *Cohens*, the Court had exercised appellate jurisdiction in controversies between private persons and states, most notably in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). For an excellent discussion of the interaction between the Supreme Court's appellate jurisdiction and the Eleventh Amendment, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 13–29 (1988). The Court reaffirmed *Cohens* in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990): "The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from the state courts." *Id.* at 31.

ing upon one's understanding of history, *Hans* either created or revived the doctrine of state sovereign immunity.

In *Hans*, a state citizen sued under the district court's then recently conferred federal question jurisdiction based upon the state's failure to pay bond interest. The claim was that a state constitutional amendment barring interest payments on its bonds violated the Contracts Clause.<sup>19</sup> The Court concluded that the Eleventh Amendment precluded suits by in-state plaintiffs, quoting Hamilton's well known remarks in *The Federalist No. 81*:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . .<sup>20</sup>

The *Hans* Court acknowledged that the Eleventh Amendment was not literally applicable.<sup>21</sup> But the Court treated the amendment as expressing a general understanding that the majority in *Chisholm v. Georgia*<sup>22</sup> (another bondholder suit, albeit one based on the state law of assumpsit) had wrongly failed to recognize state sovereign immunity:<sup>23</sup> "This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court [in *Chisholm*]."<sup>24</sup>

In fact, the real force of the *Hans* Court's analysis rested upon a controversial reading of the Eleventh Amendment: in the Court's terms, the amendment barred federal court suits by noncitizens even when suing on federal rights.<sup>25</sup> On that premise, the Court concluded that it

<sup>19</sup> See U.S. CONST. art. I, § 10, cl. 1. The *Hans* Court seemed to assume that (in modern terms) the clause created an implied right of action.

<sup>20</sup> *Hans*, 134 U.S. at 13 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)). Hamilton was speaking specifically of a narrow but important concern: debt collection suits. He argued that by adoption of the Constitution, states would not be "divested of the privilege of paying their own debts in their own way." THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Although it has acknowledged the crucial role of fiscal concerns in the passage of the Eleventh Amendment, the Supreme Court has noted that the amendment also "emphasizes the integrity retained by each State in our federal system." *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 400 (1994).

<sup>21</sup> See *Hans*, 134 U.S. at 10.

<sup>22</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>23</sup> Like *Hans*, *Chisholm* was a suit against a state by a private person based upon a state default on its bond obligations. Unlike *Hans*, however, the suit was based entirely on state common law; no Contracts Clause claim was discussed. See *id.* at 420, 428; Hart & Wechsler, *supra* note 12, at 1047.

<sup>24</sup> *Hans*, 134 U.S. at 11.

<sup>25</sup> See *id.* at 10–11. The *Hans* Court noted that it had been "clearly established" in other cases that suits by noncitizens against a state were barred, even if they involved a federal question, *id.* at 10, but the Court in those cases may have been assuming that no constitutional Contracts Clause claim was being made. See HART & WECHSLER, *supra* note 12, at 1055 n.22.

would be anomalous ever to allow a state to be sued by its own citizens in federal court:

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.<sup>26</sup>

For the commentators urging a diversity view, however, any independent doctrine of sovereign immunity exists only as a matter of federal "constitutional" common law, which the courts may enforce only absent contrary direction by Congress.<sup>27</sup> Under this conception, *Hans* is downgraded to a default, "clear-statement rule" — a federal common law rule operative only until Congress clearly abrogates it.<sup>28</sup> Yet this interpretation of *Hans* seems quite strained.<sup>29</sup> The decision contains no suggestion that Congress could have altered the result by being clear about its intention to do so.<sup>30</sup>

### C. The Scope of Congressional Abrogation of State Immunity

Nonetheless, the Court has recognized at least one area in which Congress can override state sovereign immunity in federal court. In *Fitzpatrick v. Bitzer*,<sup>31</sup> the Court established that Congress could abrogate state sovereign immunity when implementing the enforcement

<sup>26</sup> *Hans*, 134 U.S. at 15.

<sup>27</sup> See Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10–30 (1975).

<sup>28</sup> HART & WECHSLER SUPPLEMENT, *supra* note 12, at 43; cf. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989) (opinion of Brennan, J.) (warning against an exaggerated reading of *Hans*), overruled by *Seminole Tribe*, 116 S. Ct. 1114 (1996). Justices Stevens and Souter appealed to this theory in their *Seminole Tribe* dissents. They argued that *Hans* dealt only with a constitutionally implied cause of action based on the Contracts Clause, and therefore never addressed the question of Congress's power to abrogate immunity; as a result, there was no constitutional barrier to congressional abrogation. See *Seminole Tribe*, 116 S. Ct. at 1137–39 (Stevens, J., dissenting); *id.* at 1153 (Souter, J., dissenting).

<sup>29</sup> "Hans was not expressing some narrow objection to the particular federal power by which Louisiana had been haled into court, but was rather enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the States retained their sovereign prerogative of immunity." *Union Gas*, 491 U.S. at 37 (Scalia, J., concurring in part and dissenting in part).

<sup>30</sup> "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States . . . . The suability of a State without its consent was a thing unknown to the law." *Hans*, 134 U.S. at 15–16. Only after its constitutional discussion did the *Hans* Court also note that Congress "did not intend to invest its courts with any new and strange jurisdiction." *Id.* at 18.

<sup>31</sup> 427 U.S. 445 (1976).

provisions of Section 5 of the Fourteenth Amendment.<sup>32</sup> In an opinion by then-Judge Rehnquist, the Court stated: "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority."<sup>33</sup> Given the history of states' discrimination against minorities, the Court correctly viewed a federal forum — and Congress's ability to provide one — as part and parcel of congressional remedial authority under Section 5 of the Fourteenth Amendment.

*Pennsylvania v. Union Gas Co.*<sup>34</sup> is the only other decision directly recognizing congressional power to abrogate a state's Eleventh Amendment immunity in suits by private parties, this time under the Interstate Commerce Clause.<sup>35</sup> The *Union Gas* plurality opinion produced considerable confusion, however, because Justice Brennan advanced justifications that pointed in quite different directions. The plurality noted that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States."<sup>36</sup> Justice Brennan insisted that "the congressional power thus conferred would be incomplete without the authority to render States liable in damages."<sup>37</sup> The states had, therefore, necessarily surrendered a degree of their sovereign immunity in 1789 as part of the constitutional plan.<sup>38</sup> Seemingly, this explanation would apply to all exercises of congressional regulatory authority under Article I, Section 8. However, Justice Brennan also said that "[i]t would be difficult to overstate the breadth and depth of the com-

<sup>32</sup> See U.S. CONST. amend. XIV, § 5.

<sup>33</sup> *Fitzpatrick*, 427 U.S. at 456. This reasoning was reiterated in *Seminole Tribe*. See *Seminole Tribe*, 116 S. Ct. at 1125. Although this rationale would apply to legislation based upon all amendments framed as limitations on state authority, it might be inapplicable to congressional legislation enforcing the Thirteenth Amendment. That amendment does not solely "embody limitations on state authority"; it applies to the federal government and private persons as well. See U.S. CONST. amend. XIII, § 1.

<sup>34</sup> 491 U.S. 1 (1989). Writing for the *Union Gas* plurality, Justice Brennan built upon his dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), in which he had advanced his view that the amendment was wholly inapplicable to litigants asserting a federal right:

[The Eleventh Amendment was adopted simply] to remedy an interpretation of the constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the *state law* of sovereign immunity on *state law* causes of action brought in federal courts . . . . The original constitution did not embody a principle of sovereign immunity as a limit on the federal power. There is simply no reason to believe that the Eleventh Amendment established such a broad principle for the first time.

*Id.* at 289 (emphasis added).

<sup>35</sup> See *Union Gas*, 491 U.S. at 19–20 (opinion of Brennan, J.).

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.* at 19.

<sup>38</sup> See *id.* at 19–20. For Justice Brennan, Article III did not constitutionalize state immunity, the Eleventh Amendment did not reinstate it, and Article I powers were layered over common law state sovereign immunity such that immunity could be abrogated.

merce power,”<sup>39</sup> suggesting that congressional power over interstate commerce was unique. Justice White’s enigmatic concurrence provided the necessary fifth vote.<sup>40</sup> Although he agreed with the result, he added, without explanation, that he did “not agree with much of [Justice Brennan’s] reasoning.”<sup>41</sup> Largely relying on *Hans*, four Justices dissented, in an opinion authored by Justice Scalia.<sup>42</sup>

### III. IGRA

*Seminole Tribe* concerned the Indian Gaming Regulatory Act (“IGRA”).<sup>43</sup> IGRA stems from the Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*,<sup>44</sup> which held that various federal enactments did not authorize enforcement of state legislation regulating Indian tribes’ operation of bingo and poker games on their reservations.<sup>45</sup> The Court found the state legislation to be “civil/regulatory,” as opposed to “criminal/prohibitory,”<sup>46</sup> and only the latter category of legislation fell within the federal statute’s jurisdictional grant.<sup>47</sup> *Cabazon* created a regulatory vacuum, because “existing Federal law d[id] not provide clear standards or regulations for the conduct of gaming on Indian lands.”<sup>48</sup> After considerable debate concerning the appropriate state role in the regulation of gambling on Indian reservations, Congress enacted IGRA. The primary legislative purpose was “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”<sup>49</sup> The Act defines classes of Indian gaming,<sup>50</sup> establishes the National Indian Gaming Commission to monitor and regulate some forms of Indian

<sup>39</sup> *Id.* at 20.

<sup>40</sup> See *id.* at 45 (White, J., concurring in part and dissenting in part).

<sup>41</sup> *Id.* at 57. “Doesn’t a Justice who casts the deciding vote have some obligation to provide an explanation that is intelligible to the legal community?” HART & WECHSLER, *supra* note 12, at 1102.

<sup>42</sup> See *Union Gas*, 491 U.S. at 29 (Scalia, J., concurring in part and dissenting in part). Justice Scalia was joined by the Chief Justice and Justices O’Connor and Kennedy.

<sup>43</sup> Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (1994)).

<sup>44</sup> 480 U.S. 202 (1987).

<sup>45</sup> See *id.* at 221-22.

<sup>46</sup> *Id.* at 209.

<sup>47</sup> See *id.* at 207-11.

<sup>48</sup> 25 U.S.C. § 2701(3) (1994).

<sup>49</sup> *Id.* § 2702(i). The Act also aimed to shield Indian gambling from the influence of organized crime “and other corrupting influences,” to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to ensure that gaming “is conducted fairly and honestly by both the operators and players.” *Id.* § 2702(2). Nonetheless, IGRA had an unanticipated by-product: it spurred gambling. One letter to the editor of the *New York Times* stated that IGRA “has backfired.” Nicholas Goldin, *Tribal Casinos Catalyzed Gambling’s Spread*, N.Y. TIMES, June 10, 1996, at A16 (letter to the editor) (“It is unlikely that Congress anticipated such a profound social and economic fallout from its decision to encourage tribal gambling.”).

<sup>50</sup> See 25 U.S.C. § 2703(6)-(8).

gaming,<sup>51</sup> and provides a tribal-state “compacting” procedure through which states may participate in the regulation of Indian gaming.<sup>52</sup>

IGRA divides Indian gaming into three “classes,”<sup>53</sup> the most important of which is class III.<sup>54</sup> Class III gaming includes house banking games like baccarat, chemin de fer, and blackjack, casino games like roulette, craps, slot machines, horse and dog racing, and lotteries.<sup>55</sup> So far as pertinent here, class III gaming activities are lawful on Indian lands if those activities are authorized (1) by an ordinance or resolution that is adopted by the governing body of the Indian tribe, (2) located in a state that permits such gaming, and (3) “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.”<sup>56</sup>

For class III gaming, IGRA prescribes a negotiating process. Upon receiving a request to form a tribal-state compact, a state “shall negotiate with the Indian tribe in good faith to enter into such a compact.”<sup>57</sup> However, to ensure that no covered state could preclude or unreasonably delay lawful Indian gaming, IGRA provides tribes with a remedy in the federal courts if no mutually satisfactory compact is achieved. IGRA states specifically:

[T]he United States district courts shall have jurisdiction over —  
 (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] . . . or to conduct such negotiations in good faith . . .<sup>58</sup>

After a tribe has introduced evidence that no tribal-state compact has been concluded and that the state did not respond to the tribe’s request to negotiate, or did not respond in good faith, “the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith.”<sup>59</sup> The district court may take into account factors

<sup>51</sup> See *id.* §§ 2704–2709.

<sup>52</sup> See *id.* § 2710(d).

<sup>53</sup> Class I gaming, which is governed and regulated solely by individual Indian tribes, *see id.* § 2710(a)(1), includes little more than “social games solely for prizes of minimal value.” *Id.* § 2703(6). Class II gaming, which is subject to certain federal regulations, *see id.* § 2710(b), includes bingo and comparable games, *see id.* § 2703(7)(A)(i), as well as non-banking card games where allowed by state law, *see id.* §§ 2703(7)(A)(ii)(I)–(II), 2703(7)(B).

<sup>54</sup> Class III includes “all forms of gaming that are not class I gaming or class II gaming.” *Id.* § 2703(8).

<sup>55</sup> See *id.*; 25 C.F.R. § 502.4 (1996).

<sup>56</sup> 25 U.S.C. § 2710(d)(1)(A)–(C). Certain additional minor requirements also apply. *See Seminole Tribe*, 116 S. Ct. at 1120.

<sup>57</sup> 25 U.S.C. § 2710(d)(3)(A). The Secretary of the Interior is authorized to approve any tribal-state compact resulting from a successful negotiation process. *See id.* § 2710(d)(8)(A). The Secretary may disapprove such a compact only if the compact violates any provision of IGRA, another federal law, or any trust obligations of the United States to Indians. *See id.* § 2710(d)(8)(B)(i)–(iii). The Secretary must publish notice of any approved tribal-state compact in the Federal Register. *See id.* § 2710(d)(8)(D).

<sup>58</sup> *Id.* § 2710(d)(7)(A)(i).

<sup>59</sup> *Id.* § 2710(d)(7)(B)(ii).

such as “the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.”<sup>60</sup>

The district court’s role is unusual. If the court concludes that a state failed to negotiate in good faith, the court “shall order the State and the Indian Tribe to conclude such a compact within a 60-day period.”<sup>61</sup> If they fail to do so, each party must submit to a court-appointed mediator a proposed compact containing its “last best offer.”<sup>62</sup> At this point, the district court’s role apparently comes to an end.

The mediator selects the compact that “best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court.”<sup>63</sup> Once the mediator has submitted the selected compact to the state and the tribe, the state has sixty days within which to consent to that compact.<sup>64</sup> If the state does consent, the compact is treated as a tribal-state compact entered into by agreement.<sup>65</sup> If the state does not consent, “the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures”<sup>66</sup> for the class III gaming “which are consistent with the proposed compact selected by the mediator, . . . the provisions of [IGRA], and the relevant provisions of the laws of the State.”<sup>67</sup>

#### IV. THE DECISION

After negotiations had broken down between Florida officials and the Seminole tribe — largely over the question of which types of gam-

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<sup>60</sup> *Id.* § 2710(d)(7)(B)(iii)(I). A state’s demand for taxing authority over the tribe or Indian land, however, is evidence of a failure to negotiate in good faith. *See id.* § 2710(d)(7)(B)(iii)(II).

<sup>61</sup> *Id.* § 2710(d)(7)(B)(iii). The National Labor Relations Act, of course, requires good faith in employment bargaining. *See* 29 U.S.C. § 160(e) (1994); *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2120–21 (1996). The relevance of labor law precedents would have had to be considered in this context. Interestingly, by the time the Supreme Court issued its opinion in *Seminole Tribe*, the district court had found that the Governor had bargained in good faith. *See Seminole Tribe*, 116 S. Ct. at 2122 n.6.

<sup>62</sup> 25 U.S.C. § 2710(d)(7)(B)(iv).

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* § 2710(d)(7)(B)(v)–(vii).

<sup>65</sup> *See id.* § 2710(d)(7)(B)(vi).

<sup>66</sup> *Id.* § 2710(d)(7)(B)(vii).

<sup>67</sup> *Id.* § 2710(d)(7)(B)(vii)(I). In his dissent, Justice Stevens suggested that the limited role of the federal courts authorized by IGRA was jurisdictionally vulnerable because of the role subsequently played by the Executive Branch. *See Seminole Tribe*, 116 S. Ct. at 2144–45 (Stevens, J., dissenting) (citing 25 U.S.C. § 2710(d)(7)(B)) (“[I]f the District Court determines that the State’s inflexibility constitutes a failure to negotiate in good faith, . . . the maximum sanction that the Court can impose is an order that refers the controversy to a member of the Executive Branch of the Government for resolution.”). This concern is unfounded. The Executive Branch cannot revise a court’s order or determinations. *See HART & WECHSLER, supra* note 12, at 104–06; *see also* Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2022–24 (1996) (discussing the history of the rule against executive revision of judicial decisions). *See generally* *HART & WECHSLER, supra* note 12, at 104–15 (collecting cases on finality of judicial decisions).

bling were permitted under Florida state law<sup>68</sup> — the tribe sued the state and its Governor. The defendants secured interlocutory review of the district court's denial of their motion to dismiss.<sup>69</sup>

In the Court of Appeals for the Eleventh Circuit, the tribe advanced several arguments about why the suit against Florida could be maintained, each of which was rejected in an opinion by Chief Judge Tjoflat.<sup>70</sup> The court first rejected the tribe's claims that Florida had consented to suit by adopting its own constitution, by ratifying the United States Constitution, and by participating in IGRA negotiations.<sup>71</sup> The court then turned to the decisive issue: congressional power to abrogate state sovereign immunity under the Indian Commerce Clause. After rejecting several "preliminary" arguments,<sup>72</sup> the court of appeals addressed *Union Gas*.<sup>73</sup> Openly dubious of the plurality opinion in *Union Gas*,<sup>74</sup> and recognizing that "a majority of the present Court [might] disagree with *Union Gas*,"<sup>75</sup> the court of appeals confined the scope of *Union Gas* to the Interstate Commerce Clause.<sup>76</sup>

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<sup>68</sup> See Brief of Respondents at 3–4, *Seminole Tribe* (No. 94-12); Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Seminole Tribe* (No. 94-12).

<sup>69</sup> See *Seminole Tribe*, 116 S. Ct. at 1121.

<sup>70</sup> See *Seminole Tribe v. Florida*, 11 F.3d 1016, 1022–29 (11th Cir. 1994).

<sup>71</sup> See *id.* at 1021–23.

<sup>72</sup> The tribe first claimed that IGRA had been enacted pursuant to the Fourteenth Amendment, because Congress had in effect set up a licensing system, such that the tribal license constituted both "liberty" and "property" within the meaning of the Fourteenth Amendment. *See id.* at 1025. But this argument "ignore[d] the discretionary nature of the compacting process envisioned by IGRA . . . [which] does not create an entitlement to operate gambling operations" that the Fourteenth Amendment would protect. *Id.* The court of appeals next rejected the tribe's claim that the statute was based not on the Indian Commerce Clause, but on the Interstate Commerce Clause itself, thereby bringing *Union Gas* directly into play. *See id.* at 1025–26. The court of appeals observed that although concerns about the role of organized crime were expressed in the statute, its aim was not to remove a burden on interstate commerce, but to ensure that Indian tribes benefited from the legislation. *See id.* at 1026.

<sup>73</sup> See *id.* at 1026.

<sup>74</sup> See *id.* at 1026–27 & n.12.

<sup>75</sup> *Id.* at 1027.

<sup>76</sup> *See id.* According to the court of appeals, this conclusion was "bolstered by the unique qualities that distinguish the Interstate Commerce Clause and the Indian Commerce Clause." *Id.* The court of appeals relied upon the reasoning in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), in which the Supreme Court stated that the two clauses "have very different applications." *Seminole Tribe*, 11 F.3d at 1027 (quoting *Cotton Petroleum*, 490 U.S. at 192) (internal quotation marks omitted). The purpose of the Interstate Commerce Clause was to promote free trade among the states, whereas the "central function" of the Indian Commerce Clause was "to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (quoting *Cotton Petroleum*, 490 U.S. at 192) (internal quotation marks omitted). The court of appeals also read *Union Gas* narrowly, granting "federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* This claim finds no support in the Supreme Court's previous decisions, as both the tribe and the United States pointed out in their briefs. *See* Brief for Petitioner at 21–23, *Seminole Tribe* (No. 94-12); Brief for the United States as Amicus Curiae Supporting Petitioner at 29–30, *Seminole Tribe* (No. 94-12).

With *Union Gas* out of the way, the court of appeals assumed that state sovereign immunity followed as a matter of course.<sup>77</sup>

#### A. Rejecting Union Gas

The Supreme Court affirmed, in an opinion by the Chief Justice.<sup>78</sup> For the majority, *Seminole Tribe* was simply a replay of *Union Gas*, which in turn was a judicial aberration that had to be overruled.<sup>79</sup> In order to reach the constitutional question, however, the Court had to address the preliminary issue of Congress's "clear intent" to abrogate.<sup>80</sup> Although the Court adhered to its requirement that Congress make its intention to abrogate state immunity "unmistakably clear in the language of the statute,"<sup>81</sup> the Court did not require Congress to refer explicitly to the Eleventh Amendment in the statute. Instead, the Court found that "the numerous references to the 'State' in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through IGRA to abrogate the States' sovereign immunity from suit."<sup>82</sup>

The Court was then ready to address head on the constitutional issue of Congress's power to abrogate state immunity. The Court first stated that it had found that private parties could summon unconsenting states to federal court under only two provisions of the Constitution<sup>83</sup> and that only the *Union Gas* Commerce Clause exception was implicated here. Both the tribe and the United States had sought to avoid substantial reliance upon *Union Gas*, apparently fearing that it might fail to command support. They had argued instead that the Indian Commerce Clause provides a firm basis for congressional au-

<sup>77</sup> See *Seminole Tribe*, 11 F.3d at 1028.

<sup>78</sup> See *Seminole Tribe*, 116 S. Ct. at 1133.

<sup>79</sup> "In the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law." *Id.* at 1128.

<sup>80</sup> The majority also noted at the outset that, in a suit brought directly against a state, any difference in the type of relief sought — an important distinction when state officials are sued, *see* *Edelman v. Jordan*, 415 U.S. 651, 663–71 (1974) — was irrelevant when the question was whether the Eleventh Amendment barred a suit that named the state. *See Seminole Tribe*, 116 S. Ct. at 1124. This doctrine defies explanation, even though it is surely supported by the Court's case law. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) (holding that the Eleventh Amendment barred the district court's injunction against the state and the Board of Corrections absent Alabama's consent to the filing of such a suit). Why principles that govern suits against state officials — which largely turn on the nature of the relief sought — are irrelevant simply because the state (rather than its official) appears on the caption of the complaint is not apparent. *See HART & WECHSLER, supra* note 12, at 1073 (questioning the justification for making federal court jurisdiction depend on whether the state or a state officer is the named defendant). The majority instructed us, however, that this result was necessary "to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe*, 116 S. Ct. at 1124 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

<sup>81</sup> *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted).

<sup>82</sup> *Seminole Tribe*, 116 S. Ct. at 1124.

<sup>83</sup> *See id.* at 1125 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–56 (1976) and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19–20 (1989) (opinion of Brennan, J.)).

thority. They had emphasized that congressional authority over Indian affairs is plenary; that, unlike the tepid restrictions of the dormant commerce clause, the Constitution leaves little room for any independent operation of state law on tribal reservations; and finally, and perhaps most importantly, that the United States has special responsibilities to the Indian tribes.<sup>84</sup> Their efforts to break free from the chains of *Union Gas* failed. After rather laconically addressing some of the arguments advanced,<sup>85</sup> the majority concluded that, for Eleventh Amendment purposes, “no principled distinction [can be] drawn between the Indian Commerce Clause and the Interstate Commerce Clause.”<sup>86</sup>

That conclusion was the prelude to *Union Gas*’s demise. Even though the principal dissent of Justice Souter disclaimed any reliance on *Union Gas* because of its lack of an authoritative opinion<sup>87</sup> (and, perhaps more importantly, because the dissent’s reasoning differed considerably from that employed by the *Union Gas* plurality<sup>88</sup>), the majority went out of its way to reject *Union Gas*.<sup>89</sup> The majority acknowledged, as the dissents insisted, that the text of the Eleventh Amendment itself did not literally apply,<sup>90</sup> but the majority emphasized that “[b]ehind the words of the constitutional provisions are postulates which limit and control.”<sup>91</sup> The Eleventh Amendment simply confirmed a “background principle” of state sovereign immunity in existence at the time of the framing of the Constitution, a principle that Congress cannot abrogate.<sup>92</sup>

The Court then held that there was also no available remedy for the tribe against the Governor under IGRA:

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<sup>84</sup> See Brief for Petitioner at 12–23, 31–36, *Seminole Tribe* (No. 94-12); Brief for the United States as Amicus Curiae Supporting Petitioner at 22–30, *Seminole Tribe* (No. 94-12).

<sup>85</sup> See *Seminole Tribe*, 116 S. Ct. at 1126.

<sup>86</sup> *Id.* at 1127.

<sup>87</sup> See *id.* at 1145 (Souter, J., dissenting).

<sup>88</sup> Compare *id.* at 1145–85 (focusing on federal question jurisdiction in the Eleventh Amendment context), with *Union Gas*, 491 U.S. at 13–23 (focusing on the Interstate Commerce Clause as abrogating the immunity of states).

<sup>89</sup> The majority noted that the *Union Gas* plurality “reached [its] result without an expressed rationale agreed upon by a majority of the Court,” *Seminole Tribe*, 116 S. Ct. at 1127; the decision “created confusion among the lower courts that have sought to understand and apply the deeply fractured decision,” *id.*; and the plurality’s rationale “deviated sharply from [the Court’s] established federalism jurisprudence and essentially eviscerated our decision in *Hans*” by converting it into no more than a clear statement requirement, *id.* The Court added that the effect of *Union Gas* was to allow Congress to expand the jurisdiction of the lower federal courts beyond what was permitted by Article III (the limited Fourteenth Amendment exception notwithstanding). See *id.* at 1127–28. Finally, the Court noted that Justice Souter’s dissent made no effort to defend the decision in *Union Gas*. See *id.* at 1128.

<sup>90</sup> See *id.* at 1122, 1129.

<sup>91</sup> *Id.* at 1129 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)) (internal quotation marks omitted).

<sup>92</sup> *Id.* at 1131.

Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary . . . . Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies . . . .<sup>93</sup>

Finding that Congress had not created a claim for relief against state officials, and refusing to imply one on its own, the Court found that the district court lacked jurisdiction to provide the relief that the tribe sought.<sup>94</sup>

### B. The Dissents

Justice Stevens's dissent reiterated the essentials of Justice Brennan's dissent in *Atascadero State Hospital v. Scanlon*.<sup>95</sup> Much of Justice Stevens's dissent consisted of meticulous analyses of Justice Iredell's opinion in *Chisholm v. Georgia* and of the majority opinion in *Hans v. Louisiana*, through which he sought to show that neither opinion had erected a constitutional foundation for sovereign immunity.<sup>96</sup> Justice Stevens insisted that the Court's "fundamental error" was "its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity 'has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment.'"<sup>97</sup> Although he suggested that, as a matter of stare decisis, he would adhere to a judge-made federal common law doctrine of sovereign immunity,<sup>98</sup> that common law doctrine could not bar Congress from abrogating state immunity when it clearly expressed its intention to do so.<sup>99</sup>

Joined by Justices Ginsburg and Breyer, Justice Souter wrote a thorough dissent.<sup>100</sup> After disclaiming any reliance upon *Union*

<sup>93</sup> *Id.* at 1132.

<sup>94</sup> *See id.*

<sup>95</sup> 473 U.S. 234 (1985). Although Justice Stevens had joined the *Atascadero* dissent, he acknowledged that reasonable people could conclude that the text of the Eleventh Amendment might bar even federal question actions brought against a state by noncitizens. *See Seminole Tribe*, 116 S. Ct. at 1134 (Stevens, J., dissenting).

<sup>96</sup> *See Seminole Tribe*, 116 S. Ct. at 1134 (Stevens, J., dissenting); *see also id.* at 1136 ("There is a special irony in the fact that the error committed by the *Chisholm* majority was its decision that this Court, rather than Congress, should define the scope of the sovereign immunity defense."). Justice Stevens also insisted that "*Monaco* is a most inapt precedent for the majority's holding today," *id.* at 1139, because that "case concerned a purely state law question to which the State had interposed a federal defense," *id.*

<sup>97</sup> *Id.* at 1142 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25 (1989) (Stevens, J., concurring)).

<sup>98</sup> *See id.* at 1142–44.

<sup>99</sup> *See id.* at 1144.

<sup>100</sup> Justice Souter's dissent, which was both exhaustive and exhausting, surveyed materials that no litigant had called to the Court's attention. *See id.* at 1145–85 (Souter, J., dissenting).

*Gas*,<sup>101</sup> Justice Souter silently rejected the plurality's reasoning in that case and instead endorsed a version of the *Atascadero* dissent.<sup>102</sup> In a bold move, he attacked *Hans* directly,<sup>103</sup> employing a lengthy analysis of the historical origins of sovereign immunity, numerous citations to commentators' analyses of the reception of the English common law into the United States, and a discussion of the nature of "We the People" who founded the Constitution.<sup>104</sup> Justice Souter concluded that the Eleventh Amendment bars litigation based on the status of the parties only — and only when they are suing on non-federal claims. The amendment, he argued, has no applicability to Article III federal question jurisdiction.<sup>105</sup> Like Justice Stevens, Justice Souter concluded that *Hans* could be preserved as a matter of stare decisis<sup>106</sup> but that it had no applicability when Congress clearly intended to abrogate state immunity.<sup>107</sup>

Justice Souter further argued that, even if the Eleventh Amendment shielded the state from suit, the doctrine of *Ex parte Young*<sup>108</sup> should provide relief for the tribe against the state Governor. Emphasizing the jurisdictional — rather than remedial — nature of the *Young* rule,<sup>109</sup> Justice Souter maintained that Congress's mentioning of the word "State" in the statutory scheme should "not limit the possible defendants to States and is quite literally consistent with the possibility that a tribe could sue an appropriate state official for a State's failure to negotiate."<sup>110</sup>

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<sup>101</sup> See *id.* at 1145 (noting that *Union Gas* did not produce a majority opinion). Justice Souter also may have rejected the *Union Gas* plurality because he disagreed with its rationale. See *supra* note 88 and accompanying text. Abandoning *Union Gas* troubled Justice Stevens. See *Seminole Tribe*, 116 S. Ct. at 1142 n.15 (Stevens, J., dissenting).

<sup>102</sup> See *id.* at 1145 (Souter, J., dissenting).

<sup>103</sup> See *id.* at 1153–56, 1159–78. "A critical examination of [*Hans*'s holding] will show that it was wrongly decided, as virtually every recent commentator has concluded." *Id.* at 1153.

<sup>104</sup> The majority dismissed Justice Souter's discussion as "disregard[ing] our case law in favor of a theory cobbled together from law review articles and [the dissent's] own version of historical events." *Seminole Tribe*, 116 S. Ct. at 1129–30. According to the majority, *Hans* was correctly decided, and, "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Id.* at 1129. The majority emphasized post-*Hans* case law, which, although involving no direct "holdings," radiated *Hans*'s conception of sovereign immunity. See *id.* at 1130. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Id.* at 1129. Justice Souter attacked this reliance on precedent by insisting not only that *Hans* did not deal with the power of Congress to abrogate state sovereign immunity, but also that "[t]he exact rationale to which the majority refers, unfortunately, is not easy to discern." *Id.* at 1156 (Souter, J., dissenting).

<sup>105</sup> See *Seminole Tribe*, 116 S. Ct. at 1150 (Souter, J., dissenting).

<sup>106</sup> See *id.* at 1159.

<sup>107</sup> See *id.* at 1159–60.

<sup>108</sup> 209 U.S. 123 (1908).

<sup>109</sup> See *Seminole Tribe*, 116 S. Ct. at 1182, 1184 (Souter, J., dissenting) ("*Young* did not establish a new cause of action . . . . It stands, instead, for a jurisdictional rule . . . .").

<sup>110</sup> *Id.* at 1183. In this regard, Justice Souter analogized IGRA to the federal habeas corpus regime under 28 U.S.C. § 2254, which requires "'the State,' by 'order directed to an appropriate

## V. OTHER POSSIBLE AVENUES

Had the Court forgone the path that it chose to pursue, other avenues — leading either to affirmance or reversal — would have been available to provide the Court with a firmer foundation upon which to base a decision than did the logic of *Hans*. First, the Court could have recognized Indian tribes as independent sovereigns, thus placing them outside the scope of the Eleventh Amendment's text. Second, the Court could have distinguished between the Indian and Interstate Commerce Clauses on the basis of their different histories and purposes. (This option would have postponed the fight over *Union Gas*.) Finally, the Court could have reached the same result (with the same states' rights rhetoric) by looking to the Tenth Amendment implications of IGRA.<sup>111</sup>

### *A. Indian Tribes as "Independent Sovereigns"*

The status of the plaintiffs could have been an important factor in *Seminole Tribe*. In *Blatchford v. Native Village of Noatak*,<sup>112</sup> an Indian tribe argued that, whatever the status of suits by individuals against states, the doctrine of sovereign immunity had no applicability to suits by "sovereigns against sovereigns."<sup>113</sup> *Hans* notwithstanding, suits against a state can be maintained by the United States and by sister states. In *Principality of Monaco v. Mississippi*,<sup>114</sup> the Court explained that the first exception was "inherent in the constitutional plan";<sup>115</sup> the second was "essential to the peace of the Union" and a "necessary feature in the formation of a more perfect Union."<sup>116</sup> How-

State official,' to produce the state court record if an indigent habeas petitioner argues that a state court's factual findings are not fairly supported in the record." *Id.* (quoting 28 U.S.C. § 2254(e) (1994)). This analogy, however, is suspect because the federal habeas statute mentions an order directed to a state official, and because habeas corpus claims have historically been understood as suits against the warden. Congress's directive to sue a "State" under IGRA lacks that text and history and was therefore properly construed to mean a suit against the state, but not against state officers.

<sup>111</sup> Respondents asserted such an objection based on the Tenth Amendment before the Eleventh Circuit, but the court refused to consider it because it had been raised for the first time on appeal. See *Seminole Tribe v. Florida*, 11 F.3d 1016, 1019 n.2 (11th Cir. 1994). The Supreme Court followed the same path, see *Seminole Tribe*, 116 S. Ct. at 1126 n.10, even though, in principle (albeit an increasingly diminishing one), respondents could defend the judgment on any ground consistent with the record. See *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 880 n.5 (1996).

<sup>112</sup> 501 U.S. 775 (1991).

<sup>113</sup> *Id.* at 780. On the distinctive aspects of tribal immunity from suit, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978). On the shrinking idea of tribal sovereignty, see L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 889–94 (1996), which argues that the consent paradigm is replacing older, territorial conceptions of tribal sovereignty.

<sup>114</sup> 292 U.S. 313 (1934).

<sup>115</sup> *Id.* at 329.

<sup>116</sup> *Id.* at 328–29; *accord Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 33 (1989) (Scalia, J., concurring in part and dissenting in part) (following *Principality of Monaco* and stating that the

ever, the *Principality of Monaco* Court went on to hold that this reasoning would not justify suits by foreign nations against individual states.<sup>117</sup> The tribe in *Blatchford* insisted that *Principality of Monaco* was distinguishable because Indian tribes were “more like States than foreign sovereigns.”<sup>118</sup> The Court rejected the analogy:

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. . . . [I]f the convention could not surrender the tribes’ immunity for the benefit of the *States*, we do not believe that it surrendered the States’ immunity for the benefit of the tribes.<sup>119</sup>

In *Blatchford*, however, the Court did not have to decide whether Congress could abrogate immunity — finding instead that Congress had not shown an “unmistakably clear intent” to do so.<sup>120</sup> In *Seminole Tribe*, the United States argued that Congress could abrogate state sovereign immunity, at least in situations implicating the rights of another sovereign — in this case, an Indian tribe.<sup>121</sup> None of the three opinions in *Seminole Tribe* mentioned this argument. Yet, to my mind, this argument is a persuasive one, and one that the historic approach to state sovereign immunity could readily have absorbed.

### B. The Different Natures of the Indian and Interstate Commerce Clauses

In *Seminole Tribe*, the tribe argued that the existence of the Indian Commerce Clause, as well as the fact that the Eleventh Amendment mentions nothing about suits by Indian tribes, meant that there was an implicit constitutional understanding that the Eleventh Amendment should not bar such suits:

Added now is another facet — the Indian Commerce Clause. “The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.” The relation of the Indian Commerce Clause and the Eleventh Amendment

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existence of a waiver of state immunity against suits by the United States and other states is inherent in the constitutional plan).

<sup>117</sup> See *Principality of Monaco*, 292 U.S. at 330–31. Suits against county and other local government subdivisions are also excepted. See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

<sup>118</sup> *Blatchford*, 501 U.S. at 782.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 786 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)) (internal quotation marks omitted). The Court avoided directly confronting the issue of congressional abrogation in *Blatchford* by holding that the judicial “clear statement” requirement was not satisfied, meaning that Congress’s intention to abrogate the states’ sovereign immunity was far from unambiguous. See *id.* at 786–88. The Court also refused to interpret 28 U.S.C. § 1362, the grant of federal jurisdiction in cases involving Indian tribes, to effectuate a bypass of state sovereign immunity. See *id.* at 783–84.

<sup>121</sup> See Brief for the United States as Amicus Curiae Supporting Petitioner at 26, *Seminole Tribe* (No. 94-12).

need not be anomalous or complex. The plain language of the Eleventh Amendment excludes tribes. The plain language and history of the Indian Commerce Clause supports a surrender of state sovereignty. *Hans v. Louisiana* need not, and does not, preclude the Seminole Tribe's federal court suit against the State of Florida.<sup>122</sup>

Evolution of doctrine in the sovereign immunity context has occurred, as in other areas of constitutional law, in the common law mode.<sup>123</sup> Given the fact that the language of the amendment does not forbid federal court jurisdiction, and that the Indian Commerce Clause has been interpreted elsewhere as giving Congress plenary authority with respect to the Indian tribes,<sup>124</sup> the Court could have readily accommodated the interests of the tribe in a very narrow holding based on the Indian Commerce Clause while saving the *Union Gas* fight for another day.<sup>125</sup>

Unfortunately, in sweeping away arguments based on the special nature of Indian tribes, the Court once again posited an intractable "there-ness" of an historical and unyielding principle of state sovereign immunity. The Court's approach perpetuates the belief that the doctrine of sovereign immunity is an historical given, an article of faith incapable of and not needing justification, neither as to its existence nor as to its scope.<sup>126</sup> In our time, however, state sovereign immunity is largely a body of judge-made law. "*Hans v. Louisiana* and *Ex parte Young* have forged powerful doctrines; the latter an acknowledged fiction, the former constructed on language which does not support its scope."<sup>127</sup> Precedents have "accreted" and the Eleventh Amendment is now "barnacled with case law."<sup>128</sup> Case law, however, is a process of accommodating competing interests, and the special nature of the Indian tribes and the

<sup>122</sup> Brief for Petitioner at 36, *Seminole Tribe* (No. 94-12) (citation omitted) (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886)). Another argument raised by the tribe and the United States was that the Indian tribes were a "special charge" or "dependency" of the United States. Brief for the United States as Amicus Curiae Supporting Petitioner at 24, *Seminole Tribe* (No. 94-12). This argument draws upon an analogy to a qui tam action which, it was argued, would not be barred by the Eleventh Amendment. *See id.*

<sup>123</sup> See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 393 (1981). This common law approach, however, should never go so far that the doctrine is irreconcilable with the text — the approach taken by the Court in *Hans* (and in *Seminole Tribe*). *See id.*

<sup>124</sup> *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

<sup>125</sup> Although less defensible, the Court could also have taken the position of the Eleventh Circuit — simply confining *Union Gas* to the Interstate Commerce Clause and finding no abrogation possible under the Indian Commerce Clause. Such a result would undoubtedly have seemed anomalous and would generally have signaled that *Union Gas*'s days were numbered, but it would have avoided the overruling of *Union Gas* until the question was squarely before the Court.

<sup>126</sup> For a dramatic recent example of this mindset, see *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994), overturning the district court's imposition of fees and costs on the United States for prosecutorial misconduct. For the court of appeals, the doctrine of sovereign immunity was "mandatory and absolute," *id.* at 764, and "must be applied mechanically, come what may," *id.*

<sup>127</sup> Brief for Petitioner at 36, *Seminole Tribe* (No. 94-12).

<sup>128</sup> Shapiro, *supra* note 15, at 61. Although it overturned *Union Gas*, *Seminole Tribe* left most of the important case law in place.

unique nature of the congressional power under the Indian Commerce Clause could readily have moved the tribe past the Eleventh Amendment bar.

### C. The Tenth Amendment

The Tenth Amendment may have provided a more secure foundation for the Court's federalism concerns with IGRA.<sup>129</sup> Although not free from controversy, the "anti-commandeering" doctrine of *New York v. United States*<sup>130</sup> is much more defensible on textual, structural and historical grounds than *Hans*. IGRA speaks specifically to states and orders them to bargain with Indian tribes. It seemingly rearranges state lawmaking authority by superseding the Florida state law that requires legislative approval of Indian tribe compacts.<sup>131</sup> In that sense it looks like a directive to a state legislature to ratify a court-initiated compact. (Could Congress provide that a governor's consent alone was a sufficient state commitment for the purposes of federal law?) Moreover, even if state law allowed a governor alone to conclude a compact, federal "commandeering" of a state's executive process raises political accountability questions similar to those that were raised in *New York*.<sup>132</sup> Finally, IGRA interferes with the state's judicial pro-

<sup>129</sup> The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In *New York v. United States*, 505 U.S. 144 (1992), the Court explained its Tenth Amendment concerns as follows:

The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

*Id.* at 156–57.

<sup>130</sup> See *New York*, 505 U.S. at 161–66.

<sup>131</sup> Florida argued that, "[i]f the legislature assumed the role of negotiator with the Tribes, the Legislature could not be sued under *Ex parte Young* because the Legislature is unquestionably 'the State.'" Brief of Respondents at 31, *Seminole Tribe* (No. 94-12). This claim is exaggerated; the legislature is no more "the state" than is the executive or the Florida Supreme Court. *Cf. Quern v. Jordan*, 440 U.S. 332, 355 (1979) (Brennan, J., concurring in the judgment) (noting that the Fourteenth Amendment grants Congress the power to enforce its prohibitions whether they be disregarded by the legislative, executive or judicial branches of the state); *Home Tel. & Tel. Co. v. City of L.A.*, 227 U.S. 278, 286 (1913) (stating that the Fourteenth Amendment is "addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power").

<sup>132</sup> The Court will have an opportunity to address the issue of federal commandeering of state law enforcement mechanisms in the 1996 Term. On June 18, 1996, the Court granted certiorari in *Printz v. United States* and *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), cert. granted, 116 S. Ct. 2521 (1996), to review a Ninth Circuit determination that the 1993 Brady Handgun Violence Control Act, Pub. L. No. 93-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)), could validly require state and local law enforcement officials to make "reasonable efforts" to ascertain whether prospective handgun buyers are legally disqualified from possessing handguns. See *Recent Case*, 109 HARV. L. REV. 1833, 1838 (1996) ("[T]he textual and structural underpinnings of our federal system suggest that under the *New York* rule, courts should hold

cess: federal court resolution of what state gaming law permitted would raise complex problems involving the interface of such interpretations with subsequent interpretations by the state courts.<sup>133</sup>

## VI. RHETORIC

The Supreme Court, however, chose to defend its result on the "background postulates" of "inherent state sovereignty." Why? Perhaps the Court's reasoning reflects a visceral feeling among the majority of the Court that the role of the states in our federal structure has been so diminished as to become unintelligible. This feeling would generate an instinctive reaction to protect — indeed, to create — a role for the states, even if that role became merely symbolic. One can readily understand this majority's Tenth Amendment concerns. The concept of a national government of limited powers was an important and pervasive aspect of the original understanding both in the Constitutional Convention and in the ratification debates.<sup>134</sup> And defining

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federal co-optation of the states' enforcement mechanisms . . . unconstitutional."); *see also* ACORN v. Edwards, 81 F.3d 1387, 1392–94 (5th Cir.) (holding that the Lead Contamination Control Act violates the Tenth Amendment by requiring states to establish programs for removal of lead contaminants from schools and day care centers), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 22, 1996) (No. 96-174). For a criticism of the Brady Act on policy grounds, see James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 101–04 (1995).

<sup>133</sup> The United States, however, sought to salvage the entire act by claiming that IGRA was simply an example of conditional preemption. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Seminole Tribe* (No. 94-12). The states were invited to participate, and if they did not, the only "penalty" suffered was the forfeit of any role in the regulation of Indian gaming. Assuming that this kind of legislation is valid, the submission of the United States is not a fair description of IGRA. Indeed, the government made that clear when, in responding to a claim that *Ex parte Young* did not involve discretionary duties, it emphasized the "mandatory" character of the duty to negotiate in good faith. *See id.* at 16. Respondents correctly argued that the United States sought to have it both ways. *See* Brief of Respondents at 33–34, *Seminole Tribe* (No. 94-12).

<sup>134</sup> In the Constitutional Convention, moderate nationalists ensured a constitutional plan in which the states would play a vital role. *See* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 139–47 (1996). For an excellent study of the subject, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 57–93 (1996). After describing the debates over representation in the Senate and in the House of Representatives, *see id.* at 57–83, Rakove states that, "[i]n the end, the framers could not avoid treating the states as constitutional elements of the polity; nor could they deny that simple residence in a state would establish the most natural bond of civic loyalty." *Id.* at 78. In addition, the state-centered and countermajoritarian amendment process of Article V was designed to make alterations in the terms of union difficult, notwithstanding the competing principle that the Constitution must provide for a realistic mechanism for change. *See* Monaghan, *supra*, at 143–46. Nonetheless, during the state ratification debates, fears of a powerful new "consolidated" national government were widely expressed by the Constitution's opponents. *See* RAKOVE, *supra*, at 181–88; Monaghan, *supra*, at 147–56. "Federalists" of all shades (including both Madison and Hamilton, the federalists of *The Federalist*) countered by defending the Constitution as creating a national government of only limited powers, thus adopting the view of the Convention's moderate nationalists. *See* Monaghan, *supra*, at 149–51. "Responding quickly to Anti-Federalist sentiment, the Federalists deflected the state-centered attack

the proper limits on national power has been an important and contested issue throughout our history,<sup>135</sup> as both the Civil War<sup>136</sup> and the New Deal<sup>137</sup> graphically demonstrate.

Independent of the Tenth Amendment context, however, the majority's Eleventh Amendment federalism concerns are far more difficult to explain. The *Seminole Tribe* majority recognized that nothing in the language of the Eleventh Amendment (or in Article III) bars federal court suits to enforce federal rights brought against unconsenting states by their own citizens.<sup>138</sup> However, the majority fell back upon *Principality of Monaco* for the proposition that "[b]ehind the words of the constitutional provisions are postulates which limit and control."<sup>139</sup> These "postulates" include the notion that controversies must have a justiciable character and that states are immune from suit without their consent, except in instances in which such immunity was surrendered in the constitutional plan.<sup>140</sup>

But even if these "postulates" exist, what is their significance or role when Congress clearly acts to abrogate state sovereign immunity? *Seminole Tribe* acknowledged that, with one exception, the Court had not applied these postulates to the question of congressional power to abrogate state sovereign immunity, but it concluded that "consideration of that question must proceed with fidelity to this century-old doctrine."<sup>141</sup> I believe that the Court rejected clear constitutional text in preference to unarticulated and debatable historical explanations because of the power of symbolism. This may have the effect of making the other, political branches of the federal government — and the people — aware that the status of states should be treated with extra care when constructing future legislation. In this regard, the "advisory

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by, in effect, embracing it." *Id.* at 149. See generally RAKOVE, *supra*, at 188–201 (discussing the federalists' theoretical and practical arguments in support of their conception of federalism).

<sup>135</sup> For an elegant and wide-ranging exploration and defense of the contemporary importance of "Our Federalism," see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

<sup>136</sup> See *id.* at 28.

<sup>137</sup> See, e.g., *United States v. Darby*, 312 U.S. 100, 123–24 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34–38 (1937).

<sup>138</sup> See *Seminole Tribe*, 116 S. Ct. at 1122. *Seminole Tribe* thus continues the general practice, begun in *Hans v. Louisiana*, 134 U.S. 1 (1890), of relying on the amendment to support an expansive notion of state sovereign immunity, despite acknowledging that the amendment's language does not provide textual support for such a broad reading. See also *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974) (noting the divergence between the amendment's text and the doctrine).

<sup>139</sup> *Seminole Tribe*, 116 S. Ct. at 1129 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)); see also *id.* at 1122 (explaining that the principle of state sovereignty, and the corollary principle that no state can be sued by an individual without its consent, make up the two-part "presupposition" underpinning the text of the Eleventh Amendment). But see *id.* at 1152 n.13 (Souter, J., dissenting) (arguing that an appeal to background principles and postulates ordinarily cannot overcome the plain meaning of the constitutional text, especially the relatively clear jurisdictional provisions of Article III).

<sup>140</sup> See *id.* at 1129 (quoting *Principality of Monaco*, 292 U.S. at 322–23).

<sup>141</sup> *Id.*

character”<sup>142</sup> of the Court’s opinion may well work as a catalyst for political and social change.

## VII. REALITY

Despite their symbolism, constitutional conceptions of state sovereign immunity have no apparent reality. In the main, the Eleventh Amendment is concerned only with forum selection: should states be sued in state or federal courts? Although state courts are available — indeed required — to hear suits against states for the violation of federal claims, a federal forum also generally remains available for suits against states via their officers. Therefore, it is only in rare instances that a state will be unaccountable for its wrongs in any court of law.

### A. Defensible Justifications for Sovereign Immunity?

*Seminole Tribe* relied heavily, if not exclusively, on the principle of sovereign immunity to support its interpretation of the Eleventh Amendment. Although courts and commentators have offered several justifications for the concept on both functional and historical grounds, none appears convincing. Indeed, any doctrine of state sovereign immunity strains both the traditional conception of the rule of law, which emphasizes governmental accountability to courts of law,<sup>143</sup> and national supremacy, which generally presumes that Congress can entrust enforcement of whatever rights it can validly create to the national courts.<sup>144</sup> *Seminole Tribe* offered no functional justification whatsoever for its vigorous protection of state sovereign immunity; in-

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<sup>142</sup> *Id.* at 1145 (Stevens, J., dissenting).

<sup>143</sup> See, e.g., HART & WECHSLER, *supra* note 12, at 1002 (“Many scholars have argued that the doctrine of sovereign immunity, as it had evolved in England prior to 1789, was less about whether the Crown or its agents could be sued, than about how.”); Shapiro, *supra* note 15, at 62; see also *Seminole Tribe*, 116 S. Ct. at 1142–44 (Stevens, J., dissenting) (discussing the “questionable heritage” of the sovereign immunity doctrine and its unsuitability in a democratic nation).

<sup>144</sup> The Court established this presumption over 150 years ago:

[T]he legislative, executive and judicial power of every well constructed government, are co-extensive with each other; that is, they are potentially co-extensive. . . . [Article III] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.

*Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 818–19 (1824); see also *Seminole Tribe*, 116 S. Ct. at 1154 (Souter, J., dissenting) (arguing that *Hans* “destroyed the congruence of judicial power under Article III with the substantive guarantees of the Constitution, and with the provisions of statutes passed by Congress in the exercise of its power under Article I”). However, in his *Union Gas* opinion, Justice Scalia countered:

[T]he Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws. But since the Constitution does not deem this to require that private individuals be able to bring claims against the *Federal Government* for violation of the Constitution or laws . . . it is difficult to see why it must be interpreted to require that private individuals be able to bring such claims against the *States*.

*Pennsylvania v. Union Gas Co.* 491 U.S. 1, 33–34 (1989) (Scalia, J., concurring in part and dissenting in part) (citations omitted), overruled by *Seminole Tribe*, 116 S. Ct. 1114 (1996).

stead, it chose to rely on the particularly dissatisfying rationale of the "inherent nature" of a sovereign's immunity from suit.

1. *"Inherent" and Historical Rationales for Sovereign Immunity.* — As did the Court in *Hans*, the *Seminole Tribe* majority cited *The Federalist No. 81* for the proposition that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."<sup>145</sup> The historical conception of "sovereignty" itself is problematic enough,<sup>146</sup> but the word "inherent" is both meaningless and misleading. At least in the context of the historical conception of sovereignty, the word has no content; the "inherent" unamendability of sovereigns to suit is an attribution made by the writer, not a "property" of the "entity" described. In fact, in a democratic republic, it is not apparent why the presumption is not completely reversed. Should not accountability to the people — both to the majority at the polls and to wronged individuals in the courts — be "inherent in the nature of sovereignty"?

In the early years of the Republic, some justices believed that the doctrine of sovereign immunity was incompatible with our republican institutions. In *Chisholm v. Georgia*,<sup>147</sup> Chief Justice Jay expressed concern that the feudal doctrine of sovereign immunity was antagonistic to the idea that sovereignty resides in the people:<sup>148</sup> "The same feudal ideas run through all [of Europe's] jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here . . . ."<sup>149</sup> Justice Wilson thought the concept of sovereign immunity conflicted with the rule of law underlying our republican form of government.<sup>150</sup> Indeed, Justice Wilson believed that the idea of state sovereignty had an inaccurately symbolic quality to it: "The states, rather than the people, for whose sakes the states exist, are frequently the objects which attract and arrest our principal attention. . . . Sentiments and expressions of this inaccurate kind prevail in our common . . . language."<sup>151</sup> The current Court, however, still clings to these formalistic (or perhaps medieval) "[s]entiments and expressions"<sup>152</sup> of state sovereignty — the same ones

<sup>145</sup> *Seminole Tribe*, 116 S. Ct. at 1130–31 n.13 (quoting THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

<sup>146</sup> See Monaghan, *supra* note 134, at 165–69.

<sup>147</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>148</sup> See *id.* at 470–73 (opinion of Jay, C.J.).

<sup>149</sup> *Id.* at 471. "[A]t the revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . . and have none to govern but themselves . . ." *Id.* at 471–72.

<sup>150</sup> See *id.* at 461–66 (opinion of Wilson, J.).

<sup>151</sup> *Id.* at 462. "A State I cheerfully admit, is the noblest work of man: But man himself, free and honest, is, I speak as to this world, the noblest work of God." *Id.* at 463.

<sup>152</sup> *Id.* at 462.

that Justice Wilson (a member of the Committee on Detail at the Constitutional Convention<sup>153</sup>) rejected over two hundred years ago.<sup>154</sup>

*2. Executive Discretion as a Rationale for Sovereign Immunity.* — Apart from the “inherent” justifications, and the now infrequently voiced expressions of concern for the public fisc,<sup>155</sup> a number of scholars have posited that sovereign immunity is necessary to prevent excessive judicial interference with executive discretion.<sup>156</sup> The crux of this argument is that the government could never accomplish its work — at least democratically — if its citizens were continually forcing it into court to account for its actions.<sup>157</sup> Of course, the “executive discretion” rationale does not explain why immunity is in fact the exception rather than the rule, or even why other measures — such as limiting the damages available in suits against the sovereign — would not be equally effective. Instead of offering any empirical proof, the partisans of this argument assert its validity without considering the extensive areas in which a sovereign has consented to liability and has still been able to carry out the democratic will. In the federal context, for example, Congress has extensively waived sovereign immunity for the United States.<sup>158</sup> Congress and the courts have never let the immunity of the United States present a significant litigation barrier, ex-

<sup>153</sup> See Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 57 n.20 (1962).

<sup>154</sup> This sovereignty rhetoric seems particularly pointless in the waiver context, in which the Court has insisted that waivers of sovereign immunity be strictly construed. For example, last Term in *Lane v. Pena*, 116 S. Ct. 2092 (1996), the Court, by a 7-2 majority, held that the United States had not waived its sovereign immunity to a damage claim based upon an executive agency's violation of the Rehabilitation Act of 1973 and its amendment. *See id.* at 2100. The Court acknowledged that the petitioner's various arguments had “superficial appeal,” *id.* at 2096, and were “not without some force,” *id.* at 2100, and that “[t]he statutory scheme on which [petitioner] hinge[d] his argument is admittedly somewhat bewildering,” *id.* at 2098. The Court, however, rejected any finding of waiver because there was no waiver “unequivocally expressed in statutory text,” and because “a waiver . . . [must] be strictly construed, in terms of its scope, in favor of the sovereign.” *Id.* at 2096; *see also* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 776-80 (arguing that this harsh doctrine as applied to the federal government's waivers only took firm hold in 1991).

<sup>155</sup> For a rare defense of sovereign immunity as a legislative trade-off between compensation for litigants and other legitimate demands on the public fisc, see Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 937 (1988). Whatever the merits of this argument, protection of the public fisc certainly did not appear to be a major concern of the Court in *Seminole Tribe* (after all, did the state not stand to gain money for its treasury if it had concluded a compact?), or in the 1995 Term. *See United States v. Winslow Corp.*, 116 S. Ct. 2432, 2472 (1996) (deciding a contract dispute claim against the United States even though the government's potential liability ran into the billions of dollars).

<sup>156</sup> Professor Woolhandler describes this as a “discretion” model of sovereign immunity, the purpose of which is to protect “the decisionmaking processes of the official.” Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 398 (1987). As others have observed, sovereign immunity is a heavy, “blunt” tool for allaying such concerns. *See, e.g.*, Shapiro, *supra* note 15, at 79.

<sup>157</sup> *See* Woolhandler, *supra* note 156, at 411.

<sup>158</sup> *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 702 (1994); Tucker Act, 28 U.S.C. §§ 1346, 1491 (1994); Federal Tort Claims Act, 28 U.S.C. § 2675 (1994).

cept in suits for money damages.<sup>159</sup> The difference between holding the United States liable and holding a state liable (on a federal claim) is, therefore, a question of judicial federalism — whether states should be held liable for federal claims in *federal* court — rather than one of the merits of sovereign immunity itself.

### B. Reich and the Availability of State Courts

In large measure, the Eleventh Amendment operates only as a forum selection clause. Because the Eleventh Amendment doctrine prohibits federal claims against states sued in their own name from being heard in federal court, it necessitates that plaintiffs either recast their claims as suits against state officers or bring them in state court. In *Reich v. Collins*,<sup>160</sup> decided in the 1994 Term, a unanimous Court made clear that state courts must provide adequate relief when state officials deprive persons of their property in violation of federal law, irrespective of "the sovereign immunity States traditionally enjoy in their own courts."<sup>161</sup> Congress may now be forced to remove certain suits against unconsenting states from exclusive federal jurisdiction, perhaps in areas such as copyright and bankruptcy.<sup>162</sup> In this way,

<sup>159</sup> See HART & WECHSLER, *supra* note 12, at 1027–41. In 1976, Congress waived sovereign immunity in suits seeking relief other than money damages against federal agencies and officials, and specifically authorized naming the United States as a defendant. See Pub. L. No. 94-574, § 1, 90 Stat. 2721, 2721 (1976) (amending 5 U.S.C. § 702); HART & WECHSLER, *supra*, at 1036–39. But cf. *Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996) (holding that Congress did not waive sovereign immunity in a damage suit under § 504(a) of the Rehabilitation Act of 1973); Nestor M. Davidson, Note, *Constitutional Mass Torts: Sovereign Immunity and the Human Radiation Experiments*, 96 COLUM. L. REV. 1203, 1206–26 (1996) (discussing the significant gaps in the scope of governmental waivers in the tort context).

<sup>160</sup> 115 S. Ct. 547 (1994).

<sup>161</sup> *Id.* at 549. To the extent that the Court "suggested" in a footnote, see *Seminole Tribe*, 116 S. Ct. at 1131 n.14, that state "consent" is necessary to suit in state court, see HART & WECHSLER SUPPLEMENT, *supra* note 12, at 46, the suggestion is plainly wrong. However, the relief that the state courts must provide in such cases is not necessarily a money judgment. In tax refund cases, such as *Reich*, the state may satisfy its constitutional duty by retroactively eliminating any impermissible discrimination. See HART & WECHSLER, *supra* note 12, at 850–52. Of course, in claims for damages, a suit in state court is ordinarily cast against state officials, not the state, such that state sovereignty issues may not be implicated at all. See, e.g., *Reich*, 115 S. Ct. at 547. Nonetheless, suits against "the state" and state-wide entities are not uncommon. See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612–14 (1981) (coal producers and some of their utility customers suing the state in state court for refunds of severance taxes).

<sup>162</sup> See Susan D. Raively, Note, *Copyright Infringement Suits Against States: Is the Eleventh Amendment a Valid Defense?*, 6 CARDozo ARTS & ENT. L.J. 501, 504 (1988) ("If the Supreme Court maintains its current policy of upholding eleventh amendment immunity, a state could plead the eleventh amendment and not be sued for copyright infringement."). Copyright presents the most salient illustration. A copyright is property and, as such, is protected by federal legislation and the Fourteenth Amendment against state interference. Due to infringements at the state university level, Congress amended federal copyright law to ensure that copyrightholders could sue state entities. See Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) (codified at 17 U.S.C. §§ 501(a), 511 (1994)). The Fifth Circuit sustained the legislation on the authority of *Union Gas*, but the Supreme Court vacated and remanded in light of *Seminole Tribe*. See *Chavez v. Arte Publico Press*, 59 F.3d 539, 546 (5th Cir. 1995), *vacated and remanded*,

the federal government may come to rely upon state courts, with the possibility of Supreme Court review,<sup>163</sup> to enforce these federal rights against the states.<sup>164</sup>

### C. The Continuing Vitality of *Ex Parte Young*

*Ex parte Young*<sup>165</sup> long ago confirmed that citizens seeking prospective relief in suits against "the state" could simply recast their complaints as suits against state officials<sup>166</sup> and bring them in federal court, "notwithstanding the obvious impact on the State itself."<sup>167</sup>

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<sup>165</sup> 116 S. Ct. 1667 (1996). Given the exclusive nature of federal court jurisdiction, a copyright plaintiff cannot sue state entities in state court and hope to rely on the line of authority that requires a state to provide effective redress for impairing a federally created property right.

The *Seminole Tribe* majority, however, was entirely untroubled by these concerns. It pointed out, in footnotes, that prospective relief against state officials to ensure future compliance with federal law is available under *Ex parte Young*, see *Seminole Tribe*, 116 S. Ct. at 1131 n.14, but that "there is no established tradition in the lower federal courts of allowing enforcement of [copyright laws] against the States." *Id.* at 1131 n.16. Possible solutions may be that Congress could invoke the Fourteenth Amendment or authorize *qui tam* actions on behalf of the United States by private copyright holders. See Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 556–64 (1995); cf. HART & WECHSLER, *supra* note 12, at 316–22 (suggesting state capacity to sue based on *parens patriae* claims for relief). Whether the *Seminole Tribe* majority would permit so transparent an evisceration of its holdings is unclear. Congress could, of course, amend the statute to remove the federal court exclusivity bar when the state is a defendant, or when the state treasury is expected to make payment. See *Papasan v. Allain*, 478 U.S. 265, 278 (1986) ("Relief that in essence serves to compensate a party injured in the past by an action of a state official . . . that was illegal under federal law is barred even when the state official is the named defendant."). If a federal proceeding resulted in a determination of liability, normal preclusion principles would take hold; thus, the state court could not redetermine the liability determination or the amount of damages. Congress might also be able to grant federal courts the power to stay the state court proceeding to ensure that federal courts make liability determinations. See 28 U.S.C. § 2283 (1994).

<sup>163</sup> See *supra* note 18.

<sup>164</sup> See, e.g., *Reich*, 115 S. Ct. at 549; *Ward v. Board of County Comm'r's*, 253 U.S. 17, 21–23 (1920); *General Oil Co. v. Crain*, 209 U.S. 211, 226–28 (1908).

<sup>165</sup> 208 U.S. 123 (1908). It is important to note that although this doctrine is often referred to as the *Ex parte Young* doctrine, *Young* did not "establish" the doctrine. It simply reconciled, or rationalized, the Court's prior precedents. See *id.* at 150–60 (reviewing prior cases in which the Court attempted to discern whether the suit in question had been brought against the state or one of its officials). *Young*'s author, Justice Peckham, also wrote *Lochner v. New York*, 198 U.S. 45 (1905). Although *Lochner* established the Fourteenth Amendment as a basis for suit against state economic legislation, *Young* ensured an adequate judicial mechanism for such suits by limiting the applicability of Eleventh Amendment immunity in certain instances. However, *Young* took pains to make clear that it was not sacrificing the Eleventh Amendment for the sake of the Fourteenth: "We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant." *Young*, 209 U.S. at 150. As discussed below, it seems quite clear that *Young* effected a substantial limitation on Eleventh Amendment immunity, notwithstanding Justice Peckham's opinion to the contrary.

<sup>166</sup> See *Young*, 209 U.S. at 149–50. The opinion's opening sentence stated that the Court understood fully the "great importance of the case, not only to the parties now before the court, but also to the great mass of the citizens of this country." *Id.* at 142.

<sup>167</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 (1984) (construing *Young*). However, *Pennhurst* repudiated decades of settled understanding and held that the *Young* doctrine does not apply to (and thus the Eleventh Amendment bars) suits against state officials to

*Young* sapped state sovereign immunity of any real bite, leaving only a narrow domain within which to operate.<sup>168</sup> *Young*'s well-known fiction is that, when a state official violates valid federal law, he is "stripped of his official or representative character and [is] subjected in his person to the consequences of his individual conduct."<sup>169</sup> Everyone now recognizes that nothing but a fiction is involved,<sup>170</sup> one designed, as the Court subsequently recognized, "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'"<sup>171</sup> *Young* is "an exception" (a massive, judge-made exception) to the Eleventh Amendment.<sup>172</sup>

To characterize *Young* as an exception, however, gets matters nearly backward: the Eleventh Amendment is an exception to *Young*.<sup>173</sup> Because *Young* explicitly proceeded on the premise that the Fourteenth Amendment had not narrowed the Eleventh Amendment,<sup>174</sup> the Court's reasoning extended to the prospective vindication

compel their compliance with state law. *See id.* at 103–06. In the *Pennhurst* Court's view, because a federal court's grant of relief against state officials on the basis of state law does not vindicate the supreme authority of federal law, and because such an action represents a great intrusion on a state's sovereignty, the justification for the *Young* doctrine "disappears" in the context of state law. *See id.* at 106. *See generally* Shapiro, *supra* note 15, at 84–85 (criticizing *Pennhurst* for approaching the sovereign immunity doctrine with an unjustified deference and for substantially limiting the accountability of government officials to individuals harmed by a violation of state law).

<sup>168</sup> The narrow domain consists, *inter alia*, of suits that for some reason cannot be recast against a state official, *see Seminole Tribe*, 116 S. Ct. at 1132; suits in which the official's duty is only discretionary, *see Young*, 209 U.S. at 158; suits in which the only remedy requested is retrospective money damages that would be paid from the state treasury, *see Edelman v. Jordan*, 415 U.S. 651, 664–71 (1974); and suits against a state official for a violation of state law, *see Pennhurst*, 465 U.S. at 103–06. (In the second example, the doctrine is, of course, unnecessary.)

<sup>169</sup> *Young*, 209 U.S. at 160. The Eleventh Amendment thus did not bar a suit against a state officer:

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.

*Id.* at 159.

<sup>170</sup> Although some have recognized "a fictive quality" inherent in the *Young* doctrine, CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD M. COOPER, FEDERAL PRACTICE & PROCEDURE § 3524, at 154 (2d ed. 1984), it is, on the contrary, a "fiction that there ever existed a broad doctrine of sovereign immunity that, outside of a few specific areas, barred relief at the behest of individuals complaining of government illegality." HART & WECHSLER, *supra* note 12, at 1015–16.

<sup>171</sup> *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). Professor Shapiro has indicated that the fiction might be a "silver lining" that prevents a troublesome enlargement of sovereign immunity. Shapiro, *supra* note 15, at 84–85.

<sup>172</sup> Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993). "The doctrine of *Ex parte Young* . . . is regarded as carving out a necessary exception to Eleventh Amendment immunity." *Id.*

<sup>173</sup> *See* HART & WECHSLER, *supra* note 12, at 1015–16.

<sup>174</sup> *See supra* note 165.

of all federal rights, including rights created under Article I, Section 8. The law reports are, accordingly, full of suits against public officials to enforce federal statutory rights.<sup>175</sup> *Seminole Tribe* will have no significant impact on the actual authority of federal courts to enforce these federal laws prospectively against states in suits by private persons. In *Seminole Tribe*, the tribe named the Governor of Florida as an additional defendant;<sup>176</sup> both the tribe and the United States relied heavily on *Young*.<sup>177</sup> Indeed, the United States opened its argument with a discussion of *Young*'s applicability to the case and suggested that the Court need not even address the issue of the state's suability.<sup>178</sup> Although the *Seminole Tribe* majority ultimately found *Young* inapplicable,<sup>179</sup> the Court gave no indication that it intended to question *Young*. Quite to the contrary, the majority reaffirmed *Young* in several instances.<sup>180</sup> Thus, the Court's opinion should not radiate much uncertainty in the *Young* context.<sup>181</sup>

Yet *Seminole Tribe*'s majority, despite professing fidelity to *Young*, did find *Young* to be something of a public relations problem. If the suit could be maintained against the Governor but not against the state, then when all was said and done the Court's sharp divisions over sovereign immunity concerned only the caption on the tribe's complaint.<sup>182</sup> Confronted with *Young*, the Eleventh Circuit had asserted that *Young* did not authorize suits to force an official "to undertake a discretionary task."<sup>183</sup> The court of appeals stressed that governors had discretion under IGRA not only over the content of a

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<sup>175</sup> See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 653 (1974).

<sup>176</sup> See *Seminole Tribe*, 116 S. Ct. at 1121.

<sup>177</sup> See Brief for Petitioner at 23–31, *Seminole Tribe* (No. 94-12); Brief for United States as Amicus Curiae Supporting Petitioner at 12–19, *Seminole Tribe* (No. 94-12).

<sup>178</sup> See Brief for the United States as Amicus Curiae Supporting Petitioner at 12–19, *Seminole Tribe* (No. 94-12); *id.* at 19 n.5.

<sup>179</sup> See *Seminole Tribe*, 116 S. Ct. at 1132–33.

<sup>180</sup> See *id.* at 1131 nn.14 & 16, 1133 n.17.

<sup>181</sup> Hopefully, the Court will reassert the validity of *Young* in *Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244 (9th Cir. 1994), cert. granted, 116 S. Ct. 1415 (1996), which involves a suit against the state and state officials by individuals who assert a federal claim to possession or ownership of property and who seek to quiet title in the tribe to beds, banks and waters of all navigable water courses within the 1873 boundaries of the tribe's reservation. *See id.* at 1247. The district court dismissed the tribe's complaint, and the court of appeals affirmed dismissal with respect to the state. *See id.* at 1247–48. The court of appeals also held that the state officials could be required to comply with federal law for the future. *See id.* at 1251. For a discussion of the possible preclusive effect in state court of federal court determinations of state liability, see note 162 above.

<sup>182</sup> Cf. David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 151 n.11 ("People are not likely to amend constitutions just to change captions on complaints.").

<sup>183</sup> *Seminole Tribe v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994) (citing *Young*, 209 U.S. at 158).

potential compact but also (it believed) over whether to bargain at all.<sup>184</sup>

The discretion argument bristles with difficulties. At the remedial stage, for example, state implementation of federal court decrees often assumes the exercise of significant discretion by state officials.<sup>185</sup> Framed, however, in terms of the underlying substantive obligation, the discretion argument becomes more attractive: the negotiating "duty" IGRA imposed is, as respondents suggested, too indefinite in nature to be capable of judicial enforcement.<sup>186</sup> If that is so, IGRA would violate Article III's case or controversy requirement, not the Eleventh Amendment.<sup>187</sup>

Before the Supreme Court, respondents relied upon the Eleventh Circuit's discretion analysis.<sup>188</sup> The tribe and the United States countered that there was a federal statutory requirement that the Governor negotiate in good faith. The Governor had discretion as to the terms of the compact, not over whether to negotiate.<sup>189</sup> Whatever the merits of this controversy, the majority avoided it. Instead, drawing on its *Bivens* jurisprudence,<sup>190</sup> the Court concluded that Congress intended IGRA's remedial scheme to be exclusive: "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.<sup>191</sup> Otherwise, the limited duty and the "quite modest set of sanctions" Congress imposed would be "superfluous."

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<sup>184</sup> See *id.* at 1028–29. The court of appeals also concluded that IGRA authorized a suit against the state, rather than an officer, because it did not directly impose duties on any specific state officer. See *id.* at 1029. The *Young* doctrine was thus inapplicable. See *id.*

<sup>185</sup> Legislative redistricting provides a good example. Cf. *Vera v. Bush*, No. CIV. A. H-94-0277, 1996 WL 442314, at \*12–\*13 (S.D. Tex. Aug. 6, 1996) (ordering interim redistricting of congressional districts after Texas failed to adopt a remedial redistricting plan despite a Supreme Court ruling that current voting districts were unconstitutional).

<sup>186</sup> See Brief of Respondents at 32–33, *Seminole Tribe* (No. 94-12). Respondents argued that if the state could refuse to negotiate, willingness to negotiate would itself be discretionary. Therefore, negotiating "is not a ministerial duty for which a mandatory injunction will lie." *Id.* at 32.

<sup>187</sup> The complaint must assert a claim of right sufficiently definite to be judicially enforceable. See *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 430–32 (1987) (holding that an enforceable right must be "sufficiently specific and definite"); see also Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 243, 248 (1991) (comparing the nature of enforceable primary federal statutory rights with those enforceable under § 1983).

<sup>188</sup> See *Seminole Tribe*, 11 F.3d at 1028–29; Brief of Respondents at 31–35, *Seminole Tribe* (No. 94-12).

<sup>189</sup> See Brief for Petitioner at 25–29, *Seminole Tribe* (No. 94-12); Brief for the United States as Amicus Curiae Supporting Petitioner at 15–17, *Seminole Tribe* (No. 94-12).

<sup>190</sup> In *Bivens*, the Court held that the petitioner was entitled to money damages from federal officers for injuries resulting from federal agents' Fourth Amendment breach. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

<sup>191</sup> *Seminole Tribe*, 116 S. Ct. at 1132.

ous" because *Young* provided "more complete and more immediate relief," including sanctions for contempt.<sup>192</sup>

At first blush, the *Seminole Tribe* Court's analysis of *Young* is unconvincing.<sup>193</sup> Surely Congress would prefer some federal court remedy to no remedy.<sup>194</sup> And why should *Young* necessarily entail a remedial scheme different from IGRA's? Jurisdiction to hear (which *Young* helps to secure by removing the Eleventh Amendment bar) and the appropriate remedy, once jurisdiction is exercised, result from different inquiries. IGRA could be read to define the scope of the available rights and remedies. Yet this analysis might raise a further problem, namely, the extent to which Congress can eliminate the contempt power once it decides to confer jurisdiction on the federal courts.<sup>195</sup> Or is the response that no "contempt" could occur because the duty to negotiate was, as the United States said, a "conditional one"?<sup>196</sup>

The majority was correct in rejecting an underlying action against the Governor in *Seminole Tribe*, although I would put its point differently: the suit against the Governor failed to state a claim for relief.<sup>197</sup> To see why, we must return to *Young* itself. Simplified, *Young* involved railroad shareholders seeking to enjoin the state attorney general from enforcing state railroad rates on the ground that they were confiscatory.<sup>198</sup> State law precluded any other effective way to make such a challenge.<sup>199</sup> *Young* did more than simply rationalize the Court's prior precedents limiting state sovereign immunity; it also necessarily assumed the existence of an implied right of action for equitable relief against state officials. This right was grounded in the

<sup>192</sup> *Id.* at 1132–33.

<sup>193</sup> Though the Court may have been concerned that a federal court might have held the Governor in contempt for following state law, *Young* creates the same predicament.

<sup>194</sup> See HART & WECHSLER SUPPLEMENT, *supra* note 12, at 47.

<sup>195</sup> "Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 116 S. Ct. 1777, 1780 (1996).

<sup>196</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Seminole Tribe* (No. 94-12).

<sup>197</sup> Justice Souter's dissent acknowledged that *Young* could be limited in actions based on federal statutes, but he vigorously denied that IGRA had done so. See *Seminole Tribe*, 116 S. Ct. at 1180–81 (Souter, J., dissenting). Justice Souter argued that "[n]o clear statement of intent to displace the doctrine of *Ex parte Young* occurs in IGRA." *Id.* at 1181. He also claimed that Congress could not "possibly have intended to jeopardize the enforcement of the statute by excluding application of *Young*'s traditional jurisdictional rule." *Id.* at 1184. He objected to any doctrine of implied congressional displacement of *Young*. See *id.* at 1180. Justice Souter's approach, however, would cause a dramatic shift in the Court's jurisprudence; the Court apparently would have to return to the days before *Cannon v. University of Chicago*, 441 U.S. 677 (1979), see *infra* note 203, when it regularly inferred causes of action from statutes. Such a change is unwarranted. In promulgating IGRA, Congress was aware of its obligation to create a remedy; still, it chose not to act to give a claim for relief against state officials. Given this legal landscape, it is not clear under Justice Souter's reasoning how Congress would *not* create a remedy if it wished.

<sup>198</sup> See *Young*, 209 U.S. at 145–47.

<sup>199</sup> See *id.*

Constitution; the Court thereby established the existence of “arising-under” jurisdiction.<sup>200</sup> Whether the right of action was created by the Constitution itself or was simply a matter of constitutional common law need not be explored here.<sup>201</sup> This portion of *Young*, however, is not relevant when a suit is based on a federal statute, nor are *Bivens* and its progeny, except by way of analogy. The crucial issue in *Seminole Tribe* was whether the tribe stated a cognizable statutory claim for relief against the Governor. Even if IGRA imposed a concrete duty on the Governor and established a “primary right” in the tribe, a right of action against the Governor must exist to sustain a lawsuit.<sup>202</sup> IGRA creates no such privately enforceable remedial right of action, either expressly or by implication.<sup>203</sup> Given the Court’s current aversion to inferring causes of action in statutes, Congress’s failure to create an express private right of action against state officials implies that Congress did not intend there to be one. Moreover, albeit more tenuously, IGRA can also be interpreted as foreclosing use of § 1983 to provide the requisite remedial right.<sup>204</sup>

<sup>200</sup> See *id.* at 145 (declaring that the circuit court had jurisdiction over the case because “it involved the decision of Federal questions arising under the Constitution of the United States”); cf. HART & WECHSLER, *supra* note 12, at 1065 (questioning whether the *Young* court “recognized a judicially implied federal cause of action for injunctive relief under the Fourteenth Amendment”). There was no diversity jurisdiction in *Young*. See *Young*, 209 U.S. at 143.

<sup>201</sup> Cf. Monaghan, *supra* note 27, at 23–25 (arguing that *Bivens* is an example of constitutional common law). In the absence of “an exclusive federal remedy that is as effective as the fullest state remedy[,] . . . federal courts should invalidate any effort to preempt state remedies.” Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1519 (1987).

<sup>202</sup> See Monaghan, *supra* note 187, at 238–41 (criticizing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), which seemed to dispense with any right of action analysis in a suit for declaratory and equitable relief based upon claims of federal preemption); see also HART & WECHSLER, *supra* note 12, at 947–48, 1137 (discussing *Shaw* and questioning whether there is “an implied federal declaratory and injunctive remedy that does not depend on the existence or interpretation of the Declaratory Judgment Act”).

<sup>203</sup> The Court is unlikely to find implied rights of action in newly minted legislation. See *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (“Congress, at least during the period of the enactment . . . , tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself. . . . [T]he ball, so to speak, may well now be in [Congress’s] court.”); *id.* at 749 (Powell, J., dissenting) (“[W]e should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist.”); HART & WECHSLER, *supra* note 12, at 841 (stating that “post-*Cannon* decisions recognizing a new implied right of action are extremely rare”). By contrast, statutes that were enacted during the heyday of implied rights of action continue to receive the benefit of that fact. See *Morse v. Republican Party*, 116 S. Ct. 1186, 1211 (1996) (opinion of Stevens, J.) (arguing that evaluation of whether a private right of action exists under the Voting Rights Act depends on the legal context at the time Congress enacted the act); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982).

<sup>204</sup> Although implied preemption of § 1983 claims is not favored, see Monaghan, *supra* note 187, at 247–48, the Court’s finding that the remedial scheme in IGRA was particularly comprehensive would also argue that § 1983 actions are foreclosed. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 20–21 (1981) (ruling that the existence of “express remedies” in a statute “demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be avail-

*Seminole Tribe* does not disturb the doctrine of *Young*. Unless Congress provides otherwise, *Young* permits prospective federal court relief against state officials.<sup>205</sup> If the reality is that state officials can still be held accountable under *Young* and under statutory schemes that furnish remedies against state officials (provided that these remedies do not violate other constitutional provisions, such as the Tenth Amendment), then being unable to sue the state *eo nomine* in federal court will prevent a federal forum only in rare situations,<sup>206</sup> like *Seminole Tribe*, in which Congress has provided a remedy against the state but not against the state officials. In such cases, however, the plaintiffs may still have recourse in state courts under *Reich* and like cases, assuming no exclusive federal jurisdiction.

### VIII. CONCLUSION

At the bottom of the current state sovereign immunity debate, how much beyond mere symbolism — a factor I do not underestimate in constitutional law — is at stake? *Seminole Tribe*'s majority declared that it is an “indignity” to subject a state to the judicial tribunals of the United States at the “instance of private parties.”<sup>207</sup> The idea that a state, an utterly abstract entity, has feelings about being sued by a private party when “its” highest officials are regularly so sued surely strains credulity.<sup>208</sup> Indeed, in another federalism case, the Court suggested that states serve as functional entities in the constitutional context: “The Constitution does not protect the sovereignty of States for the benefit of the states or state governments as abstract political entities . . . . To the contrary, the Constitution divides authority between federal and state government for the protection of individuals.”<sup>209</sup>

In rejecting Justice Souter’s examination of the English common law origins of sovereign immunity, the *Seminole Tribe* majority claimed that *Hans v. Louisiana* “found its roots not solely in the common law of England, but in the much more fundamental ‘jurisprudence in all civilized nations,’”<sup>210</sup> and once again quoted from *The Federalist No. 81*: “sovereign immunity ‘is the general sense and the

able under § 1983”); HART & WECHSLER, *supra* note 12, at 1134–37 (discussing the Court’s decision in *Middlesex County Sewerage*, “statutory supersession” of remedies under § 1983, and the availability of § 1983 remedies in cases in which a federal statute preempts state law).

<sup>205</sup> See *supra* p. 130–31.

<sup>206</sup> See *supra* note 168.

<sup>207</sup> *Seminole Tribe*, 116 S. Ct. at 1124 (quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)) (internal quotation marks omitted).

<sup>208</sup> Justice Stevens noted, in my view correctly, that “preventing ‘indignity’ . . . is an ‘embarrassingly insufficient’ rationale for the [constitutional] rule” of state sovereign immunity. *Seminole Tribe*, 116 S. Ct. at 1143 (Stevens, J., dissenting) (quoting *Puerto Rico Aqueduct*, 506 U.S. at 151 (Stevens, J., dissenting)).

<sup>209</sup> *New York v. United States*, 505 U.S. 144, 181 (1992).

<sup>210</sup> *Seminole Tribe*, 116 S. Ct. at 1130 (quoting *Hans v. Louisiana*, 134 U.S. 1, 17 (1890) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)) (internal quotation marks omitted)).

general practice of mankind.”<sup>211</sup> We are not informed of the contemporary practice of “civilized nations,” nor, indeed, even of what nations come within this ambit. Hamilton wrote to assuage general fears that the new government might compel the states to follow the “civilized” course of actually paying their just debts.<sup>212</sup> The majority’s devotion to this doctrine of state sovereign immunity is, accordingly, mystifying.<sup>213</sup> In the end, *Seminole Tribe* simply perpetuates a questionable line of reasoning, the negative effects of which may in any event be circumvented. State sovereign immunity remains the exception, not the rule, the rhetoric of state sovereignty notwithstanding.

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<sup>211</sup> *Id.* (quoting THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

<sup>212</sup> See THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>213</sup> Any real federalism concerns can be accommodated by doctrines less “blunt” than sovereign immunity. See Shapiro, *supra* note 15, at 79.

## LEADING CASES

### I. CONSTITUTIONAL LAW

#### A. Due Process

*1. Civil Forfeiture — Innocent Owner Defense.* — Civil forfeiture has emerged in recent decades as a powerful and lucrative law enforcement tool.<sup>1</sup> Because most of the constitutional provisions that traditionally restrain criminal prosecutions do not apply to civil forfeiture actions, however, civil forfeiture defendants have enjoyed few protections.<sup>2</sup> In recent years, the Supreme Court, recognizing the unprecedented reach of modern forfeiture laws, had begun to place constitutional limitations on their use, requiring prosecutors to supply landowners with proper notice and an opportunity to be heard,<sup>3</sup> and suggesting that some forfeitures might constitute excessive fines, which violate the Eighth Amendment.<sup>4</sup> On several occasions, the Court cautioned that seizing property from owners who were neither aware of nor involved in the commission of a crime would raise serious constitutional concerns.<sup>5</sup> Last Term, however, the Court reversed its course, refusing to place new substantive restraints on the use of civil forfeiture.<sup>6</sup> In *Bennis v. Michigan*,<sup>7</sup> the Court shed its previous misgivings to hold that a state may confiscate the property of an innocent owner without violating either the Due Process or Takings Clauses of the Constitution.<sup>8</sup> The *Bennis* Court established a firm rule but failed to provide any coherent rationale for legitimating such forfeitures. Instead, the Court relied on an inflexible and anachronistic historical argument that offers little promise for reigning in future abuses of modern forfeiture laws.

On October 3, 1988, John Bennis solicited a prostitute in Detroit and engaged in an illicit sexual act in the front seat of the 1977 Pontiac he co-owned with his wife.<sup>9</sup> He was immediately arrested by an observant police officer and subsequently convicted of gross inde-

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<sup>1</sup> See Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 1–4 (1994).

<sup>2</sup> See *id.* at 4–5; Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 & n.14 (1992).

<sup>3</sup> See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 46 (1993).

<sup>4</sup> See *Austin v. United States*, 509 U.S. 602, 604 (1992).

<sup>5</sup> See *id.* at 617 & n.10; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715, 720–21 (1971).

<sup>6</sup> See *United States v. Ursery*, 116 S. Ct. 2135, 2138 (1996) (holding that parallel criminal prosecution and civil forfeiture proceedings do not violate the Double Jeopardy Clause); *Bennis v. Michigan*, 116 S. Ct. 994, 998 (1996).

<sup>7</sup> 116 S. Ct. 994 (1996).

<sup>8</sup> See *id.* at 998.

<sup>9</sup> See *State ex rel. Wayne County Prosecutor v. Bennis*, 527 N.W.2d 483, 486 (Mich. 1994); Petitioner's Brief at 2–3, *Bennis* (No. 94-8729).

cency.<sup>10</sup> While the criminal trial was proceeding, the State seized the automobile and sought to have it declared an “abatable nuisance,” which under Michigan law would be subject to civil forfeiture.<sup>11</sup>

Tina Dennis, John’s wife, challenged the abatement of her part interest in the automobile on the grounds that she had been unaware of her husband’s intent to use the car illegally.<sup>12</sup> The trial judge rejected Ms. Dennis’s defense, declared the car a public nuisance, and ordered that the vehicle be forfeited to the State.<sup>13</sup> Although Michigan law authorized the trial judge to fashion the most equitable remedy, he refused to order the State to pay half of the proceeds from the sale of the automobile to Ms. Dennis.<sup>14</sup>

The Michigan Court of Appeals reversed the trial court’s holding on state law grounds.<sup>15</sup> Following what it believed to be Michigan Supreme Court precedent, the appellate court interpreted the nuisance abatement statute to require prosecutors to prove knowledge of the illegal use,<sup>16</sup> despite explicit statutory language to the contrary.<sup>17</sup> On subsequent appeal, the Michigan Supreme Court rejected this interpretation and held the property owner’s knowledge to be irrelevant for nuisance abatement purposes.<sup>18</sup> The court also held that the forfeiture of Dennis’s interest in the property was “not constitutionally infirm.”<sup>19</sup> In reaching the latter decision, the Michigan Supreme Court relied exclusively on United States Supreme Court precedent,<sup>20</sup> which in its view, “indisputably allows forfeiture of an innocent owner’s property, unless evidence was submitted that the property was stolen or used without the consent of the owner.”<sup>21</sup>

In a 5–4 decision, the United States Supreme Court affirmed. Writing for the majority,<sup>22</sup> Chief Justice Rehnquist emphasized the “long and unbroken line of cases hold[ing] that an owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to

<sup>10</sup> See *Bennis*, 116 S. Ct. at 996.

<sup>11</sup> See *id.*; MICH. COMP. LAWS §§ 600.3801, .3825 (1987).

<sup>12</sup> See *Bennis*, 116 S. Ct. at 997.

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

<sup>14</sup> See *Bennis*, 527 N.W.2d at 495.

<sup>15</sup> See *State ex rel. Wayne County Prosecuting Attorney v. Bennis*, 504 N.W.2d 731, 735 (Mich. Ct. App. 1993).

<sup>16</sup> See *id.* at 733.

<sup>17</sup> The statute provides: “Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required.” MICH. COMP. LAWS § 600.3815(2) (1987).

<sup>18</sup> See *Bennis*, 527 N.W.2d at 495.

<sup>19</sup> *Id.* at 493–94.

<sup>20</sup> See *id.* The Michigan Supreme Court relied primarily on the holdings in *Van Oster v. Kansas*, 272 U.S. 465 (1926), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

<sup>21</sup> *Bennis*, 527 N.W.2d at 495.

<sup>22</sup> Justices O’Connor, Scalia, Thomas, and Ginsburg joined in Chief Justice Rehnquist’s opinion.

such use."<sup>23</sup> In this string of cases,<sup>24</sup> the Court repeatedly upheld the seizure of innocent owners' property as comporting with the requirements of due process.<sup>25</sup> The majority believed these cases to be "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."<sup>26</sup> The Chief Justice saw no relevant differences between the *Bennis* case and the Court's previous decisions.<sup>27</sup>

Most significantly, the Chief Justice refused to recognize an exception to the blanket rule for innocent owners who proved that they "had done all that reasonably could be expected to prevent the proscribed use."<sup>28</sup> In *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>29</sup> the Court had suggested that "it would be difficult to reject the constitutional claim" of an innocent owner who had met this standard of prevention.<sup>30</sup> Chief Justice Rehnquist, however, dismissed this proposition as mere dictum.<sup>31</sup> Rather than abandoning the reservations of *Calero-Toledo* entirely, however, the Chief Justice implied that due process concerns would prevent the forfeiture of a vehicle that was used without its owner's consent or in a manner to which its owner had not consented.<sup>32</sup> In the Chief Justice's view, because her husband co-owned the property, Bennis had constructively consented to his use of the car,<sup>33</sup> and therefore, lacked a constitutional defense.

Finally, the majority rejected Bennis's claim that the forfeiture of her interest in the automobile constituted a taking of private property for public use in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment.<sup>34</sup> In the forfeiture proceeding, the State had effectively acquired ownership of the property through the use of its police powers.<sup>35</sup> The Chief Justice concluded: "The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."<sup>36</sup>

<sup>23</sup> *Bennis*, 116 S. Ct. at 998.

<sup>24</sup> The cases cited by the majority included *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *Dobbins' Distillery v. United States*, 96 U.S. 395 (1878); *Van Oster v. Kansas*, 272 U.S. 465 (1926); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

<sup>25</sup> See *Bennis*, 116 S. Ct. at 998.

<sup>26</sup> *Id.* at 1001 (quoting *J.W. Goldsmith Jr.-Grant Co.*, 254 U.S. at 510) (internal quotation marks omitted).

<sup>27</sup> *See id.* at 999.

<sup>28</sup> *Id.* (quoting *Calero-Toledo*, 416 U.S. at 689) (internal quotation marks omitted).

<sup>29</sup> 416 U.S. 663 (1974).

<sup>30</sup> *Id.* at 689.

<sup>31</sup> *See Bennis*, 116 U.S. at 999.

<sup>32</sup> *See id.* at 999 n.5.

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

<sup>34</sup> *See id.* at 1001.

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

<sup>36</sup> *Id.*

Justice Thomas wrote a separate concurring opinion.<sup>37</sup> Although Justice Thomas believed that precedent compelled the Court's holding, he observed that, if this history were disregarded, the forfeiture of an innocent owner's property would appear to violate due process.<sup>38</sup> Accepting the absence of such a constitutional requirement of culpability, he nevertheless expressed renewed concern over the current lack of clear substantive limits on the types of property that could be forfeited as the result of a crime.<sup>39</sup> Forfeiture, he feared, could be abused, and "become more like a roulette wheel employed to raise revenue from innocent but hapless owners . . . than a component of a system of justice."<sup>40</sup> Justice Thomas, therefore, called upon Congress and the state legislatures to supply the proper safeguards.<sup>41</sup>

Justice Ginsburg also concurred, emphasizing the fact-specific nature of her decision.<sup>42</sup> She stressed the equitable nature of the nuisance abatement proceeding and the Michigan Supreme Court's discretion to restrict excessive applications of the statute.<sup>43</sup> Given the age and value of the Bennises' automobile, Justice Ginsburg agreed with the Michigan Supreme Court that there was no "blatant unfairness" in the trial court's holding.<sup>44</sup> Finally, Justice Ginsburg applauded Michigan's decision to "deter Johns from using cars they own (or co-own) to contribute to neighborhood blight."<sup>45</sup>

The majority's broad acceptance of civil forfeiture provoked sharp criticism from Justice Stevens.<sup>46</sup> In his dissent, Justice Stevens highlighted the tenuous connection between the illegal act and the property forfeited in this case.<sup>47</sup> He argued that, because the historical cases cited by the Court involved the forfeiture of property used *principally* for the commission of a crime, they did not support the forfeiture of an innocent owner's property for "[a]n isolated misuse of a stationary vehicle."<sup>48</sup> He also distinguished Bennis's car from the property seized

<sup>37</sup> See *id.* (Thomas, J., concurring).

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

<sup>39</sup> See *id.* at 1002 (citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81–82 (1993) (Thomas, J., concurring in part and dissenting in part)).

<sup>40</sup> *Id.* at 1003.

<sup>41</sup> See *id.* at 1002–03.

<sup>42</sup> See *id.* (Ginsburg, J., concurring).

<sup>43</sup> See *id.*

<sup>44</sup> *Id.* (quoting *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting)) (internal quotation marks omitted).

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* (Stevens, J., dissenting). Justices Souter and Breyer joined in Justice Stevens's dissent.

<sup>47</sup> See *id.* at 1004–07.

<sup>48</sup> *Id.* at 1005. Justice Stevens distinguished between three types of forfeitable property: contraband, proceeds of criminal activity, and instrumentalities. Although recognizing plausible rationales for seizing contraband and proceeds from innocent owners, he disputed the constitutionality of seizing instrumentalities from innocents such as Bennis. See *id.* at 1004–05.

in these cases on the grounds that her automobile did not facilitate her husband's offense.<sup>49</sup>

Justice Stevens also emphasized that “[f]undamental fairness prohibits the punishment of innocent people,”<sup>50</sup> and criticized the majority for denying the essentially punitive nature of forfeiture.<sup>51</sup> Relying on *Austin v. United States*,<sup>52</sup> Justice Stevens argued that forfeiture of an innocent owner’s property rests on the assumption that the owner negligently allowed the misuse of her property.<sup>53</sup> Because Bennis was not “negligent in her use or entrustment of the family car,” forfeiture of her interest in the property denied her due process of law.<sup>54</sup>

In a separate dissent, Justice Kennedy criticized the historical approach of the majority.<sup>55</sup> Given the changing realities of modern life, he questioned extending principles derived from admiralty cases to the forfeiture of automobiles.<sup>56</sup> He further agreed with Justice Stevens’s contention that, even if the precedents relied upon by the majority were controlling, they would not necessitate the outcome in *Bennis*.<sup>57</sup>

As both Justices Stevens and Kennedy recognized,<sup>58</sup> the holding in *Bennis* established a broad, ironclad rule on very slim foundations. The Court relied exclusively on history and the force of precedent in reaching its decision, without clearly articulating legitimate contemporary rationales for the rule it adopted. For several reasons, its cursory treatment of the issue presented by *Bennis* belittles the seriousness and complexity of the problems caused by forfeiting the property of innocent owners, such as Bennis, and could lead to further complication in civil forfeiture jurisprudence.

First, the *Bennis* Court failed to provide a coherent framework for analyzing the constitutionality of future forfeiture laws. Generally, adherence to precedent can provide certainty, consistency, and efficiency in the law if used to elucidate underlying principles or enduring values.<sup>59</sup> These goals will not be served, however, if the factual situation

<sup>49</sup> See *id.* at 1005.

<sup>50</sup> *Id.* at 1007.

<sup>51</sup> See *id.* at 1008–09. Justice Stevens strongly disagreed with the majority’s distinction between the punitive and deterrent effects of forfeiture, arguing that “deterrence itself is one of the aims of punishment.” *Id.* at 1008. He further concluded that the forfeiture of Bennis’s interest in the car had no deterrent value, thus reinforcing the punitive nature of the forfeiture. See *id.* at 1009.

<sup>52</sup> 509 U.S. 602 (1993).

<sup>53</sup> See *Bennis*, 116 U.S. at 1007–08.

<sup>54</sup> *Id.* at 1009. Additionally, Justice Stevens believed that the forfeiture of an innocent owner’s property constituted an “excessive fine” in violation of the Eighth Amendment. See *id.* at 1010.

<sup>55</sup> See *id.* at 1010 (Kennedy, J., dissenting).

<sup>56</sup> See *id.* at 1011.

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

<sup>58</sup> See *id.* at 1010–11; *id.* at 1003–10 (Stevens, J., dissenting).

<sup>59</sup> See generally RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 60–81 (1961) (identifying the major justifications for stare decisis as certainty, reliance, equality, efficiency, practical experience, and judicial restraint).

or legal context that produced the decision has changed so substantially that the principles behind the prior holding are no longer viable.<sup>60</sup> Instead of examining whether the reasoning that supported past decisions possessed continuing validity, however, the *Bennis* Court blindly followed stare decisis. This overly formalistic approach may have repercussions beyond the narrow issue of innocent owner defenses;<sup>61</sup> it appears to foreclose judicial responsiveness to the novelty of evolving civil forfeiture practices.

Modern civil forfeiture law has developed to meet dramatically different societal needs than those it met in the past. The cases relied upon by the majority were based on the "hoary fiction"<sup>62</sup> that the property, not its owner is "the offender" and thus guilty of the crime committed.<sup>63</sup> This fiction can be traced from biblical times to eighteenth-century, English common law.<sup>64</sup> After the American Revolution, the former colonies began enacting forfeiture statutes, which largely codified customary British practices, in order to combat piracy and smuggling and to secure sources of revenue.<sup>65</sup> Under these initially limited laws, the seizure of "guilty" ships or cargo may have made sense for remedial purposes because of the nature of the offense. Since the 1970s, however, legislators have enacted a new wave of forfeiture statutes, primarily as weapons in the "war on drugs."<sup>66</sup> These statutes provide broad powers to law enforcement officials to seize classes of property that are only tenuously related to the commission of a crime, and that previously had not been subject to forfeiture. Legislatures and courts have also broadened the scope of older laws,<sup>67</sup> such as Michigan's nuisance abatement statute.<sup>68</sup> The purposes of

<sup>60</sup> Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) (stating that, in deciding whether to overturn precedent, the Court must examine "whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification") (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

<sup>61</sup> In another case this Term, *United States v. Ursery*, 116 S. Ct. 2135 (1996), the Court relied upon the same string of precedent and its findings in *Bennis* to conclude that civil forfeiture does not constitute punishment for purposes of the Double Jeopardy Clause. See *id.* at 2148.

<sup>62</sup> *Bennis*, 116 S. Ct. at 1007 (Stevens, J., dissenting).

<sup>63</sup> The *Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827); accord *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

<sup>64</sup> See *Austin v. United States*, 509 U.S. 602, 611–14 (1993) (surveying the Anglo-American history of civil forfeiture); George T. Pappas, Comment, *Civil Forfeiture and Drug Proceeds: The Need to Balance Societal Interests with the Rights of Innocent Owners*, 77 MARQ. L. REV. 856, 858–60 (1994).

<sup>65</sup> See Pappas, *supra* note 64, at 860–61.

<sup>66</sup> See *id.* at 867–71 (considering 21 U.S.C. § 881 (1994), which authorizes the forfeiture of both property used to commit or facilitate drug-related offenses and money or proceeds from drug transactions).

<sup>67</sup> See, e.g., *State ex rel. Wayne County Prosecutor v. Bennis*, 527 N.W.2d 483, 490–92 (Mich. 1994) (finding that a single act of prostitution is sufficient to constitute an abatable nuisance within the meaning of the Michigan nuisance abatement statute); Petitioner's Brief at 33–37, *Bennis* (No. 94-8729) (discussing the history of nuisance abatement laws).

<sup>68</sup> See MICH. COMP. LAWS § 600.3801 (1987).

these statutes are far removed from the purposes of the seizures originally justified by the legal fiction of "guilty property."<sup>69</sup> Rather than merely following naked holdings based on no longer existent situations, the Court should have taken account of changed realities and assessed the continuing validity of the principles that underlie forfeiture doctrine.

Second, and more specifically, the holding in *Bennis* fails to provide an exception for cases in which the forfeiture of an innocent owner's property would be irrational and unduly oppressive.<sup>70</sup> To ensure due process, the Court must at a minimum protect individuals from the arbitrary exercise of government authority.<sup>71</sup> The *Bennis* Court's inflexible approach threatens to foreclose consideration of such possibilities. In the face of Justice Stevens's accusation — that the majority's reasoning would allow for the seizure of an entire ocean liner for the sins of a single passenger<sup>72</sup> — Chief Justice Rehnquist's assurance — that "[w]hen such application shall be made it will be time enough to pronounce upon it"<sup>73</sup> — rings hollow. By moving beyond the rote application of time-worn holdings to examine the legitimate interests served by forfeiting an innocent owner's property, the Court could have placed its decision on firmer ground while more fully protecting the interests of innocent third parties, such as *Bennis*.

Prior to *Bennis*, the Court appeared ready to depart from historical practice by adopting a more substantive analysis of forfeiture laws. In the last due process challenge to a civil forfeiture statute, *United States v. James Daniel Good Real Property*,<sup>74</sup> the Court declined to follow precedent that would have allowed the government to forgo providing notice and a meaningful opportunity to be heard to defendants in civil forfeiture proceedings.<sup>75</sup> Instead, the Court engaged in a detailed analysis of the respective interests of the government and the individual owner.<sup>76</sup> As in *James Daniel Good*, the *Bennis* Court

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<sup>69</sup> See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 82 (1993) (Thomas J., concurring in part and dissenting in part).

<sup>70</sup> In the past, these concerns have motivated the Court to leave open the possibility that a constitutionally required innocent owner defense exists. See *Austin v. United States*, 509 U.S. 602, 617 & n.10 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688–90 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715, 720–21 (1970).

<sup>71</sup> See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310, 322–23 (1993).

<sup>72</sup> See *Bennis*, 116 S. Ct. at 1005 (Stevens, J., dissenting).

<sup>73</sup> *Bennis*, 116 S. Ct. at 1000 (quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 512 (1921)) (internal quotation marks omitted).

<sup>74</sup> 510 U.S. 43 (1993).

<sup>75</sup> See *id.* at 57–62.

<sup>76</sup> See *id.* at 53 (applying the balancing test announced in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

should have recognized the importance of both the property rights of innocent owners<sup>77</sup> and the countervailing interests of the State.<sup>78</sup>

The government has several legitimate rationales for confiscating an innocent owner's property. Each of these purposes may be gleaned from the cases relied upon by the *Bennis* Court, but each has only limited applicability. First, forfeiture may serve as punishment for the negligence of an owner in allowing her property to be used for criminal activities.<sup>79</sup> This proposition, however, would not justify seizing the property of an owner who took all reasonable steps to prevent the misuse of her property.<sup>80</sup> In *Bennis*, it is not clear that Dennis could have taken any further steps to prevent her husband and co-owner from misusing the car. Nor was she negligent or blameworthy in allowing her husband to take the automobile.<sup>81</sup>

Second, the government may seize property for remedial purposes. Forfeiting contraband "remov[es] the [illegal] items from private circulation,"<sup>82</sup> and forfeiting the proceeds of criminal activity "render[s] illegal behavior unprofitable."<sup>83</sup> Similarly, seizing property that facilitates a crime may prevent the property's "further illicit use."<sup>84</sup> This remedial rationale, however, is difficult to extend to the forfeiture of common items that are not essential for the commission of a particular crime, such as Dennis's car.<sup>85</sup>

Third, making an owner's culpability irrelevant increases the administrative efficiency of forfeiture proceedings. Accepting an innocent owner defense might eliminate these efficiencies by creating large loopholes in civil forfeiture laws. Criminals might transfer their property

<sup>77</sup> In *James Daniel Good*, the Court recognized an "essential principle": "Individual freedom finds tangible expression in property rights." *Id.* at 61. More specifically, the Court noted that prejudgment seizure of real property denies an owner the "rights of ownership, including the right of sale . . . , the right of unrestricted use and enjoyment, and the right to receive rents." *Id.* at 54.

<sup>78</sup> Although the due process claim in *James Daniel Good* was procedural, not substantive, the interests involved were the same as those involved here.

<sup>79</sup> See *United States v. Ursery*, 116 S. Ct. 2135, 2150 (1996) (Kennedy, J., concurring); *Austin v. United States*, 509 U.S. 602, 616 (1993). Even in eighteenth-century Britain, Blackstone recognized this rationale as a primary justification for the forfeiture of an innocent owner's property. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*301 ("[S]uch misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture."). The punishment rationale, however, may no longer be recognized by the Court after its decision last Term in *Ursery*. See 116 S. Ct. at 2146-49. For a critique of the Court's approach in *Ursery*, see pages 671-681 below.

<sup>80</sup> See, e.g., *Austin*, 509 U.S. at 616 (noting that the Court did not "apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property").

<sup>81</sup> See *Bennis*, 116 S. Ct. at 1009 (Stevens, J., dissenting).

<sup>82</sup> *Id.* at 1004.

<sup>83</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974).

<sup>84</sup> *Id.* The *Bennis* majority viewed the abatement of the Bennises' car as a means for achieving this remedial purpose. See *Bennis*, 116 S. Ct. at 1000 (quoting *Calero-Toledo*, 416 U.S. at 687). The Court later expanded this justification in *Ursery*. See 116 S. Ct. at 2148.

<sup>85</sup> See *Bennis*, 116 S. Ct. at 1007 (Stevens, J., dissenting).

to "strawmen" or enter into joint ownership of their possessions with close friends or family members to avoid losses.<sup>86</sup> If culpability is disregarded, prosecutors will spend less time separating lessors, lenders, and co-owners "complicit in the wrongful use of property from innocent . . . co-owners,"<sup>87</sup> and concentrate more on pursuing a greater number of offenders. This ease of enforcement, however, may lead to unfairness<sup>88</sup> or abuse, particularly because law enforcement agencies profit directly and considerably from successful forfeiture proceedings.<sup>89</sup> Without adequate restraint, forfeiture could become the revenue-raising "roulette wheel" feared by Justice Thomas.<sup>90</sup>

Ultimately, the most convincing justification for forfeiting an innocent owner's property is deterrence. The Court has repeatedly explained that "[t]he law . . . builds a secondary defense against a forbidden use" by encouraging those with legal title to property to exercise more careful control over its use.<sup>91</sup> Like strict liability in tort, forfeiture theoretically places the costs of criminal activity on the private actors best positioned to prevent the crime's occurrence. In reality, however, some owners can neither detect misuses of their property nor place meaningful restraints on its use. A bona fide purchaser of property that has previously been used for criminal purposes is an extreme example; commercial third parties, such as lessors, vendors, lien-holders, and common carriers, are more common ones. Although such innocent parties may be able to recoup their losses through insurance or by charging higher rates, they may find it difficult to detect successfully and to specifically deter any potentially illicit activities.<sup>92</sup> Friends and family who share the use of their property may be in the best position to suspect misuse and prevent it,<sup>93</sup> but co-owners such as Bennis will not be spurred to take greater precautions unless they are aware of the possibility of forfeiture and can reasonably foresee the crime for which the property will be used. In short, the deterrence value of civil forfeiture will largely depend on the crime sought to be deterred and the ability of the innocent owner to prevent it.

Each of these rationales, therefore, reaches only so far. Cases will arise in which none of them will provide a legitimate justification for

<sup>86</sup> See Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights*, 1989 DUKE L.J. 1254, 1271-72.

<sup>87</sup> *Bennis*, 116 S. Ct. at 1001.

<sup>88</sup> The majority acknowledged the validity of this argument, but found "[i]ts force . . . reduced in the instant case . . . by the Michigan Supreme Court's confirmation of the trial court's remedial discretion . . ." *Id.*

<sup>89</sup> See Cheh, *supra* note 1, at 3-4.

<sup>90</sup> *Bennis*, 116 S. Ct. at 1003 (Thomas, J., concurring).

<sup>91</sup> *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926); *accord Bennis*, 116 S. Ct. at 1000; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974).

<sup>92</sup> Cf. Goldsmith & Linderman, *supra* note 86, at 1270-71 (noting that commercial lessors have no reason to anticipate an illegal use and that the costs of detecting illegal activity are often prohibitive).

<sup>93</sup> See *id.* at 1271.

seizing the innocent owner's property. These situations are neither as rare nor as extreme as Justice Stevens's ocean liner scenario. Common carriers and commercial lessors provide but two common examples. Indeed, *Bennis* itself is a case in which neither punishment, nor deterrence, nor remedial action justifies the forfeiture of the innocent owner's interest in the property.<sup>94</sup> Such irrational deprivations of property must fail to meet the most basic requirements of due process.

An awareness of these situations may explain the outrage of many commentators upon hearing of the Court's decision.<sup>95</sup> The immediate effect of the *Bennis* decision on the rights of civil forfeiture defendants, however, may not be as dramatic as many have imagined. Although prior to *Bennis*, many lower courts read *Calero-Toledo* to provide innocent owners with a constitutional defense,<sup>96</sup> these courts generally construed *Calero-Toledo* narrowly, and most defendants fell outside of its protection.<sup>97</sup> Additionally, most major forfeiture statutes include well-defined defenses for innocent owners.<sup>98</sup> These statutory exceptions are unaffected by the Court's decision.<sup>99</sup>

A sense of the unfairness of *Bennis* should spur legislators to follow Justice Thomas's suggestion by reigning in current civil forfeiture laws.<sup>100</sup> Existing statutes can be refined to better protect the rights of

<sup>94</sup> The *Bennis* case may not best illustrate the irrationality potentially associated with innocent owner forfeitures. As Justice Ginsburg emphasized, the recompense that *Bennis* would have received for her interest in the automobile was negligible, and the Michigan Supreme Court stood ready to prevent excessive nuisance abatements. *See Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring). If, however, the Court found the rationales supporting forfeiture applicable to *Bennis*, it should have issued a more fact-specific opinion, akin to Justice Ginsburg's, and left the broader issue of innocent owner defenses in general open for future development.

<sup>95</sup> See, e.g., David A. Kaplan, *Honey I Lost Your Pontiac*, NEWSWEEK, Mar. 18, 1996, at 61; Linnet Myers, *Forfeiture Laws Fair or Foul? Americans Not Guilty of Crimes Decry Loss of Property*, CHI. TRIB., Mar. 12, 1996, §1, at 6. But see Deborah Jones Merritt, *Forfeiture and Real Feminism*, LEGAL TIMES, July 29, 1996, at S35.

<sup>96</sup> See Goldsmith & Linderman, *supra* note 86, at 1269.

<sup>97</sup> See, e.g., United States v. 1966 Beechcraft Aircraft Model King Air A90 Cream with Bur-gundy & Gold Stripes, 777 F.2d 947, 951-52 (4th Cir. 1985) (holding that an owner who did not attempt to discover the uses to which his airplane was put had not done all that he reasonably could to prevent its unlawful use); United States v. One 1957 Rockwell Aero Commander 680 Aircraft, 671 F.2d 414, 418 (10th Cir. 1982) (holding that an owner who took no precautions to prevent others from using his airplane had not done all that reasonably could have been expected to prevent the possible illegal use of his property); United States v. Six Thousand Seven Hundred Dollars (\$6,700.00) in United States Currency, 615 F.2d 1, 3 (1st Cir. 1980) (holding that, because an error in setting up an estate account made the alleged embezzlement from the estate possible, the estate had not done all that it reasonably could to avoid an unlawful use of its property).

<sup>98</sup> See Cheh, *supra* note 1, at 27. For an example of a statutory exception for innocent owners, see 21 U.S.C. § 881(a)(4), (6)-(7) (1994).

<sup>99</sup> Of course, if these innocent owner defenses are not constitutionally required, states may repeal them or enact new forfeiture schemes that lack such safeguards.

<sup>100</sup> Proposals to reform the federal civil forfeiture statutes are already being considered. *See* H.R. 3194, 104th Cong. (1995). The Court's prior holding in *Calero-Toledo* may have similarly provoked Congress to amend the "innocent owner" provisions of 21 U.S.C. § 881(a)(4). *See* Goldsmith & Linderman, *supra* note 86, at 1268.

innocent third parties, for instance, by adding innocent owner defenses. Ironically, the Court's blanket refusal to find even minimal constitutional protection for innocent owners may encourage legislators to draft more rational innocent owner defenses tailored to the particular necessities of law enforcement. Until such legislation is enacted, innocent owners will be deprived of their property unfairly.

2. *Punitive Damages — Grossly Excessive Awards.* — The frequency of very large punitive damages awards — and the heated debate over their propriety — has increased dramatically in recent years, leading one commentator to suggest that “[p]unitive damages have replaced baseball as our national sport.”<sup>1</sup> In the 1990s, the Supreme Court has recognized the tendency of punitive damages to “run wild”<sup>2</sup> and has granted certiorari on several occasions in order to address the propriety of such awards.<sup>3</sup> Last Term, in *BMW of North America, Inc. v. Gore*,<sup>4</sup> the Supreme Court took the unprecedented step of invalidating a punitive damages award as unconstitutional simply because it was too large.<sup>5</sup> Although it is significant that the Court finally produced a definitive holding on this issue, the Court’s analysis in *Gore* provides little guidance to either legislatures or lower courts regarding the contours of the constitutional limitations on excessive punitive damages awards. Because *Gore* fails to provide such guidance, it is an inadvisable extension of substantive due process protections.<sup>6</sup>

In 1990, an Alabama car dealership sold a “new” BMW sports sedan to Dr. Ira Gore, Jr. for \$40,750.88.<sup>7</sup> Unbeknownst to Gore, however, the car was not entirely new — BMW of North America had repainted portions of the car at a preparation center in Georgia in order to repair damage that the car incurred during transport.<sup>8</sup> Pursuant to its nationwide policy regarding such damage, BMW did not report the car’s repair to either Gore or the Alabama dealer.<sup>9</sup> When Gore discovered his car’s pre-purchase repairs, he filed suit in Alabama state court alleging fraud and seeking compensatory and punitive damages of \$500,000.<sup>10</sup> The jury, finding BMW guilty of “gross,

<sup>1</sup> Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17.

<sup>2</sup> *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18 (1991) (internal quotation marks omitted).

<sup>3</sup> See, e.g., *id.* at 7–8; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76–77 (1988).

<sup>4</sup> 116 S. Ct. 1589 (1996).

<sup>5</sup> See *id.* at 1604.

<sup>6</sup> Some commentators, anticipating the Court’s reversal of a punitive damages award as a violation of substantive due process, raised similar concerns prior to *Gore*. See, e.g., Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 865–67 (1991).

<sup>7</sup> See *Gore*, 116 S. Ct. at 1593.

<sup>8</sup> See *id.* at 1593 & n.1.

<sup>9</sup> See *id.* at 1593.

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

malicious, intentional, and wanton fraud," awarded Gore \$4000 in compensatory damages and \$4 million in punitive damages, and the trial court denied BMW's motion for a new trial.<sup>11</sup> On appeal, the Alabama Supreme Court conditionally affirmed the denial of BMW's motion for a new trial, subject to a \$2 million remittitur of damages by the plaintiff.<sup>12</sup> A reduction of the punitive damages award was required, the court reasoned, because the jury had incorrectly based its award "upon a multiplication of \$4,000 (the diminution in value of the Gore vehicle) times 1,000 (approximately the number of refinished vehicles sold in the United States)."<sup>13</sup> The court established that it was improper for Alabama juries to "use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier,"<sup>14</sup> and concluded that a \$2 million punitive damages award was reasonable and constitutionally acceptable.<sup>15</sup>

In a 5–4 decision, the Supreme Court reversed and remanded. Writing for the majority, Justice Stevens concluded that "the grossly excessive award [of \$2 million] imposed in this case transcends the constitutional limit."<sup>16</sup> The Court recognized that Alabama's "interest in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages," but rejected the \$2 million punitive award as "tantamount to a severe criminal penalty."<sup>17</sup> Finding that the Alabama Supreme Court had correctly rejected the jury's reliance on BMW's conduct that occurred beyond the state's boundaries,<sup>18</sup> the majority still questioned that court's resulting figure of \$2 million.<sup>19</sup> In considering whether BMW had received fair notice of the Alabama Supreme Court's result, Justice Stevens framed the Court's analysis in terms of "[e]lementary notions of fairness enshrined in our constitutional jurisprudence [that] dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."<sup>20</sup> The Court established three "guideposts" to determine whether a party has received constitutionally adequate notice: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered . . . and [the] punitive

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<sup>11</sup> *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 622 (Ala. 1994).

<sup>12</sup> *See id.* at 629.

<sup>13</sup> *Id.* at 627.

<sup>14</sup> *Id.* (emphasis omitted).

<sup>15</sup> *See id.* at 629.

<sup>16</sup> *Gore*, 116 S. Ct. at 1604. Justices O'Connor, Kennedy, Souter, and Breyer joined Justice Stevens's opinion.

<sup>17</sup> *Id.*

<sup>18</sup> *See id.* at 1598.

<sup>19</sup> *See id.* at 1595 & n.11.

<sup>20</sup> *Id.* at 1598.

damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”<sup>21</sup>

Applying these guidelines, Justice Stevens declared the \$2 million in punitive damages stipulated by the Alabama Supreme Court to be “grossly excessive”<sup>22</sup> and a violation of the Fourteenth Amendment’s Due Process Clause.<sup>23</sup> The Court identified the first prong of the analysis, the degree of reprehensibility of a defendant’s actions, as “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.”<sup>24</sup> Justice Stevens explained that, although actions may be reprehensible enough to result in tort liability, they must meet a higher threshold to justify a large assessment of punitive damages.<sup>25</sup> Recognizing that “some wrongs are more blameworthy than others,” the Court described several “aggravating factors” that are “particularly reprehensible.”<sup>26</sup> For example, the Court asserted that nonviolent actions or those resulting in injuries that are “purely economic in nature” are less reprehensible than actions involving either violence or the threat of violence.<sup>27</sup> Applying these factors to the case at hand and emphasizing that BMW’s nondisclosure policy “coincided with the strictest extant state statute” regulating repair disclosures in the United States, the Court concluded that such a policy was not “sufficiently reprehensible” to warrant the \$2 million punitive damages award.<sup>28</sup>

With regard to the second guidepost, the Court reaffirmed its previous holdings, which established “that a comparison between the compensatory award and the punitive award is significant.”<sup>29</sup> The Court recognized that such ratios are the most frequently cited benchmark of excessive punitive awards,<sup>30</sup> but stressed that, “[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis.”<sup>31</sup> The Court refused to endorse the categorical use of ratios in the decisionmaking process<sup>32</sup>

<sup>21</sup> *Id.* at 1598–99.

<sup>22</sup> *Id.* at 1604.

<sup>23</sup> See *id.* at 1592, 1598. The Court refused, however, to propose a constitutionally acceptable punitive sanction itself, and remanded the case for this purpose. See *id.* at 1604.

<sup>24</sup> *Id.* at 1599.

<sup>25</sup> See *id.* at 1601.

<sup>26</sup> *Id.* at 1599.

<sup>27</sup> See *id.* In addition, negligent actions should be punished less severely than acts of malice, see *id.*, and the failure to disclose a material fact may be considered less reprehensible than “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive,” *id.* at 1601. However, regardless of the type of conduct involved, repeated unlawful acts should be weighted more heavily in the analysis than individual cases of malfeasance. See *id.* at 1599–1600.

<sup>28</sup> *Id.* at 1600.

<sup>29</sup> *Id.* at 1602 (discussing *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1 (1991), and *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)).

<sup>30</sup> See *id.* at 1601.

<sup>31</sup> *Id.* at 1603.

<sup>32</sup> See *id.* at 1602–03.

and “rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.”<sup>33</sup>

Finally, the Court established that considering existing sanctions for comparable misconduct, the Court’s third guidepost, involves a large degree of deference to the judgments of state legislatures.<sup>34</sup> However, Justice Stevens explained that awards of punitive damages need not mimic exactly the penalties established by the states; sanctions greater than those provided by statute might be permissible if the liable party could have looked to other judicial decisions that indicated that such a punishment was consistent with the jurisdiction’s policies.<sup>35</sup> The Court noted differences between Gore’s award and both the possible statutory fines and the prior judgments that courts had imposed for similar conduct, and concluded that neither statutory fines nor prior judgments provided BMW with adequate notice regarding the possibility of a multi-million dollar punitive damages award.<sup>36</sup>

In a concurring opinion, Justice Breyer<sup>37</sup> wrote separately to explain why the case overcame the usual presumption “that if ‘fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity.’”<sup>38</sup> Justice Breyer noted that the standards that the Alabama Supreme Court had used to evaluate Gore’s punitive damages award were not themselves constitutionally inadequate;<sup>39</sup> however, he found the standards as applied to be “vague and open-ended to the point where they risk arbitrary results.”<sup>40</sup> According to Justice Breyer, such vagueness does not, on its own, violate procedural due process standards but “does invite the kind of scrutiny the Court has given [this] verdict.”<sup>41</sup> He justified the Court’s substantive review of BMW’s punitive sanction on the grounds that the “award . . . was both (a) the product of a system of standards that did not significantly constrain a court’s, and hence a jury’s, discretion in making that award; and (b) was grossly excessive

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<sup>33</sup> *Id.* at 1602 (emphasis omitted). Despite the Court’s strongly worded position, Justice Stevens found it significant that the punitive damages the Alabama Supreme Court awarded were 35 times greater than the total damages suffered by all Alabama purchasers of repainted cars and a “breathtaking” 500 times greater than Gore’s compensatory damages of \$4000. *See id.* at 1602–03 & n.35.

<sup>34</sup> *See id.* at 1603.

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

<sup>36</sup> *See id.* at 1598, 1603.

<sup>37</sup> Justices O’Connor and Souter, who were members of the majority, also joined Justice Breyer’s concurrence.

<sup>38</sup> *Id.* at 1604 (Breyer, J., concurring) (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) (opinion of Stevens, J.)).

<sup>39</sup> *See id.*

<sup>40</sup> *Id.* at 1605.

<sup>41</sup> *Id.*

in light of the State's legitimate punitive damages objectives."<sup>42</sup> Justice Breyer believed that these "two reasons *taken together* overcome what would otherwise amount to a 'strong presumption of validity.'"<sup>43</sup>

In a strongly critical dissent,<sup>44</sup> Justice Scalia remained true to his position that "the Constitution gives federal courts no business in this area, except to assure that due process (*i.e.*, traditional procedure) has been observed."<sup>45</sup> Justice Scalia chided the Court for evaluating the substance of a punitive award because, in his opinion, the Court had "simply fabricated" the legal foundation for "the 'substantive due process' rights at issue."<sup>46</sup> He also objected to the Court's three guideposts because they fail to provide any guidance to either policymakers or lower courts.<sup>47</sup> In conclusion, Justice Scalia warned that the Court's decision propelled "*every* dispute as to evidentiary sufficiency in a state civil suit" toward constitutional inquiry — a "stupefying" prospect.<sup>48</sup>

In a separate dissent, Justice Ginsburg, joined by Chief Justice Rehnquist, also opined that the Court should have left regulation of punitive damages awards to the states.<sup>49</sup> In Justice Ginsburg's opinion, both the deference due the Alabama Supreme Court's judgment and the unique nature of the case at hand dictated that the Supreme Court should defer to the state court.<sup>50</sup> In support of her position that the Court was infringing on state sovereignty, she offered a list of all of the statutes that states have enacted or are considering enacting that operate to limit punitive damages awards.<sup>51</sup> Like Justice Scalia, Justice Ginsburg also criticized the test put forth by the majority to evaluate the excessiveness of the \$2 million punitive award.<sup>52</sup> Justice Ginsburg viewed the Court's guidepost analysis as merely "a vague concept of substantive due process, a 'raised eyebrow' test,"<sup>53</sup> suggesting that the Court's true test amounted to a subjective inquiry in

<sup>42</sup> *Id.* at 1609.

<sup>43</sup> *Id.* (quoting *TXO*, 509 U.S. at 457 (opinion of Stevens, J.)).

<sup>44</sup> See *id.* at 1610 (Scalia, J., dissenting). Justice Thomas joined Justice Scalia's dissent.

<sup>45</sup> *TXO*, 509 U.S. at 472 (Scalia, J., concurring in the judgment); see also *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 39–40 (1991) (Scalia, J., concurring in the judgment) ("Since jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity.").

<sup>46</sup> *Gore*, 116 S. Ct. at 1612 (Scalia, J., dissenting).

<sup>47</sup> See *id.* at 1612–13. Justice Scalia remarked that "[o]ne might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say." *Id.* at 1612. He suggested that "[t]o thine own self be true" would have been a fitting conclusion to the Court's amorphous analysis. *Id.* at 1614.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 1614–15 (Ginsburg, J., dissenting).

<sup>50</sup> See *id.* at 1615–16.

<sup>51</sup> See *id.* app. at 1618–20.

<sup>52</sup> See *id.* at 1617 (citing *Gore*, 116 S. Ct. at 1603).

<sup>53</sup> *Id.*

which “[t]oo big is, in the end, the amount at which five Members of the Court bridle.”<sup>54</sup>

Although earlier cases had foreshadowed the Court’s inclination to limit punitive damages in this manner,<sup>55</sup> *Gore* is the first case in which the Court actually struck down a punitive damages award based on substantive due process. Any judicial expansion of substantive due process is controversial,<sup>56</sup> but the Court’s decision in *Gore* is particularly problematic for two reasons. First, the decision provides little guidance to lower courts, thus opening the door for more of the unbridled judicial discretion that plagues substantive due process review. Second, *Gore* raises what has traditionally been a state issue to a constitutional level, thereby implicating federalism concerns and threatening state legislative efforts in this area. For these reasons, the Court’s invocation of substantive due process in this case was ill-advised.

For years, litigants have asked the Court to decide “whether due process acts as a check on undue jury discretion to award punitive damages,”<sup>57</sup> but the Court has been either unwilling or unable to overturn a punitive damages award on this account. In *Browning-Ferris Industries v. Kelco Disposal, Inc.*,<sup>58</sup> for example, the Court declined to address the due process issue because the issue had not been properly raised before the lower courts.<sup>59</sup> That case, and others similar to it,<sup>60</sup> led the Court to observe that the “constitutional status of punitive

<sup>54</sup> *Id.* at 1617 n.5.

<sup>55</sup> Prior to *Gore*, the Court had voiced concern over the magnitude of such awards. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), a majority of the Court supported a substantive due process limitation on punitive damages, *see id.* at 453–58 (opinion of Stevens, J., who was joined by Rehnquist, C.J., & Blackmun, J.); *id.* at 467 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 479–80 (O’Connor, J., dissenting, who was joined by White & Souter, JJ.), but did not establish which awards were to be rejected as being so large as to “jar one’s constitutional sensibilities.” *TXO*, 509 U.S. at 462 (opinion of Stevens, J.) (quoting *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18 (1991)) (internal quotation marks omitted). In *Haslip*, the Court upheld a punitive award, stating that the award did not “cross the line into the area of constitutional impropriety.” *Haslip*, 499 U.S. at 24. However, the *Haslip* Court suggested that, in different circumstances, it might be willing to find an award constitutionally improper, even if the defendants “had the benefit of the full panoply of . . . procedural protections.” *Id.* at 23.

<sup>56</sup> As the Court observed in *Bowers v. Hardwick*, 478 U.S. 186 (1986):

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments].

*Id.* at 194–95; *see also* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 395–96 (1981) (rejecting substantive due process as having no basis in the Constitution).

<sup>57</sup> *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276–77 (1989).

<sup>58</sup> 492 U.S. 257 (1989).

<sup>59</sup> *See id.* at 276–77.

<sup>60</sup> *See, e.g.*, *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76–79 (1988) (refusing to address the due process claim because it had not been raised before the state court); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828–29 (1986) (refusing to address the due process claim because the Court resolved the case on other grounds).

damages . . . is not an issue that is new to this Court or unanticipated by it.”<sup>61</sup> In more recent cases, the Court has indicated that an unreasonably large punitive sanction could violate a defendant’s substantive due process rights, but refused to follow through by striking down an award of punitive damages on this basis. In *Pacific Mutual Life Insurance v. Haslip*,<sup>62</sup> the Court upheld a punitive damages award that was four times greater than the accompanying compensatory damage award,<sup>63</sup> but warned that such a disparity “may be close to the line”<sup>64</sup> of “constitutional impropriety.”<sup>65</sup>

The Court extended this “line” in *TXO Production Corp. v. Alliance Resources Corp.*<sup>66</sup> In *TXO*, the jury awarded the plaintiff \$10 million in punitive damages for actual damages of only \$19,000.<sup>67</sup> However, the Supreme Court estimated the “potential harm” in the case to be between \$1 million and \$4 million and ruled that such potential harm should be considered in evaluating the excessiveness of an award.<sup>68</sup> After including potential harm in the calculation, the Court viewed the maximum resulting ratio of ten to one as insufficient to “jar one’s constitutional sensibilities.”<sup>69</sup> The ratio upheld in *TXO* was greater than that which the Court had upheld hesitantly in *Haslip*; nevertheless, the plurality asserted “that the Due Process Clause of the Fourteenth Amendment imposes substantive limits ‘beyond which penalties may not go.’”<sup>70</sup> Although the Court continued thereafter to claim “that the Constitution imposes a substantive limit on the size of punitive damage awards,”<sup>71</sup> it was questionable whether this limit would ever be reached.

In *Gore*, five Justices agreed that the “limit” had been exceeded.<sup>72</sup> Because *Gore*’s holding is a logical extension of the Court’s reasoning in both *TXO* and *Haslip*, one would expect the decision to build upon the analysis in those cases. Unfortunately, *Gore* does not complement the earlier line of cases; in fact, *Gore* obfuscates issues that the Court had seemingly settled previously. For example, unlike the decision in *Gore*, the *TXO* and *Haslip* Courts focused much more closely on the

<sup>61</sup> *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 12 (1991).

<sup>62</sup> 499 U.S. 1 (1991).

<sup>63</sup> See *id.* at 23–24.

<sup>64</sup> *Id.* at 23.

<sup>65</sup> *Id.* at 24.

<sup>66</sup> 509 U.S. 443 (1993).

<sup>67</sup> See *id.* at 446 (plurality opinion).

<sup>68</sup> *Id.* at 461–62 (opinion of Stevens, J.) (internal quotation marks omitted).

<sup>69</sup> *Id.* (quoting *Haslip*, 499 U.S. at 18) (internal quotation marks omitted).

<sup>70</sup> *Id.* at 453–54 (quoting *Seaboard Air Line Ry. Co. v. Seegers*, 207 U.S. 73, 78 (1907)). Justice Scalia noted that the plurality came close to completely foreclosing the argument that a punitive damages award violates substantive due process because “the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that ‘this is no worse than *TXO*.’” *Id.* at 472 (Scalia, J., concurring in the judgment).

<sup>71</sup> *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994).

<sup>72</sup> See *Gore*, 116 S. Ct. at 1604.

ratio of punitive damages to actual or potential damages.<sup>73</sup> Although it adopted such a comparison as one of its guideposts, the *Gore* Court explicitly de-emphasized this factor.<sup>74</sup> In addition, previous decisions had indicated that a defendant's wealth was a proper factor to consider in evaluating the excessiveness of a punitive award; a large award would be less excessive if imposed upon a defendant who had a greater ability to pay such an award.<sup>75</sup> Contradicting this practice, the majority in *Gore* suggested that a wealthier defendant merits greater protection from excessive awards because "its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce."<sup>76</sup>

The concurrence does not help to reconcile *Gore* with earlier punitive damages cases. The three concurring Justices — constituting a majority of the majority — emphasized that the factors employed by the Alabama Supreme Court to evaluate the punitive award in *Gore*, as that court interpreted them, "could not have significantly constrained the court system's ability to impose 'grossly excessive' awards," and therefore substantive due process review was appropriate.<sup>77</sup> Yet neither the concurrence nor the majority offered sufficient explanation for why Alabama's guidelines had been misinterpreted in *Gore*<sup>78</sup> but applied properly in *Haslip*, a decision in which the Court had approved the *very same* Alabama guidelines.<sup>79</sup>

*Gore*'s departure from earlier cases perhaps would not have undermined the validity of the Court's use of substantive due process review if the standards established in *Gore* were independently clear and capable of implementation. However, *Gore*'s three guideposts provide little guidance for future due process review; as a result, such review will be almost entirely subjective. The Court discussed the first guide-

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<sup>73</sup> See *TXO*, 509 U.S. at 462 (opinion of Stevens, J.); *Haslip*, 499 U.S. at 23–24.

<sup>74</sup> See *Gore*, 116 S. Ct. at 1601–03 (recognizing that "both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant," but suggesting that this factor should not be decisive in most cases). Even though the Court decreased the importance of this factor, *see id.* at 1602–03, the punitive damages award ratio in *Gore* of 500-to-1 was presumably far beyond the "line" alluded to in earlier cases, *see TXO*, 509 U.S. at 459–62 (opinion of Stevens, J.); *Haslip*, 499 U.S. at 23–24.

<sup>75</sup> See, e.g., *TXO*, 509 U.S. at 462 (opinion of Stevens, J.) ("The punitive damages award in this case is certainly large, but in light of the . . . petitioner's wealth, we are not persuaded that the award is so 'grossly excessive' as to be beyond the power of the State to allow." (citation omitted)); *Haslip*, 499 U.S. at 21–22 (approving the use of the "defendant's financial position" as one criterion in determining whether a punitive award is excessive (internal quotation marks omitted)).

<sup>76</sup> *Gore*, 116 S. Ct. at 1604.

<sup>77</sup> *Id.* at 1607 (Breyer, J., concurring).

<sup>78</sup> The Court discussed the factors from *Green Oil Co. v. Hornsby*, 589 So. 2d 218 (Ala. 1989), by which the Alabama Supreme Court had evaluated the punitive damages award. *See Gore*, 116 S. Ct. at 1594–95.

<sup>79</sup> *See Haslip*, 499 U.S. at 20–24 (discussing the *Green Oil* factors).

post, reprehensibility, in the most detail,<sup>80</sup> but did not explain how due process analysis is to differ from traditional evaluations by judges and juries regarding the reprehensibility of a defendant's conduct under state law. The Alabama Supreme Court had specifically considered this factor in *Gore*'s case and had found BMW's conduct to be reprehensible.<sup>81</sup> Thus, the *Gore* Court's due process review of and emphasis on reprehensibility amounted to nothing more than a disagreement with the state court's conclusion. Not only is it questionable whether such factual disagreements merit constitutional review,<sup>82</sup> but the Court also failed to indicate adequately how to evaluate "reprehensibility."

The other two guideposts identified in *Gore* are no more capable of providing guidance.<sup>83</sup> In particular, the Court's third factor — available sanctions for similar misconduct — focuses on state legislatures' and courts' determinations of what constitutes a reasonable penalty for a particular activity.<sup>84</sup> Why are such sanctions relevant to the constitutional analysis? Although available sanctions may serve as notice to a defendant,<sup>85</sup> the Court suggested that, even absent such notice, a punitive award may be constitutional if it represents the least drastic remedy available for achieving a state's objectives.<sup>86</sup> Unfortunately, the vagueness of this exception makes it difficult to apply. Moreover, even if the size of a challenged punitive damages award is on the same order as previous punitive awards, a large award may still violate a defendant's due process rights because previous awards have not been subject to this type of substantive due process review. In sum, the *Gore* Court's application of substantive due process review was inadvisable because the Court failed to provide a framework within which lower courts might conduct such an analysis.

In addition to providing little guidance for future judicial review, the Court's application of substantive due process in *Gore* failed to outline the limits of Supreme Court intervention in an area of law

<sup>80</sup> See *Gore*, 116 S. Ct. at 1599–1601.

<sup>81</sup> See *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 625 (Ala. 1994), cited in *Gore*, 116 S. Ct. at 1594–95.

<sup>82</sup> See Riggs, *supra* note 6, at 865–67. Professor Riggs raised similar concerns after the Court decided *Haslip*:

This in essence is a prescription for ad hoc, case by case review of court procedures and the size of awards . . . . As a common-law principle it undoubtedly makes sense; it is not far from describing what reviewing courts presently do. But it is not very useful as a rule of constitutional law, and certainly not one that the Supreme Court with its finite review capacity has the resources to police.

*Id.* at 865–66.

<sup>83</sup> It is also significant, as Justice Scalia suggested, that this list of guideposts might not be exhaustive. See *Gore*, 116 S. Ct. at 1614 (Scalia, J., dissenting). If the list of guideposts is incomplete, then the Court's decision is even less useful as a guide for lower courts.

<sup>84</sup> See *Gore*, 116 S. Ct. at 1603.

<sup>85</sup> The Court claimed that "[e]lementary notions of fairness . . . dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose." *Id.* at 1598.

<sup>86</sup> See *id.* at 1603.

traditionally controlled by state courts and legislatures.<sup>87</sup> With little more than passing reference to the concept of federalism,<sup>88</sup> the *Gore* Court disregarded the Alabama Supreme Court's judgment that a \$2 million award was proper.<sup>89</sup> The Court should refrain from applying substantive due process if, by doing so, it completely disregards the reasoned judgments of state courts, especially when the guidelines that the Court offers in place of those judgments are vague and difficult to implement.

The extent to which states regulate punitive damages awards illustrates how important the dissents' federalism concerns are.<sup>90</sup> States are attempting to handle the perceived punitive damages problem themselves, yet *Gore* legitimizes substantive due process review as a means of challenging state regulations. Although the *Gore* Court "rejected the notion that the constitutional line is marked by a simple mathematical formula,"<sup>91</sup> some states use mathematical guidelines to limit punitive awards.<sup>92</sup> Thus, an award that complies with a state statutory maximum could still violate substantive due process in a particular case if, for example, a court finds that the reprehensibility of the defendant's conduct does not merit such an award. Such a holding would be contrary to that state legislature's implicit (or perhaps explicit) finding that a punitive award authorized by its guidelines is not excessive in any case. By encouraging unprincipled judicial activism, *Gore* could undermine state legislative policy goals regarding the punitive awards process.

In striking down a particular award as violative of a defendant's substantive due process rights, the *Gore* Court provided an answer to

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<sup>87</sup> As Justices Scalia and Ginsburg both argued, punitive damages fall within "the province of state governments." *Id.* at 1610 (Scalia, J., dissenting); *accord id.* at 1614 (Ginsburg, J., dissenting).

<sup>88</sup> See *Gore*, 116 S. Ct. at 1595 ("In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.").

<sup>89</sup> See *id.* at 1596–98. The Court found that the "Alabama Supreme Court . . . properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama," *id.* at 1598 (citations omitted), but the Court did not accord any deference to that court's judgment regarding the amount of the remitted award. In dissent, Justice Ginsburg contended that the Court should have presumed that the state court's decision was valid. See *id.* at 1616 (Ginsburg, J., dissenting).

<sup>90</sup> As Justice Ginsburg argued, "the reexamination prominent in state courts and in legislative arenas serves to underscore why the Court's enterprise is undue." *Gore*, 116 S. Ct. at 1617–18 (Ginsburg, J., dissenting) (footnote omitted). Justice Ginsburg described many states' legislative actions regarding punitive damages, *see id.* app. at 1618–20, and she categorized state actions as falling within three areas: "(1) caps on awards; (2) provisions for payment of sums to state agencies rather than to plaintiffs; and (3) mandatory bifurcated trials with separate proceedings for punitive damages determinations," *id.* app. at 1618.

<sup>91</sup> *Gore*, 116 S. Ct. at 1602.

<sup>92</sup> See *id.* app. at 1618–19 (Ginsburg, J., dissenting) (listing the different monetary caps and punitive-to-compensatory damages ratios enforced by various states at the time of the *Gore* decision).

the lingering question regarding the possibility of substantive limits on punitive damages awards. Unfortunately, in the process, the Court both obfuscated the existing body of law and failed to provide adequate guidelines for future due process review of punitive awards. In addition, *Gore* virtually ignored serious federalism concerns regarding the proper role of the Court in the review of punitive damages awards. If the Court is committed to subjecting punitive awards to substantive review, then it needs to develop guidelines that lower courts can implement; after all, the Supreme Court is neither willing nor able to review every punitive damages award itself. The Court should rethink its punitive damages jurisprudence if it intends to function as an effective referee in the “sport” of punitive damages.

### B. Equal Protection

1. *Discrimination Based on Sexual Orientation.* — The Supreme Court has traditionally conceived of equal protection analysis as a matter of balancing opposing interests rather than as a doctrine with per se rules. Even when applying the strictest scrutiny, the Court will find some violations of fundamental rights and some burdens on suspect classes acceptable if the government shows that its interests are sufficiently compelling and its means narrowly tailored.<sup>1</sup> Similarly, under the rational basis test, the traditional deference shown to the legislature translates into a “strong presumption of constitutionality,”<sup>2</sup> but hardly a per se rule of constitutional validity.

Last Term, in *Romer v. Evans*,<sup>3</sup> the Supreme Court struck down an amendment to the Colorado State Constitution as an unprecedented per se violation of the Equal Protection Clause.<sup>4</sup> The Court held that Amendment 2, which singled out a class of persons — homosexuals, lesbians, and bisexuals — and denied them the right to seek protection from the government against public or private discrimination based on that class membership, was “a denial of equal protection of the laws in the most literal sense.”<sup>5</sup> Because it also analyzed the Amendment under the rational basis test, however, the Court’s opinion is fraught with interpretive difficulties. Although it leaves several unanswered

<sup>1</sup> Although strict scrutiny has been called “‘strict’ in theory and fatal in fact,” Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972), the Supreme Court has upheld laws even under this standard, see, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (sustaining military order excluding Japanese-Americans from designated areas); see also *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))); cf. *Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (upholding a federal ceiling on political campaign contributions against First Amendment challenge); *Roe v. Wade*, 410 U.S. 113, 155, 163–64 (1973) (upholding state prohibitions on post-viability abortions).

<sup>2</sup> LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1442–43 (2d ed. 1988).

<sup>3</sup> 116 S. Ct. 1620 (1996).

<sup>4</sup> See *id.* at 1628.

<sup>5</sup> *Id.*

questions in the gay rights context, the case revolutionizes the Court's equal protection analysis, raising new questions about the methodology and substance of equal protection jurisprudence.

On November 3, 1992, the State of Colorado adopted Amendment 2 as a state constitutional provision by a vote of 53% to 47% in a statewide referendum.<sup>6</sup> The Amendment was largely a response to Colorado municipal ordinances that outlawed discrimination on the basis of sexual orientation.<sup>7</sup> The Amendment not only repealed the existing ordinances insofar as they prohibited discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships,"<sup>8</sup> but also prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect the named class."<sup>9</sup>

Nine days after the Amendment's adoption, several parties commenced litigation to enjoin its enforcement and to have it declared invalid.<sup>10</sup> The trial court granted a preliminary injunction to prevent the Amendment from taking effect prior to court review.<sup>11</sup> In sustaining the injunction and remanding the case for further proceedings, the Colorado Supreme Court held that Amendment 2 was subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment because it infringed on "the fundamental right to participate equally in the political process" by "'fencing out' an independently identifiable class of persons."<sup>12</sup> On remand, the defendants offered six allegedly "compelling state interests" for passing the Amendment,<sup>13</sup> but the trial court found that only two of them were compelling and that Amendment 2 was not narrowly tailored to meet

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<sup>6</sup> See *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994) (en banc). Amendment 2, entitled "No protected status based on homosexual, lesbian or bisexual orientation," provides:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b.

<sup>7</sup> See *Romer*, 116 S. Ct. at 1623 (describing ordinances enacted in Aspen, Boulder, and Denver that "banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services").

<sup>8</sup> COLO. CONST. art. II, § 30b.

<sup>9</sup> *Romer*, 116 S. Ct. at 1623.

<sup>10</sup> See *Evans v. Romer*, Civ. A. No. 92 CV 7223, 1993 WL 518586, at \*1 (Colo. Dist. Ct. Dec. 14, 1993).

<sup>11</sup> See *Evans v. Romer*, Civ. A. No. 92 CV 7223, 1993 WL 19678, at \*12 (Colo. Dist. Ct. Jan. 15, 1993).

<sup>12</sup> *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) (en banc). The phrase "[f]encing out" was borrowed from the Supreme Court, which used it in *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

<sup>13</sup> *Evans*, 1993 WL 518586, at \*2 (internal quotation marks omitted). The defendants alleged compelling state interests were:

either of those interests.<sup>14</sup> Accordingly, it enjoined enforcement of Amendment 2.<sup>15</sup> The Colorado Supreme Court affirmed the ruling, reviewing the trial court's findings *de novo* and agreeing that Amendment 2 was not narrowly tailored to serve any compelling state interests.<sup>16</sup>

In a 6–3 decision, the United States Supreme Court affirmed the judgment, “but on a rationale different from that adopted by the State Supreme Court.”<sup>17</sup> Justice Kennedy, writing for the majority,<sup>18</sup> first described Amendment 2’s “[s]weeping and comprehensive” effect on the legal status of gays and lesbians.<sup>19</sup> He rejected the State’s principal argument that Amendment 2 merely “puts gays and lesbians in the same position as all other persons” and “does no more than deny homosexuals special rights.”<sup>20</sup> On the contrary, Justice Kennedy argued, the Amendment serves to put homosexual persons “in a solitary class with respect to transactions and relations in both the private and governmental spheres,”<sup>21</sup> and “the Amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”<sup>22</sup>

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- 1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of our children.

*Id.*

<sup>14</sup> See *id.* at \*9. The trial court found that only “the promotion of religious freedom” and “family privacy” constituted compelling state interests. *Id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *Evans v. Romer*, 882 P.2d 1335, 1341–49 (Colo. 1994) (en banc).

<sup>17</sup> *Romer*, 116 S. Ct. at 1624.

<sup>18</sup> Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer joined in the opinion.

<sup>19</sup> *Romer*, 116 S. Ct. at 1625.

<sup>20</sup> *Id.* at 1624.

<sup>21</sup> *Id.* at 1625.

<sup>22</sup> *Id.* at 1627. Justice Kennedy described these safeguards as “protections taken for granted by most people either because they already have them or do not need them.” *Id.*

In the private sphere, Justice Kennedy saw the effect of the Amendment as “far-reaching . . . when considered in light of the structure and operation of modern anti-discrimination laws.” *Id.* at 1625. Using the public accommodations context as an illustration, Justice Kennedy explained that “most States have chosen to counter discrimination by enacting detailed statutory schemes.” *Id.* Colorado’s laws exemplified this “emerging tradition of statutory protection” in that they “enumerate[d] the persons or entities subject to a duty not to discriminate” and the “groups or persons within [the statutes’] ambit of protection.” *Id.* He observed that Amendment 2 had the effect of barring “homosexuals from securing protection against the injuries that these public-accommodations laws address,” as well as “[nullifying] specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.” *Id.* at 1626.

In the public sphere, Justice Kennedy observed that the Amendment “would repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.” *Id.* He suggested that the reach of the Amendment may even extend beyond laws passed specifically for the benefit of gays and lesbians by depriving them “of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.” *Id.*

With this understanding of Amendment 2's effect, Justice Kennedy asserted that, under the Equal Protection Clause, the Amendment "fails, indeed *defies*, even [the] conventional inquiry" known as the rational basis test.<sup>23</sup> He offered two fundamentally different arguments for invalidating the Amendment, the first based on a *per se* rule, the second based on the rational basis test. According to the first argument, the Amendment "*defies*" the rational basis test by being a *per se* violation of equal protection, because the Amendment denies an entire class of persons "the right to seek specific protection from the law"<sup>24</sup> and imposes a "broad and undifferentiated disability on a single named group."<sup>25</sup> In the typical equal protection case, the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained" by a particular law.<sup>26</sup> Justice Kennedy argued that Amendment 2 presents a unique problem, because it "*confounds* this normal process of judicial review."<sup>27</sup> The Amendment, he maintained, "is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."<sup>28</sup> Underscoring the "unprecedented" nature of such a violation, Justice Kennedy proclaimed that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance,"<sup>29</sup> and a law that violates this principle by making it "more difficult for one group of citizens than for all others to seek aid from the government is *itself* a denial of equal protection of the laws in the most literal sense."<sup>30</sup>

In the second argument, one that does not appear necessary to the Court's result,<sup>31</sup> Justice Kennedy demonstrated how Amendment 2 "fails" the rational basis test.<sup>32</sup> He argued that the Amendment does not bear a rational relationship to any legitimate state interests because "its sheer breadth is so discontinuous with the reasons offered

<sup>23</sup> *Id.* at 1627 (emphasis added). Under the rational basis test, "if a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.*

<sup>24</sup> *Id.* at 1628.

<sup>25</sup> *Id.* at 1627.

<sup>26</sup> *Id.* The challenged laws that the Court has upheld are usually "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain that there existed some relation between the classification and the purpose it served." *Id.*

<sup>27</sup> *Id.* at 1628 (emphasis added).

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

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

<sup>30</sup> *Id.* (emphasis added). The word "itself" is an English cognate of the Latin "per se," see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1685 (unabr. 1986) (defining "per se," in part, as "by, of, or in itself or oneself or themselves"), and this holding therefore reads as a *per se* rule.

<sup>31</sup> Justice Kennedy introduced this argument as a "second and related point," *Romer*, 116 S. Ct. at 1628, and stated that, "*in addition to* the far-reaching deficiencies of Amendment 2 that we have noted," the Amendment also failed the rational basis test, *id.* at 1629 (emphasis added).

<sup>32</sup> See *id.* at 1627.

for it that the Amendment seems inexplicable by anything but animus toward the class that it affects.”<sup>33</sup> Justice Kennedy asserted that the concept of equal protection “must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest,”<sup>34</sup> and that Amendment 2 inflicts on the affected group “immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”<sup>35</sup> For Justice Kennedy, the Amendment “is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”<sup>36</sup>

Justice Scalia dissented vociferously, challenging the majority’s characterization of Amendment 2 as “the manifestation of a ‘bare . . . desire to harm’ homosexuals.”<sup>37</sup> In his view, the Amendment was “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws,” and he attacked the Court for imposing its own views on homosexuality upon the Colorado community.<sup>38</sup> Justice Scalia maintained that Amendment 2 was constitutional, not only because it was “unprohibited,” but also because it was “eminently reasonable, with close, congressionally approved precedent in earlier constitutional practice.”<sup>39</sup> First, Justice Scalia criticized the principle that he insisted was behind the Court’s opinion — that “one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection.”<sup>40</sup> Relying on the Colorado Supreme Court’s observation that Amendment 2 would have no effect on general laws and policies prohibiting arbitrary discrimination,<sup>41</sup> he characterized the law as prohibiting “*special treatment* of homosexuals, and nothing more.”<sup>42</sup> Second, Justice Scalia argued that in light of *Bowers*

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

<sup>35</sup> *Id.* at 1629. Justice Kennedy dismissed the rationales offered by the State, finding that, although they might constitute legitimate government interests in another context, the “breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.” *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (Scalia, J., dissenting) (quoting *Romer*, 116 S. Ct. at 1628 (quoting *Moreno*, 413 U.S. at 534)). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia’s dissenting opinion.

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

<sup>39</sup> *Id.* at 1633.

<sup>40</sup> *Id.* at 1630.

<sup>41</sup> See *id.* (citing *Evans v. Romer*, 882 P.2d 1335, 1346 n.9 (Colo. 1994) (en banc)).

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

v. Hardwick,<sup>43</sup> there was clearly a rational basis for the Amendment: "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct"<sup>44</sup> or "merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct."<sup>45</sup>

Knotty interpretive issues surround the relationship between the two arguments upon which Justice Kennedy found Amendment 2 unconstitutional. One argument subjects Amendment 2 to the conventional rational basis test and concludes that the Amendment fails, whereas the other one discusses the unprecedented manner in which Amendment 2 constituted "a denial of equal protection of the laws in the most literal sense."<sup>46</sup> This latter argument recognizes for the first time a *per se* violation of the Equal Protection Clause. Although *Romer* may have a limited effect in the gay rights context, the recognition of this new type of violation raises questions about the methodology and core values of equal protection jurisprudence.

The two arguments (*per se* rule and rational basis test) may be related,<sup>47</sup> but they are fundamentally distinct in their mode of operation. Language from the majority opinion supports the contention that the Court found Amendment 2 unconstitutional under both the *per se* rule and the rational basis test: "*in addition to* the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose and Amendment 2 does not."<sup>48</sup> Whereas conventional equal protection analysis allows the state to establish, under the appropriate standard, a justification for any *particular* differential treatment,<sup>49</sup> a state violation of the Court's *per se* rule is unjustifiable under any circumstances. Be-

<sup>43</sup> 478 U.S. 186 (1986). The *Bowers* Court held that the Due Process Clause of the U.S. Constitution does not prohibit states from criminalizing homosexual conduct. *See id.* at 191–96.

<sup>44</sup> *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting). Justice Scalia pointed out that the majority did not even mention *Bowers*, the "case most relevant to the issue before us today." *Id.*

<sup>45</sup> *Id.* at 1631–32. In response to the Court's view that the Amendment reflects "animus" toward homosexuality, Justice Scalia opined: "I had thought that one could consider certain conduct reprehensible — murder, for example, or polygamy, or cruelty to animals — and could exhibit even 'animus' toward such conduct. Surely that is the only sort of 'animus' at issue here . . ." *Id.* at 1633.

<sup>46</sup> *Romer*, 116 S. Ct. at 1628.

<sup>47</sup> After discussing the *per se* rule, Justice Kennedy introduced the rational basis argument as a "second and related point." *Id.*

<sup>48</sup> *Id.* at 1629 (emphasis added) (citation omitted). Laurence Tribe's amicus brief on behalf of the respondents reaches a similar conclusion: "Whether there might be adequate justification for a state's decision to treat homosexuals, or any other group of persons, less favorably than others *in particular circumstances*, and by what standard such a state decision should be reviewed, are questions the Court need not address in this case." Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland & Kathleen M. Sullivan as *Amici Curiae* in Support of Respondents at 3, *Romer* (No. 94-1039), available in 1995 WL 862021.

<sup>49</sup> *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

cause the final portion of the opinion invokes the rational basis test, it is tempting to conclude that the opinion rests solely upon it and to avoid recognizing that the *per se* rule forms the basis for an independent argument. The *per se* analysis alone would have been sufficient to invalidate the Amendment, however, and the rational basis argument in a sense operated as, at most, an alternative holding.<sup>50</sup>

Justice Scalia mischaracterized the *per se* rule in asserting that the "central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others."<sup>51</sup> Yet the *per se* rule is not about levels of political decisionmaking, but about the very meaning of protection of the laws. Justice Scalia made his misunderstanding apparent when he posited "a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen,"<sup>52</sup> and argued that, under the Court's theory, the state law would constitute a denial of equal protection because the relatives would have to persuade the state legislature (unlike all others who need only persuade the municipality) that they should have access to city contracts.<sup>53</sup>

Justice Scalia thought it "ridiculous to consider this a denial of equal protection."<sup>54</sup> The majority in *Romer* would no doubt agree; under the *per se* rule, properly understood, his example would not constitute a violation. First, his posited prohibition only denies the conferral of an economic benefit (city contracts); in contrast, *per se* violations of the Equal Protection Clause, according to Justice Kennedy, deny "the right to seek specific protection from the law."<sup>55</sup> Second, a denial of equal protection does not inhere because the class of persons burdened by a law can escape that burden only by resorting to a higher level of decisionmaking, such as the state legislature in Justice Scalia's example, and seeking to have the law repealed. Justice Scalia is correct in attacking as ludicrous such a conception of equal protection, which would indeed turn every law that disadvantaged a group into an equal protection violation. But the *per se* rule does not implicate the imposition of just *any* disadvantage on any random

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<sup>50</sup> Justice Scalia's arguments that a rational basis existed for Amendment 2 thus seem inappropriate because they failed to address the central holding of the case. *But see* Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 53, 55–56 (1996) (arguing that the *Romer* Court relied solely on the rational basis test in invalidating Amendment 2).

<sup>51</sup> *Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting).

<sup>52</sup> *Id.* at 1631.

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

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

<sup>55</sup> *Romer*, 116 S. Ct. at 1628. Thus, a law stating that only city councilmen could no longer enforce their contracts in the courts of that state would probably violate the *per se* rule.

group; it implicates, for a singled-out class, the denial of the right to seek the *protection of the laws*.

Because of its invocation of a per se rule, the *Romer* case is unlikely to have significant impact in the gay rights context. The per se rule made it unnecessary for the Court to address several questions that have long deserved answers. In particular, the Court did not rule on whether homosexual persons constitute a suspect or quasi-suspect class warranting strict or heightened scrutiny.<sup>56</sup> The trial court had rejected the plaintiffs' argument that homosexual persons are a suspect or quasi-suspect class,<sup>57</sup> and the plaintiffs did not appeal that ruling.<sup>58</sup> Nothing in the Supreme Court's opinion, however, would preclude suspect classification in the future.<sup>59</sup> In deciding that Amendment 2 was a per se violation of equal protection and would fail even the rational basis test, the Court did not need to reach the question of the proper level of scrutiny.<sup>60</sup>

The Court also declined even to mention *Bowers v. Hardwick*,<sup>61</sup> thus avoiding the question of whether *Bowers* has any impact on equal protection claims. Many circuit courts refusing to accord sexual orientation suspect or quasi-suspect status have done so on the theory that *Bowers* foreclosed such a finding.<sup>62</sup> Nevertheless, because *Bowers* was decided on due process grounds,<sup>63</sup> one might argue that *Bowers* carries no weight in equal protection cases.<sup>64</sup> The *Romer* Court did

<sup>56</sup> Several lower courts have rejected claims that homosexual persons constitute a suspect or quasi-suspect class, *see, e.g.*, Equality Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 268 (6th Cir. 1995), but the contrary position has also received support, *see, e.g.*, Watkins v. United States Army, 875 F.2d 699, 728 (9th Cir. 1989) (Norris, J., concurring); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 162–64 (1980) (arguing that classifications based on homosexuality merit heightened scrutiny).

<sup>57</sup> *See* Evans v. Romer, Civ. A. No. 92 CV 7223, 1993 WL 518586, at \*12 (Colo. Dist. Ct. Dec. 14, 1993).

<sup>58</sup> *See* Evans v. Romer, 882 P.2d 1335, 1341 n.3 (Colo. 1994) (en banc).

<sup>59</sup> The Court's silence with regard to the Colorado Supreme Court's holding that there is a "fundamental right" of "independently identifiable class[es]" to "participate equally in the political process," *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) (en banc), can be seen either as an implicit rejection of that holding, as asserted by Justice Scalia, *see Romer*, 116 S. Ct. at 1631 n.1 (Scalia, J., dissenting), or as a mere avoidance of the question.

<sup>60</sup> *See* Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland & Kathleen M. Sullivan as *Amici Curiae* in Support of Respondents at 3, *Romer* (No. 94-1039) ("Amendment 2, in stark contrast, involves a prior and more basic question . . . ."), available in 1995 WL 862021.

<sup>61</sup> 478 U.S. 186 (1986).

<sup>62</sup> *See, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (holding that it would be "incongruous" in light of *Bowers* "to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment").

<sup>63</sup> *See Bowers*, 478 U.S. at 191–96.

<sup>64</sup> *See* Watkins v. United States Army, 875 F.2d 699, 720 (9th Cir. 1989) (Norris, J., concurring) ("Whatever one might think about the *Hardwick* Court's concerns about substantive due process in general and the right of privacy in particular, these concerns have little if any relevance to equal protection doctrine."); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note*

not explicitly endorse either of these positions. Because the Court found Amendment 2 to be a *per se* violation of the Equal Protection Clause, it simply did not need to consider whether *Bowers* gave states a rational basis for classifications based on sexual orientation.<sup>65</sup>

Although *Romer* would appear to have limited implications for gay rights jurisprudence,<sup>66</sup> in the realm of equal protection jurisprudence generally, the decision is nothing short of revolutionary. The Court founded its decision on a rule that legislation making it more burdensome for a single group of citizens to seek the government's protection is a *per se* denial of equal protection of the laws.<sup>67</sup> Such an application of a *per se* rule in the equal protection context was unprecedented. Conventional analysis had emphasized that the Equal Protection Clause forbids only unreasonable and arbitrary classifications, not all classifications *per se*.<sup>68</sup> Prior to *Romer*, the Court had recognized the concept of *per se* invalidity only in a negative sense, holding that certain conditions or actions did *not* constitute *per se* violations of the Equal Protection Clause.<sup>69</sup> Notably, the Court has consistently rejected the proposition that affirmative action programs that treat people differently solely on account of their race are a *per se* violation of the Equal Protection Clause, embracing instead the view that an overriding statutory purpose can justify differential treatment.<sup>70</sup>

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*on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1178 (1988).

<sup>65</sup> If one reads the Court's opinion as invoking the rational basis test as an alternative holding, the Court's silence on *Bowers* may be interpreted as implicitly endorsing the position that *Bowers* is inapplicable to equal protection doctrine.

<sup>66</sup> The decision has one unambiguous effect: at the very least, constitutional amendments and laws like Amendment 2 are forbidden, offering at least some measure of protection for homosexual persons.

<sup>67</sup> See *Romer*, 116 S. Ct. at 1628.

<sup>68</sup> See, e.g., *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

<sup>69</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993) (noting that racially aligned redistricting was not impermissible *per se*); *Hernandez v. New York*, 500 U.S. 352, 361 (1991) (“[D]isproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause.”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that, although disproportionate impact was not irrelevant, it was not *per se* unconstitutional).

<sup>70</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (concluding that racial classifications, although subject to strict scrutiny review, were not *per se* unconstitutional); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 356 (1978) (opinion of Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (noting that “[o]ur cases have always implied that an ‘overriding statutory purpose,’ . . . could be found that would justify racial classifications,” and concluding that “racial classifications are not *per se* invalid under the Fourteenth Amendment” (citations omitted)).

Some Justices have conceived of the Equal Protection Clause as a *per se* ban in certain situations. In his well-known dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), Justice Harlan expressed his belief that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Id.* at 559. Justice Stewart also endorsed a *per se* rule based on a color-blindness principle that would find racial classifications *per se* unconstitutional. See *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting) (“Under our Constitution, the government may never act to the detriment of a person solely because of that

It is too early to say whether the Court's approach in *Romer* signals a new era of equal protection jurisprudence. The scope of the per se rule may be extremely limited. The Court found that laws of this sort were rare, even "unprecedented," and it therefore appears that the range of laws falling within the ambit of the per se rule will be extremely narrow.<sup>71</sup> In addition, because Justice Kennedy's opinion refers to the rational basis test, the very existence of the per se rule may be questioned by interpretations that view the opinion as resting *solely* on the rational basis test.<sup>72</sup> To avoid violating the per se rule, future lawmakers may need only to avoid drafting prohibitions, such as Amendment 2, that disqualify a class of persons from the right to seek the law's protection from an entire category of mistreatment.

That the Court set forth a per se rule at all is highly significant, however. First, the rule raises basic questions about the methodology of equal protection jurisprudence. Although per se rules exist already in several areas of constitutional law,<sup>73</sup> the relative merits of such rules in this specific jurisprudence warrant consideration. A per se rule may seem out of place in the realm of equal protection because the traditional doctrine weighs the importance of the challenged enactment against that of the state interest. Conversely, the multi-tiered balancing system, with varied weights under varied levels of scrutiny, leaves judges with perhaps too much discretion to choose both the level of scrutiny and the weight accorded the interests at stake.<sup>74</sup> A per se rule may serve to curb some of this discretion, because unlike conventional analysis, even the weightiest state interest cannot justify certain laws if they violate a per se rule.

Second, a per se rule enriches our understanding of the Equal Protection Clause. By defining a type of violation that the conventional tests cannot justify, the rule informs the judicial debate about the values at the core of the doctrine and raises questions about the nature of rights in equal protection doctrine.<sup>75</sup> A concurrence by a Justice of the Colorado Supreme Court in the *Romer* case observed that under "the Equal Protection Doctrine . . . regardless of the standard applied, it is contemplated that certain abridgements of even fundamental rights are

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person's race."); *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring) ("[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se*.").

<sup>71</sup> See *Romer*, 116 S. Ct. at 1628.

<sup>72</sup> See Sunstein, *supra* note 50, at 53, 55–56.

<sup>73</sup> For instance, the traditional view in the Fifth Amendment context is that permanent physical occupations of private property by the government are per se takings. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

<sup>74</sup> Cf. Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 56–69 (1992) (characterizing the debate over rules versus standards as primarily an issue of judicial discretion).

<sup>75</sup> Cf. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–07 (1958) (noting the importance to legal rules of having a hard core of standard instances).

acceptable."<sup>76</sup> By carving out a *per se* violation not subject to these usual presumptions, however, the *Romer* Court may have created a baseline, inviolate right that cannot be infringed under any circumstance: the right of a group not to be singled out and denied the ability to seek protection from discrimination or any other form of mistreatment under the law.

Although *Romer* failed to answer certain key questions in gay rights jurisprudence, it introduced a novel methodological approach that carries an underlying substantive message. The *per se* rule, when properly interpreted as distinct from the rational basis test, may contain the seeds of an epistemological revolution in equal protection law.

2. *Race-Based Selective Prosecution.* — Ten years ago, Congress responded to growing public concern about drug abuse by enacting strict mandatory minimum sentences for narcotics dealers convicted in federal court.<sup>1</sup> Since then, the disproportionate impact of the Federal Sentencing Guidelines on racial and ethnic minorities has provoked debate among politicians,<sup>2</sup> judges,<sup>3</sup> and scholars.<sup>4</sup> Federal law punishes traffickers in crack cocaine, who are predominantly black, much more severely than those who trade in powder cocaine.<sup>5</sup> Exacerbating this disparity, whites who do deal crack are more likely to be prosecuted in state court, where the penalties are much more lenient.<sup>6</sup>

<sup>76</sup> *Evans v. Romer*, 882 P.2d 1335, 1355 (Colo. 1994) (en banc) (Scott, J., concurring). Justice Scott, who ruled Amendment 2 unconstitutional, preferred to base his analysis on the Fourteenth Amendment Privileges or Immunities Clause, which "guarantees citizens that certain fundamental rights of national citizenship are inviolate, absent due process." *Id.* at 1356.

<sup>1</sup> See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., and 31 U.S.C.); Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-238, 98 Stat. 1987, 1987-2040 (codified as amended in scattered sections of 18 U.S.C. and at 28 U.S.C. §§ 991-998).

<sup>2</sup> See, e.g., Ann Devroy, *Clinton Retains Tough Law on Crack Cocaine; Panel's Call to End Disparity in Drug Sentencing Is Rejected*, WASH. POST, Oct. 31, 1995, at A1; David G. Savage, *Clinton OKs Bill Keeping Stiff Sentences for Crack*, L.A. TIMES, Oct. 31, 1995, at A4.

<sup>3</sup> See, e.g., *United States v. Then*, 56 F.3d 464, 466 (2d Cir. 1995); *United States v. Clary*, 34 F.3d 709, 712 (8th Cir. 1994); *State v. Russell*, 477 N.W.2d 886, 887-91 (Minn. 1991).

<sup>4</sup> Compare Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Commitment*, 107 HARV. L. REV. 1255, 1267-69 (1994) (arguing that severe penalties for crack offenders benefit law-abiding members of the black community), with David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2553-62 (1995) (criticizing Kennedy's argument).

<sup>5</sup> A federal defendant with five grams of crack (worth about \$500 on the street) would receive the same five-year minimum sentence as a defendant with 500 grams of powder cocaine (worth about \$50,000). See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY at xii-xiii, 173 (1995) [hereinafter COCAINE AND FEDERAL SENTENCING POLICY]. From 1986 to 1988, before the full implementation of the Federal Sentencing Guidelines, white, black, and Hispanic offenders received comparable sentences in federal court. Under the Guidelines from 1989 to 1990, black offenders received prison terms 41% longer on average than the terms that whites and Hispanics received. See DOUGLAS C. McDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 1 (1993).

<sup>6</sup> See H.R. REP. NO. 104-272, at 19-20 (1995), reprinted in 1995 U.S.C.C.A.N. 335, 352-53.

Against this backdrop, the Supreme Court recently confronted the difficult task of balancing the Constitution's promise of equal justice with the need for effective law enforcement. Last Term, in *United States v. Armstrong*,<sup>7</sup> the Court held that a defendant who alleges racially selective prosecution may not obtain discovery unless he presents evidence that the government declined to prosecute similarly situated persons of other races.<sup>8</sup> Although the Court's historical reluctance to interfere with prosecutorial discretion emanates from sound policy concerns, in *Armstrong* the Court underestimated the weight of competing values. By setting an unrealistically high threshold for discovery, the Court communicated a troubling indifference to the appearance of injustice, missing an important opportunity to condemn racial bias and to strengthen public faith in the neutrality of the criminal justice system.

The case arose in early 1992, when local and federal law enforcement agents began investigating a suspected crack cocaine distribution ring in Inglewood, California.<sup>9</sup> The inquiry led to the arrest and prosecution of Christopher Armstrong and four other men, all of whom are black, on federal drug and firearms charges.<sup>10</sup> In state court Armstrong would have faced a sentence of three to nine years; in federal court he would receive fifty-five years to life.<sup>11</sup>

The defendants alleged that they were chosen for federal prosecution because of their race and moved to dismiss the indictments.<sup>12</sup> To support their motion for discovery on the selective prosecution claim, the defendants submitted an affidavit stating that each of the twenty-four crack cocaine cases closed by the Federal Public Defender's Office for the Central District of California in 1991 involved a black defendant.<sup>13</sup> Despite the government's opposition,<sup>14</sup> the district court granted the discovery motion, ordering the government to identify the race of all defendants charged with both cocaine and firearms offenses in the past three years, to describe the levels of law enforcement involved in each case, and to explain the charging criteria for federal prosecution.<sup>15</sup>

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<sup>7</sup> 116 S. Ct. 1480 (1996).

<sup>8</sup> See *id.* at 1483.

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

<sup>10</sup> See *United States v. Armstrong*, 48 F.3d 1508, 1510 (9th Cir. 1995).

<sup>11</sup> See Brief for Respondents Shelton Aunwan Martin, Aaron Hampton, Christopher Lee Armstrong, and Freddie Mack at 3, *Armstrong* (No. 95-157), available in 1996 WL 17111.

<sup>12</sup> See *Armstrong*, 116 S. Ct. at 1483.

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

<sup>14</sup> See *id.* at 1484.

<sup>15</sup> See *id.*

The government moved for reconsideration, asserting race-neutral grounds for the prosecution decisions.<sup>16</sup> The government also suggested that more blacks than whites were prosecuted on crack charges because certain historical and socioeconomic conditions had led blacks to dominate the crack trade.<sup>17</sup> Finally, the government identified eleven non-black defendants out of the more than 3500 persons prosecuted for federal narcotics offenses in the preceding three years; all eleven, however, were members of other racial or ethnic minorities.<sup>18</sup>

The defendants responded with affidavits from two defense attorneys. The first affidavit reported that a drug treatment worker told defense counsel that he had encountered equal numbers of minorities and non-minorities who used and dealt crack.<sup>19</sup> In the second affidavit, another defense attorney avowed that, to his knowledge, the government had prosecuted many non-black offenders in state court but none in federal court.<sup>20</sup>

The district court denied the government's motion for reconsideration.<sup>21</sup> When the prosecution refused to comply with the discovery order, the court dismissed the indictments to sanction the government and so that an appeal might lie.<sup>22</sup>

The Ninth Circuit reversed in a split decision, then voted to rehear the case en banc.<sup>23</sup> The en banc panel affirmed the district court's dismissal,<sup>24</sup> holding that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim."<sup>25</sup> Rejecting the government's contention that a defendant must demonstrate that the government chose not to prosecute similarly situated persons of another race, the court held that a defendant at the discovery stage "need only provide a *colorable basis* for believing that other similarly situated persons have not been prosecuted."<sup>26</sup> Because "[w]e must start with the presumption that people of *all* races commit *all* types of crimes — not with the premise that any type of crime is the exclusive

<sup>16</sup> These grounds included the amount of crack involved, the multiple sales and defendants (indicating a conspiracy), the accompanying firearms violations, the strength of the evidence, and the defendants' prior criminal histories. *See id.* (citing Assistant U.S. Attorney's affidavit).

<sup>17</sup> *See United States v. Armstrong*, 48 F.3d 1508, 1511 (9th Cir. 1995).

<sup>18</sup> *See Armstrong*, 116 S. Ct. at 1495 n.6 (Stevens, J., dissenting).

<sup>19</sup> *See Armstrong*, 116 S. Ct. at 1483.

<sup>20</sup> *See Armstrong*, 48 F.3d at 1518. This attorney had considerable experience in both state and federal court and had served as a director of the state court indigent defense panel. *See id.*

<sup>21</sup> *See Armstrong*, 116 S. Ct. at 1484.

<sup>22</sup> *See id.* at 1484 & n.2.

<sup>23</sup> *See id.* at 1484.

<sup>24</sup> *See id.* at 1484–85.

<sup>25</sup> *Armstrong*, 48 F.3d at 1513–14. The Ninth Circuit noted that, when the trial judge asked the government counsel to respond to the defendants' statistics, the attorney replied, "I would have no explanation for that." *Id.* at 1511.

<sup>26</sup> *Id.* at 1516.

province of any particular racial or ethnic group,”<sup>27</sup> statistical evidence of disparate impact satisfies this burden.<sup>28</sup> Noting the “prevalence of all kinds of drugs throughout our community,” the court observed that “at least some crack distributors are likely to be non-blacks.”<sup>29</sup> To presume otherwise, the court concluded, “would be accepting unwarranted racial stereotypes.”<sup>30</sup>

The Supreme Court reversed.<sup>31</sup> Writing for an eight-Justice majority, Chief Justice Rehnquist held that a defendant who wishes to conduct discovery on a selective prosecution claim must demonstrate “that the government declined to prosecute similarly situated suspects of other races.”<sup>32</sup>

The Court began by rejecting the defendants’ contention that Federal Rule of Criminal Procedure 16 entitled them to discovery on the selective prosecution defense.<sup>33</sup> Rule 16(a)(1)(C) provides for discovery of records “which are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.”<sup>34</sup> The majority concluded that the “defendant’s defense” includes only responses to the prosecution’s case-in-chief, not affirmative defenses unrelated to the merits.<sup>35</sup>

The Court then turned its attention to the trial court’s residual authority to order discovery beyond what Rule 16 requires when appropriate. The Court offered several reasons for limiting this authority in the selective prosecution context. Chief Justice Rehnquist explained that courts should hesitate to interfere with prosecutorial discretion because “[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”<sup>36</sup> Moreover, he contended, judicial intervention in prosecutorial decisions might encroach on the executive branch’s constitutional authority to “take Care that the Laws be faithfully executed.”<sup>37</sup> Because discovery “imposes many of the costs present when the Government must respond to a *prima facie* case of selective prose-

<sup>27</sup> *Id.* at 1516–17.

<sup>28</sup> See *id.* at 1516–19 & n.6.

<sup>29</sup> *Id.* at 1516–17.

<sup>30</sup> *Id.* at 1517 n.6.

<sup>31</sup> See *Armstrong*, 116 S. Ct. at 1489.

<sup>32</sup> *Id.* at 1483. Justices O’Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg joined the Chief Justice’s opinion. Justice Breyer concurred in part and concurred in the judgment.

<sup>33</sup> See *id.* at 1485. Neither the district court nor the Ninth Circuit addressed the Rule 16 issue. See *id.*

<sup>34</sup> FED. R. CRIM. P. 16(a)(1)(C), quoted in *Armstrong*, 116 S. Ct. at 1485.

<sup>35</sup> *Armstrong*, 116 S. Ct. at 1485.

<sup>36</sup> *Id.* at 1486 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)) (internal quotation marks omitted).

<sup>37</sup> U.S. CONST. art. II, § 3; see *Armstrong*, 116 S. Ct. at 1486; *Wayte*, 470 U.S. at 607.

cution," the concerns justifying a rigorous standard on the merits of the claim "require a correspondingly rigorous standard for discovery."<sup>38</sup> Thus, the Court held, a defendant must present "some evidence tending to show the existence of the essential elements of the defense" before he may obtain discovery.<sup>39</sup>

The Court derived the elements of the selective prosecution defense from "ordinary equal protection standards":<sup>40</sup> to prevail on the merits, a defendant must demonstrate both discriminatory effect and discriminatory intent.<sup>41</sup> In a racial selective prosecution case, the discriminatory effect prong requires the defendant to "show that similarly situated individuals of a different race were not prosecuted."<sup>42</sup> Adopting the rule of a majority of the circuits, the Court held that a defendant must produce some evidence of these similarly situated individuals before he is entitled to discovery.<sup>43</sup> Because the *Armstrong* defendants failed to identify non-black individuals who could have been prosecuted for the same offenses but were not, the Supreme Court reversed.<sup>44</sup>

Justice Souter filed a brief concurrence stating that he joined the majority's discussion of Rule 16 "only to the extent of its application to the issue in this case."<sup>45</sup> Justice Ginsburg also wrote in concurrence to express her belief that the majority's decision had not "created a 'major limitation' on the scope of discovery available" under Rule 16 because the Rule's application to other affirmative defenses was not properly before the Court.<sup>46</sup>

Justice Breyer concurred in part and concurred in the judgment, arguing that Rule 16 entitles defendants to more than "just documents

<sup>38</sup> *Armstrong*, 116 S. Ct. at 1488.

<sup>39</sup> *Id.* (quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)) (internal quotation marks omitted). The Court acknowledged that the courts of appeals have employed various phrases to describe the necessary evidentiary showing, but argued that "the many labels for this showing conceal the degree of consensus about the evidence necessary to meet it." *Id.*

<sup>40</sup> *Id.* at 1487.

<sup>41</sup> See *id.* (citing *Wayte*, 470 U.S. at 608).

<sup>42</sup> *Id.* (citing *Ah Sin v. Wittman*, 198 U.S. 500, 507–08 (1905)). The Court rejected the defendants' analogies to the jury selection context. See *id.* To make out a *prima facie* case of racial discrimination in jury selection, a defendant must show that the prosecutor used peremptory challenges to strike members of the defendant's race from the jury and that the relevant circumstances, including the potential for abuse of discretion inherent in the use of peremptory challenges, raise the inference of intentional discrimination. See *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). A defendant need not show that members of other races were not struck from the jury. The *Armstrong* Court distinguished *Batson* based on the context of the allegedly discriminatory event. Jury selection occurs in front of the judge, leaving her well situated to discern a pattern of discrimination, whereas charging decisions take place outside the judge's view. See *Armstrong*, 116 S. Ct. at 1488.

<sup>43</sup> See *Armstrong*, 116 S. Ct. at 1489.

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

<sup>45</sup> *Id.* at 1489 (Souter, J., concurring).

<sup>46</sup> *Id.* (Ginsburg, J., concurring).

related to the Government's case-in-chief.<sup>47</sup> Nevertheless, he believed that the defendants in *Armstrong* did not have a right to discovery, because the defendants' failure to produce evidence that similarly situated people of other races were not prosecuted amounted to a failure to demonstrate that the requested information was "material" to the preparation of the defense.<sup>48</sup>

Writing in dissent, Justice Stevens agreed that the defendants' "showing was not strong enough to give them a *right* to discovery."<sup>49</sup> However, he rejected the majority's conclusion that the district court judge abused her discretion by requiring the government to respond to the "disturbing" evidence presented by the defense.<sup>50</sup> The defendants' failure to produce evidence of similarly situated whites who were not prosecuted should not be dispositive, he argued, for "[t]here can be no doubt that such individuals exist, and indeed the Government has never denied the same."<sup>51</sup> In his view, the trial judge's "judicial notice of this obvious fact" was not an abuse of discretion.<sup>52</sup>

In *Armstrong*, the Court missed an important opportunity to help cure, or at least to diagnose, the racial divisions that plague the criminal justice system.<sup>53</sup> By setting an unduly high threshold for discovery, the Court afforded too much deference to prosecutorial discretion at the expense of countervailing values such as fairness and accountability.<sup>54</sup> This result is unfortunate because the evidence in *Armstrong*, though inconclusive, raises disturbing questions about the role of race in the enforcement of federal drug laws. Moreover, the Court's reasoning in *Armstrong* is in tension with its reasoning in other recent equal protection cases. Together, these aspects of the Court's decision signal a disquieting insensitivity to the appearance of injustice.

<sup>47</sup> *Id.* at 1490 (Breyer, J., concurring in part and concurring in the judgment).

<sup>48</sup> See *id.* at 1491–92.

<sup>49</sup> *Id.* at 1492 (Stevens, J., dissenting).

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

<sup>51</sup> *Id.* at 1494.

<sup>52</sup> *Id.*; cf. *United States v. Al Jibori*, 90 F.3d 22, 25 (2d Cir. 1996) (suggesting that the ruling in *Armstrong* "seriously undermines" circuit case law holding that the decision to order discovery "lies largely in the trial judge's discretion" (quoting *United States v. Berrios*, 501 F.2d 1207, 1212 (2d Cir. 1974)) (internal quotation marks omitted)).

<sup>53</sup> African-Americans make up only 12% of our nation's total population but half of our nation's prison population; one in three young black men was under the supervision of the criminal justice system in 1994. See MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER I (1995) (cited in Brief Amicus Curiae of Former Law Enforcement Officials & Police Organizations in Support of Respondents at 12, *Armstrong* (No. 95-157), available in 1995 WL 17132). Racial lines similarly divide public perceptions of the criminal justice system. Seventy-four percent of blacks but only 43% of whites believe that the criminal justice system treats blacks more harshly than whites. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1993, at 171 (1993).

<sup>54</sup> Cf. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1554–60 (1981) (arguing that prosecutorial discretion is too broad and interferes with the fair and equal administration of justice).

A variety of considerations, including separation of powers concerns, relative institutional competence issues, and the need for effective law enforcement, have motivated courts' traditional reluctance to interfere with prosecutorial discretion.<sup>55</sup> But the Court's fears of excessive judicial meddling in prosecutions seem unwarranted given that the Ninth Circuit's decision in *Armstrong* is the first reported federal case in which a defendant has succeeded on a claim of racially selective prosecution since *Yick Wo v. Hopkins*<sup>56</sup> in 1886.<sup>57</sup>

Nevertheless, the *Armstrong* Court focused its attention on the judicial restraint issue while giving short shrift to concerns such as accountability and the danger of unequal enforcement of the laws. As measures like the Federal Sentencing Guidelines constrain the discretion of other players in the criminal justice system, the prosecutor's charging decision becomes more and more important.<sup>58</sup> This decision occurs out of the public eye and is "essentially unreviewable"<sup>59</sup> — a situation that permits "those to discriminate who are of a mind to discriminate."<sup>60</sup> When such a system has a disproportionate impact on minorities, the effectiveness of law enforcement is undermined because "the support of the citizens for our judicial system depends not only upon its being fair in fact, but on its appearing to be fair as well."<sup>61</sup>

<sup>55</sup> See *Armstrong*, 116 S. Ct. at 1486.

<sup>56</sup> 118 U.S. 356 (1886).

<sup>57</sup> See Brief Amicus Curiae of Former Law Enforcement Officials & Police Organizations in Support of Respondents at 20, *Armstrong* (No. 95-157), available in 1995 WL 17132 (noting that few cases have even reached the discovery threshold); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1402-03 (1988). Defendants were almost universally unsuccessful in obtaining discovery on selective prosecution claims under the already stringent standards that most circuits applied before *Armstrong*. See, e.g., United States v. Parham, 16 F.3d 844, 846-47 (8th Cir. 1994); United States v. Fares, 978 F.2d 52, 59-60 (2d Cir. 1992); United States v. Peete, 919 F.2d 1168, 1176 (6th Cir. 1990). However, in a case handed down after the Ninth Circuit's *Armstrong* decision but before the Supreme Court's reversal, a federal district court in Virginia dismissed two indictments based on a claim of racially selective prosecution. See United States v. Olvis, 913 F. Supp. 451, 453 (E.D. Va. 1995). The case is currently pending before the Fourth Circuit.

<sup>58</sup> See COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5, at 143; Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365 n.3 (1987).

<sup>59</sup> Vorenberg, *supra* note 54, at 1522; see also Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 303 (1980) (concluding that "the prosecutorial discretion of the U.S. Attorney is vast and unchecked by any formal, external constraints or regulatory mechanisms").

<sup>60</sup> Avery v. Georgia, 345 U.S. 559, 562 (1953); see also Vorenberg, *supra* note 54, at 1555 (arguing that unchecked prosecutorial discretion "raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community — racial and ethnic minorities, social outcasts, the poor — will be treated most harshly"). For a discussion of empirical studies documenting the impact of race on the charging decision, consult *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1525-32 (1988).

<sup>61</sup> Drew S. Days, III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 181, 183 (1996). As one of the amici in *Armstrong* suggested, "[t]o allow such evidence to go unanswered . . . would add to the appearance of racial

Moreover, the Court misapprehended the weight of the burden it imposed in *Armstrong*. The Court stated that “the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.”<sup>62</sup> Unfortunately, the high standard set in *Armstrong* will also be a significant barrier to meritorious claims. The Court suggested that the *Armstrong* defendants “could have investigated whether similarly situated persons of other races were prosecuted by the State of California, were known to federal law enforcement officers, but were not prosecuted in federal court.”<sup>63</sup> Although defendants might be able to obtain information about offenders prosecuted in state court, evidence that federal agents or prosecutors knew of particular offenders and declined to prosecute them seems unattainable without discovery.<sup>64</sup>

Even data on state court prosecutions is more difficult to obtain than the Court acknowledged. The *Armstrong* defendants sought discovery because they were unable to obtain the necessary information from public records, which in many states do not contain racial identifications in an accessible form.<sup>65</sup> Additionally, as Solicitor General Drew Days conceded in a speech on selective prosecution last year, “[r]elevant state statistics are particularly hard to come by because the majority of states do not distinguish between crack and powder cocaine for penalty or record-keeping purposes.”<sup>66</sup> When the U.S. Sentencing Commission requested such information, only three states were able to provide the Commission with the total number of crack cases their courts had prosecuted in a given year.<sup>67</sup>

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discrimination in criminal justice, and in drug enforcement in particular. That perception would in turn contribute to the black community’s distrust of criminal justice, and undermine the effectiveness of law enforcement.” Brief Amicus Curiae of Former Law Enforcement Officials & Police Organizations in Support of Respondents at 16, *Armstrong* (No. 95-157), available in 1996 WL 17132; see also Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043, 2044 (1996) (“Even if the statistical disparities are not the result of racial discrimination, they undermine public confidence in the fairness of the criminal justice system.”).

<sup>62</sup> *Armstrong*, 116 S. Ct. at 1486.

<sup>63</sup> *Id.*

<sup>64</sup> Moreover, showing that state court defendants are similarly situated is difficult without knowing the federal government’s charging criteria. The U.S. Sentencing Commission found that such criteria varied widely from region to region. See COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5, at 139–40.

<sup>65</sup> See Brief for Respondents Shelton Auntwan Martin, Aaron Hampton, Christopher Lee Armstrong, and Freddie Mack at 4, *Armstrong* (No. 95-157), available in 1996 WL 17111. Defendants also lack the cooperation of prosecutors, which is “essential because relevant information is not always available to the public.” Brief of NAACP Legal Defense & Educational Fund, Inc. and American Civil Liberties Union as Amici Curiae in Support of Respondents at 13 & n.19, *Armstrong* (No. 95-157), available in 1996 WL 17149 (discussing efforts of numerous state task forces to investigate racial discrepancies in prosecution patterns).

<sup>66</sup> Days, *supra* note 61, at 188.

<sup>67</sup> See *id.* (citing COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5, at 138).

As the Ninth Circuit recognized, although the evidence presented in *Armstrong* was inconclusive, it suggests a need for greater scrutiny.<sup>68</sup> The Court criticized the Ninth Circuit for presuming that "people of all races commit all types of crimes."<sup>69</sup> Pointing out that more than 90% of the persons sentenced for crack offenses in 1994 were black, the Court warned that "[p]resumptions at war with presumably reliable statistics have no proper place in the analysis of this issue."<sup>70</sup> But the Court's implicit presumption in *Armstrong* — that it is possible that people of only one race commit a particular type of crime — finds little support in the facts.

As Justice Stevens pointed out, the fact that 90% of persons sentenced for crack trafficking are black is consistent with a claim of selective prosecution.<sup>71</sup> The pool of those sentenced, after all, reflects the pool of those prosecuted; the relevant comparison is between the individuals prosecuted and the pool of similarly situated persons eligible for prosecution. Although blacks make up only 12% of the population and 38% of those reporting crack use, they represent 88% of federal crack defendants.<sup>72</sup> In contrast, whites account for 52% of reported crack users but only 4% of federal crack defendants.<sup>73</sup>

Evidence proffered by the government in another case revealed that only *one* of the 149 defendants prosecuted by the U.S. Attorney's office in Los Angeles between January 1992 and March 1995 for a crack-related offense was white.<sup>74</sup> In contrast, a study by UCLA researchers found that from 1990 to 1992, a similar length of time, more than 200 white defendants were prosecuted in state court in Los Angeles for crack offenses; during the time period covered by the UCLA study, no whites were prosecuted in federal court in Los Angeles on crack charges.<sup>75</sup> The study concluded that it was "highly unlikely"

<sup>68</sup> Because the *Armstrong* standard is so difficult to satisfy, prosecutors will have little incentive to keep reliable records or to scrutinize their own decisions for racial bias. Cf. Transcript of Motion Hearing Before the Honorable Consuelo B. Marshall, United States District Judge (reporting the government's statement at trial that "there is no data collected or retained by the U.S. Attorney's office with regards to the race of defendants or the types of offenses that certain races have been prosecuted for"), reprinted in Joint Appendix at 151, *Armstrong* (No. 95-157). Numerous commentators have discussed the benefits of requiring prosecutors' offices to implement internal controls. See, e.g., Vorenberg, *supra* note 54, at 1562-66; *Developments in the Law — Race and the Criminal Process*, *supra* note 60, at 1551.

<sup>69</sup> *Armstrong*, 116 S. Ct. at 1488.

<sup>70</sup> *Id.* at 1489.

<sup>71</sup> See *id.* at 1494 (Stevens, J., dissenting).

<sup>72</sup> See COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 5, at 38-39, 161 tbl. 13.

<sup>73</sup> See *id.*

<sup>74</sup> See *United States v. Turner*, 901 F. Supp. 1491, 1496 (C.D. Cal. 1995).

<sup>75</sup> See Richard Berk & Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 FED. SENTENCING REP. 36, 37 (1993). At oral argument, some members of the Court suggested that a showing comparable to the Berk study might satisfy the discovery threshold set in *Armstrong*. See Transcript of Oral Argument, *Armstrong* (No. 95-157), available in 1996 WL 88550, at \*18-\*21 (Feb. 26, 1996). But the Berk study took two university research-

that the racial disparity between federal and state prosecutions was random.<sup>76</sup>

As stark as these figures seem, a race-neutral criminal justice system could conceivably produce such results. First, the demographic profile of crack dealers may not match the profile of crack users. Second, the federal government might have decided to focus its limited resources on those inner-city areas most affected by drug-related violence.<sup>77</sup> This enforcement strategy would have a disproportionate impact on minority offenders, but also might provide disproportionate benefits for law-abiding members of those same communities.<sup>78</sup> If these factors, rather than racial discrimination, lie behind the statistical discrepancy, both the public and the prosecutors' office would benefit from disclosure. Unfortunately, *Armstrong* makes such disclosure far less likely.

Finally, the Court's reasoning in *Armstrong* is in significant tension with other recent equal protection cases. The Court has emphasized the importance of consistency in equal protection jurisprudence, arguing just last Term in *Bush v. Vera*<sup>79</sup> that “[i]f the promise of the Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination is to be upheld, we cannot pick and choose . . . in our efforts to eliminate unjustified racial stereotyping by government actors.”<sup>80</sup> Thus, the *Bush* Court held that the “racial stereotyping that we have scrutinized closely in the context of jury service [cannot] pass without justification in the context of voting.”<sup>81</sup> But in *Armstrong*, the Court refused to extend to the selective prosecution context the current test for prosecutors’ use of peremptory challenges.<sup>82</sup> Instead, the Court opted for a standard more reminiscent of its much-criticized holding in *Swain v. Alabama*,<sup>83</sup> which established a “crippling burden of proof” that rendered prosecutors’ racially discriminatory use of peremptory challenges “largely immune from constitutional scrutiny.”<sup>84</sup>

The decision in *Armstrong* also seems to be in tension with broader principles of equal protection jurisprudence. As Justice Stevens argued

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ers a year to complete; such a massive undertaking is surely beyond the resources of most defendants.

<sup>76</sup> Berk & Campbell, *supra* note 75, at 36. This racially disparate pattern occurs nationwide. A 1992 U.S. Sentencing Commission survey found that “only minorities were prosecuted for crack offenses in more than half the federal districts handling crack cases.” H.R. REP. NO. 104-272, at 20 (1995), reprinted in 1995 U.S.C.C.A.N. 335, 353.

<sup>77</sup> See *Turner*, 901 F. Supp. at 1495.

<sup>78</sup> Cf. Kennedy, *supra* note 4, at 1267–69 (arguing that strict penalties for drug dealing benefit law-abiding members of minority communities).

<sup>79</sup> 116 S. Ct. 1941 (1996).

<sup>80</sup> *Id.* at 1956.

<sup>81</sup> *Id.*

<sup>82</sup> See *Armstrong*, 116 S. Ct. at 1488.

<sup>83</sup> 380 U.S. 202 (1965).

<sup>84</sup> *Batson v. Kentucky*, 476 U.S. 79, 92–93 (1986) (overturning *Swain*).

in *Bush v. Vera*, the Ninth Circuit's assumption in *Armstrong* that "people of *all* races commit *all* types of crimes" seems like "a model of the sort of race-neutral decisionmaking" that the Court regularly demands.<sup>85</sup> The *Bush* majority responded that "racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime."<sup>86</sup> But without a thorough investigation of the facts, it is difficult to tell whether disproportionate statistics result from real differences or from racial discrimination.<sup>87</sup> *Armstrong* virtually ensures that such investigation will not occur.

The Court's stated concerns in *Armstrong* mask a recurrent theme in the Court's treatment of race: "a fear of too much justice."<sup>88</sup> The concern that the courts will be flooded with selective prosecution claims is legitimate, but in *Armstrong* the Court has carried it too far. Another hundred years may pass before a defendant demonstrates to the Court's satisfaction that race played a role in his prosecution. Given our country's history, however, it seems unlikely that race will not influence any prosecutions in that time.<sup>89</sup>

3. *Single-Sex Schooling*. — Under the test applied in *Mississippi University for Women v. Hogan*,<sup>1</sup> a gender classification survives scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it is "substantially related" to an "important governmental objective[ ]."<sup>2</sup> Although hardly a model of clarity, this "intermediate scrutiny" test at least had some potential to constrain judicial encroachment on legislative decisions. Last Term, however, in *United States v. Virginia*,<sup>3</sup> the Supreme Court diminished that potential significantly when it concluded that Virginia's asserted interests in excluding women from the Virginia Military Institute (VMI) were actually post hoc rationalizations, unable to satisfy intermediate scrutiny.<sup>4</sup> The Court admitted that the availability of diverse educational opportunities, including single-sex education, could serve important governmental interests,<sup>5</sup> but held nonetheless that Virginia violated equal protection by excluding women from VMI without providing

<sup>85</sup> *Bush*, 116 S. Ct. at 1988 n.30 (Stevens, J., dissenting) (internal quotation marks omitted).

<sup>86</sup> *Bush*, 116 S. Ct. at 1956.

<sup>87</sup> Cf. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2111 (1995) (holding that all explicit racial classifications are subject to strict scrutiny).

<sup>88</sup> *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

<sup>89</sup> Cf. HARPER LEE, *TO KILL A MOCKINGBIRD* 220 (Warner Books 1982) (1960) ("The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow . . . .").

<sup>1</sup> 458 U.S. 718 (1982).

<sup>2</sup> *Id.* at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (internal quotation marks omitted)).

<sup>3</sup> 116 S. Ct. 2264 (1996).

<sup>4</sup> See *id.* at 2277.

<sup>5</sup> See *id.* at 2276–77.

them with a substantial equivalent.<sup>6</sup> This increased willingness to label an asserted government interest a mere rationalization threatens to transform the Court into a “council of revision,”<sup>7</sup> ready to substitute its own policy preferences for those of the legislature.

Since its inception in 1839, the all-male, state-sponsored VMI has provided its students with a distinctive educational experience.<sup>8</sup> The distinctiveness is attributable not to the school’s academic offerings, most of which are available in Virginia’s fourteen other public colleges and universities, but to its mission — producing “educated and honorable men . . . [to serve] as citizen-soldiers”<sup>9</sup> — and its method of education — the “adversative model.”<sup>10</sup> Because of these qualities and the success of VMI’s alumni, a place in VMI’s annual entering class of 1,300 cadets is highly coveted.<sup>11</sup>

In 1990, alleging a violation of the Equal Protection Clause, the United States sued the Commonwealth of Virginia and VMI on behalf of a female high school student who wished to attend VMI.<sup>12</sup> The district court recognized that diversity in educational opportunity is an important governmental interest and found that “both VMI’s single-sex status and its distinctive educational method represent[ed] legitimate contributions to diversity in the Virginia higher education system, and that excluding women [was] substantially related to this mission.”<sup>13</sup> The court thus found intermediate scrutiny satisfied and dismissed the action.<sup>14</sup>

On appeal, the Court of Appeals for the Fourth Circuit vacated and remanded.<sup>15</sup> Although it accepted the district court’s finding that coeducation would materially alter VMI’s program,<sup>16</sup> the Fourth Circuit held that Virginia “ha[d] not . . . advanced any state policy by which it [could] justify its determination, under an announced policy of diversity, to afford VMI’s unique type of program to men and not to women.”<sup>17</sup> The court gave the state three options: admit women,

<sup>6</sup> See *id.* at 2274, 2282, 2286.

<sup>7</sup> Trimble v. Gordon, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting).

<sup>8</sup> See United States v. Virginia, 116 S. Ct. at 2269.

<sup>9</sup> *Id.* at 2270 (quoting United States v. Virginia, 766 F. Supp. 1407, 1425 (W.D. Va. 1991) (quoting Report from the Mission Study Committee of the VMI Board of Visitors (May 16, 1986)) (internal quotation marks omitted).

<sup>10</sup> *Id.* The adversative model is characterized by its “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of desirable values.” United States v. Virginia, 766 F. Supp. at 1421.

<sup>11</sup> See United States v. Virginia, 116 S. Ct. at 2269–70.

<sup>12</sup> See *id.* at 2271.

<sup>13</sup> United States v. Virginia, 766 F. Supp. at 1413.

<sup>14</sup> See *id.* at 1415.

<sup>15</sup> See United States v. Virginia, 976 F.2d 890, 900 (4th Cir. 1992).

<sup>16</sup> See *id.* at 896–97. The court noted that coeducation would lead to a “substantial change in the egalitarian ethos that is a critical aspect of VMI’s training” and would “tear at the fabric of VMI’s unique methodology.” *Id.* at 897.

<sup>17</sup> *Id.* at 892.

establish a parallel institution or program for women, or abandon funding of VMI.<sup>18</sup>

The state chose to create a parallel program: the Virginia Women's Institute for Leadership (VWIL).<sup>19</sup> Located at privately run Mary Baldwin College, VWIL shared VMI's mission of producing "citizen-soldiers" but not the adversative model.<sup>20</sup> On remand, the district court ruled that this remedial plan satisfied equal protection,<sup>21</sup> and the court of appeals affirmed.<sup>22</sup> Although it noted that a VWIL degree lacked the prestige of a VMI degree, the appellate court concluded that VWIL was "substantively comparable" in benefits to VMI and thus was a constitutionally satisfactory remedy.<sup>23</sup>

In a 7–1 opinion, the Supreme Court affirmed the Fourth Circuit's initial judgment as to liability, reversed its final judgment as to remedy, and remanded the case for further proceedings.<sup>24</sup> Writing for the majority, Justice Ginsburg<sup>25</sup> observed that the case presented two questions: first, whether VMI violated equal protection by denying admission to women "capable of all of the individual activities required of VMI cadets"; and second, if so, what remedy would be appropriate.<sup>26</sup>

Lamenting the United States's "long and unfortunate history of sex discrimination,"<sup>27</sup> the Court began its analysis with "the core instruction of [its] pathmarking decisions": gender-based government action is unconstitutional absent an "exceedingly persuasive justification."<sup>28</sup> The majority stressed that this test "does not make sex a proscribed classification,"<sup>29</sup> but indicated nonetheless that, to pass constitutional

<sup>18</sup> See *id.* at 900.

<sup>19</sup> See *United States v. Virginia*, 116 S. Ct. at 2272.

<sup>20</sup> See *id.* at 2272–73. A task force charged with designing the VWIL curriculum concluded that the adversative model would be "wholly inappropriate" for most women, and instead favored "a cooperative method which reinforces self-esteem." *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994).

<sup>21</sup> See *United States v. Virginia*, 852 F. Supp. at 484.

<sup>22</sup> See *United States v. Virginia*, 44 F.3d 1229, 1242, *reh'g en banc denied*, 52 F.3d 90, 91 (4th Cir. 1995).

<sup>23</sup> *Id.* at 1240.

<sup>24</sup> See *United States v. Virginia*, 116 S. Ct. at 2287.

<sup>25</sup> Justices Stevens, O'Connor, Kennedy, Souter, and Breyer joined the opinion of the Court. Justice Thomas took no part in the consideration of the case.

<sup>26</sup> *United States v. Virginia*, 116 S. Ct. at 2274 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1412 (W.D. Va. 1991)) (internal quotation marks omitted).

<sup>27</sup> *Id.* at 2274–75 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)) (internal quotation marks omitted).

<sup>28</sup> *Id.* at 2274.

<sup>29</sup> *Id.* at 2276. Although "inherent differences" cannot justify racial classifications, "[p]hysical differences between men and women . . . are enduring." *Id.* (internal quotation marks omitted). Consequently, even though gender classifications may not be used to discriminate against women, they "may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people." *Id.* (citations omitted) (quoting *Califano v. Webster*,

muster, the classification must serve “important governmental objectives” through means that are “substantially related to the achievement of those objectives.”<sup>30</sup> Furthermore, the state’s asserted objectives “must be genuine, not hypothesized or invented *post hoc* in response to litigation,” and cannot “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>31</sup>

The Court rejected both of VMI’s justifications for excluding women: first, that single-sex education produces pedagogical benefits and increases diversity in educational opportunities; and second, that admitting women would require a fundamental modification of the adversative approach.<sup>32</sup> In response to the first, the Court acknowledged the possible advantages of having diverse educational opportunities, but it concluded that Virginia had not shown diversity to be the actual purpose and that Virginia’s allegation to the contrary was merely a rationalization.<sup>33</sup> The Court stressed the state’s history of paternalism and unequal provision of educational benefits, the ambiguity of Virginia’s statements of educational purpose, and the movement of autonomous state institutions other than VMI away from single-sex education.<sup>34</sup> As for VMI’s second justification, the Court concluded that the district court’s findings on the potential effects of coeducation on the adversative approach were insufficiently proven.<sup>35</sup> Regardless of the average capabilities and preferences of women and men, the Court stressed that VMI’s mission and approach might be suitable for, and preferred by, *some* women and that “[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”<sup>36</sup> Thus, the Court concluded that VMI had not demonstrated an exceedingly persuasive justification for its gender-based classification,<sup>37</sup> and affirmed the Fourth Circuit’s initial judgment that VMI’s exclusion of women violated the Equal Protection Clause.<sup>38</sup>

After having established a constitutional violation, the Court found that VWIL failed to satisfy the standard for a sufficient remedy: “A remedial decree . . . must be shaped to place persons unconstitutionally denied an opportunity or advantage in ‘the position they would

<sup>430</sup> U.S. 313, 320 (1977) (per curiam), and California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 289 (1987)).

<sup>30</sup> *Id.* at 2275 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980))) (internal quotation marks omitted).

<sup>31</sup> *Id.*

<sup>32</sup> See *id.* at 2276–82.

<sup>33</sup> See *id.* at 2276–79.

<sup>34</sup> See *id.* at 2277–79.

<sup>35</sup> See *id.* at 2280.

<sup>36</sup> *Id.* (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

<sup>37</sup> See *id.* at 2282.

<sup>38</sup> See *id.* at 2287.

have occupied in the absence of [discrimination].’’<sup>39</sup> VWIL not only “affords women no opportunity to experience the rigorous military training for which VMI is famed,”<sup>40</sup> but also compares poorly to VMI in the quality of its student body, faculty, course offerings, facilities, and intangible factors such as history, prestige, and the strength of its alumni network.<sup>41</sup> Thus, the majority concluded that Virginia had failed to demonstrate substantial equality between the two programs.<sup>42</sup> The Court reversed the Fourth Circuit’s approval of Virginia’s remedial plan and remanded the case for further proceedings.<sup>43</sup>

In a concurring opinion, Chief Justice Rehnquist criticized the majority for using the imprecise phrase “exceedingly persuasive justification,” which “introduce[d] an element of uncertainty respecting the appropriate test.”<sup>44</sup> He agreed, however, that diversity was not the real goal of the exclusionary policy<sup>45</sup> and that preserving the adversative method would not serve an important governmental objective.<sup>46</sup> As for the appropriate remedy, the Chief Justice contended that VMI was not required either to admit women or to create “a VMI clone for women”: it would suffice “if [two matched single-sex schools] offered the same quality of education and were of the same overall calibre.”<sup>47</sup>

In a scathing dissent, Justice Scalia excoriated “this most illiberal Court” for forcing change upon Virginia and prohibiting single-sex education nationwide.<sup>48</sup> He argued that, in order to reject the majority opinion, “[i]t is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades.”<sup>49</sup> Justice Scalia maintained that VMI’s scheme satisfied intermediate scrutiny because single-sex instruction and the adversative approach are substantially related to Virginia’s “important state interest in providing effective college education for its citizens.”<sup>50</sup>

<sup>39</sup> *Id.* at 2282 (alteration in original) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

<sup>40</sup> *Id.* at 2283.

<sup>41</sup> See *id.* at 2284–86.

<sup>42</sup> See *id.* at 2286. The Court rejected the Fourth Circuit’s standard of “substantive comparability.” *Id.* (quoting *United States v. Virginia*, 44 F.3d 1229, 1237 (4th Cir. 1995)) (internal quotation marks omitted).

<sup>43</sup> See *id.* at 2287.

<sup>44</sup> *Id.* at 2288 (Rehnquist, C.J., concurring).

<sup>45</sup> See *id.* at 2289. The Chief Justice reached this conclusion by considering only evidence that postdated *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), because Virginia was not “on notice” before then that its exclusionary policy was open to serious constitutional question. *United States v. Virginia*, 116 S. Ct. at 2289 (Rehnquist, C.J., concurring).

<sup>46</sup> See *United States v. Virginia*, 116 S. Ct. at 2290 (Rehnquist, C.J., concurring).

<sup>47</sup> *Id.* at 2291.

<sup>48</sup> *Id.* at 2292–93 (Scalia, J., dissenting).

<sup>49</sup> *Id.* at 2293.

<sup>50</sup> *Id.* at 2297. The trial court found it “virtually uncontradicted” that single-sex education benefits both sexes. *United States v. Virginia*, 766 F. Supp. 1407, 1415 (W.D. Va. 1991), quoted in *United States v. Virginia*, 116 S. Ct. at 2297 (Scalia, J., dissenting). The trial court also found that Virginia inevitably would have to abandon the adversative approach if VMI were to admit women. See *United States v. Virginia*, 116 S. Ct. at 2297 (Scalia, J., dissenting).

Justice Scalia then embarked upon a catalogue of the Court's missteps. First, he argued that the majority implicitly and improperly adopted strict scrutiny in focusing only on whether *some* women are capable of the activities required of VMI cadets.<sup>51</sup> Second, citing a VMI committee's three-year-long study, he denied that Virginia's asserted interest in diversity was a mere pretext for discriminating against women.<sup>52</sup> The contention that the record contained no explicit statement of Virginia's legitimate interest in single-sex education was not only factually incorrect, but also constitutionally irrelevant.<sup>53</sup> Third, Justice Scalia criticized the rejection of Virginia's decision not to offer the adversative methodology to women by characterizing the Court's action as a simple substitution of the majority's "own view of the world" for district court findings.<sup>54</sup> Fourth, he questioned the Court's focus on VMI's *ends* instead of the school's *means*.<sup>55</sup> Although VMI's mission was the production of future leaders, a goal "great enough to accommodate women,"<sup>56</sup> its method was VMI's distinguishing factor, and the adversative method could not survive a female presence.<sup>57</sup> Fifth, Justice Scalia disputed the Court's argument that the admission of women would not require VMI to change substantially as not only inconsistent with the record and the findings of the two lower courts, but also irrelevant under intermediate scrutiny.<sup>58</sup> Sixth, he denied that the absence of an "all-women's analogue" to VMI was constitutionally relevant, and noted that the different means employed by the two schools were pedagogically justified.<sup>59</sup>

Justice Scalia concluded by forecasting the consequences of the Court's holding.<sup>60</sup> Although the Court stated that it was addressing "specifically and only an educational opportunity recognized . . . as 'unique,'"<sup>61</sup> the dissenting Justice proclaimed that "the rationale of today's decision is sweeping."<sup>62</sup> He argued that the majority opinion had declared single-sex public education unconstitutional.<sup>63</sup> Moreover,

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<sup>51</sup> See *United States v. Virginia*, 116 S. Ct. at 2298 (Scalia, J., dissenting).

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

<sup>53</sup> See *id.* at 2298–99.

<sup>54</sup> *Id.* at 2300–01.

<sup>55</sup> See *id.* at 2301.

<sup>56</sup> *Id.* (quoting *United States v. Virginia*, 116 S. Ct. at 2282) (internal quotation marks omitted).

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

<sup>58</sup> See *id.* at 2301–02.

<sup>59</sup> *Id.* at 2302–03.

<sup>60</sup> See *id.* at 2305–09.

<sup>61</sup> *United States v. Virginia*, 116 S. Ct. at 2276 n.7.

<sup>62</sup> *Id.* at 2306 (Scalia, J., dissenting).

<sup>63</sup> "[R]egardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, . . . single-sex education is functionally dead. The costs of litigating . . . and the risks of ultimately losing that litigation . . . are simply too high to be embraced by public officials." *Id.*

the principles in that opinion had rendered state assistance even to single-sex private schools constitutionally suspect as well.<sup>64</sup>

What makes *United States v. Virginia* unique is that the Court deemed Virginia's asserted important interest a mere rationalization even though the gender-based classification readily advanced that interest. Never before had the Court found an alleged interest to be a mere rationalization for gender stereotyping when the discriminatory classification actually promoted the interest. Granted, the majority correctly noted that, in *Weinberger v. Wiesenfeld*,<sup>65</sup> *Califano v. Goldfarb*,<sup>66</sup> and *Mississippi University for Women v. Hogan*,<sup>67</sup> the Court did explore the authenticity of an asserted interest and determined each time that the interest was only a rationalization.<sup>68</sup> *United States v. Virginia* was consistent with precedent in this regard, asking the same question: is the asserted interest a mere rationalization? *United States v. Virginia* did not, however, use the same mode of analysis in answering this question. In *Wiesenfeld*, *Goldfarb*, and *Mississippi University for Women*, the rationalization inquiry was arguably an empty construct: the Court deemed the classification a rationalization only after determining that the classification did not readily advance the asserted interest. In this sense, the rationalization inquiry behaved as an "efficacy inquiry." By finding Virginia's interest in maintaining a gender-based classification to be a rationalization despite the efficacy of the classification in promoting the interest, the Court in *United States v. Virginia* trod on new and unsteady ground.

In 1975, in *Wiesenfeld*, the Court held unconstitutional a provision of the Social Security Act that granted benefits to the widow and minor children of a deceased male wage earner, but only to the minor children and not the widower of a deceased female wage earner.<sup>69</sup> The government claimed that the congressional purpose behind this gender-based classification was to compensate women for the economic discrimination that they encountered, and not simply to permit women to stay home with the children.<sup>70</sup> But, as the Court argued, the statute hardly promoted that interest, given that benefits ceased when the children reached maturity.<sup>71</sup> If Congress had been con-

<sup>64</sup> See *id.* at 2306–08. In response to the United States' argument that the receipt of government funds does not convert such schools into state actors, and thus that the Fourteenth Amendment does not apply, Justice Scalia contended that "[t]he issue will be not whether government assistance turns private colleges into state actors, but whether the government *itself* would be violating the Constitution." *Id.* at 2307.

<sup>65</sup> 420 U.S. 636 (1975).

<sup>66</sup> 430 U.S. 199 (1977).

<sup>67</sup> 458 U.S. 718 (1982).

<sup>68</sup> See *United States v. Virginia*, 116 S. Ct. at 2277 (citing *Mississippi Univ. for Women*, 458 U.S. at 729–30; *Goldfarb*, 430 U.S. at 212–16 (plurality opinion); and *Wiesenfeld*, 420 U.S. at 648).

<sup>69</sup> See *Wiesenfeld*, 420 U.S. at 637–38.

<sup>70</sup> See *id.* at 648.

<sup>71</sup> See *id.* at 649–50.

cerned with combating economic disadvantage, "it would [have been] entirely irrational to except those women who had spent many years at home rearing children, since those women are most likely to be without the skills required to succeed in the job market."<sup>72</sup> Thus, although the Court in *Wiesenfeld* also considered evidence perhaps unrelated to the efficacy inquiry,<sup>73</sup> the finding that an asserted interest was actually a rationalization was paired with the finding that the gender-based classification did not promote that interest effectively.

Similarly, in 1977, in *Goldfarb*, the Court struck down a statute that granted benefits to a widower only if he had been receiving at least half of his support from his wife, but to a widow regardless of her dependency upon her husband.<sup>74</sup> The government argued that Congress intended to account for the different social needs of widowers and widows, and not merely to reduce administrative expenses by using a proxy for dependency.<sup>75</sup> However, given that Congress awarded benefits not to *needy* widowers, but only to those who could prove *dependency*, the plurality concluded that "nothing whatever" implied a genuine concern for social welfare.<sup>76</sup> Moreover, in casting the fifth and deciding vote, Justice Stevens argued that "[t]he widows who benefit from the disparate treatment are those who were sufficiently successful in the job market to become nondependent on their husbands";<sup>77</sup> if Congress had intended to satisfy social welfare needs, the classification was "irrational lawmaking," hardly advancing the asserted interest at all.<sup>78</sup> Although both the plurality and Justice Stevens also addressed evidence of rationalization outside the efficacy inquiry,<sup>79</sup> both opinions stressed the importance of the classification's failure to promote the asserted interest.

Finally, in 1982, in *Mississippi University for Women*, the Court ruled that the exclusion of men from a state nursing school violated the Equal Protection Clause,<sup>80</sup> despite Mississippi's claim that the school maintained the single-sex admissions policy to compensate for discrimination against women. The Court concluded that the state had "failed to establish that the alleged objective [was] the actual purpose underlying the discriminatory classification" because "Mississippi ha[d] made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in

<sup>72</sup> *Id.* at 650.

<sup>73</sup> See *id.* at 648–49.

<sup>74</sup> See *Califano v. Goldfarb*, 430 U.S. 199, 201–02 (1977) (plurality opinion).

<sup>75</sup> See *id.* at 212.

<sup>76</sup> *Id.* at 214.

<sup>77</sup> *Id.* at 221 (Stevens, J., concurring).

<sup>78</sup> *Id.*

<sup>79</sup> See *Goldfarb*, 430 U.S. at 212–16 (plurality opinion); *id.* at 220–22 (Stevens, J., concurring).

<sup>80</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982).

that field.”<sup>81</sup> The clear implication was that Mississippi could not have made such a showing and that the state’s classification did not promote its asserted interest: if women did not lack opportunities in the field, then the classification could not be compensating women for discrimination.<sup>82</sup>

Thus, the discriminatory classification in each of these cases failed to advance substantially the asserted important government interest, and the Supreme Court made no clear indication that it would invalidate a classification otherwise. In contrast, in *United States v. Virginia*, the Court concluded that Virginia’s asserted interest was a mere rationalization *despite* the importance of Virginia’s interest in providing its citizens with effective college education and even while recognizing that “[s]ingle-sex education affords pedagogical benefits to at least some students.”<sup>83</sup> VMI’s discriminatory policy directly promoted effective college education. Nevertheless, the Court proceeded to address whether Virginia’s interest was a mere post hoc rationalization,<sup>84</sup> and thus made clear that the rationalization inquiry is independent of the efficacy inquiry and not an empty construct.

As a separate test, the rationalization inquiry threatens to transform the Supreme Court into a “council of revision,”<sup>85</sup> bestowed with tremendous power to overturn legislation. Whereas the efficacy inquiry alone, though somewhat malleable,<sup>86</sup> could discipline the judiciary by confining its evaluations to a single dimension, the bipartite mode of analysis in *United States v. Virginia* gives the Court another ready excuse to reject the decisions of legislatures. Even worse, the Court has often doubted its ability to make motivation-based inquiries such as the rationalization determination objectively: “[The] Court has long recognized that ‘[i]nquiries into congressional motives or purposes are a hazardous matter . . .’”<sup>87</sup> Most recently, in *Adarand Construc-*

<sup>81</sup> *Id.* at 729–30. Moreover, because the school allowed men to audit classes and “participate fully,” the university could not legitimately claim that it sought to help women who “are adversely affected by the presence of men.” *Id.* at 730–31.

<sup>82</sup> *See id.* at 729–31.

<sup>83</sup> *United States v. Virginia*, 116 S. Ct. at 2276; *see id.* at 2277 n.8.

<sup>84</sup> *See id.* at 2277–79. Chief Justice Rehnquist also performed a rationalization inquiry. *See id.* at 2288–90 (Rehnquist, J., concurring). Thus, this new test is not simply a byproduct of the Court’s “exceedingly persuasive justification” language.

<sup>85</sup> *Trimble v. Gordon*, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting) (“The Civil War Amendments did not make this Court into a council of revision . . . [empowering it] to nullify state laws which were merely felt to be inimical to the Court’s notion of the public interest.”).

<sup>86</sup> *See United States v. Virginia*, 116 S. Ct. at 2292 (Scalia, J., dissenting).

<sup>87</sup> *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (alteration in original) (quoting *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968)). *Washington v. Davis*, 426 U.S. 229 (1976), and its progeny are not in conflict; they do not support hinging the constitutionality of a classification on the Court’s ability to divine legislative motive. Although these cases utilized an intent inquiry in the judicial review of facially neutral classifications, *see, e.g., id.* at 242, this inquiry was categorically different from the rationalization test in *United States v. Virginia*. First, in *Davis*, a finding of discriminatory intent would only shunt the constitutional analysis to a strict scrutiny inquiry, not to an immediate holding of unconstitutionality. *See, e.g., Davis*, 426 U.S. at

tors, Inc. v. Pena,<sup>88</sup> the Court decided to subject all racial classifications to the same level of scrutiny after recognizing that, “[a]bsent searching judicial inquiry . . . , there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”<sup>89</sup> The rationalization investigation used in *United States v. Virginia* similarly reduces the constitutional inquiry to the murky issue of motive.

The question thus becomes: how can one reconcile *United States v. Virginia* with *Adarand*? The rationalization investigation used in the former works upon the assumption that the Court can evaluate whether an asserted interest is genuine *without* measuring either the strength of the interest or how well the classification supports that interest.<sup>90</sup> *Adarand* takes the opposite position: in that case, the Court assumed that inquiries into legislative motivation alone are not a sufficiently reliable means of “‘smoking out’ illegitimate uses of race.”<sup>91</sup> Under *Adarand*, one cannot hinge the constitutionality of a racial classification on the rationalization inquiry. Hence, unless it is significantly easier to distinguish benign discriminations from pernicious ones in the context of gender than it is in the context of race,<sup>92</sup> the Court in *United States v. Virginia* has forced itself into an inescapable quandary. With no principled way to evaluate objectively the sincerity of the professed motive, *United States v. Virginia* compels the Court

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<sup>240–42</sup>. Second, the investigation into intent was originally designed to restrict judicial encroachment on legislative decisions, not facilitate it: a finding of discriminatory intent was not a sufficient condition for holding a statute unconstitutional, but rather a necessary condition in addition to a finding of disproportionate effects. *See id.*

<sup>88</sup> 115 S. Ct. 2097 (1995).

<sup>89</sup> *Id.* at 2112 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)) (internal quotation marks omitted). *Adarand* overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in which the Court had opined that it could distinguish benign racial classifications from pernicious ones prior to applying strict scrutiny. *See id.* at 564–65. The majority opinion in *Metro Broadcasting* was written by Justice Brennan, the same Justice who authored *Goldfarb* and *Wiesenfeld*. To the extent that Justice Brennan considered facts independent of the efficacy inquiry when evaluating the authenticity of the asserted interests in *Goldfarb* and *Wiesenfeld*, *see Califano v. Goldfarb*, 430 U.S. 199, 212–16 (1977) (plurality opinion); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648–49 (1975), he may have been guided by the same theory on motive distinctions that he championed in *Metro Broadcasting* and that the Court rejected in *Adarand*. Thus, *Goldfarb* and *Wiesenfeld* offered the majority in *United States v. Virginia* at best only marginal support.

<sup>90</sup> *See United States v. Virginia*, 116 S. Ct. at 2277–79.

<sup>91</sup> *Adarand*, 115 S. Ct. at 2112 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)) (internal quotation marks omitted).

<sup>92</sup> Of course, this analysis does not imply that gender classifications should be subject to strict scrutiny instead of intermediate scrutiny. *Adarand* defined “searching judicial inquiry” as strict scrutiny, but only for racial classifications. *Id.* at 2112–13 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)) (internal quotation marks omitted). The Court did not suggest any disruption in its analogous standard for gender classifications. *United States v. Virginia*, however, does disrupt the analogy between the two standards: the Court now has a means of rejecting gender classifications that it does not have for racial classifications.

to impart its own notions of gender roles, thereby undermining "the presuppositions of a democratic society."<sup>93</sup>

Moreover, despite the Court's previous trepidation, the majority in *United States v. Virginia* displayed boundless confidence in its ability to deduce the unexpressed motives of Virginia policymakers: it authorized itself not only to broach the intractable issue of actual intent, but also to do so while ignoring the findings of lower courts. The Fourth Circuit explicitly rejected the argument that "VMI's existing program is maintained as the result of impermissible stereotyping and overly broad generalizations,"<sup>94</sup> yet the Supreme Court nevertheless based its rationalization inquiry upon this supposition.<sup>95</sup> In so doing, the majority established a precedent for disregarding lower court findings when making a rationalization determination.

That state funding of single-sex schools, both public and private, may now be unconstitutional<sup>96</sup> is perhaps the most significant practical consequence of *United States v. Virginia*. At least three civil liberties groups have already responded to the decision by attempting to preclude the opening of a public middle school for girls in Harlem, New York.<sup>97</sup> Fortunately, the murky rationalization inquiry provides these schools with a fighting chance; *United States v. Virginia* may become the *Cleburne*<sup>98</sup> of gender-based equal protection jurisprudence. Unfortunately, saving these schools from constitutional invalidation will require showing just how unprincipled the rationalization inquiry is. Although the intermediate scrutiny test has always been somewhat malleable, *United States v. Virginia* goes one step further, distancing the Court even more from the rule of law.

4. *Voting Rights and Race-Based Districting*. — In the 1993 case of *Shaw v. Reno*,<sup>1</sup> the Supreme Court created a new cause of action to remedy a newly located constitutional injury. The injury, as elucidated by later cases, was a state's sending of the message, through the predominant use of race in redistricting, that racial identity is and

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<sup>93</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) ("[A] Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. . . . [A] legitimate Court must be controlled by principles exterior to the will of the Justices.").

<sup>94</sup> *United States v. Virginia*, 976 F.2d 890, 897 (4th Cir. 1992).

<sup>95</sup> See *United States v. Virginia*, 116 S. Ct. at 2277.

<sup>96</sup> See *id.* at 2306 (Scalia, J., dissenting).

<sup>97</sup> See Editorial, *Junior High and VMI*, WASH. POST, Sept. 7, 1996, at A20.

<sup>98</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). In *Cleburne*, the Court used rational basis review to find unconstitutional a zoning ordinance that prohibited group homes as applied to a home for the mentally retarded — "a far cry from standard rationality review." Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 300 (1992).

<sup>1</sup> 509 U.S. 630 (1993).

should be an American's most salient political characteristic.<sup>2</sup> Since *Shaw*, the Court has struggled with the question whether such an injury even exists and, if it does, whether individual districts causing the injury should be struck down as violative of the Constitution.<sup>3</sup> Last Term, in *Bush v. Vera*,<sup>4</sup> the Court had its most recent opportunity to provide more satisfying answers to the vexing questions raised by *Shaw* and to offer an acceptable justification for striking down yet another set of districts.<sup>5</sup> Unfortunately, Justice O'Connor's failure to articulate a threshold test for applying strict scrutiny that is consistent with the Court's definition of the *Shaw* injury caused the Court to squander the opportunity. The Court's persistent interference with redistricting, despite its continuing inability to devise a satisfying test, creates an appearance of arbitrary judicial interference in state activity, damages the legitimacy of the Court, and unjustifiably prevents good faith efforts to remedy this country's ugly history of discrimination in voting.

No majority-white district in Texas has ever elected a member of a racial minority to the State Senate or to Congress.<sup>6</sup> After the 1990 census, Texas gained three new congressional seats due to "a population increase, largely in urban minority populations."<sup>7</sup> In an effort to comply with the Voting Rights Act of 1965 (VRA),<sup>8</sup> the Texas Legislature created two new districts — one majority-African-American and one majority-Hispanic — and redrew an existing district to give it a majority of African-American voters.<sup>9</sup> Six Texas voters challenged the districts under *Shaw* and its progeny, claiming that the districts "constitute[d] racial gerrymanders in violation of the Fourteenth Amendment."<sup>10</sup> Although Texas admitted that it had factored race into the

<sup>2</sup> See *Bush v. Vera*, 116 S. Ct. 1941, 1962 (1996) (opinion of O'Connor, J.); *Shaw*, 509 U.S. at 642–49 (suggesting that racial gerrymandering perpetuates racial stereotypes and racial bloc voting).

<sup>3</sup> See *Vera*, 116 S. Ct. at 1950–2013; *Shaw v. Hunt*, 116 S. Ct. 1894, 1899–1923 (1996); *Miller v. Johnson*, 115 S. Ct. 2475, 2482–2507 (1995); *United States v. Hays*, 115 S. Ct. 2431, 2433–37 (1995).

<sup>4</sup> 116 S. Ct. 1941 (1996).

<sup>5</sup> On the same day, the Court also decided *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), holding that the district at issue in *Shaw v. Reno* was in fact unconstitutional. See *id.* at 1899.

<sup>6</sup> See *Vera*, 116 S. Ct. at 1992 (Stevens, J., dissenting).

<sup>7</sup> *Vera*, 116 S. Ct. at 1950 (opinion of O'Connor, J.).

<sup>8</sup> 42 U.S.C. §§ 1971, 1973 to 1973gg-10 (1994). The VRA provides, in relevant part, that redistricting may not have the effect of giving a racial group "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b). The Court has interpreted this language to require the creation of majority-minority districts when certain conditions are met, such as proven racial bloc voting and the presence of a "sufficiently large and geographically compact," "politically cohesive" minority population. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). Note that *Gingles* involved a multimember district. See *id.* It is not obvious that the *Gingles* Court's majority would have analyzed a single member district in the same way.

<sup>9</sup> See *Vera*, 116 S. Ct. at 1950–51 (opinion of O'Connor, J.).

<sup>10</sup> *Id.* at 1951.

redistricting, it asserted that race did not "predominate" because Texas had also considered other factors, foremost among them incumbency protection.<sup>11</sup> Nevertheless, the special three-judge panel of the United States District Court for the Southern District of Texas held the three districts unconstitutional.<sup>12</sup>

A fractured Supreme Court affirmed<sup>13</sup> in a 5–4 decision that produced six opinions, none of which gained the support of more than three Justices. Writing for Chief Justice Rehnquist, Justice Kennedy, and herself, Justice O'Connor stated that strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts."<sup>14</sup> She then conducted a fact-intensive inquiry<sup>15</sup> into whether race was the "predominant factor motivating" the Texas legislature's drawing of the districts' lines.<sup>16</sup> Although Justice O'Connor acknowledged Texas's "mixed motive[s],"<sup>17</sup> she asserted that the state had not only disregarded traditional districting principles, but also used race as a proxy for political characteristics even when drawing lines for ostensibly race-neutral reasons, such as incumbency protection.<sup>18</sup> Justice O'Connor agreed with "the District Court's determination that race was the 'predominant factor.'"<sup>19</sup> Accordingly applying strict scrutiny,<sup>20</sup> she determined that the districts were not "narrowly tailored to further a compelling state interest."<sup>21</sup> Justice O'Connor concluded by

<sup>11</sup> See *id.* at 1955.

<sup>12</sup> See *Vera v. Richards*, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994).

<sup>13</sup> See *Vera*, 116 S. Ct. at 1951 (opinion of O'Connor, J.).

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

<sup>15</sup> See *id.* at 1954–60.

<sup>16</sup> *Id.* at 1952 (emphasis omitted). Justice O'Connor explained that, "[f]or strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race." *Id.* at 1951 (citing *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995)).

<sup>17</sup> *Id.* at 1952. Justice O'Connor accepted Texas's claims that its desire to protect the seats of incumbents and "functional incumbents" (powerful state legislators who were running for Congress) influenced the districts' lines. *Id.*

<sup>18</sup> See *id.* at 1958. Other ostensibly race-neutral reasons could include creating a majority for a particular political party in either the majority-minority district or one of its neighbors, or connecting "communities of interest." *Id.* at 1954. Apparently, shared interests based on the common experience of African-Americans in the same metropolitan area do not suffice to avoid Justice O'Connor's condemnation as the use of race as a proxy. Cf. *Miller*, 115 S. Ct. at 2504–05 (Ginsburg, J., dissenting) (arguing that "ethnicity itself can tie people together . . . — even people with divergent economic interests" and that "[t]o accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines"). The state's use of a computer with much more refined data on race than on other characteristics influenced Justice O'Connor's conclusion that the State had used race as a proxy for political characteristics. See *Vera*, 116 S. Ct. at 1953 (opinion of O'Connor, J.). Racial identity can work well as a proxy precisely because it does correlate very strongly with party affiliation. Ninety-seven percent of Dallas area African-Americans vote for Democrats. See *id.* at 1956.

<sup>19</sup> *Vera*, 116 S. Ct. at 1952 (opinion of O'Connor, J.).

<sup>20</sup> See *id.* at 1960–63.

<sup>21</sup> *Id.* at 1960. In this opinion, Justice O'Connor assumed, without deciding, that compliance with section two of the VRA was a compelling state interest. See *id.* Because section two requires a majority-minority district only when the minority population is "sufficiently large and geographically compact," *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), a district with race-based

invoking stare decisis to criticize the dissenters' suggestion that the Court should overturn *Shaw*.<sup>22</sup>

Concurring with her own opinion and writing only for herself,<sup>23</sup> Justice O'Connor took the position that, unless and until it is declared unconstitutional, compliance with section two of the VRA is a compelling state interest.<sup>24</sup> Furthermore, asserting that section two is able to coexist "in principle and in practice"<sup>25</sup> with the *Shaw* line of cases, Justice O'Connor provided an algorithm for determining the constitutionality of race-based districting. First, if states create majority-minority districts without subordinating traditional districting principles, strict scrutiny will not apply at all.<sup>26</sup> Second, in some situations, states might be required to create majority-minority districts.<sup>27</sup> Third, avoiding section two liability is a compelling state interest that justifies creation of a majority-minority district if there is a "strong basis in evidence" that the three factors articulated in *Thornburg v. Gingles*<sup>28</sup> are present.<sup>29</sup> Fourth, the district is narrowly tailored if it "substantially addresses" the potential liability and does not "deviate substantially from a hypothetical court-drawn § 2 district,"<sup>30</sup> but if "predominantly racial reasons" cause a substantial deviation from that hypothetical district, it is unconstitutional.<sup>31</sup> Justice O'Connor concluded by stating that, although the "application of the principles . . .

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noncompact lines is not narrowly tailored. *See Vera*, 116 S. Ct. at 1961 (opinion of O'Connor, J.). In her concurrence, Justice O'Connor suggested that a noncompact majority-minority district could be deemed narrowly tailored if the state did not use race to draw its noncompact lines. *See id.* at 1970 (O'Connor, J., concurring).

<sup>22</sup> *See Vera*, 116 S. Ct. at 1964 (opinion of O'Connor, J.).

<sup>23</sup> *See id.* at 1968 (O'Connor, J., concurring). In the history of the Supreme Court, only one other time has a Justice written a separate opinion concurring with his or her own opinion. *See* Bruce Fein, *Sowing Seeds of Dubiosity*, WASH. TIMES, July 9, 1996, at A14 (discussing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 423–24 (1982) (Blackmun, J.), and *Logan*, 455 U.S. at 438 (separate opinion of Blackmun, J.)).

<sup>24</sup> *See Vera*, 116 S. Ct. at 1968–69 (O'Connor, J., concurring). Justice O'Connor emphasized the long line of lower court cases affirming the constitutionality of section two and stated that, in light of the Supremacy Clause and the presumption that statutes are constitutional, "it would be irresponsible for a State to disregard the § 2 results test." *Id.* at 1969.

<sup>25</sup> *Id.* at 1968.

<sup>26</sup> *See id.* at 1969.

<sup>27</sup> *See id.* at 1969–70.

<sup>28</sup> 478 U.S. 30 (1986).

<sup>29</sup> *Vera*, 116 S. Ct. at 1970 (O'Connor, J., concurring). The factors are: a "sufficiently large and geographically compact" minority population; evidence of political cohesiveness in the minority population; and evidence of racial bloc voting by whites that prevents the minorities from being able to elect whom they want. *Gingles*, 478 U.S. at 50–51.

<sup>30</sup> *Vera*, 116 S. Ct. at 1970 (O'Connor, J., concurring) (quoting *Shaw v. Hunt*, 116 S. Ct. 1894, 1907 (1996)).

<sup>31</sup> *Id.* (emphasis omitted). Justice O'Connor's opinion suggested, for example, that the VRA required the creation of a majority-minority district in the District 30 area, but that Texas had misused race by giving it too much prominence at the expense of traditional principles, causing the district to fail strict scrutiny. *See id.*

sometimes requires difficult exercises of judgment," states and courts are capable of making the necessary judgments.<sup>32</sup>

Justice Kennedy also wrote a concurrence,<sup>33</sup> revealing his apparent discomfort with Justice O'Connor's definition of the conditions leading to the application of strict scrutiny to race-based districting.<sup>34</sup> Noting that he regarded as dicta Justice O'Connor's statement that not all majority-minority districts would be strictly scrutinized,<sup>35</sup> Justice Kennedy refused to commit himself to the notion that a court could ever conclude that race did not predominate if a plan "foreordains that one race be the majority in a certain number of districts."<sup>36</sup>

Justice Thomas, concurring in the judgment,<sup>37</sup> went even further than Justice Kennedy. He argued that courts should always apply strict scrutiny to any intentionally created majority-minority district.<sup>38</sup> Specifically, he urged that districting cases must adhere to the mandatory application of strict scrutiny to all governmental racial classifications, as set out in *Adarand Constructors, Inc. v. Pena*.<sup>39</sup>

Justice Stevens, writing in dissent,<sup>40</sup> criticized Justice O'Connor's test, her application of it, and the wrongly decided line of cases that produced it.<sup>41</sup> He repeated his by now familiar refrain that the Court should not apply strict scrutiny in this area<sup>42</sup> and painstakingly rebutted Justice O'Connor's interpretation of the facts that led her to conclude that race "predominated" over traditional districting principles<sup>43</sup>

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

<sup>33</sup> See *id.* at 1971 (Kennedy, J., concurring).

<sup>34</sup> In this regard, Justice Kennedy continued the subtle tug-of-war begun in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). There, Justice Kennedy's opinion for the majority stated that strict scrutiny applies when a plaintiff proves "that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.* at 2488. Justice O'Connor joined Justice Kennedy's opinion but wrote a brief concurrence stating that "subordinated" meant "substantial[ly] disregard[ed]." *Id.* at 2497 (O'Connor, J., concurring).

<sup>35</sup> See *Vera*, 116 S. Ct. at 1971 (Kennedy, J., concurring). Since there was "ample evidence" that race predominated in this case, Justice Kennedy felt that the Court did not need to reach this issue. *Id.*

<sup>36</sup> *Id.* at 1971.

<sup>37</sup> Justice Scalia joined Justice Thomas's opinion.

<sup>38</sup> See *Vera*, 116 S. Ct. at 1972–74 (Thomas, J., concurring in the judgment). Justice Thomas explained that intentionally creating a district "because of" (rather than "in spite of") race subordinated race-neutral principles by definition and amounted to a racial classification by government. *Id.* at 1973 (citing *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)).

<sup>39</sup> 115 S. Ct. 2097, 2112–13 (1995).

<sup>40</sup> Justices Ginsburg and Breyer joined Justice Stevens's dissent.

<sup>41</sup> See *Vera*, 116 S. Ct. at 1974–75 (Stevens, J., dissenting) ("[T]he Court has . . . struck out into a jurisprudential wilderness that lacks a definable constitutional core . . .").

<sup>42</sup> See *id.* at 1977–78 (stating that strict scrutiny is inappropriate because "the risk of true 'discrimination' in this case is extremely tenuous in light of the remedial purpose the classification is intended to achieve").

<sup>43</sup> According to Justice Stevens, "Texas' entire map is a political, not a racial, gerrymander," *id.* at 1975, and every deviation from compactness, especially in the Dallas district, could be explained in nonracial terms, *see id.* at 1980–88. To make the point that shape proved nothing, Justice Stevens appended maps of three non-majority-minority Texas districts. These bizarrely

and that the districts were not narrowly tailored.<sup>44</sup> In conclusion, Justice Stevens identified a number of perverse incentives and consequences that would result from upholding *Shaw* and its progeny and suggested that, because the Court's jurisprudence had no constitutional basis and interfered in a highly political area, the Court risked a major blow to "the public's perception of the impartiality of the federal judiciary"<sup>45</sup> by refusing to overrule *Shaw*.<sup>46</sup>

Justice Souter also dissented,<sup>47</sup> taking a more theoretical tack than Justice Stevens.<sup>48</sup> Deeming Justice O'Connor's test inherently flawed for reasons that "go to the conceptual bone"<sup>49</sup> and stating that the Court's continuing "failure to provide a coherent concept of equal protection injury" or a coherent test for finding such injury led to "arbitrariness,"<sup>50</sup> Justice Souter recommended that the Court abandon stare decisis and overrule *Shaw*.<sup>51</sup>

When the Court identifies a new constitutional injury by the slimmest of possible margins, it has a responsibility to devise a test that clearly identifies when the injury has occurred in order to avoid the appearance of arbitrary interference with arguably constitutional behavior.<sup>52</sup> The failure of any one Justice of a five-Justice majority to recognize as injurious all behavior that causes the asserted constitutional injury weakens the legitimacy of the Court's claim that such an

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shaped districts, which could be useful as Rorschach tests, resembled a headless dancing satyr, a number of states connected together in a horseshoe shape, and a Klingon Bird of Prey being attacked by a dinosaur. *See id.* apps. A-C, at 1994-96.

<sup>44</sup> *See id.* at 1989-90. Justice Stevens added that, "[w]hile a State can be liable for a § 2 violation only if it could have drawn a compact district and failed to do so, it does not follow that creating such a district is the only way to avoid a § 2 violation." *Id.*

<sup>45</sup> *Id.* at 1991.

<sup>46</sup> *See id.* at 1990-93.

<sup>47</sup> Justices Ginsburg and Breyer joined Justice Souter's dissent as well.

<sup>48</sup> *See Vera*, 116 S. Ct. at 1998 (Souter, J., dissenting).

<sup>49</sup> *Id.* A test that looks to see whether race predominated over traditional districting principles, Justice Souter explained, is inherently doomed to failure because, in our society, "many of these traditional districting principles cannot be applied without taking race into account and are thus, as a practical matter, inseparable from the supposedly illegitimate racial considerations." *Id.* at 2005.

<sup>50</sup> *Id.* at 2006.

<sup>51</sup> *See id.* at 2011. Justice Souter, as one of the authors of the joint opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 843-911 (1992), is one of the Court's leading advocates of stare decisis. *See id.* at 854. Thus, his statement that the Court should overrule this line of cases is quite extraordinary. Justice Souter's explanation seems to be that *Shaw* is based on a "basic misconception about the relation between race and districting principles . . . that no amount of case-by-case tinkering" will ever fix, *Vera*, 116 S. Ct. at 1998 (Souter, J., dissenting), and fits into the category of a rule that "has proven to be intolerable simply in defying practical workability," *Casey*, 505 U.S. at 854 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

<sup>52</sup> Cf. *Vera*, 116 S. Ct. at 1997-98 (Souter, J., dissenting) ("When the Court devises a new cause of action to enforce a constitutional provision, it ought to identify an injury distinguishable from the consequences of concededly constitutional conduct, and it should describe the elements necessary and sufficient to make out such a claim.").

injury exists.<sup>53</sup> The Court's consideration of race in redistricting presents such a situation. Of the eleven Justices who have heard constitutional challenges to majority-minority districts, six have not accepted the proposition that a constitutional harm even exists when race is used in districting and the voting power of a racial group is not diluted as a result.<sup>54</sup> Nevertheless, a slim five-Justice majority has carried the day in each individual case, holding that such an injury is cognizable. In *Vera*, the members of the Court's slim majority once again failed to agree on a threshold test for applying strict scrutiny. Justice O'Connor — whose swing vote controls the outcome of each case<sup>55</sup> — employed a test that not only exempts certain types of allegedly injurious behavior from strict review, but also is at odds with her own conception of strict scrutiny as articulated in *Adarand*.<sup>56</sup> Because the members of the Court's slim majority are unable to agree on the circumstances that define the border between injurious behavior and non-injurious behavior in state district line drawing, and because the test Justice O'Connor posits in *Vera* is logically flawed, each recognition of a cognizable injury demanding the application of strict scrutiny appears arbitrary or politically motivated and lends an air of illegitimacy to the Court's decisions in redistricting cases.<sup>57</sup>

One of the requirements for standing to sue in a United States court is injury in fact.<sup>58</sup> Until *Shaw*, the Court recognized only two forms of actionable injury arising out of a state's drawing of district lines, both of which related to voting *power*. First, any person could sue if her district contained more people than another district (the one-person-one-vote cases);<sup>59</sup> second, a member of a class could sue if the state drew district lines in order to reduce the influence of that class (the vote dilution cases).<sup>60</sup> Justice O'Connor, writing for the Court in *Shaw*, recognized a third type of injury as violative of the Equal Pro-

<sup>53</sup> One scholar argues that "pluralities undercut the Court's role under the Constitution" and "diminish the Court's status as the body that provides content to the airy phrases of the Constitution" by "announc[ing] something like: 'We agree on who wins but cannot agree on the role of the Constitution in this setting.'" Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 134 (1994).

<sup>54</sup> See *Vera*, 116 S. Ct. at 1975 (Stevens, J., dissenting, joined by Ginsburg and Breyer, JJ.); *Shaw v. Reno*, 509 U.S. 630, 663, 674 (1993) (White, J., dissenting); *id.* at 676 (Blackmun, J., dissenting); *id.* at 677 (Stevens, J., dissenting); *id.* at 687 (Souter, J., dissenting).

<sup>55</sup> See Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 50 (1996).

<sup>56</sup> *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995).

<sup>57</sup> In this regard, *Vera* does not answer the question of "what it is that strict scrutiny is supposed to scrutinize." Issacharoff & Goldstein, *supra* note 55, at 61. "A standard of review cannot exist independent of a substantive conception of rights and wrongs that are to be examined, no matter how exacting that examination." *Id.*

<sup>58</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 734–35, 739–40 (1972).

<sup>59</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

<sup>60</sup> See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986); *Connor v. Finch*, 431 U.S. 407, 422 (1977).

tection Clause: an “expressive harm”<sup>61</sup> inflicted when districting “reinforces the perception that members of the same racial group . . . [necessarily] think alike, share the same political interests, and will prefer the same candidates at the polls,” and sends the message to the districts’ representatives that “their primary obligation is to represent only the members of [the minority] group.”<sup>62</sup> In short, the injury is the conveyance of “the *message* that political identity is, or should be, predominantly racial.”<sup>63</sup>

Justice O’Connor undermined this categorical definition, however, by failing to mandate strict scrutiny whenever this purported constitutional harm was present. In *Vera*, as in *Miller v. Johnson*,<sup>64</sup> Justice O’Connor was quite cautious in deciding whether to apply strict scrutiny to a challenged district. She pointedly stated that not all intentionally created majority-minority districts will receive strict scrutiny;<sup>65</sup> in fact, this is the main bone of contention of Justices Scalia, Kennedy, and Thomas.<sup>66</sup> Unlike these other Justices, Justice O’Connor, from *Shaw* through *Miller* to *Vera*, emphasizes district shape in the decision whether to apply strict scrutiny. Thus, Justice O’Connor’s test could exclude essentially compact majority-minority districts from strict scrutiny, for it can always be argued that compact districts, by definition, can never reveal “substantial disregard”<sup>67</sup> for traditional districting principles, since compactness seems to be the strongest of these principles in Justice O’Connor’s mind.<sup>68</sup>

Consequently, Justice O’Connor would refuse to apply strict scrutiny in many cases that, according to her definition of the constitutional harm, violate the Equal Protection Clause by sending the objectionable message. For example, she fails to recognize that the decision of an entire district’s location can also send the message that race is or should be the predominant political marker. This message sending occurs even when racial considerations do not subordinate traditional districting principles, which do not address the location of entire districts.<sup>69</sup> As Justice Stevens points out, the decision to locate

<sup>61</sup> *Vera*, 116 S. Ct. at 2002 (Souter, J., dissenting).

<sup>62</sup> *Shaw v. Reno*, 509 U.S. 630, 647–48 (1993). Such a message is “antithetical to our system of representative democracy.” *Id.* at 648.

<sup>63</sup> *Vera*, 116 S. Ct. at 1962 (opinion of O’Connor, J.) (emphasis added).

<sup>64</sup> 115 S. Ct. 2475 (1995).

<sup>65</sup> See *Vera*, 116 S. Ct. at 1951 (opinion of O’Connor, J.).

<sup>66</sup> See *id.* at 1971 (Kennedy, J., concurring); *id.* at 1972 (Thomas, J., concurring in the judgment).

<sup>67</sup> *Miller*, 115 S. Ct. at 2497 (O’Connor, J., concurring).

<sup>68</sup> See *Vera*, 116 S. Ct. at 1953–55, 1961, 1969 (opinion of O’Connor, J.).

<sup>69</sup> The principles mentioned by the Court seem to take the location of a district’s core as given and address only factors relevant to drawing individual lines. See, e.g., *id.* at 1955 (mentioning compactness, regularity, unification of communities of interest, incumbency protection, “consistent[ ] urban character,” and “common media sources”); *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995) (mentioning “compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests”).

even a compact district such that it has a majority-minority population must almost always be intentional.<sup>70</sup> This use by government of race in constructing voting districts sends the precise message that Justice O'Connor identifies as the constitutional harm. Yet, under her scheme, such injurious state action eludes strict scrutiny.

When the placement of race-based district lines would threaten incumbents' seats, the asserted harmful message is intensified. Because incumbents gain seniority in Congress and are able to wield more influence on behalf of their home states and districts, a state has a much stronger interest in protecting its incumbents' seats than in maintaining aesthetically pleasing district lines.<sup>71</sup> Thus, Justice O'Connor's focus on district shape ignores the case in which a compact majority-minority district displaces a less compact incumbent protection district. Justice O'Connor therefore allows a state to send the message that it will give up valuable influence in Congress by sacrificing incumbency protection to racial considerations in its redistricting.

Moreover, Justice Stevens points out an irony that results from Justice O'Connor's approach: if only majority-minority districts have special shape requirements, "the district may stand out as a stark, placid island in a sea of oddly shaped majority-white neighbors."<sup>72</sup> The "inviolable sanctity" of such districts will send the assertedly unconstitutional message "in a manner more blatant than the most egregious of [the] racial gerrymanders."<sup>73</sup> If the message is the injury, it is no less present in such a case.<sup>74</sup>

In light of these examples of the failure of Justice O'Connor's threshold test to address the constitutional concerns that ostensibly warrant establishing the test in the first place, Justice Kennedy's sug-

<sup>70</sup> See *Vera*, 116 S. Ct. at 1977 n.8 (Stevens, J., dissenting) ("[B]ecause minorities are, by definition, minorities in the population, it will be rare indeed for a State to stumble across a district in which the minority population is both large enough and segregated enough to allow majority-minority districts to be created with at most a 'mere awareness' that the placement of the lines will create such a district." (quoting *Vera*, 116 S. Ct. at 1973 (Thomas, J., concurring in the judgment))).

<sup>71</sup> Odd shapes cause problems only five times per decade when candidates must "carry a map to identify the district lines," *Vera v. Richards*, 861 F. Supp. 1304, 1340 (S.D. Tex. 1994).

<sup>72</sup> *Vera*, 116 S. Ct. at 1990 (Stevens, J., dissenting). The irony may even be more bitter than Justice Stevens realized. The bizarre shapes of the neighboring districts might often be caused by political gerrymandering to pick up replacement voters for those taken away by the compact majority-minority district. This process could create a ripple effect, whereby the compact majority-minority district distorts the borders of every district in the state except its own and probably sends a very loud message to even the most casual of observers. Yet strict scrutiny would likely still not apply under Justice O'Connor's approach.

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

<sup>74</sup> Further undermining the *Shaw* Court's conception of the injury, Justice O'Connor in *Vera* employed a fact-intensive analysis, closely examining and carefully weighing all the factors that might have informed the drawing of the districts at issue. This hairsplitting is exceedingly inappropriate when considering whether state action conveys constitutionally unacceptable messages to average Americans. Instead, a more appropriate test would ask whether a reasonable observer would conclude that race predominated in redistricting.

gestion that race is “predominant” for the purposes of the *Shaw* remedy whenever a state resolves to create a majority-minority district fits far more comfortably with the conception of the *Shaw* injury as undesirable message sending.<sup>75</sup> Given her conception of strict scrutiny, one would expect Justice O’Connor to agree. Indeed, Justice O’Connor’s refusal to apply strict scrutiny to all intentionally created majority-minority districts is puzzling in light of the fact that she has recently advocated more frequent application of strict scrutiny and the use of the narrow tailoring test to differentiate excusable injuries from inexcusable ones. Two Terms ago, Justice O’Connor’s opinion for the majority in *Adarand*<sup>76</sup> rejected the notion that strict scrutiny was “strict in theory, but fatal in fact”<sup>77</sup> and stated that the Court should not fear applying strict scrutiny because certain race-based remedies could pass a narrow tailoring test.<sup>78</sup> In *Vera*, responding to Justice Souter’s assertion that strict scrutiny is inappropriate for “benign” racial classifications, Justice O’Connor asserted that courts apply strict scrutiny “precisely because strict scrutiny is necessary to determine whether [racial classifications] are benign.”<sup>79</sup> Justice O’Connor’s attempt to differentiate strict scrutiny from a finding of *per se* unconstitutionality rests on her faith that the narrow tailoring test is the step that can separate justified racial classifications from unjustified ones.

Justice O’Connor’s strict scrutiny approach in *Vera*, however, is at odds with her view of strict scrutiny in *Adarand*. Justice O’Connor premises her *Adarand* statements on the notion that the narrow tailoring test genuinely adds another level of inquiry. This position allows application of strict scrutiny whenever there is a race-based constitutional harm; the narrow tailoring test then follows to determine whether, on balance, compelling state interests should excuse the harm. But in cases alleging a *Shaw* injury, it is unclear whether any conceivable district exists that Justice O’Connor would subject to strict scrutiny and yet deem narrowly tailored. This state of affairs transforms the strict scrutiny test into the surrogate for *per se* uncon-

<sup>75</sup> Justice O’Connor might reply that strict scrutiny is inappropriate in most compact districts because “district lines are ‘facially race neutral,’” *Vera*, 116 S. Ct. at 1951 (opinion of O’Connor, J.), but this is no answer in a case in which, for example, evidence exists that the location of the compact district was race-based, a situation in which Justice O’Connor would still not apply strict scrutiny. Nonetheless, such a case employs race as the predominant factor, subordinates (but does not substantially disregard) traditional principles, and sends the harmful message.

<sup>76</sup> *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

<sup>77</sup> *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)) (internal quotation marks omitted).

<sup>78</sup> See *id.* Until *Adarand*, subjection of race-based state action to strict scrutiny had almost always resulted in a finding of unconstitutionality. *But see Korematsu v. United States*, 323 U.S. 214, 218–20 (1944) (subjecting the internment of Japanese-Americans during World War II to strict scrutiny, but deeming the measure narrowly tailored to the compelling interest of national security).

<sup>79</sup> *Vera*, 116 S. Ct. at 1963 (opinion of O’Connor, J.).

stitutionality that it seemed to be before *Adarand*.<sup>80</sup> If strict scrutiny only applies to districts that egregiously undermine traditional districting principles, and districts are only narrowly tailored if they are similar to districts that courts could have drawn to remedy section two violations,<sup>81</sup> it seems that no district that could possibly be deemed narrowly tailored would receive strict scrutiny in the first place.<sup>82</sup> This mutual exclusivity is especially problematic when the threshold question of the application of strict scrutiny is itself not narrowly tailored to the remedying of constitutional harm, contributing further to a perception of a severely flawed jurisprudential approach to these cases.

In *Shaw*, Justice O'Connor stated that in the area of race-based redistricting, “appearances do matter.”<sup>83</sup> She is correct. The appearance that the Court arbitrarily applies the remedy in these cases threatens to undermine the majority’s claim that any real constitutional injury exists at all. If Justice O’Connor truly believes that constitutional injury occurs any time a state sends the message that race is or should be a predominant political characteristic, then she should apply strict scrutiny whenever that message is sent, that is, to all conscious creations of majority-minority districts. Otherwise, Justice

<sup>80</sup> In fact, caution when defining the scope of strict scrutiny’s application is more easily squared with Justice Stevens’s view of strict scrutiny — that it “describ[e]s the likelihood of success [rather] than the character of the test to be applied,” *id.* at 1978 (Stevens, J., dissenting) — a view rejected by Justice O’Connor in *Adarand*, *see* 115 S. Ct. at 2117.

<sup>81</sup> According to Justice O’Connor, courts can only provide remedies based on section two when the first *Gingles* criterion is met, *see Vera*, 116 S. Ct. at 1961 (opinion of O’Connor, J.), namely that the minority group “is sufficiently large and geographically compact to constitute a majority in a single member district,” *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (emphasis omitted). Conceivably, “sufficiently . . . compact” could be broadly construed to mean no less compact than the average compactness of other districts in the state, but this is not how Justice O’Connor interprets *Gingles*. Instead, she seems to construe “sufficiently . . . compact” to mean “compact” to the eye of an outside observer or something similar. Under this reasoning, a court remedying a section two violation may not manipulate district lines based on race beyond the district’s compact core. *See Vera*, 116 S. Ct. at 1961–62 (opinion of O’Connor, J.). Yet Justice O’Connor would never even apply strict scrutiny to such a district because its lines are not drawn based on racial considerations that subordinate traditional districting principles.

<sup>82</sup> Thus, Justice O’Connor’s rejection of the district court’s position that a district “must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria,” *Vera*, 116 S. Ct. at 1960 (opinion of O’Connor, J.) (*quoting Vera v. Richards*, 861 F. Supp. 1304, 1343 (S.D. Tex. 1994)) (internal quotation marks omitted), is a distinction without a difference because no marginal case would make it to the narrow tailoring test. Justice O’Connor would never find that race had predominated over traditional districting principles in a district that was only slightly imperfect. Justice Stevens made the interesting point that, if “fine tuning” compact lines based on race would not lead to the application of strict scrutiny, neither should the use of race in “fine tuning” the borders of areas displaced from the core due to nonracial considerations. *Id.* at 1987–88 (Stevens, J., dissenting). Put another way, the use of race to move district lines from one place to another sends the same message — that race is the predominant political identity — no matter how far from the core the lines are. If the message is the injury, it is unjustifiable to condemn one and ignore the other.

<sup>83</sup> *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

O'Connor must either reconceptualize the injury to make her threshold test make sense, or admit that the districting practices at issue are unwise but not unconstitutional and therefore overrule *Shaw* at the Court's first opportunity to do so.

### C. Export Clause

*Taxes on Insurance Premiums as Applied to Exports.* — Not every word of the Constitution has proven a wellspring of jurisprudence. For every First Amendment there is a Third, buried far off the beaten path of the law. The Export Clause, which states that “[n]o Tax or Duty shall be laid on Articles exported from any State,”<sup>1</sup> had not been the focus of a Supreme Court opinion for over seven decades,<sup>2</sup> until last Term. In *United States v. IBM Corp.*,<sup>3</sup> the Court revisited the Export Clause, holding unconstitutional a federal excise tax upon insurance policies issued by foreign companies as applied to coverage for exported products. In basing its decision on a little-known eighty-year-old precedent, however, the Court misapplied the doctrine of stare decisis, which ought to protect precedents only to the extent dictated by the policies underlying the doctrine. The preservation of constitutional cases of only limited influence generally does not serve these policies, as *IBM* makes clear.

Section 4371 of the Internal Revenue Code places a tax on premiums paid toward “each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by any foreign insurer or reinsurer.”<sup>4</sup> From 1975 through 1984, IBM routinely shipped products manufactured in the United States to its customers and consolidation centers abroad under casualty insurance policies purchased from foreign insurers.<sup>5</sup> Despite § 4371, IBM did not report these premiums in its federal excise tax returns.<sup>6</sup> The IRS audited IBM and assessed \$1,532,235.87 in back taxes and interest.<sup>7</sup> After paying this amount and making an unsuccessful request for a refund, IBM brought suit against the government in the Court of Federal Claims.<sup>8</sup>

<sup>1</sup> U.S. CONST. art. I, § 9, cl. 5.

<sup>2</sup> The last Export Clause case was *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923), in which the Court invalidated a tax as applied to the export sale of certain baseball equipment.

<sup>3</sup> 116 S. Ct. 1793 (1996).

<sup>4</sup> I.R.C. § 4371 (1994). Congress enacted this provision to eliminate the competitive advantage that foreign insurers possess because they are not subject to the domestic income tax. See *IBM Corp. v. United States*, 31 Fed. Cl. 500, 503–04 (Fed. Cl. 1994) (citing H.R. REP. NO. 77-2333, at 61 (1942)).

<sup>5</sup> See *IBM*, 31 Fed. Cl. at 500–01. Usually, IBM’s wholly owned foreign subsidiaries procured the policies and listed both themselves and their parent company as beneficiaries. See *id.* at 501.

<sup>6</sup> See *id.* at 502.

<sup>7</sup> See *id.* at 502–03. The Internal Revenue Service also charged IBM delinquency penalties but subsequently refunded these amounts with interest. See *id.*

<sup>8</sup> See *id.* at 502–03.

The arguments on each side remained essentially consistent throughout the course of litigation. IBM maintained that any tax upon insurance as applied to exports violates the Export Clause,<sup>9</sup> contending that the Supreme Court had decided the issue over eighty years ago in *Thames & Mersey Marine Insurance Co. v. United States*.<sup>10</sup> In that case, the Court declared unconstitutional a tax on marine insurance policies for exports, establishing both that all taxes on exports violate the Export Clause<sup>11</sup> and that “the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on . . . the goods themselves.”<sup>12</sup>

Although conceding IBM’s case if *Thames & Mersey* remained good law, the government argued that more recent Supreme Court precedent dealing with a related provision in the Constitution had superseded that case, rendering it obsolete.<sup>13</sup> The Import-Export Clause, which decrees that “[n]o State shall . . . lay any Imposts or Duties on Imports or Exports,”<sup>14</sup> is similar enough to the Export Clause in language and substance that the Court has tended to interpret the two in like manner.<sup>15</sup> At the time of *Thames & Mersey*, the Court read both clauses as flat prohibitions on taxation of imports and exports.<sup>16</sup> But while the Export Clause lay inert in subsequent decades, Import-Export Clause jurisprudence metamorphosed. In *IBM*, the government argued that, under the modern interpretation, the Import-Export Clause bans only imposts and duties that tax imports and exports in their capacities as such.<sup>17</sup> Positing that the developments in the Import-Export Clause cases also affected the Export Clause, the government contended that the Export Clause prohibits only a tax that discriminates against exports, in contrast to a tax that merely happens to apply to a good in the export stream.<sup>18</sup>

Based on an undisputed set of facts, IBM and the government made cross-motions for summary judgment in the Court of Federal

<sup>9</sup> See *id.* at 503–04.

<sup>10</sup> 237 U.S. 19 (1915).

<sup>11</sup> See *id.* at 25; see also *Fairbank v. United States*, 181 U.S. 283, 292 (1901) (“[T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden.”).

<sup>12</sup> *Thames & Mersey*, 237 U.S. at 27.

<sup>13</sup> See *IBM*, 31 Fed. Cl. at 504–06.

<sup>14</sup> U.S. CONST. art. I, § 10, cl. 2.

<sup>15</sup> See *IBM*, 116 S. Ct. at 1799; see also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827) (“There is some diversity in language [between the two clauses], but none is perceptible in the act which is prohibited.”).

<sup>16</sup> See *Thames & Mersey*, 237 U.S. at 27 (Export Clause); *Low v. Austin*, 80 U.S. (13 Wall.) 29, 32–33 (1871) (Import-Export Clause).

<sup>17</sup> Specifically, the government contended that *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), established that generally applicable, nondiscriminatory taxes upon imports and exports do not violate the Import-Export Clause. See *IBM*, 31 Fed. Cl. at 504–06.

<sup>18</sup> See *IBM*, 31 Fed. Cl. at 504–06.

Claims.<sup>19</sup> Asked to find that *Thames & Mersey* had been overruled, Judge Lydon refused to do so without a more explicit sign of Supreme Court intent: "The court must adhere to the accepted practice of following Supreme Court precedent unless the Supreme Court clearly states that it is overruling earlier cases and explains why it is doing so."<sup>20</sup> Judge Lydon granted IBM's motion for summary judgment.<sup>21</sup>

Despite the government's attempt to buttress its Import-Export Clause argument on appeal, the Court of Appeals for the Federal Circuit affirmed.<sup>22</sup> Writing for a unanimous court, Judge Bryson rejected the argument that the Supreme Court had abandoned *Thames & Mersey* when it disavowed a line of precedent on which that case depended.<sup>23</sup> As the government noted, the reasoning of *Thames & Mersey* relied in part on a line of dormant Commerce Clause precedent in which the Supreme Court flatly prohibited state taxes that affected interstate commerce.<sup>24</sup> In 1977, the Court expressly disavowed this view, ruling that the dormant Commerce Clause does not prohibit all nondiscriminatory state taxes that happen to burden interstate commerce.<sup>25</sup> But neither the developments in dormant Commerce Clause jurisprudence nor those relating to the Import-Export Clause convinced the Federal Circuit to disregard a recent Supreme Court admonition to the lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."<sup>26</sup>

The Supreme Court affirmed. A six-Justice majority led by Justice Thomas<sup>27</sup> declined the government's invitation to overrule *Thames & Mersey*, holding that the Export Clause bars even generally applicable, nondiscriminatory taxes upon exports.<sup>28</sup> After sketching the contours of Export Clause jurisprudence as the Court left it in the 1920s,<sup>29</sup> Justice Thomas dismissed the government's effort to link the Export

<sup>19</sup> See *id.* at 500.

<sup>20</sup> *Id.* at 506 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

<sup>21</sup> See *id.* at 507. Judge Lydon directed the parties to agree on the amount of the judgment award. See *id.*

<sup>22</sup> See *IBM Corp. v. United States*, 59 F.3d 1234, 1239 (Fed. Cir. 1995).

<sup>23</sup> See *id.* at 1238.

<sup>24</sup> See *id.* To be precise, *Thames & Mersey* relied upon the Commerce Clause analogy used in *United States v. Hvoslef*, 237 U.S. 1 (1915). See *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 25 (1915).

<sup>25</sup> See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287–89 (1977).

<sup>26</sup> *IBM*, 59 F.3d at 1239 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)) (internal quotation marks omitted).

<sup>27</sup> Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, and Breyer joined the majority opinion. Justice Stevens took no part in the decision.

<sup>28</sup> See *IBM*, 116 S. Ct. at 1795.

<sup>29</sup> See *id.* at 1796–98.

Clause to the Commerce Clause: the textual differences between the two undermined the claim that the Court's distinction between discriminatory and nondiscriminatory state taxes on interstate commerce should apply to federal taxes on exports.<sup>30</sup>

In a more extensive discussion, Justice Thomas rebuffed the government's Import-Export Clause argument. He began by noting that, although one could challenge *Thames & Mersey* by arguing that a tax on the insurance of exported goods is not the same as a tax on the goods themselves for Export Clause purposes, the government had chosen not to pursue this argument.<sup>31</sup> Given the principles underlying the doctrine of stare decisis, the Court refused to "overrule[e] a long-standing precedent on a theory not argued by the parties."<sup>32</sup> Putting this issue aside, Justice Thomas concluded that the differences in the text and purposes of the two clauses were significant enough that the Court should not impute changes in the interpretation of the Import-Export Clause to the Export Clause.<sup>33</sup> Finally, he insisted that the first step in the government's argument was fundamentally flawed in any case: under the Court's preferred interpretation, the Import-Export Clause still did not allow the assessment of even nondiscriminatory taxes on imports and exports.<sup>34</sup>

Justice Kennedy, joined by Justice Ginsburg, dissented. Ignoring the hubbub about the Import-Export Clause, he focused instead on the argument that the government had supposedly foregone: that the Export Clause should not apply to § 4371 because it imposes a tax on export insurance, not on exports.<sup>35</sup> Justice Kennedy disputed the majority's finding that the government had waived the issue, noting "repeated references to the distinction [between a tax on insurance premiums and a tax on goods] in [the government's] briefs"<sup>36</sup> and at oral argument.<sup>37</sup> Moreover, even if the government had waived this argument, he felt that this case demanded a suspension of the pruden-

<sup>30</sup> See *id.* at 1799 ("[T]he Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports." (footnote omitted)).

<sup>31</sup> See *id.* at 1800–01.

<sup>32</sup> *Id.* at 1801.

<sup>33</sup> See *id.* at 1801–03. First, Justice Thomas observed that the Court had previously distinguished the express target of the Import-Export Clause — "Imposts or Duties" — from "the broader term 'Tax' that appears in the Export Clause." *Id.* at 1802 (construing *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293–94 (1976)). The Court undertook "a more permissive approach to state taxation under the Import-Export Clause only by distinguishing the presumptively stricter language of the Export Clause." *Id.* Second, Justice Thomas stressed the different purposes of the Import-Export Clause and the Export Clause, the former restricting state power in favor of federal power and the latter operating in reverse. See *id.*

<sup>34</sup> See *id.* at 1803–04.

<sup>35</sup> See *id.* at 1805–06 (Kennedy, J., dissenting).

<sup>36</sup> *Id.* at 1805.

<sup>37</sup> See *id.* at 1805–06.

tial rule against considering unargued theories.<sup>38</sup> Justice Kennedy concluded that the text and history of the Export Clause indicate that it was not meant to ban taxes on export insurance.<sup>39</sup> Although he admitted that “[t]he protections of the Export Clause must extend, perhaps, somewhat beyond specific taxes on goods,”<sup>40</sup> Justice Kennedy maintained that the price of export insurance does not correlate with the value of the exported goods strongly enough that a tax on premiums would amount to a tax on goods.<sup>41</sup> Insisting that stare decisis “does not protect a constitutional decision where the reasoning is as poor as it is in *Thames & Mersey*,”<sup>42</sup> Justice Kennedy declared that he would have upheld § 4371 as applied to IBM’s export insurance premiums without reaching the government’s argument about discriminatory and nondiscriminatory taxes.<sup>43</sup>

By leaving open the question “whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods,”<sup>44</sup> the Court missed an opportunity to clarify Export Clause doctrine. Early this century, the Court used the Export Clause to invalidate taxes on foreign bills of lading,<sup>45</sup> contracts for the lease of export vessels,<sup>46</sup> and of course, insurance,<sup>47</sup> curtailing apparent legislative efforts to circumvent the clause.<sup>48</sup> However, the Court never established the precise method by which to determine whether a tax falls too close to exports to pass constitutional muster.<sup>49</sup> If the Court had reached this issue in *IBM*, it might have adopted Justice Kennedy’s sensible approach, which focused on whether the cost of the export service taxed correlates tightly with the value of the ex-

<sup>38</sup> See *id.* at 1806–07 (“To give Congress the respect it is owed, we must decide whether the statute is in fact unconstitutional as applied, not make the borderline call that the Government’s litigation position bars us from reaching a question which . . . is presented by the case.”).

<sup>39</sup> See *id.* at 1809–10. Justice Kennedy found particularly persuasive the historical evidence showing that the Fifth Congress passed a tax on export insurance without any fear that it would violate the Export Clause. See *id.* at 1810 (relying on Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527, 527–28). The *Thames & Mersey* Court apparently did not consider the statute. See *id.* at 1811.

<sup>40</sup> *Id.* at 1812.

<sup>41</sup> See *id.* (noting that premiums take into account both the value of the goods and “the risk factors specific to a particular shipment”). Justice Kennedy also argued that the majority’s ruling would unnecessarily complicate the taxation of insurance premiums. See *id.* at 1808–09.

<sup>42</sup> *Id.* at 1811–12 (citing *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

<sup>43</sup> See *id.* at 1813.

<sup>44</sup> *IBM*, 116 S. Ct. at 1804.

<sup>45</sup> See *Fairbank v. United States*, 181 U.S. 283, 312 (1901).

<sup>46</sup> See *United States v. Hvoslef*, 237 U.S. 1, 16–18 (1915) (invalidating a tax on “charter parties” as applied to exports).

<sup>47</sup> See *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 26–27 (1915).

<sup>48</sup> See *Fairbank*, 181 U.S. at 290, 300; Howard Schragin, Comment, *U.S. Shoe Corp. v. United States: A Victory for U.S.-Canada Maritime Trade*, 19 FORDHAM INT’L L.J. 1764, 1777–82 (1996).

<sup>49</sup> See, e.g., *Hvoslef*, 237 U.S. at 13–16 (evaluating a tax under the Export Clause through comparison to taxes previously invalidated rather than through the application of an explicit analytic framework).

ported goods.<sup>50</sup> Unfortunately, unless the Court agrees to hear another Export Clause case soon — a dubious prospect<sup>51</sup> — lower courts will not have the benefit of such a unified theory. Instead, they will have to apply the hoary precedents as best they can to new fact patterns as taxpayers encouraged by *IBM* bring new Export Clause challenges.

The holding in *IBM* is hardly shocking.<sup>52</sup> Relying on *Thames & Mersey*, the Court held that goods and closely associated services can be subject to taxes before the goods are exported, but the Export Clause shields them from even nondiscriminatory taxes once the goods enter the export stream.<sup>53</sup> But even though *IBM* reaffirms the established interpretation of the Export Clause, it represents a misapplication of the doctrine of stare decisis. Rather than addressing why the Court *should* not overturn *Thames & Mersey*, Justice Thomas instead focused on why the Court was not *required* to do so,<sup>54</sup> using the doctrine of stare decisis to disregard the issue that triggered Justice Kennedy's dissent.<sup>55</sup> Stare decisis should not protect every precedent; as Justice Thomas acknowledged, stare decisis "is a 'principle of policy,' and not 'an inexorable command.'"<sup>56</sup> Past cases deserve deference only insofar as it furthers the principles that underlie the doctrine. Yet, as in *IBM*, the Court often grants precedents the benefit of stare

<sup>50</sup> See *IBM*, 116 S. Ct. at 1812–13 (Kennedy, J., dissenting).

<sup>51</sup> See Dominic Bencivenga, *Export Taxes: Harbor Fee Opponents Cheered by 'IBM' Ruling*, N.Y. L.J., June 20, 1996, at 5. There is, however, at least one ongoing Export Clause case of note. In the appeal of *United States Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995), the Federal Circuit will consider whether a federal "harbor maintenance tax" actually represents a "user fee," not a tax, and so does not fall within the Export Clause's prohibition. See Bencivenga, *supra*, at 5. Hundreds of millions of dollars in over 2000 cases depend upon the resolution of this closely watched case. See John J. Tigue Jr. & Linda A. Lacewell, *Tax Litigation: The Supreme Court's 1995–96 Term*, N.Y. L.J., July 18, 1996, at 3.

<sup>52</sup> Cf. Aaron Epstein, *Rehnquist Court Pleases Liberals and Conservatives*, PORTLAND OREGONIAN, July 7, 1996, at F1, available in 1996 WL 4156594 (reporting that, after presenting *IBM* to those gathered to hear the Supreme Court opinions handed down that day, Justice Thomas quipped sarcastically "I know that was scintillating").

<sup>53</sup> See *IBM*, 116 S. Ct. at 1796–98.

<sup>54</sup> Indeed, Justice Thomas maintained an unusually defensive posture throughout his opinion, tending to attack the government's position rather than develop his own affirmative argument. See, e.g., *id.* at 1804 ("We think [the Import-Export Clause] cases leave us free to follow the express textual command of the Export Clause . . . ." (emphasis added)); *cf. id.* at 1804–05 (Kennedy, J., dissenting) ("In the end the Court assumes the statute to be invalid rather than deciding it to be so."); Transcript of Oral Argument, *IBM* (No. 95-591), available in 1996 WL 128273, at \*5 (Mar. 18, 1996) ("[Y]ou're going to have to persuade me that there are some very important reasons for overturning these longstanding precedents.").

<sup>55</sup> See *IBM*, 116 S. Ct. at 1801. Interestingly, in another case last Term, *Colorado Republican Federal Campaign Committee v. FEC*, 116 S. Ct. 2309 (1996), the Court criticized Justice Thomas for violating principles of stare decisis by urging the Court to "overrule[e] a longstanding precedent on a theory not argued by the parties." *Id.* at 2321 (quoting *IBM*, 116 S. Ct. at 1801) (internal quotation marks omitted). In response, Justice Thomas termed the majority's reasons for disregarding the theory "unpersuasive." See *id.* at 2323 (Thomas, J., concurring in the judgment and dissenting in part).

<sup>56</sup> *IBM*, 116 S. Ct. at 1801 (citations omitted) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

decisis without discussing these underlying considerations carefully,<sup>57</sup> thus using stare decisis less as a principle of policy than as a presumption of validity. In considering future challenges to precedent, the Court should adhere to a balancing test that weighs not only the affirmative reasons to overrule a precedent — its impracticality or flawed reasoning<sup>58</sup> — but also the degree to which preserving the precedent will promote the policies supporting stare decisis.

Precedent should not be valued merely because it *precedes*, but rather because of the secondary effects of this chronological accident.<sup>59</sup> Common justifications for the use of stare decisis focus on the doctrine's value in promoting certainty, equality, efficiency, and legitimacy.<sup>60</sup> In brief, certainty refers to maintaining stability in the law and protecting those who rely upon past court decisions;<sup>61</sup> equality to ensuring that litigants at different times and in different courts receive equal treatment;<sup>62</sup> efficiency to foreclosing needless reconsideration of recurring issues;<sup>63</sup> and legitimacy to ensuring that the judiciary retains the trust of the people by preserving even imperfect opinions when necessary to convey the appearance of impartial justice.<sup>64</sup> However, as *IBM* illustrates, once a precedent is in place, the Court generally assumes that its continued validation serves the purposes of stare decisis. Although this assumption may be accurate in most cases, the Court risks missing the exceptions.

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<sup>57</sup> See, e.g., *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2115 (1995) (invoking "the values of stare decisis" without explicating them).

<sup>58</sup> See *Payne*, 501 U.S. at 827 (citing *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

<sup>59</sup> See Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2113 (1996); cf. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987) ("Why should the best decision for now be distorted or thwarted by obeisance to a dead past . . . ?").

<sup>60</sup> See Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–72 (1988); see also *Payne*, 501 U.S. at 827 (emphasizing the role of precedent in furthering "the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process"); Schauer, *supra* note 59, at 595–602 (noting that common justifications for stare decisis center on fairness, predictability, strengthened decisionmaking, and stability). Some commentators have questioned the validity of these justifications for the use of stare decisis. See, e.g., Maltz, *supra*, at 368–72; Peters, *supra* note 59, at 2055–73; Schauer, *supra* note 59, at 595–602. Whatever the merit of these critiques, the Supreme Court apparently continues to see instrumental value in stare decisis, see, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1127 (1996) (quoting *Payne*, 501 U.S. at 827), and should at least apply the doctrine in accordance with its own policy rationales.

<sup>61</sup> See Maltz, *supra* note 60, at 368–69; see also *Smith*, 321 U.S. at 669 (Roberts, J., dissenting) (dreading a system in which a decision might resemble "a restricted railroad ticket, good for this day and train only").

<sup>62</sup> See Maltz, *supra* note 60, at 369–70; Schauer, *supra* note 59, at 595–96.

<sup>63</sup> See Maltz, *supra* note 60, at 370–71; see also *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (noting "the interest in facilitating the labors of judges").

<sup>64</sup> See Maltz, *supra* note 60, at 371–72; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 864–69 (1992) (refusing to overturn the "central holding" of *Roe v. Wade*, 410 U.S. 113 (1973), in part to preserve the legitimacy of the Court in the eyes of the nation).

Overruling *Thames & Mersey* would have had little effect on the certainty of the law, for instance. Even though apparently ratified by age,<sup>65</sup> the case was hardly influential in the decades before the Court decided *IBM*. Although a regulation that accompanied an earlier version of § 4371 specifically exempted insurance for exports from taxation,<sup>66</sup> the regulation lapsed thereafter,<sup>67</sup> and with it the palpable effect of *Thames & Mersey*.<sup>68</sup> Moreover, even if the IRS had been violating *Thames & Mersey* knowingly, it certainly had good reason to doubt the case's continued vitality, given the developments in constitutional law identified by the government in *IBM*. Although those developments may not have foreordained the demise of *Thames & Mersey*, they certainly made its fate uncertain.

Indeed, *Thames & Mersey* has exerted so little influence in recent years that its abandonment would not have impaired the other policies behind stare decisis to any appreciable extent. If *Thames & Mersey* were overruled, *IBM* could hardly have complained about unequal treatment compared to the exporters from the time of that case,<sup>69</sup> given both the developments in constitutional law that called into question the case's validity and the eighty-one-year span between *Thames & Mersey* and *IBM*.<sup>70</sup> Preservation of *Thames & Mersey* was not necessary for the sake of efficiency either: the apparent frequency of Export Clause cases — one every seventy years — hardly seems taxing on judicial resources. Indeed, with the majority reserving an important issue for consideration on another day, the overruling of the case would have conserved judicial resources more efficiently. Lastly, when a case has lain unnoticed for decades, its eventual abandonment does much less to besmirch the Court's appearance of legitimacy than might the Court's more celebrated switchbacks.<sup>71</sup>

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<sup>65</sup> See *IBM*, 116 S. Ct. at 1801 ("*Thames & Mersey* has been controlling precedent for over 80 years, and the Government does not, indeed could not, argue that the rule established there is 'unworkable.'"); cf. *Helvering v. Griffiths*, 318 U.S. 371, 403 (1943) ("[A] long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change.").

<sup>66</sup> See Reg. 55, art. 145(a) (1922) (implementing Revenue Act of 1921, ch. 136, § 1107, 42 Stat. 227, 306).

<sup>67</sup> See Brief for Respondent at 4 n.3, *IBM* (No. 95-591), available in 1996 WL 71802.

<sup>68</sup> Nothing in the text of § 4371 or the history of its enactment indicates that either Congress or the IRS considered *Thames & Mersey* an active constraint on the tax's application. See I.R.C. § 4371 (1994); H.R. REP. NO. 77-2333, at 61 (1942).

<sup>69</sup> Indeed, one could argue that *IBM* and similarly situated exporters received *preferential* treatment compared to taxpayers in the Import-Export Clause and Commerce Clause contexts.

<sup>70</sup> Cf. *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 153 (1981) (Stevens, J., concurring) ("I am firmly convinced that we have a profound obligation to give recently decided cases the strongest presumption of validity.").

<sup>71</sup> Compare, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 852-55 (1976) (overruling a case that approved federal interference with state oversight of "integral governmental functions"), with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47, 557 (1985) (overruling *National League of Cities*).

In the most prominent recent Supreme Court invocation of stare decisis, *Planned Parenthood v. Casey*,<sup>72</sup> such "prudential and pragmatic"<sup>73</sup> concerns were at the focus of the Court's reconsideration of *Roe v. Wade*,<sup>74</sup> and appropriately so.<sup>75</sup> However, the Court should engage in this type of analysis when reconsidering not only particularly significant precedents like *Roe*, but also particularly insignificant ones like *Thames & Mersey*. In *IBM*, the Court failed to apply the principles of stare decisis in a sensible fashion, giving an unimportant case an undeserved presumption of validity.

In assaying a challenged precedent's continuing vitality, the Court should weigh not only the strength of the justifications for overruling the precedent, but also the strength of the precedent as precedent. Thus, the Court should continue to favor a precedent whose preservation will advance the purposes of certainty, equality, efficiency, and legitimacy, but should give no presumption of validity to a precedent whose abandonment will not counter these purposes. Such a change will ensure that the Court will not preserve precedents needlessly.

This approach should be especially valuable in cases dealing with constitutional precedents, for stare decisis applies with much less force in constitutional cases than in other contexts.<sup>76</sup> If Congress dislikes the holding in a statutory case, for instance, it can simply enact a new statute. Because legislative correction is impossible in constitutional cases, the Court has relaxed the force of stare decisis in these cases.<sup>77</sup> Although no one seems yet to have forwarded a satisfactory theory explaining how stare decisis functions in constitutional cases,<sup>78</sup> the reconceptualization of the strength of a precedent in terms of certainty,

<sup>72</sup> 505 U.S. 833 (1992). Notably, although the *Casey* majority purported to uphold the "central holding" of *Roe v. Wade*, 410 U.S. 113 (1973), *Casey*, 505 U.S. at 854–55, this alleged use of stare decisis appeared to the dissenters and some commentators to be a mask for a rewriting of *Roe*, see, e.g., *id.* at 953–54 (Rehnquist, C.J., dissenting); *id.* at 993–94 (Scalia, J., dissenting); John Wallace, Comment, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 BUFF. L. REV. 187, 233–35 (1994).

<sup>73</sup> *Casey*, 505 U.S. at 854.

<sup>74</sup> 410 U.S. 113 (1973).

<sup>75</sup> See Peters, *supra* note 59, at 2036 ("[T]he approach to stare decisis taken by the *Casey* plurality — one of explicit, calculated pragmatism — is . . . the only defensible methodology of adjudicative consistency.").

<sup>76</sup> See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone & Cardozo, JJ., concurring).

<sup>77</sup> See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–08 (1932) (Brandeis, J., dissenting); see also Wallace, *supra* note 72, at 195 ("Aside from the fact that times can change, there also exists the possibility that the first Court is poorly prepared, the case is poorly argued, or the judgment is poorly considered."). One commentator has even suggested that the use of precedent in constitutional cases is itself unconstitutional. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994). But cf. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 157 (1990) (suggesting that a respect for precedent was inherent in the original understanding of the federal "judicial Power").

<sup>78</sup> See BORK, *supra* note 77, at 157; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988).

equality, efficiency, and legitimacy may make the application of stare decisis in constitutional cases more transparent.

Moreover, the adoption of a more sensitive test for stare decisis should not have significant costs. The increase in sensitivity will affect the reconsideration only of relatively uninfluential cases like *Thames & Mersey*; the precedential force of constitutional juggernauts like *Marbury v. Madison*<sup>79</sup> hardly needs to be reevaluated in terms of certainty, equality, efficiency, and legitimacy. Although judges will need to make the difficult decision at the margin whether a case is influential enough to warrant preservation, their decisions will still be more accurate than they are under the current approach.<sup>80</sup>

Even though the proposed multifactor analysis would provide judges with more elements to weigh in what some commentators have already derided as a manipulable doctrine,<sup>81</sup> this approach should provide no greater leeway for judicial activism. The current approach toward stare decisis is already prone to manipulation if ever five Justices feel so inclined.<sup>82</sup> A more sensitive analytical framework would at least offer the possibility of logical consistency.

Blind consistency with the past, in contrast, is not valuable in itself, either in the Supreme Court or in the lower courts.<sup>83</sup> Stare decisis should apply only when its purposes do; the failure to consider these purposes upon each application of stare decisis robs the doctrine of principled justification. In truth, the proposed approach to stare deci-

<sup>79</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>80</sup> See Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) (“Standards allow for the decrease of errors of under- and over-inclusiveness . . . ”).

<sup>81</sup> See, e.g., Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467; Monaghan, *supra* note 78, at 743.

<sup>82</sup> Cf. BORK, *supra* note 77, at 159 (“If you do not care about stability, if today’s result is all-important, there is no occasion to respect either the constitutional text or the decisions of your predecessors.”).

<sup>83</sup> Judges have differed on whether lower courts should ever stray from Supreme Court precedent that has not been explicitly overruled. Compare Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (instructing lower courts not to engage in anticipatory overruling), with Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting) (arguing that the lower courts “should not wait for formal retraction [of a Supreme Court precedent] in the face of changes plainly foreshadowed”). But as the federal docket expands and the number of grants of certiorari contracts, see Tigue & Lacewell, *supra* note 51, at 3, it makes more sense for lower courts to predict impending Supreme Court changes, when reasonably apparent. Lower courts could also adopt a more sensitive approach to stare decisis, gauging the strength of Supreme Court precedent in terms of the doctrine’s underlying values. Of course, the lower courts’ subordinate position would call for a different approach toward stare decisis from that desirable in the Supreme Court, see Schauer, *supra* note 59, at 576; after all, only in the rarest of circumstances should a lower court discount Supreme Court precedent. Full discussion of such an alternate approach lies beyond the scope of this Comment, but for an interesting counterpoint on the proper interpretation of Supreme Court precedent by the lower courts, compare Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994), with Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995).

sis might not have changed the result in *IBM*. The Justices may have upheld the weak precedent of *Thames & Mersey* if they decided that its conclusion remained correct as a matter of substantive law. But the presumption of validity for *Thames & Mersey* and other uninfluential constitutional cases — that they be departed from only with “special justification”<sup>84</sup> — obscures the proper approach. *Stare decisis* demands a more sensitive inquiry than that exhibited in *IBM*. *Thames & Mersey* received an improper presumption of validity; the Court’s current approach to *stare decisis* deserves none.

#### D. Fifth Amendment

*Double Jeopardy Clause — In Rem Civil Forfeiture.* — Throughout the history of the United States, the federal government has maintained the ability to seize the property of individuals charged with or convicted of crimes.<sup>1</sup> Although the procedural requirements for its use have changed over the years, civil forfeiture has become a powerful law enforcement tool. The increasing use of this tool, however, has not been well received. Cries of protest have deafened scholars and jurists alike as the federal government has increased its use of civil forfeiture.<sup>2</sup> Although the Supreme Court has resolved challenges to civil forfeiture under the Due Process and Excessive Fines Clauses,<sup>3</sup> until recently it had not confronted squarely whether civil forfeitures executed in tandem with other punishments may constitute double jeopardy.<sup>4</sup>

Last Term, in *United States v. Ursery*,<sup>5</sup> the Supreme Court rejected the suggestion of the Sixth and Ninth Circuits that civil forfeit-

<sup>84</sup> *IBM*, 116 S. Ct at 1801 (quoting *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))) (internal quotation marks omitted).

<sup>1</sup> There are currently over 100 federal civil forfeiture statutes. See Lawrence A. Kasten, Note, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 195 (1991). In civil forfeiture, the government files an *in rem* action against the property. Upon a showing of probable cause that the property should be seized, the burden shifts to the owner to prove, by a preponderance of the evidence, that her property was not involved in a crime. In a criminal forfeiture, by contrast, the government need only include a forfeiture count in the indictment of the individual. Upon conviction, the jury must determine, again by a preponderance of the evidence, whether the property was involved in the crime.

<sup>2</sup> See, e.g., Editorial, *All Jeopardized by Forfeiture Ruling*, CHI. TRIB., July 7, 1996, § 1, at 16; Editorial, *Civil Forfeiture Property Wrongs*, ARIZ. REPUBLIC, July 24, 1996, at B8, available in 1996 WL 7724148.

<sup>3</sup> See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993) (holding that, in the absence of exigent circumstances, real property owners are entitled under the Due Process Clause to notice and an opportunity to be heard before forfeiture of their property); *Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that forfeitures may constitute punishment so disproportionate as to violate the Excessive Fines Clause).

<sup>4</sup> The Double Jeopardy Clause of the Fifth Amendment provides: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

<sup>5</sup> 116 S. Ct. 2135 (1996).

ures constitute punishment and thus violate the Double Jeopardy Clause when pursued alongside criminal prosecutions.<sup>6</sup> The Court was correct not to declare all civil forfeitures a violation of double jeopardy. However, in its drive to preserve a powerful prosecutorial tool, the Court adopted an unnecessarily formalistic approach by excluding essentially all civil forfeiture from the double jeopardy inquiry. This decision disregards the evolution of civil forfeiture and fails to cabin prosecutors' discretion.

On July 30, 1992, the Michigan State Police searched the home of Guy Ursery and discovered marijuana seeds, stems, and stalks.<sup>7</sup> The U.S. Attorney reacted by seizing the Ursery home through a civil forfeiture executed under 21 U.S.C. § 881(a)(7).<sup>8</sup> Subsequently, a federal grand jury indicted Ursery for manufacturing marijuana.<sup>9</sup> Ursery then capitulated to the U.S. Attorney and agreed to pay \$13,250 in settlement of the civil forfeiture.<sup>10</sup> Shortly thereafter, a jury found Ursery guilty, and he was sentenced to sixty-three months in prison.<sup>11</sup>

A divided Sixth Circuit panel reversed, holding that Ursery's conviction after the civil forfeiture violated the Fifth Amendment.<sup>12</sup> After examining recent civil forfeiture-related decisions in *United States v. Halper*<sup>13</sup> and *Austin v. United States*,<sup>14</sup> the Sixth Circuit held that the forfeiture of Ursery's home constituted "punishment" for double jeopardy purposes<sup>15</sup> and that the civil forfeiture subsumed the criminal complaint.<sup>16</sup> The court held further that, although the government may "seek[ ] and obtain[ ] both the full civil penalty and the full range of statutorily authorized criminal penalties *in the same proceeding*,"<sup>17</sup> Ursery's civil forfeiture and conviction were not a single proceeding.<sup>18</sup>

In an 8-1 decision, the Supreme Court reversed, holding that in rem civil forfeitures "are neither 'punishment' nor criminal for pur-

<sup>6</sup> See *id.* at 2138. The Court's decision disposed of both *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), and *United States v. \$405,089.23 United States Currency*, 33 F.3d 1210 (9th Cir. 1994).

<sup>7</sup> See *Ursery*, 59 F.3d at 570.

<sup>8</sup> See *Ursery*, 116 S. Ct. at 2138-39; *Ursery*, 59 F.3d at 570. The statute provides, in pertinent part, that the following items shall be subject to forfeiture: "All real property . . . in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subsection." 21 U.S.C. § 881(a)(7) (1994).

<sup>9</sup> See *Ursery*, 116 S. Ct. at 2139.

<sup>10</sup> See *Ursery*, 59 F.3d at 570.

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

<sup>12</sup> See *id.* at 576.

<sup>13</sup> 490 U.S. 435 (1989).

<sup>14</sup> 590 U.S. 602 (1993).

<sup>15</sup> See *Ursery*, 59 F.3d at 572-73.

<sup>16</sup> See *id.* at 573 (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993)).

<sup>17</sup> *Id.* at 574 (alterations in original) (quoting *Halper*, 490 U.S. at 450) (internal quotation marks omitted).

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

poses of the Double Jeopardy Clause.<sup>19</sup> Writing for the majority, Chief Justice Rehnquist<sup>20</sup> first focused on Congress's long history of using concurrent civil forfeiture actions and criminal prosecutions.<sup>21</sup> The Chief Justice asserted that the Court had explicitly supported such statutes in 1931 in *Various Items of Personal Property v. United States*<sup>22</sup> and had refined that support in *United States v. One Assortment of 89 Firearms*<sup>23</sup> in 1984.<sup>24</sup> Distinguishing between in rem civil forfeitures, which are not punitive, and in personam civil penalties such as fines, which can be punitive, the Court relied upon a legal fiction: "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty . . .".<sup>25</sup> Accordingly, Chief Justice Rehnquist noted that the Double Jeopardy Clause does not apply to civil forfeiture actions that are not intended as punishment.<sup>26</sup>

The Chief Justice expressed dismay at the Sixth and Ninth Circuits' incorrect perception that, when the Court decided *Halper*, *Department of Revenue v. Kurth Ranch*,<sup>27</sup> and *Austin*, it abandoned the "impressive authority" of its double jeopardy and civil forfeiture jurisprudence.<sup>28</sup> *Halper*, the Court asserted, dealt solely with civil penalties;<sup>29</sup> *Kurth Ranch* concerned tax proceedings under the Double Jeopardy Clause;<sup>30</sup> and *Austin* concentrated on the unrelated issue of whether civil forfeitures are subject to the Excessive Fines Clause.<sup>31</sup>

The Chief Justice next restated the test used by the Court in *89 Firearms* to determine whether a civil forfeiture constitutes punishment.<sup>32</sup> First, the Court must look to the congressional intent behind the particular authorizing statute.<sup>33</sup> Second, the Court must determine "whether the statutory scheme [is] so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism."<sup>34</sup> If Congress intends the statute to be remedial, a civil forfeiture undertaken pursuant to that statute does not implicate the

<sup>19</sup> *Ursery*, 116 S. Ct. at 2149.

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

<sup>21</sup> See *Ursery*, 116 S. Ct. at 2140.

<sup>22</sup> 282 U.S. 577 (1931).

<sup>23</sup> 465 U.S. 354 (1984).

<sup>24</sup> See *Ursery*, 116 S. Ct. at 2140–42.

<sup>25</sup> *Id.* at 2140 (quoting *Various Items*, 282 U.S. at 581) (internal quotation marks omitted).

<sup>26</sup> See *id.* at 2141–42.

<sup>27</sup> 511 U.S. 767 (1994).

<sup>28</sup> *Ursery*, 116 S. Ct. at 2142 (quoting *Gore v. United States*, 357 U.S. 386, 392 (1958)) (internal quotation marks omitted).

<sup>29</sup> See *id.* at 2144–46.

<sup>30</sup> See *id.* at 2144, 2146.

<sup>31</sup> See *id.* at 2146–47.

<sup>32</sup> See *id.* at 2147.

<sup>33</sup> See *id.* at 2141–42.

<sup>34</sup> *Id.* at 2142 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980))) (internal quotation marks omitted).

Double Jeopardy Clause absent the “clearest proof” that the forfeiture is “so punitive as to transform [it] into a criminal penalty.”<sup>35</sup>

Finally, the Court applied the *89 Firearms* test. Under the first prong of the test, the Court found the procedural mechanisms employed by Congress to enforce forfeitures to be a clear determination of congressional intent.<sup>36</sup> In particular, the Court took note of the impersonal nature of such *in rem* actions and the absence of any personal notice requirement prior to forfeiture.<sup>37</sup> These procedural characteristics accorded with the legal fiction that the action proceeds against the property, not the individual, and thus rebutted the proposition that Congress intended the civil forfeiture to be punitive.<sup>38</sup>

Turning to the second prong of the *89 Firearms* test, the Court concluded that Ursery had not proven that the forfeiture statute was so severe as to be punitive.<sup>39</sup> To support this conclusion, the Chief Justice cited the long historical use of civil forfeiture in tandem with criminal prosecutions, the lack of a scienter requirement in the statute at issue, the usefulness of deterrence as a civil goal, and the Court’s unwillingness to base conclusions about the punitive nature of civil forfeiture on the concurrent timing of criminal activity in *Ursery*.<sup>40</sup>

Justice Kennedy joined in the majority opinion and concurred in the judgment,<sup>41</sup> but thought the Court’s use of *89 Firearms* unnecessary in light of the “clear rule of *Various Items* that civil *in rem* forfeiture is not subject to the Double Jeopardy Clause.”<sup>42</sup> Justice Kennedy also felt obligated to justify the Court’s decision that the Double Jeopardy Clause protects the individual only from multiple *in personam* punishments, not from multiple, nonpunitive, *in rem* civil forfeitures.<sup>43</sup> Creating a theoretical distinction between the property owner and the criminal, he argued that “the instrumentality-forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property.”<sup>44</sup>

Justice Scalia, joined by Justice Thomas, also concurred in the judgment.<sup>45</sup> Justice Scalia succinctly contributed to the majority’s ef-

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<sup>35</sup> *Id.* (quoting *89 Firearms*, 465 U.S. at 366 (quoting *Ward*, 448 U.S. at 248–49)) (internal quotation marks omitted).

<sup>36</sup> *See id.* at 2147–48.

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

<sup>38</sup> *See id.* at 2148.

<sup>39</sup> *See id.* at 2149.

<sup>40</sup> *See id.* Indeed, the Court noted that “[r]equiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property.” *Id.* at 2148.

<sup>41</sup> *See id.* at 2149 (Kennedy, J., concurring in the judgment).

<sup>42</sup> *Id.* at 2151.

<sup>43</sup> *See id.* at 2150–51.

<sup>44</sup> *Id.* at 2150.

<sup>45</sup> *See id.* at 2152 (Scalia, J., concurring in the judgment).

forts with the simple exhortation that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment."<sup>46</sup>

Justice Stevens concurred in the judgment in part and dissented in part.<sup>47</sup> He accepted the Court's proposition that the civil forfeiture of proceeds of illegal acts and of contraband does not implicate double jeopardy, but he insisted that the forfeiture of the Ursery home, an instrumentality, was punitive.<sup>48</sup> Justice Stevens lambasted the Court's attempts to explain away *Helper*, *Austin*, and *Kurth Ranch* as "artificial[ ] cabining"<sup>49</sup> and dismissed the *in rem* legal fiction upon which the Court relied: "We have repeatedly rejected the idea that the nature of the court's jurisdiction has any bearing on the constitutional protections that apply . . . ."<sup>50</sup>

In a Term in which the Court seemed to orient itself toward the expansion of "law and order,"<sup>51</sup> *United States v. Ursery* is not surprising. Commentators are likely to acknowledge that the Court's broad brushstrokes adequately deal with the forfeiture of contraband and proceeds.<sup>52</sup> However, as only one Justice seemed to realize,<sup>53</sup> the *Ursery* rule — that the nonproportional civil forfeiture of *instrumentalities* (as defined by prosecutors) parallel to a criminal prosecution does not implicate double jeopardy — does "an end run around the Bill of Rights"<sup>54</sup> and provides prosecutors with a tool that can be abused.<sup>55</sup>

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

<sup>47</sup> See *id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

<sup>48</sup> See *id.* at 2152–53.

<sup>49</sup> *Id.* at 2156.

<sup>50</sup> *Id.* at 2159–60.

<sup>51</sup> See, e.g., *Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996) (limiting access of state prison inmates to federal courts); *Bennis v. Michigan*, 116 S. Ct. 994, 998 (1996) (holding that the property of "innocent owners" may be forfeited if the property is connected to a crime). But see *Thompson v. Keohane*, 116 S. Ct. 457, 462 (1996) (holding that a state court determination of whether a suspect was "in custody" for *Miranda* purposes is not entitled to a statutory presumption of correctness during federal habeas corpus review).

<sup>52</sup> See Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 14–15 (1994); Editorial, *All Jeopardized by Forfeiture Ruling*, *supra* note 2, § 1, at 16.

<sup>53</sup> See *Ursery*, 116 S. Ct. at 2152–53 (Stevens, J., concurring in the judgment in part and dissenting in part).

<sup>54</sup> Sidney Zion, *U.S. War on Drugs Is Damaging Bill of Rights*, SALT LAKE TRIB., July 7, 1996, at AA1, available in 1996 WL 3039395. The Court attempted to respond to Justice Stevens's castigation of their reasoning by insisting that it did not "hold that *in rem* civil forfeiture is *per se* exempt from the scope of the Double Jeopardy Clause," and conceded that, "where the 'clearest proof' indicates that an *in rem* civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal procedure, that forfeiture may be subject to the Double Jeopardy Clause." *Ursery*, 116 S. Ct. at 2148 n.3 (citations omitted). However, if the Court does not rest its decision on the *in rem* basis of the proceeding, its opinion is left with only one justification: the naked force of precedent. Moreover, the Court's "clearest proof" rule, devoid of guidance as to the necessary showing, fails to protect defendants adequately.

<sup>55</sup> For examples of various types of abuse and their effects, consult David A. Kaplan, *Where the Innocent Lose*, NEWSWEEK, Jan. 4, 1993, at 42, and John T. McQuiston, *Official's Use of Seizure Law Is Questioned*, N.Y. TIMES, Oct. 2, 1992, at B1. The Double Jeopardy Clause offers no protection either to owners who are not subject to a parallel criminal proceeding or to those

The *Ursery* Court had at least two ways to reconceive the protections afforded to individuals facing both criminal charges and a civil forfeiture. The Court could have declared the civil forfeiture statute unconstitutional<sup>56</sup> and required prosecutors to use criminal forfeiture statutes with the accompanying additional constitutional hurdles. That result, viewed with dismay by law enforcement representatives,<sup>57</sup> would have been excessive. Civil forfeiture, adequately restrained, can serve important law enforcement interests.<sup>58</sup> A better approach was available, however. The Court could have continued its trend of supplying additional constitutional protection to defendants in civil forfeiture actions and applied the Double Jeopardy Clause to civil forfeitures not shown to be solely remedial in effect.

The *Ursery* decision was unsatisfactory for several reasons. First, the Court's characterization of the deterrence effect of forfeitures as nonpunitive is misconceived. Second, unlike the seizure of contraband or proceeds, the seizure of instrumentalities is inherently punitive toward the defendant when such seizure is disproportionate to the alleged offense. Third, the Court's strong reliance on historical precedent is unnecessary, because the evolution of civil forfeiture has obviated the need to follow previous decisions in lockstep. Fourth, the logic behind the Court's formalist distinction between *in rem* and *in personam* actions does not in every case support its decision to differentiate proceedings against the person and against the property.

Civil forfeiture can affect three types of property: contraband, proceeds, and instrumentalities. Contraband are objects such as illegal drugs or guns.<sup>59</sup> Proceeds are the fruits of the sale of contraband.<sup>60</sup> Instrumentalities, the most problematic type of property for the Court's decision in *Ursery*, are the physical objects used to facilitate the commission of a crime.<sup>61</sup> Under this last category, 21 U.S.C. § 881(a) calls for, with some exceptions, the forfeiture of all items relating to the production of drugs, all containers and conveyances used

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who are not charged with any crime but whose property has been seized in connection with an offense by another individual.

<sup>56</sup> Some commentators believe that civil forfeiture violates the fundamental constitutional rights not to be deprived of property without due process of law and to be free from disproportionate punishment. See, e.g., *Hearings on H.R. 1916, The Civil Asset Forfeiture Reform Act, Before the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Mark J. Kappelhoff, Legislative Counsel, American Civil Liberties Union), available in 1996 WL 10829718. These issues are beyond the scope of this Comment.

<sup>57</sup> See, e.g., Brief of Amici Curiae Cook County State's Attorney's Office in Support of the Petitioner at 17–19, *Ursery* (Nos. 95-345 & 95-346), available in 1996 WL 82435, at \*33–\*35.

<sup>58</sup> See *Hearings on H.R. 1916, The Civil Asset Forfeiture Reform Act, Before the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Jan P. Blanton, Director, Treasury Executive Office for Asset Forfeiture) (emphasizing that civil forfeiture supports law enforcement budgets and promotes cooperation among police agencies), available in 1996 WL 10828026.

<sup>59</sup> See Cheh, *supra* note 52, at 14.

<sup>60</sup> See *id.* at 14–15.

<sup>61</sup> See *id.* at 14.

in the drug trade, records of all types that aid in drug production, and all real property that is used, or intended to be used, in the drug trade.<sup>62</sup> Given this broad mandate, prosecutors have successfully seized "instrumentalities" with only tangential connection to a crime.<sup>63</sup>

Despite the strong tradition in the United States of respect for individual property rights, the Court's decision denying the applicability of the Double Jeopardy Clause is clearly correct as to contraband and proceeds. For a forfeiture to be punitive, the nominal owner must first be able to assert a defensible ownership interest in the property. An individual may not maintain a property right in contraband, given the legislature's power to outlaw objects that endanger the public welfare.<sup>64</sup> Proceeds, the derivatives of contraband, similarly carry no expectation of ownership,<sup>65</sup> partly because "[p]rofit is [often] the motivation for [the] criminal activity."<sup>66</sup> Thus, the Double Jeopardy Clause should not apply to contraband and proceeds.

The Court, however, should have applied the Double Jeopardy Clause to limit civil forfeitures of instrumentalities when a parallel criminal proceeding exists. First, the Court's assertion that the deterrence value of civil forfeiture makes it nonpunitive<sup>67</sup> is surprising, because an effective deterrent must by definition include a punitive aspect. In order for a deterrent to be effective, the potential costs to that individual, discounted by the probability that the individual will incur such costs, must be sufficiently high to dissuade her from taking that action. Thus, the strength of a deterrent depends on the size of the penalty. Inevitably, to deter effectively, some penalties will surpass the actual costs to the government or society. Asserting that deterrence is automatically remedial and nonpunitive ignores the disproportionate economic effects on the individual, who may lose her home or sole means of transportation for a minor drug infraction. In fact, the *Ursery* Court's reasoning stands in stark contrast to the assertion in *Halper* that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."<sup>68</sup>

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<sup>62</sup> See 21 U.S.C. § 881(a)(1)–(11) (1994).

<sup>63</sup> See Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 320 (1992). In one case, a couple allowed a friend who cultivated marijuana to visit. After police discovered the friend's drugs, they searched the couple's home and, upon finding a marijuana butt in their daughter's nearby parked car, seized the \$100,000 house. See Kaplan, *supra* note 55, at 42. In another instance, police seized the home of an individual who merely engaged in two phone conversations in which he set up a drug deal with a federal agent. See *United States v. 916 Douglas Ave.*, 903 F.2d 490, 491–92 (7th Cir. 1990).

<sup>64</sup> See Cheh, *supra* note 52, at 14.

<sup>65</sup> See *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir.), cert. denied, 115 S. Ct. 574 (1994).

<sup>66</sup> S. Rep. No. 98-225, at 191 (1983), reprinted in 1984 U.S.C.C.A.N. 3183, 3374.

<sup>67</sup> See *Ursery*, 116 S. Ct. at 2149.

<sup>68</sup> *United States v. Halper*, 490 U.S. 435, 448 (1989).

Second, whatever the alleged justifications for a forfeiture, the civil forfeiture of alleged instrumentalities of a crime can have excessive punitive effects.<sup>69</sup> Property ownership is a fundamental liberty interest recognized in our society.<sup>70</sup> The use of a legal fiction to categorize instrumentalities as “guilty property” demeans this fundamental liberty interest and, moreover, does not dispel the real economic burden on a defendant from the civil forfeiture of her house, car, or land.<sup>71</sup> Although the remedial intent of some forfeitures — the desire to reimburse society or the government — might justify the resulting economic burden on individuals, prosecutors currently do not need to show a proportional link between the dollar value of assets forfeited and the harm to society, including the costs of investigating and prosecuting the case.<sup>72</sup> Accordingly, the value of the forfeited assets has often been substantially higher than any possible cost to the government in enforcement or prosecution.<sup>73</sup> As long as prosecutors can use civil forfeiture without demonstrating proportionality, the Court should presume that the defendant is either being punished or bludgeoned into a settlement, and apply the Double Jeopardy Clause.

Third, the Court’s attempt to avoid unfavorable precedent is unconvincing. The Chief Justice tried to do so by arguing that the Court has a long history of declaring that civil forfeitures do not constitute punishment for purposes of the Double Jeopardy Clause.<sup>74</sup> The Court noted early in its decision that, “in a long line of cases, [the] Court . . . considered the application of the Double Jeopardy Clause to civil for-

<sup>69</sup> See Kasten, *supra* note 1, at 196–97; see also Cheh, *supra* note 52, at 17 (describing the lack of “natural boundaries” linking forfeiture penalties to the degree of culpability).

<sup>70</sup> See Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in Support of Respondent at 4–5, *Ursery* (Nos. 95-345 & 95-346), available in 1996 WL 140145, at \*17–\*20.

<sup>71</sup> Stories abound of minor crimes resulting in the civil seizure of assets with enormous value. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665, 669 (1974) (upholding the forfeiture of a \$20,000 yacht after discovery of two marijuana cigarettes); *United States v. One 1985 Mercedes*, 917 F.2d 415, 417 (9th Cir. 1990) (allowing civil forfeiture of a car valued at approximately \$45,000 despite the dismissal of charges for the possession of \$75 of cocaine).

<sup>72</sup> The *Ursery* Court responded to this objection by noting:

Civil forfeitures, in contrast to civil penalties, are designed to do more than simply compensate the Government. Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture.

*Ursery*, 116 S. Ct. at 2145. The Court provides no justification, however, why one individual should have her property seized to pay for the full cost of the deterrence of lawbreakers. In any case, the remedial goals of civil forfeiture have values that actually can be determined with a reasonable degree of accuracy; the costs of law enforcement and the harm to social productivity from drug use are estimable figures.

<sup>73</sup> See *One 1985 Mercedes*, 917 F.2d at 417; *United States v. One 1986 Mercedes Benz*, 846 F.2d 2, 3 (2d Cir. 1988) (per curiam) (allowing the forfeiture of a Mercedes upon the discovery of the remains of one marijuana cigarette).

<sup>74</sup> See *Ursery*, 116 S. Ct. at 2147.

feitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment.<sup>75</sup> However, although the weight of precedent should be accorded appropriate respect, the Court must not bind itself to old mistakes or blind itself to the realities of a changing society. Indeed, the Court reversed a historical judicial trend relating to forfeitures in an earlier case.<sup>76</sup>

In *Ursery*, the Court failed to recognize that modern civil forfeiture is far different in application, motivation, and result from the civil forfeiture statutes used in "the earliest years of this Nation."<sup>77</sup> Such early statutes were intended to be remedial, removing "guilty" property from society.<sup>78</sup> The law could not reach the individuals whose property was seized because they lived abroad; civil forfeiture developed as a result.<sup>79</sup> However, over the course of time, "when laudable and sensible modern goals were simply hitched to these ancient, sometimes irrational, and often high-handed practices, abuse was inevitable."<sup>80</sup> The police in Florida have had a practice of using alleged traffic violations to stop cars going along known drug cash-flow routes, only to seize all cash in the cars, even absent any indication of drugs.<sup>81</sup> Examples such as this one are neither laudable nor sensible.<sup>82</sup>

Moreover, as Justice Stevens pointed out, the Court's precedent is not as settled as the *Ursery* Court suggests.<sup>83</sup> The Court in *Austin* said, "The Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial."<sup>84</sup> Thus, it may have been more in line with precedent for the Court to have issued a decision instituting case-by-case analysis of the proportionality of any forfeiture.

<sup>75</sup> *Id.* at 2140.

<sup>76</sup> See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 59–61 (1993) (disregarding precedent in holding that, in the absence of exigent circumstances, real property owners are entitled to notice and an opportunity to be heard before forfeiture of their property); cf. *id.* at 81–82 (Thomas, J., concurring in part and dissenting in part) ("[S]ince the Civil War we have upheld statutes allowing for the civil forfeiture of real property. A strong argument can be made, however, that § 881(a)(7) is so broad that it differs not only in degree, but in kind, from its historical antecedents.").

<sup>77</sup> *Ursery*, 116 S. Ct. at 2140.

<sup>78</sup> See Cheh, *supra* note 52, at 16.

<sup>79</sup> See Shannon T. Noya, Comment, *Hoisted by Their Own Petard: Adverse Inferences in Civil Forfeiture*, 86 J. CRIM. L. & CRIMINOLOGY 493, 529 n.42 (1996).

<sup>80</sup> Cheh, *supra* note 52, at 7.

<sup>81</sup> See Carol M. Bast, *The Plight of Minority Motorists*, 39 N.Y.L. SCH. L. REV. 49, 49 (1994).

<sup>82</sup> By contrast, if the Court had applied double jeopardy protections to civil forfeiture, prosecutors would have had to supervise police seizures more closely or risk imperiling parallel criminal prosecutions.

<sup>83</sup> See *Ursery*, 116 S. Ct. at 2153–61 (Stevens, J., concurring in the judgment in part and dissenting in part).

<sup>84</sup> *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993). As noted above, the Court's holding also arguably contradicts its analysis in *Helper*. See *United States v. Halper*, 490 U.S. 435, 448 (1989).

Furthermore, the value of the Court's precedent has dropped as the underlying facts have changed. Civil forfeiture has become big business, and the addition of another prosecutorial motivation for its use implies the need for strengthened constitutional protection. The federal government seized over \$1.3 billion of property in the first nine months of 1995,<sup>85</sup> with further seizures by state and local authorities.<sup>86</sup> The ability of law enforcement agencies to profit directly from forfeitures has resulted in a perverse incentive for law enforcement to seize assets in order to meet department budget projections and provide for the expensive "official" lifestyles of the very prosecutors and police who execute the civil forfeitures.<sup>87</sup> In light of these conflicting motivations, the Court should have looked beyond history and recognized the need for additional protections for property owners faced with both civil forfeiture and criminal proceedings.

Finally, the Court's decision not to apply the Double Jeopardy Clause due to the *in rem* nature of civil forfeiture actions does not follow logically from the "guilty property" premise in all cases involving instrumentalities of an alleged crime.<sup>88</sup> Unlike in the case of contraband or proceeds, the breadth of the definition of instrumentality is likely to mean that not all such property may be inherently "guilty." Cases abound in which the government has seized property with only a tenuous link to a statutory violation.<sup>89</sup> Thus, if the Court's adherence to the *in rem* fiction were carried to its logical end, in many cases, the Court would have to find the property "not guilty" due to the lack of a sufficient nexus to the alleged crime.<sup>90</sup> The Court's repeated denials that the forfeiture is punishment of the individual reinforces this point.<sup>91</sup> Aside from the owner's alleged bad act, the seized instrumentality — which is not guilty in the same sense as contraband and illegal proceeds — has no connection to the crime. Like many

<sup>85</sup> See Memorandum from Gerald E. McDowell, Chief, Asset Forfeiture & Money Laundering Section, U.S. Department of Justice, to Philip B. Heymann, Professor of Law, Harvard Law School 7 (Jan. 23, 1996) (on file with the Harvard Law School Library).

<sup>86</sup> See Cheh, *supra* note 52, at 42.

<sup>87</sup> See *id.* at 41. In 1993, federal law enforcement bodies seized over \$12 million worth of vehicles and other property for their own "official" use. See *id.* For example, an Assistant District Attorney in New Jersey "officially" uses a seized yellow Corvette, while Denver police officers "officially" seized the weight-lifting equipment at a health club during a drug raid. See Michael F. Alessio, *From Exodus to Embarrassment: Civil Forfeiture Under the Drug Abuse Prevention and Control Act*, 48 SMU L. REV. 429, 456 n.177 (1995).

<sup>88</sup> The Court's reliance on this formalistic distinction is surprising given its proven ability to overcome the distinction between *in rem* and *in personam* protections. See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 52–59 (1993).

<sup>89</sup> See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665–66 (1974).

<sup>90</sup> The Court's statement in a footnote that a truly excessive penalty might bring the Double Jeopardy Clause into play, see *Ursery*, 116 S. Ct. at 2148 n.3, does not solve this problem, because the Court did not delineate the threshold the violation of which will invoke double jeopardy protection.

<sup>91</sup> See, e.g., *Ursery*, 116 S. Ct. at 2140.

victims of happenstance, the instrumentality may have been in the wrong place at the wrong time.

Even worse, the Court's legal fiction does not account for the fact that the forfeiture statute also authorizes the seizure of property when the owner merely intends to use it in a crime.<sup>92</sup> If the property is the defendant, its owner is merely a third party whose intentions are hardly relevant to the defendant's culpability. Accordingly, the Court should have rejected its previous reliance on the *in rem* distinction and instead acknowledged the practical impact of civil forfeiture on the owner of the seized property.

Civil forfeiture is a powerful tool that can serve important law enforcement objectives if adequately restrained. However, the *Ursery* Court failed to add needed protection to the forfeiture process when it followed a formalistic legal fiction and historical precedent in ruling that the Double Jeopardy Clause does not apply to *in rem* civil forfeitures. Such a decision leaves property owners subject to abuse through the civil forfeiture process.

#### E. Freedom of Speech, Press, and Association

*Commercial Speech — Advertising.* — Although two decades have passed since the Supreme Court extended First Amendment protection to commercial speech,<sup>1</sup> the scope of that protection remains murky. Specifically, even though commercial expression clearly enjoys less protection than noncommercial expression,<sup>2</sup> the Court's evolving commercial speech jurisprudence has left ambiguous the extent of this difference. Last Term, in *44 Liquormart, Inc. v. Rhode Island*,<sup>3</sup> the Court rejected the reasoning of its own precedent<sup>4</sup> and held that a statutory prohibition on liquor price advertising did not withstand First Amendment scrutiny.<sup>5</sup> The Court's four-part balancing approach ultimately led to the correct result in this case: the constitutional protection of truthful and nonmisleading advertising. Yet the Court did not go far enough. Because truthful, nonmisleading commercial speech concerning lawful activities promotes the same First Amendment values as does noncommercial speech, it should be placed on par with noncommercial speech in the First Amendment rubric and, accordingly, prohibitions on such speech should be afforded full First Amendment strict scrutiny protection.

In 1956, the Rhode Island legislature adopted two statutes prohibiting the advertising of the price of alcoholic beverages.<sup>6</sup> The first pro-

<sup>92</sup> See 21 U.S.C. § 881(a) (1994).

<sup>1</sup> See *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975).

<sup>2</sup> See, e.g., *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

<sup>3</sup> 116 S. Ct. 1495 (1996).

<sup>4</sup> See *id.* at 1511–13.

<sup>5</sup> See *id.* at 1501.

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

hibited all advertising by liquor licensees and out-of-state manufacturers, wholesalers, and shippers outside of the licensed premises, while the second prohibited news media from publishing or broadcasting advertisements making reference to the price of alcoholic beverages.<sup>7</sup> In 1991, 44 Liquormart, Inc., placed an advertisement in a Rhode Island newspaper alluding to its low prices on alcoholic beverages.<sup>8</sup> The Rhode Island Liquor Control Administrator fined 44 Liquormart \$400 and ordered the advertisement ceased.<sup>9</sup> 44 Liquormart filed an action in district court alleging, *inter alia*, that the two statutes and the accompanying regulation violated the First Amendment.<sup>10</sup> At trial, the state countered that the ban on price advertising directly advanced the governmental interest in temperance.<sup>11</sup>

Applying the test articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>12</sup> the district court held the statutes unconstitutional.<sup>13</sup> The court concluded that the statutes' prohibitions of truthful, nonmisleading advertising did not directly advance the substantial state interest in promoting temperance and were more extensive than necessary to serve that interest.<sup>14</sup> The district court also rejected the state's arguments based on the Twenty-first Amendment,<sup>15</sup> pronouncing that "[t]he Twenty-first Amendment cannot be read in isolation as a supreme provision impinging all other constitutional rights."<sup>16</sup>

The First Circuit reversed.<sup>17</sup> It found "inherent merit" in Rhode Island's argument that a ban on price advertising would promote the

<sup>7</sup> See R.I. GEN. LAWS §§ 3-8-7, 3-8.1 (1987); R.I. Liquor Control Admin. Reg. 4 (1994).

<sup>8</sup> See 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543, 545 (D.R.I. 1993).

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

<sup>10</sup> See 44 Liquormart, 116 S. Ct. at 1503.

<sup>11</sup> See 44 Liquor Mart, 829 F. Supp. at 545.

<sup>12</sup> 447 U.S. 557 (1980). The Supreme Court uses the four-part *Central Hudson* test to assess government regulations on commercial speech:

[First], we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

*Id.* at 566.

<sup>13</sup> See 44 Liquor Mart, 829 F. Supp. at 555.

<sup>14</sup> See *id.* The district court found "that Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *Id.* at 549.

<sup>15</sup> Rhode Island argued that, because the state has broad authority over alcoholic beverage use and commerce under the Twenty-first Amendment, the legislature's method of promoting temperance in alcohol consumption "need only be 'reasonably related to,' rather than 'directly advance,' its stated ends in order to withstand constitutional scrutiny." *Id.* at 551. The state also argued that the Twenty-first Amendment gave the advertising regulation "an 'added presumption' in favor of its validity." *Id.* (quoting *New York Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981) (quoting *California v. LaRue*, 409 U.S. 109, 118 (1972))).

<sup>16</sup> *Id.*

<sup>17</sup> See 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 9 (1st Cir. 1994).

substantial state interest in temperance.<sup>18</sup> In addition, it concluded that the Twenty-first Amendment entitled the state's advertising regulation to a presumption of validity.<sup>19</sup>

Unanimous in judgment yet fractured in its opinion, the Supreme Court reversed,<sup>20</sup> holding that the statutes' blanket ban on liquor price advertisements "abridge[d] speech in violation of the First Amendment."<sup>21</sup> The Court added that the Twenty-first Amendment "cannot save Rhode Island's ban on liquor price advertising" because the Amendment "does not qualify the constitutional prohibition against laws abridging . . . the First Amendment."<sup>22</sup>

In a portion of the opinion joined only by Justices Kennedy, Souter, and Ginsburg, Justice Stevens reiterated the conclusions of the Court's prior commercial speech decisions,<sup>23</sup> pronouncing for the plurality that "the First Amendment protect[s] the dissemination of truthful and nonmisleading commercial messages about lawful products and services," and also that "a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it."<sup>24</sup> Yet, as the Court explained in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>25</sup> the public's interest in receiving accurate information supports some regulation of commercial speech.<sup>26</sup> Such regulation, the *44 Liquormart* plurality reasoned, is justified by the "commonsense differences" between commercial speech and noncommercial speech: "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones, and . . . the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation."<sup>27</sup> Thus, the state

<sup>18</sup> *Id.* at 7.

<sup>19</sup> See *id.* at 8.

<sup>20</sup> See *44 Liquormart*, 116 S. Ct. at 1515. Justice Stevens delivered the judgment of the Court.

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

<sup>22</sup> *Id.* The majority, consisting of Justices Stevens, Scalia, Kennedy, Souter, Thomas, and Ginsburg, also rejected that portion of *California v. LaRue*, 409 U.S. 109 (1972), that reasoned that the Twenty-first Amendment required that a law prohibiting grossly sexual material presented at licensed drinking establishments "be given an added presumption in favor of its validity." *Id.* at 118–19.

<sup>23</sup> See *44 Liquormart*, 116 S. Ct. at 1504–05 (plurality opinion) (referring to *Bigelow v. Virginia*, 421 U.S. 809, 825–26 (1975), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)).

<sup>24</sup> *Id.* Justice Stevens also underscored the role that advertising has played in American history. See *id.* at 1504.

<sup>25</sup> 425 U.S. 748 (1976).

<sup>26</sup> See *44 Liquormart*, 116 S. Ct. at 1505 (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 765).

<sup>27</sup> *Id.* at 1506 (citations omitted).

may require such speech to be nondeceptive, and it may restrict commercial speech that exerts an "undue influence."<sup>28</sup>

Still, as Justice Stevens emphasized, *Central Hudson* clearly instructed that courts should review with "special care" all complete bans on commercial speech that are motivated by policies unrelated to speech.<sup>29</sup> Because Rhode Island's price advertising regulation constituted a blanket ban on commercial speech implemented to pursue an end not related to consumer protection, the plurality reviewed Rhode Island's advertising ban with "special care" under the *Central Hudson* four-part balancing test.<sup>30</sup> Justice Stevens quickly moved past the first prong of the inquiry by stating that the regulated advertising clearly concerned lawful activity and was not false or misleading.<sup>31</sup> Although he agreed with the state's argument that its asserted governmental interest in the reduction of alcohol consumption was substantial,<sup>32</sup> he found that there was no evidence that the ban directly promoted that interest.<sup>33</sup> Because the state also could not satisfy the requirement that its regulation be no more extensive than necessary,<sup>34</sup> Justice Stevens concluded that the price advertising ban met neither the less stringent nor the more stringent constitutional standards of review for commercial speech.<sup>35</sup>

In the next part of his opinion, joined only by Justices Kennedy and Ginsburg, Justice Stevens discussed the differing levels of scrutiny that courts should apply when reviewing restrictions on commercial speech.<sup>36</sup> He found that protection of consumers through government regulation of "misleading, deceptive or aggressive sales practices, or [by] requir[ing] the disclosure of beneficial consumer information . . . is consistent with the reasons for according constitutional protection to

<sup>28</sup> *Id.* at 1505–06 (quoting *Bates v. State Bar*, 433 U.S. 350, 366 (1977)) (internal quotation marks omitted).

<sup>29</sup> *Id.* at 1506–07 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980)) (internal quotation marks omitted).

<sup>30</sup> *Id.* at 1508 (citing *Central Hudson*, 447 U.S. at 566 n.9). The plurality thus implied that consumer protection was the only possible speech-related policy at work here.

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

<sup>32</sup> *See id.* at 1509. Although the plurality did not explicitly analyze the advertising ban under this prong of the *Central Hudson* test, it implicitly accepted the state's argument by moving directly to the third and fourth prongs. *See id.* at 1508–09.

<sup>33</sup> *See id.* at 1509–10. To find evidence that the ban would promote a significant market-wide increase in temperance, the plurality noted, would require unacceptable speculation. *See id.* at 1510.

<sup>34</sup> *See id.* at 1510.

<sup>35</sup> *See id.* This less-than-stringent standard, which applies generally in commercial speech cases, requires that the state establish a "reasonable fit" between its abridgment of speech and its temperance goal." *Id.* (citing *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Under the more stringent standard, courts review with "special care" complete bans on commercial speech that are motivated by policies unrelated to speech. *Id.* at 1506–07 (quoting *Central Hudson*, 447 U.S. at 566 n.9) (internal quotation marks omitted).

<sup>36</sup> *See id.* at 1507.

commercial speech and therefore justifies less than strict review.<sup>37</sup> In contrast, when a state completely prohibits truthful, nonmisleading commercial speech "for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."<sup>38</sup> Finally, Justice Stevens recognized that neither of the characteristics that distinguish commercial speech from noncommercial speech — neither "greater hardiness" nor "greater objectivity" — justifies reviewing the complete suppression of commercial speech with less scrutiny.<sup>39</sup> Although the state has a legitimate interest in protecting consumers from commercial harms, Justice Stevens suggested that this interest is rarely the true purpose of blanket bans on commercial speech: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."<sup>40</sup>

Justice Stevens, joined by Justices Kennedy, Thomas, and Ginsburg, rejected all three of Rhode Island's arguments urging the Court to defer to the state legislature.<sup>41</sup> First, the new plurality rejected the argument that the legislature need only have made a "reasonable choice" in regard to the ban.<sup>42</sup> In refusing to give the state discretion to impose a ban on truthful, nonmisleading advertising for paternalistic purposes, the plurality rejected the reasoning of *Posadas de Puerto Rico Associates v. Tourism Co.*,<sup>43</sup> in which the Court accepted such regulations.<sup>44</sup> Second, the plurality rejected the "greater-includes-the-lesser" reasoning of *Posadas*, upon which Rhode Island relied to argue that the state's "undisputed authority to ban alcoholic beverages must include the power to restrict advertisements offering them for sale."<sup>45</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* Justice Stevens seems to suggest that such blanket bans should be subject to strict scrutiny. Such a proposal is consistent with his view that, even within the category of protected speech, there should exist degrees of protection rather than absolutes. See John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1307 (1993).

<sup>39</sup> <sup>44</sup> *Liquormart*, 116 S. Ct. at 1508 (plurality opinion) (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976)) (internal quotation marks omitted).

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 1510–14.

<sup>42</sup> *Id.* at 1511 (quoting *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 7 (1st Cir. 1994)) (internal quotation marks omitted).

<sup>43</sup> 478 U.S. 328 (1986).

<sup>44</sup> See *44 Liquormart*, 116 S. Ct. at 1511 (plurality opinion) (citing *Posadas*, 478 U.S. at 345–46). The plurality pronounced that, although there is some room for legislative judgment in regulating commercial speech, the *Posadas* Court "erroneously performed the First Amendment analysis" and broke with precedent in validating a state legislature's decision to impose a complete ban on casino advertising rather than a policy that was less restrictive of speech. *Id.*

<sup>45</sup> *Id.* at 1512–13. On the contrary, the plurality pointed out that the First Amendment evidences the constitutional presumption that speech regulations are more dangerous than regulations on conduct. See *id.*

Finally, the plurality rejected the argument that the Court should accord deference to the legislature because alcohol is a “vice” product.<sup>46</sup>

Justice Thomas concurred in part and concurred in the judgment.<sup>47</sup> He argued that, when the state’s interest is “to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* . . . should not be applied.”<sup>48</sup> Rather, such an interest is “*per se* illegitimate.”<sup>49</sup> Moreover, he argued that the third prong of the *Central Hudson* test — the advancement of the state interest — is nonsensical, for this prong implies that, had the state successfully manipulated the choices of consumers and thereby increased temperance, the ban might have been upheld.<sup>50</sup> Justice Thomas argued for a return to *Virginia State Board of Pharmacy*, which he believed stood for the proposition that “all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.”<sup>51</sup>

Justice O’Connor also concurred in the judgment.<sup>52</sup> Although she agreed with the Court that the price advertising ban was invalid and that the Twenty-first Amendment could not save it,<sup>53</sup> she would have decided the case more narrowly by simply applying the established *Central Hudson* test.<sup>54</sup> Because the regulation was “more extensive than necessary to serve the State’s interest,” it failed that test.<sup>55</sup>

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<sup>46</sup> See *id.* at 1513–14. Justice Stevens explained that attaching a “vice” label to lawful activities is anomalous and either would require the creation of a federal common law of vice or would end in state legislatures’ justifying censorship actions by using the “vice” label. See *id.*

<sup>47</sup> See *id.* at 1515 (Thomas, J., concurring in part and concurring in the judgment). Justice Scalia also concurred in part and concurred in the judgment, arguing that courts should derive “guidance as to what the [First Amendment] forbids” from the “long accepted practices of the American people,” rather than from the *Central Hudson* test. *Id.* (Scalia, J., concurring in part and concurring in the judgment). In particular, he would look to state legislative practices at the time of the adoption of the First and Fourteenth Amendments. See *id.* Because the parties presented no evidence concerning these points, Justice Scalia adhered to the existing *Central Hudson* test and determined that the challenged regulations were unconstitutional. See *id.*

<sup>48</sup> *Id.* at 1515–16 (Thomas, J., concurring in part and concurring in the judgment) (citation omitted).

<sup>49</sup> *Id.* at 1516. Justice Thomas also opined that the Court’s traditional position that commercial speech is of lower value than noncommercial speech is misguided. See *id.* at 1518.

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

<sup>51</sup> *Id.* at 1520. Justice Thomas pointed out that the approach adopted by Justices Stevens and O’Connor, in which the fourth prong of the *Central Hudson* test — whether a regulation is more extensive than necessary to serve the state interest — is satisfied only if direct regulation of an activity would not be equally effective in achieving the state’s objective, will in practice be quite sweeping and substantially similar to his own approach. See *id.* at 1519. After all, “directly banning [or restricting the sale of] a product . . . would virtually always be at least as effective in discouraging consumption as merely restricting advertising . . . , and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.” *Id.*

<sup>52</sup> Chief Justice Rehnquist and Justices Souter and Breyer joined Justice O’Connor’s opinion.

<sup>53</sup> See *44 Liquormart*, 116 S. Ct. at 1523 (O’Connor, J., concurring).

<sup>54</sup> See *id.* at 1521.

<sup>55</sup> *Id.* The fourth prong of the test demands a narrowly tailored, “reasonable fit” between the legislature’s goal and its method; a regulation may be “too imprecise to withstand First Amend-

The Supreme Court reached the correct result in *44 Liquormart*. Through its application of the *Central Hudson* balancing test and its rejection of the misguided *Posadas* reasoning, the Court saved the commercial speech at issue from broad regulation. Yet because the *Central Hudson* test is fact-based and contextual, it cannot afford sufficient protection to commercial speech. The Supreme Court should recognize that certain commercial speech promotes the same First Amendment values as noncommercial speech and, accordingly, place it on par with noncommercial speech by reinstating and expanding on the holding of *Virginia State Board of Pharmacy*:<sup>56</sup> regulations on truthful, nonmisleading commercial speech concerning lawful activity are presumptively invalid and subject to strict scrutiny.<sup>57</sup>

The Supreme Court's modern commercial speech jurisprudence<sup>58</sup> has been confusing and continually shifting.<sup>59</sup> For example, in *Virginia State Board of Pharmacy*, the Court moved toward placing commercial speech on the same level as political speech<sup>60</sup> but foreclosed any such notion only two years later in *Ohralik v. Ohio State Bar Ass'n*,<sup>61</sup> in which the Court explicitly subordinated commercial speech

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ment scrutiny" if there are alternative, less burdensome methods of reaching the governmental goal. *Id.*

<sup>56</sup> "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer . . . is in the negative." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

<sup>57</sup> Commercial speech is, of course, subject to the same constitutional limitations as noncommercial expression. Thus, for example, speech that is obscene, profane, or libelous or that is construed as "fighting words" is not protected under the First Amendment. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–74 (1942). Moreover, certain time, place, and manner restrictions are permissible. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 771. Finally, certain regulations on speech in special governmental settings are permissible — for example, speech in public schools, see, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986), and speech by institutions receiving federal funds, see, e.g., *Rust v. Sullivan*, 500 U.S. 173, 192–200 (1991).

<sup>58</sup> The modern era of commercial speech jurisprudence almost certainly began with *Bigelow v. Virginia*, 421 U.S. 809 (1975), in which the Court held for the first time that commercial speech is entitled to some First Amendment protection. See *id.* at 825. Before the 1970s, the Court deemed commercial speech to be of such low value that it did not garner any First Amendment protection whatsoever. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

<sup>59</sup> See William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1635 (1996). Exactly what constitutes "commercial speech" is even unclear. The Court's own definition — speech that does "no more than propose a commercial transaction," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) — leaves much room for debate. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 638–48 (1990). It is clear, however, that advertising is commercial speech. See, e.g., *Bigelow*, 421 U.S. at 821.

<sup>60</sup> "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy*, 425 U.S. at 764.

<sup>61</sup> 436 U.S. 447 (1978).

in the hierarchy of First Amendment expression.<sup>62</sup> *Central Hudson* accepted this hierarchy and proffered a four-part balancing test that analyzes regulations on commercial speech by focusing largely on the asserted governmental interest.<sup>63</sup> *Posadas*, discredited by the Court in *44 Liquormart*, gave mere lip service to this test in accepting without evidentiary support that a ban on certain commercial advertising would advance a state's asserted interest.<sup>64</sup> In *44 Liquormart*, the plurality suggested that the complete suppression of speech unrelated to consumer protection should garner traditional, strict First Amendment review.<sup>65</sup> Such vacillations in the Court's commercial speech jurisprudence reflect the Court's uncertainty regarding its precise contours; moreover, they suggest that commercial speech jurisprudence is ripe for a reworking that rests upon First Amendment principles.

Despite these fluctuations, a common thread of First Amendment principles runs through the Court's commercial speech cases. Time and again, the Court has clearly announced that speech that contributes to the public discourse or is a matter of public concern is highly protected under the First Amendment.<sup>66</sup> In 1939, the Court declared that "freedom of speech . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."<sup>67</sup> In 1978, striking down a Massachusetts statute prohibiting certain businesses from making contributions for the purpose of expressing their views on a proposed constitutional amendment, the Court stated that its "decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."<sup>68</sup> The Court pronounced in 1982 that speech on public issues "is more than self-expression; it is the essence of self-government",<sup>69</sup> as such, it occupies the "highest rung of the hierarchy of First Amendment values."<sup>70</sup>

The Court has recognized that commercial expression, like non-commercial expression, often contributes to the public discourse, is a

<sup>62</sup> See *id.* at 456.

<sup>63</sup> See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

<sup>64</sup> In *Posadas*, the Court merely stated: "We think the legislature's belief is a reasonable one . . ." *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986). Similarly, in *44 Liquormart*, the plurality implicitly accepted the state's argument that its interest in temperance was substantial. See *44 Liquormart*, 116 S. Ct. at 1508–09 (plurality opinion).

<sup>65</sup> See *44 Liquormart*, 116 S. Ct. at 1507 (plurality opinion).

<sup>66</sup> See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 684 (1990).

<sup>67</sup> *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1939).

<sup>68</sup> *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>69</sup> *Connick v. Myers*, 461 U.S. 138, 145 (1982) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)) (internal quotation marks omitted).

<sup>70</sup> *Id.* (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)) (internal quotation marks omitted).

necessary part of the body politic,<sup>71</sup> and can be of as much public import as political speech.<sup>72</sup> Moreover, the Court has recognized the public value in removing restrictions on commercial information: "It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable."<sup>73</sup> The Court once even pronounced that the constitutional values promoted by commercial expression might *exceed* those promoted by noncommercial expression,<sup>74</sup> and has repeatedly underscored the public values protected by the free flow of economic information.<sup>75</sup>

It is no longer appropriate to draw a line between the roles of political speech and commercial speech in modern American public discourse. America has become a predominately consumer-driven society.<sup>76</sup> In this age of mass information and communication, commercial expression greatly influences both national developments and the daily lives of Americans.<sup>77</sup> As commentators have noted, commercial expression is a "social phenomenon" that has successfully aided in creating America's "consumerist culture."<sup>78</sup> Commercial speech so dominates public life that "public discourse cannot be significantly separated from the influences of commercialism."<sup>79</sup> As commercial speech has become equivalent to political speech in its role in the American discourse, its promotion of First Amendment values has accordingly

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<sup>71</sup> See *id.*

<sup>72</sup> See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). Some commentators even argue that both types of speech promote the First Amendment values of self-realization and self-development. See, e.g., Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 438–48 (1971).

<sup>73</sup> *Virginia State Bd. of Pharmacy*, 425 U.S. at 765.

<sup>74</sup> See *id.* at 764.

<sup>75</sup> See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561–63 (1980); *Bates v. State Bar*, 433 U.S. 350, 363–65 (1977); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 91–94 (1977).

<sup>76</sup> See *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 936 n.3 (3d Cir. 1970) (declaring this the "age of consumerism").

<sup>77</sup> See generally RONALD BERMAN, *ADVERTISING AND SOCIAL CHANGE* 12 (1981) (arguing that advertising "has often shaped our cultural imagination" and "now defines middle-class expectations"); STUART EWEN, *CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE* (1976) (explaining advertising's impact on America's consumer culture).

<sup>78</sup> Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321, 354; see also *id.* at 358 ("[A]dvertisers both responded to and shaped consumer desire; they simultaneously reflected and reinforced ideologies . . . . Ads subtly established broad frames of reference, identified boundaries of discourse, determined relevant criteria.").

<sup>79</sup> Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 699 (1993) ("As a means of expressing shared values and a common national ideology, advertising dwarfs any other genre of communication." (quoting BURT NEUBORNE, *FREE SPEECH — FREE MARKETS — FREE CHOICE: AN ESSAY ON COMMERCIAL SPEECH* 19 (1987)) (internal quotation marks omitted)).

risen. The time has come to rethink its position in First Amendment jurisprudence.

That the role of commercial speech is analogous to noncommercial speech in its contribution to public discourse might seem to suggest that commercial speech should be placed unconditionally on par with noncommercial speech. Yet there remains a principled distinction: commercial speech that is false or misleading or that concerns illegal activity should receive less First Amendment protection. Essentially, this test is the Court's own, set out in *Virginia State Board of Pharmacy*<sup>80</sup> and supported by a long line of Supreme Court precedent that has accorded such false and misleading expression little protection because it fails to promote First Amendment values.<sup>81</sup>

The proposed distinction engenders the following test for commercial speech: like content-based prohibitions on noncommercial speech, regulations on truthful, nonmisleading commercial speech concerning lawful activity should be presumptively invalid and subject to strict scrutiny.<sup>82</sup> In contrast, prohibitions on false commercial speech, misleading commercial speech, and commercial speech concerning unlawful activity are regulations on speech that merit less First Amendment protection. In the absence of a persuasive argument for a different standard of review, such prohibitions should continue to fall under the less-than-strict scrutiny of the *Central Hudson* test.

The use of a revised *Virginia State Board of Pharmacy* rule would also allow the Court finally to throw out its tenuous distinctions between commercial and noncommercial speech: the greater "hardiness" and "objectivity" of commercial speech.<sup>83</sup> These flimsy distinctions

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<sup>80</sup> See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

<sup>81</sup> See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 15–16 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464–65 (1978). Moreover, there is an additional rationale for such a distinction, one that reflects the realities of our day. In this consumer-driven age, there is an increasing centralization of corporations and institutions, see, e.g., H. Peter Nesvold, Note, *Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 781, 781–82 (1996) (describing the "unabated pace of consolidation within American industry"), and correspondingly, a decrease in the number of sources of commercial information, see *id.* at 784–85 (stating that "newly-wed media mega-companies" could "threaten 'the marketplace of ideas'" and produce the "potential for manipulation"). The self-reinforcing dynamic between the centralization of commercial information sources and the increasing influence of commercial information requires a responsive commercial speech jurisprudence, one that allows states to regulate the dissemination of false or misleading commercial speech and commercial speech concerning illegal activities.

<sup>82</sup> Under strict scrutiny, of course, the government "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). For a regulation to be considered narrowly tailored, there must be no less restrictive means available to achieve the compelling state interest. See *Boos v. Barry*, 485 U.S. 312, 328–29 (1988).

<sup>83</sup> See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980); *Friedman*, 440 U.S. at 10; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771–72 n.24. For the argument that these distinctions are meritless, see Kozinski & Banner, cited above in note 59, at 634–38.

have been the Court's only means of keeping commercial speech ghettoized as subordinate speech, yet they are insubstantial.<sup>84</sup> In contrast, the test advocated here appropriately focuses on the underlying First Amendment principles by drawing a bright line between commercial speech that reinforces those values and commercial speech that promotes unintelligent and misinformed choices.

Justice O'Connor opined in *44 Liquormart* that it was not the time to advance a new rule or standard for commercial speech.<sup>85</sup> Indeed, the Supreme Court cannot — and should not — set out to reinvent the jurisprudential wheel in every decision. Yet a change is long past due. Commercial speech happened to emerge victorious in the present case, but *Central Hudson* gives no assurance that truthful commercial speech concerning lawful activities will survive in the future. *Virginia State Board of Pharmacy* struck the appropriate balance between the extreme stance that equates commercial speech with noncommercial speech and the opposing position that subordinates all commercial speech to noncommercial speech. By returning to the *Virginia State Board of Pharmacy* reasoning, the Supreme Court might dispel the current confusion surrounding commercial speech jurisprudence.

2. *Government Contractor Speech.* — Although public employees have long enjoyed protection from government retaliation based on speech or political affiliation,<sup>1</sup> the First Amendment status of independent government contractors has been far less certain.<sup>2</sup> Last Term, in *Board of County Commissioners v. Umbehr*,<sup>3</sup> the Supreme Court held that its public employee speech precedents also determine the First Amendment rights of independent contractors.<sup>4</sup> Although the Court reached the correct result in *Umbehr*, it should have evaluated the constitutional propriety of government restrictions on the speech of independent contractors who are not tantamount to public employees

<sup>84</sup> Commercial speech is hardly more “objective” or “hardier” than noncommercial speech. First, its “objective” truth is no more easily discerned than in the case of political speech, for commercial speech expresses much more than simple factual information and is often inherently subjective. See Kozinski & Banner, *supra* note 59, at 634–37. Moreover, the profit motive in commercial speech does not make it more “hardy” than noncommercial speech; in fact, “other interests can be just as strong as economics, sometimes stronger.” *Id.* at 637 (citing the interests of religion and art).

<sup>85</sup> See *44 Liquormart*, 116 S. Ct. at 1522 (O’Connor, J., concurring).

<sup>1</sup> See *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality opinion) (affiliation protection); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (speech protection).

<sup>2</sup> Compare, e.g., *Blackburn v. Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (protecting an independent contractor’s speech under the First Amendment), with *Horn v. Kean*, 796 F.2d 668, 699 (3d Cir. 1986) (en banc) (holding that the government may terminate a contract based on the contractor’s affiliation and political participation).

<sup>3</sup> 116 S. Ct. 2342 (1996).

<sup>4</sup> See *id.* at 2346. In a related decision last Term, *O’Hare Truck Service v. City of Northlake*, 116 S. Ct. 2353 (1996), the Court reached a similar result, “declin[ing] to draw a line excluding independent contractors from the First Amendment safeguards of political association afforded to employees.” *Id.* at 2361.

under the same test applied to restrictions on the speech of ordinary citizens.

Keen Umbehr contracted with Wabaunsee County, Kansas in 1981 to provide trash hauling services.<sup>5</sup> During the ten years that this contract was in force, he was a vocal critic of the Board and its policies.<sup>6</sup> After the County terminated his contract in 1991, Umbehr brought suit against the Board and two of its members, asserting that the Board had violated the First Amendment by punishing him for his criticism.<sup>7</sup> Concluding that independent contractors do not receive "the same First Amendment protections granted to government employees," the district court granted the defendants' motion for summary judgment.<sup>8</sup> The Tenth Circuit reversed, acknowledging the need for Supreme Court guidance in this area but holding that "an independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be."<sup>9</sup> The court also clearly distinguished "speech" cases such as this one, which invoke the *Pickering v. Board of Education*<sup>10</sup> balancing test,<sup>11</sup> from "affiliation" cases, which trigger strict scrutiny.<sup>12</sup>

In a 7–2 decision, the Supreme Court affirmed and remanded. Writing for the Court, Justice O'Connor<sup>13</sup> held that independent contractors should receive essentially the same free speech protection as do government employees.<sup>14</sup> Like the Tenth Circuit, Justice O'Connor relied on the *Pickering* test, which balances "the interests of the [employee] . . . in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs."<sup>15</sup> However, she modified this test slightly

<sup>5</sup> See *Umbehr*, 116 S. Ct. at 2345.

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

<sup>7</sup> See *Umbehr v. McClure*, 840 F. Supp. 837, 838 (D. Kan. 1993).

<sup>8</sup> *Id.* at 839 (citing *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986)).

<sup>9</sup> *Umbehr v. McClure*, 44 F.3d 876, 883 (10th Cir. 1995).

<sup>10</sup> 391 U.S. 563 (1968).

<sup>11</sup> See *id.* at 568.

<sup>12</sup> See *Umbehr*, 44 F.3d at 883. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court held that penalizing a nonpolicymaking, nonconfidential public employee for the exercise of First Amendment political association rights amounts to the imposition of an unconstitutional condition. See *id.* at 359 (plurality opinion). In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court affirmed *Elrod*'s holding and clarified the circumstances in which political affiliation may legitimately justify a termination: "the ultimate inquiry is . . . whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved." *Id.* at 518.

<sup>13</sup> Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer joined Justice O'Connor's opinion.

<sup>14</sup> See *Umbehr*, 116 S. Ct. at 2346.

<sup>15</sup> *Id.* at 2347–48 (alteration in original) (quoting *Pickering*, 391 U.S. at 568) (internal quotation marks omitted). In *Connick v. Myers*, 461 U.S. 138 (1983), the Court held that the *Pickering* test applies only when an employee speaks on a matter of "public concern." *Id.* at 147.

by weighing the interest of the state-as-contractor rather than the interest of the state-as-employer.<sup>16</sup>

After considering the policy arguments advanced by both parties,<sup>17</sup> Justice O'Connor concluded that "all of [these arguments] can be accommodated by applying our existing framework for government employee cases to independent contractors."<sup>18</sup> She contended that the "nuanced approach" exemplified by *Pickering* is preferable to a "brightline rule" that carves out a libel-like exception to the First Amendment based on a speaker's government contractor status.<sup>19</sup> A brightline rule is not only overinclusive, she explained, but also allows the government to manipulate a service provider's free speech protection by simply changing the classification of the contract.<sup>20</sup>

Although she recognized that independent contractors have First Amendment rights, Justice O'Connor rejected Umbehr's argument that independent contractors should receive more free speech protection than government employees. Umbehr asserted that the Court should apply the same strict scrutiny test to the Board's actions that it would have applied "if the Board had exercised sovereign power against . . . a citizen in response to . . . political speech."<sup>21</sup> In response, Justice O'Connor identified interests that the government has when contracting — "its interests as a public service provider, including its interest in being free from intensive judicial supervision of its daily management functions" — that it does not have in relation to ordinary citizens.<sup>22</sup> She acknowledged, however, that the Court's unconstitutional conditions cases fall along a "spectrum" of government interest, and she placed independent contractors "somewhere between the case of government employees, who have the closest relationship with the government, and . . . [the case of] persons with less close relationships with the government."<sup>23</sup>

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<sup>16</sup> See *Umbehr*, 116 S. Ct. at 2352.

<sup>17</sup> See *id.* at 2348. The Board of Commissioners argued that the lack of day-to-day government supervision over contractors makes them akin to government employees with confidential, policymaking positions. See *id.*; cf. *Branti*, 445 U.S. at 518 (exempting public employees who hold such positions from First Amendment protection against political affiliation-based dismissals). The Board also argued that the government's interest in avoiding an inundation of litigation outweighs independent contractors' First Amendment interests. See *Umbehr*, 116 S. Ct. at 2348. Umbehr retorted that contractors' independence actually weakens the government's interest in restricting their speech; the public is not likely to attribute a contractor's statements to the government, and the government need not be concerned about "maintaining harmonious working environments and relationships." *Id.*

<sup>18</sup> *Umbehr*, 116 S. Ct. at 2348.

<sup>19</sup> *Id.* at 2349.

<sup>20</sup> See *id.*

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

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

<sup>23</sup> *Id.* at 2350. Justice O'Connor emphatically rejected the suggestion that the long tradition of patronage practices justifies a First Amendment exception in the contracting area. See *id.* at 2350–52.

Justice O'Connor concluded by highlighting the “limited nature” of the Court’s decision.<sup>24</sup> First, she emphasized the ways in which a government entity could defend against a claim like Umbehr’s: by showing that the government would have terminated the contract even if the disputed speech had never occurred; by proving that the government’s “legitimate interests” outweigh the independent contractor’s free speech interests; or by demonstrating that the independent contractor’s damages are mitigated because facts discovered after the termination would have been grounds for ending the contract.<sup>25</sup> Second, Justice O’Connor stressed that the Court did “not address the possibility of suits by bidders or applicants for new government contracts” who do not have a “pre-existing commercial relationship with the government.”<sup>26</sup>

In *O’Hare Truck Service v. City of Northlake*,<sup>27</sup> issued on the same day as *Umbehr*, the Court again considered the question of a government contractor’s First Amendment rights. O’Hare Truck Service appeared on the City of Northlake’s tow request “rotation list” from 1965 until 1993, the year that John Gratianna, the company’s owner and operator, openly backed the incumbent mayor’s unsuccessful challenger.<sup>28</sup> Gratianna and O’Hare alleged that the city violated their First Amendment rights by penalizing Gratianna’s political activities and affiliation, but the district court dismissed the case for failure to state a claim<sup>29</sup> and the Seventh Circuit affirmed.<sup>30</sup> The Supreme Court reversed and remanded. Writing for a seven-Justice majority, Justice Kennedy<sup>31</sup> held that, “[a]lthough the government has broad discretion in formulating its contracting policies,”<sup>32</sup> the strict scrutiny test that the Court applied in *Elrod v. Burns*<sup>33</sup> and *Branti v. Finkel*<sup>34</sup> to political affiliation-based dismissals<sup>35</sup> of public employees also applies to similar disputes involving government contractors.<sup>36</sup> Justice Ken-

<sup>24</sup> *Id.* at 2352.

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

<sup>26</sup> *Id.*

<sup>27</sup> 116 S. Ct. 2353 (1996).

<sup>28</sup> See *id.* at 2356; *A Ruling Deals Blow to Political Patronage*, BOSTON GLOBE, June 29, 1996, at 7.

<sup>29</sup> See *O’Hare Truck Serv. v. City of Northlake*, 843 F. Supp. 1231, 1235 (N.D. Ill. 1994).

<sup>30</sup> See *O’Hare Truck Serv. v. City of Northlake*, 47 F.3d 883, 885 (7th Cir. 1995).

<sup>31</sup> The same Justices who made up the majority in *Umbehr* also joined Justice Kennedy’s *O’Hare* opinion.

<sup>32</sup> *O’Hare*, 116 S. Ct. at 2355.

<sup>33</sup> 427 U.S. 347 (1976).

<sup>34</sup> 445 U.S. 507 (1980).

<sup>35</sup> In *Rutan v. Republican Party*, 497 U.S. 62 (1990), the Court held that the standard announced in *Elrod* and *Branti* also applies to “promotions, transfers, and recalls after layoffs based on political affiliation or support.” *Id.* at 75. The *O’Hare* Court did not consider the relevance of *Rutan* in the independent contractor context.

<sup>36</sup> See *O’Hare*, 116 S. Ct. at 2358. Justice Kennedy relied on three arguments to demonstrate that, in the First Amendment political affiliation context, the differences between public employees and independent contractors are not “difference[s] of constitutional magnitude,” *id.* at 2359

nedy distinguished *O'Hare*, an “affiliation” case, from *Umbehr*, which involved “adverse action” by a government entity due to speech on matters of public concern.<sup>37</sup>

Because of the close relationship between *O'Hare* and *Umbehr*, Justice Scalia, joined by Justice Thomas, dissented in both cases in a single, vitriolic opinion.<sup>38</sup> Justice Scalia maintained that, because patronage has been practiced since the earliest days of the Republic and is not explicitly proscribed by the Constitution, the majority’s decisions had no basis other than the Justices’ own “opinion[s].”<sup>39</sup> For Justice Scalia, the two decisions epitomized a larger trend toward judicial lawmaking under the guise of constitutional jurisprudence: “The people should not be deceived. While the present Court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress.”<sup>40</sup>

Justice Scalia also addressed the distinction between independent contractors and government employees. Although he disagreed with both *Elrod* and *Branti*, he argued that the distinction between public employees and independent contractors represents the most “defensible point” at which to draw the line between those individuals who receive protection from patronage practices and those who do not.<sup>41</sup> Ultimately, he asserted, the government cannot avoid intentionally disadvantaging some citizens based on their political beliefs.<sup>42</sup>

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(quoting *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973)) (internal quotation marks omitted): that “[r]ecognizing the distinction in these circumstances would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs,” *id.*; that there was no evidence that the loss of government business could not coerce independent contractors into forgoing their preferred political activities, *see id.* at 2359–60; and that the relatively low number of cases filed under *Rutan*, a decision that expanded the protections first granted in *Elrod* and *Branti*, *see Rutan*, 497 U.S. at 79, belied the claim that a decision in O’Hare’s favor would “lead to numerous lawsuits . . . which [would] interfere with the sound administration of government contracting,” *O'Hare*, 116 S. Ct. at 2360.

<sup>37</sup> *O'Hare*, 116 S. Ct at 2357. Justice Kennedy stated that *Pickering* balancing would be appropriate in cases involving both *Pickering* and *Elrod-Branti* questions, “where specific instances of the employee’s speech or expression . . . are intermixed with a political affiliation requirement.” *Id.* at 2358. Although he acknowledged that *O'Hare* might present just such an “intermixed” fact pattern, he decided the case as if it involved only affiliation and left the question whether the case should be “governed by the *Elrod-Branti* rule or the *Pickering* rule” for the district court to decide on remand. *Id.* at 2361.

<sup>38</sup> *Board of County Comm’rs v. Umbehr and O’Hare Truck Serv. v. City of Northlake*, 116 S. Ct. 2361 (1996) (Scalia, J., dissenting).

<sup>39</sup> *See id.* at 2362–63 (citing *Rutan*, 497 U.S. at 95–96 (Scalia, J., dissenting)). Justice Scalia found the majority opinions to be inconsistent as well as unreasoned, focusing his attack on the Court’s division of the First Amendment into “speech” and “political affiliation” categories. *See id.* at 2370.

<sup>40</sup> *Id.* at 2373. Justice Scalia also stated: “The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.” *Id.*

<sup>41</sup> *Id.* at 2366.

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

Justice Scalia insisted that complete government neutrality might not be a particularly desirable state of affairs.<sup>43</sup> Some degree of government discretion as to which viewpoints it chooses to subsidize "may well be important to social cohesion";<sup>44</sup> for instance, in Justice Scalia's example, the government might want to eliminate a White Aryan Supremacist Party group from consideration for the award of a contract to provide security in public housing projects.<sup>45</sup>

Although the Court ultimately reached the correct result in *Umbehr*, clearly indicating that independent contractors are not somehow "invisible to the Constitution,"<sup>46</sup> the Court's choice of the *Pickering* balancing test was too timid. The Court should have evaluated the constitutionality of government interference with independent contractors' speech under the same First Amendment analysis employed in cases involving ordinary citizens,<sup>47</sup> and contractors should be subject to the lesser protections of the *Pickering* test only if they are tantamount to government employees. This standard, suggested by the respondent in *Umbehr*<sup>48</sup> and similar to the one applied by the Fifth Circuit in *Blackburn v. Marshall*,<sup>49</sup> would be more consistent with the weight of the government's interest in controlling independent contractors' speech, would ensure that the relaxed *Pickering* test does not swallow other areas of First Amendment jurisprudence, and would be easier for lower courts to apply.

Some courts have contended that the Supreme Court's speech jurisprudence bestows "special" First Amendment protection on public employees and that granting independent contractors similar protection would be an "extension" of existing law.<sup>50</sup> This "inverted" reasoning signals a profound misunderstanding of how the public employee speech cases interact with other First Amendment doctrines.<sup>51</sup> Although "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of govern-

<sup>43</sup> See *id.* at 2368–69.

<sup>44</sup> *Id.* at 2368.

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

<sup>46</sup> R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

<sup>47</sup> The appropriate standard for viewpoint-based discrimination is strict scrutiny. See, e.g., *id.* at 382.

<sup>48</sup> See Respondent's Brief at 28, 31 n.13, *Umbehr* (No. 94-1654), available in 1995 WL 595604.

<sup>49</sup> 42 F.3d 925 (5th Cir. 1995).

<sup>50</sup> See, e.g., *Ambrose v. Knotts*, 865 F. Supp. 342, 345 (S.D. W. Va. 1994) (stating that *Connick v. Myers*, 461 U.S. 138 (1983), "create[d] a very limited, specific, free-speech protection for public employees"); *O'Hare Truck Serv. v. City of Northlake*, 843 F. Supp. 1231, 1235 (N.D. Ill. 1994) (characterizing *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), as a "refus[al] to extend beyond an actual employer-employee relationship the First Amendment protection pronounced in *Rutan*").

<sup>51</sup> See *Blackburn*, 42 F.3d at 931; see also *Umbehr*, 116 S. Ct. at 2350 ("The Board's and the dissent's assertion that the decision below represents an unwarranted 'extension' of special protections afforded to government employees is . . . not persuasive." (citation omitted)).

ment employment,”<sup>52</sup> *Pickering* and its progeny strip public employees of some of the speech protections that ordinary citizens enjoy.<sup>53</sup> The *Pickering* Court justified this loosening of First Amendment strictures by pointing to the government’s particularly strong interest in managing its internal operations.<sup>54</sup> Unless the government can demonstrate that its interest in regulating independent contractors’ speech is similarly powerful, there is no reason to treat contractors any differently from average citizens for the purposes of First Amendment analysis.<sup>55</sup>

As the Court stated in *Waters v. Churchill*,<sup>56</sup> the “government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”<sup>57</sup> The Court’s public employee precedents can be understood to indicate that the interest derives from the existence of the “relationships,” the connections between workers, that are common to most employment situations:

[T]he government, like any employer, must be able to foster healthy working relationships among its personnel[,] including the maintenance of “discipline by immediate supervisors” and “harmony among coworkers.” . . . It also has an interest in ensuring that speech does not have “a detrimental impact on close working relationships for which personal loyalty and confidence are necessary,” and does not “impede[ ] the performance of the speaker’s duties . . . .”<sup>58</sup>

The Court’s diction in these cases signifies a recognition that speech that might be objectionable to a government employer does not directly decrease the efficiency of the speaker.<sup>59</sup> If a decrease in efficiency does occur, it is through a sort of ripple effect: other employees find it difficult to work with the speaker; supervisors doubt the speaker’s trust in their judgment; the public perceives the government entity as disorganized and unfocused.<sup>60</sup> To create a splash, the speaker must be involved

<sup>52</sup> *Connick*, 461 U.S. at 140.

<sup>53</sup> See, e.g., D. Gordon Smith, Comment, *Beyond “Public Concern”: New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 251–52 (1990).

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

<sup>55</sup> See Respondent’s Brief at 19, *Umbehr* (No. 94-1654), available in 1995 WL 595604.

<sup>56</sup> 114 S. Ct. 1878 (1994).

<sup>57</sup> *Id.* at 1888.

<sup>58</sup> Respondent’s Brief at 29, *Umbehr* (No. 94-1654), available in 1995 WL 595604 (citations omitted) (quoting *Pickering v. Board of Educ.*, 321 U.S. 563, 570 (1968), and *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)); see also Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 919 (1986) (“In its capacity as employer, the government has two interests that come up in many contexts: the desire to avoid disruption of working relationships and the need to set out a uniform official position.”).

<sup>59</sup> This argument may not hold true for certain on-the-job speech by an employee or contractor whose assigned task is to express the government’s policies or viewpoints. Under *Rust v. Sullivan*, 500 U.S. 173 (1991), the government may place restrictions on such speakers’ communications with the public during the performance of their work. See *id.* at 194–95.

<sup>60</sup> See Jonathan Epstein, Comment, *You Have No Right to Remain Silent: The Strange Case of Elected Officials and Coerced Campaigning*, 1995 U. CHI. LEGAL F. 339, 343–44.

in the dynamics of a government workplace or function under the direct control of a government entity.

The rationale behind the *Pickering* test applies with full force to a certain class of independent contractors<sup>61</sup> — those contractors who are de facto employees because they work day to day in a government office, operate under the immediate supervision of government employees, or work closely with government employees in an interdependent relationship.<sup>62</sup> Such contractors' speech might disrupt the smooth functioning of the government workplace and, ultimately, the efficiency of the government entity. Because these contractors implicate the heightened government interest, they should be subject to the *Pickering* test even though they do not bear the label "employee."<sup>63</sup>

In contrast, the government does not possess any special interest in limiting the speech of contractors who are not equivalent to government employees. The *Umbehr* opinions identify two possible government interests: providing services efficiently<sup>64</sup> and preventing the use of government contract money to "subsidize" views that the government deems offensive.<sup>65</sup> The first potential interest, the efficiency concern articulated in the Court's public employee cases, is simply not pertinent in the ordinary independent contractor context, even in a weakened form. The government does not manage these contractors on a day-to-day basis; when contractors agree to perform a specific task, they retain the discretion, within the bounds of the contract<sup>66</sup> and the applicable regulatory

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<sup>61</sup> See Transcript of Oral Argument, *Umbehr* (No. 94-1654), available in 1995 WL 710471, at \*45 (Nov. 28, 1995) ("Government contractors do come in all sizes and shapes. Some are very close to employees, some are distant.").

<sup>62</sup> See, e.g., *Copsey v. Swearingen*, 36 F.3d 1336, 1344 (5th Cir. 1994); *Caine v. Hardy*, 943 F.2d 1406, 1415-16 (5th Cir. 1991) (en banc).

<sup>63</sup> See *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (assuming that *Pickering* is the appropriate test when a relationship is "tantamount to employment"); Transcript of Oral Argument, *Umbehr* (No. 94-1654), available in 1995 WL 710471, at \*56 (Nov. 28, 1995); cf. *Blackburn v. Marshall*, 42 F.3d 925, 933 (3d Cir. 1995) ("We conclude that the relationship between Blackburn and Defendants does not rise to the level of even a quasi-employment relationship . . . . Accordingly, we hold that . . . this case [is] not sufficiently analogous to the employment cases to warrant the direct and full application of *Pickering* and *Connick*.").

<sup>64</sup> See *Umbehr*, 116 S. Ct. at 2349; cf. *Waters v. Churchill*, 114 S. Ct. 1878, 1886-88 (1994) (plurality opinion) (discussing the government's efficiency interest in relation to public employees).

<sup>65</sup> See *Umbehr and O'Hare*, 116 S. Ct. at 2368 (Scalia, J., dissenting). Although Justice Scalia continues to insist that courts should give the government's interest in patronage great weight, see *id.* at 2362-64, the Court has repeatedly rejected this contention, see, e.g., *Umbehr*, 116 S. Ct. at 2350-51, and a further refutation is beyond the scope of this piece.

<sup>66</sup> Although First Amendment rights can be waived in certain contexts, see, e.g., *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991), the Supreme Court has taken the position that proscribing certain kinds of partisan activities in an employment agreement imposes an unconstitutional condition, see *Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion). On the other hand, the government does have "the right to put terms in the contract that are necessary to its effective performance." Transcript of Oral Argument, *Umbehr* (No. 94-1654), available in 1995 WL 710471, at \*51 (Nov. 28, 1995).

regime,<sup>67</sup> to perform it as they see fit. Because they are not part of the ebb and flow of workplace morale, ordinary contractors do not generate efficiency-disrupting ripples when they speak.<sup>68</sup> It also seems farfetched to assert that a contractor's expression would directly impair the contractor's own performance of an independent job such as towing cars or picking up trash;<sup>69</sup> after all, the contractor has a strong financial interest in retaining the government's business, which may generate a large percentage of the contractor's revenues.<sup>70</sup> If the contractor's performance does not satisfy the agreed-upon standards, the government can simply terminate the contract.<sup>71</sup>

The second potential interest, the government's interest in "subsidiz[ing]" only those views that it finds politically or morally acceptable,<sup>72</sup> is also an insufficient justification for altering the ordinary First Amendment test. It is precisely because the government always has such an interest — in not allowing Nazis to use public property,<sup>73</sup> or in not paying the salary of a teacher who supports the Communist Party<sup>74</sup> — that "the Court's own recent First Amendment jurisprudence . . . particularly condemns all forms of viewpoint-based suppression of speech."<sup>75</sup> For every White Aryan who might secure a government contract under a viewpoint-neutral system, there could be civil rights activists and pro-life demonstrators whose bids might be successful even though their particular stances happened to be unpopular with government officials in power at the moment. The occasional White Aryans are the cost of protecting freedom of speech, and the fact that a contract provides a direct monetary benefit, rather than a more indirect "subsidy" such as the use of a city street, does not forgive the government's constitutional obligation.

Because the government does not have a special interest in restricting the speech of independent contractors who are not equivalent to employ-

<sup>67</sup> See Petitioners' Brief at 34–35, *O'Hare* (No. 95-191), available in 1996 WL 19033 (citing federal laws such as the False Claims Act, 18 U.S.C. § 287 (1994), the False Statements Act, *id.* § 1001, and the Anti-Kickback Act, *id.* § 874).

<sup>68</sup> See Cynthia Grant Bowman, *The Law of Patronage at a Crossroads*, 12 J.L. & POL. 341, 361 (1996).

<sup>69</sup> Cf. Transcript of Oral Argument, *O'Hare* (No. 95-191), available in 1996 WL 134510, at \*41–\*42 (Mar. 20, 1996) ("Do Republican towiers tow differently from Democratic towiers? . . . We're not going to assume that a government employee is going to mess up the system just because he comes from the other party. . . . You can argue this point for the next 10 minutes, but there's nothing to it.").

<sup>70</sup> See, e.g., Brief of Towing & Recovery Ass'n of Am., Inc. as Amicus Curiae in Support of Petitioners at 9, *O'Hare* (No. 95-191), available in 1996 WL 19040, cited in *O'Hare*, 116 S. Ct. at 2359.

<sup>71</sup> See *O'Hare*, 116 S. Ct. at 2360 (listing some of the many legitimate reasons for terminating a government contractor); cf. *Elrod*, 427 U.S. at 366 ("[E]mployees may always be discharged for good cause, such as . . . poor job performance, when those bases in fact exist.").

<sup>72</sup> See *Umbehr and O'Hare*, 116 S. Ct. at 2368 (Scalia, J., dissenting).

<sup>73</sup> See *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978).

<sup>74</sup> See *Keyishian v. Board of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603–04 (1967).

<sup>75</sup> Bowman, *supra* note 68, at 362–63.

ees, those contractors should receive the same First Amendment protections as ordinary citizens. When government retaliation against an independent contractor is viewpoint-based, as in *Umbehr*, strict scrutiny is the proper standard.<sup>76</sup>

This approach has several advantages over the Court's all-inclusive balancing test. First, to borrow a phrase from Justice Scalia, strictly confining the application of the *Pickering* test is important in order to avoid "the fabled slippery slope."<sup>77</sup> However, the treacherous slippery slope is not, as Justice Scalia suggested, the continued expansion of First Amendment protections, but rather the continued expansion of weakened First Amendment tests based on the identity of the speaker and the speaker's relationship to the government. Justice O'Connor pointed out in *Umbehr* that the Court has decided numerous unconstitutional conditions cases in favor of parties to whom the government grants some small subsidy or benefit.<sup>78</sup> The "subsidy" that the government provides to an independent contractor does not radically differ in kind from the sort of benefits that the government grants to citizens in other contexts.<sup>79</sup> If a slender government interest were enough to alter a basic First Amendment test, the degree of a speaker's protection would depend more on group membership than on the nature and context of the speech.<sup>80</sup>

Lower courts will also find the proposed test easier to apply than the "nuanced approach" that Justice O'Connor favors.<sup>81</sup> The essential question for courts using the test would be a factual one: is the plaintiff tantamount to an employee? As with all such distinctions, a gray area exists, but this is the sort of inquiry for which courts have the competence to establish basic criteria.<sup>82</sup> Once judges decide the factual question, they will be able to apply one of two familiar tests for which a great deal of precedent already exists — *Pickering* (weighing the govern-

<sup>76</sup> Speech-induced terminations of independent contractors are likely to be viewpoint-based; however, other standards will be appropriate in certain factual situations. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 572–73 (1968) (observing that Pickering's speech would be evaluated under First Amendment libel standards if he were an ordinary citizen).

<sup>77</sup> *Umbehr and O'Hare*, 116 S. Ct. at 2366 (Scalia, J., dissenting).

<sup>78</sup> See *Umbehr*, 116 S. Ct. at 2350.

<sup>79</sup> See *id.* (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (public facilities); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (small government subsidies for public broadcasting); and *Speiser v. Randall*, 357 U.S. 513 (1958) (tax exemptions)).

<sup>80</sup> See Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 704 (1984) ("[I]t is likely, perhaps inevitable, that the precedents established in employee speech cases will be carried over to other kinds of speech issues.").

<sup>81</sup> *Umbehr*, 116 S. Ct. at 2349.

<sup>82</sup> Courts often perform a similar sort of factual analysis in other contexts: for instance, in torts cases, the distinction between an independent contractor and an employee is often crucial. See Rick A. Pacynski, *Legal Challenges in Using Independent Contractors*, 72 MICH. B.J. 671, 672–73 (1993).

ment's interest as an employer<sup>83</sup>) or strict scrutiny. Additionally, because recognizing contractors' heterogeneity produces a test that is structurally similar to the *O'Hare* political affiliation test — strict scrutiny with a balancing test exception when there is a particularly strong government interest<sup>84</sup> — the outcome of independent contractor cases will depend less on the somewhat metaphysical distinction between speech and affiliation and more on courts' fact-finding expertise.

Justice O'Connor, commenting on the distinction between independent contractors and public employees, declared that the Court must not "[d]etermin[e] constitutional claims on the basis of . . . formal distinctions."<sup>85</sup> However, some formalism, some willingness to categorize, is necessary to ensure that each infinitesimal gradation on the spectrum of government interest does not give rise to a distinct version of the *Pickering* test.<sup>86</sup> The *Umbehr* Court missed the opportunity to draw the proper constitutional line — not between public employees and independent contractors, but between the government's specific interest in regulating the public workplace environment and its general interest in restricting expression critical of the government.

3. *Political Party Expenditures*. — In the wake of Watergate, Congress amended the Federal Election Campaign Act (FECA) by placing strict limits on contributions and expenditures made in connection with federal campaigns.<sup>1</sup> Shortly thereafter, in *Buckley v. Valeo*,<sup>2</sup> the Supreme Court upheld the FECA provisions limiting contributions, which the Court held to encompass both direct donations and expenditures by supporters made at the candidate's suggestion.<sup>3</sup> However, it invalidated limits on individuals' independent expenditures as an unconstitutional restriction on political expression.<sup>4</sup> Last Term, in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,<sup>5</sup> the Supreme Court struck down a FECA provision that limited political parties' spending in support of congressional candidates, as applied to party spending that was not coordinated with particular candi-

<sup>83</sup> See *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Although the Court's *Umbehr* test is similar to the *Pickering* test, lower courts might well struggle to apply the new standard because the government-interest arm of the balance is so ill-defined.

<sup>84</sup> See *O'Hare*, 116 S. Ct. at 2361.

<sup>85</sup> *Umbehr*, 116 S. Ct. at 2349.

<sup>86</sup> Cf. James Kimmell, Jr., Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 COLUM. L. REV. 558, 566 (1985) ("[U]nder a categorical approach, once the competing interests have been identified and weighed, a more definitive rule of law is framed to indicate what the first amendment does protect and what it does not.").

<sup>1</sup> See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431–455 (1994)).

<sup>2</sup> 424 U.S. 1 (1976) (per curiam).

<sup>3</sup> See *id.* at 23–26, 46–47 & n.53 (upholding FECA's limitation on contributions, including its treatment of coordinated expenditures at 2 U.S.C. § 441a(a)(7)(B)(i) (1994)).

<sup>4</sup> See *id.* at 39–51.

<sup>5</sup> 116 S. Ct. 2309 (1996).

dates.<sup>6</sup> By extending to political party spending the same constitutional protection previously afforded spending by individuals,<sup>7</sup> voluntary associations,<sup>8</sup> and political action committees (PACs),<sup>9</sup> the Court ensures the continuing viability of political parties in the face of pressure from increasingly aggressive special interest groups. The Court wisely deferred consideration of political party *contributions*, however, until after lower courts re-examine the issue in light of its ruling on independent expenditures.<sup>10</sup> That decision gives lower courts the opportunity to consider more carefully whether limiting party contributions might be justified to ensure representatives' independence from party leaders.

In January 1986, then-Representative Timothy Wirth of Colorado announced that he would run for an open Senate seat the following November.<sup>11</sup> Although Wirth faced little opposition from his fellow Democrats, three Republicans were vying for their party's nomination.<sup>12</sup> In April, before either the Democratic primary or the Republican state convention, the Colorado Republican Federal Campaign Committee (Colorado Party) bought radio time to air an advertisement attacking Wirth's record.<sup>13</sup> Howard Callaway, the Colorado Party's chairman, later testified that he arranged for the advertisement on his own initiative and bore sole responsibility for its approval, and that only party staff attended meetings discussing the advertisement.<sup>14</sup>

The Colorado Democratic Party complained to the Federal Election Commission (FEC), claiming that the Republicans had exceeded the party spending limits under the applicable FECA formula.<sup>15</sup> The FEC reaffirmed its view that political parties are incapable of making "independent expenditures" because of their close relationship with candidates.<sup>16</sup> The purchase of advertising time thus constituted a coordinated

<sup>6</sup> See *id.* at 2312 (plurality opinion).

<sup>7</sup> See *Buckley*, 424 U.S. at 39–51.

<sup>8</sup> See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986).

<sup>9</sup> See *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 493–501 (1985).

<sup>10</sup> See *Colorado Republican*, 116 S. Ct. at 2320 (plurality opinion).

<sup>11</sup> See *id.* at 2314.

<sup>12</sup> See Brief for Petitioner at 11–12, *Colorado Republican* (No. 95-489), available in 1996 WL 71828.

<sup>13</sup> See *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1451 (D. Colo. 1993).

<sup>14</sup> See *Colorado Republican*, 116 S. Ct. at 2315 (plurality opinion).

<sup>15</sup> See *id.* at 2314. The formula allowed the Colorado Party to spend \$103,000 in this particular race, far more than the advertisement cost, but the party had previously assigned its spending balance to the national Republican party. See *id.*; *Colorado Republican*, 839 F. Supp. at 1451.

<sup>16</sup> *Colorado Republican*, 116 S. Ct. at 2318 (plurality opinion); see also 11 C.F.R. § 110.7(b)(1)(B)(4) (1996) (forbidding party committees from making "independent expenditures"); FEC Advisory Op. 1985-14, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (July 18, 1985) (noting that FECA limits even those party expenditures made "without consultation or coordination with any candidate" and that "[p]arty political committees are incapable of making independent expenditures").

expenditure that exceeded the Colorado Party's allotment, and the FEC accordingly filed a complaint in federal district court.<sup>17</sup>

The district court ruled that, even though the advertisement did represent a coordinated expenditure,<sup>18</sup> it was not subject to the FECA spending limitation because the party had not purchased the advertisement "in connection with" a particular federal campaign.<sup>19</sup> This conclusion depended upon the court's holding that the relevant test for determining when an advertisement is purchased "in connection with" a federal campaign is whether that advertisement expressly advocates a candidate's election or defeat;<sup>20</sup> the court thereby rejected the FEC's argument for an interpretation of the FECA language broad enough to permit regulation of such campaign spending.<sup>21</sup> The Colorado Party had also filed a counterclaim, in which it argued that FECA's party spending limits violate the First Amendment,<sup>22</sup> but the court declared that its statutory analysis rendered this counterclaim moot.<sup>23</sup> The court granted summary judgment to the Colorado Party.<sup>24</sup>

The Tenth Circuit reversed.<sup>25</sup> Relying on *Chevron v. Natural Resources Defense Council*,<sup>26</sup> the court of appeals deferred to the FEC's broader interpretation of its enabling statute and held that FECA covered the advertisement.<sup>27</sup> Turning to the Colorado Party's First Amendment claim, the Tenth Circuit accepted the spending limitation as a constitutionally permissible means of advancing the state's compelling interest in eradicating corruption and the appearance of corruption in the political process, and endorsed the FEC's view that political parties are incapable of making expenditures independent of candidates.<sup>28</sup> The court of appeals gave special deference to the statute, based both on Congress's intimate familiarity with campaign finance issues<sup>29</sup> and the value of equalizing access to the political arena by constraining campaign costs.<sup>30</sup>

<sup>17</sup> See *Colorado Republican*, 116 S. Ct. at 2314.

<sup>18</sup> See *Colorado Republican*, 839 F. Supp. at 1452–53.

<sup>19</sup> *Id.* at 1451 (quoting 2 U.S.C. § 441a(d)(3) (1994)) (internal quotation marks omitted).

<sup>20</sup> *Id.* at 1454–57.

<sup>21</sup> See *id.* at 1457.

<sup>22</sup> See *Colorado Republican*, 116 S. Ct. at 2314.

<sup>23</sup> See *Colorado Republican*, 839 F. Supp. at 1457.

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

<sup>25</sup> See *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1024 (10th Cir. 1995).

<sup>26</sup> 467 U.S. 837 (1984).

<sup>27</sup> See *Colorado Republican*, 59 F.3d at 1021–22. *Chevron* requires courts to defer to an agency's "permissible construction" of its enabling statute if the statute "is silent or ambiguous with respect to the specific issue" that the agency has addressed. *Chevron*, 467 U.S. at 843.

<sup>28</sup> See *Colorado Republican*, 59 F.3d at 1023–24.

<sup>29</sup> See *id.* at 1024.

<sup>30</sup> See *id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam)). The *Buckley* Court acknowledged Congress's desire to "equalize the relative ability of all citizens to affect the outcome of elections," *Buckley*, 424 U.S. at 26, but rejected restricting well-financed speakers as a means "to enhance the relative voice of others," *id.* at 48–49.

In a fractured 7–2 decision, the Supreme Court vacated and remanded the case, holding that the application of the FECA spending provision to truly independent political party spending violates the First Amendment.<sup>31</sup> Writing for a three-Justice plurality, Justice Breyer<sup>32</sup> explained that political parties have the same First Amendment right as do individuals and PACs to make unlimited independent expenditures.<sup>33</sup> According to Justice Breyer, however, prudence counseled against deciding whether, in the special case of political parties, the First Amendment protects those coordinated expenditures that the Court treats as contributions for constitutional purposes.<sup>34</sup>

Justice Breyer first examined FECA's limits on contributions and expenditures. The provision limiting party spending does not distinguish between coordinated and independent expenditures on its face, but instead sets a ceiling on "expenditures" generally.<sup>35</sup> That ceiling authorized the Colorado Party to spend \$103,000 for the Colorado Senate race in 1986 "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions."<sup>36</sup> Without that special authorization, Justice Breyer noted, the party's coordinated spending would have been a contribution of a "multicandidate political committee" and thus limited even further under the \$5000 contribution ceiling.<sup>37</sup> Therefore, a ruling striking down the party spending limitation on its face necessarily would have implicated the constitutionality of limits on political party *contributions*.<sup>38</sup>

Justice Breyer expressly found that the Colorado Party's advertisement represented an independent expenditure<sup>39</sup> and, relying on *Buckley*, noted the "fundamental constitutional difference" between genuinely independent expenditures and coordinated expenditures: under the First Amendment, the government may regulate only the latter as a form of contribution.<sup>40</sup> Under Justice Breyer's view, the close relationship between parties and candidates does not render the distinction between

<sup>31</sup> See *Colorado Republican*, 116 S. Ct. at 2312 (plurality opinion). The Supreme Court did not rule on the statutory issue.

<sup>32</sup> Justices O'Connor and Souter joined Justice Breyer's plurality opinion.

<sup>33</sup> See *Colorado Republican*, 116 S. Ct. at 2317 (plurality opinion).

<sup>34</sup> See *id.* at 2319–21.

<sup>35</sup> See *id.* at 2313–14.

<sup>36</sup> *Id.* at 2314 (emphasis omitted) (quoting 2 U.S.C. § 441a(d)(1) (1994)) (internal quotation marks omitted).

<sup>37</sup> *Id.* at 2313.

<sup>38</sup> See *id.* at 2320.

<sup>39</sup> See *id.* at 2317–19.

<sup>40</sup> *Id.* at 2315 (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)) (internal quotation marks omitted). Justice Breyer noted that contribution limits impose "only a marginal restriction" on the contributor's free expression, *id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 20 (1976) (per curiam)) (internal quotation marks omitted), while independent expenditure limits place "substantial . . . restraints on the quantity and diversity of political speech," *id.* (alteration in original) (quoting *Buckley*, 424 U.S. at 19 (per curiam)) (internal quotation marks omitted). Justice Breyer also reaffirmed *Buckley's* view that contribution limits directly advance the government's interest in preventing corruption or its appearance, while there is

contributions and expenditures meaningless, nor do parties pose any special corruption dangers.<sup>41</sup> Congress enacted the ceiling “for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending,” Justice Breyer contended, not because it found political parties especially prone to corruption.<sup>42</sup> According to Justice Breyer, the FEC presumption that parties’ expenditures are coordinated was not entitled to the deference ordinarily owed an administrative agency, because it was not based on an empirical judgment that all party spending is coordinated.<sup>43</sup> Finally, Justice Breyer rejected the idea that “a party and its candidate are identical, [that] the party, in a sense ‘is’ its candidates.”<sup>44</sup> The plurality found that proposition questionable both because parties are coalitions of possibly divergent interests<sup>45</sup> and because, in any case, there would be little danger of corruption when the candidate’s interests do not diverge from those of her party.<sup>46</sup> Justice Breyer wrote: “We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.”<sup>47</sup>

Justice Breyer thought it unwise and unnecessary, however, to decide whether political parties have a special constitutional entitlement to make unlimited *coordinated* expenditures, which are “virtually indistinguishable” from contributions.<sup>48</sup> The parties and lower courts did not address this question.<sup>49</sup> Although this lack of focus did not deprive the parties of a right to adjudicate this issue eventually, it “provide[d] a reason for [the] Court to defer consideration of the broader issues until the lower courts have reconsidered [those issues] in light of [*Colorado Republican*].”<sup>50</sup>

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less “danger that [independent] expenditures will be given as a *quid pro quo*.” *Id.* at 2316 (quoting *Buckley*, 424 U.S. at 47) (internal quotation marks omitted).

<sup>41</sup> See *id.* at 2316. Justice Breyer rejected theories that unrestricted “soft money” donors could indirectly corrupt candidates by pressuring party leaders, *see id.* (citing 2 U.S.C. § 431(8)(B)(xii) (1994)), or that donors could evade contribution caps by giving to parties, because such donors could make more effective use of independent expenditures on their own, *see id.* at 2316–17.

<sup>42</sup> *Id.* at 2317; *see also Buckley*, 424 U.S. at 57 (rejecting the congressional desire to limit wasteful campaign spending as a rationale for regulation).

<sup>43</sup> *See Colorado Republican*, 110 S. Ct. at 2318 (plurality opinion). Justice Breyer noted that the FEC routinely distinguishes between independent and coordinated spending by political organizations such as PACs. *See id.*

<sup>44</sup> *Id.* at 2319.

<sup>45</sup> *See id.* (citing WILLIAM J. KEEFE, PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA 59–74 (5th ed. 1988)).

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

<sup>47</sup> *Id.* at 2317.

<sup>48</sup> *Id.* at 2320.

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

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

Justice Kennedy, concurring in the judgment and dissenting in part,<sup>51</sup> argued that the First Amendment prohibits Congress from limiting political party spending, whether or not expenditures are coordinated with candidates: "The central holding in [Buckley] is that spending on one's own speech must be permitted, and this is what political parties do when they make the expenditures FECA restricts."<sup>52</sup> Because a party can reasonably support its own candidates only through some form of cooperation, Justice Kennedy concluded that the limitation on expenditures has a "stifling effect on the ability of the party to do what it exists to do."<sup>53</sup>

Justice Thomas, also concurring in the judgment and dissenting in part, challenged the narrowness of Justice Breyer's ruling and opined that the Court should have invalidated limits on coordinated party spending as well.<sup>54</sup> Justice Thomas argued that the *Buckley* Court upheld limits on individual and PAC contributions only because it believed that such contributions posed "a substantial threat of corruption."<sup>55</sup> Political parties simply do not pose such a threat, Justice Thomas insisted, because their "very aim . . . is to influence" candidates' views and votes — a legitimate, even protected, associational activity.<sup>56</sup> Moreover, in order to justify burdens on expression, the government must show that the corruption it fears is real, not hypothetical.<sup>57</sup>

Justice Thomas argued further that the Court should overrule *Buckley*'s expenditure/contribution framework.<sup>58</sup> Both giving and spending involve basic speech and associational rights at the core of the First Amendment, he maintained.<sup>59</sup> Justice Thomas rejected *Buckley*'s "proxy speech" rationale and argued that contribution limits are fatally overbroad means of serving the government's interest in combating corruption.<sup>60</sup>

Finally, Justice Stevens dissented, arguing that the party expenditure provision was necessary both to prevent actual or apparent corruption and to level the electoral playing field by constraining the spiraling costs

<sup>51</sup> Chief Justice Rehnquist and Justice Scalia joined Justice Kennedy's opinion.

<sup>52</sup> *Colorado Republican*, 116 S. Ct. at 2321 (Kennedy, J., concurring in the judgment and dissenting in part) (citing *Buckley v. Valeo*, 424 U.S. 1, 51–58 (1976) (per curiam)).

<sup>53</sup> *Id.* at 2323.

<sup>54</sup> See *id.* at 2323–25 (Thomas, J., concurring in the judgment and dissenting in part). Chief Justice Rehnquist and Justice Scalia joined portions of Justice Thomas's opinion.

<sup>55</sup> *Id.* at 2330.

<sup>56</sup> *Id.* at 2331.

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

<sup>58</sup> See *id.* at 2325–30. Chief Justice Rehnquist and Justice Scalia did not join this part of Justice Thomas's opinion.

<sup>59</sup> See *id.* at 2326.

<sup>60</sup> See *id.* at 2325–30 (citing Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1064 (1985), and Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 105–06 (1987)).

of federal campaigns.<sup>61</sup> Congress's "unique" experience entitled it to special deference in this area, and the "net effect" of campaign finance regulation, in Justice Stevens's view, is harmonious with First Amendment values.<sup>62</sup>

Liberal reformers will fault *Colorado Republican* for adhering to the much criticized *Buckley* principle that limits on political spending must satisfy strict First Amendment scrutiny — money, they claim, is not speech.<sup>63</sup> Libertarians will be disappointed that the Court was not bolder in limiting the government's meddling in campaign finance — such regulation, they claim, is dangerous.<sup>64</sup> By taking a middle ground, the Court pleased neither side. However, FECA's regulation of party spending raises issues of republican representation that most liberal reformers and libertarians have yet to address.

Republican notions of representation justify the Court's decision to extend protection to independent party spending while deferring a decision on coordinated expenditures and party contributions generally for further lower court consideration. At their best, political parties perform a unique unifying function in the American republic, a function that requires that they enjoy at least the same constitutional protection afforded individuals and special interest groups. Nevertheless, the potential for excessive party pressure may implicate republicanism's concern with the integrity of representatives — a concern at the heart of *Buckley*'s broad understanding of corruption. Any ruling that would immunize party *contributions* from regulation thus should await careful consideration of parties' current standing in the American political scene.

Political parties must receive strong First Amendment protection because they can serve a vital function in American democracy. In a country of diverse views and competing interests, political parties can enable citizens to agree on a common agenda for governing.<sup>65</sup> The

<sup>61</sup> See *id.* at 2332 (Stevens, J., dissenting). Justice Ginsburg joined Justice Stevens's opinion.

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 21–22; cf. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13–27, at 1135 (2d ed. 1988) (arguing that the "net effect" of campaign expenditure limitations is to "enhance[] freedom of speech" and that, therefore, strict scrutiny is inappropriate); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397–99 (1994) (comparing *Buckley* to *Lochner v. New York*, 198 U.S. 45 (1905), in its treatment of "existing distributions of resources as if they were prepolitical and just").

<sup>64</sup> See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 252 (1992) (arguing that civic republican justifications for campaign spending restrictions are "designed to justify silencing the opposition"); cf. Bevier, *supra* note 60, at 1046 (arguing that strict scrutiny appropriately prohibits many campaign finance regulations).

<sup>65</sup> See SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 401–20 (1968) (explaining that modern, institutionalized parties are needed to provide coherent governance in a democratic society); E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 1 (1942); Joseph A. Schlesinger, *The New American Political Party*, 79 AM. POL. SCI. REV. 1152, 1153 (1985); cf. Davies v. Bandemer, 478 U.S. 109, 144–45 (1986) (O'Connor, J., concurring) ("The preservation and health

American "winner-take-all" rule in congressional races encourages parties to appeal to a majority of voters in each district<sup>66</sup> and thus enables the electorate to transcend the parochial interests of PACs and voluntary associations, which are usually united by self-interest, narrow ideologies, or particular issues.<sup>67</sup> Finally, the political parties' role is especially vital given the exceptionally fragmented nature of our system of government. With a formal separation of powers between co-equal branches of the national government and a division of sovereign authority between the states and the federal government, political parties can provide the link that voters need to implement a coherent strategy for governing.<sup>68</sup>

In recent years, the increasing sophistication of special interest groups has severely undermined political parties' ability to unify both the electorate in political campaigns and officeholders in public policy debates. Today's professional special interest groups rival the parties in influence over federal elections and even public policy.<sup>69</sup> For example, during the recent debate over health care reform, the famous "Harry and Louise" advertisements of the Health Insurance Association of America sowed "seeds of doubt" concerning the scope of governmental control that the Clinton health care plan envisioned.<sup>70</sup> The National Federation of Independent Businesses (NFIB) mounted a grassroots campaign against the plan's mandate that employers purchase insurance for their

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of our political institutions . . . depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.").

<sup>66</sup> See V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 208–09 (5th ed. 1964); cf. HUNTINGTON, *supra* note 65, at 432–33 (explaining how the two-party system "effectively institutionalizes and moderates the polarization" of the competing factions that originally generate parties); AUSTIN RANNEY, CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA 38 (1975) (noting Edmund Burke's defense of the party as "a body of men united, for promoting by their joint endeavors the national interest upon some particular principles in which they are all agreed" (internal quotation marks omitted)).

<sup>67</sup> James Madison defined a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob Cooke ed., 1961). Madison's definition fits PACs more closely than it does modern, institutionalized parties. See HUNTINGTON, *supra* note 65, at 405 (arguing that the Framers' arguments against parties are really arguments against the factionalism of weak, infant parties).

<sup>68</sup> See JOHN H. ALDRICH, WHY PARTIES? 68–95 (1995) (explaining how Jefferson and Madison devised the Democratic-Republican Party to overcome the disadvantages of the new government); cf. KEY, *supra* note 66, at 572 (arguing that parties "modify the formal separation of the organs of government"). But see James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POL. SCI. Q. 613, 614 (1988) (arguing that divided party control of the White House and Congress has rendered obsolete the theory that parties unify the disparate branches); cf. Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1482–83 (1994) (arguing that the Framers rejected parties and set up the Constitution to prevent their effective operation).

<sup>69</sup> See KEEFE, *supra* note 45, at 258–60; see also HAYNES JOHNSON & DAVID S. BRODER, THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT 52–53 (1996) (discussing interest groups' ascendancy in the health care reform battle).

<sup>70</sup> JOHNSON & BRODER, *supra* note 69, at 205–06.

employees.<sup>71</sup> The interest groups not only conducted high-profile, professional advertising campaigns, but also targeted specific members of Congress with direct mail campaigns, rallies, and petition drives.<sup>72</sup> These and other interest groups have remained quite active during the 1996 campaign season. The NFIB has staged a massive drive to elect members of Congress who are sympathetic to its views.<sup>73</sup> Similarly, the AFL-CIO waged an extensive advertising campaign intended to influence the congressional campaigns.<sup>74</sup> For parties to serve their essential function of uniting our factious polity, they should enjoy at least the same level of constitutional protection as these other political actors.

In this political context, the holding that FECA's limits on party spending are unconstitutional when applied to independent expenditures is sound. A contrary ruling would have left political parties subject to a unique comparative disadvantage on their ability "to do what [they] exist[ ] to do"<sup>75</sup> and would have perpetuated their alarming erosion. Allowing limits on independent spending by parties — and *only* by parties — would simply reinforce the advantages that wealthy individuals and lobbies already enjoy.

At the same time, Justice Breyer's decision to defer consideration of limits on coordinated expenditures was a prudent one. The compelling interest at the heart of *Buckley*'s anti-corruption concerns — ensuring the integrity of representation in a republican system of government — may justify some limits on party influence over individual officials. Although some jurists and commentators have argued that campaign finance restrictions may be justified only to prevent outright bribery,<sup>76</sup> the *Buckley* Court recognized that such a regime would guard against "only the most blatant and specific attempts of those with money to influence governmental action."<sup>77</sup> *Buckley* and subsequent cases demonstrate that the Court was concerned with more subtle forms of undue influence.<sup>78</sup>

<sup>71</sup> See *id.* at 215–16.

<sup>72</sup> See *id.* at 220–22.

<sup>73</sup> See Michael Weisskopf, *Small Business Lobby Becomes a Big Player in Campaigns*, WASH. POST, Aug. 9, 1996, at A1.

<sup>74</sup> See Robert A. Rosenblatt, *Labor to Pour Millions into Campaigns*, L.A. TIMES, Jan. 25, 1996, at A14; see also Robin Toner, *Interest Groups Take New Route to Congressional Election Arena*, N.Y. TIMES, Aug. 20, 1996, at A1 (discussing the AFL-CIO and NFIB efforts as simply two of many special interest group campaigns in the 1996 congressional races).

<sup>75</sup> *Colorado Republican*, 116 S. Ct. at 2323 (Kennedy, J., concurring in the judgment and dissenting in part).

<sup>76</sup> Justice Scalia would define "corruption" quite narrowly: "[C]orruption means [y]ou're going to get the [candidate] to do something that will line your pockets." Transcript of Oral Argument, *Colorado Republican* (No. 95-489), available in 1996 WL 188710, at \*49 (Apr. 15, 1996). Party pressure, by contrast, is just "party discipline," and "so long as there's no exchange of money," such pressure is "good old-fashioned democratic politics." *Id.* at \*50. A similar view is held by Bevier, who argues for a definition of "corruption" that addresses practices akin to bribery rather than "undue influence." Bevier, *supra* note 60, at 1081–84.

<sup>77</sup> *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (per curiam).

<sup>78</sup> See, e.g., *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496–500 (1985) (justifying the regulation of corporate political activity in order to prevent the unfair use of

Classical republican notions may explain the Court's reluctance to strike down contribution limits under overbreadth analysis.<sup>79</sup> The republican philosophy of government — with its emphasis on deliberation in government, political equality, and civic virtue — had adherents among the Framers<sup>80</sup> and has enduring appeal for those who view pluralism — with its emphasis on self-interested political participation<sup>81</sup> — as amoral or cynical.<sup>82</sup> In the republican view, preventing corruption or its appearance is a compelling interest in constitutional terms, not simply because it protects the public fisc. Contributors who wield undue influence undermine the Framers' design: a republican form of government.<sup>83</sup> Thus, at least in theory, allowing unlimited party contributions, whether in the form of actual donations or coordinated expenditures, may threaten republican values in the same way that unlimited individual or PAC contributions would.

A party that is too strong may compromise the independence of individual officeholders. Representatives in a republican system have a constitutional obligation to *represent*<sup>84</sup> that may collide with the interests of party leaders. Furthermore, our republic's ideal of deliberative democ-

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resources amassed in the economic marketplace); California Med. Ass'n v. FEC, 453 U.S. 182, 197–99 (1981) (plurality opinion) (affirming Congress's power to enact ancillary contribution restrictions to preserve the integrity of contribution caps).

<sup>79</sup> Compare *Buckley*, 424 U.S. at 28 (holding that Congress could find anti-bribery statutes and the requirement that candidates disclose contributions insufficient to guard against corruption), *with Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637–38 (1980) (holding that a state's prophylactic regulation of charitable solicitation was overbroad, given the possibility of "less intrusive" laws requiring disclosure and punishing fraud directly).

<sup>80</sup> Bernard Bailyn and Gordon Wood, the preeminent historians of the period, argue that the leaders of the American Revolution intended a profound intellectual and cultural transformation of eighteenth-century society and politics along the lines of republicanism, a philosophy based in an Enlightenment faith in rationality, a virtuous citizenry and political class, political equality, and the existence of a public good over which deliberation is possible. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160–229 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 47–48 (1969).

<sup>81</sup> See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987).

<sup>82</sup> See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1508 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544 (1988).

<sup>83</sup> James Madison noted, in paradigmatic republican fashion:

The aim of every political Constitution is first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.

THE FEDERALIST NO. 57, at 384 (James Madison) (Jacob Cooke ed., 1961). In the rhetoric of the time, the ideal of virtue was central for representative government; a corrupt government created only the illusion of self-rule. See John Warren, *An Oration* (July 4, 1783), in THE RISING GLORY OF AMERICA, 1760–1820, at 57, 58 (Gordon S. Wood ed., rev. ed. 1990).

<sup>84</sup> See U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." (emphasis added)); *id.* at amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ." (emphasis added)); see also WOOD, *supra* note 80, at 596 (explaining how the Framers' conception of representation was unique, perhaps the greatest contribution of the American Constitution).

racy envisions representatives who will exercise independent moral judgment rather than always toeing the "party line." Unlike the British system, in which a vote against the party in power is a vote against the present government, the American system expects the legislative branch to act as a check on executive power, even when the two are controlled by a single party.<sup>85</sup> Of course, it is an open question, given the relatively weak state of parties today,<sup>86</sup> whether concerns for representatives' independence *in practice* justify the real restraints that FECA's limits on party expenditures impose on core First Amendment activity. Justice Breyer prudently left this complex empirical question for another day.

In a republican system of government, the ideal representative both faithfully represents his constituents and exercises independent moral judgment. Parties can play a vital role in such a system, a role that requires that they receive full constitutional protection such that they can effectively compete with other political actors. The Court's cautious approach preserves rigorous review for regulation of parties while leaving space for reform designed to help achieve the republican ideal.

4. *Restrictions on Indecent Cable Programming.* — Fears of sex and profanity at the turn of a dial have often prompted Congress to pass legislation limiting the availability of sexually explicit and offensive speech. The Supreme Court has permitted content-based speech restrictions that confine indecent, nonobscene speech to hours when children are unlikely to be in the audience,<sup>1</sup> but has struck down outright bans on such speech under the traditional strict scrutiny test.<sup>2</sup> Last Term, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,<sup>3</sup> the Court strayed from this approach by upholding section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992,<sup>4</sup> which permits cable system owners (cable operators) to ban indecent speech on cable channels set aside for independent commercial use (leased access channels).<sup>5</sup> Yet the Court struck down section 10(c) of the

<sup>85</sup> See KEY, *supra* note 66, at 654–66. Indeed, some of the nation's greatest congressional heroes, such as the seven Republican Senators who voted to acquit President Johnson of politically inspired impeachment charges, are admired for their principled stand *against* party discipline. See JOHN F. KENNEDY, PROFILES IN COURAGE 144 (3d ed. 1961); see also WILLIAM H. REHNQUIST, GRAND INQUESTS 244 (1992) (noting the "deep conviction" of those who opposed Johnson's impeachment).

<sup>86</sup> See Keefe, *supra* note 45, at 278; NELSON W. POLSBY, THE CONSEQUENCES OF PARTY REFORM 139 (1983). But see Schlesinger, *supra* note 65, at 1152 (arguing that parties remain robust).

<sup>1</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978).

<sup>2</sup> See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 131 (1989); *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Under the strict scrutiny test, a content-based regulation that burdens protected speech must be narrowly tailored to achieve a compelling government interest. See *Sable*, 492 U.S. at 126.

<sup>3</sup> 116 S. Ct. 2374 (1996).

<sup>4</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

<sup>5</sup> See 47 U.S.C. § 532(h) (1994).

1992 Cable Act, which permitted cable operators to ban indecent speech on cable channels set aside for public, educational, or governmental use (public access channels).<sup>6</sup> The Court followed no established rule in reaching these different outcomes, instead employing an ad hoc balancing test to evaluate the constitutionality of each subsection. Although this approach may protect children and ensure a diversity of cable programs, it raises serious doubts about the Court's commitment to protecting the speech interests of cable operators, programmers, and viewers.

Congress added section 10 to the 1992 Cable Act at the urging of Senator Jesse Helms, who insisted that the leased access channels mandated by Congress in 1984<sup>7</sup> were filled with sexually explicit programs.<sup>8</sup> The section contained three types of speech restrictions. Subsection (a) permitted cable operators to ban leased access programming that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."<sup>9</sup> Subsection (b) required cable operators who chose not to ban such programming to segregate it on a single channel accessible only at the written request of individual subscribers.<sup>10</sup> Subsection (c) ordered the FCC to promulgate regulations permitting cable operators to ban public access programming<sup>11</sup> that contained "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."<sup>12</sup>

In 1993, a group of access programmers and cable viewer organizations petitioned for review of all three of section 10's restrictions.<sup>13</sup> A panel of the Court of Appeals for the District of Columbia Circuit struck down sections 10(a) and 10(c), holding that the government may not constitutionally authorize cable operators to implement a complete ban on

<sup>6</sup> See *id.* § 531 note.

<sup>7</sup> See Cable Communications Policy Act of 1984, 47 U.S.C. § 532 (1994). The 1984 Act requires cable operators with 36 or more activated channels to designate a percentage of their channels for leased access — commercial use by independent programmers who pay operators a fee. See *id.* § 532(b)(1)(A). Until the 1992 Act, cable operators were not permitted to exercise editorial control over the contents of leased access channels except to the degree necessary to determine a price for use of the channel. See *id.* § 532(c)(2).

<sup>8</sup> See 138 CONG. REC. S642-01, S646 (1992) (statement of Sen. Helms). Senator Helms specifically attacked Robin Byrd's popular leased access talk show in New York City. See *id.* During this program, guests strip in front of the camera and then take questions from callers. At the end of the show, Ms. Byrd, often dressed in a crocheted bikini top, fondles the guests. See *Boob Tube: The Bare Facts on Robin Byrd, the First Lady of Sex TV*, TIME OUT N.Y., July 31-Aug. 7, 1996, at 15, 15.

<sup>9</sup> 47 U.S.C. § 532(h) (1994).

<sup>10</sup> See *id.* § 532(j); 47 C.F.R. § 76.701(c) (1995).

<sup>11</sup> Local cable franchising authorities have long required cable operators to create and maintain channels for public, educational, or governmental use. See H.R. REP. NO. 98-934, at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667. Congress explicitly endorsed this practice in the 1984 Cable Communications Policy Act. See 47 U.S.C. § 531 (1994). Until the enactment of the 1992 Cable Act, cable operators did not have any editorial control over the contents of these public access channels. See *id.* § 531(e).

<sup>12</sup> 47 U.S.C. § 531 note (1994); see 47 C.F.R. § 76.702 (1995).

<sup>13</sup> See *Alliance for Community Media v. FCC*, 10 F.3d 812, 814-16 (D.C. Cir. 1993).

indecent speech, which the First Amendment protects.<sup>14</sup> The full court of appeals vacated the panel's judgment,<sup>15</sup> reheard the case en banc, and held all three subsections constitutional.<sup>16</sup> The court determined that the First Amendment was inapplicable to sections 10(a) and 10(c) because they did not constitute state action: cable operators, not government actors, decided whether to ban indecent programming.<sup>17</sup>

The Supreme Court, in a badly fractured opinion, affirmed the D.C. Circuit's opinion in part and reversed in part.<sup>18</sup> The Court reached a majority only on the constitutionality of section 10(b), holding that the "segregate and block" requirement violated the First Amendment.<sup>19</sup> In contrast to both the panel and en banc opinions of the D.C. Circuit, the plurality distinguished section 10(a) from section 10(c), upholding section 10(a)'s restriction on leased access channels<sup>20</sup> but striking down section 10(c)'s restriction on public access channels.<sup>21</sup>

Writing for the majority, Justice Breyer<sup>22</sup> refused to specify whether strict or "somewhat less 'strict'" scrutiny was the appropriate standard for evaluating the constitutionality of indecent speech in general and section 10(b)'s content-based "segregate and block" requirement in particular.<sup>23</sup> Rather, the Court held that section 10(b) was unconstitutional under either test.<sup>24</sup> The Court found that section 10(b) failed strict scrutiny because it was not the least restrictive alternative to achieve the government's compelling interest in protecting children from indecent programming.<sup>25</sup> The Court also concluded that section 10(b) failed

<sup>14</sup> See *id.* at 816–17, 822–24. The Supreme Court has held that the First Amendment protects indecent speech. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>15</sup> See *Alliance for Community Media v. FCC*, 15 F.3d 186, 187 (D.C. Cir. 1994) (en banc).

<sup>16</sup> See *Alliance for Community Media v. FCC*, 56 F.3d 105, 110 (D.C. Cir. 1995) (en banc).

<sup>17</sup> See *id.* at 118, 123.

<sup>18</sup> See *Denver Area*, 116 S. Ct. at 2381, 2398.

<sup>19</sup> See *id.* at 2391–94.

<sup>20</sup> See *id.* at 2390 (plurality opinion).

<sup>21</sup> See *id.* at 2397.

<sup>22</sup> Justices Stevens, O'Connor, Kennedy, Souter, and Ginsburg joined the portion of Justice Breyer's opinion that ruled that section 10(b) was unconstitutional.

<sup>23</sup> *Denver Area*, 116 S. Ct. at 2391. The Court normally applies strict scrutiny to content-based restrictions on protected speech. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2458–59 (1994); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988). The Court has applied "less-than-strictest, First Amendment scrutiny" to content-neutral regulations of cable and regulations of commercial speech. *Denver Area*, 116 S. Ct. at 2391–92 (citing *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375–76 (1995); *Turner*, 114 S. Ct. at 2458; and *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)). The Court has not resolved whether indecent speech is also subject to this lesser standard of review. See *id.* at 2391 (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

<sup>24</sup> See *Denver Area*, 116 S. Ct. at 2391, 2394.

<sup>25</sup> See *id.* at 2391 (citing *Sable*, 492 U.S. at 126, 131). To support this finding, the Court pointed to provisions of the Telecommunications Act of 1996 that require cable operators to block or scramble indecent programs on nonleased, nonpublic access cable channels and that will soon require all television sets to be equipped with the V-chip, a device that will enable viewers to identify and block sexually explicit or violent programs on both cable and network channels. See *id.* at 2392–94 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 504–505, 551, 110

heightened scrutiny because it was “considerably ‘more extensive than necessary.’”<sup>26</sup>

Writing for the plurality, Justice Breyer refused to analyze sections 10(a) and 10(c) under either of these two levels of scrutiny.<sup>27</sup> The plurality began by analyzing the constitutionality of section 10(a), the provision allowing cable operators to ban indecency on leased channels.<sup>28</sup> After quickly dismissing the D.C. Circuit’s state action concerns,<sup>29</sup> Justice Breyer declined to apply any established First Amendment standard to determine the constitutionality of section 10(a).<sup>30</sup> Rather, he stated that the application of a specific test or analogy<sup>31</sup> to the regulation of cable programming was “unwise and unnecessary” given “the changes taking place in the law, the technology, and the industrial structure, related to telecommunications.”<sup>32</sup>

Justice Breyer employed a general balancing test to evaluate section 10(a), weighing “the government’s interest in protecting children, the ‘permissive’ aspect of the statute and the nature of the medium” against leased programmers’ and viewers’ interests in viewing sexually explicit material.<sup>33</sup> He concluded that “the permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children . . . while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of editorial control that Congress removed in 1984.”<sup>34</sup> Justice Breyer defended the use and outcome of this balancing test by arguing that section 10(a) differs from the content-based speech restrictions to which the Court has traditionally applied strict scrutiny because it affects the speech interests of both programmers and cable operators.<sup>35</sup>

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Stat. 56, 136, 140 (to be codified at 47 U.S.C. §§ 560–561, 303)). The Court could find no reason why Congress could not use these less restrictive means to protect children from indecent programs on leased access channels. *See id.*

<sup>26</sup> *Id.* at 2391 (quoting *Turner*, 114 S. Ct. at 2458).

<sup>27</sup> *See id.* at 2385, 2394–97 (plurality opinion).

<sup>28</sup> *See id.* at 2382–83. Justices Stevens, O’Connor, and Souter joined the portion of Justice Breyer’s opinion that upheld section 10(a).

<sup>29</sup> *See id.* at 2382.

<sup>30</sup> *See id.* at 2383–84.

<sup>31</sup> *See id.* at 2385 (listing the possible analogies as broadcasting, common carriers, and bookstores).

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

<sup>33</sup> *Id.* at 2389.

<sup>34</sup> *Id.* at 2387.

<sup>35</sup> *See id.* at 2387–88. *But see Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 115 S. Ct. 2338, 2348–50 (1995) (applying strict scrutiny to state interference with a public parade when that interference affected the speech interests of both parade organizers and prospective marchers).

Writing for a different plurality, Justice Breyer<sup>36</sup> applied the same balancing test to section 10(c)'s restrictions on public access channels.<sup>37</sup> Instead of reconsidering every factor in the balancing test, however, Justice Breyer emphasized the "four important differences" between public access channels and leased access channels.<sup>38</sup> First, cable operators had been reserving channels for public access use as a condition of their cable franchises before Congress endorsed this practice in 1984;<sup>39</sup> therefore, section 10(c), unlike section 10(a), did not restore to cable operators any editorial rights that they once enjoyed.<sup>40</sup> Second, unlike leased channels — over which the lessee programmers enjoy complete editorial control — public access channels are normally subject to community supervisory systems.<sup>41</sup> Third, this community involvement in the production and supervision of public access programming makes policing by the cable operator less necessary to achieve the government's goal of protecting children.<sup>42</sup> Finally, public access programming is generally not sex-related.<sup>43</sup>

In light of these differences between public access and leased access programming, Justice Breyer could find no obvious reason why the government needed section 10(c) to shield children from indecent programming.<sup>44</sup> Concluding that the government could not meet "its burden of showing that section 10(c) is necessary to protect children or that it is appropriately tailored to secure that end," the plurality found section 10(c) to be a violation of the First Amendment.<sup>45</sup>

Three Justices filed concurrences agreeing with the plurality that the Court should not use a specific test to evaluate sections 10(a) and 10(c).<sup>46</sup> These Justices disagreed, however, with the plurality's assessment of the relationship between the two sections. Justice Stevens likened section 10(a) to a permit because it allows cable operators to exercise some of the editorial discretion that they enjoyed before 1984, but likened section 10(c) to a prohibition because it lessened local governments' historical role in regulating public access channels.<sup>47</sup> In contrast, Justice O'Connor found the differences between sections 10(a) and 10(c) too minor to justify the plurality's separate treatment of the two provisions.<sup>48</sup>

<sup>36</sup> Justices Stevens and Souter joined the portion of Justice Breyer's opinion that held section 10(c) unconstitutional.

<sup>37</sup> See *Denver Area*, 116 S. Ct. at 2394–97 (plurality opinion).

<sup>38</sup> *Id.* at 2394.

<sup>39</sup> See H.R. REP. NO. 98-934, at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667.

<sup>40</sup> See *Denver Area*, 116 S. Ct. at 2394 (plurality opinion).

<sup>41</sup> See *id.* at 2394–95.

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

<sup>43</sup> See *id.* at 2396.

<sup>44</sup> See *id.* at 2397.

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* at 2398 (Stevens, J., concurring); *id.* at 2403 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2401 (Souter, J., concurring).

<sup>47</sup> See *id.* at 2398, 2400–01 (Stevens, J., concurring).

<sup>48</sup> See *id.* at 2403–04 (O'Connor, J., concurring in part and dissenting in part).

She argued that sections 10(a) and 10(c) should both be upheld because they protect children from indecent programming, regulate media that is “uniquely accessible to children,” and are permissive.<sup>49</sup> Justice Souter took a more equivocal stance, arguing that the differences between the channels are likely to blur as cable technology merges with other communications technology.<sup>50</sup>

Justice Kennedy, joined by Justice Ginsburg, demanded the application of strict scrutiny to all three content-based restrictions.<sup>51</sup> Following established First Amendment principles, Justice Kennedy invoked the public forum doctrine to defend his choice of strict scrutiny.<sup>52</sup> He described public access channels as designated public forums and leased access channels as “the practical equivalent of . . . common carriers,” which by definition serve as “conduits for the speech of others.”<sup>53</sup> Justice Kennedy then applied the strict scrutiny test, concluding that neither section 10(a) nor section 10(c) is narrowly tailored to achieve the government’s compelling interest in protecting children.<sup>54</sup> Moreover, although section 10(a) may be narrowly tailored to achieve the government’s interest in restoring cable operators’ discretion,<sup>55</sup> Justice Kennedy did not find that interest compelling enough to withstand strict scrutiny.<sup>56</sup>

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, also argued that the Court should have followed a specific test in evaluating sections 10(a) and 10(c) but came to a radically different conclusion than did Justice Kennedy.<sup>57</sup> Instead of evaluating the sections from the perspective of programmers’ First Amendment rights, Justice Thomas focused on the rights of cable operators.<sup>58</sup> He argued that the sections are constitutional because they restore First Amendment rights to operators and do not impermissibly restrict viewers’ rights.<sup>59</sup>

The plurality opinion’s balancing test attempted to take into account the First Amendment rights of both operators and programmers.<sup>60</sup> As Justices Kennedy and Thomas argued, however, such a test does not adequately protect the rights of either group because it is open to nu-

<sup>49</sup> *Id.* at 2403.

<sup>50</sup> See *id.* at 2401–02 (Souter, J., concurring). Justice Souter’s opinion contained the Court’s first citations to the World Wide Web. See *id.* at 2402 n.4 (explaining that broadcast television, cable television, and the Internet are already beginning to use a common receiver).

<sup>51</sup> See *id.* at 2404 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>52</sup> See *id.* at 2409–15.

<sup>53</sup> *Id.* at 2411.

<sup>54</sup> See *id.* at 2416–17.

<sup>55</sup> See *id.* at 2416.

<sup>56</sup> See *id.* Justice Kennedy found the government’s interest “too minimal to justify the law” because the transmission of sexually explicit programming is not forced speech and because the law did not restore operators’ discretion over all types of programming. *Id.*

<sup>57</sup> See *id.* at 2422 (Thomas, J., dissenting).

<sup>58</sup> See *id.* at 2420–22, 2425.

<sup>59</sup> See *id.* at 2422–24.

<sup>60</sup> See *Denver Area*, 116 S. Ct. at 2386 (plurality opinion).

merous interpretations and is easily manipulated.<sup>61</sup> The Court should have labeled both leased access and public access channels public forums and then applied strict scrutiny to section 10's content-based speech restrictions. This traditional First Amendment approach would have protected programmers' and viewers' access to these virtual parks and streets while implicitly affirming that cable operators enjoy full First Amendment rights when sending programs over nonleased, nonpublic access channels.

Numerous commentators have argued that the Court must use specific tests and categories of analysis in order to protect First Amendment rights.<sup>62</sup> These tests and categories define the scope of the rights, thereby preventing the Court from appearing overly legislative and minimizing confusion about which speech receives First Amendment protection. Justice Breyer's balancing test serves neither of these functions. By allowing the plurality to choose freely between competing speech interests, the balancing test bolsters the argument that the Court should simply defer to Congress.<sup>63</sup> Additionally, although the test likely will have little or no precedential value,<sup>64</sup> it raises questions about the meaning and future application of existing standards.<sup>65</sup> The test could be interpreted either as a new test or as an application of an old test<sup>66</sup> because Justice Breyer did not explain how his test related to existing standards. Justice Breyer's test therefore provides courts with little or

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<sup>61</sup> See *id.* at 2405–07 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2422 (Thomas, J., dissenting).

<sup>62</sup> See, e.g., Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 113–21; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 298–305 (1981). Other commentators warn, however, that courts may be tempted to shape the facts to fit the rule. See, e.g., Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 694–96 (1983); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 955–58, 961–62 (1978). Justice Thomas's approach, which ignored the selectiveness of the government's alleged restoration of cable operators' editorial control, illustrates this problem. See *Denver Area*, 116 S. Ct. at 2419 (Thomas, J., dissenting).

<sup>63</sup> See Archibald Cox, *The Supreme Court, 1979 Term — Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 73 (1980). Justice Kennedy echoed this view. See *Denver Area*, 116 S. Ct. at 2407 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>64</sup> Indeed, Justice Breyer explicitly denied that he was establishing a test for use in future cases. See *Denver Area*, 116 S. Ct. at 2385 (plurality opinion).

<sup>65</sup> See *id.* at 2407 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>66</sup> Justice Breyer's analysis could be interpreted as positing a new "close scrutiny" test under which governmental speech regulations are permissible if they "address extraordinary problems . . . without imposing an unnecessarily great restriction on speech." *Denver Area*, 116 S. Ct. at 2385 (plurality opinion). Alternatively, because Justice Breyer did not explicitly affirm cable operators' complete editorial control over the contents of their channels, his analysis could be interpreted as conforming to the Court's past treatment of broadcast restrictions. Compare *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969) (upholding restrictions on broadcasters' editorial control), with *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (affirming newspaper editors' complete editorial control over the contents of their newspapers).

no guidance on when to apply balancing tests, when to apply existing standards, and when to apply existing standards modified by the reasoning behind Justice Breyer's balancing test.

The Court could have grounded its review of section 10's speech restrictions in established First Amendment doctrine by labeling public access and leased access channels public forums. This label would have allowed the Court to consider the interests of both programmers and cable operators, as urged by Justice Breyer, because it would have required the Court to apply strict scrutiny to section 10's content-based speech restrictions.<sup>67</sup> As such, it would have ensured that operators' speech would not encroach on programmers' speech on access channels and that programmers' speech would not encroach on operators' speech on all other channels.

Public access and leased access channels have the same characteristics that the Court has frequently ascribed to public forums.<sup>68</sup> Such channels qualify as traditional public forums<sup>69</sup> because they provide individuals with opportunities to reach the types of audiences that historically met in parks and streets.<sup>70</sup> Specifically, these channels may provide opportunities for the lone dissenter to voice her views in earshot of the public at large — a function formerly served by parks.<sup>71</sup> Although public access and leased access channels have not "immorally been held in trust for the use of the public,"<sup>72</sup> these channels have been open for public speech ever since cable began to expand in the 1960s.<sup>73</sup> Even if leased and public access channels are not old enough to be traditional public forums, they still very likely meet the definition of designated public forums<sup>74</sup> because communities specifically chose these channels as a medium for the promotion of speech.<sup>75</sup>

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<sup>67</sup> Content-based restrictions on speech in public forums are subject to strict scrutiny. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

<sup>68</sup> See, e.g., *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

<sup>69</sup> The Court has labeled streets, sidewalks, and parks traditional public forums. See *Perry*, 460 U.S. at 45.

<sup>70</sup> See H.R. REP. NO. 98-934, at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667 ("[Public access channels are] the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.").

<sup>71</sup> Cf. L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 243–45 (discussing how speech provided through newspapers and traditional television differs from the speech of the lone dissenter).

<sup>72</sup> *Hague*, 307 U.S. at 515.

<sup>73</sup> See Reply Brief for Petitioners Alliance for Community Media at 3 n.1, *Denver Area* (No. 95-227), available in 1996 WL 63305.

<sup>74</sup> Designated public forums are areas that the government has opened up for public speech. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

<sup>75</sup> See *Denver Area*, 116 S. Ct. at 2394 (plurality opinion); DANIEL L. BRENNER, MONROE E. PRICE & MICHAEL I. MEYERSON, *CABLE TELEVISION AND OTHER NONBROADCAST VIDEO* § 6.04[1], at 6-34, § 6.05[1], at 6-52 & n.11 (1996).

In light of these characteristics, Justice Breyer's three reasons for rejecting the public forum label<sup>76</sup> are unconvincing. Justice Breyer first argued that the public forum analogy could only be partial because the technology of cable television is rapidly evolving.<sup>77</sup> However, leased access and public access channels qualify as public forums because of changing technology, not in spite of it. The dynamic nature of cable forces Congress to take an active role in ensuring continued access for the public. Congress assumed this role by creating leased and public access channels, thereby providing independent commercial and noncommercial speech and viewing opportunities.<sup>78</sup> The Court should recognize the necessity of such legislative action and permit Congress to create public forums in response to technological advances.

Justice Breyer's second reason for rejecting the public forum label — that the Court has not yet developed clear rules for all types of speech restrictions within such forums<sup>79</sup> — should not affect Congress's ability to create a public forum in the cable context. Admittedly, the Court has not determined whether governmental decisions to dedicate public forums to one type of content, to the exclusion of other types of content, should be subject to strict or heightened scrutiny.<sup>80</sup> Yet the Court could have avoided the question altogether in this case; Congress did not create limited public forums when it passed section 10. Rather, section 10 represents Congress's attempt to remove protection from one type of speech within the unlimited public forums that it created when it mandated leased and public access channels in 1984.

Finally, this public forum label does matter, despite Justice Breyer's protestations,<sup>81</sup> because its accompanying rules prevent subjective balancing like the plurality's. Justice Breyer's analysis resembles a public forum analysis because he relied so heavily on the history of public access channels.<sup>82</sup> Nonetheless, because Justice Breyer also considered the relative scarcity of sexually explicit programs on public access channels,<sup>83</sup> his approach provides no assurance that public access channels

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<sup>76</sup> See *Denver Area*, 116 S. Ct. at 2388–89 (plurality opinion).

<sup>77</sup> See *id.*

<sup>78</sup> The Court has ruled that public forums do not have to provide physical gathering places or opportunities for face-to-face discourse. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995).

<sup>79</sup> See *Denver Area*, 116 S. Ct. at 2389 (plurality opinion).

<sup>80</sup> See *id.* The Court has ruled that designated public forums may be of either limited or unlimited character, but the Court's determinations of this character have hinged on whether the forums were open to all of the public or only part of the public. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976).

<sup>81</sup> See *Denver Area*, 116 S. Ct. at 2389 (plurality opinion).

<sup>82</sup> See *id.* at 2394–95.

<sup>83</sup> See *id.* at 2395–96.

will continue to enjoy First Amendment protection if they begin showing programs that are more sexually explicit.<sup>84</sup>

Of course, applying the public forum label would eliminate cable operators' editorial control over public access and leased access channels.<sup>85</sup> However, this result does not weaken the argument for labeling the channels public forums, because the public forum label would reinforce cable operators' complete editorial control in other areas. Indeed, although the public forum label is a declaration of programmers' rights to protected speech, it does not require the Court to disregard cable operators' rights.<sup>86</sup> Rather, labeling leased and public access channels public forums is an implicit affirmation of cable operators' right to editorial control over all nonleased, nonpublic access channels. Ultimately, such an affirmation would, as Justice Thomas urged, endow cable operators with broad First Amendment rights similar to those of newspaper editors.<sup>87</sup> Furthermore, the public forum label would ensure that the scarcity rationale used to justify restrictions on television broadcasters' speech<sup>88</sup> would be clearly inapplicable to cable operators' speech. Cable can overcome the scarcity problem only if access rights exist and all citizens may use the cable medium.

Although the test proposed by Justice Thomas also appears to protect cable operators' rights, it does not offer a legitimate alternative to the strict scrutiny test that accompanies the public forum label.<sup>89</sup> Justice Thomas's choice of an intermediate scrutiny test that would evaluate sections 10(a) and 10(c) as enhancements of cable operators' speech rather than restrictions on access programmers' speech is flawed because sections 10(a) and 10(c) do not restore cable operators' editorial control over all speech, but only over speech that Congress disfavors. In addition, Justice Thomas's argument is not so much a defense of sections 10(a) and 10(c) as it is a challenge to access channels in general. Although the Court would most likely respond to this challenge by ap-

<sup>84</sup> If there were more sexually explicit programs on public access channels, Justice Breyer's balancing test would likely tip in favor of upholding section 10(c) because the prong of his test that considers the need to protect children would have more weight. *See id.* at 2396–97. This analysis suggests that Justice Breyer may be implicitly adopting Justice Stevens's view, first outlined in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), that indecent and offensive speech is less worthy of First Amendment protection. *See id.* at 744–48 (plurality opinion).

<sup>85</sup> *See Denver Area*, 116 S. Ct. at 2428 (Thomas, J., dissenting).

<sup>86</sup> Indeed, if the Court were not concerned about cable operators' rights, it could apply strict scrutiny to the content-based restrictions of sections 10(a) and 10(c) without also labeling cable channels public forums.

<sup>87</sup> *See Denver Area*, 116 S. Ct. at 2420 (Thomas, J., dissenting).

<sup>88</sup> The Court has held that television broadcasters may be forced to air the speech of others because of the scarcity of broadcasting frequencies. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969).

<sup>89</sup> Justice Thomas's test may suggest that a rule-based analysis is just as indeterminate or manipulable as Justice Breyer's ad hoc balancing test. However, Justice Thomas came to a conclusion exactly opposite the conclusion resulting from the public forum label by misapplying the test he proposed.

plying the intermediate scrutiny that Justice Thomas advocated,<sup>90</sup> the provisions mandating leased and public access channels would probably pass this test: the government's interest in limiting the monopoly power of cable operators is important,<sup>91</sup> and the provisions do not burden more speech than necessary to achieve that interest.<sup>92</sup> Therefore, Justice Thomas's proposed test, unlike the public forum strict scrutiny test, does little to protect the speech interests of operators in the current cable environment.

By not affixing the public forum label to public access and leased access channels, the *Denver Area* Court missed the opportunity to protect the rights of both cable operators and programmers. Justice Breyer's balancing test leaves speech vulnerable to restriction unless five Justices think that it "deserves" protection.<sup>93</sup> By discouraging judicial manipulation and enabling local authorities to predict which speech the Court will find worthy of protection, the public forum label would protect nonaffiliated speech from cable operator monopolies and shield cable operators from unnecessary government intrusion. Consequently, protection of speech would hinge on established rights rather than on fears of sex at the turn of a dial.

#### F. Seventh Amendment

1. *Erie Doctrine*. — The abstract principles that shape American law may float through the minds of professors and students with little grounding in reality, but inevitably, courts must reduce these ethereal ideas to earthbound application. The concept of dual sovereignty is no exception. One of the more complex areas of civil procedure arises from a deceptively simple question: "In a diversity case, what body of law, federal or state, should the court apply?"<sup>1</sup> Consideration of this question entered its modern era in 1938, when the Supreme Court held, in *Erie Railroad Co. v. Tompkins*,<sup>2</sup> that a federal court must apply the substantive statutory and decisional law of the appropriate state, except in matters governed by the Constitution or by an act of

<sup>90</sup> See *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994).

<sup>91</sup> See *id.* at 2474 (Stevens, J., concurring) (stating that most of the 60% of Americans who are cable subscribers receive video programming solely from their local cable system); H.R. REP. NO. 98-934, at 30-31 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667-68.

<sup>92</sup> The D.C. Circuit recently came to this conclusion. See *Time Warner Entertainment Co. v. FCC*, Nos. 93-5349, 93-1266, 93-1384, 93-5350 & 93-5351, 1996 WL 491803, at \*12, \*13-\*14 (D.C. Cir. Aug. 30, 1996).

<sup>93</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 775-77 (1978) (Brennan, J., dissenting).

<sup>1</sup> Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19, 20 (1995). Although application of the *Erie* doctrine typically occurs when a federal court sits in diversity jurisdiction, *Erie* may be relevant whenever Congress has not clearly indicated that federal courts should apply federal law. See Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1097 n.36 (1989).

<sup>2</sup> 304 U.S. 64 (1938).

Congress.<sup>3</sup> The *Erie* doctrine has been fairly settled since *Hanna v. Plumer*,<sup>4</sup> in which the Court established a clear analytical framework to deal with conflicts between a state law and the Federal Rules of Civil Procedure.<sup>5</sup> Last Term, in *Gasperini v. Center for Humanities, Inc.*,<sup>6</sup> the Supreme Court had the opportunity to clarify one of the areas of *Erie* jurisprudence that remained obscure: the conflict between a state statute and a judge-made federal practice.<sup>7</sup> Prior to *Gasperini*, the dominant precedent addressing this type of conflict was *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,<sup>8</sup> in which the Court balanced state and federal interests to determine which law to apply.<sup>9</sup> Rather than applying the *Byrd* balancing test, the Court in *Gasperini* adopted an analytical method characteristic of earlier *Erie* cases, especially *Guaranty Trust Co. v. York*,<sup>10</sup> that emphasized the importance of federal courts' reaching the same outcome as would state courts.<sup>11</sup> As a result of this surprising change in *Erie* jurisprudence, the preferred method for determining the proper law to be applied in cases that do not implicate a federal statute or Federal Rule of Civil Procedure is now unclear.

William Gasperini worked for seven years as a journalist for CBS and the Christian Science Monitor in Central America.<sup>12</sup> In addition, he occasionally derived income from photographs he took while he was there.<sup>13</sup> In 1990, Gasperini contracted to lend 300 transparencies of these photographs to the Center for Humanities, Inc.<sup>14</sup> The Center agreed to return the transparencies, but instead lost all 300 of them.<sup>15</sup>

Gasperini brought suit in the United States District Court for the Southern District of New York under diversity jurisdiction.<sup>16</sup> The Center admitted liability; thus, the jury considered only the issue of

<sup>3</sup> See *id.* at 78–80. Federal courts must follow the Federal Rules of Civil Procedure, which were enacted in the same year that the Court decided *Erie*. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

<sup>4</sup> 380 U.S. 460 (1965).

<sup>5</sup> See *id.* at 467–74. *Hanna* held that a Federal Rule of Civil Procedure trumps state law if the Rule is constitutional, within the Rules Enabling Act, 28 U.S.C. § 2072 (1994), and applicable to the situation at bar. See *id.* at 463–64. Thus, *Hanna* created a bright-line rule in favor of the application of federal procedural rules.

<sup>6</sup> 116 S. Ct. 2211 (1996).

<sup>7</sup> See 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4511, at 311 (2d ed. 1996).

<sup>8</sup> 356 U.S. 525 (1958).

<sup>9</sup> See *id.* at 536–40.

<sup>10</sup> 326 U.S. 99 (1945).

<sup>11</sup> See *Gasperini*, 116 S. Ct. at 2220 (analyzing whether the state standard was “outcome-affective”).

<sup>12</sup> See *id.* at 2215.

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

<sup>14</sup> See *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427, 428 (2d Cir. 1995).

<sup>15</sup> See *Gasperini*, 116 S. Ct. at 2215–16.

<sup>16</sup> See *id.* at 2216.

compensatory damages.<sup>17</sup> Gasperini's expert witness testified that the "industry standard" value for each lost transparency was \$1500, and the jury accordingly awarded Gasperini \$450,000.<sup>18</sup> Arguing that the damages were excessive, the Center moved for a new trial.<sup>19</sup> The District Court denied the motion without comment.<sup>20</sup>

Writing for the Court of Appeals for the Second Circuit, Judge Calabresi vacated the jury's verdict and ordered a new trial unless Gasperini would agree to accept a damage award of \$100,000.<sup>21</sup> Because jurisdiction was based on diversity of citizenship, the court applied the state standard of review,<sup>22</sup> codified in § 5501(c) of the New York Civil Practice Law and Rules: "the appellate division shall determine that an award is excessive or inadequate if it *deviates materially* from what would be reasonable compensation."<sup>23</sup> Emphasizing the jury's failure to consider all the relevant factors,<sup>24</sup> the court held that the jury's verdict deviated materially from reasonable compensation and remitted the damages accordingly.<sup>25</sup>

Writing for a majority of the Supreme Court, Justice Ginsburg<sup>26</sup> vacated the judgment of the Second Circuit and instructed that court to remand the case to the district court so that the trial judge could apply § 5501(c) in the first instance.<sup>27</sup> Justice Ginsburg began her analysis by briefly summarizing the history of relevant New York law. She noted that, prior to the enactment of § 5501(c), state and federal courts in New York applied the same standard to analyze the reasonableness of damage awards: whether the award was "so exorbitant that it 'shocked the conscience of the court.'"<sup>28</sup> With the enactment of § 5501(c) in 1986, however, the New York legislature established the "deviates materially" standard.<sup>29</sup>

Next, the Court considered whether federal courts sitting in diversity jurisdiction should apply the New York standard. After a brief

<sup>17</sup> See *id.*

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

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

<sup>20</sup> See *id.*

<sup>21</sup> See *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427, 431 (2d Cir. 1995).

<sup>22</sup> See *id.* at 430.

<sup>23</sup> N.Y. C.P.L.R. 5501(c) (McKinney Supp. 1995) (emphasis added).

<sup>24</sup> See *Gasperini*, 66 F.3d at 429. Interpreting New York law, Judge Calabresi declared that, although the jury correctly valued the transparencies based upon the "industry standard," the jury should also have considered whether to discount their value because not all of them were equally original and because Gasperini had a low earning level as a photographer. See *id.*

<sup>25</sup> See *id.* at 431.

<sup>26</sup> Justices O'Connor, Kennedy, Souter, and Breyer joined Justice Ginsburg's opinion.

<sup>27</sup> See *Gasperini*, 116 S. Ct. at 2225.

<sup>28</sup> *Id.* at 2217 (quoting *Consorti v. Armstrong World Indus., Inc.*, 64 F.3d 781, superseded by 72 F.3d 1003, 1012-13 (2d Cir. 1995)).

<sup>29</sup> See *id.* Justice Ginsburg also observed that the state legislature had intended the new standard to "invite[e] more careful appellate scrutiny" of damage awards, *id.* at 2218, and that the "deviates materially" standard applied both to state appellate and trial courts, see *id.*

review of *Erie* jurisprudence, Justice Ginsburg found that § 5501(c) is both substantive and procedural.<sup>30</sup> She declared that application of the federal “shock the conscience” test in lieu of the “deviates materially” standard would result in “‘substantial’ variations between state and federal [money judgments].”<sup>31</sup> The Court concluded that, in order to prevent forum-shopping and the inequitable administration of law, the federal courts located in New York should apply § 5501(c).<sup>32</sup> However, the Court declared that “[p]arallel application of § 5501(c) at the federal appellate level would be out of sync with the federal system’s division of trial and appellate court functions, an allocation weighted by the Seventh Amendment.”<sup>33</sup> Attempting to resolve this conflict through compromise, the Court endeavored to “give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases.”<sup>34</sup>

In order to ascertain the manner in which federal courts could apply § 5501(c), Justice Ginsburg first discussed the scope of appellate review permitted under the Re-examination Clause of the Seventh Amendment.<sup>35</sup> Noting that the Seventh Amendment allows re-examination as it existed at common law, Justice Ginsburg undertook a brief historical survey to demonstrate that the power of *trial judges* to grant new trials, both by “overturning verdicts for excessiveness and ordering a new trial . . . conditioned on the verdict winner’s refusal to agree to a reduction (remittitur),” is both well established and compatible with the Seventh Amendment.<sup>36</sup> In contrast, Justice Ginsburg recognized that the Court had never “expressly [held] that the Seventh Amendment allows *appellate* review of a district court’s denial of a motion to set aside an award as excessive.”<sup>37</sup> The Court noted, however, that federal appellate courts do review such denials, under an “abuse of discretion” standard, and that the Court had *implicitly* approved such review.<sup>38</sup> Justice Ginsburg explicitly approved these lower court decisions and declared that the Seventh Amendment does

<sup>30</sup> Justice Ginsburg concluded that § 5501(c) is substantive because it “controls how much a plaintiff can be awarded” and procedural because it “assigns decisionmaking authority to New York’s Appellate Division.” *Id.* at 2219.

<sup>31</sup> *Id.* at 2221 (alteration in original) (quoting *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965)) (internal quotation marks omitted).

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

<sup>33</sup> *Id.* at 2219.

<sup>34</sup> *Id.*

<sup>35</sup> See *id.* at 2222–24. The Seventh Amendment, which applies in federal court but not in state court, *see id.* at 2222, reads in pertinent part: “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law,” U.S. CONST. amend. VII.

<sup>36</sup> *Gasperini*, 116 S. Ct. at 2222.

<sup>37</sup> *Id.* at 2223 (emphasis added) (quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 n.25 (1989)) (internal quotation marks omitted).

<sup>38</sup> See *id.* at 2223–24.

not preclude “abuse of discretion” appellate review of trial court decisions not to set aside damage awards.<sup>39</sup>

Having established that federal appellate courts could review under an “abuse of discretion” standard but not under the “deviates materially” standard, the Court argued that the key to accommodating both the state and federal interests was to recognize “that the federal *district court* is capable of performing the checking function, *i.e.*, that court can apply the State’s ‘deviates materially’ standard in line with New York case law.”<sup>40</sup> Thus, although the Second Circuit had correctly interpreted New York law, Justice Ginsburg vacated that court’s judgment under the Re-examination Clause and ordered the case remanded so that the district court could apply the § 5501(c) standard in the first instance.<sup>41</sup>

Justice Stevens dissented. Although he agreed that federal courts must apply § 5501(c),<sup>42</sup> he “would not [have] require[d] the District Court to repeat a task that ha[d] already been well-performed by the reviewing court.”<sup>43</sup> Justice Stevens first asserted that *Gasperini* did not implicate the Re-examination Clause at all because the question whether damages are excessive is a mixed question of law and fact.<sup>44</sup> He argued further that, even if the appellate review in *Gasperini* implicated the Seventh Amendment, such review was consistent with the Re-examination Clause because it was performed “according to the rules of the common law.”<sup>45</sup> To support this contention, Justice Stevens conducted a historical survey of relevant Seventh Amendment case law and concluded that the Re-examination Clause permits a federal appellate court to exercise even *de novo* review of a jury award.<sup>46</sup>

Justice Scalia penned a colorful dissent in which he attacked the Court’s reasoning on almost every issue.<sup>47</sup> He railed against the majority opinion, terming it an “unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights — the Seventh Amendment’s prohibition on appellate reexamination of civil jury awards.”<sup>48</sup> After noting that the fear of appellate nullification of jury awards motivated the passage of the Re-examina-

<sup>39</sup> See *id.* at 2224.

<sup>40</sup> *Id.* (emphasis added). The Court contended that “practical reasons” supported this conclusion, in particular the district court’s comparatively intimate connection with the actual trial. *Id.* at 2225.

<sup>41</sup> See *id.* at 2225.

<sup>42</sup> See *id.* at 2225–26 (Stevens, J., dissenting).

<sup>43</sup> *Id.* at 2226.

<sup>44</sup> See *id.* at 2227.

<sup>45</sup> *Id.* (quoting U.S. CONST. amend. VII) (internal quotation marks omitted). In reaching this conclusion, Justice Stevens analogized the modern appellate court to a common law English court that ruled on new trial motions. See *id.* at 2227–28.

<sup>46</sup> See *id.* at 2229.

<sup>47</sup> Chief Justice Rehnquist and Justice Thomas joined Justice Scalia’s dissent.

<sup>48</sup> *Gasperini*, 116 S. Ct. at 2230 (Scalia, J., dissenting).

tion Clause,<sup>49</sup> Justice Scalia emphasized that the common law permitted review of judgments only for errors of law, a category that did not include claims of excessive damages.<sup>50</sup> After further taking the Court to task for the meagerness of its survey of relevant precedent,<sup>51</sup> for its failure to distinguish between compensatory and punitive damages,<sup>52</sup> and for its reliance on flawed appellate decisions,<sup>53</sup> Justice Scalia concluded his analysis of the Re-examination Clause issue by declaring that the majority “frankly abandon[ed] any pretense at faithfulness to the common law.”<sup>54</sup>

Turning his attention to the *Erie* issue, Justice Scalia discussed several reasons why no federal court — neither trial nor appellate — should apply § 5501(c). First, Justice Scalia argued that its application by federal courts would disrupt the federal allocation of duties between judges and juries<sup>55</sup> and that “federal standards determine whether the award exceeds what is lawful to such degree that it may be set aside by order for new trial or remittitur.”<sup>56</sup> Second, Justice Scalia asserted that the majority “commit[ted] the classic *Erie* mistake of regarding whatever changes the outcome as substantive”<sup>57</sup> while simultaneously questioning whether the application of the federal standard would produce disparate outcomes in state and federal courts.<sup>58</sup>

After attacking the majority’s *Erie* analysis, Justice Scalia argued that there was no *Erie* issue in *Gasperini* in any case, insisting that Federal Rule of Civil Procedure 59 establishes an applicable federal standard for determining when excessive damages should lead to a grant of a new trial.<sup>59</sup> Justice Scalia argued that, under *Hanna* and its progeny, the Court had to apply this federal rule.<sup>60</sup>

The Court’s analysis in *Gasperini* consisted of two steps. First, the Court performed an *Erie* analysis and concluded that § 5501(c) should

<sup>49</sup> See *id.* at 2231 & n.1.

<sup>50</sup> See *id.* at 2231–32. Justice Scalia also disputed the usefulness of Justice Stevens’s analogy between the modern appellate court and an English forebear. See *id.* at 2233–34.

<sup>51</sup> See *id.* at 2234–35.

<sup>52</sup> See *id.* at 2235.

<sup>53</sup> See *id.* at 2235–36.

<sup>54</sup> *Id.* at 2236.

<sup>55</sup> See *id.* at 2236–37 (citing *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958)).

<sup>56</sup> *Id.* at 2237.

<sup>57</sup> *Id.* at 2238.

<sup>58</sup> See *id.* at 2238–39. Further, Justice Scalia declared that, even if the adoption of § 5501(c) truly were outcome determinative, the majority’s rule would actually encourage forum-shopping because federal appellate courts, unlike their state counterparts, will still use an “abuse of discretion” standard when reviewing the size of jury awards. See *id.* at 2239.

<sup>59</sup> See *id.* Justice Scalia noted that district courts in the Second Circuit have interpreted that rule to permit a new trial if “letting the verdict stand would result in a ‘miscarriage of justice.’” *Id.* (quoting *Koerner v. Club Mediterranean, S.A.*, 833 F. Supp. 327, 331 (S.D.N.Y. 1993) (quoting *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978))) (internal quotation marks omitted).

<sup>60</sup> See *id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)).

apply, rather than the federal "shocks the conscience" test.<sup>61</sup> Second, the Court tailored the application of § 5501(c) to the limitations on appellate review imposed by the Re-examination Clause.<sup>62</sup> The Court supported the first step of its analysis by asserting that *Erie* prohibits application of a federal standard that would allow a recovery "significantly larger than the recovery that would have been tolerated in state court."<sup>63</sup> This analysis clearly relies on *Guaranty Trust Co. v. York*<sup>64</sup> and its progeny, which emphasized that a federal court sitting in diversity jurisdiction should achieve "substantially the same" outcome as would a state court.<sup>65</sup> The *Gasperini* Court's reliance on this line of cases presents a striking contrast to modern *Erie* trends. Even more surprisingly, the Court did not use the balancing test established in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,<sup>66</sup> a case that involved a conflict similar to the one in *Gasperini*.<sup>67</sup> In fact, the Court did not even refer to *Byrd* until the second step in its analysis, after it had already determined which law to apply.<sup>68</sup> *Gasperini* thus adds confusion to an already perplexing area of legal doctrine<sup>69</sup> and casts doubt on the validity of recent *Erie* jurisprudence.<sup>70</sup>

Despite the frequency with which federal courts confront conflicts between state and federal laws, "there continues to be no workable doctrine governing [these conflicts] in the absence of a clearly applicable Federal Rule of Civil Procedure or [federal] statute."<sup>71</sup> The confusion results from the Court's vacillation between two distinct approaches to *Erie* analyses. This analytical bifurcation reflects federal courts' struggle to reconcile two powerful and conflicting forces: "the constitutional power of the states to regulate the relations among their citizens . . . [and] the constitutional power of the federal government to determine how its courts are to be operated."<sup>72</sup>

One line of precedent is "federal-friendly." Courts following this approach focus on the distinctions between the federal and state judi-

<sup>61</sup> See *Gasperini*, 116 S. Ct. at 2220–21.

<sup>62</sup> See *id.* at 2221–25.

<sup>63</sup> *Id.* at 2221.

<sup>64</sup> 326 U.S. 99 (1945).

<sup>65</sup> *Id.* at 109.

<sup>66</sup> 356 U.S. 525 (1958).

<sup>67</sup> Like *Gasperini*, *Byrd* involved the allocation of decisionmaking functions between judge and jury. See *id.* at 537–38.

<sup>68</sup> See *Gasperini*, 116 S. Ct. at 2221.

<sup>69</sup> See, e.g., John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087, 1089 (1992) (describing *Erie* jurisprudence as a "swamp of confusion").

<sup>70</sup> See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM II (4th ed. Supp. 1996) (wondering whether *Gasperini* invalidated *Byrd*'s analytical structure).

<sup>71</sup> 19 WRIGHT, MILLER & COOPER, *supra* note 7, § 4511, at 311. Even the Supreme Court has admitted that a court attempting to resolve a conflict that does not involve a federal rule or statute must make a "relatively unguided *Erie* choice." *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

<sup>72</sup> 19 WRIGHT, MILLER & COOPER, *supra* note 7, § 4511, at 342–43.

cial systems<sup>73</sup> and give maximal effect to both “the Constitution’s grant of power over federal procedure [and] Congress’ attempt to exercise that power in the [Rules] Enabling Act.”<sup>74</sup> *Erie* declared that federal courts must apply the *substantive* laws of the appropriate state in the absence of a federal statute or constitutional provision.<sup>75</sup> In *Sibbach v. Wilson & Co., Inc.*,<sup>76</sup> the Court defined the parameters of the substance-procedure dichotomy implicit in *Erie*.<sup>77</sup> As one commentator observed, under *Sibbach*, a rule is procedural if it pertains to litigation and substantive if it creates “enforceable standards of behavior pertaining to everyday life.”<sup>78</sup> Because these definitions made it difficult for a court to apply state law instead of a Federal Rule of Civil Procedure or other federal procedural device, the *Sibbach* Court’s approach favored federal interests.

*Sibbach* was an early *Erie* case, and the influence of its “federal-friendly” approach waned for a period of time subsequent to *York*.<sup>79</sup> Perhaps in reaction to the encroachment on federal interests encouraged by *York*’s focus on achieving similar outcomes in state and federal courts,<sup>80</sup> the Court revived the “federal-friendly” approach in *Byrd* and *Hanna*. Because it did not overrule *York*, however, the Court could no longer rest its analysis solely on *Sibbach*’s distinction between substance and procedure. Instead, the Court in both *Byrd* and *Hanna* stressed the importance of the federal judiciary as “an independent system for administering justice to litigants who properly invoke its jurisdiction.”<sup>81</sup> Until *Gasperini*, these cases appeared to be the controlling *Erie* precedent.

*Guaranty Trust Co. v. York* engendered a “state-friendly” line of precedent. Decided after *Sibbach* but before *Byrd* and *Hanna*, *York* expanded the *Erie* doctrine into a general principle of federalism<sup>82</sup> that facilitated a greater displacement of federal interests than did *Sibbach*. The *York* Court de-emphasized the substance-procedure distinction and declared that “the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a

<sup>73</sup> See *Hanna*, 380 U.S. at 473; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

<sup>74</sup> *Hanna*, 380 U.S. at 474.

<sup>75</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>76</sup> 312 U.S. 1 (1941).

<sup>77</sup> See *id.* at 14. The *Sibbach* Court held that, even if a Federal Rule of Civil Procedure affects the substance of the matter at bar, it is essentially procedural if it addresses “the judicial process for enforcing rights and duties.” *Id.*

<sup>78</sup> *Ides, supra* note 1, at 32.

<sup>79</sup> See, e.g., *Woods v. Interstate Realty Co.*, 337 U.S. 535, 536–38 (1949); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949).

<sup>80</sup> See *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

<sup>81</sup> *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958); accord *Hanna v. Plumer*, 380 U.S. 460, 473 (1965).

<sup>82</sup> See *Ides, supra* note 1, at 34.

State court.<sup>83</sup> This principle became known as the “outcome-determination” test.<sup>84</sup> Strictly speaking, of course, “every procedural variation is ‘outcome determinative.’”<sup>85</sup> To the extent that judges applying *York* seek identity between outcomes in state and federal courts, the *York* inquiry is less friendly to federal interests than the analysis derived from *Sibbach*, *Byrd*, and *Hanna*. Indeed, by reconceptualizing the aim of *Erie* from the preservation of the states’ power to promulgate substantive law to the creation of outcome equivalence between two separate court systems,<sup>86</sup> the “state-friendly” approach enabled the Court to apply state law despite a conflicting Federal Rule of Civil Procedure<sup>87</sup> or other strong federal interest.<sup>88</sup>

The *Gasperini* Court’s reluctance to rely on “federal-friendly” precedent, especially *Byrd*, reveals a fundamental change in the Court’s *Erie* posture. *Byrd* and *Gasperini* dealt with similar issues. Both cases involved conflicts that implicated the allocation of responsibilities between judge and jury;<sup>89</sup> neither case implicated a Federal Rule of Civil Procedure or a federal statute.<sup>90</sup> The first issue in *Gasperini* was whether a federal court should apply the New York “deviates materially” standard or the federal “shocks the conscience” test.<sup>91</sup> Arguing from the *York* tenet that *Erie* prohibits substantially different outcomes between state and federal courts, the *Gasperini* Court applied § 5501(c).<sup>92</sup> In contrast, the *Byrd* Court used a balancing test to weigh the importance of the policies supporting the state and federal rules.<sup>93</sup> As a result of this balancing, the *Byrd* Court applied the federal practice because the “distribut[ion of] trial functions between judge and jury” is “[a]n essential characteristic” of the federal system.<sup>94</sup>

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<sup>83</sup> *York*, 326 U.S. at 109.

<sup>84</sup> See *Gasperini*, 116 S. Ct. at 2219.

<sup>85</sup> *Hanna*, 380 U.S. at 468.

<sup>86</sup> See *Ides*, *supra* note 1, at 48–49.

<sup>87</sup> See *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949).

<sup>88</sup> See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 536–38 (1949) (allowing a state door-closing statute to limit the scope of congressionally granted federal diversity jurisdiction).

<sup>89</sup> See *Gasperini*, 116 S. Ct. at 2221; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537–38 (1958). *Byrd* involved a conflict over whether employment status should be determined by a judge, as under state law, or by a jury, as under federal law. See *id.* at 531–37.

<sup>90</sup> Justice Scalia argued that Federal Rule of Civil Procedure 59 provides a federal standard for granting new trials due to excessive verdicts. See *Gasperini*, 116 S. Ct. at 2239 (Scalia, J., dissenting). The Court dismissed this argument in a footnote, asserting that, although the Rule allows a court to grant a new trial for excessive damages, the question whether damages are excessive falls under state law. See *Gasperini*, 116 S. Ct. at 2224 n.22.

<sup>91</sup> See *Gasperini*, 116 S. Ct. at 2220–21.

<sup>92</sup> See *id.* at 2221.

<sup>93</sup> See *Byrd*, 356 U.S. at 536–38.

<sup>94</sup> *Id.* at 537.

In so holding, the Court explicitly refused to adhere to a strict outcome-determination analysis.<sup>95</sup>

More strikingly, the *Gasperini* Court did not even address the importance of the federal allocation of judge-jury responsibilities or refer to *Byrd* at all until the second step of its analysis, when it had already decided to apply the state standard of review.<sup>96</sup> By deferring its consideration of *Byrd*, the Court not only eviscerated that case's balancing test, but also enabled itself to distinguish the conflicting precedent: "In *Byrd*, the Court faced a one-or-the-other choice . . . In [*Gasperini*], a choice of that order is not required . . ."<sup>97</sup> The Court's compromise strategy ignores the irreconcilable conflict between § 5501(c) and the federal "shocks the conscience" standard. The Court had to choose between these two standards, and it did so without the aid of *Byrd*.

The *Gasperini* Court's decision not to apply the *Byrd* balancing test was unexpected. Indeed, prior to *Gasperini*, commentators noted not only that *Byrd* is a "good starting place" when analyzing *Erie* conflicts that do not implicate a Federal Rule of Civil Procedure or federal statute,<sup>98</sup> but also that "[t]he most obvious context for applying the *Byrd* test is in cases involving conflicting state-federal attitudes regarding the relationship of judge and jury."<sup>99</sup> The *Gasperini* Court's choice not to rely on *Byrd* is especially surprising given that the Court could have justified the application of the state statute under the *Byrd* balancing test. The Court need only have declared that the state-interest side of the balance was weighted more heavily in *Gasperini* than in *Byrd*. For example, the state practice in *Byrd* allocated responsibilities based only on a "practical consideration" that was not "bound up with the definition of the rights and obligations of the parties."<sup>100</sup> In contrast, the New York legislature wanted to enact a substantive damage limitation when it enacted § 5501(c).<sup>101</sup> The *Gasperini* Court could easily have found the state interest to outweigh the federal interest under *Byrd*, then performed an identical Seventh Amendment analysis, and reached the same result. It simply chose not to do so.

*Gasperini* might have wide-ranging effects. First, on a fundamental level, *Gasperini* may signal a shift in the Court's approach to bal-

<sup>95</sup> See *id.* at 537–38. Indeed, the *Byrd* Court applied the federal practice despite its "assumption that the outcome of the litigation may [have been] substantially affected by whether the issue of immunity [was] decided by a judge or a jury." *Id.* at 539.

<sup>96</sup> See *Gasperini*, 116 S. Ct. at 2237 (Scalia, J., dissenting) (describing the Court's attention to the importance of the federal interests as "oddly circumscribed" because the majority only raised the issue when considering *appellate* review).

<sup>97</sup> *Gasperini*, 116 S. Ct. at 2224.

<sup>98</sup> 19 WRIGHT, MILLER & COOPER, *supra* note 7, § 4511, at 312.

<sup>99</sup> *Id.* § 4511, at 314.

<sup>100</sup> *Byrd*, 356 U.S. at 536.

<sup>101</sup> See *Gasperini*, 116 S. Ct. at 2217–18.

ancing state and federal power.<sup>102</sup> The Court's *Erie* analysis was more similar to the "state-friendly" analysis of *York* than to the "federal-friendly" analyses of more recent precedent such as *Byrd* and *Hanna*.<sup>103</sup> The *Gasperini* Court's retreat from *Hanna* and adoption of a "state-friendly" approach obviously will not dictate the outcome in every case, but the new mode of analysis does enhance the Court's ability to apply state practices, even in the face of powerful federal interests.

Second, because federal courts face an *Erie* analysis in every diversity action, the Supreme Court's new approach to *Erie* may have a profound effect on the attractiveness of diversity jurisdiction to litigants. Although Justice Scalia argued in *Gasperini* that the majority rule would encourage plaintiffs to seek out federal rather than state fora,<sup>104</sup> the opposite seems at least as likely. Risk-averse attorneys may be loath to avail themselves of a forum if they are uncertain which law — or even which analytical method — that forum will apply.<sup>105</sup>

Admittedly, some uncertainty is inherent in any *Erie* inquiry that does not involve a Federal Rule of Civil Procedure or a federal statute, for the court must balance conflicting principles of federalism anew in every such case. The outcome of such a conflict does not lend itself to easy prognostication; it is unlikely that today's Court could fashion a bright-line rule similar to the one in *Hanna* to resolve such conflicts. But given the importance of the underlying values, the Court should at least mitigate this innate uncertainty by adopting an analytical method, such as the *Byrd* balancing test, that consistently accommodates the ad hoc nature of these difficult *Erie* inquiries. By refusing to follow *Byrd*, the Court not only abandoned a useful analytical framework, but also squandered an opportunity to provide much-needed stability to a family of *Erie* conflicts that was, and remains, obscure.

2. *Scope of Right to a Jury Trial — Patents.* — Deceptively simple in its wording, the text of the Seventh Amendment mandates that,

<sup>102</sup> *Gasperini* may be part of a recent Supreme Court jurisprudential trend that favors state interests and limits federal power. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1131–32 (1996); *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995).

<sup>103</sup> In *Hanna*, the Court declared that "[t]he purpose of the Erie doctrine, even as extended in *York* and *Ragan*, was never to bottle up federal courts with 'outcome determinative' . . . stoppers when there are 'affirmative countervailing [federal] considerations.'" *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (alteration in original) (quoting *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)) (internal quotation marks omitted).

<sup>104</sup> See *Gasperini*, 116 S. Ct. at 2239 (Scalia, J., dissenting).

<sup>105</sup> A reduction in the number of cases brought in diversity jurisdiction is not necessarily a negative outcome. Indeed, many commentators have argued for a drastic reduction in diversity jurisdiction or even its complete eradication. See, e.g., Sub-Committee on Diversity Jurisdiction, *Report of the New York County Lawyers' Association Committee on the Recommendation of the Federal Courts Study Committee to Abolish Diversity Jurisdiction*, 158 F.R.D. 185, 187 (1995).

"[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."<sup>1</sup> The Supreme Court's Seventh Amendment jurisprudence, however, has been anything but straightforward or self-evident.<sup>2</sup> Because the Seventh Amendment does not create a right to jury trial but instead *preserves* the set of pre-existing jury trial rights already in place under common law in 1791, the Court has naturally engaged in a "historical" inquiry whenever questions concerning the scope of the Amendment's guarantee have arisen.<sup>3</sup> This approach has evolved into an accepted and well-settled "historical test" for determining which causes of action trigger the right to a jury trial.<sup>4</sup> One inquiry, however, for which a standardized test has *not* yet emerged involves whether a court may remove from the jury a particular trial decision or practice that arises *within* a cause of action that itself is subject to the Seventh Amendment without eviscerating the overall right to a jury trial.

Last Term, in *Markman v. Westview Instruments, Inc.*,<sup>5</sup> the Supreme Court ruled that, even though patent cases are subject to the Seventh Amendment guarantee to a jury trial, the practice of construing the claims of a patent falls exclusively within a court's province and outside the strictures of the Seventh Amendment jury trial guarantee.<sup>6</sup> Although the Court achieved a sound division of decisionmaking labor between judge and jury in patent suits, the Court's chain of reasoning contained one problematically weak link. In focusing upon the relevance of "appropriate" historical analogies for determining which contemporary trial *practices* fall within the scope of the Seventh Amendment,<sup>7</sup> the Court's decision signaled a troubling revival of the historical test's most formalistic elements. More importantly, the Court enunciated an approach that, if followed by future courts, could distort and ultimately narrow the scope of the jury trial guarantee.

Herbert Markman, an inventor, devised and patented an inventory control system capable of "monitor[sing] and report[sing] the status, location, and movement of clothing in a dry-cleaning establishment."<sup>8</sup> Markman later instituted an action for patent infringement against Westview Instruments, Inc., an electronics manufacturer, for its production and sale of a similar tracking system, and against Althon En-

<sup>1</sup> U.S. CONST. amend. VII.

<sup>2</sup> See, e.g., Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1005–07 (1992); Rachael E. Schwartz, "Everything Depends on How You Draw the Lines": An Alternative Interpretation of the Seventh Amendment, 6 SETON HALL CONST. L.J. 599, 603 (1996).

<sup>3</sup> See, e.g., 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302, at 17 (2d ed. 1995).

<sup>4</sup> See, e.g., *Curtis v. Loether*, 415 U.S. 189, 195–96 (1974).

<sup>5</sup> 116 S. Ct. 1384 (1996).

<sup>6</sup> See *id.* at 1387.

<sup>7</sup> See *id.* at 1390.

<sup>8</sup> *Id.* at 1388.

terprises, the operator of a dry-cleaning chain, for its use of Westview's allegedly infringing device.<sup>9</sup> At trial, the jury found that Westview had infringed Markman's patent.<sup>10</sup>

Upon Westview's deferred motion for judgment as a matter of law, however, the district court set aside the jury's verdict,<sup>11</sup> ruling that no infringement could be found under a proper construction of Markman's patent "claims" — the portion of the patent document that explicitly defines the scope of the patent's subject matter and thus the patent holder's rights in the invention.<sup>12</sup> More specifically, the district court concluded that the meaning of the term "inventory" in the allegedly infringed patent claims embraced "both cash inventory and the actual physical inventory of articles of clothing."<sup>13</sup> Consequently, Markman's claims necessarily failed to cover Westview's device, which tracked merely invoices and cash totals, but not actual items of clothing.<sup>14</sup>

On appeal, the Court of Appeals for the Federal Circuit affirmed,<sup>15</sup> upholding the lower court's interpretation of the term "inventory" in Markman's patent claims<sup>16</sup> and asserting, more generally, that "the interpretation and construction of patent claims . . . is a matter of law exclusively for the court."<sup>17</sup> It explicitly rejected Markman's contention that construing patent claims fell under the Seventh Amendment guarantee.<sup>18</sup>

In a unanimous opinion authored by Justice Souter, the Supreme Court affirmed, unequivocally declaring that "the construction of a patent, including terms of art within its claim, is exclusively within the province of the court," and that, as applied to patent claim interpretation, the Seventh Amendment afforded no "guarantee that a jury will determine the meaning of any disputed term of art."<sup>19</sup>

<sup>9</sup> See *id.* The two defendants are herein collectively referred to as "Westview."

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

<sup>11</sup> See *Markman v. Westview Instruments, Inc.*, 772 F. Supp. 1535, 1538 (E.D. Pa. 1991).

<sup>12</sup> Under the current system of patent protection, a patent document must have two basic elements in order to "secure to [the patentee] all to which he is entitled, [and] to apprise the public of what is still open to them." *Markman*, 116 S. Ct. at 1387 (alteration in original) (quoting *McClain v. Ortmayer*, 141 U.S. 419, 424 (1891)) (internal quotation marks omitted). First, a patent must contain a "specification," which describes the patent holder's invention "in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make and use the same." *Id.* at 1387–88 (quoting 35 U.S.C. § 112 (1994)) (internal quotation marks omitted). Second, every patent must include one or more "claims," which serve to "particularly point[t] out and distinctly clai[m] the subject matter which the applicant regards as his invention." *Id.* at 1388 (alterations in original) (quoting 35 U.S.C. § 112 (1994)).

<sup>13</sup> *Markman*, 772 F. Supp. at 1538.

<sup>14</sup> See *id.* at 1537.

<sup>15</sup> See *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970 (Fed. Cir. 1995) (en banc).

<sup>16</sup> See *id.* at 982.

<sup>17</sup> *Id.* at 970–71.

<sup>18</sup> See *id.* at 984.

<sup>19</sup> *Markman*, 116 S. Ct. at 1387.

Emphasizing that the jury trial right preserved by the Seventh Amendment is that “which existed under the English common law when the Amendment was adopted,”<sup>20</sup> the Court invoked the two-step inquiry, known as the “historical test,” that it has traditionally applied in Seventh Amendment jurisprudence.<sup>21</sup> The first step required the Court to determine whether the cause of action in question “either was tried at law at the time of the Founding or is at least analogous to one that was.”<sup>22</sup> If the Court answers this first question in the affirmative, then the Court queries “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”<sup>23</sup>

The Court quickly resolved the first question through a straightforward, “familiar” mode of analysis, in which it “compar[ed] the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.”<sup>24</sup> Because modern patent infringement actions had clearly descended from the infringement actions tried at law in the eighteenth century, the Court found that there could be “no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago.”<sup>25</sup>

Having thus answered the first prong of its historical inquiry in the affirmative, the Court then undertook the second step of the analysis: ascertaining whether a *particular* issue within a jury trial is so “essential to preserv[ing] the right to a jury’s resolution of the ultimate dispute” that it too is subject to the Seventh Amendment guarantee.<sup>26</sup> Although the Court highlighted the critical determination to be made, namely “whether the jury must shoulder this responsibility *as necessary to preserve the substance of the common-law right of trial by jury*,”<sup>27</sup> it hastened to point out that such language offered “a pretty blunt instrument for drawing distinctions.”<sup>28</sup>

Attempting to devise a more meaningful method of resolving this inquiry, the Court deemed the historical approach, like the one used to characterize suits and actions themselves, to be the most appropriate means of deciding which practices arising *within* a given cause of ac-

<sup>20</sup> *Id.* at 1389 (quoting *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)) (internal quotation marks omitted).

<sup>21</sup> *Id.* (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639 (1973)) (internal quotation marks omitted).

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (quoting *Tull v. United States*, 481 U.S. 412, 417 (1987))) (internal quotation marks omitted).

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

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1390 (quoting *Tull*, 481 U.S. at 426 (emphasis added)) (internal quotation marks omitted). The Court first used the phrase “substance of the common-law right of trial by jury” in *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

<sup>28</sup> *Markman*, 116 S. Ct. at 1390.

tion are ones that must fall to the jury.<sup>29</sup> Moreover, the Court reasoned that, “[w]here there is no exact antecedent, the best hope lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know, seeking the best analogy we can draw between an old and the new.”<sup>30</sup> In employing this method, the Court discovered that, although the historical record yielded “no direct antecedent of modern claim construction,”<sup>31</sup> the practice of construing *specifications* represented the “closest 18th-century analogue” to this modern practice.<sup>32</sup> Scrutinizing the earlier practice of specification construction further, the Court concluded that “as to that function the mere smattering of patent cases that we have from this period shows no established jury practice sufficient to support an argument by analogy that today’s construction of a claim should be a guaranteed jury issue.”<sup>33</sup>

Because the “evidence of common law practice at the time of the Framing [did] not entail application of the Seventh Amendment’s jury guarantee to the construction of the claim document,”<sup>34</sup> the Court turned to a different set of considerations to allocate this responsibility: “We accordingly consult existing precedent and consider both the relative interpretive skills of judges and juries and the statutory policies that ought to be furthered by the allocation.”<sup>35</sup> Turning to precedent, Justice Souter referred to the opinion by Justice Curtis, a former patent practitioner, in the nineteenth-century case of *Winans v. Denmead*.<sup>36</sup> Drawing a distinction between the two issues to be resolved in a patent case — what the proper construction of the patent claims is, and whether, under this construction, infringement occurred<sup>37</sup> — Justice Curtis specified that the former issue qualified as a “question of law, to be determined by the court,” whereas the latter constituted “a question of fact, to be submitted to a jury.”<sup>38</sup>

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* (citations omitted).

<sup>31</sup> *Id.* As the Court explained, such a finding was not surprising because patent claims were not recognized by statute until the mid-nineteenth century and did not become an official statutory requirement until 1870. See *id.*

<sup>32</sup> *Id.* at 1391.

<sup>33</sup> *Id.* (footnote omitted). The Court rejected Markman’s inference that eighteenth-century juries necessarily undertook the task of patent interpretation in order to render the verdicts that they reached in “enablement” and “novelty” patent cases. See *id.* at 1391–92. Such a conception of the role of the jury did not comport well with the established fact that, during the period in question, judges rather than juries were charged with construing written documents. See *id.* at 1392. Markman’s position was further undermined because the first published reports of patent construction in the nineteenth century revealed that judges, not juries, construed patent document specifications. See *id.*

<sup>34</sup> *Id.* at 1393.

<sup>35</sup> *Id.* (footnote omitted).

<sup>36</sup> 56 U.S. (15 How.) 330 (1854).

<sup>37</sup> See *id.* at 338.

<sup>38</sup> *Id.*, quoted in *Markman*, 116 S. Ct. at 1393. Continuing his discussion of precedent, Justice Souter rebutted Markman’s mistaken reliance upon two other nineteenth-century cases, *Bischoff*

Particularly because “history and precedent provide[d] no clear answers,” Justice Souter deemed it appropriate to rely upon “functional considerations.”<sup>39</sup> In regard to issues that “fall[ ] somewhere between a pristine legal standard and a simple historical fact,”<sup>40</sup> Justice Souter proposed that one such consideration should be whether, “as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.”<sup>41</sup> Applying such reasoning to the issue of claim construction, Justice Souter determined that “judges, not juries, are the better suited to find the acquired meaning of patent terms.”<sup>42</sup> Highlighting judges’ specialized training in exegesis and their heightened familiarity with written documents in general, Justice Souter concluded that the “judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury [and is] more likely to be right, in performing such a duty, than a jury can be expected to be.”<sup>43</sup> Moreover, the increasingly technical nature of patent claims in modern times furnished all the more reason to believe that experienced judges, rather than juries, would arrive at a more accurate interpretation of patent terms.<sup>44</sup>

Finally, Justice Souter pointed to the “importance of uniformity in the treatment of a given patent” as an additional factor favoring an allocation of claim construction to judges.<sup>45</sup> Assigning the task of document construction to juries would undermine such uniformity.<sup>46</sup> In Justice Souter’s view, “treating interpretive issues as purely legal

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v. Wethered, 76 U.S. (9 Wall.) 812 (1870), and *Tucker v. Spalding*, 80 U.S. (13 Wall.) 453 (1872), for the erroneous proposition that juries ultimately decided the meaning of documentary terms whenever they were subject to evidentiary proof. See *Markman*, 116 S. Ct. at 1393.

<sup>39</sup> *Markman*, 116 S. Ct. at 1395.

<sup>40</sup> *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)) (internal quotation marks omitted).

<sup>41</sup> *Id.* (quoting *Miller*, 474 U.S. at 114) (internal quotation marks omitted).

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

<sup>43</sup> *Id.* (quoting *Parker v. Hulme*, 18 F. Cas. 1138, 1140 (C.C.E.D. Pa. 1849) (No. 10,740)) (internal quotation marks omitted).

<sup>44</sup> See *id.* Justice Souter also concluded that, although claim interpretation may occasionally involve credibility determinations, juries were not generally superior to judges in evaluating the meaning of claim terms. See *id.* More specifically, the traditional strengths of juries, namely their superior capacity “to evaluate demeanor,” “to sense the ‘mainsprings of human conduct,’” or “to reflect community standards,” assumed less significance in relation to “a trained ability to evaluate the testimony in relation to the overall structure of the patent,” for which judges possessed the clear advantage. *Id.* (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960)).

<sup>45</sup> *Id.* at 1396 (reiterating that “a zone of uncertainty” in regard to the material protected by a patent would actually “discourage invention only a little less than unequivocal foreclosure of the field” (quoting *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942)) (internal quotation marks omitted)). Justice Souter remarked that the promotion of uniformity was itself a motivating factor behind Congress’s creation of the Court of Appeals for the Federal Circuit, see *id.* (citing H.R. Rep. No. 97-312, at 20–23 (1981)), with its exclusive appellate jurisdiction over patent cases, see 28 U.S.C. § 1295 (1994).

<sup>46</sup> See *Markman*, 116 S. Ct. at 1396. If a jury construed the claims of a patent, Justice Souter cautioned that, even though issue preclusion could prevent relitigation of evidentiary questions of meaning in new courts, it “could not be asserted against new and independent infringement defendants even within a given jurisdiction.” *Id.*

[would] promote . . . intrajurisdictional certainty through the application of *stare decisis* on those questions not yet subject to interjurisdictional uniformity under the authority of the single appeals court.”<sup>47</sup>

In *Markman*, the Court rightly placed the modern practice of patent claim construction beyond the reach of the Seventh Amendment’s guarantee of trial by jury in suits at common law by allocating such issues to the judge rather than the jury. Although the actual outcome that the Court reached may have been sound, its opinion in *Markman* displayed one notable lapse: the two-pronged historical inquiry that Justice Souter employed is *not* identical to the venerable “historical test” that the Court had previously utilized. Moreover, by radically diverging from the historical test as traditionally applied, the *Markman* version of the test may well compromise the Court’s evolving Seventh Amendment jurisprudence.

Correctly stated, the traditional two-tiered historical test for determining whether a modern claim is subject to the Seventh Amendment guarantee to a jury trial, an approach first enunciated in *Curtis v. Loether*,<sup>48</sup> requires the Court first to compare modern statutory actions to eighteenth-century causes of action and then to “examine the remedy sought and determine whether it is legal or equitable in nature.”<sup>49</sup> Surprisingly, though, in the *Markman* decision, Justice Souter effectively truncated the historical test by ignoring the “remedy” prong entirely.<sup>50</sup> Instead, the *Markman* Court introduced, as the second prong of *its* analysis, a novel inquiry of its own design, namely a search for historical, common law analogues to particular modern *practices*, such as claim construction, that are found within causes of action.<sup>51</sup>

Although the symmetrical treatment of actions and practices may have some superficial appeal, the *Markman* Court’s extension of the historical method from the former context to the latter one is not quite as consistent with precedent as the Court implied. *Tull v. United States*,<sup>52</sup> one of the primary cases that Justice Souter cited for his inference that this approach offered a “sounder” test<sup>53</sup> for recognizing which practices are integral to the “substance of the common-law right,”<sup>54</sup> offered no such guidance.<sup>55</sup> Even in considering causes of ac-

<sup>47</sup> *Id.*

<sup>48</sup> 415 U.S. 189 (1974).

<sup>49</sup> *Tull v. United States*, 481 U.S. 412, 417–18 (1987).

<sup>50</sup> See *Markman*, 116 S. Ct. at 1389.

<sup>51</sup> See *id.* at 1390.

<sup>52</sup> 481 U.S. 412 (1987).

<sup>53</sup> See *Markman*, 116 S. Ct. at 1390.

<sup>54</sup> *Id.* (emphasis omitted) (quoting *Tull*, 481 U.S. at 426) (internal quotation marks omitted).

<sup>55</sup> More specifically, although Justice Brennan made a passing reference to the eighteenth-century British practice of fixing penalties by statute, rather than by jury, he did not authorize a more particularized version of the historical comparison of causes of action to be applied to the individual practices within a given suit. See *Tull*, 481 U.S. at 425. In *Tull*, Justice Brennan’s allusion to “appropriate analogies” occurred strictly within the context of his analysis of whether

tion, Justice Brennan's opinion for the Court in *Tull* evinced a sharp reluctance to rely upon the historical analogizing of the test's first prong, opting instead to focus on the nature of the remedy involved.<sup>56</sup> More importantly, the *Tull* Court did not advocate a history-bound approach to determining which particular *issues* within a cause of action must fall to the jury. In deciding whether the specific assessment of civil penalties in an action brought under the Clean Water Act fell to the jury under the Seventh Amendment, the *Tull* Court adopted an approach that was, if anything, essentially functional in nature.<sup>57</sup>

Ironically, Justice Brennan, the author of the *Tull* opinion that the *Markman* Court marshaled in support of its approach,<sup>58</sup> would likely have opposed, rather than championed, transplanting the historically grounded method used to compare eighteenth-century and contemporary causes of action to the context of specific trial practices. Mindful of the vagaries inherent in this “‘abstruse historical’ search,”<sup>59</sup> Justice Brennan, in a concurring opinion in *Chauffeurs Local No. 391 v. Terry*,<sup>60</sup> even advocated that the Court jettison its historical cause of action analysis entirely and rely *solely* upon an investigation of the remedy sought.<sup>61</sup> The criticisms that Justice Brennan leveled at the historical test's cause of action prong resonate with equal, if not greater, force to the *Markman* historical inquiry that focused on discrete issues within causes of action. Justice Brennan's most forceful critique of the traditional test's first prong — that often its ultimate “result is less the discovery of a historical analog than the manufacture of a historical fiction”<sup>62</sup> — appears equally valid with respect to the *Markman* Court's search for analogous eighteenth-century counterparts to contemporary trial practices. Much like actions as a whole, these modern practices are likely “so remote in form and concept that there [would be] no firm basis for comparison” to earlier or ancient English practices.<sup>63</sup>

In addition to Justice Brennan's critique of this sort of inquiry as a highly dubious underpinning upon which to base any Seventh Amend-

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the action itself, not the civil penalty issue, should be subject to the Seventh Amendment jury trial guarantee. *Id.* at 420.

<sup>56</sup> See *id.* at 421.

<sup>57</sup> See *id.* at 426. A jury-based determination of this issue was deemed to be “*not* an essential function of a jury trial,” precisely because it involved “highly discretionary calculations that take into account multiple factors,” calculations that were “traditionally performed by judges.” *Id.* at 427 (emphasis added).

<sup>58</sup> See *Markman*, 116 S. Ct. at 1390.

<sup>59</sup> *Tull*, 481 U.S. at 421 (quoting *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970)).

<sup>60</sup> 494 U.S. 558 (1990).

<sup>61</sup> See *id.* at 574 (Brennan, J., concurring in part and concurring in the judgment).

<sup>62</sup> *Id.* at 579 n.7.

<sup>63</sup> *Id.* In addition, if, as Justice Brennan surmised, “even the most exacting historical research may not elicit a clear historical analog” for the purpose of characterizing causes of actions, *id.* at 577, such intensive research may often fare no better in yielding analogues to contemporary trial practices.

ment jurisprudence,<sup>64</sup> the *Markman* Court's attempt to utilize the historical cause of action inquiry as a model for characterizing specific trial issues seems particularly awkward when viewed in light of the Court's evolving Seventh Amendment jurisprudence. Throughout this evolution, the Court has sharply *downplayed* the significance of the cause of action prong in relation to the remedy prong. In *Curtis*, the Court emphasized the latter prong over the former.<sup>65</sup> Similarly, in *Granfinanciera, S.A. v. Nordberg*,<sup>66</sup> the Court explicitly declared that the remedy portion of the analysis should form the focal point of a properly applied historical test,<sup>67</sup> and in *Chauffeurs*, the Court noted that the cause of action prong was "only preliminary."<sup>68</sup> Finally, in *Tull*, the Court not only found the second prong to be the more important one,<sup>69</sup> but it also clearly instructed that the two prongs of the historical test exist in a relationship of interdependence and should not be divided and considered in isolation from one another.<sup>70</sup> In this sense, the *Markman* Court's conception of "appropriate analogies" was itself flawed from the beginning.<sup>71</sup> The very term "historical analog," as used by the Court in previous cases, encapsulated both the cause of action prong *and* the remedy prong;<sup>72</sup> thus, it referred to something wholly distinct from what the *Markman* Court had in mind. Therefore, if the remedy analysis is a central component of the search for historical analogies, then the *Markman* methodology seems fundamentally ill-fitted to any discussion of particular trial practices, for which the subject of remedies itself would appear meaningless.

Moreover, *Markman*'s reliance upon locating relevant common-law analogies to contemporary trial practices actually thwarts, rather than effectuates, its stated goal of preserving the "*substance* of the common-law right."<sup>73</sup> Justice Souter himself emphasized that this subset encompassed "[o]nly those incidents which are regarded as fundamental,

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<sup>64</sup> Justice Brennan assailed the historical test's first prong for embroiling the judiciary "in recondite controversies better left to legal historians," *id.* at 576, and offering "too shaky a basis for the resolution of an issue as significant as the availability of a trial by jury," *id.* at 580.

<sup>65</sup> See *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974).

<sup>66</sup> 492 U.S. 33 (1989).

<sup>67</sup> See *id.* at 42.

<sup>68</sup> *Chauffeurs*, 494 U.S. at 570.

<sup>69</sup> See *Tull v. United States*, 481 U.S. 412, 421 (1987) ("We reiterate our previously expressed view that characterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." (alteration in original) (quoting *Curtis*, 415 U.S. at 196)).

<sup>70</sup> See *id.* at 421 n.6 (faulting the government for attempting to "analyze[ ] each component [of the test] as if the other were irrelevant").

<sup>71</sup> *Markman*, 116 S. Ct. at 1390 (quoting *Tull*, 481 U.S. at 420) (internal quotation marks omitted).

<sup>72</sup> *Tull*, 481 U.S. at 421 n.6 ("Our search is for a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors.").

<sup>73</sup> *Markman*, 116 S. Ct. at 1390 (emphasis omitted) (quoting *Tull*, 481 U.S. at 426) (internal quotation marks omitted).

as inherent in and of the essence of the system of trial by jury.”<sup>74</sup> Yet Justice Souter failed to observe that this language, taken from an influential 1918 law review article<sup>75</sup> and first cited in the seminal case of *Colgrove v. Battin*,<sup>76</sup> actually suggests an analysis that is *ahistorical*. In fact, the particular passage in the article from which this language is excerpted expresses a particularly fluid and flexible view of how these “incidents” are to be determined:

[Such] incidents are not necessarily . . . unalterable. . . . The question of . . . what requirements are fundamental and what are unessential is . . . one of degree. The question . . . should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. *It is a question of substance, not of form.*<sup>77</sup>

Unfortunately, the *Markman* Court’s emphasis upon historical analogies represents precisely the sort of fixation with form that is inappropriate for determining what constitutes the substance of the common-law right.<sup>78</sup>

What would truly have offered a “sounder” approach to deciding this issue? Rather than homologizing its two inquiries, the Court should have more sharply *contrasted* them. Whereas the historical test, which does prescribe some searching for formal analogies, may be standard practice in answering the first question, a more *functional* test appears appropriate for resolving the second question. Ultimately, the *Markman* Court reached the same conclusion that it would have had it bypassed its historical consideration of the supposedly analogous practice of construing specifications altogether; it was, after all, “functional considerations” of a clearly *ahistorical* nature that tipped the balance in favor of the judge over the jury.<sup>79</sup> That the same outcome would have obtained under both *Markman*’s historical approach and a more functional one does not, however, diminish the more problematic implications of the *Markman* opinion as written. The Court’s unwillingness to elevate functional considerations to a position of primary importance in determining the scope of the Seventh Amendment’s jury trial guarantee for specific trial practices is troubling because it is highly susceptible to various forms of misapplication by the lower courts.

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<sup>74</sup> *Id.* (quoting *Tull*, 481 U.S. at 426 (quoting *Colgrove v. Battin*, 413 U.S. 149, 156 n.11 (1973) (quoting Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918)))) (internal quotation marks omitted).

<sup>75</sup> See Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918).

<sup>76</sup> See *Colgrove*, 413 U.S. at 156 n.11.

<sup>77</sup> Scott, *supra* note 75, at 671 (emphasis added).

<sup>78</sup> Despite its determination to eschew supposedly artificial distinctions that had guided past decisions — those between substance and procedure or fact and law — see *Markman*, 116 S. Ct. at 1390, the *Markman* Court thus failed to heed the one distinction that mattered.

<sup>79</sup> *Id.* at 1395.

Perhaps the most obvious danger is that the lower courts that follow *Markman* may simply neglect to consider the historical test's second prong — the inquiry into the nature of the relief or remedy sought — when seeking to determine whether a given cause of action falls under the scope of the Seventh Amendment. A less obvious but equally disturbing possibility is that lower courts may rely upon *Markman* to narrow unduly the scope of the Seventh Amendment. First, a court may posit the existence of historical analogies that would appear to establish affirmatively the lack of a jury right for particular trial decisions; in such cases, even were functional considerations to dictate a contrary result, they would effectively be trumped by the "historical" findings.<sup>80</sup> Second, even when a court's examination of historical analogies yields no conclusive results in favor of one allocation or another, an improper diminution of the right to a jury trial may still occur if the court misreads *Markman* for the proposition that the Seventh Amendment analysis of particular trial practices is subsumed entirely within Justice Souter's search for historical analogies and requires no further evaluation.<sup>81</sup>

Unfortunately, the *Markman* Court opted to rely upon superficial similarities between actions and practices to authorize an overly rigid and formal approach that appropriates the least desirable aspects of the Seventh Amendment historical test and ultimately fails to evaluate properly "the substance of the common-law right" to trial by jury.<sup>82</sup> Rather than endorsing the use of historical analogies for the purpose of determining whether a particular trial decision is subject to the Seventh Amendment guarantee, the Court should have announced a separate test to be applied in this context, a test that explicitly favors function over form, focusing directly on the relative skills of judges and juries instead of the presence or absence of supposedly analogous historical counterparts from the eighteenth century.

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<sup>80</sup> This observation also raises the interesting possibility that the excursion into historical analogies that *Markman* prescribes may actually lead to an unwarranted *expansion* of the Seventh Amendment's jury trial guarantee. This result would occur if a court concludes that the analogous practice clearly was tried to a jury around 1791 but nevertheless concedes that the actual practice in question is more fit for a judge than a jury. In the context of the *Markman* decision itself, such an enlargement of the Seventh Amendment would presumably have occurred had the Court actually been persuaded (which it was not) by *Markman*'s contention that the task of construing specifications *did* fall to the jury under the common law of 1791. Thus, the use of historical analogies to trump more basic functional considerations can, at least in theory, cut both ways.

<sup>81</sup> This misreading arises from *Markman*'s ambiguity regarding whether its discussion of "functional considerations," as found in Part III of the opinion, *Markman*, 116 S. Ct. at 1395, falls under the umbrella of its Seventh Amendment analysis. Under one possible reading, the Court simply ended its Seventh Amendment analysis in Part II of the opinion, *see id.* at 1390–93, finding the constitutional guarantee to be inapplicable.

<sup>82</sup> *Id.* at 1390 (emphasis omitted) (quoting *Tull v. United States*, 481 U.S. 412, 426 (1987)) (internal quotation marks omitted).

## II. FEDERAL JURISDICTION AND PROCEDURE

### A. *Exceptions Clause*

*Congressional Power to Restrict the Supreme Court's Appellate Jurisdiction.* — Article III, Section 2 of the United States Constitution, which delineates the jurisdiction of the federal judiciary, provides that, except in very limited circumstances in which its jurisdiction is original, “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”<sup>1</sup> For years, commentators have debated whether Congress’s power over the Court’s appellate docket is as far-reaching as the text of the Exceptions Clause seems to suggest, or whether that power is instead constrained by structural considerations such as the doctrine of separation of powers. Last Term, in *Felker v. Turpin*,<sup>2</sup> the Supreme Court found it unnecessary to determine whether the Exceptions Clause rendered unconstitutional the Antiterrorism and Effective Death Penalty Act of 1996,<sup>3</sup> which precludes the high court from reviewing, either by certiorari or by appeal, circuit court denials of motions to file second or successive habeas corpus petitions.<sup>4</sup> Although the Court declined to address squarely the Exceptions Clause issue in *Felker*, the debate regarding the provision’s scope continues to rage. Despite the admonitions of those who argue that Congress’s authority over the Court’s appellate jurisdiction must be circumscribed in order to preserve the independence of the judiciary, a number of potent considerations counsel in favor of a literal reading of the exceptions power. Not only is a literal interpretation faithful to the provision’s text and history, as well as to the Supreme Court’s occasional pronouncements on the subject, but it also affords legitimacy to the otherwise undemocratic practice of judicial review and reconciles two seemingly conflicting structural commitments of the American constitutional system by providing Congress a significant role in the development of constitutional doctrine without compromising the judiciary’s authority as the final arbiter of constitutional meaning.

On April 24, 1996, the President signed the Antiterrorism and Effective Death Penalty Act into law.<sup>5</sup> A primary purpose of the Act, embodied in Title I, was to “curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay

<sup>1</sup> U.S. CONST. art. III, § 2. The Constitution grants the Supreme Court original jurisdiction only in “Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” *Id.*

<sup>2</sup> 116 S. Ct. 2333 (1996).

<sup>3</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (to be codified in relevant part at 28 U.S.C. § 2244).

<sup>4</sup> See *id.* § 106(b)(3)(E).

<sup>5</sup> See Alison Mitchell, *Clinton Signs Measure on Terrorism and Death Penalty Appeals*, N.Y. TIMES, Apr. 25, 1996, at A18.

and abuse in capital cases.”<sup>6</sup> To that end, section 106(b) amends existing habeas law with respect to the review of second or successive habeas petitions in three significant ways. First, sections 106(b)(1) and (b)(2) designate stringent new standards against which federal courts are to judge successive habeas applications.<sup>7</sup> Second, section 106(b)(3) vests the federal circuit courts with a “gatekeeping” authority to screen out appeals that do not meet the Act’s standards.<sup>8</sup> Finally, and most significantly, section 106(b)(3)(E) clearly states that the “grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”<sup>9</sup>

In 1984, the Georgia Supreme Court affirmed the death sentence of Ellis Wayne Felker for the murder of a nineteen year-old cocktail waitress,<sup>10</sup> and the United States Supreme Court denied certiorari.<sup>11</sup> On May 2, 1996, after his attempts to secure state collateral relief were rejected<sup>12</sup> and his initial federal habeas corpus petition was denied,<sup>13</sup> Felker, in accordance with the Act, filed with the Eleventh Circuit a motion for leave to file a second habeas petition; the court, however, denied the motion the day that it was filed, holding that “Felker ha[d] failed to show substantial grounds upon which relief might be granted under [section 106(b) of] the new Act.”<sup>14</sup> Felker immediately filed in the United States Supreme Court a pleading styled a “Petition for Writ of Habeas Corpus, for Appellate or Certiorari Review of the Decision of the United States Circuit Court for the Eleventh Circuit, and for Stay of Execution.”<sup>15</sup> The Court granted the stay and the petition for certiorari, and directed briefing as to whether the provisions of Title I of the Act apply to habeas petitions filed as original matters with the

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<sup>6</sup> H.R. Conf. Rep. No. 104-518, at 111 (1996) (joint explanatory statement of the Committee of Conference).

<sup>7</sup> See Antiterrorism and Effective Death Penalty Act § 106(b)(1)-(2). Section 106(b)(1) provides that, in all circumstances, a “claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” *Id.* § 106(b)(1). Similarly, section 106(b)(2) states that a “claim presented in a second or successive habeas corpus application under section 2254 that was *not* presented in a prior application shall be dismissed” except in very limited circumstances. *Id.* § 106(b)(2) (emphasis added).

<sup>8</sup> See *id.* § 106(b)(3)(A). If the court of appeals concludes that the petition does not satisfy the standards enunciated in sections 106(b)(1) and (b)(2), it must deny the petitioner’s motion to file in the district court. See *id.* § 106(b)(3)(B)-(D).

<sup>9</sup> *Id.* § 106(b)(3)(E).

<sup>10</sup> See *Felker v. State*, 314 S.E.2d 621, 649 (Ga. 1984).

<sup>11</sup> See *Felker v. Georgia*, 469 U.S. 873, 873 (1984).

<sup>12</sup> See *Felker v. Turpin*, No. S96R1289 (Ga. May 2, 1996); *Felker v. Zant*, No. S90H1611 (Ga. Sept. 3, 1991), cert. denied, 502 U.S. 1064 (1992).

<sup>13</sup> See *Felker v. Thomas*, 52 F.3d 907, 913 (11th Cir. 1995), cert. denied, 116 S. Ct. 956 (1996).

<sup>14</sup> *Felker v. Turpin*, 83 F.3d 1303, 1313 (11th Cir. 1996).

<sup>15</sup> *Felker*, 116 S. Ct. at 2337.

Supreme Court pursuant to 28 U.S.C. § 2241(a),<sup>16</sup> and whether section 106(b)(3)(E) of the Act unconstitutionally restricts the Supreme Court's appellate jurisdiction.<sup>17</sup>

In a unanimous decision authored by Chief Justice Rehnquist, the Court first determined that the provisions of Title I — and specifically section 106(b)(3)(E), which prevents the Court from reviewing appeals court “gatekeeping” decisions via appeal or a writ of certiorari — do not affect the Court’s jurisdiction over so-called “original” habeas petitions filed pursuant to 28 U.S.C. § 2241(a).<sup>18</sup> In support of its conclusion, the Court relied upon the Reconstruction-era case *Ex parte Yerger*.<sup>19</sup> At issue in *Yerger* was an 1868 statute repealing an extension of the Court’s appellate jurisdiction over habeas decisions of the federal courts of appeals — jurisdiction that Congress had granted only a year earlier.<sup>20</sup> The Supreme Court ruled that the 1868 Act, which repealed only “so much of the [Act of 1867] as authorize[d] an appeal from the judgment of the circuit court to the Supreme Court of the United States,”<sup>21</sup> did not preclude it from considering habeas applications filed with the Court as original matters pursuant to section 14 of the Judiciary Act of 1789.<sup>22</sup> After quoting the relevant language of the 1868 Act, the *Yerger* Court concluded that its “words are not of doubtful interpretation. . . . They do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the [Judiciary Act] of 1789.”<sup>23</sup> Declaring that “[r]epeals by implication are not favored,”<sup>24</sup> the Supreme Court in *Yerger* thus affirmed its jurisdictional authority to issue original habeas writs.<sup>25</sup>

Turning to Felker’s application, the Court held that “Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in *Yerger*.<sup>26</sup> Relying, as it had in *Yerger*, upon the plain meaning of the Act and upon the rule of statutory interpretation disfavoring repeals by implication, the Court

<sup>16</sup> In relevant part, 28 U.S.C. § 2241(a) provides that “[w]rits of habeas corpus may be granted by the Supreme Court, [or] any justice thereof.” 28 U.S.C. § 2241(a) (1994).

<sup>17</sup> See *Felker v. Turpin*, 116 S. Ct. 1588, 1588 (1996).

<sup>18</sup> See *Felker*, 116 S. Ct. at 2337–39. The Supreme Court’s authority to issue “original” writs of habeas corpus, which is conferred by 28 U.S.C. § 2241(a), see 28 U.S.C. § 2241(a) (1994), should not be confused with its “original” jurisdiction, which is conferred exclusively by Article III and, according to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), cannot be supplemented by acts of Congress, see *id.* at 173–75. Rather, the *original* writ of habeas corpus is an exercise of the Court’s *appellate* jurisdiction. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 86 (1807).

<sup>19</sup> 7 U.S. (8 Wall.) 85 (1868).

<sup>20</sup> See *id.* at 87.

<sup>21</sup> Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44, 44.

<sup>22</sup> See *Yerger*, 75 U.S. (8 Wall.) at 105, cited in *Felker*, 116 S. Ct. at 2337–38.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See *id.* at 106.

<sup>26</sup> *Felker*, 116 S. Ct. at 2338.

concluded that, “[a]lthough § 106(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court.”<sup>27</sup>

The Court found that the fact that the Act left open the alternative channel of the original habeas writ — itself a form of appellate review — “obviate[d]” Felker’s Exceptions Clause claim.<sup>28</sup> The Court acknowledged that the Exceptions Clause vests Congress with the authority to define its appellate jurisdiction and that its appellate powers “are limited and regulated by the [Judiciary Act of 1789], and by such other acts as have been passed on the subject.”<sup>29</sup> However, the Court determined that, because the Act’s provisions do not restrict its jurisdiction over original habeas applications, “there can be no plausible argument that the Act has deprived [the] Court of appellate jurisdiction in violation of Article III, § 2.”<sup>30</sup>

Having avoided confronting the constitutional issue head on, the Court proceeded to consider the standards for granting original writs of habeas corpus, and whether and to what extent those standards were affected by the criteria articulated in Title I of the Act.<sup>31</sup> The Court found that, in contrast to section 106(b)(3), which specifically addresses habeas applications “filed in the district court,”<sup>32</sup> the language of sections 106(b)(1) and (b)(2) applies “without qualification to any ‘second or successive habeas corpus application under section 2254’ filed in any federal court.”<sup>33</sup> Consequently, the Court held that sections 106(b)(1) and (b)(2) must, at the very least, “inform [its] consideration of original habeas petitions.”<sup>34</sup> Because it determined that Felker’s application failed to make the showings mandated by sections 106(b)(1) and (b)(2) of the Act and by the provision of Supreme Court Rule 20.4 requiring that the petitioner demonstrate “exceptional circumstances warranting the exercise of the Court’s discretionary powers,”<sup>35</sup> the Court denied his application for an original habeas writ.<sup>36</sup>

<sup>27</sup> *Id.* at 2338–39.

<sup>28</sup> See *id.* at 2339.

<sup>29</sup> *Id.* (alteration in original) (quoting *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810)) (internal quotation marks omitted).

<sup>30</sup> *Id.*

<sup>31</sup> See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106(b), 110 Stat. 1214, 1220–21.

<sup>32</sup> *Id.* § 106(b)(3).

<sup>33</sup> *Felker*, 116 S. Ct. at 2339 (quoting Antiterrorism and Effective Death Penalty Act § 106(b)(1), and *id.* § 106(b)(2)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2340–41 (quoting SUP. CT. R. 20.4(a)) (internal quotation marks omitted).

<sup>36</sup> See *id.* at 2341. The Court also concluded that the provisions of the Act do not effectively suspend the writ of habeas corpus in violation of Article I, Section 9 of the U.S. Constitution. See *id.* at 2339–40.

In a pair of brief concurrences, Justices Stevens and Souter elaborated upon the Court's discussion of the constitutionality of section 106(b)(3)(E) under the Exceptions Clause.<sup>37</sup> The concurring Justices argued that, in addition to preserving the Court's authority over original habeas writs, the statute's text, which precludes Supreme Court review of circuit court gatekeeping orders only by "appeal" and by "certiorari," does not foreclose other avenues of pure appellate review,<sup>38</sup> including, among others, direct review under both the All Writs Act<sup>39</sup> and 28 U.S.C. § 1254(2), which provides for consideration of certified questions from the courts of appeals.<sup>40</sup> The concurring Justices observed, however, that, although the case before the Court did not squarely present the constitutional issue, if, in a subsequent action, it "turn[ed] out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."<sup>41</sup>

In light of the fact that section 106(b)(3)(E) apparently left undisturbed the Supreme Court's authority to entertain original writs of habeas corpus, the Court's decision not to address the issue of the scope of Congress's power under the Exceptions Clause was both proper and prudent; however, as the concurring Justices acknowledged, a case could conceivably arise under the Act that squarely presents the question. Meanwhile, the underlying debate regarding the provision's proper construction remains alive and, as yet, unresolved. Many commentators, following the lead of Henry Hart, contend that, despite the seemingly unequivocal nature of Article III's grant of congressional authority, Congress's prerogative is limited by the structural notion that it may not make exceptions that "will destroy the essential role of the Supreme Court in the constitutional plan."<sup>42</sup> This "narrow" conception of congressional power, however, is at odds with both the text and history of Article III, as well as with relevant Supreme Court precedent, all of which suggest a more expansive interpretation. Furthermore, a literal reading of the Exceptions Clause has the virtue of both easing the antimajoritarian tension inherent in judicial review and reconciling the apparent conflict between two fundamental structural postulates of American constitutionalism — first, that the federal

<sup>37</sup> See *Felker*, 116 S. Ct. at 2341 (Stevens, J., concurring); *id.* at 2341–42 (Souter, J., concurring). Justice Stevens authored a concurring opinion in which Justices Souter and Breyer joined, and Justice Souter penned a concurrence in which Justices Stevens and Breyer joined.

<sup>38</sup> See *id.* at 2341 (Stevens, J., concurring); *id.* (Souter, J., concurring).

<sup>39</sup> 28 U.S.C. § 1651 (1994). The All Writs Act provides, in relevant part: "The Supreme Court . . . may issue all writs necessary or appropriate in aid of their . . . jurisdiction[ ] and agreeable to the usages and principles of law." *Id.* § 1651(a).

<sup>40</sup> See *id.* § 1254(2).

<sup>41</sup> *Felker*, 116 S. Ct. at 2342 (Souter, J., concurring).

<sup>42</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

judiciary must remain wholly independent of the political branches and supreme in its exposition of the Constitution,<sup>43</sup> and second, that Congress, as well as the Court, is a constitutional actor and thus possesses a legitimate and substantial role in the development of constitutional doctrine.<sup>44</sup>

Almost without exception, theories positing a narrow conception of congressional power under the Exceptions Clause hinge primarily upon structural arguments regarding the independence of the judiciary and its primacy in interpreting the Constitution.<sup>45</sup> Commentators advocating a limited congressional role view the Exceptions Clause power as a threat to the duty of the judiciary, articulated in *Marbury v. Madison*,<sup>46</sup> to "say what the law is."<sup>47</sup> For instance, Laurence Tribe, noting that "under our system it has become axiomatic that the authoritative constitutional verdict will be that of a court,"<sup>48</sup> argues that an expansive interpretation of Congress's authority enables de facto "legislative reversal"<sup>49</sup> of the Supreme Court's constitutional pronouncements and thereby jeopardizes "a distinctly American institution, that of review of legislative and executive action by an independent judiciary entrusted to enforce the Constitution."<sup>50</sup>

Proponents of a narrow conception of congressional authority under the Exceptions Clause, however, ignore three of the most telling indicia of constitutional meaning: text, history, and precedent. The

<sup>43</sup> See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . .").

<sup>44</sup> As James Madison stated on the floor of the First Congress, "it is incontrovertibly of as much importance to [the legislative] branch of the Government as to any other, that the Constitution should be preserved entire. . . . I cannot imagine it will be less safe, that the exposition [of the Constitution] should issue from the Legislative authority than any other . . ." 1 ANNALS OF CONG. 500-01 (Joseph Gales ed., 1789).

<sup>45</sup> See Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 986 (1981-1982). This Comment takes issue only with the argument, articulated by many proponents of a limited congressional role, that the Exceptions Clause itself imposes "internal," structural limitations on Congress's exceptions authority. Certainly, as even the most ardent supporters of a literal interpretation concede, the Constitution places certain "external" limitations on congressional power — clearly Congress could not, for instance, deny jurisdiction on the basis of the race, gender, or religion of prospective litigants. See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 916 (1984).

<sup>46</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>47</sup> *Id.* at 177; see also Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 996 (1981-1982) ("Opponents of the court stripping bills argue that these bills represent legislative encroachment on the judicial function and therefore violate the doctrine of separation of powers and the principle of judicial independence as articulated in *Marbury v. Madison*.").

<sup>48</sup> Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 133 (1981) (citing *United States v. Nixon*, 418 U.S. 683, 703-05 (1974); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); and *Marbury*, 5 U.S. (1 Cranch) at 177-78).

<sup>49</sup> *Id.* at 130.

<sup>50</sup> *Id.* at 131.

language of the Exceptions Clause is clear and unambiguous, and for “many students of constitutional law, the simple reading of [its] words ends the matter.”<sup>51</sup> In fact, in the face of the Exception Clause’s unmistakable command, some naysayers of plenary congressional authority have simply conceded that the provision’s language, taken alone, supports a broad conception of congressional power.<sup>52</sup>

Although the history surrounding the adoption of the Exceptions Clause at the Constitutional Convention in 1787 is scant,<sup>53</sup> there is particularly persuasive historical evidence from the Founding Era that demonstrates that the Framers intended precisely the broad scope that their chosen language indicates. For instance, more than a decade before his appointment to the Supreme Court, John Marshall reported to the Virginia ratifying convention the expectations of the Framers regarding the Exceptions Clause, declaring that “Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. *These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.*”<sup>54</sup> Moreover, when the First Congress — twenty members of which had been delegates to the Convention<sup>55</sup> — passed the Judiciary Act of 1789,<sup>56</sup> it did not confer upon the Supreme Court the full measure of appellate power authorized by Article III; rather, it withheld, consistent with its apparent authority under the Exceptions Clause, substantial segments of that jurisdiction.<sup>57</sup>

In light of the available textual and historical evidence, it is unsurprising that, since the early years of the Republic, the Supreme Court has consistently construed the Exceptions Clause quite broadly. In *Wiscart v. D'Auchy*,<sup>58</sup> the Supreme Court’s first opportunity to interpret the clause, Chief Justice Oliver Ellsworth and Justice James Wilson — both of whom had been members of the five-man Committee

<sup>51</sup> Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 387 (1983).

<sup>52</sup> See Baucus & Kay, *supra* note 47, at 995.

<sup>53</sup> The Exceptions Clause appeared for the first time in the draft proposed by the five-member Committee of Detail and was adopted by the Convention “without a ripple of recorded debate, concern, or explication.” Lawrence G. Sager, *The Supreme Court, 1980 Term — Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 51 (1981) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 431–32 (Max Farrand ed., 1911)).

<sup>54</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 560 (Jonathan Elliot ed., 2d ed. 1836) (emphasis added).

<sup>55</sup> See *Bowsher v. Synar*, 478 U.S. 714, 724 n.3 (1985) (listing the names of all 20 Convention delegates who served in the First Congress).

<sup>56</sup> Ch. 20, 1 Stat. 73 (1789).

<sup>57</sup> More than a century ago, the Supreme Court observed that acts, such as the Judiciary Act, which were “passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, [are] contemporaneous and weighty evidence of [the Constitution’s] true meaning.” *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

<sup>58</sup> 3 U.S. (3 Dall.) 321 (1796).

of Detail, which had drafted the provision — each expressly acknowledged Congress's prerogative to restrict the Court's appellate docket.<sup>59</sup> Similarly, in the 1805 case of *United States v. More*,<sup>60</sup> Chief Justice Marshall articulated the so-called "negative pregnant" doctrine<sup>61</sup> — the broadest conceivable reading of the Exceptions Clause — observing that, "as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation . . . prohibiting the exercise of other powers than those described."<sup>62</sup> A half century later, in perhaps its most definitive statement on the issue, the Court in *Ex parte McCordle*<sup>63</sup> specifically reaffirmed Chief Justice Marshall's negative pregnant doctrine<sup>64</sup> but noted that the case before it, like the case presented in *Felker* — in which Congress had expressly withdrawn a portion of the Court's habeas jurisdiction — presented an even more straightforwardly constitutional exercise of congressional authority:

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. . . . It is hardly possible to imagine a plainer instance of positive exception.

. . . [T]he power to make [such] exceptions to the appellate jurisdiction of this court is given by express words.<sup>65</sup>

In the years since *McCordle*, the Supreme Court has indicated no intention to retreat from its traditional, literal construction of the Exceptions Clause.<sup>66</sup>

In spite of — or perhaps because of — the fact that text, history, and precedent support their position, proponents of a literal interpretation have been unwilling, or perhaps have felt unable, to engage those commentators advocating a narrower reading on their own terms —

<sup>59</sup> See *id.* at 327 (Ellsworth, C.J.); *id.* at 326 (Wilson, J.). Chief Justice Ellsworth laid the groundwork for a very expansive reading of the Exceptions Clause, arguing that the Court's appellate jurisdiction does not derive from the Constitution, but must be affirmatively granted by Congress: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." *Id.* at 327 (Ellsworth, C.J.). Although Justice Wilson contended that the appellate power of the Court flows directly from Article III and not from legislative enactments, he nonetheless explicitly affirmed Congress's authority to "ma[ke] exceptions, and introduce[ ] regulations upon the subject." *Id.* at 326 (Wilson, J.).

<sup>60</sup> 7 U.S. (3 Cranch) 159 (1805).

<sup>61</sup> See Rice, *supra* note 45, at 964.

<sup>62</sup> *More*, 7 U.S. (3 Cranch) at 173.

<sup>63</sup> 74 U.S. (7 Wall.) 506 (1868).

<sup>64</sup> See *id.* at 513.

<sup>65</sup> *Id.* at 513–14.

<sup>66</sup> In the only case since *McCordle* in which the Court has commented at any length on the scope of the Exceptions Clause — *The "Francis Wright"*, 105 U.S. 381 (1881) — it followed its predecessor Courts in construing the provision literally. See *id.* at 385–86. In addition, two members of the current Court have endorsed a literal reading of the Exceptions Clause. See *South Carolina v. Regan*, 465 U.S. 367, 396–97 (1984) (O'Connor, J., concurring in the judgment, joined by Powell and Rehnquist, JJ.).

*structural* terms. Consequently, the Exceptions Clause debate has reached a stalemate, with the former group claiming (and the latter group conceding) the support of textual, historical, and doctrinal evidence, and the latter group in turn claiming (and the former group in turn conceding) the support of structural evidence.<sup>67</sup> However, in addition to its faithfulness to text, history, and precedent, a literal reading of the Exceptions Clause has two additional attributes — *structural* attributes — to recommend it. First, by vesting in a democratically elected legislature the power — even if it remains unutilized, as it has for most of our history — to oversee the functioning of an unelected Supreme Court, the Exceptions Clause furnishes necessary legitimacy to the enterprise of judicial review (an enterprise that not only is antidemocratic, but also is without explicit textual justification).<sup>68</sup> A literal reading of the clause thus provides a solution — though perhaps an incomplete solution — to Professor Bickel's "countermajoritarian difficulty"<sup>69</sup> by recognizing that the ultimate authority over constitutional interpretation belongs not to the Court alone, but to "the People."

Second, a literal construction of the Exceptions Clause allows for the reconciliation of two seemingly irreconcilable theories of constitutional interpretive authority. Commentators who argue in favor of a narrow conception of congressional authority are undoubtedly correct in one observation: despite occasional rumblings — most recently associated with Congress's enactment of the Religious Freedom Restoration Act of 1993 (RFRA)<sup>70</sup> — it has in fact become "axiomatic"<sup>71</sup> that the Supreme Court has the final say in matters of constitutional interpretation. Equally axiomatic, however, is the proposition that Congress is a constitutional actor and, as such, possesses a meaningful role in the development of the American constitutional system.

A literal reading of the Exceptions Clause accommodates these two foundational principles. Congress possesses plenary authority to withdraw from the Supreme Court's appellate jurisdiction any case or class of cases that it desires; consequently, it has the power, as it should in a

<sup>67</sup> In this vein, William Van Alstyne has noted that Exceptions Clause literature is "choking on redundancy." Gunther, *supra* note 45, at 897 n.9 (quoting letter from William Van Alstyne, Professor, Duke University School of Law, to Gerald Gunther, Professor, Stanford Law School (Feb. 28, 1993)) (internal quotation marks omitted).

<sup>68</sup> One explicit instance of this "legitimating" function of the exceptions power occurred in 1958, when the (popularly elected) Senate refused to enact the Jenner Bill, S. 2646, 85th Cong. (1957), which would have withdrawn the Court's appellate jurisdiction over government action against alleged "subversives." *See id.* In so doing, the Senate implicitly ratified the Court's exercise of judicial review, which the Court had pursued in a long line of particularly controversial anti-McCarthyism cases, *see, e.g.*, Watkins v. United States, 354 U.S. 178 (1957).

<sup>69</sup> ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (2d ed. 1986).

<sup>70</sup> 42 U.S.C. § 2000bb (1994). RFRA purports to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990), *see* 42 U.S.C. § 2000bb(a) (1994), and "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," *id.* § 2000bb(b)(1).

<sup>71</sup> *See* Tribe, *supra* note 48, at 133.

system of separated sovereignty, to influence *ex ante* the formation of constitutional doctrine.<sup>72</sup> However, contrary to the warnings sounded by skeptics of congressional exceptions authority, such excisions do not *reverse* Supreme Court precedent<sup>73</sup> and thereby encroach upon the judiciary's authority under *Marbury* (as statutes like RFRA might); in fact, they have precisely the opposite effect, cementing in place preexisting Court doctrine.<sup>74</sup> The Exceptions Clause thus "offers a chance to restrain excesses of judicial power on the part of the Supreme Court without altering the basic charter of our government."<sup>75</sup> Under a literal reading of the Exceptions Clause, the twin doctrines of separation of powers and checks and balances coexist: the judiciary remains supreme in its interpretation of the Constitution but subject to the parameters of interpretive authority prescribed by Congress.<sup>76</sup>

As the concurring Justices observed in *Felker*, a case might soon arise that squarely presents the issue of the breadth of Congress's power under the Exceptions Clause.<sup>77</sup> If and when the Court does address the matter, it should interpret the clause literally. Not only is a literal construction dictated by the available textual, historical, and doctrinal evidence; but contrary to conventional wisdom, a literal interpretation is also supported by compelling *structural* considerations — it both tem-

<sup>72</sup> A simple hypothetical demonstrates the role that the Exceptions Clause gives Congress in constitutional interpretation: a conservative Congress, fearful of a possible return to abortion jurisprudence as it existed prior to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), might choose to withdraw the Supreme Court's jurisdiction to decide abortion cases, thereby ensuring the continuance of the "undue burden" standard, *see id.* at 874–79 (joint opinion of O'Connor, Kennedy & Souter, JJ.), instead of the more liberal trimester framework established in *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

<sup>73</sup> See Tribe, *supra* note 48, at 130.

<sup>74</sup> In the hypothetical abortion situation described above, for example, Congress's revision of the Court's jurisdiction over abortion cases would leave intact — in fact, would perpetuate — the *Casey* precedent, a result that many conservative legislators would view as an unfortunate, but necessary, consequence of their decision to avoid a return to *Roe*.

<sup>75</sup> Rice, *supra* note 45, at 960.

<sup>76</sup> Historical and doctrinal evidence confirms the conclusion that arguments from constitutional *structure* favor a literal Exceptions Clause interpretation. Both Alexander Hamilton and Chief Justice John Marshall — arguably the co-founders of federal judicial review — comprehended the coexistence of an independent judiciary and a broad exceptions power. After proclaiming that the duty of the "courts of justice . . . must be to declare all acts contrary to the manifest tenor of the Constitution void," THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961), Hamilton defended the power of Congress to control the appellate jurisdiction of the Court, *see* THE FEDERALIST NO. 80, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Similarly, only two years after craftily articulating the constitutional basis for judicial review, *see* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803), Chief Justice Marshall twice provided expansive interpretations of Congress's exceptions power, *see* *Durosseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810); *United States v. More*, 7 U.S. (3 Cranch) 159, 173 (1805). Clearly, neither Hamilton nor Chief Justice Marshall perceived any irreconcilable structural conflict between the power of judicial review and expansive congressional authority under the Exceptions Clause; quite the contrary, both correctly recognized that the two not only could coexist, but that they were also necessary correlates in a constitutional democracy.

<sup>77</sup> See *Felker*, 116 S. Ct. at 2342 (Souter, J., concurring).

pers the antidemocratic character of judicial review and harmonizes two seemingly incompatible theories of constitutional interpretive authority, and thus fully realizes the genius of the American constitutional experiment.

### B. Federal Rules of Evidence

*Rule 501 — Psychotherapist-Patient Privilege.* — More than twenty years ago, the Advisory Committee charged with drafting the Federal Rules of Evidence suggested the establishment of nine specific evidentiary privileges, one of which was to protect the psychotherapist-patient relationship.<sup>1</sup> In eventually enacting Rule 501 in 1975, however, the Senate Judiciary Committee replaced this catalog of specific privileges with the inexact instruction that courts find privileges based on “the principles of the common law . . . in the light of reason and experience.”<sup>2</sup> Federal courts have disagreed whether the psychotherapist-patient privilege survived this change.<sup>3</sup> Last Term, in *Jaffee v. Redmond*,<sup>4</sup> the Supreme Court resolved the disagreement, holding that Rule 501 protects confidential communications made to psychiatrists, psychologists, and licensed social workers.<sup>5</sup> Although clear in effect, the Court’s action was questionable in authority and detrimental in impact. By imposing such a broad mandate, the Court may have acted unconstitutionally and certainly acted in excess of its statutory authority to establish court rules. Furthermore, the Court’s deferral to state legislatures for guidance in expounding the common law dangerously broadens the sources of federal common law and violates elementary canons of interpretation. Finally, *Jaffee* enables district courts to erode federal law further by allowing state law to define the content of federal statutes and rules, threatening the uniformity, predictability, and responsiveness of the federal common law system.

On June 27, 1991, police officer Mary Lu Redmond investigated a violent disturbance at an apartment complex in the Village of Hoffman Estates, Illinois.<sup>6</sup> Redmond reached the scene in time to witness Ricky Allen, allegedly armed with a butcher knife, in close pursuit of

<sup>1</sup> See S. Rep. No. 93-1277, at 11 (1974). For a thorough chronicle of the legislative history of Rule 501, see Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511 (1994).

<sup>2</sup> FED. R. EVID. 501.

<sup>3</sup> Most circuits declined to recognize a psychotherapist-patient privilege under Rule 501. See, e.g., United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994); *In re Grand Jury Proceedings*, 867 F.2d 562, 564 (9th Cir. 1989); United States v. Meagher, 531 F.2d 752, 753 (5th Cir. 1976). Two circuits recognized the privilege. See *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983).

<sup>4</sup> 116 S. Ct. 1923 (1996).

<sup>5</sup> See *id.* at 1931.

<sup>6</sup> See *Jaffee v. Redmond*, 51 F.3d 1346, 1348 (7th Cir. 1995).

another man.<sup>7</sup> When Allen refused to drop the weapon and seemed on the verge of hacking the man with it, Redmond shot and killed Allen.<sup>8</sup>

The administratrix of Allen's estate brought suit in federal district court, alleging that Redmond's use of deadly force violated Allen's rights under the Fourth and Fourteenth Amendments and under state law.<sup>9</sup> The court ordered Karen Beyer, a licensed social worker who met with Redmond for more than fifty counseling sessions after the shooting, to relinquish copies of her notes to the plaintiff.<sup>10</sup> However, neither Beyer nor Redmond complied with the order or revealed the notes' contents.<sup>11</sup> After the instruction that this noncompliance could support an adverse inference about the notes,<sup>12</sup> the jury awarded Allen's estate \$45,000 on the federal constitutional claim and \$500,000 on the state wrongful death claim.<sup>13</sup>

A unanimous panel of the Court of Appeals for the Seventh Circuit reversed and remanded for a new trial.<sup>14</sup> The court adopted a balancing test to determine "whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests."<sup>15</sup> Under this test, the court found that Redmond's interests outweighed the evidentiary needs of the plaintiff.<sup>16</sup>

In a 7–2 decision, the Supreme Court affirmed.<sup>17</sup> Writing for the Court, Justice Stevens<sup>18</sup> first relied upon the open-ended language of Rule 501 as broad authorization for the establishment of evidentiary privileges;<sup>19</sup> as he noted, the Senate Judiciary Committee stressed that the rule "should not be understood as disapproving any recognition of a psychotherapist-patient . . . privilege[ ]."<sup>20</sup> Justice Stevens then analyzed how recognizing the privilege would affect public and private interests.<sup>21</sup> Certain that the denial of privileged status for psychotherapist-patient communications could thwart the "confidential relation-

<sup>7</sup> See *id.* at 1349.

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

<sup>9</sup> See *id.* at 1348. The estate sought damages under 42 U.S.C. § 1983 (1994) and the Illinois Wrongful Death Act, 740 ILL. COMP. STAT. 180/0.01–2.2 (West 1994). See *Jaffee*, 51 F.3d at 1348.

<sup>10</sup> See *Jaffee*, 51 F.3d at 1350.

<sup>11</sup> See *id.* at 1350–51.

<sup>12</sup> See *id.* at 1351.

<sup>13</sup> See *id.* at 1352.

<sup>14</sup> See *id.* at 1358.

<sup>15</sup> *Id.* at 1357.

<sup>16</sup> See *id.* at 1358.

<sup>17</sup> See *Jaffee*, 116 S. Ct. at 1927.

<sup>18</sup> Justices O'Connor, Kennedy, Souter, Thomas, Ginsburg, and Breyer joined Justice Stevens's opinion.

<sup>19</sup> See *Jaffee*, 116 S. Ct. at 1927.

<sup>20</sup> S. REP. NO. 93-1277, at 13 (1974). Justice Stevens cited *Trammel v. United States*, 445 U.S. 40, 47 (1980), noting its permissive interpretation of Rule 501. See *Jaffee*, 116 S. Ct. at 1927–28.

<sup>21</sup> See *Jaffee*, 116 S. Ct. at 1928–29.

ship necessary for successful treatment,”<sup>22</sup> he reasoned that a privilege in this area would “serve[ ] important private interests.”<sup>23</sup> Furthermore, the patient’s private interest in receiving treatment for psychological problems coincides with the public interest in maintaining a mentally stable populace.<sup>24</sup> Justice Stevens anticipated that a new privilege would not impinge on the public interest in gathering evidence because, without the privilege, patients would censor their own conversations with therapists.<sup>25</sup> In other words, the evidence that the privilege might exclude would not exist without the privilege in the first place.<sup>26</sup>

Justice Stevens theorized further that, if the federal courts did not privilege psychotherapist-patient communications, the states’ recognition of the confidentiality of the relationship would lose value.<sup>27</sup> Despite Rule 501’s mandate that federal courts develop privileges from “common law principles . . . in the light of reason and experience,”<sup>28</sup> the Court considered it inconsequential that the legislature — rather than the judiciary — developed the privilege in the states.<sup>29</sup> Justice Stevens speculated that state legislatures’ quick action in codifying the psychotherapist-patient privilege obviated the evolution of the common law in this area and therefore should be treated as if it *were* common law.<sup>30</sup>

Having identified this new federal privilege, Justice Stevens then made clear that it would be quite expansive, including “confidential communications made to licensed social workers in the course of psychotherapy.”<sup>31</sup> He hinted that distributional considerations motivated this expansion, noting that social workers often treated “the poor and those of modest means.”<sup>32</sup> The Court then prohibited any subsequent, ad hoc balancing of a patient’s privacy interests against the state’s evidentiary need, reasoning that allowing the trial judge discretion to revoke a communication’s confidentiality after the fact would “eviscerate the effectiveness of the privilege,”<sup>33</sup> because “an uncertain privilege . . . is little better than no privilege at all.”<sup>34</sup> Justice Stevens declined

<sup>22</sup> *Id.* at 1928.

<sup>23</sup> *Id.* at 1929.

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

<sup>25</sup> *See id.*

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

<sup>27</sup> *See id.* at 1929 n.11 (citing statutes demonstrating that every state and the District of Columbia recognize some form of psychotherapist-patient privilege).

<sup>28</sup> FED. R. EVID. 501 (emphasis added).

<sup>29</sup> *See Jaffee*, 116 S. Ct. at 1930.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* at 1931.

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

<sup>33</sup> *Id.* at 1932.

<sup>34</sup> *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)) (internal quotation marks omitted).

to “delineate [the] full contours” of the nascent privilege, suggesting that further case-by-case development would be more appropriate.<sup>35</sup>

Justice Scalia dissented. He argued that psychotherapists should receive no different treatment from that of other confidants and marshaled fairness arguments to counter the majority’s policy justifications for recognizing the new privilege.<sup>36</sup> Justice Scalia accused the majority of ignoring a venerable line of cases that had adopted a cautionary posture toward the creation or expansion of privileges, and he derided the psychotherapist-patient privilege as “new, vast, and ill-defined.”<sup>37</sup> Justice Scalia contended that the new privilege resulted from the Court’s aberrant reading of the relevant case law, rather than from the natural evolution of evidentiary principles.<sup>38</sup> He argued further that the uniformly *legislative* nature of the privilege in the states actually militated against its recognition by the federal judiciary.<sup>39</sup> Emphasizing the variations among state privilege laws, Justice Scalia warned that federal courts would have little guidance in developing a coherent federal privilege.<sup>40</sup>

Justice Scalia, joined by Chief Justice Rehnquist only for this portion of the dissent, insisted that the majority had made the case’s most contentious issue — whether a social worker-client privilege should exist — a foregone conclusion, improperly subsumed within the discussion of the broader psychotherapist-patient privilege.<sup>41</sup> Arguments for privileging communications with psychiatrists or psychologists carry less force when used in support of a social worker privilege, he contended, because social workers have less training in general, and may have no training in psychotherapy at all.<sup>42</sup> Moreover, because social workers have many duties unrelated to psychotherapy, Justice Scalia feared that courts would struggle in determining when a social worker is wearing her psychotherapist “hat.”<sup>43</sup> Furthermore, the privilege for

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* at 1934 (Scalia, J., dissenting). For example, the fact that “men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends and bartenders — none of whom was awarded a privilege” — suggested to Justice Scalia that the new psychotherapist-patient privilege defied both fairness and common sense. *Id.*

<sup>37</sup> *Id.* at 1933.

<sup>38</sup> See *id.* at 1935. Justice Scalia considered the Court’s decision offensive to the principle that “[t]estimonial privileges . . . ‘are not lightly created nor expansively construed, for they are in derogation of the search for truth.’” *Id.* at 1933. (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)) (emphasis omitted). He also noted that this principle usually led the Court to construe existing privileges narrowly. See *id.* (citing *United States v. Zolin*, 491 U.S. 554, 568–70 (1989)).

<sup>39</sup> See *id.* at 1936.

<sup>40</sup> See *id.* at 1936. Furthermore, Justice Scalia wrote, state privilege laws were the product of special-interest activism. See *id.* He also speculated that the privilege’s uneven development may have indicated legislative uncertainty regarding the wisdom or fairness of such a privilege, concluding that “adoption of a social-worker psychotherapist privilege is a job for Congress.” *Id.* at 1940.

<sup>41</sup> See *id.* at 1933.

<sup>42</sup> See *id.* at 1937–38.

<sup>43</sup> See *id.* at 1938.

social workers varies among states as widely as does the privilege for psychotherapists, making the establishment of a uniform federal privilege difficult.<sup>44</sup> Finally, Justice Scalia upbraided the Court for forgetting its own admonition that new privileges “are not lightly created,”<sup>45</sup> and he insisted that such politics better suit Congress than the Supreme Court.<sup>46</sup>

The Court’s recognition of a federal psychotherapist-patient privilege under Rule 501 was arguably unauthorized; its holding was certainly unwise and unnecessary. Despite Congress’s directive that federal courts situate new privileges in “common law” principles, the Court consulted everything *except* the common law — nonbinding Advisory Committee notes, the utter silence of the common law, and especially, state statutes — to justify the new privilege. If Rule 501’s delegation of rulemaking authority is sufficiently clear, the Court’s consideration of everything from legislative action to judicial inaction was a bold rejection of Congress’s directive. Furthermore, by relying on state statutes to support the establishment of the psychotherapist-patient privilege in federal courts, the Court arguably forced district courts to rely on state statutes to ascertain the scope of that privilege in any particular case. This result contravenes the Court’s usual presumption that congressional acts generally — and federal procedural rules particularly — have uniform nationwide application. The Court could have avoided the drastic step of recognizing the new privilege, and of excluding so much evidence, by reiterating its commitment to the relevancy rules of the Federal Rules of Evidence.

The Court’s decision recklessly broadened the sources and content of the “federal common law.”<sup>47</sup> The Court cited *Funk v. United States*<sup>48</sup> for the proposition that policy determinations by state legislatures could provide the reason and experience that the drafters of Rule 501 demanded for the recognition of new privileges.<sup>49</sup> Whatever the merits of *Funk*, in summarizing the requirements of Rule 501, the *Jaffee* Court improperly elided the fact that Congress had instructed that

<sup>44</sup> See *id.* at 1939–40.

<sup>45</sup> *Id.* at 1940 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)) (internal quotation marks omitted).

<sup>46</sup> See *id.* at 1941.

<sup>47</sup> The psychotherapist-patient privilege did not exist at common law. See *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1539 (1985) [hereinafter *Developments*]. Moreover, commentators have criticized the Court for erroneously inferring that Congress had delegated broad lawmaking power to the judiciary under similar circumstances. See, e.g., Michael S. Kaufman, *A Little “Right” Musick: The Unconstitutional Judicial Creation of Private Rights of Action Under Section 10(b) of the Securities Exchange Act*, 72 WASH. U. L.Q. 287, 341 (1993).

<sup>48</sup> 290 U.S. 371 (1933).

<sup>49</sup> See *Jaffee*, 116 S. Ct. at 1930 (citing *Funk*, 290 U.S. at 376–81). In *Funk*, the Court held that a defendant’s wife was a competent witness on his behalf — notwithstanding the common law — in light of the trend of congressional opinion, legislation, and “the great weight of judicial authority.” *Funk*, 290 U.S. at 380.

privileges "shall be governed by the principles of the *common law* as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>50</sup>

Even if the language in Rule 501 amounts to a rare, express congressional delegation of lawmaking power to the courts,<sup>51</sup> the Court neglected its duty to consider whether the "textual provision . . . circumscribes or 'frames' with reasonable specificity the area in which judicial lawmaking is to take place."<sup>52</sup> If one does not regard Congress's mention of common law principles as an intelligible guideline, the delegation is of questionable validity, because Rule 501 contains no other instructions to channel the development of new privileges.<sup>53</sup> On the other hand, if common law principles do structure the generation of novel privileges adequately — as seems likely<sup>54</sup> — then this language dictates "certain conditions and guidelines which an interpreting court is not free to ignore."<sup>55</sup> Rule 501's presence within the broader Federal Rules of Evidence provides subtle, contextual guidance for the Rule's interpretation, because the Rules carry a strong bias in favor of the admission of evidence.<sup>56</sup> By failing to adhere to the limits of Congress's delegation — both in Rule 501's language and in the broader statutory framework — the Court risked engaging in unauthorized judicial legislation.

In recognizing statutes as substitutes for a body of common law that never developed,<sup>57</sup> the majority violated an elementary interpre-

<sup>50</sup> FED. R. EVID. 501 (emphasis added); see *Jaffee*, 116 S. Ct. at 1928.

<sup>51</sup> See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 935 (1986); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 42 (1985).

<sup>52</sup> Merrill, *supra* note 50, at 41. Significantly, Justice Stevens has himself advocated a cautionary stance toward the creation of federal common law:

When judges are asked to embark on a lawmaking venture, I believe they should carefully consider whether they, or a legislative body, are better equipped to perform the task at hand . . . . [W]hen we are asked to create an entirely new doctrine — to answer "questions of policy on which Congress has not spoken," we have a special duty to identify the proper decision-maker before trying to make the proper decision.

*Boyle v. United Techs. Corp.*, 487 U.S. 500, 531 (1988) (Stevens, J., dissenting) (quoting *United States v. Gilman*, 347 U.S. 507, 511 (1954)) (citation omitted).

<sup>53</sup> The Court has required that congressional delegations to other branches carry an "intelligible principle" by which a court can discern the limits of the delegated lawmaking power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>54</sup> See *Loving v. United States*, 116 S. Ct. 1737, 1750 (1996) (noting that, since 1935, the Court has upheld "delegations under standards phrased in sweeping terms").

<sup>55</sup> Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 789 (1989). Redish adds that "certain statutes may delegate more lawmaking power than others, and it is important for the court not to exceed the limitations inherent in the outer confines set by the statute's text." *Id.* at 798 (footnote omitted).

<sup>56</sup> See Imwinkelried, *supra* note 1, at 516.

<sup>57</sup> See *Jaffee*, 116 S. Ct. at 1930 ("[O]nce a state legislature has enacted a privilege there is no longer an opportunity for common-law creation of the protection.").

tive canon, torturing meaning out of judicial silence.<sup>58</sup> The Court consistently has approached the interpretation of *legislative* silence with caution.<sup>59</sup> The Court should treat inferences from *judicial* silence with even more suspicion, for building common law on an absence of cases — even one created by preemptive legislation — will, in the next case on the issue, bind the judiciary to legislation smuggled in through common law stare decisis.<sup>60</sup> Similarly, just as it sifted significance from silence, the Court twisted Congress's refusal to recognize the psychotherapist privilege into an *inclination* to do so, emphasizing the Advisory Committee's opinion that Congress's rejection of specific, enumerated privileges should "not be understood as disapproving any recognition of a psychiatrist-patient privilege."<sup>61</sup> Ultimately, the Court converted the double negative of the committee's language into a positive argument for the new privilege — a disfavored practice at all levels of the federal bench.<sup>62</sup>

Furthermore, the district courts may view the Court's willingness to allow state statutes to support the *existence* of the psychotherapist-patient privilege as an invitation to use state law to define the *content* of the privilege. Occasionally, federal courts have allowed state law to shape the content of a federal statute, particularly when the statute

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<sup>58</sup> Courts have recognized that "[a] judicial decision is, by definition, a verbalized action of the court; it is not the product of judicial silence and inaction." *Fletcher v. Gagosian*, 604 F.2d 637, 638 (9th Cir. 1979). The casual treatment of judicial silence as acquiescence in a policy is perilous because "[j]udicial silence — like legislative silence — is usually ambiguous and is frequently an invitation to others to perform interstitial judicial functions." *Mordecai v. United States*, 252 F. Supp. 694, 702 (D.D.C. 1966). Consequently, courts have felt "unable to read . . . much into judicial silence on a point of law." *Comeau v. Rupp*, 810 F. Supp. 1172, 1176 (D. Kan. 1992). Federal courts consider such caution appropriate because justiciability is limited to cases and controversies under Article III of the Constitution. *See United States v. Woodley*, 751 F.2d 1008, 1028 (9th Cir. 1985) (en banc) (Norris, J., dissenting) (arguing that judicial silence following action by the legislative or executive branches cannot be construed to waive the constitutional rights of individuals).

<sup>59</sup> *See, e.g.*, *Zuber v. Allen*, 396 U.S. 168, 185 (1969) (characterizing "[l]egislative silence" as "a poor beacon to follow" in statutory interpretation).

<sup>60</sup> Some observers have considered that Congress's growing predilection for passing political issues to the judiciary warrants an even more rigid application of stare decisis to prevent Congress from delegating away preeminently political choices to the courts. *See, e.g.*, Lawrence C. Marshall, "*Let Congress Do It!*: The Case for An Absolute Rule of Statutory Stare Decisis", 88 MICH. L. REV. 177, 221–22 (1989).

<sup>61</sup> *Jaffee*, 116 S. Ct. at 1931 (quoting S. REP. NO. 93-1277, at 13 (1974)) (internal quotation marks omitted). Some commentators have defended the credence that courts give the Advisory Committee notes, *see, e.g.*, Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1284 (1995), although even these scholars recognize that the notes are distinct from the common law, *see id.* at 1301. When Congress demanded that common law principles shape the development of evidentiary principles, it did not implicitly include the Advisory Committee notes among the authorities that courts could consult.

<sup>62</sup> *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (cautioning that failed legislative proposals that do not become law are a "particularly dangerous ground on which to rest an interpretation").

relies on legal terminology traditionally defined by the states.<sup>63</sup> Because the licensing of psychotherapists is exclusively a creature of state law,<sup>64</sup> federal courts may consult state law to elaborate the new privilege.<sup>65</sup> However, this practice contradicts the Court's usual assumption that, when Congress designates federal courts the architects of federal common law, Congress intends that "[f]ederal interpretation of federal law will govern, not state law."<sup>66</sup> Allowing the laws of fifty-one jurisdictions to flesh out the privilege will make a Frankenstein monster of Rule 501, with several practical consequences in terms of doctrinal uniformity, predictability, and legitimacy.

First, the federal privilege will be as motley as the state privilege laws that animate it.<sup>67</sup> When the Court has interpreted federal statutes, it has generally assumed that Congress intended those rules to operate uniformly throughout the country.<sup>68</sup> Yet at least one commentator has perceived that, whenever the Court establishes a presumption against applying or creating federal common law and in favor of applying state law, it "prevent[s] the creation of a uniform common law rule."<sup>69</sup> In fact, the Court traditionally has inferred congressional intent for state law to define a federal statute only "where uniformity clearly was not intended."<sup>70</sup> The coexistence of the Court's preoccupation with creating a "certain" or reliable privilege<sup>71</sup> and its apparent indifference to national uniformity implies that the *Jaffee* majority considered "uniformity within each state . . . more important than national uniformity."<sup>72</sup>

Second, application of the new privilege will not be as certain or even as predictable as the Court hoped.<sup>73</sup> This failure will result

<sup>63</sup> See, e.g., *De Sylva v. Ballantine*, 351 U.S. 570, 580–81 (1956) (allowing state law to define a "child" for federal copyright renewal purposes); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946) (permitting state law to define "real property" as used in a federal statute).

<sup>64</sup> See Catharina J.H. Dubbelday, Comment, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 EMORY L.J. 777, 813–17 (1985).

<sup>65</sup> James Feldman, an assistant to the Solicitor General Drew S. Days, suggested this possibility at oral argument. See Transcript of Oral Argument, *Jaffee* (No. 95-266), available in 1996 WL 88548, at \*50 (Feb. 26, 1996).

<sup>66</sup> *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

<sup>67</sup> State privilege laws have become so complicated that some commentators have advocated that the states adopt a single, uniform privilege law. See, e.g., Kerry L. Morse, Note, *A Uniform Testimonial Privilege for Mental Health Professionals*, 51 OHIO ST. L.J. 741, 756–57 (1990).

<sup>68</sup> See *Jerome v. United States*, 318 U.S. 101, 104 (1943) (assuming that, "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law").

<sup>69</sup> Arthur W. Leibold, Jr., *Federal Common Law: What and Where?*, in CIVIL AND CRIMINAL LIABILITY OF OFFICERS, DIRECTORS, AND PROFESSIONALS: BANK & THRIFT LITIGATION IN THE 1990's, at 153, 197 (PLI Comm. Law & Practice Course Handbook Series No. 595, 1991).

<sup>70</sup> *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989).

<sup>71</sup> See *Jaffee*, 116 S. Ct. at 1932.

<sup>72</sup> Field, *supra* note 50, at 959.

<sup>73</sup> Commentators have asserted generally that the Court's unwillingness to define privileges leads to widespread uncertainty, both in the courts and in the privileged relationship itself. See,

partly because many states lack tidy privilege laws, instead having "patchwork[s] of laws."<sup>74</sup> Intrastate inconsistencies will breed intracircuit uncertainty about the parameters of the privilege because, as the district courts model the federal privilege after those in force in the states wherein they sit, a spectrum of interpretations of the federal psychotherapist-patient privilege will result.<sup>75</sup> More importantly, however, the Court may see its objective of creating state-federal parity in privilege law thwarted, at least in some states. The Court's extension of the psychotherapist-patient privilege to social workers, for example, will actually cause more uncertainty in the states that do not recognize that privilege than existed before.<sup>76</sup>

Third, the federal courts may now have to give credence to state statutes so old that the majoritarian force that led to their enactment no longer exists.<sup>77</sup> When the Court noted that all but one of the federal decisions rejecting the privilege were more than five years old,<sup>78</sup> it hinted that majoritarian principles were at the heart of its departure from established precedents. Yet the Court failed to mention that the vast majority of the state statutes recognizing the privilege are more than ten years old.<sup>79</sup> The Court simply abandoned old caselaw for even older statutory law without articulating any basis for this choice.<sup>80</sup>

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e.g., Jacqueline A. Weiss, Note, *Beyond Upjohn: Achieving Certainty by Expanding the Scope of the Corporate Attorney-Client Privilege*, 50 FORDHAM L. REV. 1182, 1183–84 ("The lack of any uniform privilege standard has injected unnecessary uncertainty into both attorney-client relations and judicial decisions.").

<sup>74</sup> Samuel J. Knapp, Leon VandeCreek & Perry A. Zirkel, *Privileged Communications for Psychotherapists in Pennsylvania: A Time for Statutory Reform*, 60 TEMP. L.Q. 267, 291 (1987).

<sup>75</sup> In fact, any time the Court creates federal common law, intracircuit confusion may develop. See Field, *supra* note 50, at 958 (noting that it may take time before the federal judiciary can decide as a body what the law is). Commentators were especially anxious about this possibility in the Rule 501 context. See, e.g., Catherine M. Baytion, Comment, *Toward a Uniform Application of a Federal Psychotherapist-Patient Privilege*, 70 WASH. L. REV. 153, 174 (1995) (calling on Congress to adopt a uniform federal rule).

<sup>76</sup> Five states — Alabama, Alaska, Hawaii, North Dakota, and Pennsylvania — do not extend the psychotherapist-patient privilege to social worker-client communications. See *Jaffee*, 116 S. Ct. at 1931 n.17 (listing the 45 states that give social workers the privilege). These five states are located in the Third, Eighth, Ninth, and Eleventh Circuits. None of these circuits had recognized the privilege, and two of them — the Ninth and Eleventh — had affirmatively rejected it. See *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988). Thus, individuals consulting social workers in Alabama, Alaska, and Hawaii after *Jaffee* will experience more uncertainty about the extent of their privilege than before, even though these states and their respective circuits had previously been in agreement that no privilege existed.

<sup>77</sup> See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 101 (1982).

<sup>78</sup> See *Jaffee*, 116 S. Ct. at 1926.

<sup>79</sup> See *Developments*, *supra* note 46, at 1539 n.59 (reporting that only five states had not recognized some form of psychotherapist-patient privilege as of the date of publication in 1985).

<sup>80</sup> "[T]here is nothing in democratic or majoritarian theory which supports the notion that old statutes, as a group, are more entitled to a conservative bias than old common law rules . . . ." CALABRESI, *supra* note 76, at 103.

The irony of this decision may be that well established provisions in the Federal Rules of Evidence made recognition of a new privilege unnecessary to attain the Court's goals. As Justice Scalia suggested, milder measures would have achieved the majority's ends without excluding so much relevant evidence.<sup>81</sup> In fact, at least one commentator has contended that, even in states that have recognized the psychotherapist-patient privilege, relevancy, "not privilege, governs the right of nondisclosure" in the psychotherapist-patient relationship.<sup>82</sup> Courts can employ several methods to screen a patient's records for relevancy prior to their disclosure to the opposing party, the jury, or the public at large. For example, if a judge cannot discern without more information whether a psychotherapist's records are relevant, she can conduct an *in camera* review of those records.<sup>83</sup> This procedure would intrude minimally on the patient's privacy — only the judge could peruse the records. When the relevance of the records is beyond doubt, the judge can issue a protective order providing for limited disclosure of records alleged to be subject to the psychotherapist-patient privilege.<sup>84</sup> Moreover, should a court admit some or all of a patient's file into evidence, it could issue a protective order sealing portions of the trial record.<sup>85</sup>

More than twenty years ago, Congress avoided deciding whether a psychotherapist-patient privilege should exist when it defined a single general privilege rather than several specific ones. In *Jaffee*, the Court mirrored Congress's act, defining a specific privilege broadly. Convinced on policy grounds to recognize the privilege and unable to discern a limit to its own lawmaking authority, the Court compromised Congress's directive to ground new privileges in principles of common

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<sup>81</sup> See *Jaffee*, 116 S. Ct. at 1935 (Scalia, J., dissenting).

<sup>82</sup> RALPH SLOVENKO, PSYCHIATRY AND LAW 67 (1973).

<sup>83</sup> The provisions authorizing *in camera* review are dispersed throughout the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Federal Rule of Civil Procedure 35 discusses discovery of physician-patient examination results generally, see FED. R. CIV. P. 35, and in applying this rule, courts have approved *in camera* inspection of medical reports and the excision of unduly prejudicial material therefrom, see *Swift v. Swift*, 64 F.R.D. 440, 443 (E.D.N.Y. 1974). Federal Rule of Evidence 104 allows courts to conduct hearings on preliminary factual questions out of the jury's hearing. See FED. R. EVID. 104. A proposed rule described Rule 104 as a "facilitation of] the making of claims of privilege without the knowledge of the jury"; although the proposal was not adopted, its spirit continues to infuse Rule 103(c). 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5042, at 230 (1977) (quoting Fed. R. Evid. 513(b) (proposed in 1972), reprinted in 56 F.R.D. 183, 260 (1972)) (internal quotation marks omitted).

<sup>84</sup> Courts have held that this measure ameliorates patients' privacy concerns. See, e.g., *Mines v. City of Philadelphia*, 158 F.R.D. 337, 338 (E.D. Pa. 1994).

<sup>85</sup> Federal Rule of Civil Procedure 26(c)(6) authorizes a court to order that a deposition remain sealed. See FED. R. CIV. P. 26(c)(6). Courts also have favored the redaction of irrelevant evidence to protect patients' privacy interests. Cf. *Wei v. Bodner*, 127 F.R.D. 91, 97–98 (D.N.J. 1989) (redacting information pursuant to a statutory physician-patient privilege).

law. This combination of specious policy<sup>86</sup> and self-aggrandizement will undermine doctrinal uniformity and certainty and will create confusion ill-befitting a *federal* rule. Ultimately, Congress may have to tame this intractable federal privilege into a manageable monster.

### C. Full Faith and Credit Act

*Exclusive Federal Jurisdiction.* — Collateral estoppel has never been the grist of landmark Supreme Court decisions. Last Term's *Matsushita Electric Industrial Co. v. Epstein*<sup>1</sup> proved no exception. It did, however, draw into sharp relief the Full Faith and Credit Act's<sup>2</sup> thorny interaction with exclusive federal jurisdiction. In a misguided prognostication of Delaware law, the Supreme Court concluded that Delaware courts would permit a preclusive release of exclusively federal claims in a state class action settlement.<sup>3</sup> In so holding, the Court not only misapplied its own interpretation of Delaware's issue preclusion law, but also missed a subtlety of Delaware law that would have allowed federal review of the settlement in the interest of supremacy and comity. The unhappy result is that, instead of furthering federalism and empowering the Delaware courts, the Court crafted a holding that ultimately will drive securities plaintiffs away from the state courts.

In September 1990, financial press reports indicated that Matsushita would acquire MCA, Inc.<sup>4</sup> In a preemptive strike, a group of shareholders launched a class action against MCA and its board of directors in Delaware state court, claiming that MCA's board breached its fiduciary duty by failing to conduct a *Revlon* market test.<sup>5</sup> Matsu-

<sup>86</sup> For instance, the Court did not consider how a psychotherapist-patient privilege could prevent juries from learning whether pre-trial psychotherapy had warped crucial aspects of a witness's testimony. Recently, commentators have alerted courts to the suggestive power of psychotherapy. See, e.g., HOLLIDA WAKEFIELD & RALPH UNDERWAGER, RETURN OF THE FURIES: AN INVESTIGATION INTO RECOVERED MEMORY THERAPY 173–76 (1994) (citing studies concluding that psychotherapy can distort memory); Julie M. Kosmond Murray, Comment, *Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477, 511–12 (1995). The Court's inattention to this possibility is especially remarkable given that Allen's estate alleged that Redmond's discussions with the social worker had "sharpened" Redmond's recollection of the shooting to the point that she considered her memory of the incident better at trial than it had been immediately after the shooting. See Brief for Petitioner at 21, *Jaffee* (No. 95-266), available in 1996 WL 723662.

<sup>1</sup> 116 S. Ct. 873 (1996).

<sup>2</sup> 28 U.S.C. § 1738 (1994) (requiring that judicial proceedings of any court of any state "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they were taken").

<sup>3</sup> See *Matsushita*, 116 S. Ct. at 880.

<sup>4</sup> See *id.* at 885 (Ginsburg, J., concurring in part and dissenting in part).

<sup>5</sup> See *id.* (citing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986)).

shita did not actually execute a tender offer until November 1990.<sup>6</sup> After the terms of this offer were disclosed in the required SEC filings, a second group of MCA shareholders brought suit against Matsushita in federal court in California, alleging preferential treatment of two MCA directors in violation of SEC Rules 14d-10 and 10b-13.<sup>7</sup> Unable to add this new cause of action to their state law suit (because the '34 Act claims were justiciable exclusively in federal court),<sup>8</sup> the Delaware plaintiffs instead amended their complaint against MCA to allege a further breach of fiduciary duty: waste of corporate assets by exposure to liability under federal securities law.<sup>9</sup>

In December 1990, the Delaware plaintiffs proposed a settlement agreement to the Delaware Vice Chancellor.<sup>10</sup> He remarked on the questionable nature of the Delaware class action and the weakness of the claims, but nonetheless refused to endorse the settlement.<sup>11</sup> Although the state claims were dubious, the federal claims — which the state settlement sought to encompass in its release — seemed meritorious and had yet to be adjudicated.<sup>12</sup> Moreover, the only monetary benefit that the settlement provided was for the lawyers, suggesting inadequate representation.<sup>13</sup> To compound matters, the agreement included no opt-out right for dissenting class members.<sup>14</sup>

Meanwhile, in the California federal action, the district judge denied certification of the class and entered summary judgment for the defendants because he refused to infer a private right of action under Rule 14d-10.<sup>15</sup> Back in Delaware, the state-action plaintiffs then offered a new settlement agreement that provided opt-out rights for dissenters, a nominal monetary reward for the class, and reduced attorneys' fees.<sup>16</sup>

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<sup>6</sup> See *id.* (noting that the offer was successful and that MCA acquired Matsushita for \$6.1 billion).

<sup>7</sup> See *Epstein v. MCA, Inc.*, 50 F.3d 644, 648 (9th Cir. 1995). The SEC promulgated Rule 14d-10, also known as the "all-holder, best-price" rule, 17 C.F.R. § 240.14d-10 (1996), and Rule 10b-13, 17 C.F.R. § 240.10b-13, under the 1968 Williams Act Amendments to the Securities Exchange Act of 1934. See 15 U.S.C. § 78n(d)(6)-(7) (1994). The federal plaintiffs contended that the 106% tender offer premium paid to MCA's chairman and the \$21 million paid to its chief operating officer (purportedly a "performance" payment) were actually side payments meant to induce tendering and, thus, violations of the "all-holder, best-price" mandate of Rule 14d-10. See *Epstein*, 50 F.3d at 648 & n.5, 652-53, 657-58.

<sup>8</sup> See 15 U.S.C. § 78aa (1994) (conferring exclusive federal jurisdiction).

<sup>9</sup> See *Matsushita*, 116 S. Ct. at 886 (Ginsburg, J., concurring in part and dissenting in part). The amended complaint also added Matsushita as an aider and abettor. See *id.*

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

<sup>11</sup> See *In re MCA, Inc. Shareholders Litig.*, 598 A.2d 687, 693-96 (Del. Ch. 1991).

<sup>12</sup> See *id.* at 694-95.

<sup>13</sup> See *id.* at 695.

<sup>14</sup> See *id.* at 693. Of course, as the action primarily sought equitable remedies, opt-out rights were not mandatory.

<sup>15</sup> See *Epstein v. MCA, Inc.*, 50 F.3d 644, 648-49 (9th Cir. 1995).

<sup>16</sup> See *In re MCA, Inc. Shareholders Litig.*, No. 11740, 1993 WL 43024, at \*4-\*7 (Del. Ch. Feb. 16, 1993).

Deeming it likely that the federal plaintiffs would be bound by the settlement release, the Vice Chancellor examined the nature of the federal claims.<sup>17</sup> Although the federal case was pending on appeal to the Ninth Circuit, the Vice Chancellor implied that the district court's entry of summary judgment for the defendants revealed an inherent weakness of the federal plaintiffs' case.<sup>18</sup> Thus, he concluded that the benefit to the class of approving the settlement outweighed the danger that the settlement might have a preclusive effect on the federal claims.<sup>19</sup> Notably, however, the Vice Chancellor did not compare the actual allegations underlying the federal claims with those underlying the state claims — a comparison that, under Delaware law, determines the preclusive effect of the consent decree.<sup>20</sup> Nonetheless, underscoring his reservations about the adequacy and fairness of both the process and substance of the agreement, the Vice Chancellor approved the settlement.<sup>21</sup> The Delaware Supreme Court summarily affirmed.<sup>22</sup>

Back in the federal forum, the Ninth Circuit heard the appeal from the trial court's grant of summary judgment. In an exhaustive opinion, the court of appeals not only reversed the grant of summary judgment for the defendants, but also granted summary judgment for the plaintiffs, remanding solely for the calculation of damages.<sup>23</sup> The court held that Rule 14d-10 confers a private right of action<sup>24</sup> and that the challenged payments constituted part of the tender offer.<sup>25</sup>

Matsushita raised two affirmative defenses, both of which related to the Delaware settlement. First, it contended that as a matter not of jurisdiction or judicial power, but of contract law, the non-opting-out California plaintiffs were bound as class members to the release agreement, on the theory that a class settlement is no different from a traditional settlement by individual, private litigants.<sup>26</sup> Second, it urged that as a matter of the law of judgments and of full faith and credit under 28 U.S.C. § 1738, the plaintiffs were bound by the Delaware

<sup>17</sup> See *id.* at \*3.

<sup>18</sup> See *id.* at \*2.

<sup>19</sup> He attached some (unjustified) significance, by implication, to the fact that the Ninth Circuit did not grant expedited review. See *id.*

<sup>20</sup> See, e.g., *Nottingham Partners v. Dana*, 564 A.2d 1089, 1106–07 (Del. 1989).

<sup>21</sup> See *In re MCA*, 1993 WL 43024, at \*5. "The potential for this type of abuse clearly exists in representative litigation." *Id.* "And when the settling parties have previously proposed a patently inadequate settlement in which the class would have received no monetary benefit but the attorneys would have received \$1 million in fees (as the initial, now-rejected, settlement provided), suspicions abound." *Id.* (citation omitted).

<sup>22</sup> See *In re MCA, Inc. Shareholders Litig.*, 633 A.2d 370 (Del. 1993) (mem.).

<sup>23</sup> See *Epstein v. MCA, Inc.*, 50 F.3d 644, 657 (9th Cir. 1995). The Ninth Circuit entered summary judgment only against the chairman. See *id.* at 658–59.

<sup>24</sup> See *id.* at 652. On certiorari, this question was not before the Court, which explicitly declined comment. See *Matsushita*, 116 S. Ct. at 876 n.1.

<sup>25</sup> See *Epstein*, 50 F.3d at 654–56 (commenting on the flexible definitions of § 14(d)(7)).

<sup>26</sup> See *id.* at 666.

court's decision.<sup>27</sup> The court rejected the first defense on the grounds that class actions *are* fundamentally different from settlements between individual litigants.<sup>28</sup>

The court also rejected the second defense.<sup>29</sup> While observing that § 1738 generally would require federal courts to give full faith and credit to state court judgments, the court of appeals concluded that a subject-matter exception to § 1738 prohibited the Delaware court from precluding a federal action involving exclusively federal claims.<sup>30</sup> It seemed axiomatic that a state court without authority to try an exclusively federal claim could not have the authority to release that claim with preclusive effect.<sup>31</sup> The court of appeals did, however, acknowledge case law permitting state courts to release exclusively federal claims in some situations, depending on the factual similarity between the actions.<sup>32</sup> The defendants advocated a broad "same transaction" test for comparing the claims.<sup>33</sup> The Ninth Circuit found scant support for this position and determined that federal law prescribed an "identical factual predicate" test.<sup>34</sup> Applying this test, the Ninth Circuit had little difficulty in separating the factual predicates of the state

<sup>27</sup> See *id.* at 661.

<sup>28</sup> See *id.* at 667 ("[W]e would be blind to reality to think that any consent implied by class members in deciding not to opt out is comparable to the consent given by individual plaintiffs in settling their own lawsuits."). In rejecting the simple contract law analogy, the Ninth Circuit noted that class action settlements bear judicial imprimatur and thus, in contrast to private litigants' settlement contracts, cannot be divorced from issues of jurisdiction and judicial power. See *id.* at 666–67; see also *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1557 (3d Cir. 1994) (distinguishing a private settlement between two parties in which no complaint has been filed, a settlement of a pending case, and an approval of a class action settlement); Stephen E. Morrissey, Note, *State Settlement Class Actions that Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation*, 95 COLUM. L. REV. 1765, 1771 (1995) ("The authority to release federal claims [in the individual litigation context] flows from the litigant's right to contract, not the court's power to adjudicate.").

<sup>29</sup> See *Epstein*, 50 F.3d at 668. Although the former adjudication defense seems like an argument of claim preclusion because the suitors apparently had their "day in court," the settlement release actually invokes the doctrine of issue preclusion. Because exclusively federal claims cannot be brought in state court, they cannot be part of the state court "cause of action," which is the measuring rod for claim preclusion. Their underlying facts, however, can be determined in the state court action with issue-preclusive effect. See, e.g., *Grimes*, 17 F.3d at 1563 & n.12 (noting that Delaware courts apply the doctrine of issue preclusion to bind parties to a procedurally adequate settlement); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32 (1st Cir. 1991) (employing issue preclusion rather than claim preclusion). Such reasoning is problematic, however, because it ignores the traditional issue preclusion question of full and fair litigation.

<sup>30</sup> See *Epstein*, 50 F.3d at 661 & n.25, 662 (citing *Durfee v. Duke*, 375 U.S. 106, 111–12 (1963)).

<sup>31</sup> This concept is referred to as the "jurisdictional competency" rule. See, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382, 383 n.3 (1985) (observing that because most states follow this rule, application of a state's preclusion law would not have preclusive effect on exclusively federal claims).

<sup>32</sup> See *Epstein*, 50 F.3d at 663–64.

<sup>33</sup> *Id.* at 664–65.

<sup>34</sup> *Id.* at 663–64.

action (primarily against MCA) and the federal action (against Matsushita),<sup>35</sup> and, thus, denied issue preclusion.<sup>36</sup>

The Supreme Court granted certiorari on the limited question of the former adjudication ruling<sup>37</sup> and unanimously held that the Ninth Circuit erred in turning to federal law to determine the issue preclusive effect of the state court settlement.<sup>38</sup> Both the seven-Justice majority and Justice Ginsburg (joined by Justice Stevens) agreed that § 1738 requires a federal court to examine — at least initially — the former adjudication law of the state that generated the putatively preclusive judgment, regardless of the nature of the claims being released.<sup>39</sup>

Justice Thomas's majority followed a two-step approach drawn from previous § 1738 cases:<sup>40</sup> the federal court first examines the originating state's former adjudication law to see if the subsequent federal action is foreclosed; then, if state preclusion law would prevent subsequent litigation, the court may nevertheless search for an explicit or implicit partial repeal of § 1738 and, consequently, deny full faith and credit to the state court judgment of preclusion.<sup>41</sup> Instead of remanding this substantive inquiry to the lower courts, the majority performed the two-step analysis itself. It first held that Delaware law would give preclusive effect to the exclusive federal claim release, despite the admitted lack of jurisdictional competency.<sup>42</sup> Second, it held that the grant of exclusive jurisdiction under the '34 Act did not warrant an implied repeal of § 1738's full faith and credit command, concluding that the Act and § 1738 "do not pose an either-or proposition."<sup>43</sup> The Court was unperturbed by the jurisdictional com-

<sup>35</sup> See *id.* 665–66 (finding that only one of the state law claims was even "in the same ball park as the Rule 14d-10 claim").

<sup>36</sup> See *id.* at 668.

<sup>37</sup> See *Matsushita*, 116 S. Ct. at 876 n.1, 877, 880 nn.5–6. Although the Court expressly declined to make any finding on the contract theory, see *id.* at 880 n.6, it did chide the Ninth Circuit indirectly for suggesting that federal law controls the contract inquiry, see *id.* (noting that § 1738 requires that state law control the determination); *Epstein*, 50 F.3d at 667 n.3.

<sup>38</sup> See *Matsushita*, 116 S. Ct. at 877; *id.* at 884 (Ginsburg, J., concurring in part and dissenting in part).

<sup>39</sup> See *Matsushita*, 116 S. Ct. at 877; *id.* at 884 (Ginsburg, J., concurring in part and dissenting in part). Perhaps the most curious of the many mysteries surrounding this case is that neither the majority nor Justice Ginsburg noticed that the Ninth Circuit's use of federal law led to the same standard — the identical factual predicate test — that is used in Delaware. See *Matsushita*, 116 S. Ct. at 879 (quoting Delaware law that articulates the identical factual predicate test). Thus, the potential affront to federalism was harmless error.

<sup>40</sup> See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 381 (1985); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481–83 (1982).

<sup>41</sup> See *Matsushita*, 116 S. Ct. at 878, 881.

<sup>42</sup> See *id.* at 878–80.

<sup>43</sup> *Id.* at 883 (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)) (internal quotation marks omitted). Partial repeals can be readily implied, of course, because § 1738 is a statutory concession of supremacy by the federal government. In contrast, interstate full faith and credit flows from a constitutional imperative. See U.S. CONST. art. IV, § 1.

petency requirement, because it differentiated between *adjudicating* an exclusively federal claim, which clearly would be unacceptable, and judicially endorsing a *settlement* of such a claim, which would be only a de minimis encroachment onto the federal domain.<sup>44</sup> The Court also gave little weight to the argument that class action settlements deserve special consideration in preclusion determinations.<sup>45</sup> Thus, the majority held that § 1738's full faith and credit command to follow state law precluded the federal action due to the state court settlement.<sup>46</sup>

Justice Ginsburg, joined by Justice Stevens, concurred in the reversal but disagreed with the Court's opinion. She chastised the majority for departing from precedent by speaking the first word on Delaware former adjudication law rather than remanding the case.<sup>47</sup> Moreover, she hinted that the majority's analysis of Delaware preclusion law was wrong but, to remain consistent, declined to offer a definitive pronouncement on that question.<sup>48</sup> Of greater concern to Justice Ginsburg, however, was the importance of safeguarding due process in class action settlements. She emphasized that the courts on remand were free to assess the due process rights of adequate representation, because any state's preclusion law must incorporate federal constitutional commands.<sup>49</sup> Underscoring the troublesome facts of the case,<sup>50</sup> Justice Ginsburg paved the way for a searching review on remand.

The Supreme Court doubtless felt that it was championing the legitimacy of state courts by upholding a state court release encompassing an exclusively federal claim. In actuality, it misapplied Delaware

<sup>44</sup> See *Matsushita*, 116 S. Ct. at 882 (citing *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 762 (2d Cir. 1968)).

<sup>45</sup> The Court had little sympathy for the objecting class members and seemed to imply that the non-opting-out plaintiffs had engaged in quasi-waiver (despite the unavailability of subject matter jurisdiction). See *id.* at 883 ("If class action plaintiffs wish to preserve absolutely their right to litigate exclusively federal claims in federal court, they should either opt out . . . or object . . . . In fact, some of the plaintiffs . . . requested exclusion . . . . They are now proceeding in federal court with their federal claims, unimpeded by the Delaware judgment."). But cf. *Marrese*, 470 U.S. at 386 ("We therefore reject [an interpretation of § 1738] that effectively holds as a matter of federal law that a plaintiff can bring state law claims initially in state court only at the cost of forgoing subsequent [exclusively federal] claims.").

<sup>46</sup> See *Matsushita*, 116 S. Ct. at 883.

<sup>47</sup> See *id.* at 884 (Ginsburg, J., concurring in part and dissenting in part). Justice Stevens also filed his own perfunctory opinion agreeing with the majority's '34 Act analysis. See *id.* at 884 (Stevens, J., concurring in part and dissenting in part).

<sup>48</sup> See *id.* at 888 n.4 (Ginsburg, J., concurring in part and dissenting in part).

<sup>49</sup> See *id.* at 888–90. Justice Ginsburg's due process analysis follows from *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481–83 (1982), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985), and earned Justice Souter's vote, see *Matsushita*, 116 S. Ct. at 884 (Ginsburg, J., concurring in part and dissenting in part). The majority appeared hostile to the suggestion of inadequate representation but conceded that the question had not been raised on certiorari. See *id.* at 880 n.5.

<sup>50</sup> See *Matsushita*, 116 S. Ct. at 889–90 (Ginsburg, J., concurring in part and dissenting in part). All of Justice Ginsburg's due process concerns seem warranted, but are beyond the scope of this Comment.

law and reached a policy decision that will drive plaintiffs away from the state courts into the already clogged federal system.

The Court's first mistake was its failure to analyze the factual overlap between the state and federal claims. The Supreme Court seemed to announce the similarity of the underlying facts by fiat: "The claims are clearly within the scope of the release in the judgment, since the judgment specifically refers to this lawsuit."<sup>51</sup> The absence of any discussion of the difference between the claims is astounding, because on the previous page of its opinion, the Court quoted as authoritative precedent an excerpt from an opinion of the Delaware Supreme Court requiring just such a comparison: "[A] [Delaware state] court may permit the release of a claim *based on the identical factual predicate* as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action."<sup>52</sup> Whereas the Ninth Circuit made meticulous efforts to expose palpable dissimilarities,<sup>53</sup> the Supreme Court either neglected this requirement of Delaware law or, even worse, reversed the Ninth Circuit's findings of fact in one sentence. Either explanation undermines the persuasive force of Justice Thomas's opinion.<sup>54</sup>

The latter explanation, if true, might support Justice Ginsburg's assertion that the majority had conflated Delaware's identical factual predicate test with the broader "transaction and occurrence" test advocated by Matsushita.<sup>55</sup> If these two tests are different in any meaningful way, it must be that the Delaware test encompasses a narrower sphere. Although the California federal court action and the Delaware state court action conceivably stemmed from the same transaction — the tender offer — they cannot possibly have stemmed from identical facts: in the latter, the question was whether MCA conducted appro-

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<sup>51</sup> *Matsushita*, 116 S. Ct. at 880.

<sup>52</sup> *Id.* at 879 (emphasis added) (quoting *Nottingham Partners v. Dana*, 564 A.2d 1089, 1106 (Del. 1989) (quoting *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982))) (internal quotation marks omitted).

<sup>53</sup> The circuit court opinion had a two-page discussion entitled "The Disparity Between the State and Federal Claims." *Epstein v. MCA, Inc.*, 50 F.3d 644, 665–66 (9th Cir. 1995).

<sup>54</sup> Conflating the underlying claims with the settlement agreement, the Court treated the settlement as a res unto itself. It seemed to assume that if the settlement covered exclusively federal claims, those claims were, *per se*, factually related to the state claims. To be fair to the Court, perhaps it felt that such a threshold safeguard would be assured by the Delaware Vice Chancellor. The guardedness of the Vice Chancellor's tone and the extensiveness of the Ninth Circuit's contrary analysis, however, make this a difficult position to impute to the Court.

<sup>55</sup> *Matsushita*, 116 S. Ct. at 888 n.4 (Ginsburg, J., concurring in part and dissenting in part) ("In its endeavor to forecast Delaware preclusion law, the Court appears to have blended the 'identical factual predicate' test applied by the Delaware Supreme Court . . . with the broader 'same transaction' test advanced by *Matsushita*.").)

priate market checks, and in the former, whether questionable payments were illegal.<sup>56</sup>

The majority's apparent failure to follow its own test of factual comparison is disquieting. More troubling, however, is that this test does not even accurately reflect Delaware law. The majority's understanding of Delaware law seems to be that, as a matter of claim preclusion, state settlements releasing exclusively federal claims prohibit subsequent federal action.<sup>57</sup> This analysis is flawed on two counts, one minor and one major. First, as a technical matter, Delaware treats such questions as a matter of issue (not claim) preclusion.<sup>58</sup> The second, more fundamental problem with the Court's reading is that it disregards an additional nuance of Delaware law that defers to the federal courts in instances of *intersystem* former adjudication.<sup>59</sup>

A careful reading of Delaware law reveals that the Delaware courts — either as an act of comity or in deference to federal supremacy — permit the *federal* courts to determine the *intersystem* effects of Delaware judgments, especially in areas of exclusive federal jurisdiction.<sup>60</sup> The *MCA* opinion quoted by the majority provides a striking example of this *renvoi*.<sup>61</sup> If Justice Thomas had extended his quotation by an

<sup>56</sup> Moreover, whether something as complex and expansive as a tender offer could fall within one transaction and occurrence seems questionable. *See Epstein*, 50 F.3d at 664–65.

<sup>57</sup> *See Matsushita*, 116 S. Ct. at 881.

<sup>58</sup> Compare *In re MCA, Inc. Shareholders Litig.*, 598 A.2d 687, 691 (Del. Ch. 1991) ("When a state court settlement of a class action releases all claims . . . the class members are bound by the release or the doctrine of *issue* preclusion." (emphasis added)), *with Matsushita*, 116 S. Ct. at 879 ("Delaware has traditionally treated the impact of settlement judgments on subsequent litigation in state court as a question of *claim* preclusion." (emphasis added)).

<sup>59</sup> *See* Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1215–17 (1986). *Intersystem* preclusion refers to the effect that a judgment has in an external court system. *See* Robert C. Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510, 511 n.4 (1981) (coining the term). This effect is difficult to discern because the original court is not allowed to render a holding on the binding nature of its own authority; that effect can only be tested in a subsequent action. Indeed, judges seldom postulate on the *intersystem* effect of their own rulings. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 381–82 (1985). Furthermore, § 1738's command that a federal court afford a state court holding the same preclusive effect as would another court within the same state begs the very questions of *intersystem* nuances such as federalism, supremacy, and comity. "There is little reason to pretend that rules adopted in the intra-state setting can control the problems posed by exclusive federal jurisdiction." 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4470, at 482 (Supp. 1996). Is the federal court following § 1738 to determine how preclusive a Delaware release would be in a Delaware court (*intrasytem* preclusion), or in a federal court (*intersystem*), or is it to presume that the state in question pays no special attention to the *intersystem* phenomenon? *See* 18 *id.* at 481 ("There is no reason to believe that this congeries of problems was foreseen and carefully considered when Congress enacted § 1738.").

<sup>60</sup> *See, e.g., In re Mobile Communications Corp. of America, Inc. Consol. Litig.*, No. 10627, 1991 WL 1392, at \*14 (Del. Ch. Jan. 7, 1991), *aff'd*, 608 A.2d 729 (Del. 1992).

<sup>61</sup> The abstruse *renvoi* doctrine stems from *intersystem* choice of law and describes the situation in which one sovereign's choice of law rules dictate reference to a second sovereign, whose own choice of law rules refer back ("renvoi") to the initial sovereign. *See, e.g.*, Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 980 (1991).

other sentence, a more complete picture of Delaware law would have emerged: "When a state court settlement [releases exclusively federal claims] . . . , the class members are bound by the release or the doctrine of issue preclusion. . . . *A federal court is, however, free to review and determine the effect and scope of the release on the federal claims.*"<sup>62</sup> The Vice Chancellor therefore opined that "if this Court provides for the release of all the claims arising out of the challenged transaction, the claims . . . in the federal suit *will likely* be forever barred."<sup>63</sup> Other Delaware opinions have employed similar language,<sup>64</sup> and the majority's omission of this language is perplexing.<sup>65</sup>

Thus, Delaware law countenances a jurisdictional *pas de deux* not recognized by the Supreme Court. A Delaware court passes judgment. A subsequent action occurs in federal court. Section 1738 commands the federal court to follow Delaware law. Delaware law itself, if leading to preclusion, refers the matter back to the federal court for the final word. By ignoring this final provision of state law, the Court, ironically, failed to honor the Ninth Circuit's right — under Delaware former adjudication law — to make the final assessment.

Several explanations of Delaware's deference to the federal courts on this issue are available. First, the Delaware courts might erroneously believe that they are bound by federal law and § 1738 to let the federal court make the final determination.<sup>66</sup> Second, the *renvoi* could be an empty courtesy; the Delaware courts may feel secure in the knowledge that, in light of § 1738, the federal court will afford the Delaware court's preclusion holding substantial deference. Third, the *renvoi* could be an invitation for *de novo* review by the federal court, stemming, perhaps, from a recognition that federal courts are the best arbiters of substantive federal law, especially for statutes in which

<sup>62</sup> *In re MCA, Inc. Shareholders Litig.*, 598 A.2d 687, 691 (Del. Ch. 1991) (emphasis added) (citations omitted).

<sup>63</sup> *Id.* at 692 (emphasis added).

<sup>64</sup> "However, as the Court of Chancery properly concluded, the Massachusetts Federal District Court has the final responsibility for addressing Nottingham's claims and determining the effect of the release on those claims, in the exercise of its own jurisdiction." *Nottingham Partners v. Dana*, 564 A.2d 1089, 1105 (Del. 1989); *accord Mobile Communications*, 1991 WL 1392, at \*5 ("[T]he federal court is, of course, free to determine whether the release in question would be given preclusive effect on the federal claims.").

<sup>65</sup> Justice Thomas did make reference to a state court's lack of authority to order the dismissal of a federal case, but this remark is almost certainly an allusion to intersystem injunction. See *Matsushita*, 116 S. Ct. at 879. Federal courts that have subsequently taken up the invitation have, as a matter of course, asserted their prerogative to pronounce the final word. "This Court agrees that the effect of the settlement and release on the . . . federal litigation is ultimately for this Court to decide." *Sandler Assocs., L.P. v. BellSouth Corp.*, 818 F. Supp. 695, 701 (D. Del. 1993) (permitting preclusion).

<sup>66</sup> Confusion would be understandable. "Perhaps the Supreme Court's emphasis on the state-law inquiry as the correct starting place [for § 1738] . . . is little more than a point of intersystem etiquette; or it may be a manifestation of more substantial concerns of comity and federalism." *Shreve*, *supra* note 59, at 1231 (footnotes omitted).

Congress felt the need to confer exclusive federal jurisdiction.<sup>67</sup> What seems most compelling is a flexible, contextual interpretation: Delaware most likely intends the scope of power reserved for the federal court to vary with the nature of the claim.<sup>68</sup> Logically, exclusively federal claims should engender the greatest federal discretion and, even under those circumstances, most federal courts will be solicitous of the state court's holding.<sup>69</sup>

Delaware's delegation of final authority to the federal courts likely results from an uneasiness with the aggrandizement of state court jurisdiction over exclusively federal claims. This problem invokes the greater question whether the Supreme Court should have held, as a matter of federal law, that grants of exclusive federal jurisdiction imply a partial repeal of § 1738.<sup>70</sup> Some commentators have argued thusly,<sup>71</sup> and many have at least advocated flexibility.<sup>72</sup> Although federalism, an issue close to the heart of the current Court, ostensibly militates in favor of permitting state courts to dispose of exclusively federal claims, that argument cuts both ways. Plaintiffs now faced with a forum choice will have two options. They can go to state court, forgoing their exclusively federal claims, and risk preclusive foreclosure.<sup>73</sup> Alternatively, they can initiate their exclusive claims in federal court and append their state law claims under supplemental

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<sup>67</sup> "Moreover, it is highly unlikely that Congress intended that its grant of exclusive jurisdiction to the federal courts under the securities laws would be subject to the vicissitudes of a state court settlement class action." Morrissey, *supra* note 28, at 1807.

<sup>68</sup> Cf. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4470, at 689 (1981) (suggesting factors to be weighed).

<sup>69</sup> See, e.g., *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991). Of course, Delaware's nod to the federal courts could be an incorporation of the two-part *Kremer/Marrese* test for § 1738, suggesting that the scope-and-effect determination relates simply to the power of the federal courts to imply a repeal of § 1738. This reading seems implausible, however, because the Delaware opinions make no reference to § 1738. See, e.g., *Mobile Communications*, 1991 WL 1392, at \*5. It also is unlikely that the reservation of federal power refers to the canon of former adjudication that no court may pronounce the preclusive effect of its own judgments. See, e.g., 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1789, at 245 (1986). This reading, however, skirts circularity; it is the policy animating this very canon of preclusion law that conceivably motivated the provision of Delaware law. "[F]or that [original judgment] court is ill-equipped to test the adequacy of the representation of absent class members, the sufficiency of notice given, or even the general fairness of the proceeding." Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1060 (1954).

<sup>70</sup> Indeed, *Marrese* was premised on the assumption that most states have a jurisdictional competency requirement. See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) (characterizing a jurisdictional competency requirement as "generally true").

<sup>71</sup> See, e.g., RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 74-75 (4th ed. Supp. 1996) (finding the contract theory the only tenable justification for the Court's holding).

<sup>72</sup> See, e.g., 18 WRIGHT, MILLER & COOPER, *supra* note 68, § 4470, at 689-93.

<sup>73</sup> The risk will depend on the state's preclusion law, which may well differ from Delaware's.

jurisdiction.<sup>74</sup> A prudent counselor would have to choose the federal forum.<sup>75</sup>

Moreover, the seeming judicial efficiency of tidying up outstanding federal claims in state settlements is chimerical.<sup>76</sup> Naturally, the expeditious clearing of dockets is efficient, but the countervailing costs of confusion can greatly reduce, or even eliminate, any benefit. Indeed, there are some matters that the federal courts are more deft to adjudicate,<sup>77</sup> as evidenced in general by Congress's grant of exclusive federal jurisdiction, and in this particular case by the Vice Chancellor's miscalculation of federal securities law. Thus, the systemic costs of inconsistent substantive pronouncements will undo the efficiency and regularity sought by the conferral of exclusive jurisdiction.<sup>78</sup>

The *Matsushita* decision is a compilation of unconvincing and misdirected judicial reasoning. In an attempt to vindicate the authority of state courts, the Court misinterpreted a state's substantive laws, misapplied its own misguided test, and, worst of all, deterred securities litigants from seeking justice in the state courts. Such a victory for state courts seems pyrrhic indeed.<sup>79</sup>

#### D. Standards of Review

1. *Sentencing Guidelines — Departures.* — The United States Sentencing Guidelines circumscribe federal district judges' sentencing discretion by designating a narrow range of permissible punishments for each "class of convicted persons."<sup>1</sup> Sentencing judges may "depart" from the specified range only if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into

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<sup>74</sup> Indeed, if the claims emanate from the identical factual predicate, they can come up under § 1367(a), and if they are completely discrete, they can come up under § 1367(c). See 28 U.S.C. § 1367 (1994).

<sup>75</sup> See 18 WRIGHT, MILLER & COOPER, *supra* note 59, § 4470, at 478. Suitors in jurisdictions with pro-plaintiff state courts and juries therefore face a Hobson's choice.

<sup>76</sup> See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 385 (1985).

<sup>77</sup> "All grants of federal jurisdiction are based upon some perceived inadequacy of state courts." Shreve, *supra* note 59, at 1247 (quoting David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 328 (1978)) (internal quotation marks omitted).

<sup>78</sup> See generally Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 518–26 (1986) (demonstrating the problematic interaction between § 1738 and erroneous state court pronouncements on jurisdiction and preclusion).

<sup>79</sup> In the specific case, the damage is minimal. The lower courts will have the final say and most likely will withhold preclusion because of the glaring due process inadequacies. Indeed, absent the class action dimension, the due process concerns would be less troubling, as the contract argument would gain persuasive force. See FALLON, MELTZER & SHAPIRO, *supra* note 71, at 75.

<sup>1</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 2 (1995). The Guidelines are the work of the United States Sentencing Commission, which Congress created in 1984 to "establish sentencing policies and practices for the Federal criminal justice system." Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1987, 2018 (codified as amended at 28 U.S.C. §§ 991–998 (1994)).

consideration by the Sentencing Commission.”<sup>2</sup> Last Term, in *Koon v. United States*,<sup>3</sup> the Supreme Court held that appellate judges must accord these departures deferential “abuse of discretion” review.<sup>4</sup> By clarifying the institutional structure supporting the Guidelines scheme, this decision laid the groundwork for developing the proper method of review for “combination departures,” a rapidly evolving area of sentencing law.

On March 3, 1991, an intoxicated Rodney King led police officers on an approximately eight-mile car chase around Los Angeles at an estimated speed of over 100 miles per hour.<sup>5</sup> After pulling over and exiting the car, King refused to comply with repeated orders to lie on the ground and violently resisted the officers’ attempt to force him down.<sup>6</sup> A passerby captured the remainder of the encounter on videotape.<sup>7</sup> First, King charged at Officer Laurence Powell, who knocked King to the ground with a baton blow to the head.<sup>8</sup> King resisted the officers for another thirty-seven seconds despite numerous blows to his legs and chest, one of which fractured his right leg.<sup>9</sup> Powell then struck King in the chest again, and King rolled onto his stomach and lay still.<sup>10</sup> After ten seconds of watching King lie motionless, Officer Ted Briseno “stomped” on King’s neck.<sup>11</sup> Two seconds later, while King writhed in pain, Powell and a trainee renewed their baton blows and kicked him in the throat six times.<sup>12</sup>

In verdicts that sparked massive rioting in Los Angeles, a California jury refused to convict the officers of any wrongdoing.<sup>13</sup> A federal jury, however, subsequently convicted Powell and Sergeant Stacey Koon — the officer in charge at the scene — of willfully infringing King’s constitutional rights under color of law in violation of 18 U.S.C. § 242.<sup>14</sup> The district judge found the Guidelines to require sentences of seventy to eighty-seven months for both Koon and Powell, but held that two departures from the Guidelines were appropriate.<sup>15</sup> The court departed downward five levels because “King’s wrongful

<sup>2</sup> 18 U.S.C. § 3553(b) (1994).

<sup>3</sup> 116 S. Ct. 2035 (1996).

<sup>4</sup> See *id.* at 2046–47.

<sup>5</sup> See *United States v. Koon*, 833 F. Supp. 769, 775 (C.D. Cal. 1993).

<sup>6</sup> See *Koon*, 116 S. Ct. at 2041.

<sup>7</sup> See *id.*

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

<sup>9</sup> See *id.*; *Koon*, 833 F. Supp. at 777–78.

<sup>10</sup> See *Koon*, 116 S. Ct. at 2041.

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

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

<sup>13</sup> See *id.* The riots caused over 40 deaths, more than 2000 injuries, and almost one billion dollars in property damage. See *id.* at 2041–42.

<sup>14</sup> See *id.* at 2042. More specifically, the jury convicted Powell of using unreasonable force and found Koon guilty of allowing unreasonable force to be used. See *id.*

<sup>15</sup> See *id.*

conduct contributed significantly to provoking the offense behavior.”<sup>16</sup> It departed three more levels based on a combination of four factors: the physical abuse Koon and Powell were likely to face in prison as a result of the “widespread publicity and emotional outrage” surrounding their case; the damage to their careers; their low likelihood of recidivism; and the “significant burden[ ]” of undergoing successive state and federal prosecutions.<sup>17</sup> Ultimately, the court sentenced each defendant to thirty months, the lower limit of the post-departure range.<sup>18</sup>

A Ninth Circuit panel reviewed the departures *de novo* and reversed both.<sup>19</sup> The panel rejected the five-level departure for King’s misconduct because it understood such provocation to be common in police brutality cases.<sup>20</sup> The three-level combination departure was likewise inappropriate, the panel held, because none of the supporting factors justified reducing the defendants’ sentences. First, the officers’ susceptibility to abuse in prison was too expansive a rationale; a “virtually unlimited” number of defendants could be thought similarly at risk.<sup>21</sup> The panel also considered the national outrage sparked by the defendants’ crimes to be an irrational basis for leniency.<sup>22</sup> Second, because criminal sentences “do not impose the only consequence of committing a crime,” the Ninth Circuit deemed it flatly irrelevant that Koon and Powell would lose their jobs.<sup>23</sup> Third, the court found reliance on the successive prosecutions to be inconsistent with the Attorney General’s conclusion — necessary to authorize the federal case — that the state acquittal disserved important federal interests.<sup>24</sup> Fourth, because the Guidelines explicitly account for a defendant’s criminal history and expected future dangerousness, the district court’s use of those factors as a partial justification for departure was improper.<sup>25</sup> With nine judges dissenting, the Ninth Circuit declined to rehear the case *en banc*.<sup>26</sup>

The Supreme Court affirmed in part, reversed in part, and remanded.<sup>27</sup> Writing for the Court, Justice Kennedy began by reviewing

<sup>16</sup> *United States v. Koon*, 833 F. Supp. 769, 786 (C.D. Cal. 1993).

<sup>17</sup> *Id.* at 788, 790. The district court was clear that none of these factors “[s]tanding alone” merited a departure; only “taken together” did they “justify a reduced sentence.” *Id.* at 786.

<sup>18</sup> See *id.* at 792.

<sup>19</sup> See *Koon*, 116 S. Ct. at 2043.

<sup>20</sup> See *United States v. Koon*, 34 F.3d 1416, 1460–61 (9th Cir. 1994).

<sup>21</sup> *Id.* at 1455.

<sup>22</sup> See *id.* at 1456.

<sup>23</sup> *Id.* at 1454. The court also feared that this factor could become a proxy for a defendant’s socioeconomic status, which the Guidelines prohibit sentencers from considering. See *id.*

<sup>24</sup> See *id.* at 1457.

<sup>25</sup> See *id.* at 1456–57.

<sup>26</sup> See *United States v. Koon*, 45 F.3d 1303, 1304 (9th Cir. 1995) (en banc). In his dissent, Judge Reinhardt blasted the panel for adopting a “mechanical and inflexible approach to sentencing” that “exalt[ed] the rigid calculations of charts and tables over the judgment of human beings.” *Id.* (Reinhardt, J., dissenting from denial of rehearing *en banc*).

<sup>27</sup> See *Koon*, 116 S. Ct. at 2054. Except as noted below, the Court’s opinion was unanimous.

the departure mechanism's place in the Guidelines scheme. Because Congress desired sensitivity to individual circumstances,<sup>28</sup> it explicitly provided for departures in cases involving "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."<sup>29</sup> The Commission has explained that it "intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes."<sup>30</sup> Departure is appropriate only in those "unusual" cases that fall outside the heartland.<sup>31</sup> Faced with this scheme, the Court adopted the reasoning of the First Circuit in *United States v. Rivera*,<sup>32</sup> and held that, before departing, a district judge must identify the unusual features of a case and determine whether the Guidelines encourage, discourage, or prohibit reliance on any of them.<sup>33</sup> Encouraged factors are presumptively acceptable departure grounds; discouraged factors are permissible only "in exceptional cases"; prohibited factors are always irrelevant.<sup>34</sup> Most possible departure grounds, however, are not addressed by the Guidelines. The Court held that judges must determine independently whether such unmentioned factors distance a case from the heartland.<sup>35</sup>

Justice Kennedy next discussed the appropriate standard of review for departure decisions. He noted that, although the Sentencing Reform Act introduced detailed appellate review of sentences, Congress intended "that district courts retain much of their traditional sentencing discretion."<sup>36</sup> Because departures involve "a refined assessment of . . . many facts," and because district judges have an "institutional

<sup>28</sup> See 28 U.S.C. § 991(b)(1)(B) (1994) (requiring the Commission to ensure "sufficient flexibility to permit individualized sentences when warranted"); S. REP. NO. 98-225, at 52 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3235 ("The Committee does not intend that the guidelines be imposed in a mechanistic fashion").

<sup>29</sup> 18 U.S.C. § 3553(b) (1994). Courts may look only to "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" to determine if the Commission adequately addressed a relevant circumstance. *Id.*

<sup>30</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b) (1995).

<sup>31</sup> See *id.* "[T]he Guidelines place essentially no limit on the number of potential factors that may warrant a departure . . ." *Burns v. United States*, 501 U.S. 129, 136-37 (1991). The Guidelines do, however, place a few factors off limits. Race, sex, and socioeconomic status, for example, are prohibited considerations. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (1995). In addition, certain factors, like a defendant's public service record, are discouraged grounds for departure, *see id.* § 5H1.11, and others, like victim provocation, are encouraged, *see id.* § 5K2.10.

<sup>32</sup> 994 F.2d 942 (1st Cir. 1993) (Breyer, C.J.). Then-Chief Judge Breyer was a member of the initial Commission.

<sup>33</sup> See *Koon*, 116 S. Ct. at 2045.

<sup>34</sup> *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory commentary (1995)) (internal quotation marks omitted).

<sup>35</sup> *See id.* Judges making this determination should consider "the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole." *Id.* (quoting *Rivera*, 994 F.2d at 949) (internal quotation marks omitted).

<sup>36</sup> *Id.* at 2046. The Act demands "clearly erroneous" review of factfinding as well as "due deference to the district court's application of the guidelines to the facts." *Id.* (quoting 18 U.S.C. § 3742(e) (1994)) (internal quotation marks omitted).

advantage" in determining if a case is sufficiently unusual,<sup>37</sup> the Court held that "[a] district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference."<sup>38</sup> The Court stressed that the "relevant question" is not, as the government argued, "whether a particular factor is within the heartland as a general proposition, but whether [it] is within the heartland given all the facts of the case."<sup>39</sup>

In the remainder of its opinion, the Court reviewed the district court's two departures under this deferential standard. Reversing the Ninth Circuit, Justice Kennedy upheld the departure based on King's misconduct. He first noted that the Guidelines encourage district courts to consider victim provocation in their departure decisions.<sup>40</sup> Furthermore, the Guideline range applicable to Koon and Powell covers "a Government official who assaults a citizen without provocation as well as instances like this where what begins as legitimate force becomes excessive."<sup>41</sup> Justice Kennedy found that the district court did not abuse its discretion by treating unprovoked assaults as "the relevant heartland."<sup>42</sup>

Finally, the Court addressed the combination departure. Eight Justices held that the district court abused its discretion in considering the defendants' job loss sufficiently atypical.<sup>43</sup> The Guideline under which the district court calculated their sentences applies only to government officials, who, the Court noted, frequently lose their jobs after a conviction.<sup>44</sup> The Court unanimously rejected the district court's reliance on the low probability of future criminal conduct because the Guide-

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<sup>37</sup> *Id.* at 2046–47. This institutional advantage over appellate courts derives both from district judges' greater familiarity with the facts and from the far larger number of Guidelines cases that they hear. *See id.* at 2047.

<sup>38</sup> *Id.* at 2046. Even though the Court recognized that issues of law would arise in interpreting the Guidelines, it found the "abuse of discretion" standard appropriate because "[a] district court by definition abuses its discretion when it makes an error of law." *Id.* at 2047.

<sup>39</sup> *Id.* at 2047 (citation and internal quotation marks omitted). As the Court later explained, "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance." *Id.* at 2050. Courts are limited to case-by-case review. This holding overturned a test under which courts looked to 18 U.S.C. § 3553(a)(2) to determine if a departure ground was — as a categorical matter — consistent with the statutory goals of sentencing. *See, e.g., United States v. Williams*, 65 F.3d 301, 305 (2d Cir. 1995); *United States v. Gomez-Villa*, 59 F.3d 1199, 1202 (11th Cir. 1995), cert. denied, 116 S. Ct. 716 (1996); *see also United States v. Beasley*, 90 F.3d 400, 402–03 (9th Cir. 1996) (noting *Koon*'s impact on this approach); *United States v. Pullen*, 89 F.3d 368, 370 (7th Cir. 1996) (same).

<sup>40</sup> *See Koon*, 116 S. Ct. at 2048.

<sup>41</sup> *Id.* at 2050.

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

<sup>43</sup> *See id.* at 2052. Justice Stevens wrote a three-sentence opinion indicating his disagreement with this holding. *See id.* at 2054 (Stevens, J., concurring in part and dissenting in part). No Justice, however, accepted the Ninth Circuit's rationale that considering employment consequences was too similar to considering the prohibited factor of a defendant's socioeconomic status. *See Koon*, 116 S. Ct. at 2052.

<sup>44</sup> *See Koon*, 116 S. Ct. at 2052.

lines expressly account for a defendant's criminal history.<sup>45</sup> Six Justices found the sentencing judge's treatment of the two remaining factors to be a valid exercise of his discretion.<sup>46</sup> The videotape of the beating made Koon and Powell nationally notorious figures, and the district court could have found that the particularly harsh treatment they would likely receive in prison was an unusual mitigating circumstance.<sup>47</sup> The judge's consideration of the successive prosecutions, Justice Kennedy explained, was also permissible: "The state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court."<sup>48</sup> The Court remanded the case for resentencing absent reliance on the improperly considered factors.<sup>49</sup>

Justice Souter, joined by Justice Ginsburg, dissented in part, finding the Court's approval of the final two factors in the combination departure "[in]consistent with rational normative order."<sup>50</sup> He concluded that the defendants' heightened susceptibility to abuse stemmed from "the remarkable brutality of [their] proven behavior."<sup>51</sup> That Koon and Powell inspired hatred and fury was a poor reason to reduce their sentences. Justice Souter also disagreed that the successive prosecutions could militate in favor of a departure. Because virtually identical evidence was presented at the state and federal trials, he understood the state court acquittal to represent a malfunction in the system.<sup>52</sup> Although the defendants did not cause this malfunction, "it would be a normatively obtuse sentencing scheme that would reward a defendant whose federal prosecution is justified solely because he has obtained the advantage of injustice produced by the failure of the state system."<sup>53</sup>

In a brief opinion joined by Justice Ginsburg, Justice Breyer indicated his belief that the Commission was "likely aware[ ]" that convictions under 18 U.S.C. § 242 would often be the result of double prosecutions.<sup>54</sup> He therefore determined that "the Commission would have considered" such a case to be within the applicable Guideline's heartland.<sup>55</sup> He also found no support, even under the abuse of dis-

<sup>45</sup> See *id.* at 2052–53. The Guidelines even state that downward departures on this basis "cannot be appropriate." *Id.* at 2053 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1992)) (internal quotation marks omitted).

<sup>46</sup> Justices Souter, Ginsburg, and Breyer dissented from this part of the Court's opinion.

<sup>47</sup> See *Koon*, 116 S. Ct. at 2053.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 2053–54.

<sup>50</sup> *Id.* at 2054 (Souter, J., concurring in part and dissenting in part). Because the Sentencing Reform Act authorizes departures only for those factors "that *should* result in a sentence different from that described," Justice Souter understood normative order to be a statutory requirement. *Id.* (emphasis added) (quoting 18 U.S.C. § 3553(b) (1994)) (internal quotation marks omitted).

<sup>51</sup> *Id.*

<sup>52</sup> See *id.* at 2055.

<sup>53</sup> *Id.* at 2056.

<sup>54</sup> *Id.* (Breyer, J., concurring in part and dissenting in part).

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

cretion standard, for the district court's conclusion that Koon and Powell would fare significantly worse in prison than other police officers convicted of civil rights violations.<sup>56</sup>

The standard of review established in *Koon* directly impacts only appellate judges, but the decision clarified the roles of all three major players in the Guidelines' sentencing scheme: district courts, circuit courts, and the Commission. Within congressional limits, the Commission alone sets sentencing policy.<sup>57</sup> District judges then apply the Commission's stated policy to the facts of the cases before them. Although this task often involves little more than locating the proper Guidelines and calculating a sentencing range, judges must recognize and account for relevant facts that the Commission has not addressed and perhaps could not have foreseen.<sup>58</sup> District judges are therefore at the heart of the sentencing process; their discretion both sustains and imperils it. Circuit judges have the "narrow"<sup>59</sup> and "limited"<sup>60</sup> role of ensuring that this discretion has not been abused. *Koon*'s "abuse of discretion" standard will, quite properly, embolden district judges to rely more confidently on their factual inquiries and to depart from the Guidelines more often.<sup>61</sup> The Supreme Court did not, however, absolve sentencers of carefully explaining the reasons behind each departure;<sup>62</sup> the looser standard of review would otherwise give judges room to elide the Commission's policymaking authority.

Courts' treatment of "combination departures," one of the important areas for development in Guidelines jurisprudence, will test the resilience of this balance of power. A "combination departure" is, as the name suggests, a departure from the Guidelines based not on a

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

<sup>57</sup> See *Koon*, 116 S. Ct. at 2050 (noting that resolving arguments of "sentencing policy" would "transgress the policymaking authority vested in the Commission").

<sup>58</sup> See *id.* at 2053 (highlighting the importance of "consider[ing] every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue").

<sup>59</sup> See *Williams v. United States*, 503 U.S. 193, 199 (1992).

<sup>60</sup> See *Koon*, 116 S. Ct. at 2046.

<sup>61</sup> In many instances, judges have been reluctant to depart from the Guidelines because they were unsure of their authority to do so. See, e.g., *United States v. Graham*, 83 F.3d 1466, 1481 (D.C. Cir. 1996) (remanding because the district court misunderstood the scope of its discretion); *United States v. Abbott*, 30 F.3d 71, 73 (7th Cir. 1994) (same); *United States v. Brown*, 985 F.2d 478, 483 (9th Cir. 1993) (same). Although *Koon* will ease this uncertainty, departures should remain relatively infrequent. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b) (1995) ("[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often.").

<sup>62</sup> See 18 U.S.C. § 3553(c)(2) (1994) (requiring district judges to explain "the specific reason for the imposition of a sentence different from that described" by the Guidelines); S. REP. NO. 98-225, at 80 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3263 ("[I]f the sentencing judge fails to give specific reasons for a sentence outside the guidelines, the appellate court would be justified in returning the case to the sentencing judge for such a statement."); see also *United States v. Barajas-Nunez*, 91 F.3d 826, 834 (6th Cir. 1996) ("Although *Koon* has changed the standard of review to an abuse of discretion standard, the rationale for requiring an explanation of reasons for departure . . . still remains.").

single factor, but on several factors that operate in concert to remove a case from the heartland. In most "combination" cases, the district judge finds that no individual factor is sufficiently unusual, but that several strands of the case weave together in such an unusual way that a departure is appropriate.<sup>63</sup> Combination departures are consistent with, even necessary to, the institutional structure envisioned in *Koon*.<sup>64</sup> As the Commission recognized, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."<sup>65</sup> The aptly named Guidelines therefore give way when, in an atypical case, individual circumstances make the pertinent sentencing range patently inequitable. This scheme cannot logically be limited to single-factor departures; inequities and aberrations may spring from complex sources.<sup>66</sup> To ensure fair and honestly explained sentencing for each defendant, district judges require the flexibility to base a departure on however many elements are in fact relevant. Nevertheless, this flexibility presents the potential for abuse, especially under *Koon*'s relaxed standard. Appellate courts must therefore demand that sentencers not only explain their reliance on each factor in the combination, but also articulate in detail why the combination departure — as opposed to a series of single-factor departures — is warranted.<sup>67</sup>

For a combination departure to be meaningful, each identified component must contribute to the altered sentence and "the whole [must be] greater than the sum of its parts."<sup>68</sup> For example, if a sentencing judge recognizes three factors that make a case sufficiently unusual, each of which merits a two-level reduction, an undifferentiated six-level combination departure is inappropriate. A series of single-factor departures would produce the same sentence, and the greater precision would both facilitate appellate review and eliminate unnecessary remands. More importantly, if none of the supporting factors in a sup-

<sup>63</sup> Theoretically, combinations may include factors that are unusual enough to warrant smaller departures on their own. Courts of appeals once disagreed about the validity of the more common, "something-from-nothing" type of combination departure. *Compare* United States v. Cook, 938 F.2d 149, 153 (9th Cir. 1991) (permitting such departures), *with* United States v. Minicone, 26 F.3d 297, 302 (2d Cir. 1994) (forbidding such departures). The Commission amended the official commentary to Guideline 5K2.0 to make clear that, in "extraordinary case[s]," such combination departures are allowed. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt. (1995).

<sup>64</sup> Cf. *Koon*, 116 S. Ct. at 2054 (Stevens, J., concurring in part and dissenting in part) ("I do not understand the opinion to foreclose the District Court from basing a downward departure on an aggregation of factors each of which might in itself be insufficient to justify a departure.").

<sup>65</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b) (1995).

<sup>66</sup> See *id.* ch. 1, pt. A, cmt. 3 ("[C]omplex combinations of offense and offender characteristics [may] apply and interact in unforeseen ways to unforeseen situations . . . .").

<sup>67</sup> The *Koon* Court did not need to reach this second step. Because it found two elements in the combination to have been improperly considered and because these factors clearly affected the final sentence imposed, remand was the only permissible disposition. *See Koon*, 116 S. Ct. at 2053–54 (citing *Williams v. United States*, 503 U.S. 193, 203 (1992)).

<sup>68</sup> *United States v. Koon*, 45 F.3d 1303, 1305 (9th Cir. 1995) (Reinhardt, J., dissenting from denial of rehearing en banc).

posed combination independently merits deviation from the Guidelines, then the synergy — the special interplay of the elements — is the only justifiable basis for departure.<sup>69</sup> The special utility of the combination approach is in accounting for a unique *coalescence* of factors; it is otherwise either sloppy or deceitful.

Proper appellate review can ensure that combination departures are not abused. *Koon*, however, clearly demands a deferential “abuse of discretion” standard. Ordinary departure decisions involve “multifarious, fleeting, special, [and] narrow” considerations;<sup>70</sup> the convergences of these factors that justify a combination are even less amenable to “useful generalization.”<sup>71</sup> Under the Court’s practical approach to selecting a standard of review,<sup>72</sup> the hyperfactual nature of combinations and the district judge’s “superior feel” for the heartland<sup>73</sup> mandate respect for a sentencer’s conclusions. Accordingly, the Court in *Koon* did not distinguish between single-factor and combination departures; it broadly held that “[a] district court’s decision to depart from the Guidelines . . . will in most cases be due substantial deference.”<sup>74</sup>

To allow for meaningful review of combination departures under this relaxed standard, appellate courts must begin — as the *Koon* Court did — by breaking down the combination and analyzing each component separately.<sup>75</sup> Combination departures, swallowed whole, simply present too much factual material — and not enough law —

<sup>69</sup> Otherwise, a court would have to find each of the factors “partially” worthy of a departure and then cumulate these “partial departures” to justify a full one. The partial departure, however, is a nonsensical concept. Because the Guidelines do not limit potential departure grounds, judges may define the factor narrowly enough to identify the precise atypicality in the case. The question that sentencers then face — “Has the Commission adequately accounted for this factor?” — is a binary one. “Somewhat” is an impermissible answer. Furthermore, any attempt to quantify these fractional departures would be an unreviewable exercise in hairsplitting that could reintroduce the sentencing disparities that Congress and the Commission sought to avoid.

<sup>70</sup> *Koon*, 116 S. Ct. at 2047 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 561–62 (1988))) (internal quotation marks omitted).

<sup>71</sup> *Id.* (quoting *Cooter & Gell*, 496 U.S. at 404) (internal quotation marks omitted); cf. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 3 (1995) (“The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless.”).

<sup>72</sup> See, e.g., *Koon*, 116 S. Ct. at 2046–47; *Ornelas v. United States*, 116 S. Ct. 1657, 1662–63 (1996); *Thompson v. Keohane*, 116 S. Ct. 457, 465–66 (1995).

<sup>73</sup> *United States v. Rivera*, 994 F.2d 942, 950 (1st Cir. 1993) (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 50 (1st Cir. 1989)) (internal quotation marks omitted); see also *Koon*, 116 S. Ct. at 2047 (noting district courts’ “institutional advantage” in determining whether a factor is unusual).

<sup>74</sup> *Koon*, 116 S. Ct. at 2046.

<sup>75</sup> See, e.g., *id.* at 2052 (“[T]he low likelihood of petitioners’ recidivism was not an appropriate basis for departure.”); *id.* at 2053 (“[T]he District Court did not abuse its discretion in determining that a ‘federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants.’” (omission and alteration in original) (quoting *United States v. Koon*, 833 F. Supp. 769, 790 (C.D. Cal. 1993)).

for appellate courts to handle.<sup>76</sup> Under the relatively lax abuse of discretion standard, circuit courts would have little choice but to rubberstamp such undifferentiated combination departures. Instead, by separately addressing each ingredient in the combination, reviewing courts can ensure that the record supports the existence of each contributing factual circumstance. They can also determine whether the Guidelines explicitly prohibit consideration of a factor that a court has relied on in a combination.<sup>77</sup> Additionally, this approach will facilitate the development of useful departure-related precedent; individual departure grounds are likely to recur, but combinations are not.<sup>78</sup> Lastly, district judges will need to explain more carefully the rationale behind each departure, which will make it more difficult for them to inject their own policy concerns under cover of incomplete reasoning.

This parsing of factors cannot, however, be the extent of the reviewing court's analysis. "No combination departure could survive this divide and conquer method of review."<sup>79</sup> The court must also consider the additional element that makes the combination departure worthwhile and necessary: the synergy created by the interplay of supporting factors. It must determine whether the district judge could have found the convergence of identified features unusual enough to distance the case from the heartland. This inquiry is distinctly factual; an appellate court must not — indeed, cannot — perform it alone. Under *Koon*'s abuse of discretion standard, reviewing courts must respect both the district court's factual findings and the conclusions about sentencing held to flow from them. To allow the limited review of these conclusions — which is a crucial check in *Koon*'s balance of power — to be meaningful, the district court must present a clear and persuasive explanation of the synergy it found.<sup>80</sup> Even if, on its own, an appellate court were able to identify a sufficiently atypical conflu-

<sup>76</sup> Cf. U.S. SENTENCING GUIDELINES MANUAL ch. I, pt. A, cmt. 3 (1995) ("The appropriate relationships among . . . factors are exceedingly difficult to establish, for they are often context specific.").

<sup>77</sup> See *United States v. Anders*, 956 F.2d 907, 914 (9th Cir. 1992) ("[T]he factors that go into this complex must . . . not [be] expressly prohibited[] by the Sentencing Guidelines."); cf. *Koon*, 116 S. Ct. at 2045 ("If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure").

<sup>78</sup> Even though appellate review of departures must be grounded in the unique factual world of the case under review, a large body of precedent can provide guidance through comparisons. Cf. *Ornelas v. United States*, 116 S. Ct. 1657, 1663 (1996) ("[E]ven where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject.").

<sup>79</sup> *United States v. Koon*, 45 F.3d 1303, 1305 (9th Cir. 1995) (Reinhardt, J., dissenting from denial of rehearing en banc). If the court finds that the combination's component parts independently warrant the extent of the departure taken by the district court, then further review is unnecessary. In such a case, however, the district court has misdeployed the combination departure; a series of single-factor departures would have been more appropriate.

<sup>80</sup> District courts taking combination departures have generally not lived up to this responsibility. See, e.g., *United States v. Blackwell*, 897 F. Supp. 586, 588–89 (D.D.C. 1995); *United States v. Shadduck*, 889 F. Supp. 8, 11–12 (D. Mass. 1995).

ence of factors, remand would still be appropriate. Because circuit courts are ill-equipped to wade through a complex factual record, affirming an inadequately justified combination departure would not, as *Koon* requires, meaningfully vouch for the propriety of the district court's exercise of its discretion. Affirmances would instead be a perfunctory formality — or, worse, would reflect the appellate court's own judgment about a proper sentence.<sup>81</sup> With the discretion *Koon* affords district judges comes the corresponding duty to explain in full each exercise of that discretion.

The *Koon* Court circumscribed the role of appellate courts because it recognized that district judges can more competently address the factual questions relevant to departures. In sentencing, district judges thus continue to enjoy the "superiority of [their] nether position."<sup>82</sup> Whatever respect they may command from appellate courts, however, district judges remain firmly bound by the Commission's pronouncements. Nevertheless, under *Koon*'s permissive standard of review, the combination departure could become a convenient means for masking dissatisfaction with the Guidelines. Rather than humanely accounting for "extraordinary case[s]," sentencers could use the combination to make a heartland case seem unusual.<sup>83</sup> To carry their institutional burden of ensuring that combination departures do not represent an abuse of discretion, appellate courts must therefore adopt an exacting method of review even while applying *Koon*'s forgiving standard.

2. *Mixed Questions of Law and Fact.* — Although appellate courts generally review factual findings deferentially and legal conclusions independently,<sup>1</sup> there is often disagreement as to the proper standard of review for "mixed questions of fact and law,"<sup>2</sup> which fall between

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<sup>81</sup> "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Koon*, 116 S. Ct. at 2046 (quoting *Williams v. United States*, 503 U.S. 193, 205 (1992) (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983))) (internal quotation marks omitted).

<sup>82</sup> *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971)) (internal quotation marks omitted).

<sup>83</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt. (1995).

<sup>1</sup> On direct review, a district court's findings of fact in civil cases "shall not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a). This rule is followed in the criminal context as well. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 145 (1986). On habeas review, a federal court is required to presume correct a state court's findings of fact. *See* 28 U.S.C. § 2254(d) (1994). This statute has been recently amended. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (to be codified at 28 U.S.C. § 2254(e)(1)). Questions of law, on the other hand, are reviewed de novo. *See, e.g.*, *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). *See generally* I STEVEN A. CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* §§ 2.13, 2.18 (2d ed. 1992) (explaining the relationship between categorization of questions as law or fact and standard of review); 2 *id.* §§ 7.05, 13.05 (same).

<sup>2</sup> *Pullman-Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982).

these two poles.<sup>3</sup> For example, in Title VII hostile environment sexual harassment cases,<sup>4</sup> the circuit courts have split over the appropriate standard of review<sup>5</sup> for a trial court's resolution of whether the offensive conduct was "sufficiently severe or pervasive enough" to create "an environment that a reasonable person would find hostile or abusive."<sup>6</sup>

Although the Supreme Court has not specified the standard of review for these claims, last Term it selected the standard that courts should apply to two other reasonable-person judgments, resolving splits among the circuits.<sup>7</sup> In *Ornelas v. United States*,<sup>8</sup> the Court held that whether a police officer had reasonable suspicion to make a *Terry* stop or probable cause to conduct a warrantless search (whether a reasonable person in the officer's position would believe that crime was afoot or that contraband or evidence of a crime was present<sup>9</sup>) was a mixed question to be reviewed *de novo* on direct appeal.<sup>10</sup> In *Thompson v. Keohane*,<sup>11</sup> the Court held that whether a suspect was in custody for *Miranda* purposes<sup>12</sup> (whether a reasonable person in the suspect's position would believe that he was free to leave<sup>13</sup>) was a

<sup>3</sup> See generally 1 CHILDRESS & DAVIS, *supra* note 1, § 2.17 (explaining the standard of review of mixed questions on direct review); 2 *id.* § 13.05 (discussing the issue in the context of habeas review).

<sup>4</sup> In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held for the first time that Title VII's prohibition against discrimination "with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1) (1994), encompassed "discrimination based on sex [that] has created a hostile or abusive work environment." *Meritor*, 477 U.S. at 66. The Court recognized two distinct forms of sexual harassment: quid pro quo and hostile environment harassment. *See id.* at 65–66. Quid pro quo harassment, the conditioning of a job benefit upon sexual favors, depends upon the intent of the harasser, a finding of fact reviewed for clear error. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("The 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discriminated against the plaintiff.'" (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981))).

<sup>5</sup> Compare *Hixson v. Norfolk S. Ry. Co.*, No. 94-5832, 1996 WL 316505, at \*4 (6th Cir. June 10, 1996) (per curiam) (unpublished disposition) (reviewing for clear error the trial court's findings that the facts did not amount to a hostile environment), *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 999 (10th Cir. 1996) (same), *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.* 32 F.3d 1007, 1009 (7th Cir. 1994) (same), *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 198 (5th Cir. 1992) (same), and *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988) (same), *with Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (reviewing the trial court's findings *de novo*), and *Collins v. Baptist Mem'l Geriatric Ctr.*, 937 F.2d 190, 195–97 (5th Cir. 1991) (same).

<sup>6</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

<sup>7</sup> See *Ornelas v. United States*, 116 S. Ct. 1657, 1661 & n.4 (1996) (noting circuit split); *Thompson v. Keohane*, 116 S. Ct. 457, 462 (1995) (same).

<sup>8</sup> 116 S. Ct. 1657 (1996).

<sup>9</sup> *See id.* at 1661–62.

<sup>10</sup> *See id.* at 1662–63.

<sup>11</sup> 116 S. Ct. 457 (1995).

<sup>12</sup> *See Miranda v. Arizona*, 384 U.S. 436, 467–74 (1966) (requiring a police officer to inform a suspect of his rights before engaging in custodial interrogation).

<sup>13</sup> *See Thompson*, 116 S. Ct. at 466 (citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)).

mixed question to be reviewed *de novo* by a habeas court.<sup>14</sup> Although the Supreme Court has warned that determining the proper standard of review by analogizing from one case to another is “uncommonly difficult,”<sup>15</sup> the three-factor framework applied by the Court to resolve the standard of review issue in both *Ornelas* and *Thompson* can profitably be applied to hostile environment cases. This application demonstrates that appellate courts should review hostile environment sexual harassment claims independently, thereby expounding the law without impinging upon the trial courts’ role as primary fact-finder.<sup>16</sup>

One December morning in 1992, a Milwaukee detective conducting drug-interdiction surveillance noticed a 1981 two-door Oldsmobile (“a favorite with drug couriers”) with California plates (“a ‘source State’ for drugs”) parked in a motel parking lot.<sup>17</sup> The officer checked the car’s registration and compared the names in the motel registry with the names listed in a DEA database of known or suspected drug traffickers.<sup>18</sup> He concluded that the man to whom the car was registered was a heroin dealer, and that a man who had checked into the motel at 4:00 a.m. that morning, without reservations and accompanied by another man, was a cocaine dealer.<sup>19</sup>

When two men later emerged from the motel and approached the car, police officers intercepted them.<sup>20</sup> The men identified themselves consistently with the DEA identifications,<sup>21</sup> denied that they had any illegal drugs or contraband, and gave the officers permission to search the car.<sup>22</sup> One of the officers noticed a “somewhat loose” panel in the car door and suspected that drugs might be hidden behind it.<sup>23</sup> The officer removed the panel, revealing two kilograms of cocaine, and subsequently arrested Saul Ornelas and Ismael Ornelas-Ledesma.<sup>24</sup>

The defendants moved to suppress the cocaine, arguing that the officers’ stopping, questioning, and searching violated their Fourth Amendment rights.<sup>25</sup> The district court ruled that the cocaine need not be suppressed; there had been reasonable suspicion to stop the two

<sup>14</sup> See *id.* at 465.

<sup>15</sup> *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

<sup>16</sup> This argument applies only to bench determinations of sexual harassment, not to the review of jury decisions.

<sup>17</sup> *Ornelas*, 116 S. Ct. at 1659.

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

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

<sup>20</sup> See *id.*

<sup>21</sup> The men were not in fact the individuals listed in the DEA database. See *United States v. Ornelas*, 16 F.3d 714, 716 (7th Cir. 1994).

<sup>22</sup> See *Ornelas*, 116 S. Ct. at 1660.

<sup>23</sup> *Id.*

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

<sup>25</sup> See *id.* “An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion, . . . and a warrantless search of a car is valid if based on probable cause.” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968), and *California v. Acevedo*, 500 U.S. 565, 569–70 (1991)).

men and probable cause to remove the panel when the officer discovered that it was loose.<sup>26</sup> The Seventh Circuit reviewed the district court's conclusions deferentially and, finding no "clear error," affirmed.<sup>27</sup>

Five years before the arrest at the Milwaukee motel and more than 2700 miles away,<sup>28</sup> Carl Thompson confessed to Alaska state troopers that he had killed his former wife, Dixie.<sup>29</sup> The troopers had called Thompson to the police station, ostensibly to ask him to identify some belongings found on the body, but actually to question him about the murder.<sup>30</sup> The troopers assured Thompson that he was free to leave at any time; he was neither arrested nor read his *Miranda* rights.<sup>31</sup> Nevertheless, in order to prompt a confession, the troopers repeatedly told Thompson that they knew he had killed his former wife and that he should tell his side of the story.<sup>32</sup> After Thompson confessed, the troopers did let him leave, in a sense — having impounded his truck, they drove him to a friend's house where they soon arrested him.<sup>33</sup>

Thompson moved to suppress the confession because he was never given *Miranda* warnings.<sup>34</sup> The trial judge acknowledged that the police had "devious[ly]" arranged to interrogate Thompson in a non-custodial setting to increase their chance of obtaining a confession.<sup>35</sup> Nevertheless, because a reasonable person would have felt free to leave, Thompson was not "in custody" during the interview, and therefore *Miranda* warnings were not required.<sup>36</sup> The Alaska Court of Appeals affirmed, and the Alaska Supreme Court declined to hear an appeal.<sup>37</sup> Thompson filed a habeas corpus petition challenging the finding that he was not "in custody,"<sup>38</sup> but the Ninth Circuit affirmed the conviction, holding that *Miranda* "in custody" determinations are questions of fact entitled to a presumption of correctness.<sup>39</sup>

By an 8-1 vote in *Ornelas* and a 7-2 vote in *Thompson*, the Supreme Court vacated and remanded both cases.<sup>40</sup> Both Chief Jus-

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

<sup>27</sup> *Id.* at 1660-61.

<sup>28</sup> See GARY L. FITZPATRICK & MARILYN J. MODLIN, DIRECT-LINE DISTANCES 130 (U.S. ed. 1986).

<sup>29</sup> See *Thompson*, 116 S. Ct. at 460.

<sup>30</sup> See *id.* at 460-61.

<sup>31</sup> See *id.* at 461.

<sup>32</sup> See *id.* at 461 & n.1.

<sup>33</sup> See *id.* at 461.

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

<sup>35</sup> See *Thompson v. State*, 768 P.2d 127, 131 (Alaska Ct. App. 1989).

<sup>36</sup> See *id.* at 130-31.

<sup>37</sup> See *Thompson*, 116 S. Ct. at 462.

<sup>38</sup> See *Thompson v. Keohane*, No. 94-35052, 1994 WL 424289, at \*\*1 (9th Cir. Aug. 11, 1994) (unpublished disposition).

<sup>39</sup> See *id.* (citing 28 U.S.C. § 2254(d) (1994)).

<sup>40</sup> See *Ornelas*, 116 S. Ct. at 1663; *Thompson*, 116 S. Ct. at 467.

tice Rehnquist,<sup>41</sup> writing for the majority in *Ornelas*, and Justice Ginsburg,<sup>42</sup> writing for the majority in *Thompson*, separated the trial court's substantive inquiry into two components: "a determination of [the] historical facts"<sup>43</sup> and a decision of what conclusions a reasonable person would draw from those facts.<sup>44</sup> The first, factual inquiry was subject to deferential review; the second, requiring the application of a legal standard, was a "mixed question of law and fact" for which the standard of review was uncertain.<sup>45</sup>

Both opinions proceeded to weigh several factors to decide the appropriate standard of review for the "mixed question." In *Ornelas*, Chief Justice Rehnquist began by noting that independent review of reasonable-suspicion and probable-cause determinations was consistent with past practice: "we have never, when reviewing [such determinations] ourselves, expressly deferred to the trial court's determination."<sup>46</sup> Similarly, Justice Ginsburg in *Thompson* observed that the Court had treated the "in custody" determination as a question of law in earlier cases.<sup>47</sup>

Next, the Chief Justice explained that the appellate court's "primary function as an expositor of [the] law" would be better served by independent review:<sup>48</sup> "the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles."<sup>49</sup> Otherwise, the treatment of similarly situated parties would vary depending upon the predilections of individual trial judges, a result "inconsistent with the idea of a uni-

<sup>41</sup> The Chief Justice was joined by Justices Stevens, O'Connor, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

<sup>42</sup> Justice Ginsburg was joined by Justices Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer.

<sup>43</sup> *Ornelas*, 116 S. Ct. at 1662; *accord Thompson*, 116 S. Ct. at 465. Justice Ginsburg defined "issues of fact" as "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" *Id.* at 464 (quoting *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963)).

<sup>44</sup> See *Ornelas*, 116 S. Ct. at 1661–62; *Thompson*, 116 S. Ct. at 465.

<sup>45</sup> *Ornelas*, 116 S. Ct. at 1662–63; *accord Thompson*, 116 S. Ct. at 465.

<sup>46</sup> *Ornelas*, 116 S. Ct. at 1662 (citing, for example, *Brinegar v. United States*, 338 U.S. 160, 170 (1949)).

<sup>47</sup> See *Thompson*, 116 S. Ct. at 467 (citing, for example, *California v. Beheler*, 463 U.S. 1121, 1121–25 (1983)).

<sup>48</sup> *Ornelas*, 116 S. Ct. at 1662 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)) (internal quotation marks omitted).

<sup>49</sup> *Id.* Although Chief Justice Rehnquist acknowledged that "one [reasonable-suspicion or probable-cause] determination will seldom be a useful precedent for another," *id.* at 1662 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983)) (internal quotation marks omitted), he cited a number of cases in which such determinations were given precedential effect, *see id.* at 1661–62. "And even where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject." *Id.* at 1663. Similarly, Justice Ginsburg believed that, unlike mixed questions that probe the subjective state of mind of a single actor, "'in custody' determinations do guide future decisions." *Thompson*, 116 S. Ct. at 466 & n.15.

tary system of law.”<sup>50</sup> Furthermore, because de novo review would better generate “a defined ‘set of rules,’” it would help police officers to determine when a stop or search was reasonable.<sup>51</sup> Similarly, Justice Ginsburg explained that “the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law.”<sup>52</sup>

Finally, both cases found the institutional advantages of trial courts over appellate courts insufficient to warrant deference. In *Ornelas*, Chief Justice Rehnquist recognized the special ability of trial judges to weigh the credibility of witnesses but concluded that, when independently reviewing reasonable-suspicion and probable-cause determinations, appellate courts could give “due weight” to credibility findings, as well as to other findings of historical fact and the inferences drawn from them.<sup>53</sup> In *Thompson*, Justice Ginsburg maintained that the institutional considerations that had “prompted the Court to type [certain mixed questions] as ‘factual issue[s],’ . . . governed by [a] presumption of correctness,” did not apply to the “in custody” determination.<sup>54</sup> Justice Ginsburg stressed that the application of the objective reasonable-person test did not depend upon “the trial court’s superior capacity to resolve credibility issues.”<sup>55</sup> Although judgments about witness credibility might have contributed to the findings of historical fact, the trial court made the reasonable-person evaluation after it found those facts.<sup>56</sup> She also observed that the trial court did not have a “first-person vantage” over the circumstances underlying the “in custody” inquiry.<sup>57</sup> In short, the “state court [was] not ‘in an appreciably better position than the federal habeas court to make [the ultimate] determination.’”<sup>58</sup>

Justice Scalia dissented in *Ornelas*,<sup>59</sup> and Justice Thomas dissented in *Thompson*.<sup>60</sup> Both dissents agreed that the application of an objective legal standard to the facts rendered the issue a mixed question of

<sup>50</sup> *Ornelas*, 116 S. Ct. at 1662.

<sup>51</sup> *Id.*

<sup>52</sup> *Thompson*, 116 S. Ct. at 467.

<sup>53</sup> See *Ornelas*, 116 S. Ct. at 1663. The *Ornelas* Court rejected the suggestion that de novo review here was “inconsistent with the ‘great deference’ paid when reviewing a decision to issue a warrant,” *id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)), as such deference was an incentive for police to get a warrant before searching, *see id.*

<sup>54</sup> *Thompson*, 116 S. Ct. at 465.

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

<sup>56</sup> *See id.* at 465–66.

<sup>57</sup> *Id.* at 466.

<sup>58</sup> *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 117 (1985)) (alteration in original). The judgments vacated, the cases were remanded to their respective circuits to determine, de novo, whether the police officers had reasonable suspicion to stop the *Ornelas* defendants and probable cause to search the compartment in their car, *see Ornelas*, 116 S. Ct. at 1663, and whether *Thompson* was in custody when the police interrogated him, *see Thompson*, 116 S. Ct. at 467.

<sup>59</sup> Justice Scalia did, however, join the *Thompson* majority.

<sup>60</sup> Justice Thomas was joined by the Chief Justice; Justice Thomas in turn joined the Chief Justice’s majority opinion in *Ornelas*.

fact and law, but stressed that this labeling did not establish that de novo review was appropriate.<sup>61</sup>

In *Ornelas*, Justice Scalia argued that the district court's expertise with "commonsense, nontechnical conceptions"<sup>62</sup> and familiarity with the instant "issues and litigants [rendered the trial court] better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard."<sup>63</sup> Furthermore, because these determinations are "resistant to generalization," de novo review would contribute little to the clarification of the doctrine or to the development of "useful precedent."<sup>64</sup> Justice Scalia also observed that, whereas de novo review in criminal cases can "prevent a miscarriage of justice," review of probable-cause and reasonable-suspicion inquiries does not protect the innocent but only deters "unlawful police conduct."<sup>65</sup> Because this deterrent effect "will not be *at all* lessened if the trial judge's determination . . . is subjected to only deferential review,"<sup>66</sup> de novo review was not worth its "huge cost in diversion of judicial resources."<sup>67</sup>

Dissenting in *Thompson*, Justice Thomas asserted that the trial judge could better decide the in-custody question than could an appellate court, as "[i]t is only in light of . . . case-specific determinations that the reasonable person test can be meaningfully applied."<sup>68</sup> Because they can only review a "cold record[, often] as much as a decade after the initial determination," federal habeas courts should defer to the findings of state courts, who are fully competent to apply federal law.<sup>69</sup>

Having determined that the application of the reasonable-person test to the facts as found was a mixed question of fact and law, both *Ornelas* and *Thompson* considered three factors before concluding that the appellate court should independently review the question at issue: the Court's past practice, the appellate courts' role, and the trial

<sup>61</sup> See *Ornelas*, 116 S. Ct. at 1664 (Scalia, J., dissenting); *Thompson*, 116 S. Ct. at 468–69 (Thomas, J., dissenting).

<sup>62</sup> *Ornelas*, 116 S. Ct. at 1664 (Scalia, J., dissenting) (quoting *Ornelas*, 116 S. Ct. at 1661) (internal quotation marks omitted).

<sup>63</sup> *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990)) (internal quotation marks omitted).

<sup>64</sup> *Id.* at 1665.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1665–66. Similarly, Justice Scalia asserted that police will have ample incentive to obtain a warrant even if deference is paid to the trial court's probable-cause determination. See *id.* at 1666.

<sup>67</sup> *Id.* at 1665 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574–75 (1985)) (internal quotation marks omitted).

<sup>68</sup> *Thompson*, 116 S. Ct. at 468–69 (Thomas, J., dissenting). Justice Thomas emphasized that the trial judge often must assess the credibility of live testimony and consider documentary evidence and audio or video tapes of the interrogation itself to develop an overall sense of the defendant's situation. See *id.* at 468.

<sup>69</sup> *Id.* at 469. Finally, Justice Thomas saw no need to remand the case, finding that *Thompson* could not establish a *Miranda* violation even under de novo review. See *id.* at 469–70.

courts' advantages. These factors can also be weighed to select the appropriate standard of review for other reasonable-person tests. Applying the three-factor framework in the context of hostile environment sexual harassment suggests that whether "a reasonable person would find [a work environment] hostile or abusive"<sup>70</sup> is a mixed question to be reviewed *de novo*.<sup>71</sup> Independent review will clarify this evolving area of law and guide employers and employees attempting to conform with the law.

In determining the proper standard of review, both *Ornelas* and *Thompson* began with the Supreme Court's past practice. To date, however, the Court has not reviewed the application of the correct law to the facts in a hostile environment case.<sup>72</sup>

Both *Ornelas* and *Thompson* recognized that the appellate court's "primary function as an expositor of [the] law"<sup>73</sup> favors independent review when a legal concept can only be given substance through case-by-case application.<sup>74</sup> The parameters of an actionable claim for hostile environment sexual harassment are still evolving.<sup>75</sup> Because "the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing" is not bright,<sup>76</sup> it is incumbent upon courts of appeals to illustrate and define the distinction.<sup>77</sup> This exposition of the law will also aid actors attempting to conform their actions to legal requirements. Just as *de novo* review of

<sup>70</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

<sup>71</sup> The rules mandating deference to findings of fact do not apply to mixed questions, and independent review is the norm. See 1 CHILDRESS & DAVIS, *supra* note 1, § 2.18, at 2-125 to 2-126, 2-130; *id.* § 13.05, at 13-36.

<sup>72</sup> See Search of Westlaw, US Database (Aug. 23, 1996) (search for "hostile or abusive /3 environment").

<sup>73</sup> *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

<sup>74</sup> See *Ornelas*, 116 S. Ct. at 1662; *Thompson*, 116 S. Ct. at 467.

<sup>75</sup> See, e.g., *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996) (noting that, although the circuit had previously evaluated hostile environment sexual harassment claims using a reasonable-woman standard, the trial court's application of a reasonable-person standard was not error given the Supreme Court's use of that standard in *Harris*). Compare *Hixson v. Norfolk S. Ry. Co.*, No. 94-5832, 1996 WL 316505, at \*3 (6th Cir. June 10, 1996) (per curiam) (unpublished disposition) (applying a reasonable-woman standard), with *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir. 1995) (rejecting a reasonable-woman standard), cert. denied, 116 S. Ct. 473 (1995). The extent to which Title VII protects against same-sex sexual harassment is also an open question. See, e.g., *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995). Compare *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376 n.4 (8th Cir. 1996) (citing cases that recognize Title VII protection against same-sex harassment), with *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that Title VII does not apply to same-sex harassment), petition for cert. filed, 64 U.S.L.W. 3839 (U.S. June 10, 1996) (No. 95-1983). As these matters of law are resolved, district courts will need guidance in applying the newly fashioned legal standards to real factual situations.

<sup>76</sup> *Baskerville*, 50 F.3d at 431 (quoting *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1010 (7th Cir. 1994)) (internal quotation marks omitted).

<sup>77</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring) (lamenting that the standard for determining whether a given environment is hostile or abusive is unclear and provides little guidance to trial courts).

in-custody, reasonable-suspicion, and probable-cause determinations will guide police and serve law enforcement interests;<sup>78</sup> de novo review of hostile environment determinations will guide employers in their attempts to comply with Title VII without overly controlling their employees' workplace expression.<sup>79</sup> But if appellate courts defer to district courts instead of guiding them, employees' working conditions will vary with the differing judgments of each trial judge.<sup>80</sup>

De novo review will only serve to unify precedent if harassment cases are sufficiently similar to one another that useful precedent can be generalized from them. In the hostile environment context, although the possible factual permutations are endless, particular fact patterns arise often enough to make many cases useful precedents for the future.<sup>81</sup> As Chief Justice Rehnquist noted in *Ornelas*, even if one case does "not squarely control another one, the two decisions when viewed together may usefully add to the body of" hostile environment jurisprudence.<sup>82</sup>

The trial judge's advantages do not suggest a different result. The trial court does not have a "first-person vantage" on the allegedly hostile environment.<sup>83</sup> Nor do reasonable-person inquiries depend upon credibility judgments (for which the trial court has primary responsibility<sup>84</sup>). Such judgments are important when finding the historical facts and drawing inferences from them, and a court of appeals should defer to these conclusions. The appellate court can apply the reasonable-person standard to these findings as easily as the trial court can, however.<sup>85</sup>

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<sup>78</sup> See *Ornelas*, 116 S. Ct. at 1662; *Thompson*, 116 S. Ct. at 467.

<sup>79</sup> See generally Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 8–20 (discussing the tension between protecting free speech and protecting workers from harassment).

<sup>80</sup> Appellate courts could still provide some guidance by reversing district courts that make clear errors of application. See *Ornelas*, 116 S. Ct. at 1665 (Scalia, J., dissenting). However, in the harder cases, when the lower courts need the most guidance, no decision is likely to rise to the clearly erroneous level. See *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993) (explaining that "review under the 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed'" (quoting *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948))). Courts applying this deferential standard are more likely to affirm marginal but incorrect decisions, thereby creating precedent that may actually mislead lower courts.

<sup>81</sup> See, e.g., *McFadden-Cooper v. New York City Transit Auth.*, No. CV-94-4932(SMG), 1996 WL 68554, at \*6 (E.D.N.Y. Feb. 5, 1996) (following *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 n.5 (2d Cir. 1995)); *Barnes v. Breeden*, 911 F. Supp. 1038, 1048 (S.D. Tex. 1996) (following *Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989)); *Williams v. Runyon*, 881 F. Supp. 359, 364 (N.D. Ill. 1995) ("The Seventh Circuit has previously found similar acts as not rising to the level of a hostile environment.").

<sup>82</sup> *Ornelas*, 116 S. Ct. at 1663.

<sup>83</sup> *Thompson*, 116 S. Ct. at 466.

<sup>84</sup> "[D]ue regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a).

<sup>85</sup> If a subjective standard were used, then the trial court's in-person exposure to the litigants would give it an advantage. But as long as an objective standard is applied, an appellate court

In addition to the factors that the Court explicitly considered, two contextual considerations may have further strengthened the case for de novo review in *Ornelas* and *Thompson* but seem not to be present in hostile environment sexual harassment cases. First, *Ornelas* and *Thompson* were based on the Constitution (the Fourth and Fifth Amendments), whereas hostile environment claims are based on a statute (Title VII). Second, *Ornelas* and *Thompson* were criminal cases, whereas a hostile environment claim is civil. That the Court did not explicitly mention either of these two factors when deciding the standard of review in *Ornelas* or *Thompson* suggests that these contextual considerations were not critical to the Court's decisions, although they may have operated implicitly.

Regarding the first contextual consideration, the federal courts' role as guardians of constitutional rights has created a tradition of free review of constitutional questions.<sup>86</sup> This tradition seems to suggest that the *Miranda* warnings at issue in *Thompson* and the exclusionary rule involved in *Ornelas* should be reviewed more carefully than a claim of sexual harassment, a statutory cause of action. But Title VII is central to the Constitution in a way that typical economic regulation is not. Title VII's protection against discrimination implements the promise of the Equal Protection Clause of the Fourteenth Amendment.<sup>87</sup> Title VII is the legislative equivalent of *Miranda* warnings or the exclusionary rule, which are judicially designed prophylactic rules rather than constitutional mandates.<sup>88</sup> A court should review the application of Title VII just as carefully as it reviews the application of these judge-made rules.

The second contextual consideration that appears to favor de novo review in *Ornelas* and *Thompson* is the idea "that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned."<sup>89</sup> Independent review in criminal cases "prevent[s] a mis-

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can develop that standard without deferring to the trial court, thus ensuring that the same hypothetical reasonable person's judgment controls the outcome of each case.

<sup>86</sup> See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510–11 (1984) ("[J]udges . . . must exercise [independent appellate] review in order to preserve the precious liberties established and ordained by the Constitution.").

<sup>87</sup> See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249 (1964) ("The legislative history of the [Civil Rights Act of 1964, of which Title VII is a part,] indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment . . . ."); *id.* app. at 286–91 (Douglas, J., concurring) (excerpting the legislative history).

<sup>88</sup> "[D]ecisions have established that the [exclusionary] rule is not a personal constitutional right . . . . Instead, 'the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . .'" *Stone v. Powell*, 428 U.S. 465, 486 (1976) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Similarly, the Court has "recognized that [Miranda warnings are] not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

<sup>89</sup> *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) (quoting William O. Douglas, *Foreword* to JEROME FRANK & BARBARA FRANK, NOT GUILTY 11, 11 (1957)) (internal quotation marks omitted).

carriage of justice that might result from permitting the verdict of guilty to rest upon the legal determinations of a single judge.<sup>90</sup> This consideration played no part in *Ornelas*, however; as Justice Scalia's dissent perceived, deterrence of police misconduct, not innocence, was the issue.<sup>91</sup> And the Court never mentioned the criminal context in *Thompson*, instead weighing the same three factors later used in *Ornelas*. In fact, the Court has previously weighed substantially similar factors in determining the proper standard of review for mixed questions in civil as well as criminal contexts.<sup>92</sup>

Clearly, it would be a mistake to extrapolate from *Ornelas* and *Thompson* that all reasonable-person tests, as mixed questions, should be reviewed independently,<sup>93</sup> but the factors that the Court considered in these two cases can profitably be applied to these tests. In sexual harassment cases, this application indicates that courts of appeals should independently review the question whether a reasonable person would find a working environment hostile or abusive. De novo review will provide needed guidance to courts and citizens in an evolving area of the law and ensure that our judicial system treats similarly situated actors equally.

### III. FEDERAL STATUTES AND REGULATIONS

#### A. Antitrust

*Nonstatutory Labor Exemption.* — Courts have long struggled to reconcile the federal antitrust laws, which prohibit anticompetitive combinations, with the federal labor laws, which encourage the formation of unions, multiemployer bargaining groups, and other competition-reducing collaborations. Last Term, in *Brown v. Pro Football, Inc.*,<sup>1</sup> the Court clarified one area of dispute, holding that a group of

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<sup>90</sup> *Ornelas*, 116 S. Ct. at 1665 (Scalia, J., dissenting).

<sup>91</sup> See *id.* at 1665.

<sup>92</sup> See, e.g., *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) ("[W]e have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985), and citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990))). Furthermore, that this *additional* factor favoring de novo review appears not to be present in hostile environment cases does not undermine the force of the factors upon which the court expressly relied.

<sup>93</sup> In fashioning its opinions, the Court took care to explain that its reasoning did not mandate a de novo standard of review for all mixed questions, or even for all evaluations of a reasonable person's actions. A finding of negligence, for example, requires the application of an objective reasonable person test, but is treated as a question of fact and reviewed deferentially (originally because our legal system entrusted jurors with the application of community standards in judging the reasonableness of citizens' conduct). See *Thompson*, 116 S. Ct. at 466 n.13. And although an officer's probable cause to conduct a warrantless search is reviewed de novo, a finding that a judge had probable cause to issue a warrant is reviewed deferentially in order to encourage police officers to get warrants before searching. See *Ornelas*, 116 S. Ct. at 1663.

<sup>1</sup> 116 S. Ct. 2116 (1996).

employers bargaining as a unit is immune from antitrust review when, after an impasse in labor negotiations, the employers agree to implement the terms of their last good faith offer.<sup>2</sup> The Court explained that the nonstatutory labor exemption,<sup>3</sup> which allows the joint activity encouraged by labor law to coexist with antitrust law, shields from antitrust intervention not only agreements between unions and employers, but also agreements among employers made incident to "the lawful operation of the bargaining process."<sup>4</sup> Although the Court did not address whether actions in violation of labor law should receive the exemption, subsequent courts should extend the principles of *Brown* to immunize from antitrust scrutiny all joint employer actions within a valid multiemployer bargaining relationship, regardless of the legality of these actions under labor law. As long as no party outside the collective bargaining relationship is substantially affected, courts should remedy improper labor practices exclusively under labor law, not through antitrust claims.

In 1987, the collective bargaining agreement in place between the National Football League and the NFL Players Association expired.<sup>5</sup> While negotiating a new agreement, the NFL adopted a plan permitting each football team to establish a "developmental squad" of six players with little or no game experience to supplement its regular roster of forty-seven players.<sup>6</sup> Squad members could play in practice games without restriction but could appear in regular games only as replacements for injured players.<sup>7</sup> In its negotiations with the Players Association, the NFL proposed a uniform salary of \$1000 per week for the developmental squad players.<sup>8</sup> The union objected, insisting that club owners allow individual squad members to negotiate their own salaries.<sup>9</sup> Negotiations quickly stalled and, in keeping with labor law principles allowing employers confronting an impasse to implement the terms of their last good faith offer,<sup>10</sup> the NFL went forward with the

<sup>2</sup> See *id.* at 2119.

<sup>3</sup> The term "nonstatutory labor exemption" is a bit misleading. Although largely a judge-made doctrine, the exemption is considered to have an implicit basis in statute. See *id.* at 2120. Justice Powell coined the term in order to distinguish this exemption from the more specific exemption for union activities that emanates from sections of the Clayton and Norris-LaGuardia Acts. See *Connell Constr. Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 622 (1975); see also Clayton Act § 6, 15 U.S.C. § 17 (1994) (declaring that labor unions are not combinations or conspiracies in restraint of trade); Clayton Act § 20, 29 U.S.C. § 52 (1994) (restricting the use of injunctions against union activities); Norris-LaGuardia Act §§ 4, 5, 13, 29 U.S.C. §§ 104, 105, 113 (1994) (exempting specific union activities, including striking, supporting strikers, and participating in secondary picketing, from antitrust liability).

<sup>4</sup> *Brown*, 116 S. Ct. at 2127; see *id.* at 2123–26.

<sup>5</sup> See *id.* at 2119.

<sup>6</sup> *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1046 & n.1 (D.C. Cir. 1995).

<sup>7</sup> See *Brown*, 116 S. Ct. at 2119.

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

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

<sup>10</sup> See *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224–25 (1949); *Atlas Tack Corp.*, 226 N.L.R.B. 222, 227 (1976), *enforced*, 559 F.2d 1021 (1st Cir. 1977).

developmental squad program at the \$1000 a week salary.<sup>11</sup> The NFL ordered all of its member clubs to abide by this new policy.<sup>12</sup>

Claiming that the joint agreement to impose the \$1000 weekly salary violated § 1 of the Sherman Act<sup>13</sup> as a type of price-fixing, a class of developmental squad players brought an antitrust suit against the NFL and the individual clubs.<sup>14</sup> The football clubs argued in response that the nonstatutory labor exemption shielded their agreement from antitrust review.<sup>15</sup> The district court disagreed, holding the nonstatutory labor exemption inapplicable to the case on a number of alternative theories: the exemption ended with the expiration of the collective bargaining agreement;<sup>16</sup> the exemption lapsed no later than impasse;<sup>17</sup> and the exemption did not apply to terms not encompassed in a previous collective bargaining agreement.<sup>18</sup> The court granted summary judgment to the players on the merits of the antitrust claim, and a jury awarded damages, after trebling, of \$30 million.<sup>19</sup>

The NFL and its member clubs appealed, and a divided panel of the Court of Appeals for the District of Columbia Circuit reversed.<sup>20</sup> Chief Judge Edwards, joined by Judge Randolph, held that the club owners were immune from antitrust liability because of the nonstatutory labor exemption.<sup>21</sup> The court said that "restraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship."<sup>22</sup> Because the employers' unilateral imposition of terms was an accepted tactic in collective bargaining, like the use of a strike or a lock-out, the court concluded that employers should not be subject to antitrust liability for the use of such a technique.<sup>23</sup> Under the court's rule, employees in a labor dispute must choose between the protections afforded by labor law and the remedies of antitrust law;<sup>24</sup> employees who wish to pursue antitrust claims must "forgo unionization or . . . decertify their unions."<sup>25</sup>

<sup>11</sup> See *Brown*, 116 S. Ct. at 2119.

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

<sup>13</sup> 15 U.S.C. § 1 (1994).

<sup>14</sup> See *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1047 (D.C. Cir. 1995).

<sup>15</sup> See *id.*

<sup>16</sup> See *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 130–34 (D.D.C. 1991).

<sup>17</sup> See *id.* at 134–37.

<sup>18</sup> See *id.* at 137–39.

<sup>19</sup> See *Brown v. Pro Football, Inc.*, 821 F. Supp. 20, 21 (D.D.C. 1993). The court also granted injunctive relief, see *id.* at 24, and attorneys' fees of \$1.7 million, see *Brown v. Pro Football, Inc.*, 846 F. Supp. 108, 112 (D.D.C. 1994).

<sup>20</sup> See *Brown*, 50 F.3d at 1046.

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

<sup>22</sup> *Id.* at 1045.

<sup>23</sup> See *id.* at 1051–52.

<sup>24</sup> See *id.* at 1057.

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

In a lengthy dissent, Judge Wald argued that forcing unions to choose between antitrust rights and collective bargaining “sharply tilts the playing field in employers’ favor” and creates incentives for employees not to engage in bargaining at all.<sup>26</sup> Judge Wald agreed with the majority that multiemployer bargaining tactics fall within the scope of the nonstatutory labor exemption,<sup>27</sup> but she drew a distinction between bargaining *tactics*, temporary measures used only to help reach agreement, and *terms*, which could exist in perpetuity.<sup>28</sup> Although she acknowledged that the imposition of terms may serve as a bargaining tactic, she thought that, because terms also represent “the way the employer decides to run his business in the absence of any bargaining agreement,”<sup>29</sup> they should be subject to general background laws, including the antitrust laws.<sup>30</sup>

In an 8–1 decision, the Supreme Court affirmed. Writing for the majority, Justice Breyer<sup>31</sup> held that federal labor laws prevent antitrust challenges to joint actions by employers taken during the collective bargaining process, including the implementation of a wage rate after a bargaining impasse.<sup>32</sup> The Court began by noting that the nonstatutory labor exemption finds support in both the history and logic of the federal labor laws. According to the Court, when Congress passed various labor laws in the 1930s, it meant to adopt the view of the dissenting Justices in *Duplex Printing Press Co. v. Deering*,<sup>33</sup> who urged that courts not use antitrust law to resolve labor disputes.<sup>34</sup> The Court also found that the antitrust exemption is logically implicit in labor law’s requirements of collective action: “it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work . . .”<sup>35</sup>

After completing its discussion of the exemption’s roots, the Court considered its scope. Although the labor statutes do not mention multiemployer bargaining explicitly, the Court described it as “a well-established, important, pervasive method of collective bargaining”,<sup>36</sup>

<sup>26</sup> *Id.* at 1058–59 (Wald, J., dissenting).

<sup>27</sup> See *id.* at 1067 n.7.

<sup>28</sup> See *id.* at 1066–69.

<sup>29</sup> *Id.* at 1068.

<sup>30</sup> See *id.* at 1069.

<sup>31</sup> Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg joined Justice Breyer’s opinion.

<sup>32</sup> See *Brown*, 116 S. Ct. at 2119.

<sup>33</sup> 254 U.S. 443, 483–88 (1921) (Brandeis, J., dissenting, joined by Holmes & Clarke, JJ.).

<sup>34</sup> See *Brown*, 116 S. Ct. at 2120.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2122. Justice Breyer noted that “multiemployer bargaining accounts for more than 40% of major collective-bargaining agreements.” *Id.*

thus, the Court concluded that, for purposes of the exemption, multiemployer groups should be treated no differently from single employers.<sup>37</sup> Justice Breyer concluded that agreements among employers about what tactics to adopt or terms to impose, both of which are integral parts of multiemployer bargaining, should not be subject to antitrust scrutiny.<sup>38</sup> The Court believed that the entire process of collective bargaining, not just union-employer agreements, deserves protection from interference by antitrust courts.<sup>39</sup> Still, the Court noted that its opinion was “not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.”<sup>40</sup>

Justice Breyer specifically rejected several positions that would have limited the scope of the nonstatutory exemption. First, the Court rebuffed the players’ argument that the exemption should apply only to labor-management agreements by insisting that the exception should cover the entire collective bargaining process, which may begin before an agreement is in place or extend after its expiration.<sup>41</sup> Similarly, the Court found unpersuasive the Solicitor General’s position that exemption should terminate at the point of impasse, because “[l]abor law permits employers, after impasse, to engage in considerable joint behavior.”<sup>42</sup> The Court also rejected Judge Wald’s theory that “tactics” but not “terms” should be exempt, because such a distinction would require “amorphous” inquiries into employers’ motives.<sup>43</sup> Finally, the Court dismissed the players’ claim that the unique circumstances of professional sports merited special treatment.<sup>44</sup>

Justice Stevens dissented. He argued that the labor laws underlying the *statutory* labor exemption “were enacted to enable collective action by union members to achieve wage levels that are higher than would be available in a free market”<sup>45</sup> and that the aim of the nonstatutory labor exemption was only to ensure that unions that used these wage-enhancing techniques would enjoy the benefits of their agreements with employers.<sup>46</sup> In Justice Stevens’s view, therefore, the nonstatutory exemption would not protect action “initiated by employ-

<sup>37</sup> See *id.* at 2121.

<sup>38</sup> See *id.* at 2122–23.

<sup>39</sup> See *id.* at 2123–25.

<sup>40</sup> *Id.* at 2127.

<sup>41</sup> See *id.* at 2123–24.

<sup>42</sup> *Id.* at 2124. In addition, this rule would be inadmissible, because impasse is an often temporary, frequently repeated, and not easily recognizable stage in bargaining. See *id.* at 2124–25.

<sup>43</sup> See *id.* at 2125–26.

<sup>44</sup> See *id.* at 2126.

<sup>45</sup> *Id.* at 2129 (Stevens, J., dissenting).

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

ers to depress wages below the level that would be produced in a free market.”<sup>47</sup> Justice Stevens also criticized the majority for failing to give appropriate weight to the unusual features of the case, such as the unique economic position of professional athletes, the possibility that the NFL’s adoption of the developmental squad plan was not motivated by collective bargaining objectives, and the fact that minimal bargaining had occurred before impasse was declared.<sup>48</sup>

*Brown* differs significantly from previous Supreme Court cases that have considered the nonstatutory labor exemption. In prior cases, the Court had to weigh the labor law interests of the negotiating parties against the antitrust interests of third parties.<sup>49</sup> In contrast, *Brown* discussed the scope of the exemption in a “pure labor market” case, in which the alleged anticompetitive conduct had no significant impact on parties who were not members of the collective bargaining relationship.<sup>50</sup>

In holding that the nonstatutory labor exemption continues beyond impasse,<sup>51</sup> the *Brown* Court resolved much of the unruly debate about the scope of the exemption in “pure labor market” cases.<sup>52</sup> However, the Court did not identify the specific point at which the bargaining

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<sup>47</sup> *Id.*

<sup>48</sup> See *id.* at 2129–30.

<sup>49</sup> See, e.g., Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 679–80 (1965) (assessing the legality of an agreement between a butchers’ union and certain retailers that imposed fixed hours for all meat markets); United Mine Workers v. Pennington, 381 U.S. 657, 660 (1965) (considering an agreement between a union and large mining operators setting uniform terms that small operators could not meet). See generally Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 25–36, 42–51 (1983) (discussing the distinction between labor and product markets as the central idea of the nonstatutory exemption).

<sup>50</sup> The D.C. Circuit and the Supreme Court understood the football clubs’ wage implementation in *Brown* to produce consequences only in the labor market for professional football services. See *Brown*, 116 S. Ct. at 2127; *Brown* v. Pro Football, Inc., 50 F.3d 1041, 1046 (D.C. Cir. 1995). Only Judge Wald suggested that parties outside the collective bargaining agreement, namely consumers, would be hurt by the implementation of the wage rate. See *Brown*, 50 F.3d at 1061–62 (Wald, J., dissenting). She argued that the NFL, as a monopsony purchaser of football talent, would drive down prices, causing talented athletes to switch to other sports or professions, and thus lower the overall quality of the product for consumers. See *id.* But see *Brown*, 50 F.3d at 1057 (“[C]ounsel for the plaintiff class at oral argument acknowledged that the fixed salary for Developmental Squad players had no effect on the product market.”).

<sup>51</sup> See *Brown*, 116 S. Ct. at 2123–25.

<sup>52</sup> *Brown* should silence the judicial cacophony on the proper scope of the nonstatutory labor exemption in these cases. Before *Brown*, several courts had held that the exemption applies as long as the labor relationship continues. See *National Basketball Ass’n v. Williams*, 45 F.3d 684, 692–93 (2d Cir. 1995); *Powell v. National Football League*, 930 F.2d 1293, 1304 (8th Cir. 1989). Other courts had argued that the exemption should end when the bargaining agreement expires, see *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (D.D.C. 1976), that the exemption should end at impasse, see *Powell v. National Football League*, 678 F. Supp. 777, 788 (D. Minn. 1988), *rev’d*, 930 F.2d 1293 (8th Cir. 1989), and that the exemption should last as long as the employers reasonably believe the challenged practice will be included in the next agreement, see *Bridgeman v. National Basketball Ass’n*, 675 F. Supp. 960, 967 (D.N.J. 1987).

relationship ends and the exemption terminates.<sup>53</sup> Lower courts and commentators have suggested that the exemption should lapse upon the commission of a labor law violation by employers,<sup>54</sup> but the use of this trigger would contradict the policies underlying *Brown*.<sup>55</sup> These policies suggest that, if the bargaining relationship remains intact and third parties are unaffected, employees should not be able to seek antitrust remedies for joint employer actions, even for actions that are illegal under labor law. This rule would prevent the undesirable enforcement of the labor laws by antitrust courts and avoid overdeterrence of desirable employer action.

The *Brown* Court did not decide whether the legality of the employers' conduct under the labor laws would affect the availability of the nonstatutory labor exemption. The parties, the lower courts, and the Supreme Court all assumed that the NFL's implementation of terms was "unobjectionable as a matter of labor law and policy."<sup>56</sup> The D.C. Circuit suggested that this assumption was essential to its holding. Judge Edwards said that the nonstatutory labor exemption applied here partly "[b]ecause the NFL in this case acted lawfully within the framework of the collective bargaining process."<sup>57</sup> In contrast, the Supreme Court merely noted its assumption that the teams had complied with labor law: "On that assumption, we conclude that the exemption applies."<sup>58</sup>

The Supreme Court has not yet considered the question whether a labor law violation should invalidate the nonstatutory exemption. In *Connell Construction Co. v. Plumbers Local Union No. 100*,<sup>59</sup> the Court ruled that the National Labor Relations Act does not provide an exclusive remedy for labor law violations and that, when the labor exemption does not apply, dual remedies in labor and antitrust are

<sup>53</sup> See *Brown*, 116 S. Ct. at 2127.

<sup>54</sup> See, e.g., *Consolidated Express v. New York Shipping Ass'n (Conex)*, 602 F.2d 494, 519 (3d Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980); Randall Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AM. U. L. REV. 699, 753 (1986).

<sup>55</sup> The labor law rules of collective bargaining place significant restraints upon joint employer activity of the type at issue in *Brown*. For example, employers cannot unilaterally implement the terms of their last good faith offer under the labor laws until an actual impasse. See *NLRB v. Katz*, 369 U.S. 736, 741–43 (1962). Similarly, an employer may not impose terms unless it has engaged in good faith bargaining, see *Akron Novelty Mfg. Co.*, 224 N.L.R.B. 998, 1002 (1976), and the terms were "reasonably comprehended" within the employer's pre-impasse proposals, *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989).

<sup>56</sup> *Brown*, 116 S. Ct. at 2121; see *Brown*, 50 F.3d at 1056–57; *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 134 (D.D.C. 1991); Petition for Certiorari at i, *Brown* (No. 95-388).

<sup>57</sup> *Brown*, 50 F.3d at 1046; see also id. at 1045 ("[R]estraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability . . . .").

<sup>58</sup> *Brown*, 116 S. Ct. at 2121.

<sup>59</sup> 421 U.S. 616 (1975). In this case, the Court held that the nonstatutory labor exemption would not protect a "hot cargo" agreement, whereby a union pressured a general contractor with which it had no collective bargaining agreement into agreeing to subcontract work only to unionized firms. See *id.* at 619–25. This agreement also violated § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1994). See *Connell*, 421 U.S. at 626.

permissible.<sup>60</sup> *Connell* did not suggest, however, that the union's violation of labor law was responsible for the Court's denial of the non-statutory labor exemption. On the contrary, the Court examined the impact of the union's activity on the business market to determine whether the exemption was applicable before even beginning to discuss whether the agreement had violated labor law.<sup>61</sup>

Lower courts are split on whether a labor law violation should remove the nonstatutory labor exemption from antitrust liability. In *Consolidated Express v. New York Shipping Ass'n (Conex)*,<sup>62</sup> the Court of Appeals for the Third Circuit held that a finding of a labor law violation can remove eligibility for the nonstatutory labor exemption.<sup>63</sup> The court argued that only conduct that furthers some labor law policy should receive the antitrust exemption and that conduct that is illegal under labor law clearly does not do so.<sup>64</sup> However, other courts have not found the labor law status of the challenged conduct to be determinative in deciding whether the exemption applies. In *Richards v. Neilsen Freight Lines*,<sup>65</sup> the Ninth Circuit held that a bargaining agreement that may have been illegal under labor law restrictions on secondary boycotts was nonetheless exempt from the antitrust laws.<sup>66</sup> Located somewhere between these two positions, the Second Circuit has stated that illegality under the labor laws does not necessarily determine the antitrust exemption issue but is a relevant consideration.<sup>67</sup>

The better view, and the one most consonant with the policy concerns articulated in *Brown*, is that, in "pure labor market" cases, the

<sup>60</sup> See *Connell*, 421 U.S. at 634–35.

<sup>61</sup> See *id.* at 622–26. Dicta in a later case might seem to suggest that the *Connell* Court disallowed the nonstatutory exemption because the union-employer agreement had violated the labor laws. See *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 85 (1982) ("In *Connell*, we decided the [labor law] issue in the first instance. It was necessary to do so to determine whether the agreement was immune from the antitrust laws."). This view, however, cannot be squared with a logical reading of *Connell*. See *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987).

<sup>62</sup> 602 F.2d 494 (3d Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980).

<sup>63</sup> See *id.* at 519. *Conex* held that the labor law violation would automatically eliminate the exemption only in connection with a claim for an injunction under the antitrust laws. See *id.* The court left in place a limited exemption for damages claims, as long as "the parties reasonably believed that their agreement was directly related to" legal labor practices, *id.* at 519–20, a distinction intended to protect employers from the over deterrence that they might otherwise suffer from exposure to antitrust damages, see *id.* at 521.

<sup>64</sup> See *id.* at 518; see also *Combs v. Associated Elec. Coop., Inc.*, 752 F. Supp. 1131, 1134–36 (D.D.C. 1990) (following *Conex*); *Marks*, *supra* note 54, at 755 ("[T]he argument that there is a substantial labor policy interest at stake loses considerable — if not all — force for activities that are unlawful under the labor laws.").

<sup>65</sup> 810 F.2d 898 (9th Cir. 1987).

<sup>66</sup> See *id.* at 906 ("[A] labor law violation may still be within the antitrust exemption, for the violation will carry its own remedies under the labor laws . . . ."); see also *Zimmerman v. National Football League*, 632 F. Supp. 398, 404 (D.D.C. 1986) ("[T]he validity of an agreement under [labor] laws is a separate question from the applicability of the labor exemption.").

<sup>67</sup> See *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793, 803–05 (2d Cir. 1977).

legality of an action under labor law should not affect whether the antitrust exemption applies. The reasons offered in *Conex* and other cases for making the nonstatutory labor exemption turn on labor law status have little applicability in cases like *Brown*, in which the challenged restraint has no significant impact on parties outside the collective bargaining relationship. The decision whether to allow the antitrust exemption rests on a balancing of the labor law interest served against the potential anticompetitive impact. Whether the action that raises antitrust concerns constitutes an unfair labor practice obviously affects the importance of the labor law side of this balancing test; thus, in cases like *Conex*, when the practice affects third parties, it makes sense to consider the acceptability of the challenged activity under labor law as a factor in the analysis. However, when the only parties in question are participants in an ongoing bargaining relationship, the parties have, in effect, chosen to be governed by federal labor law.

Furthermore, it would seem arbitrary for the antitrust treatment of two activities with identical market effect to vary depending on whether one meets labor law standards.<sup>68</sup> *Connell* and *Conex* dealt with secondary boycotts, in which the concerns of labor law are similar to those of antitrust law.<sup>69</sup> In contrast, in the “pure labor market” case, the boundaries of what constitutes an unfair labor practice are not related to antitrust issues.<sup>70</sup>

The reasons given in *Brown* for extending the nonstatutory labor exemption to all actions taken within the collective bargaining relationship remain persuasive whether or not the actions are in compliance with labor law. Although the *Brown* Court did not indicate precisely when the exemption should end, its emphasis on protecting the collective bargaining *process* suggests that the scope of the antitrust exemption should cover the entire collective bargaining relationship:<sup>71</sup> the exemption should end only upon dissolution of the collective bargaining relationship, either through the employees’ repudiation of the union as a collective bargaining representative<sup>72</sup> or by the valid withdrawal of the union or of one or more employers from the multiemployer bargaining unit.<sup>73</sup> A violation of a labor standard does not in itself result in the dissolution of the collective bargaining

<sup>68</sup> See Lee Goldman, *The Labor Exemption to the Antitrust Laws: A Radical Proposal*, 66 O.R.L. REV. 153, 179–80 (1987).

<sup>69</sup> See *Connell Constr. Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 619–21 (1975); *Conex*, 602 F.2d at 512–13 (“[Labor law restrictions on secondary boycotts] are, like the Sherman Act, statutes reflecting the basic federal economic policy against restraints upon competition in the marketplace for goods and services . . . .”).

<sup>70</sup> The NLRB does not generally consider an activity’s anticompetitive impact when determining whether it constitutes an unfair labor practice. See Goldman, *supra* note 68, at 180.

<sup>71</sup> See *Brown*, 116 S. Ct. at 2123.

<sup>72</sup> See *id.* at 2127 (citing *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995)).

<sup>73</sup> See *id.* (citing *El Cerrito Mill & Lumber Co.*, 316 N.L.R.B. 1005, 1006–07 (1995)).

relationship;<sup>74</sup> therefore, the exemption should remain in effect regardless of whether a labor law violation occurs.

The rule prohibiting antitrust interference in the collective bargaining process stems from both an institutional concern about who should resolve labor disputes and a substantive concern about the distortion of actors' behavior. According to the Court in *Brown*, a central goal of the labor exemption is "to take from antitrust courts the authority to determine . . . what is socially or economically desirable collective-bargaining policy" and to leave that question in the hands of the National Labor Relations Board (NLRB).<sup>75</sup> In *Brown*, the Court refused to subject employers' bargaining tactics to antitrust law because this rule would "require antitrust courts to answer a host of important practical questions about how collective bargaining over wage, hours and working conditions is to proceed — the very result that the implicit labor exemption seeks to avoid."<sup>76</sup> If the availability of the antitrust exemption were to turn on the existence of a labor law violation, antitrust courts would still be obliged to answer this type of question in order to resolve antitrust suits.<sup>77</sup> The reasoning of *Brown* suggests that this result is undesirable; parties should not lose the antitrust exemption for engaging in unfair labor practices.

Furthermore, making antitrust liability turn on labor law may lead to overdeterrence of desirable employer activity. The triple damage provision of the antitrust laws is intended to clear a wide path for competitive activity by making employers err on the side of caution.<sup>78</sup> In contrast, the system of primarily injunctive relief in place for labor law violations reflects the congressional intent that the labor laws maintain equipoise between the bargaining parties rather than push decisively in either direction.<sup>79</sup> This difference in the statutory

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<sup>74</sup> A party's duty to bargain may be suspended if the other party engages in certain types of egregiously unlawful activity. See 1 PATRICK HARDIN, THE DEVELOPING LABOR LAW 710–11 (3d ed. 1992). However, even in these cases, the suspension of this duty is only temporary. *See id.* The situation is more akin to an impasse than it is to a dissolution of the bargaining relationship.

<sup>75</sup> *Brown*, 116 S. Ct. at 2123.

<sup>76</sup> *Id.* at 2122. Using similar reasoning, the Court rejected the Solicitor General's suggestion that antitrust's "rule of reason" could accommodate labor law concerns: "any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Labor Board." *Id.* at 2123.

<sup>77</sup> For example, if labor remedies were not considered exclusive, players presented with a fact scenario similar to *Brown* would still be able to go to antitrust court simply by alleging that the team's implementation of the \$1000 weekly salary was an unfair labor practice and that, therefore, the exemption would not apply.

<sup>78</sup> *See Prima Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

<sup>79</sup> "[F]ederal labor policy favors neither party to the collective bargaining process, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power and leaves each side to its own devices." *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1052 (D.C. Cir. 1995). The court's role is to "preserve the delicate balance of countervailing power that characterizes the process." *Id.*

schemes provides further indication that antitrust remedies should not be applied to labor law violations in the "pure labor market" context.<sup>80</sup>

Several commentators suggest an intermediate approach under which antitrust liability should attach only when the labor law violation is foreseeable or in bad faith.<sup>81</sup> This rule would be significantly better than one that automatically removed the exemption for any labor law violation. By exempting not only those actions that comply with labor law, but also those actions that a reasonable person might have believed to be in compliance, this intermediate rule would lessen the chilling effect exerted by the threat of antitrust litigation. Any added deterrence from the heightened penalties of antitrust law would discourage only conduct already thought undesirable under labor law. Unfortunately, this intermediate rule allays only the problem of overdeterrence. It leaves intact the other major problem by inviting judicial intervention into labor conflicts more appropriately resolved by the NLRB.

The policies and principles of *Brown* suggest that, as long as the collective bargaining relationship remains intact and the negotiations do not substantially affect outside parties, violations of labor laws should not extinguish the antitrust exemption. In these cases, labor law remedies should be exclusive. Although this result may seem harsh to some observers, ultimately, both employees and employers alike will benefit from the supremacy of labor law over antitrust law in collective bargaining.

### B. Banking

*National Banks' Power to Sell Insurance.* — Competitive forces — and the relaxed regulations that have followed — have transformed traditional banks from loan and deposit account providers into "financial supermarkets."<sup>1</sup> These new "banks" use inherent economies of

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<sup>80</sup> Treble damages are also justified in the antitrust context because agreements in restraint of trade are often difficult to detect, and thus, the law must use harsher penalties to achieve the same level of deterrence. See Virginia G. Maurer, *Antitrust and RICO: Standing on the Slippery Slope*, 25 GA. L. REV. 711, 734 (1991). In the labor context, one would expect fewer violations to occur in secret, and accordingly, this rationale for triple damages is less applicable to violations of labor law.

<sup>81</sup> See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* § 229.2d, at 299 (Supp. 1996) ("If one feels obligated to add antitrust sanctions to those of labor law, a strong case can be made for placing the burden on the plaintiff of proving . . . that the negotiators knew or should have known, while bargaining, that the challenged terms would violate the labor laws."); Martin I. Kaminsky, *The Antitrust Labor Exemption: An Employer Perspective*, 16 SETON HALL L. REV. 4, 62 (1986) (endorsing adoption of the *Conex* rule providing for a good faith defense in the context of antitrust damages claims).

<sup>1</sup> Debra Cope & Howard Kapiloff, *Mellon Package Would Combine Investment and Bank Accounts*, AM. BANKER, May 23, 1996, at 1, 18.

scope<sup>2</sup> in financial services to offer customers a wide variety of financial products.<sup>3</sup> Last Term, in *Barnett Bank v. Nelson*,<sup>4</sup> the Supreme Court gave this trend toward increased bank powers new impetus by holding that national banks located in towns of fewer than five thousand inhabitants could sell insurance despite conflicting state regulation. Although the *Barnett Bank* Court's decision moves the industry forward, the Court's "ordinary English"<sup>5</sup> approach may cause lower courts to construe national banks' general banking powers too narrowly. This narrow construction could undercut national banks' competitive market position in the financial services industry by preventing them from offering innovative financial products for a changing market.

Congress enacted § 92 of the National Bank Act<sup>6</sup> in 1916 to permit national banks located in towns of fewer than five thousand people to act as insurance brokers.<sup>7</sup> Then in 1945, Congress enacted the McCarran-Ferguson Act,<sup>8</sup> which "overturn[s] the normal rules of preemption . . . [by providing] that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise."<sup>9</sup> The McCarran-Ferguson Act provides in relevant part:

- (a) . . . The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
- (b) . . . No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . .<sup>10</sup>

<sup>2</sup> The term "economies of scope" refers to the efficiencies generated by a single business that sells different products. For example, a store that sells umbrellas may realize economies of scope if it sells raincoats as well.

<sup>3</sup> The trend appears to be toward the consolidation of the entire financial services market. See *Crossing the Boundary Lines: A Banker, a Broker and an Insurer Discuss Plans for the Others' Markets*, BUS. J. (Charlotte, N.C.), Oct. 23, 1995, at 23.

<sup>4</sup> 116 S. Ct. 1103 (1996).

<sup>5</sup> *Id.* at 1111.

<sup>6</sup> Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753-54 (1916) (codified at 12 U.S.C. § 92 (1994)).

<sup>7</sup> According to the Comptroller of the Currency ("Comptroller"), the law was needed to prevent state banks, which had the power to offer financial services traditionally understood to be outside the scope of "banking" services, from driving national banks out of small town markets. See *Barnett Bank*, 116 S. Ct. at 1110 (citing letter from J. Skelton Williams, Comptroller of the Currency, to Robert L. Owen, Chairman of the Senate Bank and Currency Committee (June 8, 1916), reprinted in 53 CONG. REC. 11,001 (1916)). The Comptroller believed that the existing "incidental powers" of the "business of banking" outlined in § 24 did not include brokering insurance. Thus, § 24 would not authorize national banks to offer insurance. See *id.* (discussing 12 U.S.C. § 24).

<sup>8</sup> 15 U.S.C. §§ 1011-1015 (1994).

<sup>9</sup> United States Dep't of Treasury v. Fabe, 508 U.S. 491, 507 (1993) (quoting 15 U.S.C. § 1012(b)).

<sup>10</sup> 15 U.S.C. § 1012.

These two statutes collided in 1974 when Florida seized on its power to regulate insurance and enacted a statute that prohibited banks from acting as insurance brokers.<sup>11</sup> The Florida act exempted independent banks located in towns of less than five thousand inhabitants, but did not do the same for banks that were subsidiaries of bank holding companies.<sup>12</sup> Thus, the statute precluded subsidiaries of national banks from exercising the power to broker insurance granted to them by § 92.

Barnett Marion, a national-bank subsidiary of Barnett Banks, Inc., operates a branch in Bellevue, Florida — a town of less than five thousand inhabitants.<sup>13</sup> On October 18, 1993, Barnett Marion purchased Linda Clifford Insurance, Inc., a Bellevue-based insurance agency, and hired a Florida-licensed insurance agent and her staff as bank employees.<sup>14</sup> On October 22, the Florida Insurance Commissioner found the insurance agent in violation of Florida law and issued “an Immediate Final Order to Cease and Desist to [the agent] and Linda Clifford Insurance, Inc.”<sup>15</sup> Barnett Marion then filed a declaratory judgment action in the federal district court,<sup>16</sup> claiming that the Florida statute was preempted by § 92 of the National Bank Act.<sup>17</sup> The district court denied Barnett Marion’s request for a permanent injunction, finding that, because the Florida statute regulated insurance and because § 92 did not “specifically relate[ ] to the business of insurance,”<sup>18</sup> the McCarran-Ferguson Act’s reverse preemption applied. The court therefore found that the conflicting National Bank Act did not preempt the state statute, even though the state statute would have been preempted under normal

<sup>11</sup> See FLA. STAT. ANN. § 626.988(2) (West Supp. 1996).

<sup>12</sup> See *id.* § 626.988(1)(a).

<sup>13</sup> See *Barnett Bank v. Gallagher*, 43 F.3d 631, 632–33 (11th Cir. 1995). Even though Barnett Marion operates a branch in Bellevue, its principal place of business is Ocala, Florida, *see id.* at 632, which has a population of more than five thousand people, *see RAND McNALLY COLLEGE WORLD ATLAS* 379 (rev. ed. 1985). The Comptroller has determined that national bank branches and subsidiaries located in towns of less than five thousand inhabitants satisfy the location requirement of § 92 even though the main bank or parent is located in a town of more than five thousand inhabitants. *See* 12 C.F.R. § 7.1001 (1996); *see also* *Independent Ins. Agents Ass’n v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993) (upholding the Comptroller’s determination that national bank subsidiaries located in a town of less than five thousand inhabitants could market insurance nationwide). Interestingly, even before *Barnett Bank*, “the Comptroller had [also] concluded that a national bank’s small town agency could market its products to consumers anywhere regardless of their location.” *Stuart Stock & John Dugan, Barnett Bank Opens New Opportunities for Banks*, INT’L FIN. L. REV., June 1996, at 21, 23. The accuracy of these conclusions of the Comptroller was not before the Supreme Court in *Barnett Bank*.

<sup>14</sup> See *Barnett Bank v. Gallagher*, 839 F. Supp. 835, 837 (M.D. Fla. 1993).

<sup>15</sup> *Id.*

<sup>16</sup> Federal jurisdiction was based upon *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 259 n.6 (1985), and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983). *See Barnett Bank*, 43 F.3d at 633.

<sup>17</sup> See *Barnett Bank*, 839 F. Supp. at 836–37.

<sup>18</sup> 15 U.S.C. § 1012(b); *see Barnett Bank*, 839 F. Supp. at 840–41, 843.

preemption principles.<sup>19</sup> The Court of Appeals for the Eleventh Circuit affirmed.<sup>20</sup>

In a unanimous opinion written by Justice Breyer, the Supreme Court reversed. Using “ordinary English,”<sup>21</sup> Justice Breyer found that the McCarran-Ferguson Act’s reverse preemption did not apply because § 92 “‘specifically’ relates to the insurance business.”<sup>22</sup> The Court divided its analysis of the issue into two parts. First, the Court determined that under normal preemption principles, the Florida statute interfered with the national banks’ operations to such an extent that it would have to fall: “Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted.”<sup>23</sup> The Court further noted that, unlike other sections of the National Bank Act, which expressly condition the power of national banks on the laws of the state,<sup>24</sup> § 92 powers are “not expressly conditioned . . . upon a grant of state permission.”<sup>25</sup> Accordingly, under the ordinary principles of statutory construction and preemption, § 92 would trump the Florida law.

Turning to the McCarran-Ferguson Act, the Court stated: “In ordinary English, a statute that says that banks may act as insurance agents, and that the Comptroller of the Currency may regulate their insurance-related activities, ‘relates’ to the insurance business” for purposes of § 1012(b).<sup>26</sup> The Court concentrated on § 92’s use of the word “insurance” in granting power to national banks operating in towns of less than five thousand people: “The statute explicitly grants national banks permission to ‘act as the agent for any fire, life, or other insurance company,’ to ‘solicit and sell[] insurance,’ to ‘collect premiums,’ and to ‘receive for services so rendered . . . fees or commissions,’ subject to Comptroller regulation.”<sup>27</sup> In § 92, Congress has spoken to “matters . . . placed at the core of the McCarran-Ferguson Act’s concern,”<sup>28</sup> and therefore, that section does not fall within the special reverse preemption of the McCarran-Ferguson Act.

Ultimately, the implications of the Court’s emphasis on the “ordinary English” of § 92 may be problematic. Specifically, the *Barnett Bank* Court’s emphasis on Congress’s use of the word “insurance” may confuse lower courts that must delineate the McCarran-Ferguson Act’s applicability to other provisions of the National Bank Act. The “ordinary

<sup>19</sup> See *Barnett Bank*, 839 F. Supp. at 843.

<sup>20</sup> See *Barnett Bank*, 43 F.3d at 637.

<sup>21</sup> *Barnett Bank*, 116 S. Ct. at 1111.

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

<sup>23</sup> *Id.* at 1109.

<sup>24</sup> See *id.* (citing 12 U.S.C. §§ 36(c), 92a (1994)).

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

<sup>26</sup> *Id.* at 1111.

<sup>27</sup> *Id.* (quoting 12 U.S.C. § 92) (alterations in original).

<sup>28</sup> *Id.* at 1112.

English" mode of analysis<sup>29</sup> is particularly likely to stymie the development and marketing of innovative financial products under the auspices of national banks' general banking powers.<sup>30</sup>

Section 24 of the National Bank Act enumerates national banks' general banking powers. A national bank shall, inter alia, "have power . . . [t]o make contracts . . . [and t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking."<sup>31</sup> The Comptroller of the Currency, whom Congress has charged with the interpretation of ambiguous provisions of the National Bank Act,<sup>32</sup> defines the scope of these general banking powers and determines which "incidental" powers are necessary to the "business of banking."<sup>33</sup> The Comptroller is also responsible for ensuring the safety and soundness of national banks.<sup>34</sup>

In light of the fast pace at which the world of financial services is changing,<sup>35</sup> the Comptroller may soon find that the scope of the "business of banking" has expanded to include many products traditionally thought of as "insurance."<sup>36</sup> Indeed, the Comptroller has already found that many annuity products — the "mirror image of life insurance" poli-

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<sup>29</sup> Given the straightforward issue presented, the *Barnett Bank* Court may have been acting appropriately in advocating a strictly textual approach to § 92. However, lower courts should be wary about importing this approach wholesale into the interpretation of other sections of the National Bank Act. Those sections' relation to the McCarran-Ferguson Act may engender complexities that were not presented to or considered by the *Barnett Bank* Court.

<sup>30</sup> See 12 U.S.C. § 24(Seventh) (1994).

<sup>31</sup> *Id.* § 24(Third). (Seventh).

<sup>32</sup> See, e.g., *Smiley v. Citibank* (S.D.), 116 S. Ct. 1730, 1733 (1996) (quoting *NationsBank* of N.C. v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995)).

<sup>33</sup> See, e.g., *NationsBank*, 115 S. Ct. at 813–14.

<sup>34</sup> See, e.g., 12 U.S.C. § 26 (1994) (requiring the Comptroller to investigate whether an association has met the conditions to engage in the "business of banking"); *id.* § 27 (giving the Comptroller the discretion to withhold a certificate of authority if he has "reason to suppose" that "shareholders have formed [a national bank] for any other than the legitimate objects contemplated" by the National Bank Act).

<sup>35</sup> See JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 35–36 (1992).

<sup>36</sup> Such a determination might be problematic for the Comptroller to reach, however, due to the decisions in the Second and Fifth Circuits holding that insurance products are not within the general banking powers of § 24(Seventh) because of § 92. See *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 155–57 (2d Cir. 1992); *Saxon v. Greater Ass'n of Indep. Agents*, 399 F.2d 1010, 1013–14 (5th Cir. 1968) (prohibiting banks from acting as insurance agents under § 24(Seventh)). But cf. *NationsBank*, 115 S. Ct. at 814 n.2 (finding that the enumerated powers in § 24(Seventh) are not exclusive); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1169–70 (D.C. Cir. 1979) (holding that Comptroller's powers to issue credit life regulations under 12 U.S.C. § 1818(b) were not barred by § 92).

cies<sup>37</sup> — are within the scope of a national bank's § 24 powers.<sup>38</sup> Given that the risk-spreading function served by annuities is the same as that served by life insurance, the "business of banking" may also logically include the brokerage and underwriting of insurance policies — formerly activities exclusively thought of as the "business of insurance."<sup>39</sup>

From an economic standpoint, the Comptroller should view banks as universal financial institutions. Specifically, the Comptroller should use his powers and discretion under the National Bank Act to define the "business of banking" in a way that alleviates the economic pressures and fulfills the needs of national banks as comprehensive financial insti-

<sup>37</sup> Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295, 1301 (5th Cir. 1993) ("In a life insurance contract, in return for periodic payments by the insured, the insurance company promises to pay a lump sum to the insured's beneficiary upon the death of the insured. . . . An annuity contract is the exact inverse of a life insurance contract."), *rev'd*, 115 S. Ct. 810 (1995); *accord* American Deposit Corp. v. Schacht, 84 F.3d 834, 840 & n.4 (7th Cir. 1996).

Although it is true that the *NationsBank* Court reached its result by drawing a legal distinction between annuities and insurance, *see NationsBank*, 115 S. Ct. at 815, the distinction seems overly formalistic given that the same economic operations underlie both insurance and annuities.

<sup>38</sup> See, e.g., *NationsBank*, 115 S. Ct. at 815 (finding that the Comptroller had "reasonably typed the permission sought by NationsBank as an 'incidental power[r] . . . necessary to carry on the business of banking'" and concluding that "modern annuities, though more sophisticated than the standard savings bank deposits of old, answer essentially the same need"); *Schacht*, 84 F.3d at 837 n.2 (noting that the Comptroller "had no objection" to a bank's offering a "Retirement CD," which entailed a mortality risk and a guaranteed return).

<sup>39</sup> There are several possible objections to including the power to broker or underwrite insurance within the incidental powers of national banks under § 24 of the National Bank Act. First, § 24 does not explicitly grant banks the power to sell insurance. Nonetheless, in *NationsBank* the Court rejected the argument that national banks' powers are limited to those specifically enumerated in § 24. *See NationsBank*, 115 S. Ct. at 814 n.2 ("We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller . . . has discretion to authorize activities beyond those specifically enumerated.").

Second, the fact that § 92 authorizes national banks operating in small towns to broker insurance arguably suggests by negative implication that Congress did not intend national banks to have the power under § 24 to sell insurance in other circumstances. *See American Land Title Ass'n*, 968 F.2d at 155–57; *Saxon*, 399 F.2d at 1013–14. Yet § 92 speaks only to the brokerage of insurance and not to its underwriting. Moreover, § 92 may be concerned more with certain types of insurance, such as life and fire insurance, than with other types of insurance products that might be closer to the "business of banking." For instance, § 92 does not speak specifically to products such as annuities and credit risk insurance.

Finally, allowing banks to sell insurance under their general banking powers would require the Comptroller to assume a position inconsistent with the one the Comptroller advocated in 1916 while urging the passage of § 92. At that time, the Comptroller expressed his belief that § 24 did not include "either expressly nor [sic] by necessary implication the power to act as agents for insurance companies." *Barnett Bank*, 116 S. Ct. at 1110 (quoting letter from J. Skelton Williams, Comptroller of the Currency, to Robert L. Owen, the Chairman of the Senate Bank and Currency Committee (June 8, 1996), *reprinted in* 53 CONG. REC. 11,001 (1916)) (internal quotation marks omitted). The Court, however, has rejected the idea that the Comptroller must adhere to a consistent position in order to be entitled to deference. *See Smiley v. Citibank (S.D.)*, 116 S. Ct. 1730, 1734 (1996) ("Of course the mere fact that an agency interpretation contradicts a prior agency position is not fatal. . . . [T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."); *NationsBank*, 115 S. Ct. at 817 ("[A]ny change in the Comptroller's position might reduce, but would not eliminate, the deference we owe his reasoned determinations.").

tutions. By authorizing innovative approaches to the “business of banking,” the Comptroller could increase the profitability of national banks while still ensuring that these innovations did not compromise the banks’ safety and soundness. As a result, national banks would more closely resemble other financial intermediaries,<sup>40</sup> which hold the majority of their asset portfolios in financial assets.<sup>41</sup> This broader economic definition of the “business of banking” would necessarily encompass what traditionally has been known as the “business of insurance.”

Unfortunately, any attempt by the Comptroller to expand the legal definition of the “business of banking” to correspond to its economic definition is likely to meet resistance in the lower courts, and that resistance may draw strength from the language of *Barnett Bank*. Many courts are likely to use the reasoning of *Barnett Bank* to require that Congress use the “ordinary English” word “insurance” explicitly in any grant of power to a national bank to show that it intends to escape the bonds of the McCarran-Ferguson Act. Indeed, the Seventh Circuit has already relied on *Barnett Bank* to construe a national bank’s powers under § 24 of the National Bank Act in this fashion. In *American Deposit Corp. v. Schacht*,<sup>42</sup> the court stated that “[the *Barnett Bank*] Court focused on the fact that Section 92 ‘explicitly’ grants national banks permission to sell insurance, and contains ‘specific’ rules prohibiting banks from guaranteeing premium payments or the truth of statements made by an assured . . . .”<sup>43</sup> Section 24, however, does not contain such explicit language. As analyzed by the court, therefore, § 24 had not overcome the reverse preemption of McCarran-Ferguson.<sup>44</sup> Consequently, the court permitted state insurance regulators to bar the national bank in *Schacht* from offering an innovative product known as a “Retirement CD.”<sup>45</sup>

Because the *Barnett Bank* Court focused on the “ordinary English” of § 92, many courts may follow the *Schacht* court and interpret § 24’s lack of the word “insurance” to mean by negative implication that § 24 does not “specifically [relate] to the business of insurance.”<sup>46</sup> Thus, courts will subject products offered by national banks under their general powers to state insurance regulation whenever the products offered qualify as “insurance” under state law.

<sup>40</sup> Financial intermediaries are entities that raise funds from one segment of the population and distribute them to another. See MACEY & MILLER, *supra* note 35, at 37–39.

<sup>41</sup> Financial assets are claims rather than real assets. These assets provide the bank with liquidity.

<sup>42</sup> 84 F.3d 834 (7th Cir. 1996).

<sup>43</sup> *Id.* at 843.

<sup>44</sup> See *id.* at 843–44.

<sup>45</sup> A Retirement CD allows a customer to deposit money at a bank and select a maturity date (usually corresponding to the depositor’s retirement) at which time he can withdraw up to two-thirds of the accrued balance; the remaining accrued balance at maturity is used to purchase an annuity for the remainder of the depositor’s life. See *id.* at 836.

<sup>46</sup> See *id.* at 843.

Yet the general powers of a national bank — as outlined in § 24 of the National Bank Act — should be found specifically to relate to insurance for purposes of the McCarran-Ferguson Act and therefore should preempt conflicting state law. Congress never could have listed the general powers of a national bank exhaustively in § 24.<sup>47</sup> Therefore, the absence of the word “insurance” should not prove that § 24 does not specifically relate to insurance. A more reasonable interpretation of § 24 recognizes that Congress chose to grant the Comptroller discretion in order to promote the safety and soundness of national banks.<sup>48</sup> Allowing national banks to exploit new markets for financial services — perhaps by offering insurance products — under the guidance of the Comptroller will advance the goals of safety and soundness<sup>49</sup> and therefore should fall at “the core of the McCarran-Ferguson Act’s concern.”<sup>50</sup> The Comptroller can only effectively exercise the discretion to authorize new banking powers if his decisions cannot be thwarted by contrary state law.

Moreover, it is unlikely that Congress intended the McCarran-Ferguson Act to limit the scope of national bank powers under § 24. Congress passed § 24 long before it passed the McCarran-Ferguson Act and designed § 24 specifically to deal with the unique subject of banking powers. When Congress later passed the McCarran-Ferguson Act to restore the understanding that insurance was not subject to congressional regulation as interstate commerce,<sup>51</sup> it probably did not intend for the Act to affect the already existing banking laws. At that time, banking was viewed as a separate and distinct enterprise and Congress probably did not foresee that the McCarran-Ferguson Act could affect the special status of banks. Unfortunately, the Act’s language is so broad that it could encompass almost all financial services that arguably infringe on the traditional “business of insurance.”

Yet state regulation of national banks without express congressional authorization conflicts with a long-standing congressional desire to protect national banks from discrimination by the states. The implications of interpreting the McCarran-Ferguson Act as broadly as its language,

<sup>47</sup> See *NationsBank of N.C. v. Variable Annuity Life Ins., Co.*, 115 S. Ct. 810, 814 n.2 (1995).

<sup>48</sup> Given the dynamic nature of the industry and the development of innovative banking products, regulation of national banks’ general banking powers should change as the industry develops. Indeed, the purpose of the *Chevron* doctrine is “that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute,” *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626–27 (1971), in order to allow flexible, efficient administration of the law.

<sup>49</sup> Restricting national banks to their traditional powers may cause them to lose market share. If these banks are unable to offer new products, their consumers will obtain these products from competitors in other financial services who can offer greater return or less risk for a lower cost.

<sup>50</sup> *Barnett Bank*, 116 S. Ct. at 1112.

<sup>51</sup> Congress enacted the McCarran-Ferguson Act in the wake of *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 543–53 (1944), which overruled *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868), a nineteenth-century case that had held that insurance was not within the scope of Congress’s Interstate Commerce Clause powers.

therefore, are particularly problematic. Since as early as *McCulloch v. Maryland*<sup>52</sup> and before,<sup>53</sup> states and the federal government have fought over the latter's power to create and operate national banks free of state restraints.<sup>54</sup> States have their own interests in bank regulation, including the protection of local banks and insurance agents from interstate competition.<sup>55</sup> For this reason, Congress was explicit in the National Bank Act; whenever it wanted to subject national banks to state regulation, it expressly said so. For example, Congress specifically provided for state regulation in both sections 36(b) and (c) of the McFadden Act,<sup>56</sup> concerning branching, and in § 92a,<sup>57</sup> dealing with national banks' trust powers. Congress did not, however, explicitly or implicitly subject national banks' general powers to the whims and wiles of state regulators. Instead, Congress delegated the discretion to define these general powers to the Comptroller so that he could interpret these powers in light of the demands of efficiency, safety, and soundness.

In the end, the "ordinary English" approach taken by the *Barnett Bank* Court, while attractive in light of the question presented to the Court under § 92, is likely to open a Pandora's box concerning the McCarran-Ferguson Act's application to national banks' general powers under § 24. The Court's reasoning leaves the door open for state insurance regulators and lower courts to stymie the development of innovative financial services products in the insurance area. By failing to consider the legal and economic principles underlying the "business of banking" and the "business of insurance," lower courts may use the *Barnett Bank* Court's analysis to subject national banks to a barrage of litigation each time the banks try to offer a new product that arguably infringes on the traditional insurance business.

### C. Government Contracts

*Savings and Loans — Liability for Changing Regulatory Accounting Procedures.* — The bailout of hundreds of federal savings and loan associations (S&Ls) that failed in the 1980s has already cost taxpayers an estimated \$130 billion, and the costs continue to mount.<sup>1</sup> Last Term, in *United States v. Winstar Corp.*,<sup>2</sup> the Supreme Court

<sup>52</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>53</sup> See MACEY & MILLER, *supra* note 35, at 2–8.

<sup>54</sup> See *American Deposit Corp. v. Schacht*, 84 F.3d 834, 858–59 (7th Cir. 1996) (Flaum, J., dissenting) ("The tradition against allowing state intrusion into the activities of national banks is a long and lofty one." (citing *Easton v. Iowa*, 188 U.S. 220, 229 (1903))).

<sup>55</sup> See Charles W. Calomiris, *Regulation, Industrial Structure, and Instability in U.S. Banking: An Historical Perspective*, in *STRUCTURAL CHANGE IN BANKING* 19, 90–91 (Michael Klausner & Lawrence J. White eds., 1993).

<sup>56</sup> 12 U.S.C. § 36 (1994).

<sup>57</sup> *Id.* § 92a.

<sup>1</sup> See Richard W. Stevenson, *G.A.O. Puts Cost of S.& L. Bailout at Half a Trillion Dollars*, N.Y. TIMES, July 13, 1996, at 34.

<sup>2</sup> 116 S. Ct. 2432 (1996).

rebuffed the government's attempt to shift over \$10 billion of these costs to private parties whom it had induced to acquire failing S&Ls.<sup>3</sup> The government had reneged on its promises to afford these parties favorable regulatory treatment and then invoked the sovereign acts and unmistakability doctrines — which preserve the government's sovereign right to legislate for the public good — to avoid liability. Although the Court correctly held the government liable for breach of contract, Justice Souter's eagerness to root out unfairness to the government's contractual partners led him to adopt a test that limits the sovereign acts defense in an unworkable and unnecessary way.

Widespread failure of federally insured S&Ls in the early 1980s threatened to exhaust the limited reserves of the Federal Savings and Loan Insurance Corporation (FSLIC), the government entity charged with insuring thrift deposits.<sup>4</sup> In response, the Federal Home Loan Bank Board (Bank Board), which managed FSLIC, encouraged adequately capitalized thrifts and other entities to acquire financially troubled thrifts, thereby obviating the need for immediate government liquidation.<sup>5</sup> As an incentive, the Bank Board agreed to allow the post-merger S&L to count "supervisory goodwill" — the excess of the purchase price of the failed thrift over the fair value of its identifiable assets — toward the S&L's regulatory capital reserve requirements.<sup>6</sup>

By the late 1980s, however, Congress was convinced that the "utilization of [such] capital gimmicks that masked the inadequate capitalization of thrifts" was exacerbating the S&L crisis.<sup>7</sup> Thus, in 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA),<sup>8</sup> which prescribed strict new minimum capital requirements for S&Ls and severely restricted the use of supervisory goodwill to satisfy those requirements.<sup>9</sup> Consequently, many of the thrifts created through Bank Board-encouraged mergers were unable to meet the new regulatory capital requirements; these thrifts either underwent costly private recapitalizations or were seized and liquidated by federal regulators.<sup>10</sup>

<sup>3</sup> See Marianne Lavelle, *Federal Contractors Hail High Court's S&L Ruling*, NAT'L L.J., July 15, 1996, at B1, B1.

<sup>4</sup> See *Winstar*, 116 S. Ct. at 2440–41 (plurality opinion).

<sup>5</sup> See *id.* at 2442.

<sup>6</sup> See *id.* at 2442–43. This favorable accounting method artificially inflated a thrift's reserves, thereby allowing it to leverage more loans. See *id.* at 2443.

<sup>7</sup> *Id.* at 2446 (quoting H.R. REP. NO. 101-54(I), at 310 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 106) (internal quotation marks omitted).

<sup>8</sup> Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at various sections of the United States Code (1994)).

<sup>9</sup> See 12 U.S.C. § 1464(t)(2)(A), (9)(A) (1994). FIRREA also abolished FSLIC, created a new insurance fund, replaced the Bank Board with another regulatory entity, and created the Resolution Trust Corporation to liquidate failed thrifts. See *Winstar*, 116 S. Ct. at 2446 (plurality opinion).

<sup>10</sup> See *Winstar*, 116 S. Ct. at 2446–47 (plurality opinion).

Three such thrifts brought separate suits against the United States in the United States Claims Court, seeking monetary damages for the government's breach of its alleged contractual obligation to allow the thrifts to count supervisory goodwill toward regulatory capital requirements.<sup>11</sup> The Claims Court held the government liable for breach of contract in each case.<sup>12</sup> A divided panel of the Federal Circuit reversed.<sup>13</sup> On rehearing en banc, however, the Federal Circuit reversed the panel decision and affirmed the Claims Court's determinations of liability.<sup>14</sup> In so holding, the en banc court concluded that neither the unmistakability doctrine nor the sovereign acts doctrine shielded the government from liability.<sup>15</sup>

A fractured Supreme Court affirmed by a 7–2 margin.<sup>16</sup> Writing for a four-Justice plurality,<sup>17</sup> Justice Souter first concluded that the government had expressly contracted to permit the thrifts to count supervisory goodwill toward satisfaction of minimum capital requirements.<sup>18</sup> The plurality next considered whether the unmistakability doctrine, which requires that the government's contractual surrender of a sovereign power be accomplished in "unmistakable terms" to be effective, applied to the contracts at issue.<sup>19</sup> Justice Souter held that "[t]he application of the doctrine . . . turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government."<sup>20</sup> Justice Souter found that nothing in the *Winstar* contracts "purported to bar the Government from changing the way in which it regulated the thrift industry."<sup>21</sup> Instead, the contracts were merely "risk-shifting agreements," under which the government agreed to compensate the thrifts for "any losses arising

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

<sup>12</sup> See *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904, 924 (1992); *Winstar Corp. v. United States*, 25 Cl. Ct. 541, 553 (1992). The Claims Court consolidated the cases and certified its liability rulings for interlocutory appeal. See *Winstar*, 116 S. Ct. at 2447 (plurality opinion).

<sup>13</sup> See *Winstar Corp. v. United States*, 994 F.2d 797, 813 (Fed. Cir. 1993).

<sup>14</sup> See *Winstar Corp. v. United States*, 64 F.3d 1531, 1551 (Fed. Cir. 1995) (en banc).

<sup>15</sup> See *id.* at 1545–51.

<sup>16</sup> See *Winstar*, 116 S. Ct. at 2440 (plurality opinion).

<sup>17</sup> Justices Stevens, O'Connor, and Breyer joined Justice Souter's opinion. Justice O'Connor, however, did not join the full opinion.

<sup>18</sup> See *Winstar*, 116 S. Ct. at 2448–51 (plurality opinion). Justice Souter reasoned that it would have been "madness" for healthy thrifts to enter into the mergers without securing such a promise. See *id.* at 2472.

<sup>19</sup> *Id.* at 2453.

<sup>20</sup> *Id.* at 2457.

<sup>21</sup> *Id.* at 2452. Thus, the government may use the unmistakability doctrine as a defense only when a private party claims that the government, having contractually surrendered a sovereign power, can be enjoined from passing or enforcing a subsequent legislative act; the party is entitled to an exemption from such an act; or the party is entitled to a damage award that is functionally equivalent to an exemption from the act. See *id.* at 2456–57.

from future regulatory change.”<sup>22</sup> Because the government did not purport to surrender any sovereign power to regulate, but agreed only to pay damages if it exercised that power,<sup>23</sup> the government could not assert the unmistakability doctrine as a defense.<sup>24</sup>

Next, in a section of his opinion joined only by Justices Stevens and Breyer, Justice Souter rejected the government’s argument that the sovereign acts doctrine protected it from contractual liability. The doctrine was inapplicable, Justice Souter held, because FIRREA was not a “‘public and general’ sovereign act.”<sup>25</sup> According to Justice Souter, the sovereign acts doctrine — that the government-as-contractor cannot be held liable for the sovereign acts of the government-as-regulator — ensures that the government-as-contractor is in the same position that a private party would be with regard to its contractual obligations.<sup>26</sup> Thus, when a sovereign legislative act “incidentally” impairs the government’s performance of a contract, that act should not be attributable to the government-as-contractor for purposes of determining whether it is entitled to the benefit of the impossibility defense.<sup>27</sup> However, Justice Souter held that, “where a substantial part of the impact of the Government’s action rendering performance impossible falls on its own contractual obligations, the [act is not deemed general and the sovereign acts] defense will be unavailable.”<sup>28</sup> Justice Souter regarded “Congress’s expectation that the Government’s own

<sup>22</sup> *Id.* at 2458. This characterization of the contract also allowed the Court to dispose quickly of the government’s “reserved powers” and “express delegation” defenses. *See id.* at 2461–63.

<sup>23</sup> *See id.* at 2458. The plurality acknowledged that providing compensation for the costs of regulatory changes might “indirectly deter needed governmental regulation by raising its costs,” but argued that such costs — present to a greater or lesser degree with “all regulations” — do not imply that the government has surrendered a sovereign power. *Id.* at 2459.

<sup>24</sup> Justice Breyer wrote a separate concurrence emphasizing that both precedent and the practical exigencies of government contracting supported the plurality’s restrictive reading of the unmistakability doctrine. *See id.* at 2472–76 (Breyer, J., concurring).

<sup>25</sup> *Winstar*, 116 S. Ct. at 2468 (opinion of Souter, J.). One of the seminal formulations of the sovereign acts doctrine was set forth by the United States Court of Claims in 1865:

The two characters which the government possesses as a contractor and as a sovereign cannot be . . . fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.

*Jones v. United States*, 1 Ct. Cl. 383, 384 (1865). The Supreme Court adopted the “public and general” act requirement in *Horowitz v. United States*, 267 U.S. 458, 461 (1925).

<sup>26</sup> *See Winstar*, 116 S. Ct. at 2464–65 (plurality opinion).

<sup>27</sup> *See id.* at 2466 (opinion of Souter, J.). Under the impossibility doctrine, a party’s contract performance is excused when a supervening event makes the agreed upon performance impracticable, the nonoccurrence of the event was a basic assumption upon which the parties contracted, the impracticability was not the fault of the party seeking to be discharged, and the circumstances or contract terms do not otherwise indicate that discharge is improper. *See E. ALLAN FARNsworth, CONTRACTS* § 9.6, at 708 (2d ed. 1990).

<sup>28</sup> *Winstar*, 116 S. Ct. at 2466 (opinion of Souter, J.). Justice Souter viewed such a substantial impact as persuasive evidence that legislation was tainted by a degree of government “self-interest” that precluded assertion of the impossibility defense.

obligations would be heavily affected" by FIRREA as sufficient evidence that FIRREA had such a substantial impact.<sup>29</sup>

Moreover, the plurality<sup>30</sup> asserted that, even if FIRREA qualified as a "public and general" sovereign act, the government would still be liable because it did not prove the other conditions of the impossibility defense.<sup>31</sup> For example, the government failed to prove that the regulatory change was "an event the non-occurrence of which was a basic assumption on which the contract was made,"<sup>32</sup> given that the change was "foreseeable and likely" when the parties contracted.<sup>33</sup> Additionally, the plurality held that any governmental contract that "not only deals with regulatory change but allocates the risk of its occurrence will, by definition, fail the further condition of an impossibility defense, for it will indeed indicate that the parties' agreement was not meant to be rendered nugatory by a change in the regulatory law."<sup>34</sup>

Concurring in the judgment, Justice Scalia, joined by Justices Kennedy and Thomas, claimed that the plurality departed from precedent as well as basic principles of ordinary contract law by characterizing the contracts as "risk-shifting agreements" — rather than as promises to regulate in a certain manner — in order to avoid the government's sovereign defenses.<sup>35</sup> In Justice Scalia's view, the plurality's distinction between a contract not to exercise a sovereign power and a contract to pay damages if that power is exercised is untenable because "[v]irtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of non-performance."<sup>36</sup> Thus, Justice Scalia reasoned, the unmistakability doctrine applied because the contracts in *Winstar* purported to limit the government's sovereign power to regulate.

However, Justice Scalia argued that, having obtained a clear promise that the government would accord the thrifts favorable regulatory treatment, the thrifts were not required by the unmistakability doctrine to secure a further, secondary promise that the government would keep its promise.<sup>37</sup> Instead, the unmistakability doctrine merely embodies the reversal of the ordinary contract law presumption that a contracting party implicitly promises to refrain from committing any act that would interfere with the performance of the contractual obligations. In contrast to a private party, the government is presumed *not* to have promised that none of its various acts will incidentally

<sup>29</sup> *Id.* at 2468 n.50.

<sup>30</sup> Justice O'Connor joined this section of the plurality opinion.

<sup>31</sup> See *Winstar*, 116 S. Ct. at 2469–71 (plurality opinion).

<sup>32</sup> *Id.* at 2469 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981)) (internal quotation marks omitted).

<sup>33</sup> *Id.* at 2470.

<sup>34</sup> *Id.* at 2471.

<sup>35</sup> *Id.* at 2476–77 (Scalia, J., concurring in the judgment).

<sup>36</sup> *Id.* at 2476 (emphasis omitted).

<sup>37</sup> See *id.* at 2477–78.

interfere with the contract's performance.<sup>38</sup> This "reverse" presumption is overcome, however, when the government makes such a promise in "unmistakable terms"; an "unmistakable" promise is present when, as in *Winstar*, "the very subject matter of [the contract], an essential part of the quid pro quo, [is] government regulation."<sup>39</sup> Justice Scalia concluded by arguing that the sovereign acts doctrine "adds little" to the unmistakability doctrine because both defenses are avoided "whenever it is clear from the contract in question that the Government was committing itself not to rely upon its sovereign acts in asserting (or defending against) the doctrine of impossibility."<sup>40</sup> Thus, in *Winstar*, the government had no sovereign acts defense because "Congress specifically set out to abrogate the essential bargain of the contracts."<sup>41</sup>

Chief Justice Rehnquist, joined by Justice Ginsburg, dissented. The Chief Justice criticized the plurality for gutting both the unmistakability and sovereign acts doctrines.<sup>42</sup> According to Chief Justice Rehnquist, conditioning the applicability of the unmistakability doctrine on a distinction between money damages and injunctive relief (or the monetary equivalent thereof) was both unworkable and unsupported by precedent.<sup>43</sup> Moreover, because FIRREA was a comprehensive, "general regulatory enactment," the government was entitled to the sovereign acts defense; therefore, FIRREA's enforcement could not trigger government contractual liability.<sup>44</sup>

The *Winstar* plurality's concern that citizens not be disadvantaged by having contracted with the government rather than a private party led Justice Souter to adopt a probing "substantial impact" test to define the requirement of the sovereign acts doctrine that only a "general and public" act can shield the government from liability for breach of contract.<sup>45</sup> The "substantial impact" test, however, is inconsistent with the essential nature of a generality requirement, will often be difficult for courts to apply, and as a result, may devolve into an invasive examination of legislative intent. Moreover, adoption of the "substantial impact" test was unnecessary because the plurality's additional requirement that the government prove all of the elements of the impos-

<sup>38</sup> See *id.* at 2477.

<sup>39</sup> *Id.* (emphasis omitted).

<sup>40</sup> *Id.* at 2478.

<sup>41</sup> *Id.* at 2479 (emphasis omitted).

<sup>42</sup> See *id.* (Rehnquist, C.J., dissenting).

<sup>43</sup> See *id.* at 2479–82.

<sup>44</sup> *Id.* at 2483. Thus, the Chief Justice would not require the government to prove the impossibility defense, because if an act is "public and general" then the sovereign acts defense standing alone absolutely precludes government liability. See *id.*

<sup>45</sup> The plurality's interest in ensuring fairness to the government's contractual partners was motivated in part by a desire to preserve the government's credibility as a contracting partner. See *Winstar*, 116 S. Ct. at 2459–60 (plurality opinion).

sibility defense is a more appropriate and administrable way of ensuring that the government's contractual partners are treated fairly.

The sovereign acts doctrine attempts to balance the government's sovereign prerogative to act in the public interest against the legitimate expectations of the government's contractual partners.<sup>46</sup> The heart of the disagreement between the plurality and the dissent is the relative weight to be given to each of these interests. According to the plurality, the sovereign acts doctrine is grounded in "the need to treat the government-as-contractor the same as a private party."<sup>47</sup> In contrast, Chief Justice Rehnquist argued that the doctrine is animated by the need to "protect[ ] the federal fisc."<sup>48</sup> Although the Chief Justice may have overstated his case, the plurality opinion in *Winstar* does mark a subtle but discernable shift in the focus of the sovereign acts doctrine. Whereas early cases explicating the doctrine attempted to ensure that the government-as-contractor was in no *worse* position than a private party would be when the government-as-sovereign interfered with its contract performance,<sup>49</sup> the *Winstar* plurality made clear that invoking the doctrine should also leave the government-as-contractor in no *better* position than a private party.<sup>50</sup>

This difference in emphasis informed Justice Souter's analysis in two important respects. First, rather than relying on indicia of generality that are ascertainable from the face of the statute,<sup>51</sup> Justice Souter adopted an invasive "substantial impact" test to determine whether legislation that impairs the performance of public contracts is moti-

<sup>46</sup> See, e.g., Ronald G. Morgan, *Identifying Protected Government Acts Under the Sovereign Acts Doctrine: A Question of Acts and Actors*, 22 PUB. CONTRACT L.J. 223, 224 (1992).

<sup>47</sup> *Winstar*, 116 S. Ct. at 2463 (plurality opinion).

<sup>48</sup> *Id.* at 2485 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist vigorously disputed the plurality's conclusion that early cases relied on a narrow rule that the government-as-contractor should be treated the same as a private party. *See id.* at 2482.

<sup>49</sup> See, e.g., *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (holding that the United States may "be held liable only within the same limits that any other defendant would be" for interference with contractual obligations occasioned by a sovereign governmental act); *Deming v. United States*, 1 Ct. Cl. 190, 191 (1865) (holding that "the United States can be held to no greater liability than other contractors" when a sovereign act impairs public contracts).

<sup>50</sup> *See Winstar*, 116 S. Ct. at 2463 (plurality opinion) (noting "the need to treat the government-as-contractor the same as a private party"); *id.* at 2464–65 (emphasizing that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals" (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)) (internal quotation marks omitted)).

<sup>51</sup> Lower courts and administrative boards traditionally have relied on factors such as whether the act applied equally to private and public contracts (if a private analog to the public contract existed), whether the act otherwise applied to all similarly situated contractors, and whether the act was "special" or "local" in application. *See Morgan, supra* note 46, at 233–47. In his *Winstar* dissent, Chief Justice Rehnquist argued that a number of facial indicia of generality confirmed that FIRREA was indeed a "general regulatory enactment," including, for example, the fact that FIRREA implemented a comprehensive reform of the entire regulatory structure for thrifts, imposed the same capital requirements on all thrifts, and occupied 372 pages in the *Statutes at Large*. *Winstar*, 116 S. Ct. at 2483 (Rehnquist, C.J., dissenting).

vated by government “self-interest.”<sup>52</sup> Second, the plurality carried its reasoning through to its logical — but novel — conclusion by holding that the sovereign acts defense alone does not absolve the government of liability; instead, it merely allows the government to clear the first hurdle for asserting the impossibility defense by employing the legal fiction that the government did not cause its inability to perform the contract.<sup>53</sup> Like a private party, the government must still prove the other elements of the impossibility defense.

Justice Souter formulated the “substantial impact” test to define the “public and general” act requirement in a way that would deny the sovereign acts defense to legislation “tainted” by “self-relief.”<sup>54</sup> Legislation is self-interested, according to Justice Souter, when the “Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties”<sup>55</sup> in violation of the principle that “the Government may not ‘forc[e] some people alone to bear public burdens which . . . should be borne by the public as a whole.’”<sup>56</sup> Thus, “where a substantial part of the impact of the [legislation] rendering performance impossible falls on [the Government’s] own contractual obligations,” the legislation is deemed to be self-interested and is therefore not “general.”<sup>57</sup>

Using the effects of the legislation as a touchstone for ascertaining whether that legislation is general, however, is inconsistent with the essential character of the generality requirement. By requiring a legislature to speak in terms applicable to all parties who are similarly situated, the generality requirement provides a process-based assurance that the effects of the legislation will not be unfairly concentrated on any given individuals.<sup>58</sup> Indeed, as Justice Souter acknowledged, the generality requirement “reflects the traditional ‘rule of law’ assumption that generality in the terms by which the use of power is authorized will tend to guard against its misuse to burden or benefit the few unjustifiably.”<sup>59</sup> Verifying a law’s generality is thus a means of ferreting out any illicit motive to concentrate costs unfairly, without having to engage in either a difficult inquiry into legislative intent or an ex

<sup>52</sup> See *Winstar*, 116 S. Ct. at 2466 (opinion of Souter, J.). When the government legislates merely to relieve itself of a contractual obligation it has deemed unwise, it acts in a way unavailable to a private party.

<sup>53</sup> See *Winstar*, 116 S. Ct. at 2469–72 (plurality opinion).

<sup>54</sup> *Id.* at 2465 (opinion of Souter, J.).

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

<sup>56</sup> *Id.* (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>57</sup> *Id.*

<sup>58</sup> As Justice Jackson explained: “[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.” *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J. concurring). Conversely, requiring general applicability provides some assurance that the political process will prevent the legislature from targeting and burdening the few unfairly.

<sup>59</sup> *Winstar*, 116 S. Ct. at 2466 (opinion of Souter, J.).

ante identification and weighing of the practical effects of the legislation.<sup>60</sup> The generality requirement is, in essence, an administrable “procedural” proxy for a more wide-ranging inquiry into the substance and effects of the legislation.

Paradoxically, by conditioning the generality of legislation on an assessment of its effects, Justice Souter engaged in the very inquiry that the generality determination is meant to obviate. Although a relatively limited inquiry into the facial generality of legislation will not always uncover unfair cost-shifting, there are sound reasons why Justice Souter should have adhered to this more formalistic approach.

First and foremost, the “substantial impact” test will often be difficult for courts to apply. The test requires that a court initially identify and assess the myriad practical effects of a piece of legislation and then determine whether the legislation’s effect on government contracts is a “substantial part” of its cumulative impact or aggregate effects.<sup>61</sup> Because information regarding the overall effects of an act will usually be outside the scope of the immediate parties’ knowledge and control, this information will often be unavailable to a court,<sup>62</sup> and the resulting assessment of an act’s relative effects may be speculative.

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<sup>60</sup> Cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585, 593 (1983) (striking down a special tax on the press but noting that “[w]hen the State imposes a generally applicable tax, there is little cause for concern”). When the incidence of a tax falls on all businesses alike, rather than just on the press, the presumption is that the legislature is not trying to target and burden the press in violation of the First Amendment. *See id.* Similarly, when the incidence of legislation falls on both private and public contracts, the presumption is that the legislature’s primary motive was not to target and discharge its own contractual obligations.

<sup>61</sup> Justice Souter himself rejected a “predominant purpose or effect” test because of the “difficulty . . . of ascertaining the relative intended or resulting impacts on governmental and purely private contracts.” *Winstar*, 116 S. Ct. at 2467 n.46 (opinion of Souter, J.). Although the “substantial impact” test will spare courts the task of determining which effect of the legislation predominates, they must still consider the legislation’s actual burdens to gauge whether the effect on government contracts is substantial in comparison to the other effects of the legislation. This focus on the *comparative* effect on government contracts is necessary because a focus on the absolute magnitude of the effect would be at odds with Justice Souter’s desire to insulate the government from liability when the legislation’s effect on government contracts is “incidental” to its purposes. *See id.* at 2466. Many laws enacted for purposes wholly unrelated to the impairment of government contracts may nonetheless entirely abrogate such contracts. For example, if the Department of Housing and Urban Development (HUD) made a contract to purchase asbestos insulation and thereafter the Environmental Protection Agency (EPA) promulgated a general regulation forbidding the sale of asbestos, an incidental effect of the EPA regulation would be to abrogate the HUD contract entirely. Moreover, if HUD had many such contracts, the absolute magnitude of the total impact on all government contracts would be large, even though that effect was incidental to the regulation’s purpose. Under the comparative approach, the regulation might still qualify as “public and general” because other compliance costs would likely dwarf the impact on public contracts. In contrast, if the test focused instead on the absolute magnitude of either the effect on *individual* public contracts (that is, whether the law entirely abrogated or merely burdened the contracts) or the *total* effect on public contracts, the sovereign acts defense would be unavailable.

<sup>62</sup> Even though the scope of discovery against nonparties is theoretically the same as for parties under the Federal Rules of Civil Procedure, discovery of nonparties may be more difficult and

Moreover, because it will often be difficult for parties to produce credible evidence about the relative impacts of legislation, the “substantial impact” test may devolve into a direct examination of legislative intent. In *Winstar* itself, the lack of other available information led Justice Souter to rely solely on an analysis of legislative history to determine the substantiality of FIRREA’s effects.<sup>63</sup> Thus, as Chief Justice Rehnquist argued:

[J]udging from the plurality’s use of comments of individual legislators in connection with the enactment of FIRREA, it would appear that the sky is the limit so far as judicial inquiries into the question of whether the statute was “free of governmental self-interest” or rather “tainted” by a government objective of “self-relief.”<sup>64</sup>

The more formal, process-based inquiry traditionally embodied in the generality requirement evolved precisely so that courts could avoid such complex, wide-ranging, and unstructured inquiries into the fine, and often elusive, distinction between the government’s sovereign and proprietary capacities.<sup>65</sup> Although the “substantial impact” test has the superficial appeal of an “objective” test, if the absence of other evidence forces courts to resort to examining legislative history, the test becomes an invasive, highly subjective inquiry.<sup>66</sup>

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expensive to obtain in practice. See, e.g., *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) (holding that courts may consider nonparty status in determining whether to allow discovery).

<sup>63</sup> See *Winstar*, 116 S. Ct. at 2467–69 (opinion of Souter, J.). Justice Souter eschewed the Chief Justice’s suggestion that the “substantial impact” test had devolved into nothing more than an examination of legislative history. Nevertheless, citing the absence of evidence about FIRREA’s relative impacts, Justice Souter found that Congress’s focus on FIRREA’s impact on public contracts was sufficient evidence of a “substantial impact.” See *id.* at 2468, 2469 n.52. Thus, Justice Souter treated the legislative intent evidence as a rebuttable presumption that a substantial impact existed.

<sup>64</sup> *Id.* at 2483 (Rehnquist, C.J., dissenting). Moreover, Justice Souter’s resort to legislative intent reveals the circular nature of his approach: Justice Souter held first that it is the policy of the sovereign acts doctrine in general and the generality requirement in particular to deny protection to acts that are not “general” because they are tainted by government self-interest (which implies an inquiry into motive); second, that the “substantial impact” test (a non-motive inquiry) is a good proxy for determining when the self-interested motive is present; and finally, that congressional intent (a motive inquiry) is a good proxy for determining whether a “substantial impact” exists. This bizarre result followed directly from the adoption of a probing generality test that is no easier to apply than the “intent” inquiry for which generality is a substitute.

<sup>65</sup> Cf. *Indian Towing Co. v. United States*, 350 U.S. 61, 65–68 (1955) (labeling the distinction between government’s proprietary and sovereign capacities a “quagmire”).

<sup>66</sup> Justice Souter’s willingness, and even eagerness, to engage in this inquiry is particularly striking in light of the fact that FIRREA is a presumptively valid national law passed by Congress. Lower courts have generally scrutinized the nature of the interfering act less closely when it was performed by an agency or branch of government other than the contracting agency (here, the Bank Board). See *Morgan*, *supra* note 46, at 247–48.

Additionally, the “substantial impact” test may be overinclusive, denying the sovereign acts defense to government acts that affect public and analogous private contracts similarly and that thus should not be suspect. See, e.g., *Deming v. United States*, 1 Ct. Cl. 190, 191 (1865); *Morgan*, *supra* note 46, at 234–36. Although Justice Souter contends that “[t]he generality requirement will almost always be met where . . . the governmental action ‘bears upon [the government’s contract]

Finally, the plurality's second doctrinal innovation — that the sovereign acts doctrine merely satisfies the first condition of the ordinary contract law impossibility defense and that the government must still satisfy the other conditions of that defense — makes the adoption of the "substantial impact" test unnecessary. Justice Souter's primary motivation for imposing a more probing generality test was to prevent the government from "unfairly" shifting the cost of the interfering act to its contractual partners.<sup>67</sup> The fairness of this cost-shifting, however, ultimately depends on the risk allocation agreed to by the parties to the contract, rather than on whether the act was performed in the government's sovereign capacity.<sup>68</sup> Because the impossibility doctrine focuses on the risk allocation implicit in the particular contract at issue,<sup>69</sup> it provides a more appropriate framework for detailed consideration of the fairness of the government's attempt to shift costs.<sup>70</sup> Moreover, the information necessary to evaluate the government's impossibility defense is specific to the contract at issue, and consequently is more easily accessible to the parties and the court than is the information necessary to apply the "substantial impact" test. Requiring proof of the other elements of impossibility will prevent the government from evading liability in cases like *Winstar*, in which the government "specifically set out to abrogate the essential bargain of the contract[ ],"<sup>71</sup> without forcing courts to engage in a difficult inquiry into the motivation for and effects of a piece of legislation.

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as it bears upon all similar contracts between citizens,'" *Winstar*, 116 S. Ct. at 2466 n.42 (opinion of Souter, J.) (quoting *Deming*, 1 Ct. Cl. at 191), the "substantial impact" formulation belies this conclusion. Interference with private contracts and impairment of government contracts might both be "substantial impacts" of particular legislation. For example, a law prohibiting all logging in the United States would have the substantial effect of abrogating not only all government timber contracts but also all private timber contracts as well. In such a case, the "substantial impact" test would deny the government the protection of the sovereign acts defense despite the general applicability of the law.

<sup>67</sup> See *Winstar*, 116 S. Ct. at 2465–66 (opinion of Souter, J.); FARNSWORTH, *supra* note 27, § 9.6, at 707–08.

<sup>68</sup> That an act is performed in the government's sovereign capacity is significant precisely because it is more likely that a private party would agree to bear the risk that contract performance will be affected by a generally applicable law than that a party would agree to bear the risk that the government may simply change its mind and later abrogate the agreement through a specific, targeted act. Thus, the "public and general" act requirement can be viewed as just one factor that bears on the court's determination of the risk allocation agreed to by the parties.

<sup>69</sup> See *Winstar*, 116 S. Ct. at 2469–70 (plurality opinion).

<sup>70</sup> The plurality's willingness to use the impossibility doctrine to probe the implicit risk allocation to which the government agreed is consistent with its decision that the unmistakability doctrine does not require that the government assume monetary risks in explicit, unmistakable terms. Chief Justice Rehnquist would argue, however, that the whole thrust of the unmistakability and sovereign acts doctrines is to protect the government against "implicit" risk allocation and to ensure that only explicit assumptions of risk may be enforced against the government. See *id.* at 2480 (Rehnquist, C.J., dissenting). Nonetheless, to the extent the plurality chose to give increased weight to fairness concerns, it should have done so solely by relying on impossibility rather than heightening the generality threshold by adopting the "substantial impact" test.

<sup>71</sup> *Id.* at 2479 (Scalia, J., concurring in the judgment) (emphasis omitted).

Given the difficulties inherent in the “substantial impact” test and the invasive inquiry into legislative intent that may result, the plurality should instead have applied a formal, facial test for generality. Then, if the Court deemed the legislation general, it could require the government to prove the other elements of the impossibility defense before excusing the government’s obligations to ensure that costs were not unfairly shifted to the government’s contractual partners.

#### D. Voting Rights Act

*Attendance Fees at State Party Nominating Conventions.* — Thirty-one years ago, Congress passed the Voting Rights Act of 1965 (“the Act”),<sup>1</sup> which gave effect to the Fifteenth Amendment’s guarantee that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>2</sup> Among the Act’s most powerful provisions is section five’s requirement that, “[w]henever a State or political subdivision”<sup>3</sup> in specified jurisdictions “shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964,”<sup>4</sup> that entity must first obtain “preclearance” from either the United States Attorney General or the Federal District Court for the District of Columbia.<sup>5</sup>

Last Term, in *Morse v. Republican Party*,<sup>6</sup> the Supreme Court concluded that the section five preclearance requirement applies to state political parties’ decisions to alter the manner in which party nominees are selected, if the state has granted such nominees automatic access to the general election ballot. Although four *Morse* dissenters contended that this application of section five violates political parties’ associational rights, their concerns were misplaced. The Court’s jurisprudence allows the state to regulate groups’ activities to further compelling interests that cannot be addressed in any significantly less restrictive manner. Because party leaders have an incentive to curtail party members’ access to the nominating process, and because that access is a crucial component of members’ political rights, the state has a compelling interest in preclearing changes in that process. Because no feasible device could effectively guard against such abuse in

<sup>1</sup> 42 U.S.C. §§ 1971–1974e (1994).

<sup>2</sup> U.S. CONST. amend. XV, § 1.

<sup>3</sup> 42 U.S.C. § 1973c (1994).

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

<sup>5</sup> See *id.* The preclearance requirement applies to states or other political jurisdictions that required a literacy test for voter registration on November 1 of 1964, 1968, or 1972, and whose voter registration or turnout in any of those years’ presidential elections was under half of the voting age population. See *id.* § 1973b(b).

<sup>6</sup> 116 S. Ct. 1186 (1996).

a manner significantly less restrictive than preclearance, section five survives the dissents' First Amendment challenge.

The Republican Party of Virginia nominated its 1994 candidate for the United States Senate at a state convention.<sup>7</sup> Republicans who wished to attend the convention were required to pay a registration fee of \$35 or \$45, depending on the certification date.<sup>8</sup> Kenneth Curtis Bartholomew and Kimberly J. Enderson "wish[ed] to become delegates to the . . . convention," but were "deterred . . . by the \$45.00 fee."<sup>9</sup> Fortis Morse paid the fee using "funds advanced by supporters of the eventual nominee," Oliver North.<sup>10</sup> The three filed suit in federal district court and alleged, *inter alia*, that "the Party did not receive preclearance before implementing the registration fee requirement and the fee [was] therefore in violation of section five of the Voting Rights Act."<sup>11</sup> They further claimed that the registration fee requirement violated section ten of the Act, according to which "the Attorney General is authorized and directed to institute . . . such actions . . . against the enforcement of any requirement of the payment of a poll tax as a precondition to voting."<sup>12</sup> The district court held that the imposition of such a fee was not subject to the section five preclearance requirement,<sup>13</sup> and found it "immediately apparent" that "the statute does not, on its face, authorize private actions for violations of Section 10."<sup>14</sup>

A splintered Supreme Court reversed and remanded, but produced no majority opinion. Justice Stevens announced and concurred in the judgment.<sup>15</sup> He first argued that regulations promulgated by the United States Attorney General required the party to preclear the fee's imposition.<sup>16</sup> Second, Justice Stevens criticized the district court's reliance on a 1972 district court opinion, *Williams v. Democratic Party*,<sup>17</sup> which held that a political party's decision to change its selection process for delegates to a national convention was not subject to the Act's

<sup>7</sup> See *id.* at 1191.

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

<sup>9</sup> Morse v. Oliver North for United States Senate Comm., 853 F. Supp. 212, 214 (W.D. Va. 1994) (per curiam).

<sup>10</sup> Morse, 116 S. Ct. at 1191.

<sup>11</sup> Morse, 853 F. Supp. at 214 (citation omitted).

<sup>12</sup> *Id.* at 217 (quoting 42 U.S.C. § 1973h(b) (1994)) (internal quotation marks omitted).

<sup>13</sup> See *id.* at 216.

<sup>14</sup> *Id.* at 217.

<sup>15</sup> Justice Ginsburg joined Justice Stevens.

<sup>16</sup> According to these regulations, "[a] change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction." Morse, 116 S. Ct. at 216 (citing 28 C.F.R. § 51.7 (1995)). Justice Stevens contended that the Virginia Democratic and Republican parties are "effectively granted the power to enact their own qualifications for placement of candidates on the ballot, which the Commonwealth ratifies by adopting their nominees." Morse, 116 S. Ct. at 1195.

<sup>17</sup> No. 16,286 (N.D. Ga. Apr. 6, 1972), *aff'd mem.*, 409 U.S. 809 (1972).

requirements.<sup>18</sup> The political party in *Williams* acted without any grant of state authority; the Virginia Republicans' exercise of delegated state power<sup>19</sup> "graphically distinguishe[d] the two cases."<sup>20</sup>

Based on the language, structure, and history of the Act, Justice Stevens next concluded that section five "of its own force" covered the Party's imposition of a filing fee for convention delegates.<sup>21</sup> He noted that the Court had previously held that section five "applies to all entities having power over any aspect of the electoral process within designated jurisdictions,"<sup>22</sup> and covers "all changes to rules governing voting."<sup>23</sup> Justice Stevens reasoned that the fee was "a more onerous burden" on voting than several burdens the Court had previously held to require preclearance.<sup>24</sup> He drew additional support from the text and legislative history of section fourteen of the Act, which indicate that the selection of party officers — such as convention delegates — is determinative of "the effectiveness of a vote in the general election."<sup>25</sup>

Justice Stevens then turned to the Court's prior consideration of the Fifteenth Amendment. He noted that the Court had long ago discerned "state action" in cases in which political parties<sup>26</sup> — and even purely private associations with de facto influence over a party's nomination<sup>27</sup> — adopted racially discriminatory selection procedures. The Act represented Congress's response to intransigent officials who had "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination."<sup>28</sup> For Justice Stevens, the filing fee was "just another variation" on the scheme section five was intended "to end . . . once and for all."<sup>29</sup>

<sup>18</sup> See *Morse*, 116 S. Ct. at 1197.

<sup>19</sup> Virginia confers privileges upon Republican and Democratic nominees that are unavailable to independent candidates. See VA. CODE ANN. § 24.2-506 (Michie 1993); *id.* § 24.2-511.

<sup>20</sup> *Morse*, 116 S. Ct. at 1197.

<sup>21</sup> *Id.* at 1198.

<sup>22</sup> *Id.* (quoting *United States v. Sheffield Bd. of Comm'r's*, 435 U.S. 110, 118 (1978)) (internal quotation marks omitted).

<sup>23</sup> *Id.* (quoting *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501 (1992)) (internal quotation marks omitted).

<sup>24</sup> *Id.* at 1199-1200.

<sup>25</sup> *Id.* at 1200 (citing H.R. REP. No. 89-439, at 32 (1965)). In fact, section 14's legislative history indicated that the term "party office" was added to section 14 "for the express purpose of extending coverage of the Act to the nominating activities of political parties." *Id.* This phrase was included to "prevent[] a reprise of the fiasco of the previous year, 1964, 'when the regular Democratic delegation from Mississippi to the Democratic National Convention was chosen through a series of Party caucuses and conventions from which Negroes were excluded.'" *Id.* at 1200 (quoting 111 CONG. REC. 16,273 (1965) (statement of Rep. Bingham)).

<sup>26</sup> See *id.* at 1202 (citing *Smith v. Allwright*, 321 U.S. 649 (1944)).

<sup>27</sup> See *id.* (citing *Terry v. Adams*, 345 U.S. 461 (1953)).

<sup>28</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966) (citing H.R. REP. NO. 89-439, at 10-11 (1965), and S. REP. NO. 89-162, pt. 3, at 8, 12 (1965)).

<sup>29</sup> *Morse*, 116 S. Ct. at 1203.

After quickly dismissing several arguments raised in the dissents,<sup>30</sup> Justice Stevens addressed two practical objections to the Court's construction of section five. First, he rejected the party's contention that the Court's decision would "create an administrative nightmare."<sup>31</sup> Second, because the party asserted no *actual* infringement on associational liberty stemming from the imposition of a preclearance requirement, Justice Stevens denied its claim that the Court's decision would threaten First Amendment associational freedoms.<sup>32</sup> Finally, Justice Stevens rejected the district court's holding that no private right of action to challenge racially motivated poll taxes existed under section ten of the Act.<sup>33</sup> The Court thus remanded the case for consideration of the plaintiffs' section ten claims.

Justice Breyer concurred in the judgment,<sup>34</sup> insisting that the Eighty-ninth Congress passed the Act with full knowledge of the history of parties' clever attempts to disenfranchise black voters.<sup>35</sup> The Act *must* cover the actions of major political parties, he reasoned, because no Congress aware of this "obvious history" would enact "a 'voting rights' law containing a major and obvious loophole that would allow [discriminatory] practices to continue, thereby threatening to destroy in practice the very promise of elementary fairness that the act

<sup>30</sup> Justice Stevens criticized the dissents' argument that, "under a literal reading of the statutory text, a political party is not a 'State or political subdivision.'" *Id.* at 1206. He contended that this interpretation contradicted a long line of precedents and failed "at the purely textual level" because, "[l]ong before Congress passed the [Act], [the Court] had repeatedly held that the word 'State' in the Fifteenth Amendment encompassed political parties." *Id.* at 1206 (citing *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953)).

Responding to Justice Kennedy's contention that the judgment established a "'blanket rule' that all political parties must preclear all of their 'internal procedures,'" *id.* at 1208 (quoting *id.* at 1220, 1221 (Kennedy, J., dissenting))), Justice Stevens maintained that preclearance applied "only insofar as the Party exercises delegated power over the electoral process when it charges a fee for the right to vote for its candidates," *id.* Justice Stevens also doubted Justice Kennedy's suggestion that the Attorney General might subordinate her legal responsibility to her political agenda. "[A] political party distrustful of the Attorney General may seek preclearance under § 5 from the District Court for the District of Columbia." *Id.* at 1209.

<sup>31</sup> *Id.* at 1209. Only changes "affecting voting" were subject to preclearance; changes involving recruitment, campaigning, and wording of party platforms could proceed without preclearance. *Id.* (citing 28 C.F.R. § 51.7 (1995)).

<sup>32</sup> See *id.* at 1210–11.

<sup>33</sup> See *id.* at 1211–13. Justice Stevens posited that the Court must consider congressional action in light of its "contemporary legal context." *Id.* at 1211 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) (internal quotation marks omitted)). For Justice Stevens, three items defined section 10's legal context and warranted the Court's finding of a private right of action: the Court's holding that "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General," *id.* (quoting *Allen v. Wright*, 393 U.S. 544, 556 (1969)) (internal quotation marks omitted); the undisputed right of private action under section two of the Act, *see id.* at 1212 (citing S. REP. NO. 91-397, at 8 (1970)); and Congress's recognition "that private rights of action were equally available under § 10," *id.* at 1212–13.

<sup>34</sup> Justices O'Connor and Souter joined Justice Breyer's opinion.

<sup>35</sup> See *Morse*, 116 S. Ct. at 1214 (Breyer, J., concurring in the judgment).

held out.”<sup>36</sup> Deeming congressional intent determinative, Justice Breyer concluded that section five required preclearance of political party actions.<sup>37</sup> Although he “recognize[d] that some First Amendment concerns” might limit section five’s applicability, Justice Breyer left consideration of such concerns “for a case that squarely presents them.”<sup>38</sup>

In a livid dissent, Justice Scalia<sup>39</sup> decried Justices Stevens’s and Breyer’s willingness to dismiss First Amendment concerns:

It has been a constant of our free-speech jurisprudence that claimants whose First Amendment rights are affected may challenge a statute, not merely on the ground that its specific application to them is unconstitutional, but also on the ground that its application is void in a substantial number of other contexts that arguably fall within its scope.<sup>40</sup>

Justice Scalia charged that the Court’s judgment would chill political association because it failed to provide parties with guidance regarding precisely which actions were subject to preclearance.<sup>41</sup> Justice Scalia also claimed that the Court’s application of the preclearance requirement effectively imposed a “prior restraint” upon the exercise of freedoms guaranteed by the First Amendment.<sup>42</sup> Positing that the Court’s judgment supplied no principled limit, Justice Scalia argued that “§ 5 [now] requires political parties to submit for prior Government approval, and bear the burden of justifying, virtually every decision of consequence regarding their internal operations.”<sup>43</sup>

Justice Kennedy maintained in dissent<sup>44</sup> that “§ 5 of the [Act] does not reach all entities or individuals who might be considered the State for constitutional purposes.”<sup>45</sup> Section eleven of the Act, he noted, referred to any “person acting under the color of law.”<sup>46</sup> Because the Court had treated the concepts “under color of law” and “state action” as identical,<sup>47</sup> the former term’s presence in section eleven and absence in section five indicated that Congress had affirmatively chosen to exclude

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<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.* at 1215.

<sup>39</sup> Justice Thomas joined Justice Scalia.

<sup>40</sup> *Morse*, 116 S. Ct. at 1216 (Scalia, J., dissenting). Justice Scalia maintained that this “overbreadth” principle had previously been applied in the context of “freedom to associate for the purpose of political speech.” *Id.* (citing *United States v. Robel*, 389 U.S. 258, 265–66 (1967), and *Elfbrandt v. Russell*, 384 U.S. 11, 18–19 (1966)).

<sup>41</sup> *See id.* at 1217. “Before today, this Court has not tolerated such uncertainty in rules bearing upon First Amendment activities, because it causes persons to refrain from engaging in constitutionally protected conduct for fear of violation.” *Id.* (citations omitted).

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

<sup>43</sup> *Id.* at 1218.

<sup>44</sup> Chief Justice Rehnquist joined Justice Kennedy’s dissent.

<sup>45</sup> *Morse*, 116 S. Ct. at 1220 (Kennedy, J., dissenting).

<sup>46</sup> 42 U.S.C. § 1973i(a) (1994).

<sup>47</sup> *See Morse*, 116 S. Ct. at 1220.

private actors from the preclearance requirements of section five.<sup>48</sup> Finally, Justice Kennedy contended that political parties' First Amendment "freedom to identify the people who constitute the association, and to limit the association to those people only"<sup>49</sup> precluded preclearance of private party policies.

Also dissenting, Justice Thomas<sup>50</sup> noted that the Act does not define the term "State" and argued that, "[w]hen words in a statute are not otherwise defined, it is fundamental that they 'will be interpreted as taking their ordinary, contemporary, common meaning.'"<sup>51</sup> The word "State," Justice Thomas urged, "is generally understood to mean one of the 50 constituent States of the Union."<sup>52</sup> Justice Thomas observed that the Act "speaks of the 'territory' of a State or political subdivision," and argued that "[i]t is nonsensical to talk of things existing 'within the territory' of a political party."<sup>53</sup> The Act, therefore, reached Virginia, but not the Republican Party of Virginia.

Justice Thomas next critiqued Justices Stevens's and Breyer's failure to explain the circumstances under which a party qualified as a "State or political subdivision."<sup>54</sup> He repudiated the concurrences' strict association of the term "State" and the "state action" doctrine.<sup>55</sup> Furthermore, even if section five did extend to "all activity that qualifies as state action for constitutional purposes," Justice Thomas rejected the conclusion that the party's actions "in this case are fairly attributable to the State."<sup>56</sup>

Justice Thomas also contested the conclusion that the change at issue concerned a practice or procedure with respect to voting. Because section fourteen's definition of "voting" specifically includes primaries but not "conventions," Justice Thomas suggested the "logical" inference "that Congress did not intend to include voting at conventions within the defi-

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

<sup>49</sup> *Id.* at 1221 (quoting *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981)) (internal quotation marks omitted).

<sup>50</sup> Chief Justice Rehnquist and Justice Scalia joined Justice Thomas. Justice Kennedy joined Part II of the dissent, in which Justice Thomas argued that section 10 of the Act contained no private right of action. *See id.* at 1238–40 (Thomas, J., dissenting).

<sup>51</sup> *Id.* at 1222–23 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

<sup>52</sup> *Id.* at 1223.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1228.

<sup>55</sup> *See id.* Noting the wording of 42 U.S.C. § 1983 and section 11 of the Act, both of which refer specifically to individuals acting "under the color of" state law, he reasoned that Congress would have used similar language in section five if it had intended that section's application to hinge on a finding of state action. *See id.* at 1228–29.

<sup>56</sup> *Id.* at 1229. Justice Thomas argued that cases such as *Terry v. Adams*, 345 U.S. 461 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944), "have come to stand for" the limited proposition that, "[w]hen political parties discharge functions 'traditionally performed' by and 'exclusively reserved to' government, their actions are fairly attributable to the State." *Morse*, 116 S. Ct. at 1231 (Thomas, J., dissenting) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). A party's candidate selection, Justice Thomas concluded, does not satisfy this test.

nition of ‘voting.’”<sup>57</sup> Justice Thomas next repeated Justice Scalia’s First Amendment concerns.<sup>58</sup> Finally, he disagreed that section ten of the Act offered a private right of action.<sup>59</sup>

The *Morse* dissents’ First Amendment arguments rest on the faulty premise that “[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.”<sup>60</sup> This argument fails when the interests of “the party” (as defined by the party leadership) and the interests of its “adherents” diverge. In such a case, interference with the freedom of a party might be necessary to *protect* the freedom of its adherents. Moreover, the Court has held that “[t]he right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>61</sup> Long-recognized rights to political participation generate such a compelling state interest in guarding against party leaders’ manipulation of the candidate selection process. Preclearance of changes in a party’s nominating procedures furthers this interest by preventing manipulations that have the “purpose” or “effect” of “denying or abridging the right to vote on account of race or color.”<sup>62</sup> Finally, preclearance should effectuate this state interest in a relatively unrestrictive manner.

A simple model of electoral behavior demonstrates that party leaders in certain instances will have incentives to limit party members’ participation in the candidate-selection process. Figure 1 maps the preferences of fifteen hypothetical voters, *A* through *O*, who will participate in a one-dimensional<sup>63</sup> election “game” involving fifteen candidates, *A'* through *O'*. Each voter most prefers a candidate with political preferences at her own “ideal point”—that is, voter *A* prefers candidate *A'*, while voter *B* prefers *B'*, and so forth. A voter’s satisfaction with a given candidate is proportionate to that candidate’s “proximity” to the voter’s ideal point. Thus, voter *H* prefers *H'* over *G'* and *I'*, and *G'* and *I'* over *F'* and *J'*. In this model, the distance between each voter’s ideal

<sup>57</sup> *Morse*, 116 S. Ct. at 1234 (Thomas, J., dissenting). Justice Thomas found a reference to conventions in the Federal Election Campaign Act of 1971 especially important. “Congress obviously knows how to cover nominating conventions when it wants to.” *Id.* at 1235.

<sup>58</sup> *See id.* at 1237–38.

<sup>59</sup> “By its very terms, § 10 authorizes a single person to sue for relief from poll taxes: the Attorney General. The inescapable reference from this express grant of litigating authority to the Attorney General is that no other person may bring an action under § 10.” *Id.* at 1238–39.

<sup>60</sup> *Id.* at 1216 (Scalia, J., dissenting) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)) (internal quotation marks omitted).

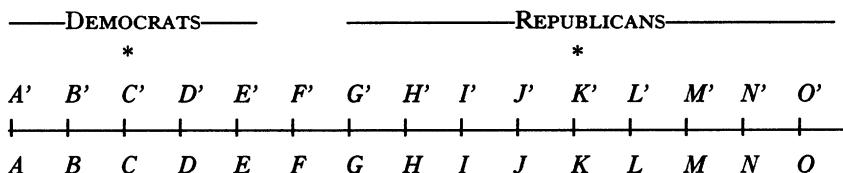
<sup>61</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

<sup>62</sup> 42 U.S.C. § 1973c (1994). An individual’s status as a “language minority,” *id.*, will also trigger protection under this section. *See id.* § 1973b(f)(2).

<sup>63</sup> All the options available to voters in a one-dimensional “game” fall along a single dimensional vector — here, the line connecting voter *A* to voter *O*.

point is constant. Therefore, voter  $H$  will be indifferent between  $G'$  and  $I'$ , between  $F'$  and  $J'$ , and so on.<sup>64</sup>

FIGURE 1



If voters  $A$  through  $O$  collectively selected the winner from the entire candidate pool in a majority-rule election,  $H'$  would win. According to the "median voter theorem," if individuals collectively consider a one-dimensional issue under majority rule, and their individual utility levels consistently decline as the chosen outcome moves away from their respective ideal points, the median voter's preferences will prevail over any other.<sup>65</sup> Because  $H$  represents the median voter,<sup>66</sup>  $H'$  should prevail.<sup>67</sup>

The game changes when political parties nominate candidates for an eventual runoff. Suppose voters  $A$  through  $E$  form the minority "Democratic Party," and players  $G$  through  $O$  form the majority "Republican Party," while player  $F$  remains independent.<sup>68</sup> If all party members vote to select their party's nominee, the median voter theorem predicts that  $C'$  will win the Democratic Party nomination, and  $K'$  will win the Republican Party nomination. In the general election, voters  $A$  through  $F$  will prefer the Democratic nominee  $C'$ , players  $H$  through  $O$  will prefer the Republican nominee  $K'$ .  $K'$  will win no matter how the indifferent  $G$  votes.

In most cases, a majority-party candidate situated at any of a range of points could defeat the opposing party's nominee. Suppose that the Democrats choose their candidate,  $C'$ , before the Republicans choose

<sup>64</sup> For similar uses of one-dimensional models in the context of strategic statutory interpretation, see William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–54 (1992); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 267–76 (1992); and Pablo T. Spiller & Matthew L. Spitzer, *Where is the Sin in Sincere? Sophisticated Manipulation of Sincere Judicial Voters (With Applications to Other Voting Environments)*, 11 J.L. ECON. & ORG. 32, 35–44 (1995).

<sup>65</sup> See DENNIS C. MUELLER, PUBLIC CHOICE II, at 65–66 (1989).

<sup>66</sup> A voter is the "median" voter if half or fewer of the voting population's preferences fall to her right and half or fewer fall to her left. See *id.* at 66.

<sup>67</sup> If more than two candidates ran (for example,  $G'$ ,  $H'$ , and  $I'$ ) and only a *plurality* of the votes were required for victory,  $H'$  could lose. Under majority rule, though,  $H'$  would presumably recognize her superior position, enter the race, and defeat any other candidate.

<sup>68</sup> This arrangement might well mirror the political demographics of Virginia, "a conservative Southern state." John H. Cushman, Jr., *Environment Gets a Push From Clinton*, N.Y. TIMES, July 5, 1995, at A11.

theirs.<sup>69</sup> The Republican candidates  $G'$ ,  $H'$ ,  $I'$ ,  $J'$ ,  $K'$ , or  $L'$  would be assured of victory if nominated; if nominated,  $M'$  might or might not win a general election, depending upon the uncertain vote of  $H$ . Under these circumstances, if the Republican Party leader occupies any position other than  $K$ , she will have an incentive to manipulate candidate selection.<sup>70</sup> If the Democrats have already chosen  $C'$  as their nominee, the Republicans will win so long as they nominate  $G'$ ,  $H'$ ,  $I'$ ,  $J'$ ,  $K'$ , or  $L'$ . Thus, if the party leader prefers a candidate to the left of  $K'$ , she will, if able, curtail party members' access to the candidate-selection process and ensure victory for her ideal candidate; if she prefers any candidate to the right of  $K'$ , she can safely restrict access and choose  $L'$ , who will still defeat the Democratic nominee.<sup>71</sup> Thus, by manipulating the candidate-selection procedure, party leaders can eradicate other party members' influence in the nomination, without fear of losing these voters' support in the general election.<sup>72</sup>

<sup>69</sup> The examples employed by this Comment involve situations in which one party chooses its candidate before the other (including cases in which one party's candidate is an incumbent bound to receive renomination). Formal analysis of the strategies that would be employed if the two chose simultaneously would require consideration of the precise (as opposed to *relative*) levels of utility voters would enjoy if each of the fifteen candidates won election, as well as the beliefs of each party's leadership concerning the likelihood that the opposing party's leaders will manipulate the selection of its candidates. The uncertainty engendered by simultaneous decisionmaking would mitigate, but not eliminate, leaders' power to manipulate candidate selection.

<sup>70</sup> This Comment assumes that one party member is the "leader," who makes decisions regarding the party's operations. Although other arrangements are certainly possible, most such arrangements would fall within the analysis presented here with minor alteration. For example, if the party were led by three members, the median member's preferences would dominate, such that her power would be equivalent to the power of the single leader considered here.

<sup>71</sup> If the party leader lies to the right of  $L$ , the outcome will depend upon her realization that selection of her ideal candidate will result in general election defeat, and her willingness instead to choose  $L'$ , whom she still prefers to  $K'$  and who will win the general election. If no such realization occurs or no such agreement is reached, the leader might misjudge the electorate and nominate a candidate who will lose to the Democratic nominee.

The leadership of the weaker party will also have an incentive to manipulate the electoral process. If the Republicans have chosen their nominee,  $K'$ , before the Democrats select theirs, the Democratic Party leader will wish to ensure that  $E$ 's wins nomination.

<sup>72</sup> To the extent that one's wealth serves as a proxy for one's ideological preferences, a requirement that members who wish to participate in candidate selection pay a \$45 fee might be a particularly effective way to engineer the nomination of  $L'$  while obscuring the leader's ideological motives. At the convention in June, 1994, the Virginia Republicans nominated Oliver North, a conservative candidate "heavily supported by right-wing Republicans." Michael Janofsky, *G.O.P. Debates Meaning of Warner's Victory*, N.Y. TIMES, June 13, 1996, at A26. North won 55% of the votes cast at the convention. See Richard L. Berke, *G.O.P. in Virginia Nominates North for Senate Seat*, N.Y. TIMES, June 5, 1994, at A1. "[R]eligious conservatives proved to be a . . . powerful force at the convention, which can be swayed by small but motivated groups . . . . That was why it probably would have been far more difficult for Mr. North to win the nomination had there been an open primary." *Id.*

If the Republican Party leadership acted strategically to ensure North's nomination in accordance with the model presented herein, their plan backfired when J. Marshall Coleman, a Republican, entered the race as an independent candidate. See Donald P. Baker, *Robb Triumphs in Va. Democratic Primary*, WASH. POST, June 15, 1994, at A1. North won 43% of the vote, Democrat Chuck Robb won 46%, and Coleman won 11%. See *The 1994 Elections: State by State*, N.Y.

The foregoing analysis demonstrates that the interests of a party's leadership are not necessarily synonymous with the interests of the party's members. If leaders manipulate the nominating process to ensure that their preferred candidates are nominated instead of the candidates preferred by the parties' members, those members are deprived of their most meaningful opportunity to give effect to their particular political preferences.<sup>73</sup> Interference with the freedom of a party thus becomes *necessary* to safeguard the freedom of its adherents. A party's associational rights derive entirely from the rights of its individual members and rely on the identity of interests between individual and association.<sup>74</sup> It is disingenuous to argue that a political party's associational freedoms should shield from scrutiny its leadership's attempts to subjugate members. Rather, when a party's interests in excluding its own members clash with the recognized "constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences,"<sup>75</sup> the latter must prevail. The state has a compelling interest in ensuring that it does.

Section five's preclearance requirement serves the state's compelling interest by preventing manipulative changes in a party's candidate-selection process that have the purpose or effect of denying or abridging the right to vote on the basis of race.<sup>76</sup> Even facially race-neutral voting

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TIMES, Nov. 10, 1994, at B9. Thus, although Republicans garnered a majority of the votes cast, the interposition of a third candidate between the major-party nominees resulted in victory for Charles Robb, the Democratic nominee.

<sup>73</sup> Of course, leaders' machinations need not necessarily conflict with party members' interests. For example, an arrangement in which one party was small and the pool of independent voters was large might explain cases in which party leaders have fought to include independent voters in their party's primary. In *Tashjian v. Republican Party*, 479 U.S. 208 (1986), the Court held for the Republican Party which, "badly outnumbered by Democrats," Al Kamen, *Benefits for Pregnant Workers Raise Issue of Discrimination: Administration, NOW Join Employer's Challenge at Supreme Court*, WASH. POST, Jan. 14, 1986, at A6, had attempted to overturn a state statute that allowed only a party's members to participate in the party's primary. See *Tashjian*, 479 U.S. at 210–11. If only Republicans participated in the primary, the candidate preferred by the median primary voter would be nominated but would face eventual defeat. If independents voted, they would help nominate a candidate closer to the spectrum's center, who might prove victorious in the general election. Not surprisingly, "[t]he Democratic-controlled state legislature refused to amend the state law." Kamen, *supra*, at A6.

<sup>74</sup> In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the root of the modern associational freedoms, see, e.g., AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 35–36 (1995) (noting that the *Patterson* Court "described what seemed a new right"), the Court held that the close nexus between a group and its members permitted the group to act as its members' representative. *Patterson*, 357 U.S. at 458–59. "If [the NAACP's] rank-and-file members are constitutionally entitled to withhold their connection with the Association . . . it is manifest that this right is properly assertable by the Association . . . . [The Association] is the appropriate party to assert these rights, because it and its members are in every practical sense identical." *Id.* at 459.

<sup>75</sup> *Norman v. Reed*, 502 U.S. 279, 288 (1992).

<sup>76</sup> "Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). The distinct problems faced by African-Americans, see *id.* at 310–14, justify the Act's focus on a particular subclass of political exclusion.

restrictions — such as the \$45 fee at issue in *Morse* — may disproportionately exclude members of one or another racial minority; a party leader's attempt to use wealth as a proxy for ideology will trigger the Act's protections if wealth *also* serves as a proxy for race. Thus, preclearance protects against a particular category of intra-party discrimination. Further, it is unlikely that the state's interest could be achieved in a significantly less restrictive manner.<sup>77</sup>

Party leaders' incentives to disempower party members during candidate selection create a compelling state interest in preclearing changes in party nomination procedures. Section five of the Act serves this governmental interest in a relatively unrestrictive manner, and therefore overcomes political parties' countervailing associational interests. The *Morse* Court's failure to establish a majority position on this issue all but ensures that a future Court will reconsider this issue. That Court should cement section five's applicability to private party policies by squarely rejecting the deceptive suggestion that the rights of a group trump the rights of its members.

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<sup>77</sup> Although some parties might forego legitimate actions for fear of litigation, the Court has long recognized that the Act's preclearance requirement is the only effective check against restriction of African-Americans' voting rights:

The previous legislation ha[d] proved ineffective . . . . Voting suits are unusually onerous to prepare . . . . Litigation ha[d] been exceedingly slow . . . . Even when favorable decisions ha[d] finally been obtained, some of the states affected ha[d] merely switched to discriminatory devices not covered by the federal decrees or ha[d] enacted difficult new tests designed to prolong the existing disparity.

*Id.* at 314. Thus, although significantly less restrictive devices might be imagined, none would sufficiently effect the state's interest.

## IV. THE STATISTICS

**TABLE I<sup>a</sup>**  
**(A)**  
**ACTIONS OF INDIVIDUAL JUSTICES**

	OPINIONS WRITTEN <sup>b</sup>				DISSENTING VOTES <sup>c</sup>		
	Opinions of Court <sup>d</sup>	Concur- rences	Dissents <sup>e</sup>	Total	In Disposition by		
					Opinion	Memo- randum	Total
Rehnquist	10	3	2	15	13	1	14
Stevens	8	6	21	35	23	1	24
O'Connor	9	2	4	15	8	0	8
Scalia	9	7	10	26	16	1	17
Kennedy	8	5	5	18	6	0	6
Souter	8	6	6	20	11	1	12
Thomas	8	5	9	22	17	1	18
Ginsburg	8	7	3	18	15	1	16
Breyer	7	5	7	19	15	1	16
Per Curiam	4	—	—	4	—	—	—
Total	79	46	67	192	124	7	131

<sup>a</sup> A complete explanation of how the tables are compiled may be found in *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 93, 301–02 (1968), and *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 254–55 (1970).

Table I, with the exception of the dissenting votes portion of section (A) and the memorandum tabulations in section (C), concerns only full-opinion decisions disposing of cases on their merits. Four per curiam decisions contained legal reasoning substantial enough to be considered full opinions. These cases are *Pennsylvania v. Labron*, 116 S. Ct. 2485 (1996) (per curiam); *Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996) (per curiam); *Lawrence v. Chater*, 116 S. Ct. 604 (1996) (per curiam); and *Wood v. Bartholomew*, 116 S. Ct. 7 (1996) (per curiam). The opinion for *Pennsylvania v. Labron* decided two cases. The memorandum tabulations include memorandum orders disposing of cases on the merits by affirming, reversing, vacating, or remanding. They exclude orders disposing of petitions for certiorari, dismissing writs of certiorari as improvidently granted, dismissing appeals for lack of jurisdiction or for lack of a substantial federal question, and disposing of miscellaneous applications. Certified questions are not included.

<sup>b</sup> A concurrence or dissent is recorded as a written opinion whenever its author provides a reason, however brief, for his or her vote.

<sup>c</sup> A Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from that of the majority of the Court. Votes to reverse in a decision affirming by an equally divided Court are not, however, considered to be dissenting votes since there is no majority of the Court.

<sup>d</sup> Plurality opinions that announce the judgment of the Court are counted as opinions of the Court.

<sup>e</sup> Opinions concurring in part and dissenting in part are counted as dissents.

**TABLE I (*continued*)**  
**(B)**  
**VOTING ALIGNMENTS<sup>f</sup>**

		Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	O	—	38	59	56	59	52	54	50	45
	S	—	0	4	9	3	1	10	2	1
	D	—	38	63	65	62	53	64	52	46
	N	—	77	79	79	79	79	78	79	79
	P	—	49.4	79.7	82.3	78.5	67.1	82.1	65.8	58.2
Stevens	O	38	—	45	35	48	49	33	49	48
	S	0	—	1	0	2	7	1	9	12
	D	38	—	46	35	50	54	34	56	57
	N	77	—	77	77	77	77	76	77	77
	P	49.4	—	59.7	45.5	64.9	70.1	44.7	72.7	74.0
O'Connor	O	59	45	—	54	62	59	52	54	54
	S	4	1	—	4	0	4	4	0	6
	D	63	46	—	57	62	62	56	54	59
	N	79	77	—	79	79	79	78	79	79
	P	79.7	59.7	—	72.2	78.5	78.5	71.8	68.4	74.7
Scalia	O	56	35	54	—	54	48	52	46	42
	S	9	0	4	—	5	0	16	0	1
	D	65	35	57	—	58	48	68	46	43
	N	79	77	79	—	79	79	78	79	79
	P	82.3	45.5	72.2	—	73.4	60.8	87.2	58.2	54.4
Kennedy	O	59	48	62	54	—	59	51	58	53
	S	3	2	0	5	—	0	3	3	1
	D	62	50	62	58	—	59	54	60	54
	N	79	77	79	79	—	79	78	79	79
	P	78.5	64.9	78.5	73.4	—	74.7	69.2	75.9	68.4
Souter	O	52	49	59	48	59	—	45	58	59
	S	1	7	4	0	0	—	0	10	15
	D	53	54	62	48	59	—	45	66	70
	N	79	77	79	79	79	—	78	79	79
	P	67.1	70.1	78.5	60.8	74.7	—	57.7	83.5	88.6
Thomas	O	54	33	52	52	51	45	—	43	38
	S	10	1	4	16	3	0	—	0	0
	D	64	34	56	68	54	45	—	43	38
	N	78	76	78	78	78	78	—	78	78
	P	82.1	44.7	71.8	87.2	69.2	57.7	—	55.1	48.7
Ginsburg	O	50	49	54	46	58	58	43	—	52
	S	2	9	0	0	3	10	0	—	9
	D	52	56	54	46	60	66	43	—	59
	N	79	77	79	79	79	79	78	—	79
	P	65.8	72.7	68.4	58.2	75.9	83.5	55.1	—	74.7
Breyer	O	45	48	54	42	53	59	38	52	—
	S	1	12	6	1	1	15	0	9	—
	D	46	57	59	43	54	70	38	59	—
	N	79	77	79	79	79	79	78	79	—
	P	58.2	74.0	74.7	54.4	68.4	88.6	48.7	74.7	—

**TABLE I (*continued*)**  
**(C)**  
**UNANIMITY**

	Unanimous <sup>f</sup>	With Concurrence <sup>h</sup>	With Dissent	Total
Full Opinions	29 (38.7%)	3 (4.0 %)	43 (57.3%)	75
Memorandum Orders	108 (98.2%)	0 (0.0%)	2 (1.8%)	110

<sup>f</sup> This section records the number of times that one Justice voted with another in full-opinion decisions, including the four per curiam decisions containing sufficient legal reasoning to be considered full opinions (*Pennsylvania v. Labron*, 116 S. Ct. 2485 (1996) (per curiam); *Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996) (per curiam); *Lawrence v. Chater*, 116 S. Ct. 604 (1996) (per curiam); and *Wood v. Bartholomew*, 116 S. Ct. 7 (1996) (per curiam)).

Two Justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a Justice in the body of his or her own opinion. The table does not treat two Justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case and wrote separate opinions revealing very little philosophical disagreement. In these calculations, we have not counted the partial concurrences of Justices Souter and Thomas in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), as agreement with the opinion of Justice Stevens because they did not join the greater part of his analysis. Similarly, only Justices Stevens and Souter were considered to have joined in Justice Breyer's opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996). Justices concurring in part and dissenting in part are not considered to have joined the majority opinion.

"O" represents the number of times the two Justices agreed in opinions of the Court or opinions announcing the judgment of the Court. "S" represents the number of times the two Justices agreed in separate concurrences and dissents. "D" represents the number of decisions in which the two Justices agreed in either a majority, dissenting, or concurring opinion. "N" represents the number of decisions in which both Justices participated and thus the number of opportunities for agreement. "P" represents the percentage of decisions in which one Justice agreed with another Justice, calculated by dividing "D" by "N" and multiplying by 100.

It should be noted that the "P" totals have been computed differently than they were in past versions of this table. Before 1988, the "P" line was calculated by dividing the sum of the "O" and "S" lines by "N." This method of calculation overstated "P" whenever two Justices both joined more than one opinion in the same case.

<sup>g</sup> A decision is considered unanimous only when all Justices hearing the case voted to concur in the Court's opinion as well as its judgment. When at least one Justice concurred in the result but not in the opinion, the case is not considered unanimous.

<sup>h</sup> A decision is listed in this column if at least one Justice concurred in the result but not in the Court's opinion, and there were no dissents.

**TABLE I (*continued*)**  
**(D)**  
**5–4 DECISIONS<sup>i</sup>**

Justices Constituting the Majority	Number of Decisions <sup>j</sup>
Rehnquist, O'Connor, Scalia, Kennedy, Thomas <sup>k</sup>	5
Rehnquist, O'Connor, Scalia, Thomas, Ginsburg <sup>l</sup>	1
Rehnquist, Scalia, Kennedy, Thomas, Ginsburg <sup>m</sup>	1
Stevens, O'Connor, Kennedy, Souter, Breyer <sup>n</sup>	1
Stevens, O'Connor, Souter, Ginsburg, Breyer <sup>o</sup>	1
Stevens, Kennedy, Souter, Ginsburg, Breyer <sup>p</sup>	1
O'Connor, Kennedy, Souter, Ginsburg, Breyer <sup>q</sup>	1
Total	11

<sup>i</sup> This table concerns only decisions rendered in full opinion, including four per curiam opinions containing sufficient legal reasoning to be counted as full opinions. A decision is counted as 5–4 only if four Justices voted to decide the case (or set of consolidated cases) in a manner different from that of a majority of the Court.

<sup>j</sup> This column lists the number of times each five-Justice group constituted the majority in a 5–4 decision.

<sup>k</sup> *Gray v. Netherland*, 116 S. Ct. 2074 (1996) (Rehnquist, C.J.); *Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996) (per curiam); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) (Rehnquist, C.J.); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (Rehnquist, C.J.); *Wood v. Bartholomew*, 116 S. Ct. 7 (1996) (per curiam).

<sup>l</sup> *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (Rehnquist, C.J.).

<sup>m</sup> *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996) (Scalia, J.).

<sup>n</sup> *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996) (Stevens, J.).

<sup>o</sup> *Morse v. Republican Party*, 116 S. Ct. 1186 (1996) (Stevens, J.).

<sup>p</sup> *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396 (1996) (Ginsburg, J.).

<sup>q</sup> *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211 (1996) (Ginsburg, J.).

**TABLE II**  
**FINAL DISPOSITION OF CASES**

	Disposed of	Remaining on Docket
<b>Original Docket</b>	5	6
<b>Appellate Docket<sup>a</sup></b>	2099	357
On Merits	154	
Review Granted <sup>b</sup>	92	
(Percent Granted: 4.4 %) <sup>c</sup>		
Summarily Decided <sup>d</sup>	62	
Appeals and Petitions for Review		
Denied, Dismissed, or	1945	
Withdrawn <sup>e</sup>		
<b>Miscellaneous Docket<sup>f</sup></b>	4507	591
On Merits	68	
Review Granted	13	
(Percent Granted: 0.3 %)		
Summarily Decided	55	
Appeals and Petitions for Review		
Denied, Dismissed, or	4439	
Withdrawn		
<b>Total</b>	<b>6611</b>	<b>954</b>

<sup>a</sup> The appellate docket consists of all paid cases.

<sup>b</sup> This category includes cases in which review was granted that were carried over to a subsequent Term, but not cases summarily decided.

<sup>c</sup> In the computation of the percentage of cases granted review last Term, the divisor is the number of cases docketed during last Term plus the number of cases not acted upon in prior Terms minus the number cases not acted upon last Term. Past versions of this table inflated the number of cases granted review by including cases in which review was granted in prior Terms.

<sup>d</sup> Including cases summarily affirmed, reversed, or vacated.

<sup>e</sup> This category primarily includes dismissals of appeals and denials of petitions for certiorari. It also includes withdrawals of appeals and denials of other applications for review, such as petitions for writs of habeas corpus or mandamus.

<sup>f</sup> This miscellaneous docket consists of all cases filed in forma pauperis.

**TABLE II (*continued*)**  
**METHOD OF DISPOSITION**

By Written Opinion <sup>g</sup> ( <i>Number of Written Opinions:</i> 79) <sup>h</sup>	92	By Denial, Dismissal, or Withdrawal of Appeals or Petitions for Review	6384
By Per Curiam or Memorandum Decision	114		
Total			6590

**DISPOSITION OF CASES REVIEWED ON WRIT OF CERTIORARI**

	Reversed <sup>i</sup>	Vacated <sup>j</sup>	Affirmed	Total
Full Opinions	47 (56.0%)	10 (11.9%)	27 (32.1%)	84
Memorandum Orders	0 (0.0%)	106 (96.4%)	4 (3.6%)	110
Total	47 (24.2%)	116 (59.8%)	31 (16.0%)	194

<sup>g</sup> Including five cases decided per curiam containing legal reasoning sufficient to be considered full written opinions rather than per curiam opinions. These cases are *Pennsylvania v. Labron*, 116 S. Ct. 2485 (1996) (per curiam); *Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996) (per curiam); *Lawrence v. Chater*, 116 S. Ct. 604 (1996) (per curiam); and *Wood v. Bartholomew*, 116 S. Ct. 7 (1996) (per curiam). The opinion for *Pennsylvania v. Labron* decided two cases.

<sup>h</sup> Including four per curiam opinions containing legal reasoning substantial enough to be considered full written opinions rather than per curiam opinions.

<sup>i</sup> Including cases reversed in part and affirmed in part.

<sup>j</sup> Including cases affirmed in part and vacated in part.

**TABLE III**  
**SUBJECT MATTER OF DISPOSITIONS WITH FULL OPINIONS<sup>a</sup>**

	Principal Issue		Decision		
	Constitutional	Other	For Gov't <sup>b</sup>	Against Gov't	TOTAL
<b>ORIGINAL JURISDICTION</b>	0	1	—	—	1
Interstate Boundaries	0	1	—	—	1
<b>CIVIL ACTIONS FROM INFERIOR</b>					
<b>FEDERAL COURTS</b>	14	36	14	15	50
<b>FEDERAL GOVERNMENT LITIGATION</b>	5	15	11	9	20
<i>Taxation</i>	0	1	1	0	1
<i>Review of Administrative Action</i>	2	4	4	2	6
Cable Television Consumer					
Protection and Competition Act	1	0	0	1	1
Census	1	0	1	0	1
Federal Railroad Administration	0	1	0	1	1
National Labor Relations Board	0	3	3	0	3
<i>Other Actions by or Against the</i>					
<i>United States or Its Officers</i>	3	10	6	7	13
Bankruptcy	0	2	1	1	2
<i>Bivens Action</i>	0	1	1	0	1
Civil Forfeiture	1	1	1	1	2
Equal Protection Clause	1	0	1	0	1
Export Clause	1	0	0	1	1
Federal Election Campaign Act	0	1	0	1	1
Government Contracts	0	2	1	1	2
Rehabilitation Act	0	1	1	0	1
Social Security Act	0	1	0	1	1
Suits in Admiralty Act	0	1	0	1	1

<sup>a</sup> Including four per curiam opinions containing substantial legal reasoning. These cases are *Pennsylvania v. Labron*, 116 S. Ct. 2485 (1996) (per curiam); *Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996) (per curiam); *Lawrence v. Chater*, 116 S. Ct. 604 (1996) (per curiam); and *Wood v. Bartholomew*, 116 S. Ct. 7 (1996) (per curiam).

<sup>b</sup> "Government" refers to federal, state or local government or agency thereof, or to an individual participating in the suit in an official capacity. A case is counted "for the government" if the government as a party prevails on the principal issue. When the federal government opposes a state or local government, a decision is counted "for the government" if the federal government prevails. When two states, two units of local government, or two federal agencies oppose each other, the decision is counted neither "for the government" nor "against the government."

**TABLE III (*continued*)**  
**SUBJECT MATTER OF DISPOSITIONS WITH FULL OPINIONS<sup>a</sup>**

	Principal Issue		Decision		<b>TOTAL</b>
	Constitu-tional	Other	For Gov't <sup>b</sup>	Against Gov't	
<b>STATE OR LOCAL GOVERNMENT</b>					
<b>LITIGATION</b>	7	2	3	6	9
Abortion	0	1	1	0	1
Abstention	0	1	0	1	1
Commercial Speech	1	0	0	1	1
Due Process	1	0	1	0	1
Eleventh Amendment	1	0	1	0	1
Equal Protection Clause	2	0	0	2	2
Government Contractor Speech	2	0	0	2	2
<b>PRIVATE LITIGATION</b>	2	19	—	—	21
<i>Federal Question Litigation</i>	1	19	—	—	20
Admiralty	0	2	—	—	2
Age Discrimination in					
Employment Act	0	1	—	—	1
Antitrust	0	1	—	—	1
Bankruptcy	0	3	—	—	3
Employment Retirement Income	0	3	—	—	3
Security Act					
Expedited Funds Availability Act	0	1	—	—	1
Federal Food, Drug, and					
Cosmetic Act	0	1	—	—	1
Federal Rules of Evidence	0	1	—	—	1
Full Faith and Credit Act	0	1	—	—	1
National Bank Act	0	1	—	—	1
Patents	1	0	—	—	1
Resource Conservation and					
Recovery Act	0	1	—	—	1
Voting Rights Act of 1965	0	1	—	—	1
Warsaw Convention	0	1	—	—	1
Worker Adjustment and					
Retraining Notification Act	0	1	—	—	1
<i>Diversity Jurisdiction</i>	1	0	—	—	1
Choice of Law	1	0	—	—	1

**TABLE III (*continued*)**  
**SUBJECT MATTER OF DISPOSITIONS WITH FULL OPINIONS<sup>a</sup>**

	Principal Issue		Decision		<b>TOTAL</b>
	Constitutional	Other	For Gov't <sup>b</sup>	Against Gov't	
<b>FEDERAL CRIMINAL CASES</b>	5	7	8	4	12
<b>Comprehensive Drug Abuse Prevention and Control</b>					
Act of 1970	0	1	1	0	1
Criminal Forfeiture	0	1	1	0	1
Double Jeopardy	1	0	0	1	1
<b>Federal Rules of Criminal Procedure</b>					
Procedure	0	1	1	0	1
Right to Jury Trial	1	0	1	0	1
Selective Prosecution	1	0	1	0	1
Search and Seizure	1	0	1	0	1
Sentencing Guidelines	0	2	1	1	2
Separation of Powers	1	0	1	0	1
Standard of Review	0	1	0	1	1
Statutory Interpretation	0	1	0	1	1
<b>FEDERAL HABEAS CORPUS</b>	2	3	3	2	5
<b>Delayed Petitions</b>					
Exceptions Clause	0	1	0	1	1
<b>Prosecutorial Suppression of Evidence</b>					
Retroactivity	1	0	1	0	1
Standard of Review	0	1	0	1	1
<b>CIVIL ACTIONS FROM STATE COURTS</b>	5	3	1	3	8
<b>STATE OR LOCAL GOVERNMENT LITIGATION</b>					
Civil Forfeiture	4	0	1	3	4
Dormant Commerce Clause	1	0	1	0	1
Due Process	1	0	0	1	1
Equal Protection Clause	1	0	0	1	1

**TABLE III (*continued*)**  
**SUBJECT MATTER OF DISPOSITIONS WITH FULL OPINIONS<sup>a</sup>**

	Principal Issue		Decision		<b>TOTAL</b>
	Consti-tutional	Other	For Gov't <sup>b</sup>	Against Gov't	
<b>PRIVATE LITIGATION</b>	1	3	—	—	4
Due Process	1	0	—	—	1
Federal Arbitration Act	0	1	—	—	1
National Bank Act	0	1	—	—	1
Safety Appliance Act	0	1	—	—	1
<b>STATE CRIMINAL CASES</b>	3	0	2	1	3
Due Process	2	0	1	1	2
Search and Seizure	1	0	1	0	1
<b>Total</b>	29	50	28	25	79