RECENT DEVELOPMENTS

PRIVATIZING SECTION 1983 IMMUNITY: THE PRISON GUARD'S DILEMMA AFTER *Richardson v. McKnight*, 117 S. Ct. 2100 (1997)

The scope of qualified immunity under Title 42 U.S.C. § 1983[1] has been questioned in recent years, as states have increasingly employed private agents to perform governmental functions. Section 1983 remedies violations of federal rights that are attributable to an "official's abuse of his position."[2] Although the statute "on its face admits of no immunities,"[3] Supreme Court interpretations of § 1983 have recognized immunities "well grounded in history and reason."[4] Qualified immunity applies to "state actor[s]" who commit an objectively reasonable federal infraction "under color of" law.[5] Qualified immunity does not, however, shield officials who violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[6]

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1. Section 1983, "Civil action for deprivation of rights," provides in pertinent part:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured....

42 U.S.C. § 1983 (1994) (§ 1 of the Civil Rights Act of 1871). *See generally Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) [hereinafter *Developments*] (reviewing the history and application of the statute).

2. Monroe v. Pape, 365 U.S. 167, 172 (1961); *see also* United States v. Classic, 313 U.S. 299, 326 (1941) (stating that § 1983 seeks to deter abuses of power that are "made possible only because the wrongdoer is clothed with the authority of state law").

3. Malley v. Briggs, 475 U.S. 335, 339 (1986) (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

4. Tenney v. Brandhove, 341 U.S. 367, 376 (1951); *see also, e.g., Imbler*, 424 U.S. at 418 ("§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."); Pierson v. Ray, 386 U.S. 547, 554 (1967) (Section 1983 was not meant "to abolish wholesale all common law immunities.").

5. Robert G. Schaffer, *The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U.S.C. § 1983 to Private Prisons*, 45 DUKE L.J. 1049, 1051 & nn.11, 14 (1996); *see also* Allison Hartwell Eid, Note, *Private Party Immunities to Section 1983 Suits*, 57 U. CHI. L. REV. 1323 (1990) (proposing to extend the fiction of private-party state action to qualified immunity analysis).

6. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, qualified immunity differs from absolute immunity, which automatically "defeats a suit at the outset." *Imbler*, 424

Last Term, in *Richardson v. McKnight*,[7] the Court held that contract prison guards are not entitled to qualified immunity under § 1983, even though public-sector employees that perform an identical government function receive such protection.[8] *Richardson*'s result is unfairly formalistic and socially counter-productive. First, the majority's classification of officials as "public" or "private" inequitably cloaks the state employee in immunity, while subjecting her functional equivalent to a form of strict liability.[9] Second, the decision may have the perverse effect of diminishing the efficacy of civil rights litigation or even exacerbating prison conditions.

In the Private Prison Contracting Act of 1986, the State of Tennessee outsourced its prison management.[10] In *Richardson*, prison guards who were employed under that statute allegedly subjected inmate Ronnie Lee McKnight to physical restraints that were too tight.[11] McKnight sued the guards in federal district court in Tennessee, claiming he had suffered "cruel and unusual" punishment under the Eighth Amendment,[12] and invoking § 1983.[13] Moving to dismiss the lawsuit, the guards asserted qualified immunity.[14]

The district court denied the guards' motion to dismiss, ruling that qualified immunity is unavailable to employees of for-profit corporations.[15] The defendants then filed an interlocutory appeal with the United States Court of Appeals for the Sixth Circuit.[16] Reasoning that private correctional officers are not motivated by the public good and are thus more likely to cut constitutional corners, the appellate court affirmed the district court's holding that private-sector prison guards are not entitled to the same immunity their governmental counterparts enjoy.[17]

U.S. at 419 n.13.

7. 117 S. Ct. 2100 (1997).

8. *See* Procunier v. Navarette, 434 U.S. 555 (1978).

9. *See infra* note 73 and accompanying text.

10. *See* TENN. CODE ANN. §§ 41-24-101 to -115 (1990 and Supp. 1996).

11. *See Richardson*, 117 S. Ct. at 2102.

12. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

13. *See Richardson*, 117 S. Ct. at 2102.

14. *See id.*

15. *See id.*

16. *See* McKnight v. Rees, 88 F.3d 417 (6th Cir. 1996); *see also Richardson*, 117 S. Ct. at 2102 (citing Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (allowing interlocutory appeals of qualified immunity determinations)).

17. *See McKnight*, 88 F.3d at 424 ("The balance struck by qualified immunity, at least

The Supreme Court affirmed in a five-to-four decision. Justice Breyer, writing for the majority,[18] relied on the Court's ruling in *Wyatt v. Cole*[19] that qualified immunity does not protect private defendants invoking state replevin, garnishment, or attachment statutes that are later declared unconstitutional. The majority adopted *Wyatt* as its guide to immunity analysis because *Wyatt*: (1) reaffirmed that § 1983 can sometimes implicate a private individual; (2) noted the distinction between a legal defense and immunity from suit;[20] and (3) suggested that legal history and judicial policy be examined in determining whether private individuals are to receive immunity.[21]

Applying *Wyatt*'s history-and-policy test, the *Richardson* Court first found that the common law did not disclose any "firmly rooted" tradition of private prison guard immunity.[22] For-profit companies had leased and operated jails in the United States since the Eighteenth Century, Justice Breyer wrote, while the common law had consistently provided remedies for prisoner abuses.[23] In addition, the Court "found no evidence" that individual employees of private-sector entities were accustomed to receiving "any special immunity" for their constitutional torts.[24]

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implicitly, contemplates a government actor acting for the good of the state, not a private actor acting for the good of the pocketbook.").

18. Justice Breyer was joined by Justice Stevens, Justice O'Connor, Justice Souter, and Justice Ginsburg.

19. 504 U.S. 158 (1992).

20. A legal defense concerns whether an alleged "wrong" should be punished, "while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson*, 117 S. Ct. at 2103.

21. *See id.* (citing *Wyatt*, 504 U.S. at 167). *Wyatt*, however, was explicitly limited to its "narrow" fact-pattern. *See Wyatt*, 504 U.S. at 168-69. *Wyatt* involved a replevin action between two members of a dissolving cattle partnership. Partner Bill Cole had presented a complaint and bond in Mississippi state court, seeking to attach cattle and equipment in partner Howard Wyatt's possession. Although the state statute gave a judge no discretion to deny writs of replevin, Cole's complaint was later dismissed in a post-seizure hearing. When Cole refused to return the property, Wyatt brought suit under § 1983, claiming that the statute violated federally guaranteed due process. Entertaining Wyatt's complaint, a district court ruled Mississippi's statute unconstitutional. Cole demurred in the § 1983 action against him, citing qualified immunity. *See id.* at 159-60.

22. *Richardson*, 117 S. Ct. at 2104 (citing *Wyatt*, 504 U.S. at 164 (quoting Owen v. Independence, 445 U.S. 622, 637 (1980))).

23. For instance, prison contractors at common law had been held financially liable for unlawful whippings, inmate beatings causing death, and chain-gang-related deaths. *See id.* (citing, *inter alia*, G. BOWMAN, ET AL., PRIVATIZING CORRECTIONAL INSTITUTIONS 42 (1993)).

24. *Id.* The majority also found "no indication" of a general immunity available to private companies under the common law of England. *Id.* at 2105.

Turning to policy arguments, the majority acknowledged that whether immunizing private prison guards would serve the immunity doctrine's purposes presented a "closer question."[25] As Justice Breyer described it, the prevailing rationale for qualified immunity had been: (1) "'to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service'";[26] (2) to protect the public from "'unwarranted timidity'" of public officials by "'encouraging the vigorous exercise of official authority'";[27] (3) to facilitate "'principled and fearless decision-making'";[28] (4) to cabin liability so it does not "'dampen the ardour of all but the most resolute, or the most irresponsible' public officials";[29] and (5) to prevent lawsuits from "'distrac[ting] officials from their governmental duties.'"[30]

Implicitly weighing these prudential concerns against the remedial purposes of § 1983, the Court concluded that official reticence is less worrisome when prison managers face "competitive market pressures."[31] Justice Breyer reasoned that the market, by threatening to replace overly timid guards and their firms, could maintain sufficient prison order.[32] This would occur because corporations cannot assume state responsibilities under Tennessee's prison privatization statute without first demonstrating a history of managerial competence.[33] Also, because a firm's first contract term automatically expires after three years,[34] competing companies might replace ineffective contractors at that point.[35] Finally, the majority suggested, private companies could pass-on market benefits and pressures to prison guards through employment-related rewards or

25. *Id.* at 2105.

26. *Id.* (quoting *Wyatt*, 504 U.S. at 167).

27. *Richardson*, 117 S. Ct. at 2105 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

28. *Id.* (quoting Wood v. Strickland, 420 U.S. 308, 319 (1975) (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967))).

29. *Id.* at 2106 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.))).

30. *Id.* (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

31. *Id.*

32. *See Richardson*, 117 S. Ct. at 2106.

33. *See id.* (citing TENN. CODE ANN. § 41-24-104 (Supp. 1996)).

34. *See* TENN. CODE ANN. § 41-24-105(a) (three-year initial contract).

35. *See Richardson*, 117 S. Ct. at 2106; *cf.* TENN. CODE ANN. § 41-24-104(a)(4) (permitting State to rescind contract after first year); §§ 41-24-105(c)-(f) (setting standards for renewal of contract); § 41-24-109 (providing for State monitoring of private prison firms).

penalties.[36] Prison management firms, thus equipped to offset increased liability risks with higher pay or additional benefits, were less in need of immunity than a traditional government department.[37]

Conversely, the Court contended, qualified immunity is required to attract and to motivate civil-service jailers who lack such an incentive structure.[38] In this respect, the majority deemed it significant that prison contractors in Tennessee must purchase tort liability insurance.[39] Because indemnification tends to alleviate an employee's ex-ante fear of personal liability, insurance would likely liberate the private guard to exercise her independent professional judgment.[40]

Finally, the majority was unmoved by the fact that the defendants' work was functionally equivalent to that of government guards. Justice Breyer noted that the Court's preferred "functional approach" to immunity questions had been used to decide only which type of immunity applied—absolute or qualified—and not whether immunity was to be granted in the first instance.[41]

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36. *See Richardson*, 117 S. Ct. at 2107; *see also* TENN. CODE ANN. § 41-24-111 (exempting private contracting firms from certain civil-service laws).

37. *See Richardson*, 117 S. Ct. at 2107. Justice Breyer added that he was unimpressed with the argument that distraction from duty, in itself, was a significant factor in the immunity calculus. *See id. But see* Clinton v. Jones, 117 S. Ct. 1636, 1657 (1997) (Breyer, J., concurring) ("[T]he Court, in numerous other cases, has found the problem of time and energy distraction a *critically important* consideration militating in favor of a grant of immunity." (emphasis supplied)).

38. According to the majority, immunity is needed to stimulate vigorous performance in the governmental context because bureaucratic rules and the imprecise manner in which elected officials are held accountable to voters do not translate into individualized compensation or penalization, as the case may require, of civil-service employees. *See Richardson*, 117 S. Ct. at 2107.

39. *See id.*; *see also* TENN. CODE ANN. § 41-24-107(a)(2) (requiring that each contractor provide an adequate insurance plan which specifically covers civil rights claims).

40. In fact, argued Justice Breyer, not only would the psychic benefits of having insurance enhance decisionmaking during the course of employment, but it might also motivate a guard's threshold decision to enter public service. *See Richardson*, 117 S. Ct. at 2107.

41. *See id.* at 2106. The Court concluded with three caveats: (1) its decision addressed § 1983 immunity, not § 1983 liability under the facts presented; (2) its immunity determination was limited to the narrow context in which "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms"; and (3) its resolution of the matter did not "'foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith . . . .'" *Id.* at 2108 (quoting Wyatt v. Cole, 504 U.S. 158, 169 (1992)).

Justice Scalia dissented. He charged that the Court's holding was "supported neither by common-law tradition nor public policy," and that it contradicted the "settled practice of determining § 1983 immunity on the basis of the public function being performed."[42]

First, the dissent maintained, mere absence of a common-law case explicitly granting immunity to private prison guards did not defeat the petitioner's claim.[43] Although Justice Scalia agreed that legal history must be explored in an immunity inquiry, he also observed that qualifiedly immune government guards were successfully sued at common law.[44] In fact, posited the dissent, there may have been more precedent for private-jailer immunity than for government-jailer immunity.[45]

Justice Scalia next explained that the Court's immunity cases rest on "'functional categories, not on the status of the defendant.'"[46] Under this traditional approach, the Court examines "'the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . seek[s] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.'"[47] According to the dissent, where a private prison guard conducts a quintessential government service[48] that would give rise to qualified immunity if performed by a publicly-paid prison guard, no such functional distinction can be made.[49]

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42. *Id.* at 2108-09 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas.

43. *See id.* at 2109.

44. *See id.* (citing Procunier v. Navarette, 434 U.S. 555 (1978)).

45. *See Richardson*, 117 S. Ct. at 2109 (Scalia, J., dissenting) (citing Williams v. Adams, 85 Mass. 171, 173 (1861) (holding that an independent contractor acting as master of a house of correction has immunity)). The dissent also invoked *Alamango v. Board of Supervisors of Albany County*, 32 N.Y. Sup. Ct. 551, 552 (1881) (holding that non-government employees supervising a state penitentiary stand in the shoes of government officials and are immune from prisoner lawsuits). *See id.* at 2110 & n.2.

46. *Richardson*, 117 S. Ct. at 2109 (Scalia, J., dissenting) (quoting Briscoe v. LaHue, 460 U.S. 325, 342 (1983)).

47. *Id.* at 2110 (quoting Forrester v. White, 484 U.S. 219, 224 (1988)).

48. In this case, such service was the "enforcement of state-imposed deprivation of liberty." *Id.*

49. *See id.* (confirming that judicial witnesses enjoyed absolute immunity at common law, irrespective of whether they worked for the government); Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976) (recognizing "quasi-judicial" immunity for private citizens temporarily employed as grand jurors).

The dissenters also regarded the Court's policy analysis as "unconvincing."[50] First, Justice Scalia rejected the notion that privately-paid jailers require fewer immunity incentives than government guards to enforce prison discipline. He considered "fanciful" Justice Breyer's reliance on labor market analysis, especially where the purchaser was a single public official or office using taxpayer money.[51] "This is a government decision," Justice Scalia reminded the majority, "not a market choice."[52]

Second, the dissent continued, even if a political regime were determined to emulate the market in its selection of a prison management firm, price and not discipline would be the primary concern.[53] Because a contractor's price depends upon its costs, and because lawsuits increase costs, exposure to judgment liability would discourage profit-motivated firms from zealous prison management.[54] And this result would contravene the ideal of energetic government that underpins § 1983 immunity. Thus, private prison guards within a competitive market structure would need immunity even more than government officials.[55]

The dissent proceeded to analyze anomalies in the Court's reasoning. First, even assuming that liability insurance undermined the justification for private immunity (which Justice Scalia doubted), it must have been the availability of such insurance, and not its actual purchase, that mattered for the

50. *See Richardson*, 117 S. Ct. at 2110-11 (Scalia, J., dissenting).

51. *See id.* at 2111; *see also id.* at 2112 ("[I]t is poetic justice (or poetic revenge) that the Court should use one of the principal economic benefits of 'prison out-sourcing'—namely, the avoidance of civil-service salary and tenure encrustations—as the justification for a legal rule rendering out-sourcing more expensive."). The Court's use of civil-service laws as a primary justification for § 1983 immunity was also "fascinating" to the dissent because such bureaucratic routines did not exist when the statute was first enacted or the immunity originally conceived. *See id.*

52. *Id.* at 2111 (citing TENN. CODE ANN. §§ 41-24-103 to -105 (Supp. 1996)). Justice Scalia explained that the government's selection process would resemble a market model only insofar as "political actors (1) are willing to pay attention to the issue of prison services, among the many issues vying for their attention, and (2) are willing to place considerations of cost and quality of service ahead of such political considerations as personal friendship, political alliances, [and, *inter alia*,] in-state ownership of the contractor." *Id.*

53. *See id.*

54. *See id.* ("[T]he more cautious the prison guards, the fewer the lawsuits, the higher the profits."). Unless one believes in a "free lunch," Justice Scalia added, this would be the result even for successfully defended § 1983 lawsuits and for liability that is covered by insurance. As civil rights claims increase, the cost of civil rights insurance also increases. *Id.* at 2111 n.3.

55. *See Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting).

majority's analysis.[56] Otherwise, the Court would have held that prison management companies without liability insurance are more entitled to immunity than insured government-run systems.[57] Each case could then turn on whether the particular defendant had purchased insurance, and the Court's *a priori* distinction between public and private jailers would be meaningless. Yet, Justice Scalia stated, such insurance is no less available to public entities.[58] Second, inasmuch as the majority relied on private-sector freedom from civil-service "encrustations," the possibility of a government-run prison that is exempt from bureaucratic controls would equally vitiate any public-private dichotomy.[59]

Finally, the dissent challenged the judicial administrability of a fixed public-private scheme.[60] For Justice Scalia, an artificial public-private line would only clutter the Court's immunity jurisprudence.

The Court's ruling in *Richardson* suffers from two principal defects. First, given the Court's immunity precedents, its failure to treat like actors alike in matters of financial liability is inequitable. Second, considering the political economy of civil rights litigation and of prison management, the Court's resolve to subject private jailers to suits alleging only objectively reasonable conduct is counter-productive.[61]

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56. *See id.*

57. This might occur in states whose prison-contracting statutes do not mandate civil rights insurance coverage.

58. *See Richardson*, 117 S. Ct. at 2111-12 (Scalia, J., dissenting).

59. *See id.* at 2112.

60. Justice Scalia inquired:

> Is it privity of contract that separates the two categories—so that guards paid directly by the State are 'public' prison guards and immune, but those paid by a prison-management company are 'private' prison guards and not immune? Or is it rather 'employee' versus 'independent contractor' status—so that even guards whose compensation is paid directly by the State are not immune if they are not also supervised by a state official? Or is perhaps state supervision alone (without direct payment) enough to confer immunity? Or is it... the formal designation of the guards, or perhaps of the guards' employer, as a 'state instrumentality' that makes the difference? Since, as I say, I see no sense in the public-private distinction, neither do I see what precisely it consists of.

Id.

61. The case is vulnerable for another reason: *certiorari* was improvidently granted. Even if the Court had provided qualified immunity to private prison officials as a class, the particular defendant guards under *Richardson*'s facts would not have been eligible for it. This is because of clearly established precedent that "deliberate indifference" to a prisoner's medical needs violates the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-06 (1976). Once a plaintiff alleges "deliberately indifferent conduct, the official

First, *Richardson* is "wrong" on an equality theory of justice. In *Procunier v. Navarette*,[62] the Court concluded that state prison officials are entitled to qualified immunity under § 1983. Thus, the *Richardson* majority did not write on a clean slate when it held that qualified immunity does not shield private prison officials. The Court's immunity jurisprudence had been predicated on functional analysis, an "unquestioned" objective of which is to ensure "parity in treatment among state actors engaged in identical functions."[63]

The principle that immunity is based on substance rather than status was reinforced by a unanimous Court in *Clinton v. Jones*,[64] decided the same Term as *Richardson*: "immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'"[65] For this reason, the President of the United States was denied temporary immunity from a private civil suit based on § 1983 and other claims.[66] In addition,

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could not have acted reasonably." David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 57 (1989).

Because McKnight alleged intentional deprivation of a clearly established constitutional right, the defendants could not have benefited from a general grant of qualified immunity to private prison guards. *See* Transcript of Oral Argument, *Richardson*, 1997 WL 136255, at *4-5 (questions by Justice Ginsburg). In turn, the decision's legitimacy is undercut by the fact that the petitioners had inadequate incentives to prevail on the immunity question.

62. 434 U.S. 555 (1978).

63. Buckley v. Fitzsimmons, 509 U.S. 259, 288 (1993) (Kennedy, J., concurring in part and dissenting in part); *accord* Burns v. Reed, 500 U.S. 478, 486 (1991) (citing cases recognizing the functional approach to be immunity's touchstone); Forrester v. White, 484 U.S. 219, 227 (1988) (justifying immunity by the functions it serves, not by the person to whom it attaches); Cleavinger v. Saxner, 474 U.S. 193, 201 (1985) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)) (affirming that immunity "flows not from rank or title or 'location within the Government,' but from the nature of the responsibilities of the individual official"); Ex Parte Virginia, 100 U.S. 339, 348 (1880) (ruling that the immunity of an action is "determined by its character, and not by the character of the agent").

Indeed, several circuit courts have already applied this principle to grant qualified immunity to "state actors" employed in a private capacity. *See, e.g.*, Warner v. Grand County, 57 F.3d 962, 967 (10th Cir. 1995) ("We hold that a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself."); Frazier v. Bailey, 957 F.2d 920, 929 (1st Cir. 1992) (deciding that private individuals under a government contract may raise qualified § 1983 immunity because they are the "functional equivalent" of public officials).

64. 117 S. Ct. 1636 (1997).

65. *Id.* at 1644 (quoting *Forrester*, 484 U.S. at 229).

66. "The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." *Jones*, 117 S. Ct. at 1643. *Compare id.* (immunity denied to President Clinton because liability for private conduct has a diminished effect on official conduct), *with* Nixon v.

because the issue in *Jones* was whether President Clinton was entitled to any immunity, and not which kind of immunity applied (absolute or qualified), *Jones* alone refutes *Richardson*'s novel contention that functional analysis can be used only to distinguish between gradations of immunity.[67]

If qualified immunity is to be calibrated according to functional relationships, as the Court has previously held, private prison officials should be treated the same as state prison officials. Both public and private guards must make difficult discretionary judgments,[68] while remaining subject to supervision by the sovereign.[69] The immediate burdens and indirect costs of diverting prison resources to litigation, including compromised security and safety, operate no differently in private than in publicly-managed penitentiaries.[70]

Fitzgerald, 457 U.S. 731, 756 (1982) (former President Nixon immune from civil damage suits based upon conduct within the "outer perimeter" of his official responsibilities).

67. Whereas *Richardson* exalted the actor's identity by drawing a per se distinction between public and private prison guards, *Jones* jettisoned any slavish application of *Nixon* simply because the defendant "happen[ed] to be the President." *Jones*, 117 S. Ct. at 1648. Thus, *Jones*, by reaffirming the traditional concern with official decisionmaking distortion and context-bound policy analysis, rubs up against *Richardson* in its reasoning.

68. All prison officials, public or private, respond to threats to the safety of other inmates, the public, and themselves. As guards often lack complete information, bold and swift action is imperative. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)) (noting that corrections officers act "'in haste, under pressure, and frequently without the luxury of a second chance'"); *Cleavinger*, 474 U.S. at 203 ("The administration of a prison is a difficult undertaking at best, for it concerns persons many of whom have demonstrated a proclivity for antisocial, criminal, and violent conduct."); Davis v. Scherer, 468 U.S. 183, 196 (1984) (recognizing that prison wardens "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them ... [and] are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively'" (citation omitted)).

Moreover, fights, rapes, riots, escape attempts, hostage takings, and violations of prison rules are commonplace. *See, e.g.*, Dan Morain, *1 Inmate Killed, 13 Hurt In Prison Fight Melees*, L.A. TIMES, Sept. 28, 1996, at A21 (documenting a general increase in interracial riots and related gang violence in California's state prisons, and reporting higher inmate-to-staff ratios attributable to longer sentences and overcrowding). Overcrowding has especially complicated the job of prison guards. Between 1980 and 1994, the number of inmates in state prisons increased threefold, to more than 900,000. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, 548 tbl. 6.11 (1996). This trend is expected to continue. *See id.* at 553 tbl. 6.20. Unless such sociological phenomena cease to operate once a state issues a prison management contract, the need for fearless decisionmaking is no less applicable to private than to public guards.

69. *See, e.g.*, TENN. CODE ANN. § 41-24-104(a)(1) & (2) (requiring that contracts be reviewed by the Attorney General, Commissioner of Correction, Select Oversight Committee on Corrections, Fiscal Review Committee, and both houses of the State legislature); *id.* §§ 41-24-105 to -106 (mandating that the State scrutinize each contractor's performance and retain plenary powers to terminate contracts).

70. *See Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting) ("Today's decision says that

Accordingly, private corrections officers exercise authority that is functionally analogous to, and shares a substantial nexus with, state police powers.[71]

It is unjust to impose liability on an individual performing a governmental function if an employee on the public payroll would be immunized when performing that same act. More pointedly, it is incongruous to hold that because one person's paycheck comes from the taxpayer, whereas the other's paycheck comes from a shareholder,[72] the former should receive immunity while the latter suffers strict liability.[73] Where the

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two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owe towards prisoners, are to be treated quite differently in the matter of their financial liability."); *accord* DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 723 (10th Cir. 1988) (asserting that qualified immunity's rationales of sparing officials the cost and disruption of defending lawsuits, of promoting effective government, and of encouraging public service "apply equally" to private individuals or corporations carrying out traditional government functions under a government contract); *see also* Note, *Liability of State Officials and Prison Corporations for Excessive Use of Force Against Inmates of Private Prisons*, 40 VAND. L. REV. 983, 1020 (1987) ("The private prison corporation's exposure to liability for the use of force against prison inmates is greater than the exposure of the state itself, even though both are engaged in the same prison management activity and deal with the same potentially volatile situations.").

71. The private prison firm is a mere construct of the state; but for enabling legislation, it could never even exist. Thus, to the extent that management companies are partners or joint venturers with the state corrections department, *Richardson*'s theoretical distinction between public and private officials loses critical meaning. *See, e.g.*, TENN. CODE ANN. § 41-24-109 (authorizing the Tennessee Commissioner of Corrections to monitor private firm compliance with state and federal law); *id.* § 41-24-110 (stating that various powers and duties are not delegable to contractors); *id.* § 4-3-609 (permitting correctional officers to exercise certain police powers).

72. *See* McKnight v. Rees, 88 F.3d 417, 425 (6th Cir. 1996) (Nelson, J., concurring) ("The notion that there is likely to be a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America is a notion . . . that bespeaks a vaguely utopian view of the virtues of those who feed at the public trough.").

73. It is essentially strict liability to hold prison guards responsible under standards that were not clearly established. *See, e.g.*, Owen v. Independence, 445 U.S. 622, 669 & n.9 (1980) (Powell, J., dissenting) (lamenting that officials must "look over their shoulders at a strict . . . liability for unknowable constitutional deprivations"). Even if "vagueness" concerns are avoided, private guards would still be in the "unhappy" position of choosing between "being charged with dereliction of duty . . . and being mulcted in damages." Pierson v. Ray, 386 U.S. 547, 555 (1967). They may face individual liability for exercising discretion (as required by their employer and the state), while being held publicly accountable for prison security. *See DeVargas*, 844 F.2d at 722 ("Not to allow immunity here places defendants between Scylla and Charybdis—potentially liable either to plaintiffs for obeying the contract, or to governmental bodies for breaching it." (citing HOMER, THE ODYSSEY, BOOK XII)); *see also* Sherman v. Four County Counseling Ctr., 987 F.2d 397, 406 (7th Cir. 1993) (refusing to give private hospital the "Hobson's choice" between (a) facing liability because it obeyed a court order directing discretionary medical treatment to a violent patient, or (b) exposing its employees to possible harm for

nature of public service requires an individual to exercise discretion, where he does so in an objectively reasonable fashion, and where derivative legal claims were not clearly established, this inequity is further aggravated.[74] As a result, *Richardson* not only deprives private employees of a benefit to which their public counterparts are entitled, but singles out contractors for litigation burdens where fair warning may have been lacking.

The absurdity of § 1983's liability-and-immunity landscape also accentuates *Richardson*'s unfairness. It is at least curious that prison contractors are "public" enough for purposes of § 1983 liability,[75] but not "public" enough for purposes of § 1983 immunity.[76] And it is powerfully ironic that a statute intended to make *state actors* answerable for constitutional deprivations

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failure to administer treatment).

In actual cases of prison guards transporting violent inmates, such as *Richardson* itself, this theoretical tension assumes tangible bite. For example, in 1994, the year of McKnight's alleged constitutional deprivation, 258 inmates escaped from high- and medium-security facilities, while 1619 escaped from low- and minimum-security institutions. *See* CRIMINAL JUSTICE INSTITUTE, THE CORRECTIONS YEARBOOK 1995: ADULT CORRECTIONS 23-24 (1995). Inmates committed 13,379 assaults against corrections staff and 24,128 assaults against other inmates (many of which required medical attention). *See id.* at 25-26. In addition, there were 61 inmate-on-inmate homicides. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 68, at 603. When legal claims not on firm footing are permitted to stand against private officials working within such a system, correctional vigilance may sink below its optimal level.

74. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (noting the "injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion"). "Implicit in the idea that officials have some immunity . . . for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242. This is particularly apt when discretion must be exercised "in an atmosphere of confusion, ambiguity, and swiftly moving events." *Id.* at 247. Even *Wyatt*, the case on which Justice Breyer relied in *Richardson*, acknowledged that "principles of equality and fairness" suggested a result at variance with its own. Wyatt v. Cole, 504 U.S. 158, 168 (1992).

75. Prison contractors are "state actors" who may be held liable for violations "fairly attributable" to their official positions. *See, e.g.*, West v. Atkins, 487 U.S. 42 (1988) (holding that a physician, when obligated by contract to treat state inmates, acts "under color of law" for § 1983 purposes); *see also* Linda Greenhouse, *Issue at Privately Run Prison Draws High Court's Review*, N.Y. TIMES, Nov. 28, 1996, at B21 ("Under Supreme Court precedents dating from the early 1980's, private sector employees who perform government functions are treated as 'state actors' for purposes of liability for constitutional damages.").

76. *See Wyatt*, 504 U.S. at 180 (Rehnquist, C.J., dissenting) ("[I]t is at least passing strange to conclude that private individuals are acting 'under color of law' . . . but yet [to] deny them the immunity to which th[eir] same state [counterparts] are entitled, simply because the private parties are not state employees."); *see also* Eid, *supra* note 5, at 1325 ("Treating private individuals who act jointly with public officers as officers of the state for purposes of liability but not immunity creates a fundamental asymmetry . . . .").

cannot be used to assign liability to the federal government,[77] the state governments,[78] or public prison guards,[79] but may punish private prison contractors for reasonable violations of standards that were not well established.[80]

Finally, if fairness is any guide, private prison guard immunity should not depend upon its historical footing unless civil-service immunity requires an analogous empirical exercise. Whatever the merits of the dissent's postulation that private guards were more likely than government guards to receive immunity at common law, the presence or absence of such immunity should not be dispositive.[81] Because the Court "abandoned" any inquiry into the common law for purposes of extending public guard immunity,[82] it ought not to restore it when considering private

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77. The federal government has not waived sovereign immunity under § 1983. *See* 28 U.S.C. § 2679(b)(2) (1994) (Federal Tort Claims Act exclusion). However, a fairer (if not more productive) liability system would shift the focus from the individual to the government. *See, e.g.*, Laura Oren, *Immunity And Accountability In Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989) (arguing that the federal government should take responsibility for the constitutional torts of its agents); H. Allen Black, Note, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733 (1991) (similar); *see also* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 21 (1970) (demonstrating that "deep pocket" defendants are best able to pay and are in a superior position to distribute risk); *Developments*, *supra* note 1, at 1217 ("Compensation to an individual injured by state action, if paid by the government, may be justified as a means of spreading the cost of official wrongdoing among all citizens rather than allowing the cost to fall on the unlucky few.").

78. *See* U.S. CONST. amend. XI ("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."); *accord* Edelman v. Jordan, 415 U.S. 651 (1974) (recognizing that § 1983 cases do not override the Eleventh Amendment); *see also* Quern v. Jordan, 440 U.S. 332, 341 (1979) (holding that states are excluded from the definition of "person" for purposes of § 1983 liability). Although the nuances of Eleventh Amendment jurisprudence are beyond the scope of this Recent Development, it is enough to note that § 1983 cases cannot be brought against any state without its consent. *See Edelman*, 415 U.S. at 661 n.9 (citing THE FEDERALIST No. 81 (Alexander Hamilton)). *See generally* Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

79. *See* Procunier v. Navarette, 434 U.S. 555 (1978).

80. *See* Wyatt v. Cole, 504 U.S. 158, 180 (1992) (Rehnquist, C.J., dissenting) ("Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was 'to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement.'" (citations omitted)).

81. *See* McKnight v. Rees, 88 F.3d 417, 420 (6th Cir. 1996) (stating that common-law immunity should inform the analysis for correctional officers, "but the presence or absence of immunity found there is not necessarily dispositive"); *see also* Charles W. Thomas & Linda S. Calvert Hanson, *The Implications of 42 U.S.C. § 1983 for the Privatization of Prisons*, 16 FLA. ST. U. L. REV. 933, 954 (1989) (noting that the case law de-emphasizes the common-law status of private parties and concentrates on the actor's function).

82. *See Procunier*, 434 U.S. at 568 (Stevens, J., dissenting) (reflecting that "a considered

guard immunity.[83] In short, as the majority was unwilling to overturn *Procunier*, its importation of *Wyatt*'s methodology resembles result-based decisionmaking more than even-handed reasoning.[84]

Richardson may also prove counter-productive. The litigation costs it immediately imposes on the judiciary and on prison officials will ultimately be borne by taxpayers and prisoners as a social cost. As sketched below, the costs of denying qualified immunity to contract prison guards may exceed the benefits under both a macro analysis (focusing on the public) and a micro analysis (focusing on inmates themselves).

First, recognizing prisoner claims that are not clearly established in the law incurs administrative costs that exceed the societal value of such cases. Prisoners may be the single most litigious group in America.[85] They have unparalleled amounts of

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inquiry into the common law" has "now been abandoned"); Anderson v. Creighton, 483 U.S. 635, 645 (1987) (observing that the Court "completely reformulated qualified immunity along principles not at all embodied in the common law").

83. *See Richardson*, 117 S. Ct. at 2109 (Scalia, J., dissenting) (As *Procunier* "did not trouble itself with history . . . but simply set forth a policy prescription . . . it is irrational, and productive of harmful policy consequences, to rely upon lack of case support to create an artificial limitation upon the scope of a doctrine (prison-guard immunity) that was itself not based on case-support."). In any event, it is erroneous to assume that "the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson*, 483 U.S. at 645. *But see* Malley v. Briggs, 475 U.S. 335, 342 (1986) (Supreme Court may not make a "freewheeling policy choice"); Tower v. Glover, 467 U.S. 914, 922-23 (1984) (Supreme Court does not have "license" to extend § 1983 immunity based on its own public policy calculations).

84. Interestingly, Justice Scalia characterized the slowing of privatization as a "purpose," and not just a predictable "effect," of the majority's decision. *See Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting).

85. *See Is Pursuit of Prison Justice Too Trivial?*, CHI. TRIB., Oct. 29, 1995, at 17 (reporting that the number of prisoner filings has doubled in the last decade, and that such cases now constitute the single largest class of lawsuits in the federal system). Indeed, in some U.S. district courts, up to 34% of the caseload consists of prisoner lawsuits. *See* Sandra Ann Harris, *Lawsuits Filed By Prisoners Cost Millions To State Governments*, CHARLESTON GAZETTE, Oct. 23, 1995, at P7A (itemizing certain annual costs for county, state, and federal officials to administer prisoner litigation).

There has, however, been a long-standing history of concern about the volume of prisoner civil rights litigation. Between 1966 and 1967, for instance, there were only 2131 civil rights actions in federal courts, comprising just 3% of federal cases. But by 1986-1987, there were 43,359 civil rights cases filed in federal district courts, constituting more than 18% of the total caseload. Thus, there was nearly a 2000% increase in such cases between 1966 and 1987, while the total number of federal cases rose only 235%. *See* Douglas A. Blaze, *Presumed Frivolous: Application Of Stringent Pleading Requirements In Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 935-36 (1990). As of Fiscal Year 1995, the 63,550 civil lawsuits filed by prisoners in federal court comprised over 25% of that year's total federal civil filings. *See* 142 CONG. REC. S10576-02 (daily ed. Sept. 16, 1996) (statement of Sen. Abraham) (reciting statistics and describing lawsuits about prisoners' subjection to melted ice cream, "hacked up" cake, and Converse tennis shoes (as opposed to Reebok "Pumps")).

free time.[86] In addition, "[s]ince the overwhelming majority of prisoner cases are filed in forma pauperis," the cost-benefit analysis performed by prisoner litigants may be cursory and may fail to account for external costs.[87]

When prisoners are permitted to sue for offenses that are at most objectively reasonable, the judiciary may become a tool for intimidation, harassment, or retaliation against private jailers.[88] The administrative costs alone of such claims would outweigh their marginal utility. Therefore, potential for vexatious prisoner lawsuits is a matter of legitimate social concern.

Constitutional complaints also have alleged being forced to listen to country and western music, being fed chunky rather than smooth peanut butter, and being denied sex change surgery while in prison. *See* 142 CONG. REC. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham). Thus, it is not merely the number but also the quality of many prisoner lawsuits that has aroused controversy. For an account of some humorous—even ridiculous—prisoner suits, *see* Blaze, *supra*, at 938 & nn.12-14.

86. *See, e.g.*, Cleavinger v. Saxner, 474 U.S. 193, 211 (1985) (Rehnquist, C.J., dissenting) ("With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population."); *see also* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1158 (1981) ("[I]nvestment of time by parties to [prisoner] suits may be considerable, and the alternative uses of plaintiffs' and defendants' time may have strikingly different value.").

87. William Bennett Turner, *When Prisoners Sue: A Study Of Prisoner Section 1983 Suits In The Federal Courts*, 92 HARV. L. REV. 610, 646 (1979). For instance, a constitutional complaint concerning a broken cookie, 1 of more than 40 claims that the death row inmate had filed, cost one state more than $4,500 before the judge dismissed it two years later. *See Is Pursuit of Prison Justice Too Trivial?*, *supra* note 85. Another prisoner's paranoia that his thoughts were being broadcast over the facility's loudspeakers consumed an estimated $18,500 in state resources. *See id.*; *see also Cleavinger*, 474 U.S. at 210-11 (Rehnquist, C.J., dissenting) ("[P]risoners simply are not subject to many of the constraints which often deter members of the population at large from litigating at the drop of a hat. We have held, for example, that prisoners in confinement are entitled to free access to lawbooks or some other legal assistance. And the great majority of prisoners qualify for *in forma pauperis* status, which entitles them to relief from statutory filing fees." (citation omitted)).

88. *See, e.g.*, Cass, *supra* note 86, at 1156 ("It is plausible to expect anger directed against [prison] officials to motivate suit, regardless of likely recovery, more often than would occur where the user of a commercial product, having sought contact with the producer, is disappointed with or injured by it."); James Theodore Gentry, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 355 n.16 (1986) (arguing the limits of privatizing prisons but conceding that some prisoners may view litigation as "recreational or vindicatory and bring a costly batch of frivolous suits"); *see also Cleavinger*, 474 U.S. at 203 ("[M]any inmates do not refrain from harassment and intimidation. The number of nonmeritorious prisoners' cases that come to this Court's notice is evidence of this.... 'Retaliation is much more than a theoretical possibility.'" (citation omitted)).

Concomitantly, admitting legal claims that fail to allege a clearly established right may transform the legal system into a lottery for windfall recoveries. *See, e.g.*, *Prisoners Suing At Alarming Rate; Lawsuits Cost Calif. More Than $25 Million In '95*, ASHEVILLE CITIZEN-TIMES, Oct. 23, 1995, at 5A (quoting correctional officer as saying that "every inmate who files a lawsuit thinks he's going to get a million dollars").

However, qualified immunity for private actors would also generate social value for less recognized reasons. Privatized prisons provide: (1) an established and stable system of incarceration;[89] (2) more efficient and effective management than government-run jails;[90] and (3) comparably safer housing for inmates.[91] Tennessee's transition to prison privatization, for instance, stemmed from the State's inability to operate prisons properly.[92] Similarly, public management of correctional facilities in other states has perennially produced poor civil rights records.[93]

Consequently, it is the state that has historically cut constitutional corners, and it was the private prison firm that was

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89. At least 22 states have already privatized their correctional services. *See, e.g., Private Prison Guards Can Be Sued*, FACTS ON FILE WORLD NEWS DIGEST, July 10, 1997, at 494. Moreover, about 30% of all government services are now carried out by private contractors. *See, e.g., Privatized, Not Immunized*, N.J.L.J., Aug. 4, 1997, at 26.

90. *See, e.g.*, Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577, 601 (1992) (reporting that across 333 empirical categories designed to measure the quality of prison management, private prisons outperform state and federal prisons in virtually every one); *see also* NATIONAL INSTITUTE OF JUSTICE, CORRECTIONS AND THE PRIVATE SECTOR: A NATIONAL FORUM 77-78 (1985) (concluding that private firms have superior incentives to innovate, are free of patronage obligations, take better advantage of economies of scale, are able to spread the risk of shutdowns, and can construct facilities more quickly than can the state); Thomas & Hanson, *supra* note 81, at 960 n.180 (citing research suggesting that private firms can provide higher quality and lower cost correctional services than the government).

91. *See* CHARLES THOMAS, CORRECTIONAL PRIVATIZATION: THE ISSUES AND THE EVIDENCE 40-41 (Frazier Institute 1996) (finding, as of 1996, that not one privately-managed facility was operating under court order or consent decree, while three-quarters of the states had facilities under court supervision); *Matters Relating To The Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 108 n.30 (1995) (statement of Charles Thomas, Director, Private Corrections Project, University of Florida) (similar).

In any event, privately-managed prisons that are not as effective or safe as state-operated prisons may not be chartered in the first place. *See, e.g.*, TENN. CODE ANN. § 41-24-104(a)(3) (requiring that firms have history of successful operation of facilities and demonstrate compliance with all correctional standards). Furthermore, firms that do not perform satisfactorily may have their contracts discontinued. *See, e.g., id.* § 41-24-105(d) ("The contract may be renewed only if the contractor is providing at least the same quality of services as the state at a lower cost, or if the contractor is providing services superior in quality to those provided by the state at essentially the same cost.").

92. Privatization was a *response* to Tennessee's inability to abide by the State and U.S. Constitutions. *See* W. J. Michael Cody and Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 840-41 (1987) (citing cases finding persistently deplorable prison conditions under the State's care). It was only after several court orders had failed to cure the overcrowding, health hazards, and prison riots, that then-Governor Lamar Alexander proposed privatization as an *answer* to the unconstitutional behavior of Tennessee prison officials. *See id.* at 842.

93. By 1986, *thirty-three* states and several localities were under federal court orders to correct unconstitutional conditions in their prisons. *See, e.g.*, Aric Press, *Inside America's Toughest Prison*, NEWSWEEK, Oct. 6, 1986, at 46.

retained to remedy the situation. Withholding qualified immunity from private guards may slow the public service of privatization by reducing the number of individuals who are willing to work for a management company or by driving up the firm's operating costs.[94]

Second, prisoners themselves may be harmed by the Court's resolution of *Richardson*. Any costs charged to judicial administration will ultimately be passed through to civil rights litigants. Assuming that courts have finite capacity, and that prisoners are already the most prolific source of federal litigation, tenuous claims that would not have survived a qualified immunity screen may now displace, delay, or prejudice the adjudication of meritorious cases.[95] With enough "bad apples" in the system, judges may develop a grudging attitude towards *all* prisoner claims.[96] Indeed, as some scholars have admonished, "overextension of constitutional protection may dilute and thus debase constitutional values."[97] From this perspective, qualified immunity may be seen as a device to

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94. *See* Harlow v. Fitzgerald, 457 U.S. 800, 827 (1982) (Burger, C.J., dissenting) ("When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Those potential risks inevitably will be a factor in discouraging able men and women from entering public service."); *see also* Citrano v. Allen Correctional Ctr., 891 F. Supp. 312, 317 (W.D. La. 1995) ("Any cost of litigation will ultimately be passed on to the State.... The threat of litigation is also a deterrent factor both to those who might seek employment [with a private firm] and to [the private firm itself] when it considers whether it wishes to contract with the state.").

95. *See* Turner, *supra* note 87, at 611 (reasoning that rising case volume threatens "both efficient judicial administration and the achievement of justice in individual cases, creating the possibility that judges will not be able to identify the meritorious cases in the flood of those deemed frivolous"). Similarly, Judge Learned Hand's now-entrenched justification for immunity was that "it is impossible to know whether the claim is well founded until the case has been tried.... [and so it is] in the end better to leave unredressed the wrongs done by [some] dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

96. As one commentator elaborated:

> A crushing weight of cases—whatever their worth—ultimately denigrates all rights because the judiciary is not capable of sympathetically responding to all the claims. Individual judges, as a matter of self-preservation, may begin to read complaints in a grudging manner and to look for narrow resolutions that avoid the most difficult issues. Or, the burden may lead to the creation of a bureaucracy—of law clerks or judges—to process the caseload. The mode in which decisions are reached and opinions written may suffer as a consequence of decreased collegiality and sense of personal responsibility.

Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 27 (1980). These concerns are pronounced in the prison context, where litigation is commonplace and its administration can become susceptible to (a sort of) "adverse selection."

97. *Id.*

protect prisoners from themselves,[98] and *Richardson* may be expected to hurt the very people § 1983 suits are presumed to help.[99]

At some point on the cost-benefit margin, every dollar spent defending or indemnifying a lawsuit that fails to allege a clearly established right is one less dollar that the firm can devote to training correctional officers or to improving prison conditions directly.[100] Additionally, without qualified immunity, more of the firm's funds may be diverted from prison maintenance to bureaucratic paperwork as a response to "real or perceived demands for accountability by the courts."[101] These litigation-related costs, both actual and anticipatory, will raise the contract price charged to the state and may eviscerate privatization's advantages.[102] In short, *Richardson* will not merely increase costs

98. The need for qualified immunity in a prison context is analogous to that for the "business judgment rule" in a corporate context. Both doctrines maintain minimum safeguards for prisoner or shareholder "rights," while limiting less tenable legal claims. In neither case is the screening function meant to benefit the prison guard or the director personally; rather, the purpose is to protect the integrity of discretionary judgments, while reducing the externalities of frivolous claims. *Compare, e.g., id.* at 25 ("[E]very expansion of constitutional rights [under § 1983] will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights."), *with* Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation*, 44 BUS. LAW. 503, 522 (1989) ("By limiting judicial review of board decisions, the business judgment rule.... preserves the value of centralized decisionmaking for the stockholders and protects them against unwarranted interference in that process by one of their number. Although it is customary to think of the business judgment rule as protecting directors from stockholders, it ultimately serves the more important function of protecting stockholders from themselves.").

99. *See, e.g., Private Prisons; A Darkened Path?*, THE ARIZ. REPUBLIC, July 4, 1997, at B10 (discussing studies showing that privatization "not only expands the legal remedies available to prisoners, but reduces construction and operating costs, results in quality improvements in correctional services, and enhances the ability of government to control—and be accountable for—its correctional facilities").

100. *Cf. Richardson*, 117 S. Ct. at 2112-13 (Scalia, J., dissenting) ("Whether this will cause privatization to be prohibitively expensive, or instead simply divert state funds that could have been saved or spent on additional prison services, it is likely that taxpayers *and prisoners* will suffer as a consequence." (emphasis added)).

101. Turner, *supra* note 87, at 639. "Where only a few years ago prisons operated without written rules and with only the most rudimentary recordkeeping systems, today prison authorities are engulfed in bureaucratic paper. There are regulations, guidelines, policy statements, and general orders; there are forms, files, and reports for virtually everything." *Id.*

102. "[I]t is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest." McKnight v. Rees, 88 F.3d 417, 424 (6th Cir. 1996); *cf.* Cleavinger v. Saxner, 474 U.S. 193, 203 (1985) ("[I]mmunity status is for the benefit of the public as well as for the individual concerned."); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (stating that suits impose "a cost not only [on] the defendant officials, but [also on] society as a whole").

for the private contractor; more importantly, it will reduce privatization's public benefits.[103]

Finally, *Richardson*'s requirement that private guards defend their reasonable conduct defeats qualified immunity's instrumental purposes. The received wisdom is that, absent immunity, some public officials would be overdeterred from doing their jobs.[104] Fearing personal liability, they may refrain from acting when it is in the public interest to do so.[105] Yet, liability risk-aversion affects decisionmaking no more in public than in privatized prisons.[106] And it is incoherent to suggest that strict liability must be imposed to make private actors respect federal rights, but that such liability will nevertheless not distort decisionmaking.[107]

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103. *See* Linda Greenhouse, *The Supreme Court: The Overview; Immunity from Suits is Withheld for Guards in Privately Run Jails*, N.Y. TIMES, June 24, 1997, at B10 (recognizing that *Richardson* "could help shape the law and economics of the fast-growing move to the privatization of government services"). Privatized welfare administration or Department of Defense contracting, for example, could be frustrated by the Court's departure from functional analysis of immunity questions. *See id.; see also* Michael Martinez, *No Immunity For Government-Contract Employees*, TEX. LAW., July 14, 1997, at 30 ("The implications of *Richardson* on those who contract with federal, state and local governments are likely to be wide-ranging and more expensive for the public.").

104. *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988) ("[T]he threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties."); Imbler v. Pachtman, 424 U.S. 409, 423 (1976) ("[H]arassment by unfounded litigation would cause a deflection of the [official's] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.").

105. *See, e.g.*, Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 309-15 (canvassing the consequences of official liability, including inaction, delayed action, and changes in the character of decisionmaking); *see also, e.g.*, Burns v. Reed, 500 U.S. 478, 492 (1991) ("[V]exatious litigation . . . might have an untoward effect on the independence of the [official]."); Owen v. Independence, 445 U.S. 622, 655-56 (1980) (Qualified immunity reflects a "concern that the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy."); Wood v. Strickland, 420 U.S. 308, 319-20 (1975) ("The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious . . . decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest.").

106. *See Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting) ("One would think that private prison managers, whose § 1983 damages come out of their own pockets, as compared with public prison managers, whose § 1983 damages come out of the public purse, would, if anything, be more careful in training their employees to avoid constitutional infractions.").

107. *Cf. Owen*, 445 U.S. at 669 n.9 (Powell, J., dissenting) ("[T]he Court apparently believes that strict [ ] liability is needed to modify public policies, but will not have any impact on those policies anyway.").

Even when litigation does not survive the pre-trial process, each filing imposes substantial costs on a named defendant. These costs could include attorney's fees and other expenses, wage or career-advancement penalties, layoffs deriving from loss of a government contract, opportunity loss, distraction, and detriment to one's reputation.[108] The possibility of ex-post insurance indemnification, upon which *Richardson* relies to distinguish public from private jailers, does virtually nothing to absorb these costs.[109] Furthermore, even if indemnity did assuage prison guards' loathing for lawsuits, qualifiedly immune public officials also receive indemnification (and sometimes legal representation) from their employers.[110]

Indeed, if pre-trial litigation is significantly burdensome for a private correctional officer, then the threat of strict liability may result in overdeterrence. Under a qualified immunity regime, which requires state actors to defend against all allegations of unreasonable conduct, and which imposes substantial costs even when the claim is frivolous, it is sufficiently self-penalizing for the contractor to abridge federal rights. As a result, private guards' self-interest in avoiding costly suits may be optimally aligned with their legal duties in the absence of strict liability.[111] Qualified immunity, which applies only sparingly and is

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108. Significantly, in California, where the cost of responding to prisoner suits has risen ten-fold in the past ten years (from $1 million to $10 million), only 3% of inmate cases reach settlement or proceed to trial. *See* Martinez, *supra* note 103. Such statistics demonstrate the flippancy of many prisoner suits and expose the costs of pre-trial process. If these administrative costs are prohibitive for the state, they could be back-breaking for an individual contract guard. *See* Briscoe v. LaHue, 460 U.S. 325, 343 & n.29 (1983) (recognizing that convicts transform resentment of state actors into lawsuits, and that considerable resources will be consumed merely moving for summary judgment).

109. *See, e.g.*, DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 723 & n.14 (10th Cir. 1988) (reasoning that even if a private individual is ultimately indemnified by his employer, official conduct may still be chilled by the necessity of paying various hard and soft costs up-front).

110. *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 83-88 (1983) (positing that the federal, state, and local governments provide counsel to represent defendant employees and usually indemnify such employees for judgments arising out of the course of their agency); *see also Briscoe*, 460 U.S. at 366 n.38 (Marshall, J., dissenting) (indicating that state officials are "generally provided free counsel and are indemnified for conduct within the scope of their authority"); Harlow v. Fitzgerald, 457 U.S. 800, 827 n.7 (1982) (Burger, C.J., dissenting) (citing the Department of Justice's long-standing policy of representing or retaining private counsel in civil suits against federal officers who acted within the scope of their employment).

111. *Cf.* JEREMY BENTHAM, PANOPTICON 20-21 (Dublin 1791) (concluding that private incarceration unites duty and interest in the prison contractor). Thus, to the extent that correctional officers wish to avoid lawsuits (which they know are easily provoked), there is little need to deter private guards from violating prisoner rights.

designed to advance the public interest, should thus adequately protect federal rights.[112]

To conclude, any fairness or utilitarian rationale supporting immunity for the public prison guard in *Procunier v. Navarette* is wholly applicable to her private counterpart.[113] Denying qualified immunity to private jailers is unjust for two reasons. First, it singles out contractors for liability or expense while functionally equivalent state actors receive an immunity. Second, even supposing such a public-private polarization can be justified, *Richardson*'s strict liability scheme second-guesses discretionary judgments with legal claims that were not clearly established or otherwise foreseeable.

Additionally, *Richardson* is counter productive because inmate suits involving only objectively reasonable conduct will inevitably detract attention from cases of obvious civil rights abuse. Whether the state's cost of contracting increases or the private firm's quality of service declines, both taxpayers and prisoners themselves will ultimately pay for the Court's newly countenanced § 1983 litigation. The application of qualified immunity to private prison guards would have marked a more

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112. First, it is important to recognize that immunizing private prison officials would not increase the aggregate level of immunity. If the state corrections department does not privatize prison management, then public guards will simply receive the immunity instead. Second, qualified immunity in civil damages actions does not foreclose declaratory or injunctive relief, which remain available to check systematic wrongdoing. *See* 42 U.S.C. § 1983 (1994) (authorizing a "suit in equity, or other proper proceeding for redress"); *see also Harlow*, 457 U.S. at 819 n.34 (leaving open the possibility of injunctive or declaratory relief). Third, deterrence might better be served through professional discipline or criminal sanctions. For instance, truly willful or malicious deprivations of unclearly established constitutional standards could be punished under 18 U.S.C. § 242 (1994) (criminal analogue of § 1983). *See Briscoe*, 460 U.S. at 345 n.32 (citing this alternative).

113. One *Harvard Law Review* commentator put it thus:

> Where it was not apparent that action would infringe any constitutional rights and where the action was clearly a necessary—or at least a reasonable—means of securing certain social goals within the purview of the official, the imposition of damage liability on the individual may in fact be inappropriate. Part of the reason is the fairness of the cost shifting involved; it is difficult to find the official truly "at fault," for while his intentional actions resulted in the constitutional deprivation, the fact that the right involved was unclear and that the action was taken to further goals for which he is publicly responsible undercuts any sense of "blameworthiness." Moreover, there is a danger that were liability to be imposed in this case, the decisionmaker would in the future be reluctant to take action which is necessary to accomplish public goals and which would ultimately *not* infringe individual constitutional rights.

Developments, *supra* note 1, at 1224 (footnotes omitted).

appropriate accommodation of robust and responsible state action.[114]

Daniel J. Juceam

BALANCING AWAY THE FREEDOM OF SPEECH: *TURNER BROADCASTING SYSTEM V. FCC*, 117 S. CT. 1174 (1997).

In the past two decades, technological innovations in the field of telecommunications have revolutionized the way Americans speak to each other. In the meantime, academics have wondered aloud and in print whether traditional First Amendment[1] jurisprudence can adequately resolve the free speech issues that arise from these new media of communication.[2] When Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (the Cable Act), it gave the courts an opportunity to reassess the application of the First Amendment to the issues presented by modern technology. In twin decisions in the case of *Turner Broadcasting System v. FCC*, one in 1994 (*Turner I*)[3] and the other last Term (*Turner II*),[4] the Court declined to revise the traditional framework of free speech jurisprudence in the context of cable television. Justice Breyer, however, attempted to upset that framework with a concurring opinion in the second *Turner* decision, arguing that the First Amendment permits Congress to regulate speech in order to enhance "public discussion" and "informed deliberation."[5] Future decisions should reject this

114. Although it had been settled that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery," a good-faith defense for private contractors may now constitute the next best alternative to qualified immunity. *Harlow*, 457 U.S. at 817-18.

1. The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. *See, e.g.*, Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995); Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 997 (1997) ("[M]embers of the Supreme Court have been actively disassembling the existing framework of First Amendment case law and using changing media technology to justify their assault on accepted doctrine.")

3. 512 U.S. 622 (1994).

4. 117 S. Ct. 1174 (1997).

5. *Turner II*, 117 S. Ct. at 1204 (Breyer, J., concurring).

view because it is unsupported by established precedent and it would grant legislatures a dangerous power over the scope and content of political life, and because new technologies have enhanced rather than diminished the capacity of Americans to communicate political ideas to each other.

The two *Turner* opinions revolve around "must-carry" provisions in the Cable Act.[6] When drafting the Cable Act, Congress took the unusual step of including in the statute a detailed list of factual findings about the economic health and public importance of broadcast television.[7] The findings in the Cable Act include statements that the Federal Government has substantial interests in requiring cable systems to carry local public and commercial broadcast stations and that the "undue market power" of cable systems threatens to wipe out these local sources of information.[8] In passing the Cable Act, Congress sought to preserve the benefits of local broadcast television both for cable subscribers who might otherwise see such stations eliminated from their cable packages[9] and for non-subscribers who would lose viewing options if local broadcasters were to falter in the face of competition from cable systems.[10] To preserve these benefits, Congress required that cable systems set aside up to one-third of their usable channels for local commercial television stations and carry a minimum number of non-commercial educational television stations.[11]

Turner Broadcasting System (Turner) challenged the Cable Act in federal court, contending that the Cable Act's must-carry provisions abridged Turner's rights under the First Amendment. In *Turner I* the Court heard arguments that must-carry warrants strict scrutiny under the First Amendment[12] because it interferes

6. Section 4 of the Cable Act provides in pertinent part that "[e]ach cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator." 47 U.S.C. § 534(a) (1994). Section 5 provides that "[i]n addition to the carriage requirements set forth in section 534 of this title, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section." 47 U.S.C. § 535(a) (1994).

7. *See Turner I*, 512 U.S. at 679 (O'Connor, J., concurring in part and dissenting in part) (acknowledging the rarity of inclusion of underlying factual findings in statutes).

8. *See* Cable Act §§ 2(a)(3),(16), included in note following 47 U.S.C. § 521 (1994).

9. *See* Cable Act §§ 2(a)(4),(17), included in note following 47 U.S.C. § 521 (1994).

10. *See* Cable Act §§ (a)(11)-(16), included in note following 47 U.S.C. § 521 (1994).

11. *See* 47 U.S.C. § § 534(b)(1), 535(b) (1994).

12. In order to survive strict scrutiny under the First Amendment, a statute must serve

with cable operators' editorial discretion to select the content of their programming[13] and compels them to transmit speech they otherwise would not.[14] A majority of the Court disagreed, determining that must-carry simply regulates an economic market whose product happens to be speech, without reference to the content of that speech.[15] As a content-neutral regulation of speech, wrote Justice Kennedy, the Cable Act must be sustained under the First Amendment if it satisfies the standard of intermediate scrutiny articulated in *United States v. O'Brien*: "if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.'"[16] The Court, however, was not satisfied that it had enough information to evaluate must-carry under the *O'Brien* standard, and it remanded the case to district court for a determination whether the threat that cable poses to broadcast television is real enough to warrant must-carry regulations and whether those regulations suppress "substantially more speech than is necessary to ensure the viability of broadcast television."[17]

On remand, a three-judge panel of the District Court for the District of Columbia[18] resolved these questions on cross-motions for summary judgment.[19] Writing the controlling opinion, Judge Stanley Sporkin granted summary judgment to the government, ruling that the record before Congress contained substantial

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a compelling government interest and burden no more speech than necessary to further that interest. *See* Simon and Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (citing Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231 (1987)). A statute warrants strict scrutiny if it regulates speech on the basis of content: "[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner I*, 512 U.S. at 641-42 (citing R.A.V. v. St. Paul, 505 U.S. 377, 382-83 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989)). "Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." *Turner I*, 512 U.S. at 642 (citing Riley v. National Federation for Blind of N.C., Inc., 487 U.S. 781, 798 (1988); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

13. *See Turner I*, 512 U.S. at 643-52.

14. *See id.* at 653-57.

15. *See id.* at 661-62.

16. *Id.* at 662 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

17. *Id.* at 667-68.

18. As required by the Cable Act, 47 U.S.C. § 555(c)(1) (1994), a three-judge federal district court panel was convened pursuant to 28 U.S.C. § 2284 (1994).

19. *See Turner Broadcasting v. FCC*, 910 F. Supp. 734, 737 (D.D.C. 1995).

evidence from which Congress could reasonably conclude that must-carry provisions were necessary to protect the economic health of local broadcasting.[20] In dissent, Judge Stephen F. Williams would have granted summary judgment to Turner. He emphasized economic data and expert testimony developed during the *Turner* litigation and concluded that the "parties agree that there is no real threat to the continued viability of broadcast television, either now in existence or looming on the horizon."[21] Although Judge Thomas Penfield Jackson thought that the "most ambiguous record" before the court should have precluded summary judgment, he elected to concur with Judge Sporkin rather than to force to trial a case that both of his colleagues thought disposable on summary judgment.[22]

Last Term, in a fractured decision, the Supreme Court affirmed the judgment of the district court. Writing the principal opinion of the Court,[23] Justice Kennedy held that the must-carry provisions of the Cable Act survive intermediate scrutiny under the *O'Brien* test. Justice Kennedy began by reciting *O'Brien's* requirement that "[a] content neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[24] He went on to identify the government's interest in must-carry as the prevention of "any significant reduction in the multiplicity of broadcast programming sources available to noncable households."[25] Stressing that Congress's goal in enacting must-carry was not solely "to protect broadcasters from cable operators' anticompetitive behavior," the Court recognized an independent government interest in "preserving a multiplicity of broadcast sources to ensure that all households have access to

20. *See id.* at 740-51.

21. *Id.* at 755, 758-67 (Williams, J., dissenting).

22. *Id.* at 752 (Jackson, J., concurring).

23. Chief Justice Rehnquist and Justices Stevens and Souter joined Justice Kennedy's opinion in full. Justice Breyer joined it except insofar as it relied upon an anticompetitive rationale to sustain the government's interest behind the must-carry provisions. *See Turner II*, 117 S. Ct. at 1203.

24. *Id.* at 1186 (citing *O'Brien*, 391 U.S. at 377).

25. *Id.* at 1188.

information and entertainment on an equal footing with those who subscribe to cable."[26]

Justice Kennedy next examined whether the Cable Act's "must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way."[27] In answering these questions, Justice Kennedy relied heavily on the findings of Congress. He emphasized that courts owe deference to "traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy," even when such a policy triggers judicial scrutiny under the First Amendment.[28] The record before Congress, wrote Justice Kennedy, "indicated the structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems, or reposition them to a less-viewed channel."[29] Relying on Congress's observation that most cable operators possess a local monopoly over cable households, Justice Kennedy reasoned that Congress had before it evidence substantial enough to conclude that cable operators had both the ability and the incentive to drop local broadcasters in favor of cable-affiliated programming, and hence to frustrate the government's interests in broadcast programming.[30]

In support of its deference to the factual conclusions of Congress, the Court pointed both to Congress's trustworthiness as a fact-finder and to evidence produced on remand that tended to support the judgment of Congress.[31] Conceding that interested parties provided the testimony upon which Congress relied, Justice Kennedy noted that parties with diverse stakes in cable regulation, including those of the cable industry, took advantage of the opportunity to provide evidence to Congress. That evidence, he wrote, "was supported by verifiable information and citation to independent sources."[32] In addition,

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26. *Id.* at 1188-89. Justice Stevens wrote a brief concurrence to emphasize that deference to congressional judgments was warranted because, in his opinion, the Cable Act regulated the structure of a market rather than the content of speech. "If this statute regulated the content of speech rather that the structure of the market," he wrote, "our task would be quite different." *See id.* at 1203 (Stevens, J., concurring).

27. *Id.* at 1189.

28. *Turner II*, 117 S. Ct. at 1189.

29. *Id.* at 1190.

30. *See id.*

31. *See id.* at 1191-97.

32. *Id.* at 1191 (citing Hearings on Cable Television Regulation at 705, 707-8, 712 (statement of Gene Kimmelman); *id.* at 869-70, 878-79 (statement of James B. Hedlund).

Justice Kennedy argued that the evidence developed in the district court provided an independent confirmation of Congress's judgment "that cable systems would have incentives to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advertisers."[33] These bodies of evidence, wrote Justice Kennedy, verified Congress's conclusion that the structure of the cable industry threatened the viability of broadcast television.[34]

After concluding that must-carry advanced a real and important government interest, Justice Kennedy turned to whether must-carry burdened "more speech than necessary" to preserve broadcast television.[35] Justice Kennedy acknowledged that must-carry burdens speech by limiting the number of channels over which cable operators exercise control, by restraining their editorial discretion and by "render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining."[36] Justice Kennedy quantified the burden of must-carry as the 5,880 broadcast channels that gained carriage under the Cable Act and assessed the benefit of must carry as the same 5,880 channels that were preserved for non-subscribers.[37] Thus he concluded that "the burden of must-carry is congruent to the benefits it affords."[38] Finally, Justice Kennedy rejected the argument that must-carry burdens too much speech because alternative schemes of regulation could advance Congress's stated interests while burdening less speech than the provisions of the Cable Act.[39] To the contrary, Justice Kennedy wrote that the record before Congress supported its decision not to pursue regimes of leased access, financial subsidies to broadcasters, or antitrust regulation instead of must-carry.[40] In light of such "reasonable factual findings supported by

33. *Turner II*, 117 S. Ct. at 1191.

34. *See id.* at 1197.

35. *Id.* at 1198 (internal citations omitted). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.").

36. *Turner II*, 117 S. Ct. at 1198 (quoting *Turner I*, 512 U.S. at 637).

37. *See id.* at 1198-99. The addition of these 5,880 channels, wrote Justice Kennedy, was one of the "few definite conclusions" about must-carry that could be drawn from the record. *Id.* at 1198.

38. *Id.* at 1199.

39. *See id.* at 1202.

40. *See id.* A regime of leased access, which would afford equal access to both broadcasters and programmers under regulated rates, reasoned Justice Kennedy, would

evidence that is substantial for a legislative determination," he wrote, the Court was not authorized to replace the judgment of Congress with its own.[41]

Writing a partial concurrence, Justice Breyer would have upheld the statute, not on the basis of the government's interest in promoting fair competition, but on its interest in protecting free, over-the-air broadcast television and in "promoting the widespread dissemination of information from a multiplicity of sources."[42] Conceding that must-carry "extracts a serious First Amendment price" by interfering with the programming decisions of cable operators and by preventing cable viewers from watching what they want to see, Justice Breyer posited "important First Amendment interests on the other side."[43] Must-carry, wrote Justice Breyer, seeks to prevent "too precipitous a decline in the quantity and quality" of broadcast television "for an ever-shrinking non-cable subscribing segment of the public," and in turn to "facilitate the public discussion and informed deliberation, which . . . democratic government presupposes and which the First Amendment seeks to achieve."[44]

Weighing these interests against each other, Justice Breyer argued that the First Amendment requires reviewing courts to determine not only whether there exist significantly less restrictive means to the end sought by Congress, but also whether the statute "strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences."[45] Justice Breyer accepted the plurality's determinations that the quantity and quality of broadcast television would diminish in comparison to cable television in the absence of must-carry and that must-carry imposes a limited and diminishing burden on cable programmers.[46] To these

not be as effective as must-carry in furthering Congress's goal of preserving the benefits of broadcast television for those who do not subscribe to cable. *See id.* at 1201. Justice Kennedy wrote that Congress was entitled to reject a system of subsidies and an antitrust regime on grounds that they would be more difficult to administer than must-carry. *See id.* at 1202.

41. *Turner II*, 117 S. Ct. at 1203.

42. *Id.* at 1203-04 (Breyer, J., concurring) (internal citations omitted).

43. *Id.* at 1204.

44. *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945); Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

45. *Id.*

46. *See Turner II*, 117 S. Ct. at 1205.

agreements with the principal opinion, he added that "Congress could reasonably conclude that the statute will help the typical over-the-air viewer . . . more than it will hurt the typical cable subscriber."[47] Having declared that the balance of "First Amendment interests" tilts in favor of must-carry, Justice Breyer concluded that "the statute survives 'intermediate scrutiny' whether or not . . . [it is] properly tailored to Congress's purely economic objectives."[48]

Four dissenters, led by Justice O'Connor,[49] contended that Congress designed must-carry to advance content-based objectives and that must-carry is not narrowly tailored to the content-neutral objectives that it does advance.[50] Reiterating her opinions expressed in *Turner I*,[51] Justice O'Connor noted that when pressed to explain its interest in preserving access to broadcast stations, the government emphasized the need "to ensure that broadcast stations maintain 'diverse', 'quality' programming that is 'responsive' to the needs of the local community."[52] According to the dissent, the government's concern for local and educational programming, though based on important interests, "reveals a content-based preference for broadcast programming."[53] Noting that Justice Breyer's concurrence weighed "First Amendment interests" tied directly to the political and educational value of speech, Justice O'Connor counted five Justices who believed the government's interests to be based on content; she therefore concluded that "under these circumstances, the must-carry provisions should be subject to strict scrutiny, which they surely fail."[54]

Justice O'Connor devoted the bulk of her dissent to the argument that must-carry does not survive even intermediate scrutiny under the First Amendment.[55] She began by questioning the Court's reliance on Congress's judgments about the importance of must-carry, writing that as a general matter,

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47. *Id.*

48. *Id.*

49. Justice Scalia, Justice Thomas, and Justice Ginsburg joined in the dissent.

50. *See Turner II*, 117 S. Ct. at 1208 (O'Connor, J., dissenting).

51. *See Turner I*, 512 U.S. 674-85 (O'Connor, J., dissenting).

52. *Turner II*, 117 S. Ct. at 1207 (O'Connor, J., dissenting) (citing Brief for Federal Appellees at 13, 30).

53. *Id.* at 1208.

54. *Id.*

55. *See id.* at 1208-18.

courts should treat with skepticism the testimony that interested parties have offered before Congress.[56] She then expressed particular doubts about Congress's judgments as to the importance of must-carry, poking numerous holes in its conclusions that "vertically integrated" cable operators favor affiliated cable programmers over broadcasters and that cable operators will cease to carry broadcaster programming in order to capture revenues that advertisers would otherwise pay to broadcasters.[57] Justice O'Connor also questioned whether there was any evidence that broadcast stations were suffering real harm in the absence of must-carry.[58] The record developed on remand, she wrote, contained "sharp conflicts . . . that call into question the reasonableness of Congress's findings."[59] The principal opinion, concluded Justice O'Connor, accepted a "highly dubious economic theory" to justify governmental burdens on First Amendment rights.[60]

The dissent also argued that must-carry was not narrowly tailored to achieve the government's interest in protecting broadcast stations from unfair market competition.[61] Justice O'Connor criticized the "circular" reasoning behind the Court's determination that must-carry is narrowly tailored.[62] The Court erred, she wrote, in counting the 5,880 broadcast stations added by must-carry as both the burden imposed by the statute and the government interest at stake.[63] The government's interest, Justice O'Connor reminded the Court, was not simply the protection of those stations, but rather the prevention of anti-competitive conduct on the part of cable companies.[64] In order to determine whether the addition of 5,880 stations fit that interest, she argued, the Court needed to first to hear evidence about whether those stations would have been refused carriage because of anti-competitive impulses.[65] Without such proof, she

56. *See id.* at 1210.

57. *Turner II*, 117 S. Ct. at 1210-12.

58. *See id.* at 1213 ("The Court [in *Turner I*] remanded for a determination whether broadcast stations would be 'at serious risk of financial difficulty' and would 'deteriorate to a substantial degree or fail altogether.'"(internal quotations and citations omitted)).

59. *Id.* at 1214.

60. *Id.* at 1215.

61. *See id.* at 1215-18.

62. *See Turner II*, 117 S. Ct. at 1215.

63. *See id.*

64. *See id.*

65. *See id.*

concluded, it was improper to conclude that the statute was narrowly tailored.[66] Finally, Justice O'Connor argued that "the availability of less intrusive approaches" to the problem of broadcast vulnerability, such as a system of subsidies, demonstrated that must-carry was not narrowly tailored to the government's asserted interest in providing a remedy for anti-competitive conduct on the part of cable systems.[67]

The importance of *Turner II* stems from its relationship to a school of thought arguing that, under the First Amendment, legislatures ought to be able to regulate speech in order to promote "democratic deliberation" and "political equality."[68] Although neither the principal nor the dissenting opinion endorsed this notion, Justice Breyer based his concurrence upon it.[69] Perhaps more important, Justice Breyer phrased his concurrence to imply that the principal opinion likewise evaluated the Cable Act based on its potential to enhance certain types of speech.[70] In the midst of this confusion, Justice Breyer asserted an unconventional reinterpretation of the First Amendment. The approach proposed by Justice Breyer not only contradicts established free speech doctrine, it also seeks to grant Congress a dangerous franchise to shape the substance of political life at a time when new technology, rather than government regulation, is enhancing public discussion.

Established free speech doctrine reflects the principle that government may not regulate speech on the basis of its content.[71] Subject to a few narrow exceptions,[72] content-based

66. *See id.* at 1215-16.

67. *Turner II*, 117 S. Ct. at 1216-17.

68. *See* Sunstein, *supra* note 2, at 1763.

69. *See Turner II*, 117 S. Ct. at 1204 (Breyer, J., concurring) (arguing that the policy behind must-carry "seeks to facilitate the public discussion and informed deliberation, which . . . democratic government presupposes and the First Amendment seeks to achieve.")

70. *See id.*

71. *See Turner I*, 512 U.S. at 640-42 ("Government action that stifles speech on account of its message or that requires the utterance of a particular message favored by the Government" is contrary to the First Amendment.); *see also* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 225-26 (1992). "Government may not suppress or regulate speech because it does not like its content . . . ." *Id.* at 225.

72. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (defamation); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

regulations are invalid under the First Amendment.[73] Nor may government regulate the time, place, or manner of speech unless it remains neutral with respect to the content of that speech.[74] Similarly, a government regulation that only indirectly burdens speech must also be content-neutral.[75]

In recent years, prominent liberal academics have argued that traditional First Amendment jurisprudence ought to be revised to meet changing economic and political arrangements.[76] According to these scholars, the established principle that the government should not regulate speech on the basis of its content is not an inherent requirement of the First Amendment.[77] Professor Owen Fiss has argued that the Supreme Court developed the notion of content-neutrality in order to preserve free and open political debate at a time when the most effective vehicle of political speech was the street-corner speaker.[78] In Professor Fiss's view, the Court was simply ensuring that speakers retained access to street corners and other public areas where they might address an audience.[79] The street corner, argues Professor Fiss, has been replaced by television and other mass media, and so the Court ought to adjust its First Amendment jurisprudence to guarantee public access to these modern fora.[80] Professor Fiss concedes that ensuring public access to traditionally private means of communication ordinarily requires the government to regulate speech on the basis of its content, but nonetheless contends that the Court should abandon its traditional free speech jurisprudence in

73. *See* R.A.V. v. St. Paul, 505 U.S. 377, 382-83 (1992). "Content based regulations are presumptively invalid." *Id.* at 382.

74. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that time-place-and-manner regulations are permissible, "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information").

75. *See O'Brien*, 391 U.S. 376-77.

76. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (2d ed. 1995); Owen M. Fiss, Comment, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2088 (1991) (arguing that the "enormous growth in state power" that has taken place over the Twentieth Century has created "new challenges for the First Amendment").

77. *See, e.g.*, Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-10 (1986).

78. *See id.* at 1408-09.

79. *See id.*

80. *See id.* at 1409-13, 1425.

order to advance the First Amendment's broad goal of enlightened political debate.[81]

Professor Cass Sunstein has applied a similar argument to the Cable Act. He argues that under a "Madisonian"[82] free speech tradition, the government may regulate the electronic media to promote "a well-functioning democratic regime," so long as it does not restrict speech on the basis of viewpoint.[83] This regulatory license, he argues, includes the ability to "promote political speech at the expense of other forms of speech," to favor "educational and public-affairs programming," and to "ensure diversity of view."[84] The Constitution must protect regulation of this type because "[a] well-functioning democracy requires a degree of citizen participation, which requires a degree of information."[85] Professor Sunstein claims that his conception of the First Amendment is well-grounded in a tradition championed by Justice Brandeis[86] and exemplified in cases such as *New York Times Co. v. Sullivan*[87] and *Red Lion Broadcasting Co. v. FCC*.[88] Conceding that *Turner I*, in its concern for content regulation, did not endorse his "Madisonian"

81. *See id.* at 1425 ("The received Tradition takes no account of the fact that to serve the ultimate purpose of the first amendment we may sometimes find it necessary to 'restrict the speech of some elements of our society in order to enhance the relative voice of others,' and that unless the Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free." (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam))).

82. Professor Sunstein traces his interpretation of the First Amendment back to James Madison's statement that "[t]he value and efficacy" of the right of electing the members of government "depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." Sunstein, *supra* note 2, at 1757 (quoting James Madison, Report on the Virginia Resolutions, Feb. 7, 1777, *in* 6 WRITINGS OF JAMES MADISON 341, 397 (Gaillard Hunt ed., 1906)).

83. *Id.* at 1762.

84. *Id.*

85. *Id.*

86. *See* Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("Those who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

87. 376 U.S. 254, 270 (1964) (invoking "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .").

88. 395 U.S. 367, 392 (1969) ("Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.").

free- speech tradition, Professor Sunstein suggests that it might have taken a first step toward its adoption.[89]

With his concurrence in *Turner II*, Justice Breyer may have taken a second step in that direction. To justify the inclusion of content-based government interests under intermediate scrutiny, Justice Breyer echoed Professor Sunstein by implying that courts should evaluate government regulation of speech on its capacity to secure the goals of the First Amendment, namely "public discussion" and "informed deliberation."[90] Justice Breyer recited Professor Sunstein's litany of Madisonian authorities, to which he added *Turner I*'s dictum that ensuring public "'access to a multiplicity of information sources . . . promotes values central to the First Amendment.'"[91] Unlike Professor Sunstein, however, Justice Breyer did not claim that the Madisonian tradition is separate from the Court's precedents emphasizing the importance of content-neutrality. Rather, he attempted to graft this content-based vision onto an accepted line of precedent that takes content-neutrality as the baseline principle of free speech jurisprudence.[92]

In his concurrence, Justice Breyer ostensibly pledged his allegiance to the Court's two main precedents on intermediate scrutiny, *United States v. O'Brien*[93] and *Ward v. Rock Against Racism*.[94] He cited *O'Brien* for its familiar maxim that to survive intermediate scrutiny, a statute must advance "important governmental interests unrelated to the suppression of free speech."[95] Addressing *Ward*, a case that involved an application of the *O'Brien* test,[96] Justice Breyer attempted to recast the standard for intermediate scrutiny. *Ward*, he claimed, requires a reviewing court to ask "whether the statute . . . strikes a reasonable balance between potentially speech-restricting and

89. *See* Sunstein, *supra* note 2, at 1778-79 (characterizing *Turner II* as "a cautious and incompletely theorized first step that appropriately leaves gaps for future refinement").

90. *Turner II*, 117 S. Ct. at 1204 (Breyer, J., concurring).

91. *Id.* (quoting *Turner I*, 512 U.S. at 663).

92. For a summary of this line of precedent, see *Turner I*, 512 U.S. at 641-42.

93. 391 U.S. 367 (1968) (holding that a federal law prohibiting the destruction of draft cards did not violate the First Amendment, even as applied to a person who burned the card as part of a demonstration against the war in Vietnam).

94. 491 U.S. 781 (1989) (holding that it did not violate the First Amendment for New York City to require the organizers of a rock concert in Central Park to use amplification equipment owned by the city and operated by municipal employees).

95. *Turner II*, 117 S. Ct. at 1203 (internal quotations and citations omitted).

96. *See Ward*, 491 U.S. at 797-98.

speech-enhancing consequences."[97] By juxtaposing the familiar *O'Brien* test with his own interpretation of *Ward*, Justice Breyer suggested that the governmental interests behind a regulation that promotes more speech than it burdens will necessarily be unrelated to the suppression of free speech because such a regulation will produce a net increase in speech. There are at least three reasons to reject this idea.

First, though such an explanation may render Justice Breyer's concurrence consistent with the letter of the *O'Brien* test, it does not enable Justice Breyer to explain the Court's past application of intermediate scrutiny. Neither *O'Brien* nor *Ward* undertook any sort of balancing of speech-enhancing and speech-restricting consequences. *O'Brien* evaluated a prohibition on the destruction of draft cards based on the nation's interest in the "smooth and proper functioning" of a system for raising armies.[98] *Ward* assessed New York City's control over sound amplification equipment for public concerts in Central Park based on governmental interests in protecting citizens from unwelcome noise and ensuring amplification adequate to reach all listeners within the concert grounds.[99] In each of these cases, the Court's application of intermediate scrutiny under the First Amendment hinged on its determination that the government interests involved were content-neutral.

Second, Justice Breyer's approach to free speech would permit legislatures to restrict speech that is protected under current precedent. For example, in *Buckley v. Valeo*,[100] the Court held invalid a cap on campaign expenditures by political candidates, reasoning that telling candidates how much they may speak reflects a government concern about the substantive content of their communication.[101] Under the approach championed by Justice Breyer's concurrence, a cap on such expenditures would be valid under the First Amendment so long as Congress could reasonably conclude that it would enhance equal participation in public debate,[102] and did not burden

97. *Turner II*, 117 S. Ct. at 1204 (Breyer, J., concurring) (citing *Ward*, 451 U.S. at 799-80).

98. *O'Brien*, 391 U.S. at 381.

99. *See Ward*, 491 U.S. at 800-01.

100. 424 U.S. 1 (1976) (per curiam).

101. *See id.* at 17.

102. The issue of campaign finance reform intersects directly with the question how to treat new communications media under the First Amendment. Proponents of spending

substantially more speech than necessary to achieve it goal of equal participation.[103] Moreover, under *Turner II*'s standard of deference to legislative fact-finding, Congress could easily assemble a record to demonstrate an important interest in equal access to candidacy and to predict that a mandatory spending limit would be an efficient means to that goal.[104]

The principle of speech-enhancement that Justice Breyer proposes in place of content-neutrality would allow legislatures to restrict speech in the guise of enhancing public debate. Congress might, for instance, enact a campaign spending limit that it claims enhances public awareness of and participation in politics, but in reality simply discourages wealthy eccentrics such as Steve Forbes or Ross Perot from threatening the established political order.[105] Such a limit might reasonably be defended as an enhancement of First Amendment interests or challenged as a burden on them. Under a standard of deference to the fact-finding and predictions of Congress, however, a reviewing court would likely be obliged to uphold such a limit under the First Amendment. Justice Breyer's approach would thus enable elected politicians to protect their own incumbencies under a cloak of promoting equal access to public deliberation.[106]

Finally, there are also strong reasons to doubt whether new technologies have rendered the average American helpless to participate in public debate, either as a speaker or a listener. Although Professor Fiss claims that the street-corner speaker is irrelevant in an era of mass media, and Justice Breyer believes that free speech principles must be altered to fit new communication technologies, it is far from evident that political speech will suffer in an era of television and cyberspace unless

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limits frequently justify them by pointing to the expense of purchasing television advertisements and by arguing that such advertisements stultify political discourse. *See* Kathleen M. Sullivan, Edward L. Barrett, Jr. Lecture on Constitutional Law, *Political Money and Freedom of Speech*, 30 U. C. DAVIS L. REV. 663, 684-85 (1997) (discussing the connection between television advertising and proposals for campaign reform).

103. *See Turner II*, 117 S. Ct. at 1204 (Breyer, J., concurring).

104. *See id.* at 1191; *cf.* Harold J. Krent, *Turning Congress Into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 736 (1996) (noting that a "skilled staffer" could ensure favorable judicial review of a federal statute under the Commerce Clause by including the right factual findings).

105. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L. J. 1049, 1072-74 (1996) (noting that *Buckley*'s rejection of mandatory spending limits made possible Ross Perot's 1992 presidential campaign).

106. *See* David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 158-59 (citing legislative motive and opportunity to protect incumbents as a reason to question campaign finance reform).

the government intervenes to assure access to speakers with a particular interest in public affairs. As Justice Charles Fried[107] has pointed out, advances in information technology have enhanced rather than diminished the ability of individuals and organizations to transmit their opinions to the public; the proponents of mandatory-access fear not that public-minded speakers will lose their voices, but that the public will not pay attention to them.[108]

The main line of the Court's free speech cases advances the notion that private individuals and organizations are the arbiters of public discourse.[109] The principal and dissenting opinions of *Turner II* share that notion. Justice Breyer, however, contends that the First Amendment authorizes the government not only to promote the dissemination of different points of view, but also to channel them in a way that promotes "public discussion" and "informed deliberation."[110] This interpretation of the First Amendment, combined with the discretion *Turner II* allows Congress in identifying the interests behind its regulations of speech, [111] would grant Congress dangerous and unwarranted latitude in determining the parameters of public discourse. Future decisions regarding the application of intermediate scrutiny should heed Justice O'Connor's warning that "it is government power, rather than private power, that is the main

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107. Associate Justice, Massachusetts Supreme Judicial Court.

108. *See* Fried, *supra* note 71, at 252 ("What this comes to, of course, is that what some on the left have to say is so boring or so unconvincing that people would rather watch *Wheel of Fortune*. But is that really *Wheel of Fortune*'s fault?").

109. *See, e.g., Buckley*, 424 U.S. at 57 ("In the free society ordained by our Constitution it is not the government, but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign."). The standard of private control over public discourse has often been justified on the theory that the First Amendment is designed to aid the search for truth by protecting a "marketplace of ideas." *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("Believing in the power of reason as applied through public discussion, [the founders] eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."); *see generally*, David M. Rabban, 50 U. CHI. L. REV. 1207 (1983) (examining the genesis of the First Amendment opinions by Justices Holmes and Brandeis, and their effect on subsequent free speech jurisprudence).

110. *Turner II*, 117 S. Ct. at 1204 (Breyer, J., concurring).

111. *See id.* at 1204-05.

threat to free expression"[112] and reject Justice Breyer's attempt to reinvent First Amendment jurisprudence.

Andre R. Barry

A JURISDICTIONAL VACUUM IN THE WAKE OF CAMPS NEWFOUND/OWATONNA?: *Camps Newfound/Owatonna v. Town Of Harrison*, 117 S. Ct. 1590 (1997).

Camps Newfound/Owatonna v. Town of Harrison[1] is the Supreme Court's latest attempt to define the division of power between the Congress and the States. In this case, the Court struck down a Maine real-estate tax as violating the dormant commerce clause because it unduly discriminated against interstate commerce. Consistent with much of the Court's jurisprudence in the area of commerce, the Court's decision is confusing and confused.[2] It leaves the States with troubling uncertainty as to what State legislation will withstand the Court's scrutiny. More importantly, the Court may have exceeded its powers by striking down the statute.

Dormant commerce clause jurisprudence depends entirely upon interpreting congressional silence in an area in which Congress has the authority to legislate. In the wake of its decision in *United States v. Lopez*,[3] the Court has not clarified whether Congress has the authority to pass legislation that impacts a state real-estate tax. Consequently, the Court's opinion in *Camps* may have created a regulatory vacuum by forbidding both Congress and the States to legislate.

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112. *Turner I*, 512 U.S. at 685 (O'Connor, J., dissenting).

1. 117 S. Ct. 1590 (1997).

2. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) ("The progression of our Commerce Clause cases from Gibbons to the present was not marked, however, by a coherent or consistent course of interpretation . . . ."); West Lynn Creamery v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) ("Applying [a self-executed dormant, or negative, commerce clause] is not always easy, since once one gets beyond facial discrimination, our negative-Commerce-Clause jurisprudence becomes (and has long been) a 'quagmire.'"); Hodel v. Virginia Surface Mining, 452 U.S. 264, 308 (1980) (Rehnquist, J., concurring) ("[O]ne could easily get the sense from this Court's [commerce] opinions that the federal system exists only at the sufferance of Congress."); Kassel v. Consolidated Freightways, 450 U.S. 662, 706 (1980) (Rehnquist, J., dissenting) ("We know only that . . . the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused.").

3. 514 U.S. 549 (1995).

Camps Newfound/Owatonna ("the Camp") is a non-profit entity, incorporated in Maine, and located in the town of Harrison ("the Town"). The Camp provides a religious summer camp for Christian Scientist children, 95 percent of whom are not residents of Maine.[4] A Maine statute gives charities that are incorporated in Maine and primarily benefit Maine residents a general exemption from real estate and personal property taxes.[5] If a charity does not principally benefit Maine residents, however, the tax relief diminishes.[6] To qualify for the exemption, a charity must not charge more than $30 per week per person. The Camp charges $400 per week per child and thus is not eligible for any tax exemption.[7]

The Camp filed suit in the Maine Superior Court, challenging the constitutionality of the exemption under the Commerce Clause. Both parties cross-appealed for summary judgment.[8] The Superior Court found for the Camp, holding that Maine denied the tax exemption because of the Camp's participation in interstate commerce.[9] Institutions serving non-residents faced higher operation costs from this denial that led to "'an impermissible distinction between in-state and out-of-state consumers.'"[10] The Town appealed,[11] and the Maine Supreme Judicial Court unanimously reversed.[12]

The Supreme Judicial Court focused its analysis on the theory of tax exemptions as "tax expenditures."[13] By choosing to exempt non-profit corporations that meet a certain criterion, the Maine legislature chose to "purchase" the charitable services

4. *See Camps*, 117 S. Ct. at 1594.

5. *See id.* Although the majority of the tax was on real estate, and this was the primary concern of the parties and the Court, a modest amount of personal property taxes were also at issue. *See id.* at 1594 n.1.

6. *See id.*

7. *See id.*

8. *See id.* at 1595.

9. *See Camps*, 117 S. Ct. at 1595.

10. *Id.*

11. The State, which had intervened below, did not appeal. *See* Camps Newfound/Owatonna v. Town of Harrison, 655 A.2d. 876 (Me. 1995).

12. The Camp cross-appealed on the denial of its Privileges and Immunities Clause and Equal Protection Clause claims in the Superior Court. The Supreme Judicial Court found that the statute did not violate the either the U.S. or Maine Constitutions on these grounds, and the Camp did not pursue the issue before the Supreme Court. *See id.* at 887, 880.

13. *Id.* at 878.

of that corporation.[14] To examine the statute at issue, the Supreme Judicial Court applied traditional commerce law analysis. Under this analysis, if a statute were facially discriminatory, the Supreme Judicial Court would subject it to a "per se rule of invalidity."[15] If, on the other hand, the statute were not facially discriminatory, the Supreme Judicial Court would apply a "flexible approach," weighing Maine's interest in the statute against the burden the statute placed on interstate commerce.[16]

The Supreme Judicial Court concluded that the statute did not discriminate between in-state camps and out-of-state camps, but rather distinguished among camps within Maine. Furthermore, benefits to the State outweighed the burden on interstate commerce.[17] Because the statute remained neutral on its face, the court applied a flexible test.[18] It weighed the local interest—that of promoting benefits and services of charitable institutions by reducing their taxes—against the burden on interstate commerce and concluded that the burden was not clearly greater than the legitimate state interest.[19]

The Camp appealed the decision, and the United States Supreme Court granted certiorari and reversed in a 5-4 decision. Justice Stevens wrote the majority opinion, in which Justices O'Connor, Kennedy, Souter, and Breyer joined. Justice Scalia wrote a dissenting opinion in which Justices Ginsburg and Thomas and Chief Justice Rehnquist joined. Justice Thomas wrote a dissenting opinion in which Justice Scalia joined and Chief Justice Rehnquist joined in part.

The Town raised several arguments in defense of the Maine statute in an attempt to remove the real-estate tax from the scope of the Commerce Clause. First, the case did not involve commerce.[20] The campers were not "articles of commerce," and the Camp's product, its unique religious environment, "'[was] delivered and consumed entirely within Maine.'"[21] Second,

14. *See id.*
15. *Id.*
16. *Camps*, 655 A.2d. at 878.
17. *See id.* at 879.
18. *See id.*
19. *See id.*
20. *See Camps*, 117 S. Ct. at 1596.
21. *Id.*

Congress lacked the authority to enact real-estate taxes.[22] Third, even if the Maine statute involved commerce, it fell within one of the exceptions to the dormant commerce clause. The tax exemption was either a government expenditure on charitable services and thus excluded from the Commerce Clause as an act of market participation,[23] or it was tantamount to a subsidy, which "'ordinarily impose[s] no burden on interstate commerce, but merely assist[s] local business.'"[24] Because the exemption is the functional equivalent of a subsidy, it must also be acceptable state legislation.[25]

The majority phrased the question as, "whether an otherwise generally applicable state property tax violates the Commerce Clause of the United States Constitution . . . because its exemption for property owned by charitable institutions excludes organizations operated principally for the benefit of nonresidents."[26]

The Court summarily rejected the idea that the Camp did not engage in commerce.[27] The Camp engaged in commerce as a purchaser of goods and as a provider of goods and services.[28] It advertised in periodicals that originated in other states, and it sent recruiters across the country.[29] In turn, campers responded by crossing state lines into Maine to consume the goods and services.[30] The Camp's activities implicated the Commerce Clause because service to out-of-staters had an effect on interstate commerce.[31]

Justice Stevens then addressed the argument that the dormant commerce clause does not apply to a real-estate tax issue because Congress cannot pass a national real-estate tax.[32] Even

22. *See id.* at 1597. The first argument is that Congress cannot regulate the Camp because the Camp's activities are not sufficiently interstate. The second argument is that Congress cannot override the State's tax because Congress lacks the authority to pass its own real-estate tax. *See infra* text at 298-99 for a discussion of this second point.

23. *See Camps*, 117 S. Ct. at 1604-05.

24. *Id.* at 1605 (quoting the Town's argument, which quotes West Lynn Creamery v. Healy, 512 U.S. 186, 199 (1994)).

25. *See id.*

26. *Id.* at 1593-94.

27. *See id.* at 1596 (citing United States v. Lopez, 514 U.S. 549, 558-59 (1995); Katzenbach v. McClung, 379 U.S. 294, 300-01 (1964)).

28. *See Camps*, 117 S. Ct. at 1596.

29. *See id.*

30. *See id.*

31. *See id.* at 1597.

32. *See id.*

assuming that Congress lacked the affirmative power to tax in this instance, the States may not apply taxes "'in a manner that discriminates against interstate commerce.'"[33] To decide otherwise would eviscerate the "barrier against protectionism that the Constitution provides" by allowing a State to change the name of its discriminatory tax.[34] If Commerce Clause jurisdiction excluded real-estate taxes, then a State could levy a real-estate tax "on property used to store, process, or sell imported goods . . . [and thus] create the functional equivalent of an import tariff."[35]

After concluding that the statute implicated the Commerce Clause, the Court held that the statute facially discriminated against interstate commerce and was thus "'virtually per se invalid'"[36]:

> The Maine law expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business.[37]

One of the "central purposes of . . . negative Commerce Clause jurisprudence" is preventing economic isolation.[38] Rejecting the Town's argument that the dormant commerce clause concerns the protection of out-of-state producers only, the Court found that impermissible protection can come both in the form of preferences to local merchants and advantages to local consumers.[39] "[I]t matters little that it is the camp that is

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33. *Camps*, 117 S. Ct. at 1597.

34. *Camps*, 117 S. Ct. at 1597.

35. *Id.* at 1598.

36. *Id.* at 1598 (citing Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (internal citations omitted)). In contrast, both the Supreme Judicial Court and Justice Scalia concluded that the statute did not discriminate against interstate commerce on its face, and thus that the more lenient balancing test was proper. *See supra* text at 290; *infra* text at 294-95.

37. *Camps*, 117 S. Ct. at 1598.

38. *Id.* at 1599.

39. *See id.* If a State were to pass a statute forbidding camps from serving non-residents, there would be little doubt that it was invalid, because the Court has consistently found that a state may not mandate a preferred right for its own citizens to natural resources or derivatives thereof. *See id.* at 1598. Part of the product of the Camp is the "natural beauty of Maine itself"; therefore the State impermissibly burdened access to this natural resource for out-of-state residents. *See id.*

taxed rather than the campers . . . . the economic incidence of the tax falls at least in part on the campers . . . ."[40]

Furthermore, the Court saw no distinction between a discriminatory tax on a particular activity and the denial of a generally available tax benefit.[41] A State could not, therefore, provide a tax credit for domestically produced products and not for products produced in certain other States.[42] Because "the burden of Maine's facially discriminatory tax scheme falls by design in a predictably disproportionate way on out-of-staters, the pernicious effect on interstate commerce is the same as in our cases involving taxes targeting out-of-staters alone."[43]

The Court next rejected the argument that the tax benefit was a government expenditure and thus exempt from the dormant commerce clause because the government either provided a legitimate discriminatory subsidy or acted as a market participant by "purchasing" charitable services for the Town.[44] Justice Stevens maintained that a "constitutionally significant difference [exists] between subsidies and tax exemptions."[45] The fact that a tax exemption performs fundamentally and deliberately the same function as a subsidy does not make the Town a market participant.[46] Through the exemption, the Town assesses taxes; it does not purchase or sell charitable activities.[47]

In conclusion, the Court noted that history and interests of "national solidarity" dictate that even the smallest forms of discrimination must not stand.[48]

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40. *Id.* at 1600. The Town argued that the record does not show that any camper chose not to attend because of the real-estate tax, and the Supreme Judicial Court of Maine found this persuasive. Justice Stevens, however, declared that the Commerce Clause allows no "de minimis" defense, and therefore a showing of particular harm is unnecessary. *See id.* at 1651 n.15.

41. *See id.* at 1599.

42. *See Camps*, 117 S. Ct. at 1599-1600.

43. *Id.* at 1600.

44. *See id.* at 1604-05.

45. *Id.* at 1605.

46. *See id.* at 1606-07.

47. *See Camps*, 117 S. Ct. at 1607. The Court also addressed whether the non-profit status of the Camp had an effect on the dormant commerce clause analysis. The Court found no basis for not applying the Commerce Clause, in all its forms, to for-profits and non-profits alike. *See id.* at 1602-03. "For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory." *Id.* If there is a need to create an exception to this rule for non-profits, Congress has the power to do so and is better qualified than the Courts. *See id.* at 1604.

48. *Id.* at 1608.

Justice Scalia began his dissent by criticizing the extent to which the dormant commerce clause jurisprudence has strayed from its theoretical underpinnings.[49] The purpose of the dormant commerce clause, Justice Scalia explained, is to create free access to state markets for all domestic producers.[50] In the effort to protect the national market, the Court must take care not to infringe on the States' ability to legislate for the "health, life, and safety of their citizens."[51] The case law has been an attempt to "develop a set of rules" that would respect both these objectives.[52]

Justice Scalia then explained that, properly viewed, the Maine statute creates a narrow exemption for organizations that provide services the state might otherwise provide.[53] To Justice Scalia, relieving the state of social costs is a "particular state interest deserving of exemption" and will not harm the national market.[54] He likened tax breaks to purchasing services and noted that "it is certainly reasonable to think that property gratuitously devoted to relieving the state of some of its welfare burden is not similarly situated to property used 'principally for the benefit of persons who are not residents of [the State].'"[55] He continued by saying that regardless of whether the majority is correct and the statute is facially discriminatory, the Court failed to analyze whether the tax relief to charities designed to ease the State's welfare burden was a sufficiently compelling, nonprotectionist, interest at stake.[56] He found the statute no more protectionist "[than] any state law which dispenses public assistance only to the State's residents."[57]

Justice Scalia asked whether, even if this statute were facially discriminatory and its policy justifications were insufficient to

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49. *See id.* (Scalia, J., dissenting).

50. *See id.* at 1608.

51. *Id.* (quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443-44 (1960)).

52. *Camps*, 117 S. Ct. at 1608 (Scalia, J., dissenting).

53. *See id.* at 1609.

54. *Id.* at 1610 n.1.

55. *Id.* at 1611 (citing ME. REV. STAT. ANN. tit. 36 § 652(1)(A) (West 1990)) (emphasis supplied by Justice Scalia).

56. *See id.*

57. *See Camps*, 117 S. Ct. at 1612 (Scalia, J., dissenting). Justice Scalia also asserted that the question was not whether the State was regulating or not regulating, but whether the regulation was protectionist. If the regulation were discriminatory but not protectionist, the State would have no obligation to recast its statute in a nonregulatory way. *See id.* at 1612 n.3.

save it, the Court should nonetheless create an additional exemption from the dormant commerce clause.[58] "In my view, the provision by a State of free public schooling, public assistance, and other forms of social welfare to only (or principally) its own residents—whether it be accomplished directly or by providing tax exemptions, cash or other property to private organizations that perform the work for the State—implicates none of the concerns underlying our negative-commerce-clause jurisprudence."[59]

Justice Thomas dissented from the Court's opinion, asserting that the majority unwisely and unnecessarily expanded the jurisprudence of what he prefers to call the "negative commerce clause," which he believes has no constitutional foundation and is unworkable.[60] Rather than using the negative commerce clause, he argued that the proper test for adjudicating the validity of state taxes is the Import-Export Clause. Furthermore, he believed that under either clause, the Maine statute is valid.[61] "The tax at issue here is a tax on real estate, the quintessential asset that does not move in interstate commerce."[62]

Although the dissenting opinions in *Camps* are very powerful, they do not address the most serious flaw in the majority opinion: the Court may not have had jurisdiction to strike down the Maine statute. By doing so, the Court may have made the unfortunate mistake of stripping *both* Congress and the States of regulatory power in areas of law where commerce powers are marginal or uncertain. The focus of this Recent Development is to examine this flaw and analyze its consequences for further dormant commerce clause cases.

The landmark decision of *United States v. Lopez*[63] not only altered the scope of congressional authority in interstate commerce, but had a corresponding impact on the jurisdiction of the federal courts in judging state statutes that affect commerce, an impact this article refers to as the "*Lopez* Corollary." This Corollary imposes a jurisdictional hurdle that the Court did not address in the *Camps* decision. Failure to

58. *See id.* at 1613.
59. *Id.* at 1614.
60. *See id.* at 1614 n.1, 1615 (Thomas, J., dissenting).
61. *See id.* at 1615.
62. *See Camps*, 117 S. Ct. at 1614 (Thomas, J., dissenting).
63. 514 U.S. 549 (1995).

articulate how the Court should overcome this hurdle in each case could lead to a vacuum in which the Court removes all regulatory authority save its own.

Conducting the jurisdictional analysis in retrospect does little to alleviate this anxiety, because the scope of *Lopez* is unclear and thus the analysis is necessarily incomplete. The extent of the limits on Congress under *Lopez* is the height of the jurisdictional hurdle for the Court. The conclusion that emerges, therefore, is that the Court must elaborate on the *Lopez* holding. By doing so, not only will Congress have a clearer idea of its authority, but state legislators and federal courts will have a clearer idea of theirs.

Although *Camps* is a case about state taxing authority, it evokes the larger debate about the definition of commerce, which itself is merely a surrogate for the federalism question of whether Congress or the States ought to govern in any given sphere.[64] The *Lopez* decision had an enormous impact on this question. For the first time since *Carter v. Carter Coal Co.*[65] in 1936, the Court struck down an act of Congress because it was beyond the scope of the Commerce Clause. In a 5-4 decision, the Court in *Lopez* upheld the Fifth Circuit's declaration that Congress had exceeded its powers when it passed a criminal statute forbidding the possession of guns in or near schools.

Reintroducing the concept of congressional limits, however, also affected the dormant commerce clause, because the

64. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895) (concluding that Congress could not regulate the manufacture of goods but only the interstate transport); Swift and Co. v. U.S., 196 U.S. 375 (1905) (adopting the "stream of commerce test" to judge congressional regulations); NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937) (developing the "substantial effects" test for congressional action under the Commerce Clause and abandoning all categorical approaches); *see also* Steven A. Delchin, *Note: Viewing the Constitutionality of the Access Act through the Lens of Federalism*, 47 CASE W. RES. L. Rev. 553, 566 (1997) ("These conflicting approaches toward articulating a limit on Congress' Commerce Clause powers... left in place an uneasy substructure teetering and unstable under the weight of growing congressional exercises of power. In retrospect, these approaches left the constitutional landscape littered with discarded doctrines and a hesitancy toward categorical approaches to the commerce clause.").

Another area in which the Court has struggled with the division of power between the States and Congress arose when states accused Congress of "commandeering" their governmental processes. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997) (striking portions of the Brady Act, which directed state executive officers to implement federal regulations involving handguns); New York v. United States, 505 U.S. 144 (1992) (striking the portion of the congressional act requiring the States to either take title of waste or comply with congressional directives).

65. 298 U.S. 238 (1936).

authority of the Court to adjudicate dormant commerce clause issues has its origin in the commerce power. The dormant commerce clause is not a textual part of the Constitution. It stems, rather, from the grant of plenary power to Congress to regulate interstate commerce.[66] This plenary power serves as an affirmative bar against the States.[67] When the States choose to act in a manner inconsistent with the granting of interstate commerce power to Congress, the courts have presumed jurisdiction to strike down the offending statute.[68] Congress can, however, use its plenary power to reverse the Court by enacting legislation supporting the previous action by the State.

> [The important cases] are the ones involving situations where the silence of Congress or the dormancy of its power has been taken judicially, on one view or another of its constitutional effects, as forbidding state action, only to have Congress later disclaim the prohibition or undertake to nullify it. Not yet has this Court held such a disclaimer invalid or that state action supported by it could not stand. On the contrary, in each instance it has given effect to the congressional judgment contradicting its own previous one.[69]

So long as the congressional action legitimately falls within the commerce power and suffers no other constitutional defect, the will of Congress is supreme.[70]

The implied impact of *Lopez* for the dormant commerce clause is that if Congress has no supremacy because it has no authority, then the Court has no jurisdiction. Therefore, if the Court intends to invalidate on dormant commerce clause grounds, it must first show that Congress has the authority to regulate under the Commerce Clause.

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66. U.S. CONST. art. I, § 8, cl. 3. ("The Congress shall have Power to . . . regulate Commerce with foreign nations, and among the several States, and with the Indian tribes.").

67. *See, e.g.*, Freeman v. Hewit, 329 U.S. 249, 252 (1946) (citing Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945); Morgan v. Virginia, 328 U.S. 373 (1946)).

68. *See* Kassel v. Consolidated Freightways, 450 U.S. 662, 669 (1980).

69. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423-24 (1946); *see also, e.g.*, Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992) ("[T]he underlying issue is . . . one that Congress has the ultimate power to resolve. No matter how much we evaluate the burdens . . . on interstate commerce, Congress remains free to disagree with our conclusions.").

70. *See* C & A Carbone v. Clarkstown, 511 U.S. 383, 410 (1994) (O'Connor, J., concurring) ("It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends state and localities to implement flow control, we will, of course, defer to that legislative judgment.").

In the *Camps* decision, Justice Stevens said, for the majority, "We may assume as the town argues (though the question is not before us) that Congress could not impose a national real estate tax."[71] By presuming Congress lacked authority, however, Justice Stevens may have presumed away the Court's ability to overturn the state statute. Justice Stevens avoids this question and relies solely on *Pennsylvania v. West Virginia*[72] for the proposition that even if Congress lacks the power to pass a national real-estate tax, "[i]t does not follow that the State may impose real-estate taxes in a manner that discriminates against interstate commerce."[73]

Pennsylvania v. West Virginia is a case that did not question congressional power. West Virginia had placed restrictions on the sale of natural gas, which Pennsylvania and other neighboring States believed would curtail the supply into their territory and interfere with pre-existing sales contracts for that supply.[74] Insofar as natural gas is actually an item in interstate commerce, Congress has clear authority to regulate its transport.[75] The Court's summary of the petitioners' argument stated, "The Commerce Clause establishes, *in the absence of congressional action to the contrary*, the right to free trade between the states."[76] Similarly, the Court's summary of the defense argued, "the *Congress not having acted*, even in respect of interstate transportation," the States had the power to regulate.[77] Furthermore, the Court had independent jurisdiction because the dispute was between two States, and the Court has the power to adjudicate the rights of States vis-à-vis one another.[78] Therefore, the authority of Congress was not an issue in *Pennsylvania v. West Virginia*, as it is in the instant case. To the

71. *Camps*, 117 S. Ct. at 1597.

72. 262 U.S. 553 (1923).

73. *Camps*, 117 S. Ct. at 1597.

74. *Pennsylvania v. West Virginia*, 262 U.S. at 581.

75. *See Prudential*, 328 U.S. at 422 (rejecting a similar argument against discriminatory powers of Congress). "Fundamentally, [Prudential] maintains that the Commerce Clause 'of its own force' without reference to any action by Congress, whether through its silence or otherwise, forbids discriminatory State taxation of interstate commerce. . . . Merely to state the position that way compels its rejection." *Id.*

76. *Pennsylvania v. West Virginia*, 262 U.S. at 565.

77. *Id.* at 571.

78. *See* U.S. CONST. art. III, § 2, cl. 1 (establishing that the federal judicial power shall extend, among other things, to "Controversies between two or more States").

extent that a contrary reading could actually support the proposition that there are areas of Commerce in which neither the Congress nor the States have the authority to regulate, this reading must surely be incorrect. Such a conclusion would remove all policy-making authority from legislatures and deposit it with the Court.

By assuming away the power to pass a national real-estate tax in the *Camps* case and never addressing how Congress *could* act, the Court fails to answer the fundamental question of jurisdiction. The implications of this failure are ominous. The Court could, theoretically, forbid Congress to act in a given area under the *Lopez* analysis and then forbid the States to act in the same area by ignoring the jurisdictional vacuum that *Lopez* creates. The only regulatory body, then, would be an overreaching Court.

To determine whether overreaching occurred in *Camps*, a retrospective analysis of congressional power is necessary. Assuming, as the Court did, that Congress lacks the power to pass a national real-estate tax, in what other form could Congress legislate so as to prevent the States from passing a real-estate statute of the kind in this case? Of course Congress could pass a general law stating that no state shall tax in such a manner as to burden interstate commerce or travel. Such a construction, however, would be merely a restatement of the authority of Congress and would prove too much. "Now the power to regulate Commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature."[79] Without more specificity, the policy-making power would still lie with the judiciary.

An analogy that helps to explain why Congress must legislate narrowly is that of a basket of sticks. The basket is the Commerce Clause, and it belongs to Congress. The individual sticks within the basket are the pieces of the commerce power. Congress has the power to use, or not use, any of the individual sticks in the basket. If Congress does not use them, the States may borrow them until such time as Congress does use them. Congress may also pass legislation that explicitly grants to the States the privilege of borrowing sticks or that reserves to itself the sole

79. Cooley v. Board of Wardens, 53 U.S. 299, 319 (1851).

ability to use a particular stick, even if the States' use does not interfere with congressional use.

If Congress does not use a stick or pass legislation reserving the exclusive use of the stick, the Court may decide, under the dormant commerce clause, that the States ought not to borrow certain sticks. Because the sticks belong to Congress, though, Congress can overrule the Court and allow the States to continue to borrow. The question in the *Camps* case is which stick, if any, has Maine borrowed? Put another way, what statute, related to the *Camps* issue, could Congress have passed?

One possible statute that Congress could have passed is similar to the disputed legislation in *Prudential Ins. Co. v. Benjamin*,[80] in which the Court upheld a state tax on foreign insurance companies as a cost of doing business. Similarly, Congress could, under a federal interstate charity or non-profit act, authorize any state taxes on charities or non-profit organizations.[81] One crucial difference between the statute at issue in *Prudential* and the Maine statute, however, is that discrimination in the former was between in-state and out-of-state insurance companies. In *Camps*, all the relevant entities were incorporated and located within Maine.

Can Congress regulate to affect the treatment of local Maine charities in the wake of *Lopez*? The distinctions between the *Prudential* legislation and the hypothetical *Camps* statute would be even more pronounced if the hypothetical non-profit act were to reserve regulatory power to Congress exclusively, although the powers to reserve to itself and to grant to the states are theoretically identical. Under this construction, could Congress actually reserve to itself the exclusive right to tax and regulate charitable and non-profit corporations incorporated and residing wholly within an individual state?

The decision in *Lopez* outlined three areas in which Congress can regulate within the scope of the Commerce Clause. First, Congress can regulate channels of interstate commerce,

80. 328 U.S. 408 (1946).

81. *See* Hodel v. Virginia Surface Mining, 452 U.S. 264, 290 (1980) ("A wealth of precedent attests to Congressional authority to displace or pre-empt State law regulating private activity affecting interstate commerce when these laws conflict with federal law. Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all—and not just inconsistent—state regulations of such activities." (internal citations omitted)).

including the moral uses thereof.[82] Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[83] Finally, Congress may regulate activities "having a substantial relation to interstate commerce."[84]

If Congress were to legislate affirmatively so as to pre-empt the Maine statute (to take back the stick), such legislation would not easily fall into either of the first two categories. An act regulating or taxing non-profits or charities, or reserving the exclusive right to regulate and tax, would neither involve interstate channels nor instrumentalities or people traveling in commerce.[85]

Although the Court does not explicitly say so, the majority opinion seems to indicate that it believes *Camps* to be a "channels" case. It refers extensively to the opinion in *Heart of Atlanta Motel Inc. v. United States*,[86] which addressed Congress's affirmative commerce powers.[87] At issue in *Heart of Atlanta*, was a federal law regulating local business activities. The Court held that insofar as these businesses facilitated travel, they were clearly "channels" of interstate commerce. In the *Camps* scenario, on the other hand, Congress would be regulating a tax imposed by the State, a step removed from regulating the activity of the Camp. Even if the Camp were part of a channel of commerce because of children crossing state lines, the real-estate tax is not such a channel.[88] Thus, although Congress might regulate the Camp as a "channel," the question remains whether it could pass regulations pertaining to a stationary state

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82. *See* United States v. Lopez, 514 U.S. 549, 558 (1995) (citing Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 256 (1964); United States v. Darby, 312 U.S. 100, 114 (1941)).

83. *Id.* (citing Perez v. United States, 402 U.S. 146, 150 (1971); Shreveport Rate Cases, 234 U.S. 342 (1914); Southern Ry. Co. v. United States, 222 U.S. 20 (1911)).

84. *Id.* (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

85. By "instrumentalities," the Court means methods of travel such as aircraft or railways. *See infra* note 88.

86. 379 U.S. 241 (1964).

87. The Court compared a summer camp to a hotel that services interstate travelers. *See Camps*, 117 S. Ct. at 1597. The activities of a hotel that advertises across state lines, even though its services are all consumed locally, substantially affect interstate commerce. Private racial discrimination at such a hotel "imped[es] interstate commerce in the form of travel." *Id.* "Official discrimination that limits the access of nonresidents to summer camps creates a similar impediment." *Id.*

88. If the real-estate tax were somehow part of a "channel," then category one of *Lopez* would be so broad as to nearly eliminate the need for any other category.

real-estate tax which, by definition, is wholly intrastate. This question requires an analysis under the third *Lopez* category.

To fall within the third category of acceptable legislation, the activity that Congress wished to regulate would have to "'substantially affect[ ]' interstate commerce."[89] The activity that Congress would regulate or tax in the present hypothetical is that of non-profit/charitable corporations, which includes the movement of children across state lines. Congress would have to prove that its regulation was so extensive as to pre-empt the allegedly offensive state real-estate tax.[90] To do this, Congress would have to show that the hypothetical tax "'substantially affects' interstate commerce."[91]

For an activity to "substantially affect" commerce it must have more than a tenuous relationship to commerce. Congress must be able to point to an economic impact without resorting to a chain of events that would sweep in most every human activity. The Court in *Lopez* reasoned,

> The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population.... Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe.... The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse

89. United States v. Lopez, 514 U.S. 549, 559 (1995).

90. The analysis would be much simpler if one could assume that Congress did have the power to pass a national real-estate tax. If that were true, Congress could declare that its tax would simply supersede the state tax. In the end, however, the questions are largely the same, because to pass a national real-estate tax, Congress must demonstrate that the tax has a "substantial affect" on interstate commerce. *Cf. id.* at 569 (Kennedy, J., concurring) ("[T]he Court embraced the principle that the States and the National Government both have authority to regulate certain matters absent the congressional determination to displace local law or the necessity for the court to invalidate local law because of the dormant national power.").

91. "[T]he Commerce Clause... granted Congress express authority to override *restrictive and conflicting commercial regulations* adopted by the States." *Camps*, 117 S. Ct. at 569 (emphasis added). Leaving aside the purpose of the "and" in the previous sentence, both the restriction and the conflict refer to interference with congressional interstate commerce powers. The test for congressional power, in turn, is that it regulates an activity which "substantially affects interstate commerce." *Lopez*, 514 U.S. at 559.

> effect on the Nation's economic well-being. . . .
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> . . .
>
> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . This we are unwilling to do.[92]

Thus, the *Lopez* Court essentially found too many inferential steps between guns in school and commerce. "[The Gun-Free School Zones Act] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[93]

If *Lopez* requires Congress to show a substantial effect between the activity it wishes to regulate under the Commerce Clause and commerce, then the *Lopez* Corollary requires that, before the Court may strike down a state law on dormant commerce clause grounds, it must show a sufficient connection between the offending state legislation and commerce *such that Congress could regulate under the Commerce Clause.*

The status of the jurisdictional analysis in *Camps*, therefore, depends on the scope of *Lopez*. Since the Court announced the *Lopez* decision in 1995, however, the legal community has engaged in a debate over just what that scope is.[94] The only conclusion arising from this debate so far is that *Lopez* has re-created some boundaries on the affirmative powers of Congress within the Commerce Clause. What these limits are, and how far they extend, however, remains unclear.

Often congressional authority, and thus judicial authority, will be obvious. For example, if Maine had passed a real-estate tax on only foreign corporations doing business in Maine, it would automatically implicate congressional power because Congress can regulate the interstate flow of goods. Such a tax would act as a tariff on those goods.[95] Similarly, if the State were to tax children for crossing into Maine, this statute would fall within

92. *Id.* at 567-68.

93. *Id.* at 561.

94. *See generally, e.g.*, Symposium, *The New Federalism After United States v. Lopez: Introduction*, 46 CASE W. RES. L. REV. 635 (1996).

95. *Cf.* West Lynn Creamery v. Healy, 512 U.S. 186, 210-11 (1994) (Scalia, J., concurring) (agreeing that the Court should strike statutes that are functionally the same as a discriminatory tax on interstate commerce).

congressional powers under the authority to regulate "channels."[96] It, too, would be the equivalent of a border tax.[97] The tax in *Camps*, however, does not function as a uniform border tax like the two previous examples. Non-resident children will face this "tariff" not because they cross state lines, but because they choose one particular domestic camp instead of another that serves a greater number of local residents.

Perhaps it does follow from these examples that Congress can pre-empt a real-estate tax on domestic corporations because a charity accepts business from out-of-state.[98] This assertion is uncertain, because *Lopez* offers little guidance to lawmakers. To the extent that non-resident children are no worse off than local children, and to the extent that this camp does not compete with other local camps for business because of its unique religious nature, *Camps* is far from the paradigmatic border tax.[99] Of course, the difference between a paradigmatic border tax and any statute which uses state residence as a distinction is merely one of degree, but "[the law] cannot be indifferent to [considerations of degree] without an expansion of the Commerce Clause that would absorb the reserve power of the states."[100]

If Congress does not have the authority to pass a statute regulating a particular activity, then the Court lacks jurisdiction to strike down, on commerce grounds alone, a state statute that regulates that activity. The Court can only interpret

96. *See* Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 255-56 (1964).

97. *See* Camps Newfound/Owatonna v. Town of Harrison, 655 A.2d. 876, 879 (Me. 1995) (stating that the legislature did not intend for the statute to "affect the number of out-of-state campers attending summer camps within Maine"). Additionally, the tax exemption was not likely to trigger retaliation from other States because it did not increase cost to out-of-state charities, and it did not force them to abandon the Maine market. See *id.*

98. Even if Congress does have the power to enact a statute so broad as to pre-empt state property taxes, there would be at least a question as to whether the Tenth Amendment would act as an affirmative bar to this power. *See* Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992). *But see* Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976), and rejecting the doctrine of "traditional" state functions as unworkable). The scope of the *New York* and *Printz* precedents beyond actual "commandeering" of the state's governmental functions is probably limited. The Court's use of the Tenth Amendment at all as a block on legitimate congressional action, however, raises some concern over our hypothetical federal law on charities and nonprofits.

99. *See supra* note 97.

100. Carter v. Carter Coal Co., 298 U.S. 238, 327 (1936).

congressional silence if Congress has something to be silent about. If the Court nonetheless assumes jurisdiction, it creates a situation in which Congress is powerless to overturn a policy choice it could not affirmatively pass. Consequently, the Court could very well usurp economic policy-making by forbidding the States to regulate activities Congress is also forbidden to regulate.

The ultimate concern, then, is guidance as to what *Lopez* means. Congress might have had the power to pre-empt the Maine statute at issue in the *Camps* case. Then again, it may not. Regardless, lawmakers need to know. *Lopez* is a landmark case that has re-opened many aspects of the federalism debate. Even if its holding is ultimately quite narrow, it has had a tremendous impact. Authoritative explanations of this case are crucial for understanding the powers of the courts, the States, and Congress. Instead of an authoritative explanation, however, the *Camps* case is silent as to the role of Congress, and thus has added a new level of confusion to an already muddy debate.

Karin J. Kysilka