RECENT DEVELOPMENTS

THE EVER MORE COMPLICATED "ACTUAL INNOCENCE" GATEWAY TO HABEAS REVIEW: *Schlup v. Delo*, 115 S. Ct. 851 (1995).

As the Republican-controlled Congress considers proposals to streamline the criminal justice system[1] and the nation debates the proper balance of power between the States and the federal government,[2] the Supreme Court continues to labor over the issue of federal habeas corpus review for actually innocent state prisoners. In *Herrera v. Collins*,[3] the Court erected barriers to capital prisoners who sought habeas review on actual innocence grounds, but who did not also claim a constitutional deficiency at trial.[4] This Term, in *Schlup v. Delo*,[5] the Court lowered the barrier for capital prisoners who use actual innocence as a gateway to habeas review. Although the Court's precedents support this holding, *Schlup* adds yet another twist to the already confusing and inconsistent law of habeas corpus. Instead, the Court should have started from scratch and created a new, common-sense actual innocence standard that considers only whether the petitioner committed the crime.

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1. *See, e.g.*, Kenneth J. Cooper, *House Substitutes Block Grants for Police Hiring Funds*, WASH. POST, Feb. 15, 1995, at A1 (reporting passage in the House of Representatives of bills to relax the exclusionary rule, to place time limits on capital habeas appeals, and to speed the deportation of illegal immigrants who commit serious crimes); Ann O'Hanlon, *The Contract with America: Where it Stands*, WASH. POST, Feb. 13, 1995, at A19 (reporting that exclusionary rule reform and habeas corpus appeals reform bills have passed the House).

2. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that Congress's power to regulate interstate commerce does not extend to a prohibition of bringing a gun into a school zone); Ann Devroy & Helen Dewar, *Hailing Bipartisanship, Clinton Signs Bill to Restrict Unfunded Mandates*, WASH. POST, Mar. 23, 1995, at A10 (reporting that President Clinton signed into law a bill to restrict the imposition of unfunded mandates upon the States); Helen Dewar, *Senate Votes to Limit Unfunded Mandates*, WASH. POST, Jan. 28, 1995, at A1, A1 (describing a bill to limit unfunded mandates as "a key part of the GOP effort to shrink the federal government and return power, responsibilities and dollars to states and municipalities"); John M. Goshko, *States Conference Encounters Resistance; 'Extreme' Groups Allege Initiative Would Lead to Constitutional Changes*, WASH. POST, Mar. 27, 1995, at A17, A17 (describing a "Conference of the States to reshape the federal-state relationship by getting Washington to dictate less and share power more" tentatively planned for Philadelphia in October); *'We Will Continue in Our Drive to Return Power to Our States and Our People,'* WASH. POST, Jan. 5, 1995, at A10 (reporting that Senate Majority Leader Bob Dole wishes to "restore" the Tenth Amendment and return power to the States in such areas as spending and crime control).

3. 113 S. Ct. 853 (1993).

4. The Court did not reach the question whether a federal court could overturn a state conviction solely on actual innocence grounds, but did hold that even if the federal courts did have such an ability, "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.* at 869.

5. 115 S. Ct. 851 (1995).

Lloyd Eugene Schlup and two other white inmates were accused of murdering Arthur Dade, a black inmate, on February 3, 1984. At trial, two corrections officers identified Schlup as the assailant who immobilized Dade while Robert O'Neal stabbed him.[6] Schlup maintained that he was not involved in the attack. His defense featured a videotape that showed him arriving at the prison dining hall sixty-five seconds before Dade's murder caused a general distress call and ninety-one seconds before O'Neal ran into the room.[7] Both sides agreed that the timing of the distress call is of utmost importance. Schlup insisted that the call was sounded soon after the murder, and thus he could not have had time to commit the murder and arrive at the dining hall when he did.[8] At trial, the State of Missouri introduced evidence that several minutes had passed before the distress call was sounded.[9] The jury convicted Schlup.

At the penalty phase,[10] the State introduced two aggravating factors that warranted the death penalty. The first, that the murder was committed in a prison, was undeniable.[11] The second was that Schlup had "a substantial history of serious assaultive convictions."[12] The State presented evidence that Schlup had been convicted previously for slitting a cellmate's throat and that "for two weeks, [he] had brutally beaten, tortured, and sodomized a cellmate in a county jail."[13] Schlup's attorney introduced evi-

6. *See id.* at 854-55.

7. *See id.* at 855.

8. The State introduced evidence that it would take the average man thirty-three seconds to run from the scene of the murder to the dining hall, and about one minute and thirty-seven seconds to walk it. *See id.* at 856. Thus, the State argued that a ninety-eight second delay between the murder and the distress call would be enough for Schlup to run to the dining hall, and a two minute, forty-two second delay would be enough for Schlup to walk to the dining hall.

9. Sergeant Robert Flowers, who witnessed the slaying, testified that none of the officers on the prison floors had radios. He decided to subdue Rodnie Stewart, the third assailant, before trying to sound the distress call. He testified that this took "a couple [of] minutes." *Id.* at 856. Captain James Eberle testified that another minute passed between the time that Flowers brought Stewart to him and when he radioed for help. *See id.* at 856. Since the call only had to be at least ninety-eight seconds after the murder for Schlup to be involved, *see supra* note 8, this evidence was consistent with the State's theory.

10. Missouri has a bifurcated system for capital cases, which means that the penalty is determined at a hearing conducted after guilt has been determined. *See* MO. REV. STAT. § 565.006 (West 1979). Missouri repealed this law in 1984 and replaced it with a similar statute. This Recent Development will refer only to the Missouri criminal statutes applicable at the time of the murder.

11. *See Schlup*, 115 S. Ct. at 871 (Rehnquist, C.J., dissenting); MO. REV. STAT. § 565.012.2(9).

12. MO. REV. STAT. § 565.012.2(1).

13. *Schlup*, 115 S. Ct. at 871 (Rehnquist, C.J., dissenting). The Missouri Supreme Court characterized the incident as involving "vile, sordid, repulsive conduct . . . so base and vile

dence of Schlup's horrible childhood as a mitigating factor.[14] The jury sentenced Schlup to death.

Schlup has a long history of postconviction litigation.[15] His most important issue has been an ineffective counsel claim.[16] He raised this when he unsuccessfully appealed the conviction[17] and then he sought state postconviction relief on it. When the state trial court denied his petition, Schlup failed to raise the issue on appeal, and the Missouri Supreme Court again affirmed his conviction and punishment.[18]

Schlup then raised the ineffective counsel claim in a pro se federal habeas corpus petition.[19] The district court concluded that Schlup's failure to raise the issue on the state postconviction appeal barred the federal courts from considering it.[20] The Eighth Circuit disagreed and considered the ineffective counsel

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that we believe there could be no social benefit from copying it in detail into this public opinion." State v. Schlup, 724 S.W.2d 236, 239 (Mo. 1987). At the time of the murder, Schlup already was serving a life sentence and had been convicted of first degree assault, two counts of second degree assault, and two counts of sodomy. *See id.* at 240.

14. *See* Schlup v. Armontrout, 941 F.2d 631, 639 n.9 (8th Cir. 1991). It is unclear which statutory mitigating factor was being asserted. *Compare* MO. REV. STAT. § 565.012.3 (listing mitigating factors) *with* MO. REV. STAT. § 565.012.1(3) (stating that the sentencer may consider "[a]ny mitigating or aggravating circumstances otherwise authorized by law").

15. Many capital prisoners have a long history of postconviction litigation. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 503-06 (1991) (Appendix to opinion of the Court) (detailing Zant's history of postconviction litigation).

16. Many commentators consider ineffective assistance of counsel a common problem in capital cases. *See, e.g.*, Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (arguing that too many attorneys for capital defendants are incapable of mastering the complexities of capital litigation).

17. The Missouri Supreme Court affirmed both Schlup's conviction and sentence. *See* State v. Schlup, 724 S.W.2d 236 (Mo.), *cert. denied*, 482 U.S. 920 (1987).

18. *See* Schlup v. State, 758 S.W.2d 715 (Mo. 1988). Schlup raised several ineffectiveness of counsel claims on postconviction appeal, but the record does not indicate that he argued that his counsel was ineffective for failing to interview potential alibi witnesses, which is the central claim in the present case. In the second federal habeas petition, Judge Heaney argued that Schlup did raise the issue on appeal but the Missouri Supreme Court inadvertently failed to address it. *See* Schlup v. Delo, 11 F.3d 738, 750 (1993) (Heaney, J., dissenting). The issue is now moot, because the Eighth Circuit refused to apply a procedural bar. *See infra* notes 20-21 and accompanying text.

19. State prisoners must show both that their attorney performed "acts or omissions . . . outside the wide range of professionally competent assistance," Strickland v. Washington, 466 U.S. 668, 690 (1984), and that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 694.

20. *See* Schlup v. Armontrout, 941 F.2d 631, 638 (8th Cir. 1991). This is known as a procedural bar and results when state prisoners do not raise a constitutional issue at every possible state level. *Cf.* Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that a state prisoner's failure to object to the admission of a confession at trial bars him from raising the issue in a federal habeas petition).

claim on the merits.[21] Explaining that Schlup's trial counsel called three alibi witnesses and that Schlup refused to give his attorney the names of four other potential alibi witnesses, the Eighth Circuit held that he had received adequate representation at trial.[22] The Eighth Circuit denied a petition for rehearing and a petition for rehearing en banc,[23] and the United States Supreme Court again denied certiorari.[24]

On March 11, 1992, more than eight years after Arthur Dade's murder, Schlup filed a second federal habeas corpus petition. Among other issues,[25] Schlup again asserted that his trial counsel was ineffective for failing to interview alibi witnesses.[26] Because the ineffectiveness claim already had been decided on the merits,[27] Schlup needed to show either "cause and prejudice"[28] or that he was actually innocent of the crime.[29] To prove the latter, Schlup offered the deposition of former fellow inmate John Green who said he called the security base to report the fight within seconds of the murder.[30] Without holding an evidentiary

21. The Eighth Circuit stated that ineffective counsel during the postconviction appeal would excuse Schlup's failure to raise the issue. *See Schlup v. Armontrout*, 941 F.2d at 638-39 (citing Simmons v. Lockhart, 915 F.2d 372, 376 (8th Cir. 1990); Shook v. Clarke, 894 F.2d 1496, 1497 (8th Cir. 1990); Shaddy v. Clarke, 890 F.2d 1016, 1018-19 & n.4 (8th Cir. 1989); Harper v. Nix, 867 F.2d 455, 457 (8th Cir.), *cert. denied*, 491 U.S. 908 (1989)). Because the court had no means to determine the effectiveness of the postconviction counsel, it decided that it would be easier to address the merits of Schlup's claim. *See Schlup v. Armontrout*, 941 F.2d at 639 (citing Long v. Iowa, 920 F.2d 4, 6 n.2 (8th Cir. 1990) (resolving merits of a claim because decision on merits was less complicated than procedural bar issue)).

22. *See Schlup v. Armontrout*, 941 F.2d at 639.

23. *See* Schlup v. Armontrout, 945 F.2d 1062 (8th Cir. 1991).

24. 503 U.S. 909 (1992).

25. For example, Schlup argued that he was actually innocent of the murder and thus his execution would violate the Eighth and Fourteenth Amendments. After Herrera v. Collins, 113 S. Ct. 853 (1993), this claim required a burden of proof that Schlup could not meet. *See* Schlup v. Delo, 11 F.3d 738, 743-44 (1993). *But see id.* at 753-54 (Heaney, J., dissenting) (arguing that Schlup had introduced sufficient evidence to meet the high standard of proof required by *Herrera*). Schlup also claimed that the State failed to disclose all exculpatory evidence as required by the Court's ruling in Brady v. Maryland, 373 U.S. 83 (1963). *See Schlup*, 115 S. Ct. at 857.

26. *See Schlup*, 115 S. Ct. at 857.

27. Because the petition raised an issue that already had been decided on the merits, it was "successive." *See* Sanders v. United States, 373 U.S. 1, 10 (1963) (describing a "successive application" as one based on "a ground heard and denied on a prior application").

28. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (holding that federal habeas review is barred "absent a showing of 'cause' and 'prejudice' ").

29. *See* Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (Powell, J., plurality opinion) ("the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence").

30. *See Schlup*, 11 F.3d at 741.

hearing, the district court denied the petition and later denied a motion to set aside the dismissal.[31]

After vacating a denial of a stay of execution,[32] the Eighth Circuit Court of Appeals affirmed the district court. The Eighth Circuit applied the rule that Schlup must show "by clear and convincing evidence that but for a constitutional error no reasonable jury would have found him guilty" to establish his actual innocence.[33] A majority of the panel found Green's deposition unconvincing, because Sergeant Peoples had testified that Captain Eberle, and not Green, called base, and because it flatly contradicted both an earlier statement by Green to prison investigators and his own sworn testimony at the Stewart trial.[34] The court also found unconvincing an affidavit by Lt. Faherty that Schlup had added on appeal because it also contradicted earlier sworn testimony.[35] The court found similar flaws in Schlup's other affidavits, and held that he had not shown "clear and convincing" evidence of actual innocence.[36] Judge Heaney dissented and argued that Schlup's evidence was "clear and convincing" and that Schlup's trial counsel had been ineffective.[37] A motion for rehearing en banc was denied over three dissents.[38]

In a five to four vote, the Supreme Court vacated and remanded. Writing for the majority,[39] Justice Stevens first distinguished the case from *Herrera v. Collins*[40] by explaining that Schlup alleged a constitutional error.[41] Justice Stevens then com-

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31. *See id.* at 739.

32. *See Schlup*, 115 S. Ct. at 859.

33. *Schlup*, 11 F.3d at 741. This standard follows the rule for "innocence of death" (that is, eligibility for the death penalty) that the Supreme Court created in Sawyer v. Whitley, 112 S. Ct. 2514, 2518-23 (1992). The Eighth Circuit adopted this rule for innocence of the death penalty conviction in McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir. 1992) and confirmed it en banc in Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1820 (1993).

34. *See Schlup*, 11 F.3d at 742.

35. *See id.* at 742-43.

36. *See id.* at 743-44.

37. *See id.* at 744-54 (Heaney, J., dissenting). Judge Heaney made this same argument at Schlup's first habeas corpus appeal, where he also dissented. Schlup v. Armontrout, 941 F.2d 631, 642-45 (8th Cir. 1991) (Heaney, J., dissenting).

38. *See Schlup*, 11 F.3d at 754 (denying rehearing en banc). *But see id.* at 754-55 (Arnold, C.J., dissenting) (arguing that a rehearing en banc ought to be granted to reconsider the proper standard for an actual innocence claim in a capital case).

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

40. 113 S. Ct. 853 (1993).

41. *See Schlup*, 115 S. Ct. at 860 (stating that Schlup makes a constitutional claim of ineffective counsel). Herrera did not allege that a constitutional violation occurred at trial. *See Herrera*, 113 S. Ct. at 858-59.

pared *Murray v. Carrier*[42] with *Sawyer v. Whitley*.[43] Justice Stevens explained that in *Carrier*, the Court required a prisoner to show that a constitutional violation probably had resulted in the conviction of an innocent,[44] while in *Sawyer*, the Court required a "clear and convincing" showing that the prisoner was not eligible for the death penalty.[45] To determine which standard was more appropriate under the circumstances, Justice Stevens weighed "the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice."[46] Because the individual interest was so great in a case of actual innocence and the societal interests were small due to the rarity of actual innocence challenges,[47] Justice Stevens held that the *Carrier* standard was superior, and thus Schlup needed to show "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[48]

In applying this standard, the Court held that, because this is an issue of actual innocence, the district court is not bound by the rules of admissibility.[49] Justice Stevens also stressed that, unlike a claim of insufficient evidence,[50] the judge must consider the evidence's credibility.[51] Finally, the Court argued that both the district and circuit courts refused to consider the credibility of the State's evidence, and thus misapplied both the *Sawyer* and the *Carrier* standards.[52] Justice Stevens remanded the case to the

42. 477 U.S. 478 (1986).

43. 112 S. Ct. 2514 (1992).

44. *See Schlup*, 115 S. Ct. at 864; Murray v. Carrier, 477 U.S. 478, 496 (1985) ("we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

45. *See Schlup*, 115 S. Ct. at 865; Sawyer v. Whitley, 112 S. Ct. 2514, 2523 (1992) (explaining that the writ should be granted "if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [applicable] law").

46. *Schlup*, 115 S. Ct. at 865.

47. *See* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 377 (1993) (stressing the importance of "striking an appropriate balance between fairness to inmates and the demands of finality").

48. *Schlup*, 115 S. Ct. at 867.

49. *See id.*; *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160-64 (1970) (arguing that courts should not be bound by rules of admissibility when determining actual innocence).

50. There is sufficient evidence to uphold a conviction if the evidence, construed in the light most favorable to the State, would allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. This requires that all credibility issues be resolved in the State's favor. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979).

51. *See Schlup*, 115 S. Ct. at 868.

52. *See id.* at 869. Because the lower courts failed to apply either standard properly, the decision is reversible no matter which standard is more appropriate. As a result, the

district court for an examination of Schlup's evidence under the *Carrier* standard.[53]

Justice O'Connor, who joined Justice Stevens's opinion, also wrote a separate concurrence.[54] In response to Chief Justice Rehnquist's dissent, Justice O'Connor echoed Justice Stevens's distinction between the new standard and the *Jackson* standard. Justice O'Connor then lauded the new standard as "properly balanc[ing] the dictates of justice with the need to ensure that the actual innocence exception remains only a safety valve for the extraordinary case."[55] Finally, Justice O'Connor stated that the district court based its decision on an erroneous view of the law. Responding to Justice Scalia's dissent, Justice O'Connor argued that this was a traditional abuse of discretion, and thus the Court did not "speak to the standard of appellate review."[56]

Chief Justice Rehnquist filed a dissenting opinion.[57] The Chief Justice argued that by combining a finder of fact standard ("more likely than not") with a conclusion of law standard ("no reasonable juror would have convicted"), the majority had created a hopelessly complex test. The Chief Justice also stressed that by using the phrase "no reasonable juror" instead of "an average juror," the majority was giving the original trier of fact a presumption of correctness.[58] Finally, Chief Justice Rehnquist argued for the *Sawyer* standard because having the same standard for innocence of the crime as for "innocence of death" would "take a step in the direction of simplifying this jurisprudence."[59]

Justice Scalia dissented separately.[60] Turning to the federal habeas statute, Justice Scalia observed that it merely stipulates that a successive or abusive petition "need not be entertained by

proper standard for actual innocence is irrelevant to the disposition of the case. Arguably, this renders the Court's opinion dictum.

53. *See id.* at 869.

54. *See id.* at 869-70 (O'Connor, J., concurring).

55. *Id.* at 870 (internal quotation marks omitted).

56. *Schlup*, 115 S. Ct. at 870 (O'Connor, J., concurring). *But cf. infra* note 64 (asserting that Justice O'Connor's argument did not really address Justice Scalia's point).

57. *See Schlup*, 115 S. Ct. at 870-74 (Rehnquist, C.J., dissenting). The Chief Justice was joined by Justices Kennedy and Thomas.

58. *Id.* at 873-74. The Chief Justice compares this formulation to Jackson v. Virginia, 443 U.S. 307 (1979), which uses the same type of "no reasonable juror" standard, although it requires the court to construe all evidence in the light most favorable to the State. Justice O'Connor takes issue with this claim in her concurrence. The difference between the *Jackson* standard and the majority's standard is unclear, but presumably a reasonable juror will not always construe evidence in the light most favorable to the State.

59. *Schlup*, 115 S. Ct. at 874 (Rehnquist, C.J., dissenting).

60. *See id.* at 874-78 (Scalia, J., dissenting). Justice Thomas joined both Justice Scalia's and the Chief Justice's dissents.

a court of the United States."[61] Justice Scalia argued that this statute grants the district court judge full discretion in deciding whether to entertain such a petition. Turning next to precedent, he admitted that *Kuhlmann v. Wilson*[62] and *McCleskey v. Zant*[63] suggest that a district court may be required to entertain a successive or abusive petition, but stressed that this was dictum because in both cases the Court affirmed the district court's decision to dismiss the petition. Therefore, Justice Scalia argued that neither precedent nor statute require removing the district court judge's discretion, and so the Court ought to give the district courts full power to entertain or dismiss a successive or abusive habeas petition, subject only to "abuse of discretion" review.[64]

Both the majority's standard and the minority's standard are defensible; there was no controlling precedent and the Court had the authority to create a standard that best suited its purposes because it was acting in its supervisory role over the lower federal courts. The majority focused on the rarity of successful actual innocence defenses;[65] the Chief Justice focused on the burden that thousands of habeas petitions each year place on the federal judiciary.[66] Though the Court considered the issues in

61. *Id.* at 875 (citing 28 U.S.C. § 2244(b)).

62. 477 U.S. 436, 454 (1986) (Powell, J., plurality opinion) ("we conclude that the 'ends of justice' *require* federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence") (emphasis added). The requirement that the court entertain habeas petitions whenever the "ends of justice" so require was removed by Congress in 1966, but the Supreme Court construed the statute as containing the standard nonetheless. *See Schlup*, 115 S. Ct. at 876.

63. 499 U.S. 467, 495 (1991) (explaining that the Court has "*required* federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence' ") (emphasis added).

64. *Schlup*, 115 S. Ct. at 878 (Scalia, J., dissenting). Despite Justice O'Connor's protestations to the contrary, her argument that the district court abused its discretion by not applying the *Carrier* standard is irrelevant because the *Carrier* standard is a test that the district court judge must use instead of applying his own best judgment. Therefore, the requirement that the judge use the *Carrier* standard limits his discretion.

65. Justice Stevens found only two cases since 1985 in which a prisoner successfully pursued an actual innocence claim. *See Schlup*, 115 S. Ct. at 864 n.36. This fact, however, does not mean that the standard creates too high a barrier to habeas review, as a 1992 anti-capital punishment study had to go back to 1984 to find an execution of an innocent. *See* MICHAEL L. RADELET, HUGO A. BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE 5-10 (1992); *see also* Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 91 (1987) (discussing the case of James Adams, executed in Florida on May 10, 1984); *see generally* RADELET, *supra*, at 282-356; Bedau, *supra*, at 36, 173-79.

66. The Chief Justice decried the additional burden the majority's standard placed on district courts. *See Schlup*, 115 S. Ct. at 874 (Rehnquist, C.J., dissenting).

Schlup very carefully, seven Justices[67] failed to deal with the habeas confusion left in the wake of *Kuhlmann.*

The Court must create a new actual innocence standard based on factual innocence. Under this standard, a district court judge would be instructed to consider the merits of a procedurally defaulted, successive, or abusive habeas petition if "in light of the new evidence, it is more likely than not that the prisoner did not commit the crime of which he was convicted." This standard would make habeas review simple to understand and execute and thus would put an end to the confusion and unfairness of the current system.

To illustrate the problems with the current system, let us consider a hypothetical prisoner. Doug Wood, an African-American, is convicted for killing a man for payment in Florida. At trial, two persons identify him and claim they saw him commit the murder and collect the money; Wood's brother claims that Wood was with him at the time of the murder. At the penalty phase, the State introduces the aggravating factor under Florida law that the murder was for pecuniary gain.[68] The jury recommends death and the judge imposes the sentence.

Wood exhausts his state postconviction remedies and files a federal habeas corpus petition, but does not raise the grounds of ineffective assistance of counsel. The district court considers the merits of his claims and denies relief. Later, Wood files a second federal habeas corpus petition. He proffers an affidavit by two neighbors who claim that they saw him enter his house an hour before the murder and did not see him leave for several hours. He also introduces an affidavit stating that the two eye-witnesses, who testified against him and since have passed away, were white supremacists who hated him because of his race.

Wood claims that his counsel was ineffective for failing to discover any of this evidence. As he failed to raise this issue in the first habeas petition, it is an "abuse of the writ."[69] He also claims that the new alibi evidence demonstrates that he is actually innocent of the crime, and the new evidence refuting the aggravating

67. All of the Justices except for Justice Scalia argued for different permutations of the same type of standard. Justice Thomas joined the Chief Justice's argument but he also joined Justice Scalia in arguing for a simpler, fully discretionary standard.

68. *See* FLA. STAT. ANN. § 921.141(5)(f) (West 1985).

69. An "abuse of the writ" occurs whenever a prisoner fails to raise an issue on a previous federal habeas petition. *See* Sanders v. United States, 373 U.S. 1, 10 (1963) (describing the withholding of a ground for relief on a previous petition as an "abuse of the writ").

factor[70] shows that he is not eligible for the death penalty ("innocent of death"). Wood also claims that his counsel for his first federal habeas corpus petition was ineffective for the same reason.

The district court judge must determine whether there is "cause and prejudice" for Wood's failure to present this new evidence on his first habeas petition.[71] Cause and prejudice exist if Wood's attorney for the first habeas petition performed "acts or omissions . . . outside the wide range of professionally competent assistance,"[72] ("cause") and if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"[73] ("prejudice"). If both factors are present, the judge may consider the merits of the ineffective counsel claim.

If one of these factors is absent, the judge must consider whether Wood falls into the actual innocence exception.[74] First, the judge must consider Wood's possible innocence of the crime itself. The new *Schlup* standard requires him to determine whether "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[75] Once again, the judge has to weigh the credibility of the new affidavits against the credibility of two deceased eye-witnesses. The probability and "no reasonable juror" standards complicate the problem. Under a strict reading of the *Schlup* standard, the judge cannot consider the merits of the claim if he feels that one juror out of a hundred could find Wood guilty.

The judge then must consider "innocence of death"—whether Wood is eligible for the death penalty. Using the *Sawyer* standard, the judge has to "determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [applicable state] law."[76] The test is whether the new evidence

70. Since the aggravating factor was supported only by the testimony of the two eye-witnesses, new evidence questioning the credibility of those officers can refute the existence of the aggravating factor.

71. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (holding that federal habeas review is barred "absent a showing of 'cause' and 'prejudice' ").

72. Strickland v. Washington, 466 U.S. 668, 690 (1984).

73. *Id.* at 694.

74. *See* Murray v. Carrier, 477 U.S. 478, 496 (1986) ("where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause").

75. *Schlup*, 115 S. Ct. at 867.

76. Sawyer v. Whitley, 112 S. Ct. 2514, 2523 (1992).

about the motives of the eye-witnesses means that no reasonable juror would find the aggravating factor of pecuniary gain.[77] As Florida law defines the aggravating factor, the judge must consider this issue through the lenses of the Florida criminal code. As a result, the strictness of a state's death penalty statute determines a prisoner's chance of getting federal review of a constitutional claim.[78]

While considering Florida law, the judge has to weigh the credibility of the new affidavits against the credibility of two eye-witnesses whom he never has seen and who are now dead. Then the judge must decide whether the evidence is "clear and convincing." The judge must assume that the underlying ineffective assistance claim is meritorious to apply the "but for constitutional error" clause—he must assume the merits of the claim in determining if he is allowed to address the merits of the claim.

Due to the difference between the *Sawyer* and the *Schlup* standards, the judge's deliberations in determining actual innocence of the crime itself are of little use in determining innocence of death. A prisoner easily could qualify as actually innocent of the crime itself although failing to meet the higher "clear and convincing" standard for innocence of death. This phenomena makes the judge's task all the more difficult.

Finally, if the judge can resolve all the confusion, he may find actual innocence and have to consider the merits of the underlying ineffective counsel claim. In many cases, the judge will find it easier simply to bypass the confusion and address the merits of the underlying claim.[79]

77. Florida, like most States, requires the trier of fact to weigh aggravating factors against mitigating factors. *See* FLA. STAT. ANN. § 921.141(2)-(3) (West 1986). The hypothetical could have been made even more complicated by the introduction of a mitigating factor. However, a literal reading of *Sawyer* suggests that death penalty eligibility is the only issue, and thus balancing is not allowed in a habeas review. *Cf.* Lisa R. Duffett, Note, *Habeas Corpus and Actual Innocence of the Death Sentence after Sawyer v. Whitley: Another Nail into the Coffin of State Capital Defendants*, 44 CASE W. RES. L. REV. 121 (1993) (arguing that the eligibility standard distorts the capital sentencing process in States that require the sentencer to weigh aggravating and mitigating factors).

78. This also results in inconsistencies among States. A prisoner in New York, for instance, may have a better chance of getting habeas review than a prisoner in Georgia. The result is inconsistent enforcement of constitutional rights. *Cf.* Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992) (stressing the importance of uniformity in the law of habeas corpus).

79. *See* Schlup v. Armontrout, 941 F.2d 631, 639 (8th Cir. 1991) (addressing an underlying claim because it is easier to decide than whether there is cause and prejudice for the procedural default), *cert. denied*, 503 U.S. 909 (1992); Long v. Iowa, 920 F.2d 4, 6 n.2 (8th Cir. 1990) (resolving the merits of a claim because a decision on the merits was less complicated than procedural bar issue).

Judge Friendly's famous article, *Is Innocence Irrelevant?*,[80] brought the actual innocence confusion to life. It was there that actual innocence first was defined as showing "a fair probability that, in light of all the evidence, including that alleged to have been admitted illegally (but with due regard to any unreliability of it) and evidence tenably claimed to have been excluded wrongly or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt."[81] The Court adopted this formulation in *Kuhlmann v. Wilson*,[82] and has stuck with it ever since, arguing mostly over what constitutes "a fair probability."

What is most striking about this definition of actual innocence is that it does not relate to factual innocence at all; instead, it considers "legal innocence:" whether a court would find the defendant guilty beyond a reasonable doubt.[83] When a jury finds a defendant "not guilty," it does not establish innocence but rather insufficient proof of guilt. A jury that thinks there is an 80% chance that a defendant is guilty must return a verdict of "not guilty," but no one could say that the defendant therefore was likely to be actually innocent.

Thus, the Court's *Schlup* standard really asks, "if this new evidence had been available at trial, could a reasonable jury still have convicted the defendant?" If the judge thinks it is more likely than not that the answer is "no," he must consider the merits of the petitioner's claim. But to follow the *Schlup* standard strictly, the judge must conduct a mental retrial without the benefit of seeing the original witnesses in person or observing the courtroom drama. He must do so despite the fact that Anglo-American jurisprudence has held for centuries that a jury of one's peers, and not a judge, must determine guilt.[84] He must ignore state evidence rules and the policies behind them.[85] He

80. *Supra* note 49.

81. *Id.* at 160.

82. 477 U.S. 436, 453-54 (1986).

83. *See* Charles R. Morse, Recent Development, *Habeas Corpus and "Actual Innocence": Herrera v. Collins*, 16 HARV. J.L. & PUB. POL'Y 848, 856-60 (1993).

84. *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

85. In addition, the requirement that the judge consider inadmissible evidence usually will work to the prisoner's advantage, as he will have records of all inadmissible evidence favorable to himself. The State, on the other hand, usually is represented at habeas proceedings by a different set of attorneys than the ones who prosecuted the case at trial.

must do so despite the federalism principle that only state judges are able to conduct state criminal trials.

The Court never has articulated a compelling reason why a retrial standard should govern whether a federal habeas court will entertain a successive, abusive, or procedurally defaulted claim.[86] The factual innocence standard described above has none of the problems of the retrial standard.[87] Under it, the district court judge is instructed simply to consider the merits of the habeas petition if "in light of the new evidence, it is more likely than not that the prisoner did not commit the crime of which he was convicted." Under this standard, the judge does not have to perform a hypothetical retrial, but rather can consider the issue of factual innocence.

The factual innocence test also properly balances societal interests and individual interests.[88] Review of successive, abusive, or procedurally defaulted habeas petitions would be rare, as only a handful of petitioners would be able to establish the necessary probability that they did not commit the crimes, and the individual liberty interest of those who have strong evidence that they are innocent will be protected. This test addresses the Chief Justice's concern about the *Schlup* standard's confusion[89] by replacing it with a standard that truly is easy to apply. Finally, it avoids Justice Scalia's objection about the discretion of district court judges[90] by creating a standard that gives them wide discretion in making determinations of innocence.[91]

This makes it more difficult and more expensive for the State to obtain records of the inadmissible evidence favorable to the State.

86. The closest the Court has come to doing so is the statement that "[t]he Carrier standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt." *Schlup*, 115 S. Ct. at 867. Justice Stevens invoked In re Winship, 397 U.S. 358 (1970) (holding that the State must prove a juvenile defendant is guilty beyond a reasonable doubt to convict him of a criminal violation).

87. *See supra* pp. 897-99, 900-01.

88. *Cf. Schlup*, 115 S. Ct. 865 ("the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case").

89. *See id.* at 873 (Rehnquist, C.J., dissenting).

90. *See id.* at 877-78 (Scalia, J., dissenting).

91. This test would work well with an "abuse of discretion" appellate review standard. The circuit courts can be instructed to uphold the district court's determination of the presence or lack of factual innocence as long as the district court judge considers relevant standards and gives a "justifying reason," *see* Foman v. Davis, 371 U.S. 178, 182 (1962) ("outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion"), and his factual findings are not "clearly erroneous," *see* FED. R. CIV. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous"); *see also* Cooter & Gell v. Hartmarx Corp., 496

It is not certain that this standard will mean that the courts review fewer habeas petitions on the merits. It removes the "guilty beyond a reasonable doubt" formulation that helped prisoners, but it also removes the "no reasonable juror" formulation that hampered prisoners who tried to attain relief.[92] But most importantly, by giving the judge broad discretion, the standard allows him to concentrate judicial resources on the rare innocent prisoner instead of forcing him to waste time applying complex standards to an endless stream of petitions. As Justice Jackson explained over forty years ago:

> It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.[93]

When this Recent Development was written, the Republican House had passed a bill that would require all federal habeas corpus petitions by state prisoners to be filed within one year.[94] If passed by the Senate and signed by the President, this bill virtually would eliminate successive and abusive habeas petitions.[95] However, the actual innocence exception still would apply for procedurally defaulted claims.[96] Whatever the fate of the bill, a simpler factual innocence standard would make the habeas corpus process fairer, easier for the States, and might well eliminate the need for Congressional reform of habeas review. It also would make the process comprehensible to the American people. With the endless complications of the *Kuhlmann, Carrier, Sawyer,* and now *Schlup* standards, however, the Republic may be

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U.S. 384, 401 ("A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous").

92. *Cf.* Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557 (1994) (arguing for a strict scrutiny standard of review in capital cases).

93. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result).

94. *See* Cooper, *supra* note 1.

95. Some commentators doubt Congress's ability to eliminate habeas corpus petitions. *See* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994); *see also* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it").

96. A prisoner's first federal habeas petition, filed within one year, still could contain issues that the prisoner failed to litigate at the trial or upon state appeal. The prisoner then could invoke actual innocence to try to get the federal court to review the merits of these constitutional claims.

mired in a confusing and inequitable habeas rut for years to come.[97]

Joseph M. Ditkoff

FEDERAL PREEMPTION OF STATE CONSUMER FRAUD REGULATIONS: *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817 (1995).

Almost since the inception of widespread commercial air travel, Congress has struggled to find the right balance between regulating the airline industry to protect consumers and eschewing such regulation to enhance the industry's economic viability. Until 1978, the airline industry was governed by the Federal Aviation Act of 1958 (FAA).[1] The FAA gave the Civil Aeronautics Board broad power to regulate the airline industry, including power to regulate fares and to address complaints regarding deceptive commercial practices. The FAA contained no provision regarding the preemption of state law, but did contain a "savings clause" stating that "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute."[2] In 1978, however, the political winds changed and Congress embarked on a wave of deregulation by enacting the Airline Deregulation Act (ADA).[3] The ADA contained a detailed preemption provision,[4] but did not repeal or alter the "savings clause" of the FAA.[5] The Supreme Court has wrestled since with the interpretation of the ADA's preemption provision, most recently in *American Airlines, Inc. v. Wolens*.[6] Unfortunately, the

97. *Cf.* Kelli Hinson, Comment, *Post-Conviction Determination of Innocence for Death Row Inmates*, 48 SMU L. REV. 231 (1994) (arguing that clemency *or* ineffective assistance claims best protect capital defendants); Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47 (1994) (arguing that meaningful state clemency procedures best protect the interests of capital defendants).

1. Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended at 49 U.S.C.), *repealed in part by* Pub. L. No. 103-272, 108 Stat. 745 (1994).

2. 49 U.S.C.App. § 1506, *repealed by* Pub. L. No. 103-272, 108 Stat. 745 (1994) (replaced in substance by 49 U.S.C. § 40,120(c)).

3. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in 49 U.S.C.), *repealed in part by* Pub. L. No. 103-272, 108 Stat. 745 (1994).

4. *See* 49 U.S.C.App. § 1305(a)(1) (1988), *repealed by* Pub. L. No. 103-272, 108 Stat. 745 (1994) (replaced in substance by 49 U.S.C. § 41,713(b)(1)). The ADA's preemption provision states that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier."

5. *See* 49 U.S.C.App. § 1506, *repealed by* Pub. L. No. 103-272, 108 Stat. 745 (1994) (replaced in substance by 49 U.S.C. § 40,120(c)).

6. 115 S. Ct. 817 (1995).

Court's holding in *Wolens* that state-imposed regulation of air carriers is preempted by the ADA, while enforcement of contract terms that the parties set themselves is not,[7] merely complicates the preemption issue further rather than laying it to rest. This result stems from the fact that the Court misconstrues the preemption provision's meaning, misapplies the meaning at which it arrives, and fails to consider the adverse consequences of its decision.

Wolens involved two consolidated state class actions brought by participants in American Airlines's AAdvantage frequent flyer program.[8] Participants in the program earned mileage credits when they flew on American Airlines that could be applied toward additional flight tickets or class-of-service upgrades. Plaintiffs, however, alleged that the modifications American made to the AAdvantage program in 1988[9] devalued mileage credits that they already had earned.[10] Plaintiffs conceded that American had reserved the right to modify the AAdvantage program, but challenged the retroactive modifications on the ground that they constituted both a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act)[11] and a breach of contract.[12] The Illinois Supreme Court denied plaintiffs' petition for injunctive relief, but preserved the contract and Consumer Fraud Act Claims on the grounds that they had no more than a "tangential" relationship to airline "rates, routes or services," and thus fell outside the ADA's preemption provision.[13] After the U.S. Supreme Court decided *Morales v. Trans World Airlines*,[14] giving a broad construction to the ADA's preemption provision, American petitioned for certiorari. The Court granted certiorari, vacated the judgment of the Illinois

7. *See id.* at 820.

8. *See id.* at 822.

9. *See id.* American altered the AAdvantage program by imposing both capacity controls and blackout dates. The capacity controls consisted of limitations on the seats available to passengers obtaining tickets with frequent flyer credits, whereas the blackout dates consisted of restrictions on the dates on which mileage credits could be used. Both modifications were applied to prior, as well as future, frequent flyer credits.

10. *See id.*

11. 815 ILL. COMP. STAT. § 505 (1992) (formerly codified as ILL. REV. STAT., ch. 121 1/2, para. 261 (1991)).

12. *See Wolens*, 115 S. Ct. at 822.

13. Wolens v. American Airlines, Inc., 589 N.E.2d 533, 536 (Ill. 1992).

14. 504 U.S. 374 (1992). In *Morales*, the Court held that the phrase "relating to," as used in the preemption provision of the ADA, is to be interpreted broadly to preempt all state laws having a "connection with" or "reference to" airline rates, routes, or services. *Id.* at 384.

Supreme Court, and remanded for consideration in light of *Morales*,[15] but the Illinois Supreme Court adhered to its earlier judgment.[16] The Illinois court continued to assert that the contract and Consumer Fraud Act claims had only a "tangential" relationship to airline "rates, routes or services," and also argued that frequent flyer programs are not "essential" to the operation of a airline.[17]

The Supreme Court granted American's second petition for certiorari, and in a five to three decision affirmed the Illinois court's decision to preserve the contract claims, but reversed its decision to preserve the Consumer Fraud Act claims.[18] Writing for the majority, Justice Ginsburg[19] relied heavily on the Court's recent decision in *Morales*. *Morales* addressed the issue of whether the ADA's preemption provision prevented States from prohibiting deceptive airfare advertisements through enforcement of general consumer protection statutes.[20] The Court held that enforcement of the Travel Industry Enforcement Guidelines promulgated by the National Association of Attorneys General (NAAG) constituted enactment or enforcement of a law "relating to" airline rates and therefore was preempted by the ADA.[21] In doing so, the Court adopted a broad interpretation of the ADA's preemption provision. Basing its construction of the provision's "relating to" language on the identical language in the Employee Retirement Income Security Act of 1974 (ERISA), the *Morales* Court held that the ADA preempted all state law having a "connection with" or "reference to" airline rates, routes, or services.[22] Under this interpretation, the *Wolens* Court concluded, the Illinois court's separation of matters "essential" to airline operations from matters not essential could not stand.[23]

By applying the *Morales* Court's interpretation of the "relating to" language of the ADA's preemption provision to the claims

15. *See* American Airlines, Inc. v. Wolens, 113 S. Ct. 32 (1992).
16. *See* Wolens v. American Airlines, Inc., 626 N.E.2d 205 (Ill. 1993).
17. *Id.* at 208.
18. *See Wolens*, 115 S. Ct at 827.
19. Justice Ginsburg was joined by Chief Justice Rehnquist as well as Justices Kennedy, Souter, and Breyer. Justice Stevens filed an opinion concurring in part and dissenting in part. Justice O'Connor also filed an opinion concurring in part and dissenting in part, which Justice Thomas joined in part. Justice Scalia took no part in the consideration or decision of the case.
20. *See Morales*, 504 U.S. at 378.
21. *See id.* at 2039.
22. *Id.* at 2037.
23. *See Wolens*, 115 S. Ct. at 823.

brought in *Wolens*, the Court concluded that those claims related to both rates and services.[24] Unlike the *Morales* Court, however, the *Wolens* Court focused on other language in the ADA's preemption provision as well. In particular, Justice Ginsburg focused on the words "enact or enforce any law" in the instruction that "no state . . . shall enact or enforce any law . . . relating to rates, routes or services."[25] This language formed the basis for the Court's distinction between the plaintiffs' Consumer Fraud Act claims and their contract claims, which relied on the distinction between state-imposed and self-imposed regulation.

In holding that the ADA preempted the plaintiffs' Consumer Fraud Act[26] claims, the Court compared the Act to the NAAG guidelines addressed in *Morales*. Like the NAAG guidelines, the Court reasoned, the Consumer Fraud Act controlled the primary conduct of those it regulated and served to police the marketing practices of airlines.[27] It thus constituted the type of *state*-imposed regulation that both the "enact or enforce any law" language of the ADA preemption provision and the ADA's objective of leaving decisions regarding marketing mechanisms to the airlines themselves clearly sought to prohibit.[28]

The majority, however, found the plaintiffs' contract claims to be of a fundamentally different nature. Looking to the distinct authority on which the claims were based, rather than to the substance of the claims themselves, the Court concluded that for preemption purposes there is a clear distinction between "what the State dictates and what the airline itself undertakes."[29] Enforcing *self*-imposed obligations, the Court reasoned, merely holds parties to their agreement, and promotes economic effi-

24. *See id.* Plaintiffs' claims related to "rates" to the extent that they addressed American's charges in the form of mileage credits for free tickets and upgrades. They related to "services" to the extent that they addressed access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates.

25. *Id.*

26. The Act declares unlawful "[u]nfair methods of competition and unfair or deceptive practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act' . . . whether any person has in fact been misled, deceived or damaged thereby." 815 ILL. COMP. STAT. § 505/2 (1992).

27. *See Wolens*, 115 S. Ct. at 823.

28. *See id.*

29. *Id.* at 826.

ciency.[30] This logic was consistent with the Court's recent tendency to grant state common law contractual remedies special immunity from preemption provisions.[31] The Court also addressed the administrability problem that would result from the preemption of state contract claims by explaining that the ADA, unlike ERISA, was not intended to channel civil actions into the federal courts.[32] The vast array of possible contract claims relating to airline rates, routes, or services, the Court resolved, were not intended to be adjudicated under federal common law, nor were they intended to be relegated to the Department of Transportation (DOT), which lacked both the Congressional instruction and funding to resolve them.[33]

Justice Stevens's opinion argued for a narrower construction of the ADA's preemption provision, and thus concurred with the portion of the majority opinion preserving the plaintiffs' breach of contract claims, but dissented from the portion denying their Consumer Fraud Act claims. Taking issue with the majority's method of statutory interpretation, Justice Stevens argued that the majority failed to heed the restraints of the interpretive presumption *against* preemption.[34] Without greater evidence of Congressional intent, he concluded, this presumption had not been overcome in the case of the ADA's preemption provision, making any extension of its scope from airline-specific rules to rules of general applicability unjustified. He also stated that adherence to the presumption against preemption was particularly appropriate in the case of the ADA, in light of the fact that Congress preserved the savings clause maintaining state "remedies now existing at common law or by statute."[35]

In contrast to the majority's efforts to highlight the differences between the Consumer Fraud Act claims and contract claims as examples of state- and self-imposed regulations, respectively, Justice Stevens sought to highlight their similarity as background,

30. The Court stated that legal enforcement of contracts is more efficient than a purely voluntary system. *See id.* at 824 (citing RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 90-91 (4th ed. 1992)).

31. *See, e.g.*, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2612 (1992) ("a common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . *imposed under State law*' within the meaning of [the Federal Cigarette Labeling and Advertising Act] § 5(b)").

32. *See Wolens*, 115 S. Ct. at 825.

33. *See id.* at 825-26.

34. *See id.*, 115 S. Ct. at 828 (Stevens, J., concurring in part and dissenting in part).

35. *Id.*

rather than airline-specific, rules. Both claims, he suggested, would have an identical effect on airline rates, routes, or services, and he analogized the Consumer Fraud Act to a codification of common law negligence rules.[36] Just as the duty of care, whether drawn from common law or statute, is a background rule that cannot be preempted, so is the duty not to deceive embodied in the Act.[37] Just as no court would suggest that the ADA exempts airlines from the duty of care, which falls no more heavily on airlines than any other industry, no court would suggest that it gives airlines free reign to deceive consumers. Employing this reasoning, Justice Stevens distinguished the holding of *Morales* as having nothing to do with background rules prohibiting fraud. Instead, it merely addressed the uncontestedly airline-specific NAAG guidelines.[38] Justice Stevens also stated that the majority opinion, by making legislative enactment the hallmark of a state-imposed rule, placed the Court in the dangerous position of privileging judicially crafted common law rules over rules enacted by state legislatures in the preemption context.[39]

Justice O'Connor's opinion, in sharp contrast to Justice Stevens's, argued for an extremely broad interpretation of the ADA's preemption provision, and thus concurred with the portion of the majority opinion that denied the plaintiffs' Consumer Fraud Act claims, but dissented from the portion preserving their breach of contract claims. Arguing that the majority's departure from precedent amounted to impermissible legislation, Justice O'Connor focused on the Court's interpretation of the portion of the ADA's preemption provision requiring that "no State . . . shall enact or enforce any law . . . ."[40] Addressing the "enact or enforce" language first, Justice O'Connor departed from the majority's position that upholding a contract constitutes not "enact[ing] or enforc[ing]" law, but merely holding parties to their agreement. By settling on such a distinction, Justice O'Connor asserted, the Court contradicted its own ruling in *Morales*. In both cases, the subject matter of the suit—the NAAG guidelines in *Morales* and the frequent flyer contract in *Wolens*—had no legal force except to the extent that generally applicable state law—consumer fraud law in *Morales* and contract law in *Wolens*—

36. *See id.* at 827.
37. *See Wolens*, 115 S. Ct. at 828 (Stevens, J., concurring in part and dissenting in part).
38. *See id.* at 827.
39. *See id.* at 828.
40. *Id.* at 828 (O'Connor, J., concurring in part and dissenting in part).

allowed one party to bring the state's coercive power to bear against the other.[41] As the result of the lack of any relevant factual distinction between *Morales* and *Wolens* in this regard, Justice O'Connor reasoned, *Morales* should be dispositive. Lower courts construing the ADA preemption provision post-*Morales* have tended to support this view by declining to grant state contract law special preemption-exempt status.[42]

Justice O'Connor then turned to the "any law" language of the ADA's preemption provision. Once again citing *Morales*, she reasoned that the term "law" could not possibly be limited to official government-imposed policies, because the NAAG guidelines that *Morales* preempted were mere recommendations.[43] In addition, adopting such a rule would be the equivalent of reading the prohibition against state enforcement of "any law" as a prohibition against state "regulation," a reading explicitly rejected in *Morales*.[44] Justice O'Connor also argued that the majority's exception to this rule—that principles of contract law might be preempted to the extent that they effectuate a state's public policy rather than the parties' intent—ultimately swallows the rule itself. The two cannot be separated, she reasoned, making contract law a set of policy judgments advanced by a particular state's enforcement decisions.[45] Justice O'Connor also countered Justice Stevens's objection that allowing the term "any law" to include background rules would preempt the airlines' duty of care, depriving potential personal injury victims of their state tort claims. Such claims, she argued, escape preemption not because

41. *See id.* at 829-30.

42. *See, e.g.*, Statland v. American Airlines, Inc., 998 F.2d 539, 541-42 (7th Cir.) (contract claim preempted), *cert. denied*, 114 S. Ct. 603 (1993); Cannava v. USAir, Inc., No. CIV.A.91-30003-F, 1993 WL 565341, at *6 (D. Mass. Jan. 7, 1993) (same); Schaefer v. Delta Airlines, No. CIV.92-1170-E(LSP), 1992 WL 558954, at *2 (S.D. Cal. Sept. 18, 1992) (same); Vail v. Pan Am Corp., 616 A.2d 523, 526-27 (N.J. Super. Ct. App. Div. 1992) (same); El-Menshawy v. Egypt Air, 647 A.2d 491, 493 (N.J. Super. Ct. Law Div. 1994) (same).

43. *See Wolens*, 115 S. Ct. at 830-31 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor also found support for this proposition in the Court's recent decision in Norfolk & Western R.R. Co. v. Train Dispatchers, 499 U.S. 117 (1991). The question in *Norfolk* was whether a rail carrier's statutory exemption from "all other law" exempted it from contractually-imposed obligations. The Court held that it did, stating that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." *Id.* at 130.

44. *Wolens*, 115 S. Ct. at 832 (O'Connor, J., concurring in part and dissenting in part).

45. *See id.* at 834.

they fall outside the scope of "any law," but because they do not relate to airline rates, routes, or services.[46]

The confusion that *Wolens* likely will generate in the lower courts can be attributed largely to the fundamental flaw of the majority's opinion: its misconstruction of the ADA preemption provision itself. To reach its broad interpretation of the preemption provision, rather than the more appropriate narrow reading advocated by Justice Stevens, the Court equates the language of two wholly separate and unrelated pieces of legislation. Ignoring its own previous decisions characterizing the ERISA preemption provision as "virtually unique,"[47] and stating that the broad reading of its "relating to" language can be attributed to the relationship between different subsections of ERISA that have no parallel in other federal statutes,[48] the Court looks to *Morales* as its authority. Even while acknowledging that the ADA differs markedly from ERISA in at least one respect,[49] the *Wolens* Court rends the terms of the separate preemption provisions from their respective contexts and links their interpretation together. The majority compounds its indifference to the two acts' striking dissimilarity—there being little common ground between the protection of employee retirement income and airline deregulation—by failing to heed the ADA's legislative history. It thus settles upon its broad interpretation of the preemption provision despite the fact that testimony of the Civil Aeronautics Board accompanying the proposed ADA neither focused on the "relating to" language nor suggested that this language was intended to be indicative of broad preemptive effect.[50]

The majority's misconstruction of the ADA's preemption provision also can be attributed to its indifference to the provision's words of limitation. Although the preemption provision requires that "no State . . . shall enact or enforce any law . . . relating to rates, routes or services," the *Wolens* Court, through its broad in-

46. Justice O'Connor stated that the term "services" should not be interpreted as being coextensive with airline "safety." *See id.* at 830 (citing Hodges v. Delta Airlines, Inc., 4 F.3d 350, 353-56 (5th Cir. 1993)).

47. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 24 n.26 (1983).

48. *See* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 98 (1983).

49. *See Wolens*, 115 S. Ct. at 825 ("Nor is it plausible that Congress meant [for the ADA] to channel into federal courts the business of resolving . . . contract claims . . . . The ADA contains no hint of such a role for the federal courts. In this regard, the ADA contrasts markedly with the ERISA, which does channel civil actions into federal courts.").

50. *See Hearings on H.R. 8813 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess., pt. 1, 243 (1977).

terpretation of the "relating to" language, reads the final four words out of the Act. So long as "relating to" means only "connection with" or "reference to," the words "rates, routes or services" will have hardly any limiting effect. Virtually any state law claim affecting an airline would generate legal fees, which have a direct "connection with" rates to the extent that rates must rise to compensate for such fees. If Congress had desired such a result, it simply would have omitted the words of limitation from the ADA's preemption provision altogether. Drawing an inference to the contrary, unsupported by any indicia of Congressional intent, runs counter to the strong presumption against preemption.[51] It also conflicts with the majority's stated desire to grant effect to the "full text" of the provision.[52]

In addition to misconstruing the ADA's preemption provision, the *Wolens* Court misapplies the interpretation at which it eventually arrives. While the majority describes the preemption provision as a stop-gap measure meant to prevent state regulation of the airline industry from filling the vacuum created by federal deregulation, in accordance with the ADA's purpose,[53] it wields the provision as a kind of eraser of existing state law. This erasure of state background rules, such as the Illinois Consumer Fraud Act, directly contradicts the Court's preemption jurisprudence. Absent express Congressional intent, state law generally is preempted only if it directly conflicts with federal law,[54] or if federal law governs a subject area so completely that no state law could possibly coexist with it.[55] While these rules are generally difficult to apply to a case involving a conflict between a state law and federal deregulatory legislation—because the analysis turns not

51. *See* Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992) (stating that preemption provisions must be construed in light of the presumption against the preemption of state police power); *see also* Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States"). *But see Cipollone*, 112 S. Ct. at 2632 (Scalia, J., concurring in part and dissenting in part) ("[T]here is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.").

52. *See Wolens*, 115 S. Ct. at 823.

53. *See id.* at 821 ("Congress enacted the Airline Deregulation Act . . . '[t]o ensure that the States would not undo federal deregulation with regulation of their own' ") (quoting *Morales*, 504 U.S. at 378).

54. *See* Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983).

55. *See* Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982).

so much on whether state law conflicts with federal law, but on whether state law encroaches upon the vacuum created by the absence of federal law—the particular factual scenario presented in *Wolens* eliminates this problem. A brief historical review reveals that prior to the enactment of the ADA, state consumer fraud regulation coexisted with federal regulation of the airline industry.[56] There was thus neither a direct conflict with federal law nor an exclusive exercise of federal authority in the subject area, giving the *Wolens* decision the feel of a creeping, and unjustified, diminution of state power.

The majority also misapplies the rule at which it arrives by finding that the plaintiffs' Consumer Fraud Act claims relate to "rates" and "services." In doing so, it fails to acknowledge that the ADA was primarily a piece of economic legislation. Through the ADA, Congress sought not to create a special position for the airline industry beyond the scope of the law, but to remove federal regulations having an adverse affect on air carriers' ability to respond to market forces.[57] As a result, the use of the ADA's preemption provision also should be limited to state law having an economic impact on airline rates and services.[58] The Illinois Consumer Fraud Act simply has no such impact. As Justice Stevens states, background consumer protection rules of this kind do not burden the airlines with additional affirmative undertakings, but merely require them to refrain from opportunistic behavior. They thus reflect a "duty not to deceive" borne equally by all businesses. Compliance with such a duty is, if not completely costless, at least not sufficiently costly to require the drastic step of preemption. The *Morales* Court decided as much when it observed that the relationship of state law regulating "nonprice aspects of fare advertising," such as enticements like frequent flyer plans, to airline rates "would obviously be far more tenuous" than that of state law with a more direct economic impact.[59]

56. *See Morales*, 504 U.S. at 424 (Stevens, J., dissenting) ("because state and federal prohibitions of unfair and deceptive practices had coexisted during the period of federal regulation, there is no reason to believe that Congress intended [the ADA's preemption provision] to immunize the airlines from state liability for engaging in deceptive or misleading advertising").

57. *See* 49 U.S.C.App. §§ 1302(a)(4), 1302(a)(9) (1988) ("maximum reliance on competitive market forces" will most effectively promote "efficiency, innovation, and low prices" as well as the "variety [and] quality . . . of air transportation services").

58. *See* John W. Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747, 766-67 (1978).

59. *Morales*, 504 U.S. at 390.

In addition to its misconstruction and misapplication of the ADA's preemption provision, the *Wolens* Court appears not to have pondered the adverse consequences of its decision. The first and most obvious of these is that large numbers of commercial airline passengers will be left without remedy when defrauded by the airlines. The reassurance of Justice Scalia in June of 1992, when the Court decided *Morales*, that "our decision does not give the airlines *carte blanche* to lie to and to deceive consumers"[60] thus offered little comfort to the plaintiff AAdvantage members in January of 1995. Justice Scalia based his reassurance on the belief that the DOT would take action to prohibit anticompetitive behavior by air carriers, including misrepresentations made in advertising. The *Wolens* Court, however, harbored no such illusions, and stated not only that the DOT lacked adequate resources to engage in contract dispute resolution, but also that the opinion of the Court should not be read as "foist[ing]" on the DOT work Congress neither instructed nor funded it to perform.[61] While the Court did not address the DOT's ability to adjudicate consumer fraud claims, the fact that the plaintiffs' consumer fraud claims were substantively identical to their contact claims, differing only in their source of authority, suggests that the DOT is equally ill-equipped to handle this work.[62] With state consumer fraud actions preempted, and federal relief admittedly nonexistent, it appears that the airlines have indeed been granted *carte blanche* to lie and to deceive. While the Court should be commended for its candor in acknowledging the lack of a federal remedy, it also was required to consider this factor when interpreting the ADA's preemption provision.[63] Lamentably, it did not.

The second adverse consequence of the *Wolens* decision flows from the first. As a result of the fact that commercial air travel consumers will be without recourse when defrauded by the airlines, air carriers will have an incentive to engage in consumer

60. *Id.*

61. *Wolens*, 115 S. Ct. at 826.

62. Remarkably, the opinion of the majority in *Wolens* was the position advanced by the DOT itself. *Id.* at 823. Apparently, the department was not concerned with either the possibility of being overwhelmed by work it was not equipped to handle or allowing large numbers of commercial air travel consumers to be defrauded without remedy.

63. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"); *see also id.* at 263 (Blackmun, J., dissenting) ("It is inconceivable that Congress intended to leave victims [of illegal conduct] with no remedy at all").

fraud with greater frequency. This result, once again, runs directly contrary to the ADA's stated purpose of promoting "reliance on competitive market forces" to maximize "efficiency, innovation, and low prices."[64] Rather than permitting the operation of competitive market forces, the information asymmetry created by essentially halting enforcement of consumer protection legislation in the air carrier context will result in a situation of classic economic inefficiency.[65] While inducing consumers through fraudulent claims in frequent flyer programs certainly will enhance the economic viability of the airline industry—a no less important goal of the ADA—this short term boon to struggling carriers cannot justify the resultant harms to other market actors. The opportunistic behavior of those airlines that choose to exploit their de facto exemption from consumer protection standards will not only damage consumers, but also, by placing alternative carriers at a competitive disadvantage, will injure the commercial transportation industry as a whole.

The most serious adverse consequence of the Court's decision, however, involves the role of the judiciary in the lawmaking process. By holding that the ADA's preemption provision applies to claims based on the legislatively enacted Consumer Fraud Act, but not to claims based on judicially crafted contract law, the *Wolens* Court effects a subtle but significant shift of political power. The majority thus finds itself in the rather unusual role of a court creating law that in turn magnifies the impact of the law created by other courts. Both of these steps seem to be conspicuously at odds with the separation of powers outlined in the U.S. Constitution,[66] yet they elicit indications of mild concern from only two of the eight justices involved in the deliberations.[67] The fact that this magnification of judicial power need not be limited

64. 49 U.S.C.App. §§ 1302(a)(4), 1302(a)(9) (1988).

65. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-8 (1960). According to the Coase Theorem, information disparities will impede parties from bargaining to an efficient allocation of resources. The economic inefficiency created by information asymmetries is pronounced especially in situations—such as participation in frequent flyer programs—in which consumers are asked to accept contracts of adhesion. *See* Michael Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 585 (1990) ("Imperfect consumer information causes a tendency toward inefficiency in transactions involving consumer form contracts").

66. *See* U.S. CONST., arts. I, III (describing the powers of the legislative and judicial branches, respectively).

67. *See Wolens*, 115 S. Ct. at 828 (Stevens, J., concurring in part and dissenting in part) ("if judge-made duties are not pre-empted, it would make little sense to find pre-emption of identical rules codified by the state legislature"); *see also id.* (O'Connor, J., concurring in part and dissenting in part) ("the court arrives at what might be a reasonable policy

necessarily to the context of airline regulation is a source of even greater concern. Because the elevation of judge-made law over state legislative action stems from the Court's reading of the "enact or enforce any law" language of the ADA's preemption provision, there is no reason to believe that it could not be transmitted to other contexts via similarly worded provisions, in much the same way that the language of ERISA found its way into the ADA. The *Wolens* decision thus assures that the legion difficulties associated with judicially crafted law, ranging from judges' lack of electoral accountability[68] to courts' inadequate information gathering capacity,[69] will not remain solely the concern of the airline industry for long.

The majority's decision to grant broad effect to the ADA's preemption provision was ill-conceived, and contributed to the muddling of the Court's preemption jurisprudence begun in *Morales.* Within the airline regulation context, the decision will foster anticompetitive industry conduct, corrupting the very well-working market that the ADA was enacted to protect. Beyond that context, however, the decision's consequences could be even more severe. Rather than focusing on the substantive similarities between the plaintiffs' consumer fraud and contract claims, as Justice Stevens suggested, five Justices focused instead on a single technical difference. These same Justices eventually held that law fashioned by the state legislature would be preempted while law fashioned by the judiciary would not. Perhaps the majority simply missed the doctrinal forest through the trees. In any event, it is remarkable that a Court so punctilious that it rested its judgment on the distinction between the enforcement of obligations based on a statute and obligations based on a contract could fail to see the danger its holding presented to a cornerstone constitutional principle like the separation of powers.

John T. Delacourt

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judgment as to when state law actions should be preempted *if we were free to legislate it*") (emphasis added).

68. *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4-5 (1990).

69. *See* Lillian BeVier, *Judicial Restraint: An Argument from Institutional Design*, 17 HARV. J.L. & PUB. POL'Y 7, 11 (1994) ("[T]he information that courts receive is backward-looking; the database upon which their decisions rest is limited. There is no systematic way for them to acquire knowledge about the effects of their decisions on the behavior of all those foreseen and unforeseen persons who will be affected by the decision.").

THE FIRST AMENDMENT AND CABLE TELEVISION: *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994).

In 1985, and again in 1987, the U.S. Court of Appeals for the D.C. Circuit held unconstitutional the Federal Communications Commission's so-called "must-carry" rules,[1] which had required cable operators[2] to carry the signals of local broadcast stations. Subsequently, Congress passed a must-carry provision in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[3] Last term, in *Turner Broadcasting System, Inc. v. FCC*,[4] the Supreme Court held that as a matter of First Amendment issues the provision was content-neutral, and therefore the intermediate scrutiny of the *United States v. O'Brien*[5] test was appropriate. The Court also found that the factual record was insufficient to weigh properly the *O'Brien* factors, and remanded the case for further proceedings. None of the decision's five opinions created a new First Amendment jurisprudence for cable television; by choosing an established, flexible test, the Justices declined the chance to forge any new rule which might have affected greatly the ongoing evolution of the industry.

The Court decided *Turner* against a background of massive and rapid transformation in the cable business.[6] The earliest cable systems were designed merely to carry the signals of broadcast stations to areas where viewers could not receive a clear broadcast signal.[7] As the cable industry matured, federal and local regulations influenced the course of its development, local authorities regulated cable operators through local franchise and license systems, and Congress passed several federal statutes affecting the rights and duties of cable operators.[8]

1. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert denied* 476 U.S. 1169; *Century Communications Corp. v. FCC* 835 F.2d 292 (D.C. Cir. 1987), *cert denied* 486 U.S. 1032.

2. *Cable operators* own the cable systems which deliver programming to viewers, but usually do not create programming. *Cable programmers* (such as CNN, The Discovery Channel, and MTV) and *local broadcasters* (independent stations and broadcast network affiliates) sell or license programming to cable operators. *See* Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329, 332-34.

3. Pub. L. No. 102-385, 106 Stat. 1460 (1992).

4. 114 S.Ct. 2445 (1994).

5. 391 U.S. 367 (1968).

6. *See Turner*, 114 S.Ct. at 2445.

7. *See Turner*, 114 S. Ct. at 2451.

8. The Copyrights Act, Pub. L. No. 94-553, § 111, 90 Stat. 2541, 2550-58 (1976) (codified at 17 U.S.C. § 111), granted cable operators license to retransmit broadcast signals.

Despite their modest start, by 1992 cable operators enjoyed a dominant position over local broadcasters. Cable provided a clearer signal than broadcast television, and had the capacity to carry far more channels than the broadcast spectrum in a given area.[9] By 1992, 60% of American households had chosen to subscribe to cable television, making broadcast stations dependent on cable systems to reach a large portion of viewers. Congress reasoned that unless broadcasters' programming could reach cable subscribers, broadcasters would lose advertisers and perish.[10]

Congress viewed the broadcasters' dependence on cable as particularly dangerous in light of the cable industry's increasing horizontal concentration and vertical integration. For regulatory and technological reasons, most cable operators have monopoly power in their markets, and many operators share common ownership. Cable operators, many of whom are affiliated with cable programmers, have an incentive to deny carriage to broadcasters, thereby capturing broadcasters' viewers and advertising dollars.[11] Because the broadcasters which operators have an incentive to "drop" could be denied 60% of the viewing public, Congress concluded "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."[12]

The Communications Act Amendments of 1978, Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C. § 224), passed in 1978, authorized the FCC to resolve utility pole attachment disputes which arose between the utilities and the increasing numbers of cable operators. Finally, the Cable Communications Policy Act of 1984 helped cable operators by weakening local authorities' regulatory power over the cable industry; cable operators were guaranteed fewer difficulties with rate-setting, franchise renewal, and local imposition of other obligations. *See Turner Broadcasting System v. FCC* 819 F.Supp. 32, 53 (D.D.C. 1993) (Sporkin, J., concurring).

9. "More than half of the cable systems in operation today have a capacity to carry between 30 and 53 channels. And about 40 percent of cable subscribers are served by systems with a capacity of more than 53 channels. Newer systems can carry hundreds of channels, and many older systems are being upgraded with fiber optic rebuilds and digital compression technology to increase channel capacity." *Turner*, 114 S. Ct. at 2452.

10. *Turner*, 819 F.Supp. at 53.

11. *See Turner*, 114 S. Ct. at 2454. Turner Broadcasting pointed out a disincentive for cable operators to drop broadcasters: most operator revenues come from subscriber fees, not advertising. This means an operator has little incentive to drop popular broadcasting stations to increase the market share of its affiliated cable programmers. Although the cable operator-programmer might capture greater advertising revenues for itself, the operator makes its cable service as a whole less attractive to subscribers, who at some point may "drop" the operator. *See* Brief For Appellants at 44, *Turner*. This disincentive is currently not as strong as one might expect, however, because viewers normally cannot choose another cable system and are unlikely to give up cable service entirely.

12. 1992 Cable Act, § 2(a)(16).

After three years of hearings,[13] Congress recognized and responded to the cable "market disfunction" with the 1992 Cable Act, which passed over a Presidential veto on October 5, 1992.[14] Section 4 of the Act requires cable operators to set aside up to one-third of their systems for the carriage of local commercial broadcasters. Section 5 of the Act requires cable operators to carry the signals of every local noncommercial educational broadcaster, until redundant carriage creates substantial duplication of programming on the cable system.[15] In the five weeks after the Act became law, The Turner Broadcasting System, Inc. ("Turner"), along with a coalition of other cable programmers and operators, sued the United States and the FCC, challenging the constitutionality of various provisions of the Act.

The three-judge district court[16] declined to exercise jurisdiction over any of Turner's claims except for those challenging the must-carry provisions.[17] Divided, the court granted summary judgment in favor of the Government, holding that the Act's must-carry provisions were consistent with the First Amendment.[18] The court held that must-carry was nothing more than a content-neutral congressional regulation of a disfunctional market. Judge Jackson emphasized Congress's finding of economic danger to broadcasters, writing that "the regulation is justified by the existing structure of the cable business itself, and by the market peculiarities resulting from the technological differences" between broadcast and cable.[19] Because the rule conferred benefits based on the use of a particular communications *medium*, he concluded that "if the must-carry provisions are content related at all, they are only marginally so, to the point of *de minimis*."[20] The district court then applied the *O'Brien*[21] test,

13. *See Turner*, 114 S. Ct. at 2454.

14. *See Turner*, 819 F.Supp. at 35.

15. *See* 1992 Cable Act, § 5.

16. Section 23 of the 1992 Cable Act provides for such a court to hear any suit challenging the constitutionality of sections 4 and 5. The D.C. Circuit already had rejected FCC must-carry rules twice, and the Supreme Court had denied certiorari both times. *See supra* note 1. Section 23 allowed the review to bypass the skeptical D.C. Circuit and to go directly to the Supreme Court.

17. *See Turner* at 37, 819 F. Supp. at 37.

18. *Id.* at 36. This was true although the Government itself had not moved for summary judgment. The private plaintiffs and intervenor defendants moved for summary judgment, and the federal defendants moved to dismiss.

19. *Id.* at 40.

20. *Id.* at 44. In response to the plaintiffs' contention that Congress's praise of localism was in fact a content-based rationale for legislation, the court replied, "It appears to the Court, however, that Congress' solicitousness for local broadcasters' material simply rests

and, showing great deference to Congress's express findings of peril to broadcasters, sustained the provisions as sufficiently tailored to serve an important government interest.[22]

Judge Williams dissented.[23] He argued that must-carry was not content-neutral, and could not pass the scrutiny required in previous compelled-speech cases.[24] Must-carry provisions unconstitutionally abridged the speech rights of cable operators and programmers.[25]

The Supreme Court, in a five to four decision, vacated the judgment and remanded for further proceedings. Writing for the Court, Justice Kennedy held that must-carry was a content-neutral rule subject only to *O'Brien* scrutiny.[26] He refused to extend to cable the rule of *Red Lion Broadcasting, Inc. v. FCC*,[27] which relaxed the scrutiny to which regulations of broadcast television speech are subject. The Court held that only the scarcity of frequencies in the broadcast spectrum justified the *Red Lion* rule, and that any other structural disfunction in a communications market was insufficient to permit lessened First Amendment protection. As future cable systems are anticipated to have virtually unlimited capacity, no analogy could be made on the basis of spectrum scarcity.[28]

Justice Kennedy then proceeded to choose between levels of scrutiny. He wrote that rigorous scrutiny should be applied to a statutory provision that distinguishes between favored and disfavored speech by the ideas or views expressed. "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral."[29]

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on its assumption that they have as much to say of interest or value as the cable programmers who service a given geographic market audience, not on any recognition that there is a discrete 'local' subject matter." *Id.*

21. *See United States v. O'Brien*, 391 U.S. 367 (1968).

22. *Turner*, 819 F. Supp. at 45-48.

23. The district court panel included Judge Williams, a circuit judge. Jurisdiction over the constitutional claims against must-carry were defined by section 23 of the 1992 Cable Act. *See supra*, note 16.

24. *See Turner*, 819 F.Supp. at 58.

25. *See id.* at 67.

26. *See Turner*, 114 S. Ct. at 2469.

27. 395 U.S. 367 (1969).

28. *Turner*, 114 S. Ct. at 2457. In rejecting *Red Lion*, Justice Kennedy was joined by the Chief Justice and Justices Blackmun, O'Connor, Scalia, Souter, Thomas, and Ginsburg.

29. *Id.* at 2459. In this part, Justice Kennedy was joined by the Chief Justice and Justices Blackmun, O'Connor, Scalia, Souter, Thomas, and Ginsburg.

Justice Kennedy then held that must-carry is content neutral. He reasoned that despite the Act's unabashed praise of the value of the local-interest programming that local broadcasters provide, must-carry is chiefly a regulation to preserve the availability of free broadcast television for those who do not have cable.[30] According to Justice Kennedy, Congress's identification of the public's interest in broadcasters' speech

> does not indicate that Congress regarded broadcast programming as more valuable than cable programming. Rather, it reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable.[31]

Must-carry is content-neutral despite the localism language, for the rule favors all broadcasters and no cable programmers. No programmer can change its entitlement by becoming any more or less "local" or "educational." According to Justice Kennedy, it is not important that the statute praises the content of the programming which broadcasters provide. What matters is that Congress's "overriding objective" was merely to protect the providers of free video programming.[32]

Justice Kennedy distinguished the compelled speech cases relied upon by the appellant. *Miami Herald Publishing Co. v. Tornillo*[33] and *Pac. Gas and Elec. v. Public Utils. Comm'n. of California*[34] were inapposite because must-carry does not give operators an incentive to alter their expression to minimize the effects of the rule. The right-of-reply requirement in *Tornillo* was triggered only when a newspaper attacked a political candidate,[35] and the compelled speech in *PG & E* similarly "conferred benefits based on viewpoint."[36] In contrast, must-carry obligations are only a function of an operator's capacity. Another significant difference between the instant case and *Tornillo* was the far greater power cable operators have as "gatekeepers" of video speech.[37]

30. *Id.* at 2462. The Chief Justice and Justices Blackmun, Stevens, and Souter joined in this part of the opinion.
31. *Id.* at 2462.
32. *Id.* at 2460-61.
33. 418 U.S. 241 (1974).
34. 475 U.S. 1 (1986).
35. *See Turner*, 114 S. Ct. at 2460.
36. *Id.* at 2465.
37. In *Tornillo*'s one-paper town, one still could distribute printed material, but if a monopolist cable operator drops a broadcast station, subscribers will not receive the broadcaster's signal and the broadcaster will go broke. *Id.* at 2466. Soon, however, the

Justice Kennedy also distinguished *Turner* from other cases which had struck down efforts to change the balance of power between speakers. Must-carry was a response to "economic peril due to the physical characteristics of cable transmission and the economic incentives facing the industry,"[38] so the strict scrutiny of *Buckley v. Valeo*[39] and *Arkansas Writers' Project, Inc. v. Ragland*[40] was inappropriate.

Justice Kennedy applied the intermediate level of scrutiny applicable to content-neutral restrictions under *United States v. O'Brien*.[41] *O'Brien* requires that a regulation of speech serve an important or substantial government interest unrelated to the suppression of speech, and that the incidental restriction on First Amendment freedoms be no greater than essential to the furtherance of the government interest.[42] Justice Kennedy concluded that "in the abstract" the government had sufficiently strong interests in preserving free television for those without cable, promoting a multiplicity of information sources, and ensuring fair competition in the programming market.[43]

Justice Kennedy concluded, however, that the record did not demonstrate that must-carry actually advanced the theoretical interests asserted.[44] Despite the appropriateness of "substantial deference to the predictive judgments of Congress," the Court nonetheless decided to engage in "meaningful judicial review" of Congress's conclusions. Despite Congress's finding of broadcaster peril, the plurality found the evidence of must-carry's benefits and harms insufficient to support summary judgment. There was an incomplete record of past "drops" of broadcasters, and a total lack of evidence as to whether cable systems were dropping cable programmers to clear channel space for must-carry-entitled broadcasters.[45] Consequently, the Court re-

"gatekeeper" reasoning will be less relevant, as technological and regulatory changes increasingly will subject cable operators to competition from other service providers. *See infra*, note 81 and accompanying text.

38. *Turner* 114 S. Ct. at 2467.

39. 424 U.S. 1 (1976).

40. 481 U.S. 221 (1987).

41. 391 U.S. 367 (1968).

42. Justice Kennedy added that the tailoring component of the *O'Brien* test is not so strict as to require that the regulation be the "least speech-restrictive means." *Turner*, 114 S. Ct. at 2469 (citing Ward v. Rock Against Racism, 391 U.S. 367 (1989)).

43. *Id.* at 2470. The Chief Justice and Justices Blackmun, Stevens, Kennedy, and Souter joined in this part of the opinion.

44. In this section of his opinion, Justice Kennedy was joined only by the Chief Justice and Justices Blackmun and Souter.

45. *Turner*, 114 S. Ct. at 2471 (Kennedy, J., plurality opinon).

manded the case to the district court for further development of the record.

Justice Blackmun wrote a concurring opinion to emphasize the "paramount importance of according substantial deference to the predictive judgments of Congress," especially where the legislature "has compiled an extensive record in the course of judgment."[46] Justice Blackmun explained that he joined the plurality only because of the weak record and the high standard for summary judgment.

Justice Stevens also concurred in the judgment. Although Justice Stevens agreed with "most of Justice Kennedy's reasoning," he would have affirmed the judgment of the district court. Justice Stevens felt that the case called for greater deference to the policy judgments of Congress, because must-carry is a primarily economic measure with "only incidental effects on speech." According to Justice Stevens, must-carry should pass constitutional review if Congress could "fairly conclude" that there was a threat to broadcasters and that must-carry was an appropriate way of addressing the threat.[47] Justice Stevens criticized the Court's instructions for remand, because they would make the lower court's judgment depend on facts that the litigants can strategically affect, for example, the degree to which cable operators drop cable programmers.[48] Justice Stevens voted with the plurality merely so that the Court could produce a majority in favor of some disposition of the case.[49]

Justice O'Connor concurred in part and dissented in part.[50] Justice O'Connor argued that must-carry was not content-neutral, and that therefore strict scrutiny applied. According to Justice O'Connor, a rule's content neutrality cannot be established merely by demonstrating its *viewpoint* neutrality; in fact, an attempt to preserve the existence of "diverse and antagonistic sources of information" was sufficient to tie a rule to content and therefore to warrant strict scrutiny.[51] Justice O'Connor examined the Cable Act's references to the value of local programming and its separation of noncommercial educational

46. *See id.* at 2472 (Blackmun, J., concurring).
47. *See id.* at 2473 (Stevens, J., concurring).
48. *See id.* 2475.
49. *See id.*
50. Justice O'Connor was joined in full by Justices Scalia and Ginsburg, and in part by Justice Thomas.
51. *Id.* at 2477 (O'Connor, J., concurring in part and dissenting in part).

broadcasters from commercial broadcasters, and concluded that must-carry was motivated by content preference.[52] Given the statute's content-based justification, no independent, sufficient policy justification (like market failure) could save must-carry from strict scrutiny.[53] Applying strict scrutiny, Justice O'Connor argued that the government's interests in diversity, localism, and noncommercial educational programming were insufficient to justify restricting the speech of dropped cable programmers and the editorial discretion of cable operators.[54]

Justice O'Connor then argued that must-carry fails even content-neutral scrutiny.[55] Justice O'Connor contended that must-carry was insufficiently tailored because by giving *all* broadcasters its entitlement, the regulation harms even cable programmers whose carriage does not threaten broadcasters.[56] As an alternative, Justice O'Connor suggested subsidizing troubled broadcasters, a policy that would protect free reception "without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event."[57] Justice O'Connor concluded by placing faith in the market to discipline cable operators, and remarked that "the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression."[58]

Justice Ginsburg also concurred in part and dissented in part. Justice Ginsburg argued that even though must-carry does not differentiate by "viewpoint," it shows a preference for a particular (local) "subject matter." Justice Ginsburg wrote that although subject matter favoritism does not warrant the same high scrutiny as viewpoint discrimination, it does require more scrutiny than *O'Brien* provides. Finally, Justice Ginsburg agreed with the lower court's dissent that the threat to broadcasters was merely theoretical and was not supported by material evidence.[59]

The importance of *Turner* goes beyond cable policy. Consistent with its pragmatist outlook, the Court in *Turner* went out of

52. *Id.* at 2476-7.
53. *Id.* at 2478.
54. *Id.* at 2479.
55. In this section, Justice O'Connor was joined by Justices Scalia and Ginsburg. Justice Thomas did not join Justice O'Connor's *O'Brien* analysis.
56. *See id.* at 2480 (O'Connor, J., concurring in part and dissenting in part).
57. *Id.*
58. *Id.*
59. *Id.* at 2480 (Ginsburg, J., concurring in part and dissenting in part).

its way to choose a balancing test over a rule. Then, unable to resist the temptation of fact-intensive analysis, the Court applied the *O'Brien* test without the test's nearly blind deference to Congress.[60] While *Turner* may be problematic from a doctrinal perspective, at least the Court avoided casting a decision which would distort the industry's development.[61]

The majority accepted the explanation that must-carry was intended to preserve the possibility of free access to television programming. Because they also own cable programmers, cable operators have an incentive to drop local broadcasters, thereby capturing for themselves broadcasters' advertising revenues. If denied cable carriage and access to 60% of the viewing market, broadcasters would be unable to sell advertising time and would go out of business. As a result, non-cable subscribers would be unable to receive free programming from local broadcasters.[62]

In response to this threat, Congress adjusted the market power position of local broadcasters vis-a-vis both cable operators and cable programmers. Under the must-carry rule, a broadcaster can insist that a local cable operator comply with "must-carry," or, if the broadcaster thinks its programming highly valuable, it can withhold programming from the cable operator, demanding that the cable operator pay for the right to carry the signal. Must-carry thus radically changes the relative bargaining strengths of video industry actors.

Broadcasters' power is increased most dramatically against cable programmers. As Justice O'Connor observed in the first sentence of her dissent, "There are only so many channels that any cable system can carry."[63] By setting aside for broadcasters about one-third of a cable system's channels, must-carry makes it far more likely that when there are more would-be programmers than channel slots, it is cable programmers who will be denied carriage.[64] Empirical evidence supports the theory that must-

60. *See* David Cole *The Perils of Pragmatism*, LEGAL TIMES, July 25, 1994, at S27.

61. Commentators feared that the Court might establish a speech rule for the cable medium. This could have caused future cable cases to be decided according to a rule arising from mutable technological features of today's cable industry. *See* Note, *The Message in the Medium: The First Amendment on the Information Superhighway* 107 HARV. L. REV. 1062, 1063; *see also* David Cole, *supra* note 60, at S27.

62. *See Turner*, 114 S. Ct. at 2454.

63. *Id.* at 2475 (O'Connor, J., concurring in part and dissenting in part).

64. *See id.* The dissent in the district court observed, "There is uncontroverted evidence that 2000 cable systems, serving one-third of all subscribers, have no excess channel capacity." *Turner*, 819 F.Supp. at 59 (Williams, J., dissenting).

carry tilts the playing field in broadcasters' favor; when must-carry came into effect it became difficult for small cable programmers to secure and maintain carriage.[65] Carriage prices for cable programmers are bid up as they compete for the channel slots left after must-carry apportions over a third of the most coveted positions to broadcasters.

The First Amendment injustice, therefore, is done not so much to cable operators as to cable programmers. Cable programmers suffer a loss of carriage due to the advantage Congress gives to local broadcasters. If we take Congress's words seriously, it is clear that this advantage was conferred at least partly on the basis of content. On its face, the 1992 Cable Act was intended to preserve free *local* programming; the only way to escape this conclusion is to argue that Congress did not mean what it said.

Although must-carry does not offer any speaker an incentive to alter content, it nonetheless contains a content-based judgment. Not only did Congress justify its regulation by referring to the content of the protected class's speech, but also the Act's provisions actually create a hierarchy of entitlement which is tied to content. Must-carry treats cable, commercial broadcast, and noncommercial broadcast programmers differently.

Congress chose to explain and justify this differentiation in the Act itself, and such a rare choice should require a reviewing Court to give weight to the language.[66] Justice O'Connor quoted Congress's reasoning at length:

> "[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens." § 2(a)(8)(A) "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation." § 2(a)(10). "Broadcast television stations continue to be an important source of local news and public affairs services critical to an informed electorate."

65. "The subject of must-carry rules is raised almost immediately in every conversation with every cable operator. The must-carry rules consistently serve as an impediment to access for Court TV's programming, blocking access to a large percentage of the available slots on nearly all cable systems." Amicus brief for Court TV at 11, *Turner*.

66. *See Turner*, 114 S. Ct. at 2476 (O'Connor, J., concurring in part and dissenting in part).

§ 2(a)(11).[67] Justice O'Connor also pointed out that Congress's instructions to the FCC show a similar content preference:

> In determining whether a broadcast station should be eligible for must-carry in a particular market, the FCC must "afford particular attention to the value of localism by taking into account such factors as . . . whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community."

§ 4, 47 U.S.C. § 534(h)(1)(C)(ii) (1988 ed., Supp. IV). In determining whether a low-power station is eligible for must-carry, the FCC must ask whether the station "would address local news and informational needs which are not being adequately served by full power broadcast stations." § 4, 47 U.S.C. § 534(h)(2)(B) (1988 ed., Sup. IV).[68] While these provisions do not express a preference for a particular viewpoint, they certainly express a preference for content—local content.[69] Furthermore, in the case of low-power stations, must-carry actually does give speakers an incentive for content-alteration,[70] because when deciding whether to confer must-carry rights on a low-power broadcaster, the FCC is directed explicitly to consider broadcaster's local content as a factor favoring forced carriage.

Justice Kennedy's answer was simply to give less evaluative weight to the Act's findings. First, he said, the statute's "*overriding* objective" is merely to preserve free programming.[71] Yet, as Justice O'Connor pointed out, the Court never has held that "a permissible justification lessens the impropriety of relying in part on an impermissible justification."[72] Second, Justice Kennedy argued, Congress's emphasis on the importance of localism and educational programming does not show that Congress regarded

67. *Id.*
68. *Id.*
69. *Id.* at 2477.
70. *Id.* at 2476.
71. *Id.* at 2462 (emphasis added).
72. *Id.* at 2478 (O'Connor, J., concurring in part and dissenting in part). A precedential content-neutrality case, Ward v. Rock Against Racism, 491 U.S. 781 (1989), stated that "the government's purpose is the controlling consideration," in determining content-neutrality, so long as it is "justified without reference to the content of the regulated speech." *Id.* at 791 (internal quotation marks omitted) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Justice Kennedy's addition of the word "overriding" may signal to lower courts a general increased willingness to find statutes content-neutral. *See* Am. Library Assoc. v. Reno 33 F.3d 78, 84, 87 (D.D.C. 1994) (holding a law imposing reporting requirements on pornography producers constitutional in part because Congress had a permissible purpose, the protection of children).

broadcast programming as "*more* valuable than cable programming,"[73] but rather recognizes that such programming "has some intrinsic value and, thus, [is] worth preserving against the threats posed by cable."[74] But in deciding a class of speech is content-differentiated and worth saving, Congress necessarily makes a judgment about content.

Because in this case the judgment on content is made explicit in the Act itself, the logical conclusion is that of the dissent: no matter how praiseworthy Congress's objective, its content-based singling out of a favored class of speakers should be subject to strict scrutiny. If Congress overjustified its statute both by pointing out the importance of free reception and by praising broadcasters' local content, the Court cannot ignore the impermissible reason on the statute's face. Thus, *Turner* should have demanded the application of *Buckley v. Valeo*,[75] which Justice Kennedy said "stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."[76]

The Court instead applied what appears to be a new, stricter version of *O'Brien* intermediate scrutiny. *O'Brien* states that a content-neutral regulation will be upheld if it serves a sufficiently strong governmental interest unrelated to the suppression of speech, and if it is narrowly tailored to achieve that interest.[77]

The *O'Brien* Court itself was extremely deferential to Congress's judgment of what interests justified a regulation, and what constituted narrow tailoring.[78] In contrast, the *Turner* Court remanded the case to review whether the peril to broadcasters was sufficient to justify the regulation, and whether the regulation imposes an unjustified burden on cable programmers.

It is doubtful that such a fact review will be helpful. Justice Stevens argued persuasively that *O'Brien* required "even greater deference to factual findings accompanying economic measures enacted by Congress itself,"[79] given the complexity and fact-intensiveness of such questions. Furthermore, as Justice Stevens ar-

73. *Turner*, 114 S. Ct. at 2462 (original emphasis).
74. *Id.*
75. 424 U.S. 1 (1976).
76. *Turner*, 114 S. Ct. at 2467.
77. *Id.* at 2469.
78. "In *O'Brien* itself, the Court essentially engaged in blind deference, upholding a duplicative and unnecessary ban on destruction of draft cards that was clearly directed at Vietnam War protesters." Cole, *supra* note 60, at S27.
79. *Turner*, 114 S. Ct. 2473 (Stevens, J., concurring).

gued, cable systems could respond to the remand by dropping cable programmers instead of expanding channel space, thus altering the facts of the case.[80] This of course would increase the apparent magnitude of must-carry's harm, leading the district court to find must-carry insufficiently tailored.

In fact, technological and regulatory change soon should make must-carry irrelevant. As the capacity of cable systems expands, setting aside tens of channels for broadcasters will not affect a cable system's ability to offer carriage to new cable programmers.[81] Furthermore, the monopoly position of cable operators soon will be undermined by competition. In the near future, cable operators will have to compete with each other, as well as small-dish direct broadcast satellite systems, and possibly even telephone companies. At that point, consumers will have choices other than that of cable service from a monopolist or none at all, so cable operators will have a stronger incentive to offer their subscribers a rich channel selection.[82] Because most of cable operators' revenue comes from subscriber fees,[83] there will be no profit in dropping local broadcasters to capture advertising revenue for affiliated cable programmers. The threat of subscriber abandonment will be too great.

Although the existence of must-carry soon will be unimportant, the legal principles established by *Turner* will endure. Because the industry is changing so rapidly, it is fortunate that the Court avoided creating any sweeping, clear authority that could return to haunt cable's unforeseeable future.[84] But *Turner* has been[85] and will be applied outside the cable context. The case can be relied upon to justify future regulations of speech, for it appears to provide authority for avoiding strict scrutiny even when a statute on its face refers to content. By tilting towards the unpredictable and subjective[86] *O'Brien* test, the Court has not made the First Amendment stronger.[87]

Matthew D. Segal

80. *Id.* at 2474-5.
81. *See* Rex S. Heinke & Seth M.M. Stodder, *The Supreme Court Speaks on Cable: The Turner Broadcasting Case*, COMM. LAW., Fall 1994, at 3, 4.
82. *See id.*
83. *See supra* note 11.
84. *See* Cole, *supra* note 60, at S27.
85. *See* Am. Library Assoc. v. Reno, 33 F.31 78 (D.C. Cir. 1994).
86. *See* Brenner, *supra* note 2, at 363.
87. *See* Cole, *supra* note 60, at S27.

THE INCREASED NEED FOR STRONGER ANTI-CHILD PORNOGRAPHY STATUTES IN THE WAKE OF *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

"Of all the crimes known to our society, perhaps none is more revolting than the sexual exploitation of children, particularly for the purpose of producing child pornography."[1] Few would disagree with the House Judiciary Committee's condemnation of child pornography.[2] As a result, when the child pornography industry boomed in the 1970s,[3] Congress enacted legislation[4] to combat the interstate trafficking of such material.[5] The Child Protection Act of 1984 (CPA)[6] further facilitated the prosecution of child pornographers.[7] However, section 2252,[8] which targeted

1. H.R. REP. NO. 910, 99th Cong., 2d Sess. 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952, 5953 (statement of the House Judiciary Committee).

2. *See* Trek Doyle, Casenote, *Possession of Child Pornography: The Kallestad Conviction and 18 U.S.C. § 2252*, 21 AM. J. CRIM. L. 223, 228 (1993); Schwartz, *supra* note 1, at 585; *see also* Josephine R. Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 15 & n.1 (1988) (illustrating the proposition that "the child pornography question makes strange bed-fellows" by quoting a condemnation of child pornography by Al Goldstein, the publisher of *Screw* magazine, in a hearing before the Subcommittee on Juvenile Justice of the Senate Judiciary Committee).

3. Susan G. Caughlan, Note, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187, 198 & n.91 (1987) (citing DEPT. OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY: FINAL REPORT 601 (1986)).

4. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-53 (1994)).

5. Unfortunately, the original version of this statute was "virtually ineffective." Lisa S. Smith, *Private Possession of Child Pornography: Narrowing At-Home Privacy Rights*, 1991 ANN. SURV. AM. L. 1011, 1014 (1992) (citing DEPT. OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY: FINAL REPORT 604 (1986)).

6. Pub. L. No. 98-292, 98 Stat. 204 (codified at 18 U.S.C. §§ 2251-56, 2516 (West 1984 & Supp. 1988)).

7. The CPA included three substantive changes: (1) it raised the age of majority from sixteen to eighteen; (2) it deleted the requirement that the distribution be for a commercial purpose; and (3) it deleted the obscenity requirement in § 2252(a) in response to New York v. Ferber, 458 U.S. 747 (1984), in which the Supreme Court held that the First Amendment does not prohibit the proscription of non-obscene child pornography. CPA §§ 4(1), 4(3), 5(a)(1). These changes faciliated prosecution of child pornography cases involving fourteen- and fifteen-year-olds, allowed prosecutors to target the substantial amount of child pornography distributed for non-commercial purposes, and broadened the reach of the statute due to its prohibition of non-obscene child pornography. *See* Robert J. Clinton, Note, *Child Protection Act of 1984—Enforceable Legislation to Prevent Sexual Abuse of Children*, 10 OKLA. CITY U. L. REV. 121, 128 (1985); Janelle E. Pretzer, Casenote, United States v. United States Dist. Court (Kantor): *Protecting Children From Sexual Exploitation or Protecting the Pornography Producer?*, 20 PAC. L.J. 1343, 1357-58 (1989). As a result of these changes, federal child pornography prosecutions "increased dramatically." Schwartz, *supra* note 1, at 589 & n.35.

8. 18 U.S.C. § 2252 (1990). Section 2252 provides in pertinent part:

(a) any person who—

the distribution of child pornography, was poorly written.[9] It was ambiguous with respect to the scienter requirements for the elements of the offense.[10] As a result of this ambiguity, federal judges have struggled to determine the proper reading of the statute and often have come to conflicting conclusions.[11]

This Term, in *United States v. X-Citement Video, Inc.*,[12] the Supreme Court resolved the confusion by interpreting the statute to require the government to prove knowledge for each element of the offense. The Court interpreted section 2252 in the only way that preserves both the constitutionality and rationality of the statute.[13] As the dissent suggested, however, a superior decision would have been to invalidate the statute.[14] Congress should rewrite section 2252 to encourage distributors to take steps to ensure that they do not traffic in child pornography.

Rubin Gottesman owns X-Citement Video. In June 1986, Police Officer Steven Takeshita, posing as a pornography distributor, met with Rubin Gottesman at X-Citement Video.[15] Officer Takeshita expressed interest in obtaining videotapes featuring porn star Traci Lords.[16] Gottesman eventually sold the under-

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(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct . . . .

9. *See* Oral Argument at 31, *X-Citement Video, available in* 1994 WL 665284, at *29.

10. There are three elements of the offense to which a scienter requirement may apply: (1) the transporting, shipping, receiving, or distributing of any visual depiction; (2) the nature and contents of the material; and (3) the age of the performer or person depicted. The original version of § 2252 may have been less ambiguous in this respect. *See* Brief for the United States at 37, *X-Citement Video, available in* 1994 WL 135195, at *71-72.

11. Judges have had particular difficulty in determining what level of scienter is required with respect to the age of the performer or person depicted. *See* United States v. X-Citement Video, Inc., 982 F.2d 1285 (9th Cir. 1992); *id.* at 1292 (Kozinski, J., dissenting in part); United States v. Knox, 977 F.2d 815 (3d Cir. 1992); United States v. Long, 831 F. Supp. 582 (W.D. Ky. 1993); United States v. Kleiner, 663 F. Supp. 43 (S.D. Fla. 1987).

12. 115 S. Ct. 464 (1994).

13. *See id.* at 467-72.

14. *Id.* at 475 (Scalia, J., dissenting).

15. Brief for the Unites States at 4, *X-Citement Video, available in* 1994 WL 135195 at *23.

16. *X-Citement Video*, 115 S. Ct. at 466.

cover officer forty-nine videotapes that featured Lords.[17] Two months later, Gottesman shipped an additional eight tapes depicting the underage Lords to Takeshita in Hawaii.[18] These two transactions formed the basis for an indictment in which Gottesman and X-Citement Video were each charged with one count of violating 18 U.S.C. § 2252(a)(1)-(2).[19]

At a bench trial,[20] the government established that Gottesman was fully aware of Lord's underage status.[21] The district court found Gottesman and X-Citement Video guilty,[22] rejecting their argument that the law was unconstitutional.[23] Three months later, in *United States v. Thomas*,[24] a Ninth Circuit panel ruled that the term "knowingly" in section 2252 only modifies the transportation or receipt of visual depictions and therefore does not require the government to prove that a defendant knew a performer was a minor at the time of the performance.[25] The Ninth Circuit remanded to the district court for reconsideration in light of *Thomas*.[26] On remand, the district court upheld the convictions.[27]

The Court of Appeals for the Ninth Circuit reversed.[28] The court reasoned that it was bound by *Thomas* and thus construed section 2252 as lacking a scienter requirement for the age of the performer.[29] Arguing that Supreme Court precedent required some knowledge of the nature of the contraband on the part of defendants before they could be criminally punished, the Ninth Circuit concluded that the First Amendment requires the government to prove defendants possess knowledge that at least one performer engaged in sexually explicit acts was underage.[30] Because it found that section 2252, as construed by *Thomas*, did not

17. *Id.* Lord was under eighteen-years-old in the videos. *Id.*
18. *Id.*
19. *Id.* Additionally, each defendant was charged with conspiracy to distribute and ship child pornography under 18 U.S.C. § 371 (1988). *Id.*
20. Brief for the United States at 3, *X-Citement Video, available in* 1994 WL 135195 at *22.
21. *X-Citement Video*, 115 S. Ct. at 466 (citation omitted).
22. *Id.* The district court sentenced Gottesman to 12 months incarceration and ordered him to pay a $100,000 fine. United States v. X-Citement Video, Inc., 982 F.2d 1285, 1286 (9th Cir. 1992).
23. Brief for Appellants at 7, *X-Citement Video* (9th Cir. 1992) (Nos. 89-50556, 89-50562); *see* Schwartz, *supra* note 1, at 587 & n.17.
24. 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990).
25. *Id.* at 1070.
26. *X-Citement Video*, 115 S. Ct. at 466.
27. *Id.*
28. *X-Citement Video*, 982 F.2d at 1286.
29. *Id.* at 1290.
30. *Id.* at 1291.

contain this requirement, the court ruled that section 2252 was unconstitutional.[31]

The Supreme Court, by a vote of seven to two, reversed in part and affirmed in part.[32] Writing for the majority,[33] Chief Justice Rehnquist explained that the critical determination was whether "the term 'knowingly' in subsections (1) and (2) [of section 2252(a)] modifies the phrase 'the use of a minor' in subsections (1)(A) and (2)(A)."[34] Chief Justice Rehnquist conceded that the Ninth Circuit adopted "[t]he most natural grammatical reading" of the statute's provisions.[35] The Chief Justice nonetheless found it "odd," if not "positively absurd," that Congress would intend for criminal liability to turn on whether someone consciously mailed a package, but be unconcerned about whether the person was aware of the contents of the package.[36]

Also weighing against the Ninth Circuit's reading, the Chief Justice reasoned, was the presumption that criminal laws, especially those with harsh penalties, contain a scienter requirement for each of the statutory elements that criminalize otherwise innocent conduct.[37] He found this presumption to be important because "the age of the performers is the crucial element" that

31. *Id.* at 1292. In addition, the court rejected defendants' arguments that § 2256 is unconstitutionally overbroad and vague because it set the age of majority at 18, substituted "lascivious" for "lewd," and prohibited actual or simulated bestiality and sadistic or masochistic abuse. *Id.* at 1288-89.

32. *See X-Citement Video*, 115 S. Ct. at 467-72. The Court affirmed the circuit court's ruling on respondents' constitutional challenges to 18 U.S.C. § 2256 (1988). *Id.* at 472.

33. Chief Justice Rehnquist was joined by Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Justice Stevens also wrote a separate concurring opinion.

34. *X-Citement Video*, 115 S. Ct. at 467; *see* 18 U.S.C. § 2252(a) (1990).

35. *X-Citement Video*, 115 S. Ct. at 467. The Chief Justice noted that the elements of the statute relating to the age of the performers and the sexually explicit nature of the material were set forth in an independent clause separated from the term "knowingly" by interruptive punctuation. *Id.*; *see* 18 U.S.C. § 2252(a) (1990).

36. *X-Citement Video*, 115 S. Ct. at 467. The Chief Justice observed that under the Ninth Circuit's reading of § 2252, "a retail druggist who returns an uninspected roll of developed film to a customer 'knowingly distributes' a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct. . . . Similarly, a Federal Express courier who delivers a box in which the shipper has declared the contents to be 'film' 'knowingly transports' such film" and would also be liable under such a statute. *Id.* at 467-68.

37. *Id.* at 469. With the exception of public welfare offenses, this presumption operates in the criminal law in the absence of express contrary intent of Congress. *See* Morissette v. United States, 342 U.S. 246 (1952). While Chief Justice Rehnquist stated that "sex offenses" such as statutory rape contain a strict liability standard, he distinguished such offenses, arguing that in those instances, the "perpetrator confronts the underage victim personally and may reasonably be required to ascertain the victim's age." *X-Citement Video*, 115 S. Ct. at 469 n.2.

separates legal trafficking in sexually explicit adult materials from wrongful trafficking in child pornography.[38]

Chief Justice Rehnquist then turned to the statute's legislative history. After a lengthy analysis,[39] the Chief Justice found that the legislative history "persuasively indicate[d] that Congress intended that the term 'knowingly' apply to the requirement that the depiction be of sexually explicit conduct."[40] Chief Justice Rehnquist recognized that "it is a good deal less clear . . . that Congress intended the [knowledge] requirement extend also to the age of the performers."[41] However, as a matter of grammar, the Chief Justice found it difficult to conclude that " 'knowingly' modifies one of the elements in [subsections] (1)(A) and (2)(A), but not the other."[42]

Finally, the Chief Justice asserted that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions."[43] Chief Justice Rehnquist reasoned that "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts."[44] Therefore, the Chief Justice held that it was "incumbent upon [the Court] to read [section 2252] to eliminate those doubts so long as such a reading [would] not [be] plainly contrary to the intent of Congress."[45] In conclusion, Chief Justice Rehnquist found that section 2252 requires the government to prove that the defendant had knowledge of the sexually explicit nature of the material *and* knowledge of the age of the performers.[46]

Justice Scalia, joined by Justice Thomas, dissented. Justice Scalia disagreed with the majority's "sweeping proposition that 'the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct,' . . . even when the plain text of the statute says

38. *X-Citement Video*, 115 S. Ct. at 469.

39. *See id.* at 469-71.

40. *Id.* at 471.

41. *Id.*

42. *Id.* at 471-72.

43. *X-Citement Video*, 115 S. Ct. at 467.

44. *Id.* at 472.

45. *Id.* (citation omitted).

46. *Id.* Justice Stevens, in a brief concurrence, emphasized the reasonableness of the Court's conclusion. *Id.* at 472 (Stevens, J., concurring). While joining the Chief Justice's opinion "without qualification," Justice Stevens wrote separately because he believed that constructing the statute so that "knowingly" modified each element of the offense was the "normal, commonsense reading." *Id.*

otherwise."[47] Justice Scalia argued that the "only grammatical reading" of the statute is that it does not require the government to prove knowledge either of the fact that the visual depiction portrays sexually explicit conduct, or the fact that a participant in the conduct was a minor.[48] Finally, Justice Scalia disagreed with any suggestion that holding distributors strictly liable with respect to the age of the performer would raise serious constitutional concerns, stating that the " 'prevention of sexual exploitation and abuse of children' [is] 'a government objective of surpassing importance.' "[49] In conclusion, however, Justice Scalia stated that he would have held the statute unconstitutional, finding that "by imposing criminal liability upon those not knowingly dealing in pornography, [section 2252] establishes a severe deterrent, not narrowly tailored to its purpose, upon fully protected First Amendment activities."[50]

The majority correctly held that if section 2252 is to be saved, the term "knowledge" must modify each element in the offense. The Chief Justice cited many examples of innocent conduct that would be subject to criminal prosecution if section 2252 were interpreted as imposing strict liability as to the nature of the material and the age of the person depicted.[51] Such an alternative reading of the statute led to the irrational results described by Chief Justice Rehnquist, and the entire Court agrees that such a statute would be fatally overbroad.[52] Furthermore, while the legislative history may provide support for requiring knowledge of the nature of the material but not of the age of the person depicted,[53] interpreting the statute in that manner would defy all rules of grammar, as Justice Stevens explained in his concurrence.[54]

47. *Id.* at 473 (Scalia, J., dissenting) (quoting *X-Citement Video*, 115 S. Ct. at 469).

48. *Id.* at 473 (emphasis deleted). Justice Scalia also argued that if the Court intended to ignore what the statute plainly says, it should interpret the statute to require knowledge of the nature of the material, but not of the age of the performer. *Id.* at 474. This interpretation, he states, is what the statute "was meant to say." *Id.*

49. *Id.* at 475 (quoting New York v. Ferber, 458 U.S. 747, 757 (1984)). He argued that because the First Amendment does not protect pornography as extensively as other speech, the balancing of interests tilted in favor of the government. *Id.* at 474-75.

50. *Id.* at 475.

51. *See, e.g., supra* note 36.

52. *See X-Citement Video*, 115 S. Ct. at 467-68; *id.* at 472 (Stevens, J., concurring); *id.* at 475 (Scalia, J., dissenting).

53. *X-Citement Video*, 115 S. Ct. at 470 (citing S. REP. No. 95-438, 95th Cong., 1st Sess. 28, 29 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 64 (statement of Assistant Attorney General Patricia M. Wald)).

54. *See X-Citement Video*, 115 S. Ct. at 472 (Stevens, J., concurring).

The problem with the Court's holding is that it is not clear that section 2252 should be saved. As Justice Scalia wrote, the majority "save[d] a single conviction by putting in place a relatively toothless child-pornography law that Congress did not [intend to] enact."[55] Requiring prosecutors to prove that distributors had knowledge of a performer's underage status is too heavy a burden. The government attempted to alleviate this burden in two ways.[56] First, the government argued that, "[l]ike other elements of a criminal offense, a defendant's state of mind may be proved by circumstantial as well as by direct evidence."[57] Second, the government contended that it may establish that a defendant acted knowingly when he willfully blinded himself to the truth.[58] These doctrines, however, do not go far enough to lower the burden of proving knowledge.[59] The willful blindness doctrine is a "strictly limited exception" to the knowledge requirement.[60] In addition, this doctrine and a government showing of proof by circumstantial evidence fail to place an affirmative duty on distributors to take reasonable steps to avoid dealing in child pornography. In fact, under the Court's interpretation of section 2252, a defendant may avoid criminal liability simply by ignoring indications that he is engaged in illicit transactions.[61] As interpreted by the majority, the statute now fails to impose the proper incentives on distributors to act affirmatively to ensure that they do not deal in child pornography.

Strict liability,[62] on the other hand, creates strong incentives for parties to ensure that the proscribed activity does not occur.

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55. *Id.* at 476 (Scalia, J., dissenting).

56. *See* Brief for the United States at 40 n.29, *X-Citement Video, available in* 1994 WL 135195 at *76-78 n.29.

57. *Id.* (citations omitted).

58. *Id.*

59. Before any weakening of the knowledge requirement occurs, the courts must accept the government's arguments. Such an assumption, however, is not unreasonable, as both devices are well established. *See id.*; *see also* United States v. Jewell, 532 F.2d 697, 702 nn.12-13 (9th Cir. 1976) (citing the many cases in which, and the many statutes for which, "willful blindness" has substituted for knowledge).

60. *Jewell*, 532 F.2d at 700 (quoting GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 57, at 157 (2d ed. 1961)).

61. *Cf.* Christopher L. Hall, Comment, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 298 (1994) (arguing that the Foreign Corrupt Practices Act, 15 U.S.C. § 78, was designed with a "reason to know" scienter requirement rather than a knowledge standard in order "to prevent a defendant from avoiding criminal liability by ignoring reasonable indications that an agent or intermediary was engaged in illicit bribery").

62. For purposes of this Recent Development, strict liability only will apply to the performer's age (as opposed to applying strict liability to both the age of the performer and the nature of the material).

"In the interest of the larger good, [a strict liability offense] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[63] Furthermore, strict liability effectively eliminates the "possibility that a culpable defendant would escape punishment by feigning ignorance or mistake."[64] Strict liability for distributors of sexually explicit material, however, poses problems. Distributors lack the opportunity to deal with the depicted performers personally and therefore would have great difficulty ascertaining the performers' ages.[65] In addition, distributors deal in vast quantities of materials, so it would be "virtually impossible for them to know the contents" of everything they distribute.[66] As the Ninth Circuit stated, "it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of actors with whom they have had no direct contact."[67] Therefore, holding distributors to a pure strict liability standard with respect to the age of the performer might be unconstitutionally overbroad because it might have a substantial chilling effect on expression protected by the First Amendment.[68]

Congress needs to enact a statutory regime that will create strong incentives against distributing child pornography, but which does not discourage the distribution of constitutionally protected materials. Two changes should be instituted to move in

63. United States v. Dotterweich, 320 U.S. 277, 281 (1943).

64. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 424 (1993).

65. Robert R. Strang, Note, *"She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779, 1800 (1990); *see* Reply Brief for the United States at 8, *X-Citement Video, available in* 1994 WL 369731, at *18.

66. Strang, *supra* note 65, at 1800-01 (citing DEPT. OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY: FINAL REPORT 1384 (1986)).

67. United States v. United States Dist. Court (Kantor), 858 F.2d 534, 543 n.6 (9th Cir. 1988) (reviewing 18 U.S.C. § 2251(a)).

68. Producers, in contrast, "are in a position to know or learn the ages of their employees." *Id.* As a result, Congress has imposed an affirmative duty to ascertain the birth date of each performer on producers of materials containing depictions of sexually explicit conduct. 18 U.S.C. § 2257(b) (1988). Congress has placed no comparable duty on distributors. Additionally, a producer is involved with only a limited number of productions each year, and therefore would have more time and opportunity to ascertain ages with accuracy. Strang, *supra* note 65, at 1800. As a result of the different positions of producers and distributors, Congress purposefully did not require that a defendant know that the actor was a minor, if that defendant was charged with *producing* child pornography. Pretzer, *supra* note 7, at 1354-55. These differences also led the Ninth Circuit to declare unconstitutional a strict liability offense applied to distributors, *X-Citement Video*, 982 F.2d at 1292, yet uphold a strict liability offense (with a mistake of age defense) applied to producers, *Kantor*, 858 F.2d at 540-43.

this direction. First, Congress needs to fill a gap in the current regime. Congress has enacted federal laws prohibiting the distribution of obscenity,[69] and although section 2252 prohibits the distribution of child pornography, no law specifically targets obscene child pornography. Congress therefore should enact a statute that outlaws the distribution of obscene child pornography, holds a defendant strictly liable with respect to the age of the performer, and contains stiffer sanctions than either the statutes that prohibit obscenity in general or section 2252.[70] Because the distribution of obscenity already is prohibited by federal law,[71] the new statute simply would provide for increased penalties if the illegal obscenity also depicts underage performers. This statute would be constitutional, as it would not chill protected speech any more than the general obscenity statutes. Furthermore, "once a defendant has been shown to have acted with criminal intent, factual circumstances of which he was unaware may properly be taken into account in establishing his guilt of a particular offense within federal jurisdiction and in assessing the appropriate level of punishment."[72] Therefore, once a defendant is shown to have sold obscene materials illegally, the fact that the depicted performer was underage may be considered in increasing the defendant's punishment, regardless of whether the defendant knew of this fact.

This statute would send a strong message to would-be distributors of child pornography. "[S]trict liability expresses emphatically that such conduct will not be tolerated regardless of the

69. 18 U.S.C. §§ 1461-66 (1988 & Supp. V 1993).

70. The original version of § 2252 only prohibited the distribution of child pornography that was obscene, but Congress dropped the obscenity requirement once the Supreme Court indicated that non-obscene child pornography could be prohibited. *See* New York v. Ferber, 458 U.S. 747 (1984); *supra* note 7.

71. *See supra* note 69.

72. Brief for the United States at 15, *X-Citement Video, available in* 1994 WL 135195 at *40. Some examples of this doctrine are: (1) the felony murder rule, which imposes strict liability for any deaths that occur during the commission of a felony because the felon already has crossed the line into unacceptable behavior, *see* Levenson, *supra* note 64, at 469; (2) under 21 U.S.C. § 860(a) (Supp. IV 1992), a person who distributes narcotics within 1000 feet of school property faces increased criminal penalties even if he is unaware that he is within the 1000 foot range, *see* United State v. Falu, 776 F.2d 46, 50 (2d Cir. 1985); (3) a person may be convicted of violating 18 U.S.C. § 111 (1970) (criminalizing assault on an on-duty federal officer) for assaulting an undercover agent even if the defendant had no knowledge that the victim was a federal officer, *see* United States v. Feola, 420 U.S. 671, 684 (1975); and (4) a person may be convicted of "knowingly or intentionally" distributing a controlled substance to a minor even if he was unaware that the person is a minor, United States v. Pruitt, 763 F.2d 1256, 1261-62 (11th Cir. 1985), *cert. denied*, 474 U.S. 1084 (1986).

actor's intent."[73] Moreover, holding a defendant strictly liable for the age of the performer would simplify child pornography prosecutions.[74] This simplification would create a risk of steeper criminal sanctions for distributors of child obscenity and would serve as a better deterrent than the current statutes. Any increase in deterrence would be valuable because child pornography undoubtedly causes unspeakable harms.[75] Finally, much of child pornography "would be found obscene under existing federal and state obscenity laws."[76] Therefore, Congress could enact this penalty-enhancing statute, which would proscribe the distribution of most of the material currently defined as child pornography, while simultaneously holding distributors strictly liable with respect to the age of the performer.[77]

Second, Congress needs to rewrite section 2252. The Food, Drug and Cosmetic Act (FDCA) provides a useful framework. The FDCA prohibits the mislabeling or adulteration of food or drugs and the introduction of such articles into interstate commerce.[78] Merely causing a prohibited act, regardless of fault, is a violation.[79] This strict liability applies to distributors and any per-

73. Levenson, *supra* note 64, at 422.

74. "Any [decrease] in the number of conditions required to establish criminal liability [decreases] the opportunity for deceiving the courts or juries by the pretense that some condition is not satisfied." *Id.* at 424 n.119 (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 77 (1968)).

75. Many harms have been attributed to the child pornography industry. The Supreme Court has "painfully catalogued the harms sexual exploitation inflicts on children." *X-Citement Video*, 982 F.2d at 1293 n.2 (Kozinski, J., dissenting in part) (citing New York v. Ferber, 458 U.S. 747 (1984)). The *Ferber* Court specifically declined to "second-guess [the] legislative judgment . . . that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Ferber*, 458 U.S. at 758 (footnote omitted). Additionally, the *Ferber* Court recognized that the public distribution of the pornographic materials disseminated a permanent record of the children's participation in sexual activity and thus "exacerbated" the initial harm. *Id.* at 759. The Court has stated that pedophiles use child pornography to lure children into engaging in sexual activity or posing for sexually explicit photographs. Osborne v. Ohio, 495 U.S. 103, 111 (1990). Furthermore, sexually exploited children often are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers. Ulrich C. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 AM. ACAD. CHILD PSYCHIATRY J. 289, 296 (1980).

76. H.R. REP. NO. 696, 95th Cong., 1st Sess. 7 (1977); *cf. X-Citement Video*, 115 S. Ct. at 475 (Scalia, J., dissenting) (arguing that "sexually explicit conduct" as defined by the child pornography statutes "constitutes not merely pornography but fully proscribable obscenity, except to the extent it is joined with some other material . . . that has artistic or other social value").

77. Additionally, the benefits derived from the existing non-obscene child pornography laws would not be undermined by this new statute.

78. 21 U.S.C. § 331(a), (b) (1988).

79. 21 U.S.C. § 333(a) (Supp. V 1993).

sons in responsible relation to a violation.[80] Nonetheless, "a person who introduces an illegal article into commerce is exempt from liability if he has received the article in good faith and obtained a written guaranty that it is not in violation of the Act."[81]

The justification for this regime is well established: "the public interest in the purity of its food and drugs is so great as to warrant the imposition of the highest standard of care on distributors."[82] As the Supreme Court explained:

> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.[83]

The guarantee exemption protects distributors who often have no control over the contents of the food or drugs, and who, therefore, would face great difficulty ascertaining whether their cargo was adulterated or mislabeled.[84] The guarantee provision is vital for businesses handling a large number of different products.[85]

A revised section 2252 should be modeled after the statutory regime found in food and drug law.[86] The statute should impose

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80. *See* United States v. Dotterweich, 320 U.S. 277, 284-85.

81. PETER B. HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW 1165 (2d ed. 1991); *see* 21 U.S.C. § 333(c)(2) (Supp. V 1993).

82. United States v. Park, 421 U.S. 658, 671 (1975) (quoting Smith v. California, 361 U.S. 147, 152 (1959)); *cf. Ferber*, 458 U.S. at 757 (indicating that the government interest in preventing the sexual exploitation and abuse of children is "of surpassing importance").

83. *Park*, 421 U.S. at 672; *cf. X-Citement Video*, 115 S. Ct. at 475 (Scalia, J., dissenting) ("The First Amendment will lose none of its value to a free society if those who knowingly place themselves in the stream of pornographic commerce are obliged to make sure that they are not subsidizing child abuse").

84. *Cf. supra* p. 936 (explaining that often distributors have little time or capacity to determine the age of the performers in videos).

85. *See, e.g.*, United States v. Balanced Foods, Inc., 146 F. Supp. 154 (S.D.N.Y. 1955) (finding that defendants handled from 1,500 to 2,000 different products).

86. *But see X-Citement Video*, 115 S. Ct. at 468 (explicitly distinguishing the child pornography laws from "public welfare offenses"); United States v. United States Dist. Court (Kantor), 858 F.2d 534, 538 (9th Cir. 1988) ("There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller") (quoting Smith v. California, 361 U.S. 147, 152-53 (1959)). Even if child pornography statutes are not public welfare offenses, distributing child pornography still might be classified as a pure strict liability offense if it is considered to be a "morality offense" such as bigamy, adultery, or statutory rape. Levenson, *supra* note 64, at 422-25. *But see X-Citement Video*, 115 S. Ct. at 469 n.2

strict liability on a distributor with respect to the age of the performer or person visually depicted. The distributor should be exempted from criminal liability if: (1) he obtains, in good faith, a written guarantee from the producer that all people depicted as engaging in sexually explicit conduct are not minors; and (2) a reasonable distributor would have been satisfied that the guarantee was legitimate and would not have investigated further to determine whether the guarantee was given falsely.[87]

Before discussing the merits of these changes to section 2252, it is important to mention that while the FDCA provides that a guarantee obtained in good faith is an unconditional exemption from liability, such an exemption would not be practical for section 2252. In the food industry, if a producer gives a distributor a guarantee, and a product later turns out to have been mislabeled, the Food and Drug Administration can track down the producer for sanctions.[88] This tracking ability, however, does not exist in the context of child pornography. As a result of the underground nature of the child porn industry,[89] unknown, untraceable producers could give a false guarantee, and law enforcement officials would be hard-pressed to track or prosecute the culpable party.[90] An unconditional exemption for guarantees thus would create a huge legal loophole in this setting.

The amendments to the statute proposed above address the problem of false guarantees. If the government can prove that the distributor knew that the depictions are of minors, the guarantee would not have been obtained in good faith and the distributor would thus remain liable.[91] The second part of the exemption, moreover, requires that a reasonable distributor would have relied on the guarantee, and would not have investi-

(distinguishing the distribution of child pornography from statutory rape laws). Despite these contrary arguments, the analogy to food and drug law is appropriate as the proposed regime is not in actuality a pure strict liability regime, *see infra* note 96, and would pass constitutional muster, *see infra* pp. 942-44.

87. *Cf.* Strang, *supra* note 65, at 1802.

88. The guarantee exemption requires the producer to provide his name and address. *See* 21 U.S.C. § 333(c)(2) (Supp. V 1993).

89. *See* Smith, *supra* note 5, at 1011 (citing DEPT. OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY: FINAL REPORT 600 (1986)).

90. *See* Potuto, *supra* note 2, at 38 n.98 (citing *Ferber*, 458 U.S. at 758 n.9, 759-60); *see also* John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347, 359 & n.117 (1991) (noting Ohio's argument that the only way to eliminate the underground market for child pornography was to ban private possession).

91. Since the *X-Citement Video* Court required the government to establish that the distributor had knowledge of the performer's underage status, the suggested regime would not make the government's burden of proof more difficult to meet.

gated further to determine whether the guarantee is legitimate. Objective factors such as the circumstances surrounding the transaction, whether the parties conformed with normal above-board business practices, and the title, jacket cover, or price of the material all could be examined to determine whether the distributor should be held liable.[92] This provision thus creates an incentive for distributors to take affirmative steps to avoid accepting guarantees given under questionable circumstances.[93]

Because the child pornography industry effectively is part of the underground economy, it is essential to attack it from the distribution side.[94] Requiring distributors to obtain a guarantee creates an opportunity for indicia of illicit dealings to present themselves. And because distributors would face criminal liability for ignoring or missing obvious signals of questionable transactions, they would have an incentive against "feigning indifference or mistake."[95]

A statute with these amendments would be much stronger than section 2252 as interpreted by the Court in *X-Citement Video*, and would be constitutional.[96] The major problem with a pure strict liability standard would be the chilling effect on distributors of non-obscene adult pornography. In such a regime, distributors would need to try to obtain the ages of all the performers in sexually explicit material—a requirement that most believe is too burdensome.[97] The regime suggested here does not pose the

92. *See* Strang, *supra* note 65, at 1802 (stating that "[t]itles or jacket covers often give obvious clues as to whether the contents are child pornography"). Because of the black market nature of child pornography, the price for it often may be higher than for adult pornography, reflecting the risk involved in distributing such material. *See* Brief for Respondent at 5, *X-Citement Video, available in* 1994 WL 379096 at *20 (mentioning that the defendant believed porn star Traci Lords "falsely floated the rumor that she was under 18 when she made tapes . . . so that the new film she was in the process of making would be more valuable").

93. The statute also could prohibit the giving of a false guarantee. *Cf.* 21 U.S.C. § 331(h) (1988) (prohibiting the "giving of a guaranty . . . referred to in [21 U.S.C.] section 333(c)(2), which guaranty . . . is false").

94. *See Ferber*, 458 U.S. at 759-60.

95. *See supra* p. 936; *see also* Smith, *supra* note 5, at 1020 (arguing that "[w]ithout criminal distribution laws, efforts to enforce laws prohibiting the production of child pornography would be hindered").

96. Although a pure strict liability standard might pose serious constitutional problems, *see X-Citement Video*, 115 S. Ct. at 472, the suggested statutory regime would not impose such a liability standard. One may think of this regime rather as imposing a negligence standard, with a statutory duty to obtain a guarantee. If a distributor fails to meet his statutory duty, the distributor is negligent per se. If the distributor obtains the guarantee, he will be found liable only if he was negligent with respect to accepting the guarantee.

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

same problem as it is narrowly tailored to serve the government's interest. The burden on distributors of protected expression would be minimal. Producers of sexually explicit material already are required to ascertain and record the ages of its performers.[98] As in the case of food and drug producers, it would require very little effort on the part of pornography producers to provide a written guarantee that their product complies with the applicable statutes. In most cases, this guarantee would satisfy the distributor's burden, because there generally would be no reason for the distributor to doubt the guarantee's legitimacy, especially when the producer is known within the industry. Thus, this requirement rarely will be more burdensome than obtaining and retaining a sales receipt.

In transactions in which certain indications suggest that the proffered guarantee may be false, the distributor merely needs to ask the producer to provide a copy of the records documenting the performers' ages. Compliance with such a request would cost little, and then a reasonable distributor would satisfy her statutory duty, having no reason to believe the guarantee was false. The distributor, therefore, would face little risk of being found criminally liable. Because a distributor could, in most cases, satisfy her duty of care with little effort, this new regime would not "significantly compromise the exercise of constitutionally protected speech in a substantial number of instances,"[99] and therefore would pass constitutional muster.[100]

If any chilling does occur, it would be a rare situation in which the producer, for whatever reason, could not adequately reassure the distributor that the depictions were not of children.[101] Any such chilling, however, would be de minimis and would be out-

98. 18 U.S.C. § 2257 (1990). Because producers are held strictly liable with respect to the age of their performers and face severe sanctions for mistakes, *see* 18 U.S.C. § 2251 (1990), they have strong incentives to comply.

99. Pretzer, *supra* note 7, at 1346 n.28.

100. *See id.* at 1345-46 & n.27 ("a statute should be invalidated [as violative of the First Amendment] only if the statute is 'substantially' overbroad") (citing New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11 (1988); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

101. Suppose, for example, that a distributor distrusts a legitimate guarantee, and the producer provides documentation that fails to satisfy the distributor's concerns. The distributor may feel the risk that the guarantee is false and that a jury would find him negligent outweighs the benefit of dealing in that material. Such a scenario, however, is hardly conceivable. Producers of legal, adult pornography already have strong incentives to keep accurate documentation. *See supra* note 98. It would be the exceptionally rare case in which a producer of legitimate material would be unable to provide documentation that would satisfy a concerned distributor.

weighed by the substantial government interests involved. Pornography is low value speech that does not receive full First Amendment protection.[102] Balanced against this interest is the protection of children, an "objective of surpassing importance."[103]

"The need for special protection of the young has become an accepted government interest."[104] Statutory rape laws hold defendants strictly liable for the age of their partner[105] despite the strong presumption against strict liability for non-public welfare offenses and for felonies.[106] Furthermore, "many jurisdictions today make it a criminal offense to fail to report a suspected instance of child abuse or child sex abuse. . . . Several jurisdictions expressly cover child sexual exploitation . . . in the list of crimes for which observers have an affirmative duty to report" even though there generally is no duty to act to prevent a crime.[107] Concededly, the First Amendment does not speak to these examples. The government's interest in protecting children, however, has justified a number of infringements on First Amendment interests that would not have been otherwise permitted.[108] More-

102. *Cf. Ferber*, 458 U.S. at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest if not de minimis"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976) ("there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance").

103. *Ferber*, 458 U.S. at 757.

104. Strang, *supra* note 65, at 1798 n.145.

105. *See X-Citement Video*, 115 S. Ct. at 475 (Scalia, J., dissenting).

106. *X-Citement Video*, 115 S. Ct. at 469. The *X-Citement Video* Court distinguished statutory rape laws from § 2252, likening them, instead, to the criminalization of child pornography production at 18 U.S.C. § 2251 (1990). *X-Citement Video*, 115 S. Ct. at 469 n.2. The Court argued that a person committing statutory rape, like a person producing child pornography, "confronts the underage victim personally and may reasonably be required to ascertain that victim's age." *Id. But see id.* at 475 (Scalia, J., dissenting) (arguing that "it is no more unconstitutional to make persons who knowingly deal in hard-core pornography criminally liable for the underage character of their entertainers than it is to make men who engage in consensual fornication criminally liable (in statutory rape) for the underage character of their partners").

Because the statutory regime suggested here for prohibiting the distribution of child pornography does not require the distributor to determine the performers' ages, but rather imposes a lesser duty of care, *see supra* pp. 942-43, the Court's argument does not undermine the analogy between the suggested statutory regime for child pornography and statutory rape laws.

107. Potuto, *supra* note 2, at 47-48 (footnotes omitted).

108. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 749-51 (1978) (upholding a regulation on indecent broadcasting due to the ease with which minors may obtain access); Ginsburg v. New York, 390 U.S. 629, 641-43 (1968) (upholding a statute which made illegal the sale of adult, non-obscene pornography to children in the interest of protecting the ethical and moral development of children).

over, the First Amendment already has given way to the protection of children in the context of child pornography.[109] Private, in-home possession of child pornography may be criminalized,[110] while private, in-home possession of obscene adult material may not be.[111] Similarly, child pornography may be barred even if it does not appeal to prurient interests or is not patently offensive, and may be barred without considering the work as a whole,[112] while adult pornography cannot be.[113] The need for protecting our children today should be no less compelling than the reasons found to protect them in the past.

Matthew S. Queler

109. *See generally X-Citement Video*, 982 F.2d at 1294 (Kozinski, J., dissenting in part).

110. Osborne v. Ohio, 495 U.S. 103, 108 (1990).

111. Stanley v. Georgia, 394 U.S. 557, 568 (1969). The Court found *Osborne* "distinct from *Stanley* because the interest underlying child pornography prohibitions far exceed the interest justifying the Georgia law at issue in *Stanley*." *Osborne*, 495 U.S. at 108.

112. *Ferber*, 458 U.S. at 764 ("the test for child pornography is separate from the obscenity standard enunciated in *Miller*").

113. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).