RECENT DEVELOPMENTS

JUDICIAL REVIEW OF IMPEACHMENT PROCEEDINGS: *Nixon v. United States*, 113 S. Ct. 732 (1993).

Impeachment proceedings in the Senate have traditionally been immunized from judicial review on the theory that they are inherently "political questions."[1] This view was stated forcefully in *Ritter v. United States*,[2] in which the Court of Claims[3] held that the Impeachment Trial Clause[4] of the Constitution grants the Senate exclusive power to try impeachments "without any other tribunal having anything to do with the case."[5] *Ritter* reflected the traditional understanding that political questions should not be handled by the judiciary, and that impeachments in particular are fundamentally political questions. Some twenty-five years after *Ritter*, however, the Supreme Court in *Baker v. Carr*[6] found a role for the courts to play in ostensibly political cases. Starting from the assumption that the Court stands as the "ultimate interpreter of the Constitution," the *Baker* majority reasoned that the Court bears the responsibility in political question cases for deciding how broad a scope of authority the Constitution granted to a particular political branch, as well as whether that branch's actions exceeded its proper authority.[7] By this theory, the Court has a constitutional duty to consider "a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[8]

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1. *See, e.g.*, Michael Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 97-99 (1989); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

2. 84 Ct. Cl. 293 (1936).

3. The Court of Claims was the predecessor of the current United States Claims Court.

4. U.S. CONST. art. I, § 3, cl. 6 (granting "sole Power to try Impeachments" to the Senate).

5. 84 Ct. Cl. 293, 296 (1936)(holding that the question whether specific charges against a federal judge constitute impeachable offenses is political and nonjusticiable). The court in *Ritter* seemed to regard review of Senate impeachment cases as somewhat unimaginable: "[W]hat court is authorized to review [the Senate's] judgments and set them aside? The writers on constitutional law are unanimous in holding that there is none." *Id.*

6. 369 U.S. 186 (1962). The Court distinguished nonjusticiability from lack of jurisdiction, noting that the former did not immediately foreclose "consideration of the cause." *Id.* at 198.

7. *Id.* at 211.

8. *Id.* at 217.

Baker laid the foundation for *Powell v. McCormack*,[9] which followed *Baker*'s method of interpreting the constitutional text in order to discern limits on a political power.[10] In *Powell*, the Court determined that the House's authority to "be the Judge of the Qualifications of its own Members"[11] is restricted by the meaning of "Qualifications," which the Court read to refer only to the constitutionally prescribed requirements of age, citizenship, and residence.[12] Thus, the *Powell* court did not upset any substantive decision by the House, but rather the House's conception of its powers under the Constitution. Although *Powell* followed directly from *Baker* and solidified the idea that courts may override political assumptions about the contours of purely political powers, contemporary commentators generally regarded it as more of an anomaly than a threat to the political question doctrine's continued vitality.[13] At least one commentator, however, predicted that *Powell* had opened the door to judicial review of impeachments.[14]

That door was closed last term in *Nixon v. United States*,[15] when the Supreme Court declined to decide whether Walter Nixon, an impeached and removed federal judge, had been tried by the Senate in a procedural manner in accordance with its constitutional duty. The *Nixon* majority retreated from *Baker* and *Powell*, calling into question *Baker*'s designation of the Court as "ultimate interpreter of the Constitution." In essence, the majority opinion paid lip service to the methodology of *Baker* and *Powell*, but rolled back the clock to the days of *Ritter*, when the courts abdicated to the political branches unreviewable authority to set the constitutional limits of their own powers. In the process, the Court took out of its own hands the responsibility to protect the due process rights of impeached public figures.

The Senate procedure at issue in *Nixon* is embodied in Senate

9. 395 U.S. 486 (1969).
10. *See id.* at 519-21.
11. U.S. CONST. art. I, § 5, cl. 1.
12. 395 U.S. at 522, 548. These requirements were set forth in U.S. CONST. art. I, § 2, cl. 2.
13. *See, e.g.*, Terrance Sandalow, *Comments on* Powell v. McCormack, 17 U.C.L.A. L. REV. 164, 174 (1969).
14. *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 108 (1973).
15. 113 S. Ct. 732 (1993).

Impeachment Rule XI,[16] which provides for a committee of twelve senators to receive evidence, hear testimony, and submit a report and transcript to the full Senate for decision. Mr. Nixon came before the Senate committee after the House adopted three articles of impeachment grounded on his 1986 conviction for lying to a Grand Jury.[17] The committee heard evidence from ten witnesses, including Mr. Nixon, and reported to the full Senate in accordance with Rule XI.[18] Both sides submitted briefs to the Senate and delivered oral arguments from the Senate floor.[19] The Senate thereafter convicted Mr. Nixon on two of the three articles, prompting him to file suit in federal district court on the theory that, by using a committee to hear evidence on behalf of the whole body, the Senate had failed its constitutional mandate to "try" his impeachment.[20] The district court dismissed the case as nonjusticiable[21] and the District of Columbia Circuit affirmed.[22] The Supreme Court unanimously affirmed the judgment, although two Justices would have reached the merits.[23]

Chief Justice Rehnquist, writing for the majority,[24] began his analysis by citing two primary indicia of nonjusticiability listed in *Baker*: a textually demonstrable commitment of the issue to a political department by the Constitution and a lack of judicially manageable standards for resolving the controversy.[25] The Chief Justice then followed the pattern of *Baker* and *Powell* by stating that interpretation of the constitutional text would be necessary in order to determine both the extent of textual "commitment" and the existence of applicable standards for decision.[26] Chief Justice Rehnquist noted that the inquiries are not entirely distinct, as "the lack of judicially manageable standards may strengthen the conclusion that there is a textually

16. The Rule was reprinted in Senate Manual, S. Doc. No. 101-1, 101st Cong., 1st Sess. 186 (1989).

17. 113 S. Ct. at 734; *see* United States v. Nixon, 816 F.2d 1022 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988).

18. 113 S. Ct. at 735.

19. *Id.* Mr. Nixon himself spoke from the floor.

20. *Id.*

21. Nixon v. United States, 744 F. Supp. 9, 14 (D.D.C. 1990).

22. Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991).

23. *See* Nixon v. United States, 113 S. Ct. 732 (1993).

24. Justices Stevens, O'Connor, Scalia, Kennedy, and Thomas joined the opinion of the Court.

25. 113 S. Ct. at 735.

26. *Id.*; *see also id.* at 740.

demonstrable commitment to a coordinate branch."[27] This analytical approach highlighted the majority's central concern with interpreting the constitutional text, first to determine the availability of judicially applicable standards, but ultimately to decide the scope of the Senate's impeachment trial powers.

The majority accordingly relied largely on a trio of textual arguments in reaching its conclusion that the Impeachment Trial Clause granted the Senate unreviewable authority over impeachment trial decisions and procedures.[28] First, Chief Justice Rehnquist rejected Mr. Nixon's claim that the word "try" has a judicially cognizable meaning that limits the Senate's choice of procedures.[29] He reasoned from the variety of modern and Eighteenth-Century dictionary definitions that "try" neither has today, nor had in 1787, "sufficient precision to afford any judicially manageable standard of review of the Senate's actions."[30] The Chief Justice buttressed this conclusion by noting that the Framers incorporated three specific procedural requirements into the Impeachment Trial Clause; he reasoned that enumeration of these detailed requirements implies an intent that "try" should not function as a fourth restriction.[31] This second, structural argument, in other words, emphasized that the Clause makes its procedural demands explicitly, and that a judicially classifiable "trial" is not among them. Chief Justice Rehnquist's final textual point was that a common-sense reading of "sole," a word used only one other time in the Constitution, signifies absolute exclusivity in the Senate's handling of impeachments.[32]

The majority supported this reading of the text with historical evidence that the judiciary was meant to have no role in impeachment proceedings.[33] The Chief Justice noted first that not "a single word in the history of the Constitutional Conven-

27. *Id.* at 735.

28. *See id.* at 735-37.

29. Nixon v. United States, 113 S. Ct. 732, 736 (1993).

30. *Id.*

31. *Id.* The three procedural requirements were that the Senators be on oath or affirmation, that the Chief Justice preside over trial of the President, and that a two-thirds vote be required for conviction. U.S. CONST. art. I, § 3, cl. 6.

32. The Chief Justice relied on *Webster's Third New International Dictionary*, which defined "sole" as "functioning . . . without . . . interference." *Nixon*, 113 S. Ct. at 736 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2168 (1971)). The other constitutional appearance of "sole" was in the grant of "sole Power of Impeachment" to the House. U.S. CONST. art. I, § 2, cl. 5.

33. *See* Nixon v. United States, 113 S. Ct. 732, 737-39 (1993).

tion or in contemporary commentary . . . even alludes to the possibility of judicial review in the context of the impeachment powers."[34] Moreover, the Framers considered and purposefully rejected plans that would have placed the authority to try impeachments with the federal judiciary,[35] reasoning that the Senate would be able through impeachment to exercise an essential check on the power of the judiciary.[36] This check would be lost if judges were permitted to try one another's impeachments themselves.[37]

The majority's final move was to distinguish *Powell*, which had interpreted the Constitution so as to limit the House's apparently exclusive authority to judge its members' qualifications.[38] In *Powell*, the Chief Justice emphasized, the Court was able to look to a separate constitutional provision that precisely fixes the meaning of "qualifications."[39] Thus, the *Powell* Court could conclude that, while the Constitution gives the House exclusive power to judge qualifications, *which* qualifications it may judge are determined by the text.[40] By contrast, in *Nixon* "there [was] no separate provision of the Constitution which could be defeated by allowing the Senate final authority to determine the meaning of the word 'try.' "[41] Chief Justice Rehnquist concluded that "try" is not a textual limit on the "sole Power" granted to the Senate.[42]

Justice Stevens noted in a brief concurring opinion that his agreement was compelled less by the Court's interpretations of "try" and "sole" than by respect for the Senate's ability to perform competently its textually and historically assigned function.[43]

Justice White wrote an opinion concurring in the judgment, but stating that the issue was justiciable and that he would decide against Nixon on the merits.[44] He began by drawing a crucial distinction between two sorts of constitutional

34. *Id.* at 737.
35. *Id.* at 738.
36. *Id.* at 738-39.
37. *Id.* at 739.
38. *Id.* at 739-40.
39. *See* U.S. CONST. art. I, § 2, cl. 2.
40. Nixon v. United States, 113 S. Ct. 732, 740 (1993)(emphasis added).
41. *Id.*
42. *Id.*
43. *See id.* (Stevens, J., concurring).
44. *See id.* at 740-47 (White, J., concurring in the judgment). Justice Blackmun joined Justice White's opinion.

commitment: commitment of exclusive power to perform a particular governmental function and commitment of final responsibility for determining the extent of such power.[45] The role of the Court, Justice White argued, is to examine the text of the Constitution in order to decide whether final *interpretive* authority, as opposed to exclusive *functional* authority, has been committed to a political branch.[46] The Court's task in *Nixon*, then, was to determine whether the Constitution granted the Senate unchecked power to define impeachment trial procedures or simply unshared authority to try the merits of impeachment decisions.

Looking to the text of the Impeachment Trial Clause, Justice White read both "try" and "sole" differently than did the majority.[47] He vehemently rejected the majority's argument that "try" is not susceptible to judicial interpretation, noting that the Framers surely used the term in its legal sense.[48] That sense "is hardly so elusive as the majority would have it," Justice White argued;[49] he demonstrated that it is easy to construct hypotheticals in which the Senate clearly fails to "try" an impeachment. He further noted that the Court has often found much more opaque constitutional language—"due process," for example—to be capable of interpretation.[50] Justice White also rejected the majority's inference from "sole" that the judiciary may have nothing to do with impeachments.[51] He argued that the significance of "sole" lies not in its infrequent use in the Constitution, but in its use in parallel provisions granting the House the power to impeach and the Senate the power to try.[52] The natural implication of this parallelism, Justice White reasoned, is that neither body may interfere with the other in the exercise of these powers, not that judicial review is

45. Nixon v. United States, 113 S. Ct. 732, 741 (1993)(White, J., concurring in the judgment).

46. *Id.* (White, J., concurring in the judgment).

47. *See id.* at 742, 744-45 (White, J., concurring in the judgment). I have taken Justice White's arguments out of order for the sake of parallelism with the arguments of the majority.

48. *Id.* at 744 (White, J., concurring in the judgment). "The third clause of Art. I, § 3 cannot seriously be read to mean that the Senate shall 'attempt' or 'experiment with' impeachments." *Id.*

49. *Id.* (White, J., concurring in the judgment).

50. *Id.* at 744-45 (White, J., concurring in the judgment).

51. Nixon v. United States, 113 S. Ct. 732, 742 (1993)(White, J., concurring in the judgment).

52. *Id.* (White, J., concurring in the judgment).

foreclosed.[53]

As the crux of his argument, Justice White drew on his distinction between functional and interpretive authority as a means of re-explaining the history relied on by the majority.[54] He noted that, although the Chief Justice cited convincing historical reasons for giving the Senate sole authority to try impeachments, none precluded the judiciary from reviewing the constitutionality of the Senate's trial *procedure*.[55] What the history showed is "that the Framers were deeply concerned about [exclusively] placing in *any* branch the 'awful discretion, which a court of impeachments must necessarily have.' "[56] Justice White reasoned that the Court's holding, which leaves Congress unchecked by a separate branch in the exercise of its impeachment powers, unacceptably disturbs the Framers' careful balancing, giving Congress potentially unanswerable power over the other branches.[57] What would be better, he concluded, and what the Framers intended, is a system in which the Senate could check the judiciary through impeachment, while the judiciary could ensure that it did so in accordance with minimal procedural safeguards.[58]

On the merits, Justice White found that Mr. Nixon did not meet the "substantial burden" of showing that the word "try" prohibits the Senate from using a committee to hear evidence.[59] He pointed out that judicial delegation of fact-finding was not unknown to the Framers, and reasoned that this fact, in the light of the Senate's rule-making authority and need for somewhat flexible rules, suggested that "try" was not meant to exclude hearings by committee.[60]

Justice White concluded with the distinction from which he started: "[P]etitioner has not asked the Court to conduct his impeachment trial; he has asked instead that it determine whether his impeachment was tried by the Senate."[61] The

53. *Id.* (White, J., concurring in the judgment).

54. *Id.* at 742-43 (White, J., concurring in the judgment).

55. *Id.* (White, J., concurring in the judgment).

56. *Id.* at 743 (White, J., concurring in the judgment)(emphasis added)(quoting THE FEDERALIST No. 65, at 441 (Alexander Hamilton)(Jacob E. Cooke ed., 1961)).

57. Nixon v. United States, 113 S. Ct. 732, 743 (1993)(White, J., concurring in the judgment).

58. *Id.* (White, J., concurring in the judgment).

59. *Id.* at 745 (White, J., concurring in the judgment).

60. *Id.* at 745-46 (White, J., concurring in the judgment).

61. *Id.* at 747 (White, J., concurring in the judgment).

Court need not decline its duty to interpret the Constitution out of deference to the Senate because sufficient deference is found in the Constitutional grant of discretion "to determine how best to *try* impeachments."[62]

Justice Souter, in a brief concurrence in the judgment, emphasized the central concern of the political question doctrine with separation of powers.[63] Whether to apply the doctrine, he argued, depends on whether the question at issue seems to " 'demand[ ] an answer,' "[64] such that interference would not be disrespectful to the political departments. Justice Souter, unlike the majority, noted that there could arise cases in which the Senate goes "so far beyond the scope of its constitutional authority" that judicial response would be necessary.[65] In Mr. Nixon's case, however, Justice Souter determined that the Senate seemed to remain within the Impeachment Trial Clause's "broad boundaries" and that, therefore, the Court should not disrupt its workings.[66]

Comparison of Justice White's concurring opinion to Chief Justice Rehnquist's majority opinion focuses on the latter's retreat from responsibility for determining whether a political department has exceeded its constitutional powers.[67] Although for the majority the key issue is whether the Constitution gave the Senate exclusive power to try impeachments, Justice White recognizes that the more deeply relevant question is whether the Constitution gives the Senate ultimate authority to determine the *limits* of that power.[68] By demanding a showing that the Constitution commits interpretive, or self-limiting, power to the Senate, Justice White remains true to the Court's duty under *Baker* and *Powell* to ensure that the political branches act

62. *Id.* (White, J., concurring in the judgment)(emphasis added). At the conclusion of his opinion, Justice White devoted a footnote to Justice Souter's concurrence in the judgment. He explained that Justice Souter's approach put the cart before the horse by requiring a preliminary judgment on the merits as a means of determining justiciability. *See id.* at n.4 (White, J., concurring in the judgment).

63. *See* Nixon v. United States, 113 S. Ct. 732, 747-48 (1993)(Souter, J., concurring in the judgment).

64. *Id.* at 748 (Souter, J., concurring in the judgment)(quoting LEARNED HAND, THE BILL OF RIGHTS 15 (1958)).

65. *Id.* at 748 (Souter, J., concurring in the judgment).

66. *Id.* (Souter, J., concurring in the judgment).

67. *Baker* and *Powell* treat this responsibility of the Court as well-established. *See* Baker v. Carr, 369 U.S. 186, 211 (1962); Powell v. McCormack, 395 U.S. 486, 521 (1969).

68. Nixon v. United States, 113 S. Ct. 732, 741 (1993)(White, J., concurring in the judgment).

in accordance with the Constitution. The majority, on the other hand, is satisfied to let the Senate police its own impeachment procedures simply because it alone may try impeachments.

The majority's attempt, on the basis of the word "sole," to transmute "power to try" into "power to decide by any method you wish" seems to lack a logical step. It is true that "sole" is used only twice in the Constitution and that it is defined as "having no companion" and "functioning . . . independently."[69] But it is not clear how these facts establish any more than that the Framers intended for the Senate alone to judge the substantive questions in impeachment trials. Certainly a court may not try an impeachment, but it does not follow that a court may not evaluate the constitutionality of the Senate's trial procedure. Justice White might be right in arguing that the thrust of "sole" in the parallel impeachment clauses is to separate emphatically the prosecutorial (House) and adjudicative (Senate) aspects of impeachment.[70] But a more fundamental response to Chief Justice Rehnquist's arguments inheres in Justice White's basic approach to the issue: "sole Power to try Impeachments" is clearly a grant of exclusive *functional* power to the Senate, but nothing in the phrase indicates that final *interpretive* power should rest with the Senate as well. It is the majority's eagerness to infer the latter from the former that rightly aroused Justice White's opposition.[71]

Another point of contention lies in the divergent interpretations of the same historical materials. The conclusion espoused by the majority is supported only when the materials are read with the assumption that nonjusticiability follows from emphatic commitment of functional power. When approached from Justice White's angle, the history reads differently. The lack of explicit references to judicial review of impeachments, for instance, implies nonjusticiability only on the normative assumption that political power prohibits judicial review absent a stated exception. This is Chief Justice Rehnquist's assumption, or his interpretation of the political question doctrine. Justice White's assumption, or interpretation, points to a different possible meaning of the historical silence—if political powers are

69. *Id.* at 736.

70. *Id.* at 742 (White, J., concurring in the judgment).

71. As Justice White recognizes, the constitutional grant of "[a]ll legislative powers" to Congress has never prevented the Court from interpreting the extent of those powers. *Id.* (White, J., concurring in the judgment)(quoting U.S. CONST. art. I, § 1).

normally subjected to judicial review, then the lack of a statement about whether impeachments are reviewable implies justiciability.[72]

Similarly, all the reasons behind the Framers' decision to have the Senate try impeachments, though surely cited correctly by the Chief Justice, do not help his argument unless it is assumed that exclusive functional authority entails nonjusticiability. Examined from Justice White's perspective, this history is useless to the Court because it does not explain why anyone should conclude that the Senate has interpretive authority. Simply put, the history does not support the majority's conclusion of nonjusticiability because its meaning depends on the assumptions of its interpreter; thus, a historical argument merely resolves into an argument about the competing assumptions.

Especially when the Court relies in part on a precise reading of "sole," it is difficult not to read the majority's discussion of "try" as disingenuous. The dictionary definitions of "try" cited in the majority opinion do not seem significantly more various than the cited definitions of "sole," and they tend to bear out Justice White's observation that the Framers surely meant "try" in its legal sense.[73] Yet, Chief Justice Rehnquist concludes that the meaning of "try" is too broad to set any limitation on the methods used by the Senate "in trying impeachments."[74] Certainly the concept of a legal trial is not sharply specific, and a variety of proceedings could well qualify. The breadth of the category does not imply, however, that it has no boundaries at all, nor does it even imply that its boundaries are especially difficult to perceive. Presumably some procedures would clearly fall outside the broad meaning of "try," but the Court disavows any ability to identify these procedures or to prevent their use. Practically speaking, dire abuses of the impeachment powers are not likely to follow—the Senate probably will not start flipping coins anytime soon, despite the Court's ruling that it may.[75] The real problem with the *Nixon* decision in this respect

72. The "historical silence" argument will always cut both ways: the history does not say courts *can* review impeachment procedures, but it also does not say they *cannot*.

73. Nixon v. United States, 113 S. Ct. 732, 736 (1993).

74. *Id.* It is ironic that the Chief Justice seems to take the meaning of "trying impeachments" for granted, even as he explains that "try" does not define any procedural limits.

75. *See id.* at 741 (White, J., concurring in the judgment). Senatorial coin-flipping

is that it ignores the Court's duty to determine whether the political departments have acted in line with the Constitution. The Court's unwillingness to define "try" indicates that it is willing to strain (and risk irony) in order to retreat from that duty.

The Court's attempt to distinguish *Powell* seems equally forced and equally indicative of an intent to erode the rationale of *Powell* and *Baker*. The *Powell* decision demonstrates that limited review of political actions—review of Congress's choice and application of procedures, in particular—is available to the federal courts as a means of keeping the political branches from doing more than the Constitution permits.[76] The *Nixon* Court declines to apply this fundamental reasoning on the puzzling grounds that no separate constitutional provision defines "try," while in *Powell* another provision does clarify "qualifications."[77] This distinction is puzzling, because the holding in *Powell* hinges upon the Court's perceived responsibility to enforce constitutional limits, not upon the existence of a provision making delineation of those limits easier. The distinction shows that *Nixon* is a somewhat more difficult case than *Powell*, because the Court is faced with interpreting a single, unilluminated provision, but it does not explain why the rationale behind *Powell* should not also demand resolution of *Nixon* on the merits. Chief Justice Rehnquist argues that allowing the Senate to interpret "try" itself could not defeat any separate provision of the Constitution, yet he ignores the fact that doing so *could* defeat the very provision at issue (if the Senate were to choose a procedure nothing like a trial).[78] His argument is predicated on the supposed inscrutability of "try"; ultimately the Chief Justice seems to state that he would follow *Powell* if only the Constitution would help him figure out what "try" means.

By side-stepping *Powell* instead of openly challenging its premises, the Court quietly undermines the *Baker-Powell* trend toward judicial scrutiny of constitutionally questionable polit-

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aside, less extreme measures, such as a straight up-or-down vote on the basis of a paper record alone, could conceivably be adopted at some point.

76. *See* Gerhardt, *supra* note 1, at 99-100 ("The lesson of *Powell* is that the Supreme Court may use judicial review to determine whether Congress followed the proper procedure for making the political decision committed to it by the Constitution.").

77. *See* 113 S. Ct. at 740.

78. *See id.*

ical activities. The Supreme Court's duty to interpret the Constitution and restrain the other branches within its textual bounds goes almost without saying,[79] yet precisely that duty is set aside when the political question doctrine is invoked to prevent the Court from reviewing Senate impeachment procedures. The doctrine undercuts its own separation-of-powers rationale when it allows the political branches unreviewable authority to determine the extent of their own constitutional powers—" '[l]imits' on Congress determined by Congress itself [are] no limits at all."[80] Justice White is right to remind the Senate that it should not forget its duty to try impeachments in a manner approximating a legal trial.[81] What is at stake, though none of the *Nixon* opinions mentions it, is due process, which is always endangered when governmental procedures are permitted to edge toward arbitrariness.[82]

Thomas D. Amrine

REAPPORTIONMENT AND THE DILUTION OF MINORITY VOTING STRENGTH: *Growe v. Emison*, 113 S. Ct. 1075 (1993), and *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993).

For nearly three decades, the Court has wrestled with the issue of minority vote dilution.[1] In 1986, a divided Court attempted to impose order on the lower court chaos in the decision of *Thornburg v. Gingles*[2] by establishing three preconditions[3] to bringing a vote-dilution claim in a multimember district (the "*Gingles* test"). Although the Court was praised by some for establishing a structured hierarchy,[4] it was criticized

79. *See, e.g.*, BERGER, *supra* note 14, at 116-21.

80. *Id.* at 118. Professor Berger also cites *The Federalist* in arguing that "[i]t was never intended that Congress should be the final judge of the boundaries of its own powers." *Id.* at 116.

81. *See* Nixon v. United States, 113 S. Ct. 732, 741 (1993).

82. *See* BERGER, *supra* note 14, at 120.

1. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964)(holding that malapportionment of the voting districts violated the Equal Protection Clause of the Fourteenth Amendment). *See generally* Chandler Davidson, *Minority Vote Dilution: An Overview*, *in* MINORITY VOTE DILUTION 1-23 (Chandler Davidson ed., 1984); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 552-60 (1973).

2. 478 U.S. 30 (1986).

3. *See infra* at text accompanying note 24.

4. *See, e.g.*, Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1845 (1992); Mary J. Kosterlitz,

by others, including Justice O'Connor in her concurring opinion, for arguably displacing the statutory test with its own tripartite test.[5] The *Gingles* test provided a more precise standard for the vote-dilution inquiry, but still left questions regarding the relationship between the *Gingles* test and the statutory test and whether Section 2 of the Voting Rights Act and the new test should apply to single-member, as well as multimember, districting schemes.

In *Growe v. Emison*[6] and *Voinovich v. Quilter*,[7] the Court reemphasized that states have the primary responsibility for reapportionment. Moreover, the Court properly defined the *Gingles* test as a threshold inquiry, and appropriately extended it in *Growe*[8] to apply to Section 2 vote-fragmentation challenges to single-member districts. In *Voinovich*, the Court properly declined to decide whether influence-dilution claims are viable under Section 2.[9] At the first opportunity, however, the Court should extend Section 2 and the *Gingles* test to apply to influence-dilution cases, as in *Voinovich*, in order to provide consistent protection to minority voting strength.

The Voting Rights Act was passed in 1965 to give full force to the Fifteenth Amendment by "ridding the country of racial discrimination in voting."[10] President Johnson and other proponents of the Act believed that complete access for minorities to the political arena would ultimately lead to political equality, including the ability of minorities to elect representatives of their choice.[11] Section 2 of the Act was intended to further this goal by prohibiting the use of any electoral practice or procedure which infringed upon the right to vote on the basis of race or color.[12]

The genesis of vote-dilution cases can be traced to the reapportionment case of *Reynolds v. Sims*.[13] *Sims*, like most early vote-dilution cases, predicated its claim on constitutional

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Note, Thornburg v. Gingles: *The Supreme Court's New Test For Analyzing Minority Vote Dilution*, 36 CATH. U. L. REV. 531, 560-63 (1986).

5. 478 U.S. at 92-93 (O'Connor, J., concurring).

6. 113 S. Ct. 1075 (1993).

7. 113 S. Ct. 1149 (1993).

8. 113 S. Ct. at 1085-85.

9. 113 S. Ct. at 1155.

10. Chisom v. Roemer, 111 S. Ct. 2354, 2368 (1991)(quoting South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966)).

11. *See* 111 CONG. REC. H5059 (1965); *see also* Issacharoff, *supra* note 3, at 1838.

12. 42 U.S.C. § 1973 (1988).

13. 377 U.S. 533. For similar cases following *Reynolds*, see Town of Lockport v. Citi-

grounds.[14] Even after Section 2 of the Act was made available, plaintiffs relied more heavily upon constitutional grounds, and had varying degrees of success.[15] Then, in 1980, the Supreme Court placed a virtually insurmountable hurdle in the path of minority plaintiffs in *Mobile v. Bolden*[16] by holding that plaintiffs must show discriminatory intent to prove a vote-dilution claim on either constitutional or statutory grounds.[17]

In 1982, Congress responded by amending Section 2 of the Voting Rights Act to overrule the restrictive "intent" test established in *Bolden*.[18] In lieu of *Bolden*'s near-impossible test, Congress adopted a "results" test, whereby the plaintiff merely had to show that under the "totality of circumstances"[19] the electoral practices had a discriminatory result. Moreover, Congress spelled out nine factors that courts should consider when determining the validity of a Section 2 claim.[20]

Despite the increased success of vote-dilution claims following the 1982 amendment, the courts still struggled with the broad, highly discretionary "totality of circumstances" test. Congress had given them nine factors, but had established no hierarchy or valuation method for applying the factors.[21] The

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zens for Community Action, 430 U.S. 259 (1977); Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968).

Some commentators argue that the concept of vote dilution began with Allen v. State Board of Elections, 393 U.S. 544, 569 (1969). *See* Issacharoff, *supra* note 3, at 1834 n.9. Others trace the origin of the concept back further to United States v. Mosley, 238 U.S. 383, 386 (1915). *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1 n.22 (1991).

14. Minority groups could challenge election practices and procedures as statutory violations under Section 2 of the Voting Rights Act or as constitutional violations under the Fourteenth and Fifteenth Amendments. 377 U.S. at 537.

15. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982); United Jewish Org. v. Carey, 430 U.S. 144 (1977); Kirksey v. Bd. of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977).

16. 446 U.S. 55 (1980).

17. *See* Peyton, *History in the Courts*; McCrary, *The Significance of* Bolden v. the City of Mobile, *in* MINORITY VOTE DILUTION, *supra* note 1, at 3-5.

18. 446 U.S. 55 (1980).

19. The "totality of circumstances" test was first handed down in White v. Regester, 412 U.S. 755 (1973), and further refined by Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), *aff'd per curiam on different grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). The 1982 amendment effectively restored the judicial standard to its original status as handed down in these two cases.

20. *See* S. REP. No. 417, 97th Cong., 2d Sess., 28-29, *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (citations omitted)(1982).

21. Lower courts attempted to establish a methodical analysis through various hierarchies, but were unable to reach a consensus. *See* United States v. Marengo County Comm'n, 731 F.2d 1546 (11th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364, *reh'g en banc denied*, 730 F.2d 233 (5th Cir. 1984); United States v. Dallas County Comm'n, 739 F.2d 1529 (11th Cir. 1984); McMillan v. Escambia County, 748 F.2d 1037 (5th Cir.

"totality of circumstances" test was considered by some to be "as empty as the resigned 'I know it when I see it' approach to obscenity under the First Amendment."[22] Then, in *Gingles*,[23] the Supreme Court narrowed the inquiry by establishing three preconditions to a vote-dilution claim:

> First, the minority group must be able to demonstrate that it is sufficiently *large and geographically compact* to constitute a majority in a single-member district . . . . Second, the *minority group* must be able to show that it is *politically cohesive* . . . . Third, the minority must be able to demonstrate that the white *majority votes sufficiently as a bloc* to enable it—in the absence of special circumstances . . .—usually to defeat the minority's preferred candidate.[24]

In *Gingles*, the Court noted two ways that racial minority group voting strength could be diluted: either by fragmenting, "the dispersal of blacks into districts in which they constitute an ineffective minority of voters,"[25] or by packing, "the concentration of blacks into districts where they constitute an excessive majority." [26] *Growe* and *Voinovich* were two of the first vote-dilution cases to come before the Court after *Gingles*.[27] In these cases, the Court dealt with fragmenting and packing, respectively.[28]

In *Growe*, the Court reviewed a Minnesota district court's decision where the plaintiffs challenged congressional and legislative reapportionment. The plaintiffs included members of various racial minorities who alleged that the redistricting

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1984); Lee County Branch of NAACP v. City of Opelika, 748 F.2d 1473 (11th Cir. 1984).

22. *See* Issacharoff, *supra* note 3, at 1845 (referring to Justice Stewart's famous phrase in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)(Stewart, J., concurring)).

23. 478 U.S. at 50-51.

24. *Id.* (footnotes omitted)(emphasis added).

25. 478 U.S. 30, 46 n.11 (1986).

26. *Id.*; *see also* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 553 (1973); Richard L. Engstrom & John K. Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 LEGIS. STUD. Q. 465, 465-466 (1977). *See generally* Allan B. Moore, Note, *A "Frightful Political Dragon" Indeed: Why Constitutional Challenges Cannot Subdue the Gerrymander*, 13 HARV. J.L. & PUB. POL'Y 949 (1990).

27. Two previous cases considered the scope of Section 2 coverage, but did not focus on *Gingles*. *See* Houston Lawyers' Ass'n v. Texas Att'y Gen., 111 S. Ct. 2376 (1991)(holding that Section 2 encompassed the election of executive officers and trial judges, even if they were single-member offices); Chisom v. Roemer, 111 S. Ct. 2354 (1991)(holding that elected judges were within the term "representatives" under Section 2, and thus were not exempt from the Voting Rights Act).

28. Although both terms are technically considered vote dilution, fragmenting is commonly referred to as vote dilution, while packing is labeled influence dilution.

needlessly fragmented their vote, and thus unfairly diluted their voting strength under Section 2 of the Voting Rights Act. Prior to the filing of the district court action, however, a group of Minnesota voters filed a state court action against the Minnesota Secretary of State and other election officials, which also alleged that the state's congressional and legislative districts were malapportioned in light of the 1990 census results. Both suits sought declaration that the current districts were unlawful and judicial construction of new districts if the state legislature failed to act.

After the state legislature adopted a new legislative districting plan, a second federal action was filed raising constitutional challenges to the new legislative districts; the two federal suits were consolidated. The district court set a deadline for the legislature to act on redistricting plans, but refused to abstain or defer to the state court proceedings.

The state court found the new legislative districts defective because of numerous drafting errors and issued a preliminary legislative redistricting plan correcting most of these errors, to be held in abeyance pending further action by the legislature. Before the state court could take additional action, the district court stepped in and stayed the state court proceedings. The Supreme Court vacated that stay.[29]

Ultimately, the governor vetoed the legislature's efforts to correct the defective legislative redistricting plan and to adopt new congressional districts. The state court then issued a final order adopting its legislative plan and held hearings on the congressional plans submitted by the parties. Before the state court could issue a congressional plan, however, the district court adopted its own legislative and congressional redistricting plans and permanently enjoined interference with state implementation of those plans. The district court specifically found that the state court's legislative plan violated the Voting Rights Act because it did not contain a "super-majority minority" Senate District.[30]

Justice Scalia, writing for a unanimous court, reversed the district court's decision and remanded with instructions to dis-

29. 112 S. Ct. 855 (1992).

30. A "super-majority-minority" district is one in which a minority group is constituted as more than a majority to account for lower voting participation rates among minorities, in order that a minority candidate can be elected.

miss. The Court held that under the principles of federalism and comity, the District Court must defer to the states the consideration of a legislative redistricting dispute that the state has begun to timely address, through either its legislative or judicial branch. The Court also held that Section 2 vote-fragmentation challenges to single-member districting schemes must satisfy the *Gingles* prerequisites.

The Supreme Court clarified the roles of the federal and state courts by declaring that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts."[31] Justice Scalia noted that a district court does not typically have to abstain or defer to state proceedings, but "[i]n rare circumstances principles of federalism and comity dictate otherwise."[32] Scalia cited the reapportionment context as one of those "rare circumstances."[33] Specifically, the Court stated that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."[34]

The majority rejected several justifications for intervention put forth by the district court. The district court argued that its intervention was proper because the state court complaint did not allege a violation of the Voting Rights Act, unlike the federal court complaint. The Court acknowledged this fact, but considered it irrelevant under the principles of *Germano*,[35] which focus on the nature of the relief requested, namely the reapportionment of election districts. Minnesota can have only one set of legislative districts, the Court concluded, and the federal court must defer to the state in this task.

The district court also argued that its actions were proper in light of the lack of time for orderly appeal prior to the State's primaries. Justice Scalia again rejected the justification as irrelevant, pointing out that *Germano* only requires the state agencies to adopt a constitutional plan " 'within ample time . . . to

31. 113 S. Ct. 1075, 1081 (1993)(citing U.S. CONST. art. I, § 2).

32. *Id.* at 1080 (citing Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941)).

33. *Id.*

34. *Id.* at 1081 (citing Scott v. Germano, 381 U.S. 407, 409 (1965)(per curiam)). The Court held that the district court should have deferred to the Minnesota Special Redistricting Panel's proceedings under the principles laid out in *Germano*.

35. 381 U.S. 407.

be utilized in the upcoming election,' "[36] and does not require appellate review of the plan prior to the election.[37] The Court concluded its discussion of the concurrent roles of the district and state courts by acknowledging that the district court could act as a last resort, which was not true in this case: "What occurred here was not a last-minute federal court rescue of the Minnesota electoral process, but a race to beat the [state court] to the finish line."[38]

In addition, the district court had held that there was sufficient evidence to prove minority vote dilution in a portion of the city of Minneapolis, in violation of Section 2 of the Voting Rights Act.[39] The district court, however, chose not to apply the *Gingles* tripartite test used in challenges to multimember districts and proceeded to the "totality of circumstances" test to reach its result. The Supreme Court, considering the issue, extended the *Gingles* test to a Section 2 vote-fragmentation challenge to a single-member districting scheme.

The Court offered two justifications for the extension of the *Gingles* test to dilution challenges in single-member districts. First, Justice Scalia argued that there should be a threshold showing that a single-member district challenge is no more difficult than a multimember district challenge because multimember districting plans generally pose greater threats to minority-voter participation than single-member districts.[40] In addition, Scalia noted that the same "no harm, no foul" ration-

36. 113 S. Ct. at 1081 (quoting *Germano*, 381 U.S. at 409).

37. Justice Scalia argued that an appellate review requirement would be illogical because it would ignore the fact that most states are forced to redistrict in the most exigent circumstances, namely the short interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year. *Id.* at 1081.

The Court further noted that, as a baseline, the district court should have been obligated to give the state court judgment legal effect under the principles of federalism and comity embodied in the Full Faith and Credit Clause. *Id.* at 1082 (citing 28 U.S.C. § 1738 (1988)).

38. *Id.* at 1082. The Court noted that it would be appropriate to set a deadline for action. The deadline, however, must be directed to both the legislature and the court. The Court further stated that district court action would be justified if it were apparent that the state court would not develop a redistricting plan in time for the primaries. "*Germano* requires deferral, not abstention." *Id.* at 1082.

39. Emison v. Growe, 782 F. Supp. 427 (D. Minn. 1992).

40. Justice Scalia's argument assumes that the *Gingles* test increases the plaintiff's burden for establishing a dilution claim. I refer to this assumption as the "Two Hurdle Theory" because it assumes that the *Gingles* test is an additional hurdle for minority groups. Later in the text, I argue that this assumption of an increased burden is not consistent with the Court's interpretation of the Voting Rights Act. *See supra* text accompanying notes 56-64.

ale exists for applying the *Gingles* test to single-member schemes as it does for multimember.[41]

The Court ultimately held that the plaintiffs' claim did not violate Section 2 because it would not have passed the *Gingles* test. Specifically, the Court found insufficient evidence of both minority political cohesion and majority bloc voting (the racially polarized voting prongs of the *Gingles* test) in Minnesota: "A law review article on national voting patterns is no substitute for proof that bloc voting occurred in Minnesota."[42]

The plaintiffs in *Voinovich*[43] alleged the opposite end of the Section 2 dilution spectrum by claiming that the reapportionment plan created *too many* super-majority-minority districts, and not enough influence districts.[44] In bringing the influence-dilution claim, the Democratic members of the state apportionment board petitioned the District Court to invalidate the plan as a violation of Section 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments.

A three-judge district court ordered the board to reconsider the plan, holding that Section 2 prohibits the wholesale creation of majority-minority districts unless necessary to remedy a Section 2 violation. The board, it held, had failed to show such a violation. The district court reaffirmed that holding when it reviewed the board's revised 1992 plan, rejecting the defendant's argument that it should not have invalidated the 1991 plan without finding that, under the totality of the circumstances, the plan diluted minority voting strength. In addition, the court held that the board had violated the Fifteenth Amendment by applying the remedy of creating majority-mi-

41. "Unless [the following] points are established, there neither has been a wrong, nor can be a remedy." 113 S. Ct. at 1084. The "geographically compact majority" and "minority political cohesion" prongs must be satisfied to show that the minority has the potential to elect a representative of its own choice in some single-member district, while the "minority political cohesion" and "majority bloc voting" prongs are necessary to establish that the districting scheme "thwarts a distinctive minority vote by submerging it in a larger white voting population." *Id.* (citing Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)). For more on this rationale, see *infra* text accompanying notes 53-55.

42. 113 S. Ct. at 1085 (citing Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1625 (1983)). *But cf. Gingles*, 478 U.S. at 58-61 (summarizing statistical and anecdotal evidence in that case).

43. 113 S. Ct. 1149 (1993).

44. An influence district is one in which black voters could elect candidates of their choice with the help of a predictable number of cross-over votes from white voters. *Id.* at 1155.

nority districts intentionally and for the purpose of political advantage. It further held that the plan violated the Fourteenth Amendment by departing from the requirement that all districts be of nearly equal population.

The Supreme Court reversed and remanded the case, holding that the plan did not violate Section 2 of the Voting Rights Act. Although the Court did not decide whether an influence-dilution claim is viable under Section 2, it held that the claim should have been filtered through the *Gingles* test, where it would have failed under the third prong because Ohio does not suffer from racially polarized voting.[45] The Court also held that the district court's finding of intentional vote dilution under the Fifteenth Amendment was clearly erroneous.[46] Finally, the Court found that the district court erred in holding that the plan violated the Fourteenth Amendment requirement that all electoral districts be of nearly equal population and should reconsider the population justifications to determine whether the plan could reasonably be said to advance the state's rational policy goal.[47]

In *Growe*, the Court appropriately extended the *Gingles* test to cover Section 2 vote fragmentation claims in single-member districts.[48] In *Voinovich*, however, the Court did not decide

45. The district court found, and the plaintiffs agreed, that Ohio does not suffer from racially polarized voting. *Id.* at 1158 (citing Voinovich v. Quilter, 794 F. Supp. 695, 700-01 (N.D. Ohio 1992)).

Related to the Section 2 claim, the Court held that Section 2 contains no per se prohibitions against any particular type of district. The Court conceded that, under Section 2, federal courts may not order the creation of majority-minority districts unless necessary to remedy a statutory violation. This restriction, however, does not extend to limit the state's powers, because reapportionment is primarily the duty of the states (citing *Growe*, 113 S.Ct. at 1081). In addition, the Court interpreted Section 2(b) as placing the initial burden of proving an apportionment's invalidity on the plaintiff's shoulders.

46. *Voinovich*, 113 S. Ct. at 1158. Although the defendant possessed Democratic documents speculating about possible discriminatory strategies that he might use, the Court found nothing in the record to indicate that the defendant actually relied on the documents.

On the issue of race-conscious redistricting and the Fifteenth Amendment, the Court stated that it expressed no view.

47. The district court mistakenly held that total deviations in excess of ten percent cannot be justified by a policy of preserving political subdivision boundaries. The Court cited case law directly to the contrary. *Id.* at 1159; *see* Mahan v. Howell, 410 U.S. 315, 325-30 (1973)(allowing a total deviation of over 16 percent where justified by the rational objective of preserving the integrity of political subdivision lines); Brown v. Thomson, 462 U.S. 835, 843-46 (listing factors such as the character of the deviations, the consistency of application, and the evidence of built-in bias).

48. A multimember electoral district is a district that elects more than one official to fill a given office. A state, for example, is a multimember district with respect to the

whether influence-dilution claims were viable under Section 2. Consistent with the Voting Rights Act and the *Growe* extension, the Court should hold Section 2 and a modified *Gingles* test applicable to influence-dilution claims.[49]

Many courts and commentators have recently argued that single-member offices should be exempt from Section 2.[50] The Second Circuit was the first court to grant this exemption in *Butts v. City of New York*.[51] The Court, however, rejected the single-member office doctrine in *Houston Lawyers' Association v. Texas Attorney General*.[52] Although it applied Section 2 to single-member districts, the Court made no mention of the *Gingles* test.

The same rationale exists for extending the *Gingles* test to Section 2 dilution challenges to single-member districts as to multimember. The purpose of the *Gingles* test is to provide a

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United States Senate because each state elects two senators. In addition to U.S. Senators, at-large city council members are a part of multimember district offices.

A single-member district is a district that selects only one person to fill a given office. A state is a single-member district with respect to the office of Governor because it elects only one person to fill the office. Governors, mayors, and congressional representatives are single-member district offices. *See, e.g.*, Southern Christian Leadership Conf. v. Siegelman, 714 F. Supp. 511, 518 (M.D. Ala. 1989); Karlan, *supra* note 12, at 7; Edward J. Sebold, Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 MICH. L. REV. 2199, 2205-13 (1990).

49. Although the Court, in *Voinovich*, stated that the influence-dilution claim would fail under the *Gingles* test, it did not explicitly hold that the *Gingles* test should be applied in influence-dilution claims."[T]he *Gingles* [test] cannot be applied mechanically and without regard to the nature of the claim." *Voinovich*, 113 S. Ct. at 1157.

50. This exemption has been dubbed the "single-member office" doctrine. *See* Karlan, *supra* note 12, at 3-4; Sebold, *supra* note 48, at 2200.

Two courts of appeals and one district court had previously held or suggested that single-member offices are exempt from Section 2. *See* Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); Dillard v. Crenshaw County, 831 F.2d 246 (11th Cir. 1987); *Southern Christian Leadership Conf.*, 714 F. Supp. at 511.

51. In rejecting the plaintiffs' claim of vote dilution, the court stated:

> There can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a share of a single-member office.

Butts, 779 F.2d at 148. For a similar justification, see *Southern Christian Leadership Conf.*, 714 F. Supp. 511, 519-20.

52. 111 S. Ct. 2376 (holding that judicial and executive elections are covered by Section 2, even if districts are single-member). The Court spoke specifically regarding how single-member districts might operate to impair voters' ability to elect representatives of their choice. For example, a single-member district could arguably violate Section 2 if its boundaries were shaped in "an uncouth twenty-eight-sided figure" and the result of the abnormal district was an unnatural distribution of voting power for different racial groups. *Id.* at 2380 (citing Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960)). For more discriminatory uses of single-member districts, see generally Karlan, *supra* note 12; Sebold, *supra* note 48.

logically narrowed inquiry by focusing on the "circumstances that are necessary preconditions for multimember districts to operate to impair voters' ability to elect representatives of their choice."[53] Because these threshold "circumstances" are the same in both single and multimember districts, the *Gingles* test is equally applicable. Without establishing the first prong (sufficiently large and geographically compact), the minority group cannot show that it even has the potential to elect its candidate of choice. The second and third prongs (racial polarization) are necessary to demonstrate that the "challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population."[54] Of course, "[u]nless these points are established, there neither has been a wrong nor can be a remedy."[55]

Consider, for example, a state legislative redistricting plan comprised of twenty senate districts with a white majority, and no district with a black majority. If any one of the *Gingles* prongs is not satisfied, a minority group cannot show that the redistricting scheme had actually caused harm. If the state has only twenty percent minority voters who are widely located throughout the state, the minority has no potential to elect its candidate in the challenged district. On the other hand, if the minority population is larger and more geographically compact, but does not vote differently than the majority population, then the vote-dilution claim fails the racially polarized voting prongs. If there has been no harm, then there can be no violation or remedy.

Justice Scalia's "Two Hurdle Theory"[56] justification for applying the *Gingles* test to single-member districts presents a troubling point. Justice Scalia argues that the *Gingles* test should apply to single-member districts because it would be "peculiar" to require a higher threshold showing for a Section 2 challenge to the more dangerous multimember district. Viewing the *Gingles* test as an additional hurdle, Justice Scalia's argument assumes that the *Gingles* test raises the plaintiffs' burden of proving a Section 2 violation.

Justice Scalia's assumption of an increased burden is not con-

53. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).
54. Growe v. Emison, 113 S. Ct. 1075, 1084 (1993).
55. *Id.*
56. *See supra* note 40 and accompanying text.

sistent with the Court's interpretation of the Voting Rights Act. In *Chisom v. Roemer*,[57] the Court explicitly states:

> Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of 'ridding the country of racial discrimination in voting.'[58] [T]he Act should be interpreted in a manner that provides the '*broadest possible scope*' in combatting racial discrimination.[59]

There is nothing in the *Gingles* opinion that even hints that the *Gingles* test is designed to be an increased threshold burden on the plaintiffs.[60] Moreover, most courts and commentators view the test as a hierarchical framework or logically focused inquiry that arguably reduces the evidentiary requirements for a vote-dilution claim.[61] With a focus on polarized voting, the *Gingles* test has been hailed as "greatly [facilitating] the curtailment of [discriminatory] election practices and the dramatic increase in numbers of minority elected officials. The new focus . . . for the first time has lent a coherence to court intervention . . . and defined workable boundaries for judicial review of election outcomes."[62] Consistent with the "logically focused inquiry" view, one court characterizes the functional approach of the *Gingles* test as an attempt by the Supreme Court "to define a point at which an arguable voting rights deprivation becomes so marginal as to be unworthy of analysis under a 'totality of circumstances' approach."[63] If the *Gingles* test is not a structured hierarchy, but rather an increased threshold showing, then the Court would be forced to reconsider any application of the *Gingles* test.[64]

Aware of the congressional purpose of the Voting Rights Act

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57. 111 S. Ct. 2354 (1991).

58. South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

59. 111 S. Ct. at 2368 (citing Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969))(emphasis added).

60. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 46-51 (1986).

61. As stated in the text accompanying notes 20-21, the courts before *Gingles* struggled to define a precise standard by which to evaluate a Section 2 claim. Although it has been faulted for other reasons, the *Gingles* test has been considered to be successful as a "structured hierarchy within which to evaluate [the Senate Report] factors." Kosterlitz, *supra* note 3, at 560-63.

62. *See* Issacharoff, *supra* note 3, at 1891.

63. McNeil v. Springfield Park District, 851 F.2d 937, 947 (7th Cir. 1988).

64. It would have been simpler for Justice Scalia only to argue that single and multi-member districts should meet the same threshold showing because they involve the same threshold "circumstances" for a Section 2 violation. Now, the Court has implicitly stated that the *Gingles* test serves the purpose of making it more difficult for minorities to show a Section 2 violation.

and with the stated intent of giving the "broadest possible scope" to the Act, the Court would be "peculiar" in its own right to require *any* increased threshold showing for a challenge to a electoral process that allegedly deprives minorities of an opportunity "to participate in the political process and to elect representatives of their choice."[65] The "totality of circumstances" test is the only hurdle for a minority group in a Section 2 dilution case. The group, however, must be able to show the ability to walk.

In extending the application of the *Gingles* test to Section 2 dilution challenges to single-member districts, the Court prudently abstains from applying it to *all* Section 2 claims because the test is not relevant to some discriminatory practices. Generally, plaintiffs challenge three types of electoral discrimination under Section 2: disenfranchisement, candidate diminution, and dilution of minority voting strength.[66] Disenfranchisement involves practices that discourage citizens from voting, such as denying voter registration to minority citizens.[67] Candidate diminution takes place when citizens are discouraged from running for office. Common examples include changing government posts from elective to appointive when a minority candidate has a substantial chance of winning, setting high filing and bonding fees, and increasing the number of signatures required on qualifying petitions.[68] The *Gingles* test should not be applied here, because it has no relevance to the discriminatory results of these practices. In *Houston Lawyers' Association v. Texas Attorney General*,[69] the Court stated in dicta that "if a particular practice or procedure . . . results in an abridgment of a racial minority's opportunity to vote and to elect representatives of their choice, the [Voting Rights] Act would unquestionably apply to restrict such practices, regardless of whether the election was for a single-member officeholder or not."[70] A denial of voter registration or substantially increasing the filing and bonding fees could be discriminatory even if the minority population was small and geographically diffuse, and voted similarly with the majority.

65. 42 U.S.C. § 1973(b) (1988).
66. *See* Davidson, *supra* note 1, at 3-5.
67. Sebold, *supra* note 48, at 2203-04.
68. *Id.*
69. 111 S. Ct. 2376 (1991).
70. *Id.* at 2380.

The Court properly refrains from ruling on the viability of a influence-dilution claim under Section 2 in *Voinovich*, because it is unnecessary.[71] At the first legitimate opportunity, however, the Court should hold that influence-dilution claims are cognizable under Section 2 in order to consistently provide protection to minority voting strength.[72] The Court has previously recognized that vote dilution and influence-dilution are the flip sides of the same coin.[73] The coin is minority voting strength. Any electoral practice that reduces the value of that coin should be open to challenge under Section 2. A minority group, for example, might have sufficient numbers to constitute a majority in five districts of a ten-district area. If apportioned in that manner, the group will have five elected representatives. But, if the group is packed (influence dilution) into two districts, it will only have two representatives.[74] On the other hand, if the group is fractured (vote-dilution) into minorities in all ten districts, then it will have no representatives. Whether it is called "packing" or "fracturing," the process dilutes the voting strength of the minority group and should be open to challenge under Section 2.

The *Gingles* test should also apply to influence-dilution claims, as well as to vote-dilution claims. If there is no racially polarized voting (second and third prongs), then no "influence" is lost, and no harm is done.[75] The first prong, however, should not be applied.[76] This prong requires that a group be geographically compact and sufficiently large to constitute a single district majority. Plaintiffs alleging an influence-dilution claim are complaining precisely because the districting plan constitutes their group as a majority. Therefore, the first prong, by definition, would always be satisfied. Such a requirement would add nothing to the court's inquiry. Moreover, the first prong requirement would be directly counter to the plain-

71. The Court also left open the possibility of influence-dilution claims in both *Growe*, 113 S. Ct. at 1089 n.5, and *Gingles*, 478 U.S. at 46-47 nn.11-12.

72. *See, e.g.*, Chisom v. Roemer, 111 S. Ct. 2354 (1991); *see also id.* at 2357 ("[T]he [Voting Rights] Act should be interpreted in a manner that provides the 'broadest possible scope' in combatting racial discrimination." (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969))).

73. *Voinovich*, 113 S. Ct. at 1154 (citing *Gingles*, 478 U.S. at 46 n.11).

74. *See, e.g., id.* at 1155.

75. *See, e.g.*, Growe v. Emison, 113 S. Ct. 1075 (1993).

76. The Court recognized that the first prong would have to be eliminated or modified when analyzing an influence dilution claim. *See* Voinovich v. Quilter, 113 S. Ct. 1149, 1157 (1993)

tiffs' actual goal of constituting a sufficiently large minority able to elect candidates of choice with the help of white cross-over votes.

Finally, the Court provides a much-needed clarification regarding the relationship between the *Gingles* test and the "totality of circumstances" test through the simple use of the word "threshold."[77] The relationship has been interpreted in various ways.[78] Some courts have practically ignored the *Gingles* test,[79] while others have held it essential to a vote-dilution claim.[80] Some have gone so far as to state that the *Gingles* test actually replaces the "totality of circumstances" test.[81] Although the Court refers to the *Gingles* test as "necessary preconditions" when adopted,[82] *Growe* and *Voinovich* take a slight, yet significant, step further to establish unequivocally the test prongs as "threshold conditions."[83] In its first two cases applying the *Gingles* test, the Court clearly interprets the test as a threshold inquiry, which, if satisfied, should be followed by a "totality of circumstances" test in order to prove a Section 2 violation.[84]

The Court reemphasizes that reapportionment is the primary responsibility of the states and clarifies the *Gingles* test as a threshold inquiry. Most significantly, the Court properly extends application of the *Gingles* test to Section 2 vote-dilution challenges to single-member districting schemes. At the first opportunity, the Court should hold Section 2 and the *Gingles*

77. *See Growe*, 113 S. Ct. at 1084; *Voinovich*, 113 S. Ct. at 1156.

78. *See, e.g.*, Kathryn Abrams, *"Raising Politics Up": Minority Political Participation & Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 464-65 (1988); Sebold, *supra* note 48, at 2218.

79. *See, e.g.*, Dillard v. Crenshaw County, 649 F. Supp. 289, 293-94 (M.D. Ala. 1986), *aff'd in part and remanded in part*, 831 F.2d 246, 253 (11th Cir. 1987), *reinstated on remand*, 679 F. Supp. 1546, 1547 (M.D. Ala. 1988); Dallas v. County Comm'r, 661 F. Supp. 955 (S.D. Ala. 1987); McNeil v. Springfield, 658 F. Supp. 1015 (C.D. Ill.), *appeal dism'd*, 818 F.2d 565 (7th Cir. 1987).

80. *See, e.g.*, League of United Latin Am. Citizens v. Clements, 1993 U.S. App. LEXIS 1305 (1993); Buckanaga v. Sisseton Indep. School Dist., 804 F.2d 469, 471-72 (8th Cir. 1986); Martin v. Allain, 658 F. Supp. 1183, 1199-204 (S.D. Miss. 1987); *McNeil*, 658 F. Supp. at 1019.

81. *See* Issacharoff, *supra* note 3, at 1834 ("Instead of the . . . totality of circumstances inquiry, the Court adopted a simplified test to determine [vote dilution]."). Justice O'Connor's concurring opinion in *Gingles*, 478 U.S. at 91-92, has been interpreted as evidence that the *Gingles* test was a replacement of the totality of circumstances test. *See* Sebold, *supra* note 48, at 2218.

82. 478 U.S. at 50.

83. *Growe*, 113 S. Ct. at 1084; *Voinovich*, 113 S. Ct. at 1156.

84. *Growe*, 113 S. Ct. at 1084; *Voinovich*, 113 S. Ct. at 1156.

test applicable to influence-dilution claims in order to provide consistent protection to minority voting strength.

G. Hunter Bates

CIVIL FORFEITURE AND THE INNOCENT OWNER DEFENSE: *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993).

In an effort to combat the rising tide of drug trafficking and narcotics crime, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970,[1] legislation directed at broadening the powers of the federal government and its drug enforcement agencies to vanquish "the growing menace of drug abuse."[2] The civil forfeiture provision, 21 U.S.C. § 881(a),[3] has proven to be an especially effective device for targeting the heart of the drug industry—its illicit profits.[4] Civil

1. Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236 (1970)(codified as amended at 21 U.S.C. § 881 (1988 & Supp. III 1991)).

2. H.R. REP. No. 1444, 91st Cong., 2d Sess. pt. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567.

3. Civil forfeitures are *in rem* proceedings directed at the property itself, under the legal fiction that the property is the guilty party. DAVID B. SMITH, 1 PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 2.01, 2-2 to 2-3 (1992). The guilt or innocence of the owner in a forfeiture proceeding is irrelevant. *Id.*; *see also* United States v. 3120 Banneker Drive, 691 F. Supp.497, 499 (D.D.C. 1988). The civil forfeiture statutes allow the government to confiscate any property used or acquired in illegal drug operations. In particular, 21 U.S.C. § 881(a) provides in pertinent part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
> (1) All controlled substances . . .
> (2) All raw materials . . . used, or intended for use, in manufacturing . . . any controlled substance . . .
> (3) All property . . . used, or intended for use, as a container for [controlled substances] . . .
> (4) All conveyances . . . used, or intended to for use . . . to facilitate the transportation [of controlled substances]. . .
> (5) All . . . records . . . used, or intended for use, in violation of [§ 881] . . .
> (6) All moneys . . . furnished or intended to be furnished . . . in exchange for a controlled substance . . . [and] all proceeds traceable to such an exchange . . .
> (7) All real property . . . used, or intended to be used . . . to facilitate the commission of a violation of [§ 881] . . . .

21 U.S.C. § 881(a)(1988 & Supp. III 1991).

4. *See* Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1255-56 ("Forfeiture laws are one of the few effective ways to combat narcotic racketeers. Driven by enormous potential profits, drug dealers are not deterred by traditional criminal sanctions such as fines and incarceration. . . . Forfeiture laws supplement traditional criminal remedies by attacking the economic foundation of criminal activity—confiscating illicit profits and assets.").

forfeiture actions invest the government with the power to reach beyond the crime's perpetrator and seize the fruits of the criminal activity, thereby effectively taking the profit out of drug trafficking.[5] In theory, civil forfeiture appears to be perfectly suited to the task at hand.[6]

In practice, however, the federal government has wielded the civil forfeiture sword with a heavy and often unjust hand, indiscriminately penalizing parties both guilty and innocent.[7] Since 1985, the federal government has secured over $2.6 billion for the federal coffers through civil forfeitures; yet, alarmingly, barely fifty percent of the targeted property owners were charged with a crime.[8] The reason for this striking disparity between forfeiture and conviction is that the deck in civil forfeiture is stacked heavily in the government's favor. In a civil forfeiture proceeding, the government need only show by a preponderance of evidence that the property in question is substantially connected to a drug crime.[9] Once the government

5. *See* S. REP. No. 225, 98th Cong., 1st Sess. 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3374, 3374 ("Clearly if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes."); 124 CONG. REC. 23,055 (1978)(statement of Sen. Nunn)("we cannot forget that profit, astronomical profit, is the base motivation of drug traffickers"); *see also* Alice M. O'Brien, Note, *"Caught in the Crossfire": Protecting the Innocent Owner of Real Property from Civil Forfeiture under 21 U.S.C. § 881(a)(7)*, 65 ST. JOHN'S L. REV. 521, 521 (1991)("[F]orfeiture laws are a logical deterrent to narcotics dealers and organizations whose activity is motivated and sustained by the prospect of tremendous monetary rewards.").

6. *See* 124 CONG. REC. 23,056 (1978)(statement of Sen. Culver)("The purpose of the proposed amendment is to help combat the flow of illicit drugs in the United States by striking at profits from illicit drug trafficking."); *see also* Kent A. Russell, *Fighting the New Crime Control Act*, 7 CAL. LAW. 17, 18 (Oct. 1987)("The Drafters of the Comprehensive Crime Control Act were not just interested in removing dangerous individuals from the street; they also wanted to keep crime from paying.").

7. *See generally* Goldsmith & Linderman, *supra* note 4 (discussing need for law reform to further safeguard the right of innocent owners); O'Brien, *supra* note 5, at 522 (analyzing the impact of civil forfeitures on innocent owners, the "unintended casualties of the war against drugs"); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 921 (1991)("The doctrine of civil forfeiture has turned into a legal juggernaut, crushing every due process claim thrown in its path.").

8. *See* David A. Kaplan, *Where the Innocent Lose: Civil-Forfeiture Law Can Put Your Furniture in Jail*, NEWSWEEK, Jan. 4., 1993, at 42.

9. *See, e.g.*, 124 CONG. REC. S17,647, *reprinted in* 1978 U.S.C.C.A.N., 9518, 9522 ("property . . . forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent."); United States v. One Parcel of Real Property, 904 F.2d 487, 491 (9th Cir. 1990); United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160 (2d Cir. 1986). Moreover, hearsay is admissible for purposes of making such a showing. *See, e.g.*, United States v. Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258, 1267 (2d Cir. 1989); United States v. Single Family Residence & Real Property, 803 F.2d 625, 629 n.2 (11th

has made the requisite showing, the burden then shifts to the claimant to prove the res's innocence.[10] In sustaining this burden, the claimant is not afforded the Fifth Amendment protection against self-incrimination[11] nor the Eight Amendment rule against disproportionate punishment.[12] Despite the potential for immediate and complete divestment of an individual's entire assets, the government has insisted on treating civil forfeitures as it would any other nominally civil matter.[13] Indeed, the manner in which the federal government has conducted its civil forfeiture proceedings has at times brought courts to wonder whether, in the government's eyes, the claimant is entitled to any due process at all.[14]

Cir. 1986); United States v. All That Lot of Ground Known as 2511 E. Fairmount Ave., 722 F. Supp. 1273, 1277 n.1 (D. Md. 1989).

10. *See, e.g., 2511 E. Fairmount Ave.*, 722 F. Supp. at 1277. Furthermore, an unrebutted showing of probable cause may result in summary judgment in favor of the government. *Id.*

11. *See, e.g., Single Family Residence*, 803 F.2d at 630 n.4; United States v. $75,040 in United States Currency, 785 F. Supp. 1423, 1429 (D. Or. 1991).

12. *See, e.g.*, United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied sub nom.* Jaffee v. United States, 493 U.S. 954 (1989); *see also* James M. Strauss, *Shouldn't the Punishment Fit the Crime?*, 55 BROOK. L. REV. 417 (1989)(advocating the application of Eighth Amendment defense to civil forfeitures).

13. In 1988, the Department of Justice articulated a "zero tolerance" drug enforcement policy, in effect advocating the full enforcement of drug laws authorizing the seizure and forfeiture of property, regardless of its size or value, when federal agents discover any presence of controlled substances. *See* Maureen Fan, *Zero Tolerance Policy Alive and Well*, L.A. TIMES, Mar. 30, 1989, § 2, at 1; Nicholas M. Horrock, *US Zeroes in on Drug Users*, CHI. TRIB., May 15, 1988, at C1. Indeed, just over a year ago, Cary Copeland, Director and Chief of the Office for Asset Forfeiture, issued an internal memorandum promoting the use of the relation back doctrine to divest all post-crime transferees of their property interests. *See Text of the New "Relation Back Doctrine,"* 2 DOJ ALERT 9 (Summer 1992).

14. *See, e.g.*, Austin v. United States, 113 S. Ct. 1036 (1993); United States v. $31,990 in United States Currency, 982 F.2d 851, 856 (2d Cir. 1993)("While we recognize the formidable task faced by the government in its war on drugs, we decline to condone the abuse of civil forfeiture as a means to winning the war."); United States v. One Parcel of Property Located at 508 Depot Street, 964 F.2d 814, 817 (8th Cir. 1992)("[W]e are troubled by the government's view that any property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."), *cert. granted sub nom.* Austin v. United States, 113 S. Ct. 1036 (1993); United States v. All Assets of Statewide Auto Parts Inc., 971 F.2d 896, 903, 905 (2d Cir. 1992)(expressing substantial concern over the federal government's "increasing and virtually unchecked use of the civil forfeiture statutes . . . [and] disregard for the due process that is buried in those statutes", disapproving the use of civil forfeiture "as a substitute—or perhaps a dry run—for a criminal prosecution"); United States v. Lasanta, 978 F.2d 1300, 1305 (2d Cir. 1992)("[I]t would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the constitution itself a casualty."); United States v. $38,000 in United States Currency, 816 F.2d 1538, 1548-49 (11th Cir. 1987) (realizing that although the drug problem is "a tremendous threat . . . [we] must not forget . . . that at the core of [our system of government] lies the Constitution, with its guarantees of individuals' rights. We cannot permit these

Last Term, in *United States v. 92 Buena Vista Avenue*,[15] the Supreme Court limited the scope of the civil forfeiture statute by expanding the defenses available to innocent third parties. In effect, the Court declined to endorse the expansion of civil forfeiture as a means of combating drug kingpins. Holding that the so-called innocent owner defense can be invoked by anyone who obtained a bona fide interest in the res before forfeiture, the Court correctly interpreted the statute to offer a legitimate and effective defense to third-party owners who obtain a property interest without any knowledge of the related drug offense. *92 Buena Vista* should send the unequivocal message to both the federal government and the courts that the High Court will no longer tolerate the "take no prisoners"[16] philosophy that has to date pervaded the drug enforcement program.[17]

In 1982, Beth Ann Goodwin received a gift of approximately $216,000[18] from her boyfriend, Joseph Anthony Brenna.[19] Ms. Goodwin then used the funds to purchase a home, 92 Buena Vista Avenue in Rumson, New Jersey, where she resided with her three children.[20] In 1989, acting upon reasonable belief that the residence was purchased with proceeds of Brenna's alleged drug trafficking activities in or about 1982, federal agents seized the property.[21] Thereafter, Ms. Goodwin filed a claim in

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rights to become fatalities of the government's war on drugs."); *In re* Kingsley, 614 F. Supp. 219, 226 (D. Mass. 1985)(criticizing a DEA investigative seizure as "an intrusion border[ing] on a substantive due process violation" which the "public interest demands. . .be redressed"), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986). For a comprehensive, articulate treatment of the evils of civil forfeiture, see Piety, *supra* note 7.

15. 113 S. Ct. 1126 (1993).

16. *Cf.* Andrew Houlding, *Feds Reorder House as Forfeitures Hit Home*, CONN. LAW TRIB., Mar. 23, 1992, at 1 (criticizing a U.S. Attorney "for wielding the legal weaponry at her disposal in a take-no-prisoners manner—albeit with the blessings of the U.S. Department of Justice").

17. *Cf.* Carl H. Loewenson, Jr. & Kathleen Fallon, *Banks as Innocent Owner in Forfeiture Cases*, N.Y. L.J., Mar. 17, 1993, at 1, 7 ("[T]he Supreme Court confirmed what most lower courts had assumed all along: that the forfeiture law meant what it said when it provided for an 'innocent owner' defense.").

18. There appears to be some discrepancy among the court opinions about how much money Ms. Goodwin actually received. The district court and the court of appeals both recounted that Mr. Brenna wired $216,000 to Ms. Goodwin's attorneys, which she thereafter used to purchase her residence. United States v. 92 Buena Vista Ave., 738 F.Supp. 854, 858 (D.N.J. 1990); United States v. A Parcel of Land, Bldgs., App. & Imp., 937 F.2d 98, 100 (3d Cir. 1991). The Supreme Court, on the other hand, related that Mr. Brenna gave Ms. Goodwin approximately $240,000. *92 Buena Vista*, 113 S. Ct. at 1130.

19. *A Parcel of Land*, 937 F.2d at 100.

20. 113 S. Ct. at 1130.

21. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1130. Under Section 881(a)(6), "all proceeds traceable to" an exchange for a controlled substance in viola-

the District Court of New Jersey and moved for summary judgment, claiming, inter alia, that she was unaware of the alleged drug offenses and therefore was exempted from forfeiture pursuant to the "innocent owner" defense codified at 21 U.S.C. § 881(a)(6).[22] The government responded that Ms. Goodwin could not assert an innocent owner defense because the relation provision, 21 U.S.C. § 881(h),[23] vests title to the property in the government from the time of the commission of the illegal act giving rise to the forfeiture, thereby voiding any subsequent transfers, including Brenna's gift to Ms. Goodwin.[24]

The district court denied Ms. Goodwin's motion, holding that Ms. Goodwin could not assert an innocent owner defense because she was not a bona fide purchaser for value.[25] First, focusing upon the word "owner" in the statute, the district court concurred with the government's position and held that the party raising the innocent owner defense must obtain a legitimate ownership interest prior to the commission of the illegal act giving rise to the forfeiture.[26] Second, the district court explained that, under traditional rules of law, one who holds voidable title can improve the title's defect only through a

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tion of Section 881 are subject to forfeiture. The United States Marshals Service entered an Occupancy/Tenant Agreement with Goodwin, allowing her and her three children to remain on the premises. *Id.*

22. *Id.* 21 U.S.C. § 881(a)(6) provides, in pertinent part, that property subject to forfeiture includes:

> All . . . moneys or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, *all proceeds traceable to such an exchange, . . . except that no property shall be forfeited . . . to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.*

21 U.S.C. § 881(a)(6)(emphasis added). In brief, a claimant must show that he did not know or consent to the drug activities related to the seized property in order to exempt the property from forfeiture. The issue of whether "knowledge or consent" should be read disjunctively or conjuctively is still unsettled. *See* 6 ST. JOHN'S J. LEGAL COMMENT. 143 (1989)(surveying courts' treatment of the "knowledge or consent" provision). It is noteworthy that at common law there was no innocent owner defense to forfeiture. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827). The defense is a statutory construction. For a complete discussion of the innocent owner defense and subsequent court interpretation, see Beverly J. Lacklin, Annotation, *Who is Exempt from Forfeiture of Drug Proceeds Under "Innocent Owner" Provision of 21 USCS § 881(a)(6)*, 109 A.L.R. FED. 322 (1992).

23. 21 U.S.C. § 881(h) provides: "All right, title and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to the forfeiture under this section." 21 U.S.C. § 881(h) (1988).

24. United States v. 92 Buena Vista Ave., 738 F. Supp. 854, 859-60 (D.N.J. 1990).

25. *Id.* at 860-61.

26. *Id.* at 860.

transfer to a bona fide purchaser for value.[27] Consequently, the district court reasoned, the innocent owner defense could only apply to a purchaser, who, by providing value, obtains valid title in the res and thus merits the equitable defense of an innocent owner.[28] Recognizing, however, that the question of whether a donee could invoke the innocent owner defense was one of first impression in the Third Circuit, the district court certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[29]

On appeal, the Court of Appeals for the Third Circuit reversed, holding that Ms. Goodwin could assert a defense as an innocent owner under Section 881(a)(6) despite the fact that she was not a bona fide purchaser for value.[30] Upon review of the legislative history of Section 881(a)(6), the court of appeals rejected the district court's analysis, holding instead that the term "owner" found in the statute was not limited to purchasers for value, but rather encompassed anyone with "a recognizable legal or equitable interest in the property."[31] Moreover, the court of appeals noted that the relation back doctrine codified at Section 881(h) applied only to "property described in subsection (a)" [Section 881(a)].[32] Property, as defined in Section 881(a), *specifically excluded* any property exempted from forfeiture under its innocent owner defense, Section 881(a)(6).[33] Hence, a court would have to ascertain whether the innocent owner defense found in Section 881(a)(6) were applicable *before* applying the relation back provision, Section 881(h).[34] As a result, the government's interest, even if vesting upon the commission of the illegal act, could not attach under Section 881(h) to property exempted from forfeiture under Section 881(a)(6), because Section 881(a)(6) preempted Section 881(h). Any other interpretation of the relation back doctrine, the court of appeals explained, would "essentially . . . emasculate the innocent owner defense" by preventing anyone who obtained an interest in the res after the alleged illegal acts, whether they be

27. *Id.* at 861 (referring, in support, to N.J. STAT. ANN. § 12A:2-403 (West 1962)).
28. *Id.*
29. United States v. A Parcel of Land, 742 F. Supp. 189, 192 (D.N.J. 1990).
30. United States v. A Parcel of Land, 937 F.2d 98, 100 (3d Cir. 1991).
31. *Id.* at 102 (citing United States v. 6109 Grubb Road, 896 F.2d 618, 625 n.4 (3d Cir. 1989)(quoting 1978 U.S.C.C.A.N. at 9522-23)).
32. 937 F.2d at 102.
33. *Id.*
34. *Id.*

a donee or a purchaser for value, from contesting the forfeiture action.[35] Accordingly, the court of appeals remanded the matter to the district court to determine whether Ms. Goodwin was in fact an innocent owner.[36]

The Supreme Court, in a 6-3 decision, affirmed the Third Circuit holding.[37] Justice Stevens, writing for the plurality,[38] quickly dispensed with the question of the applicability of the innocent owner defense to donees, explaining that the term "owner" in the statute was "sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers."[39] Additionally, while the statute contained a provision relating back the government's title in the res to the date of the crime, Justice Stevens refused to bar those holding a post-crime property interest from advancing an innocent owner defense. Citing Chief Justice John Marshall for the proposition that title did not vest immediately in the government upon instituting a forfeiture action,[40] Justice Stevens explained that the relation back doctrine of "retroactive vesting was not self-executing."[41] Rather, under common law, title vested in the government only upon the execution of a recognized judicial procedure, such as a forfeiture decree.[42] Consequently, Justice Stevens reasoned, in a forfeiture action, any party who obtained a colorable interest in the res prior to a judicial condemnation should have standing to contest the forfeiture.[43]

Moreover, the Court reasoned, even if the common-law rule of retroactive vesting were inapplicable to the proceeds of an illegal transaction, a close reading of the statute itself supported extending the innocent owner defense to post-crime property interests. In particular, the relation back doctrine codified at Section 881(h) was applicable exclusively to "property described in subsection (a)."[44] Justice Stevens, agreeing with the argument advanced by the court of appeals,[45] ex-

35. *Id.*
36. United States v. A Parcel of Land, 937 F.2d 98, 103 (3d Cir. 1991).
37. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993).
38. Justices Blackmun, O'Connor, and Souter joined in the plurality opinion.
39. *92 Buena Vista*, 113 S. Ct. at 1134.
40. *Id.* at 1135.
41. *Id.*
42. *Id.* at 1136.
43. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1136 (1993).
44. *Id.* (quoting 21 U.S.C. § 881(h)).
45. *See supra* notes 32-35 and accompanying text.

plained that, because Subsection (a) contained an innocent owner defense, the courts must determine whether the property in question was indeed "property described under Subsection (a)" or was statutorily exempted by the defense before the relation back provision could be applied.[46] The Court concluded that Ms. Goodwin was therefore entitled to a hearing on the issue of her lack of knowledge of the alleged criminal offense before the government moved to procure a forfeiture order, even though she was a donee who obtained her interest in 92 Buena Vista Avenue only after the alleged illegal activity.

Justice Scalia, concurring in the judgment, agreed with the plurality's conclusion, though not with its reasoning.[47] Eschewing the plurality's statutory analysis because of its faulty premises,[48] Justice Scalia explained that the relation back doctrine embodied in Section 881(h) merely codified the traditional common-law relation back doctrine articulated by the Supreme Court since the early Nineteenth Century.[49] Citing *United States v. Grundy*[50] and its progeny, Justice Scalia argued that title vested in the government only upon an order of forfeiture, though it then vested as of the date of the commission of the illegal activity.[51] Unlike the plurality, which appealed to the relationship between Section 881(a) and Section 881(h), Justice Scalia relied solely on the common law, explaining that "the term 'owner' in Section 881(a)(6) [bore] its ordinary mean-

46. *92 Buena Vista*, 113 S. Ct. at 1137.

47. *Id.* at 1138 (Scalia, J., concurring in the judgment). Justice Thomas joined in the concurring opinion.

48. The plurality argued that, because Section 881(h) could not be applied until Section 881(a)(6) had been fully addressed, the term "owner" in Section 881(a)(6) must have referred to even those who obtained an interest after the alleged illegal act. Justice Scalia disagreed. True, vesting title with the government immediately upon the commission of the illegal act would necessarily void any subsequent transfer and exclude such transferees from the innocent owner defense. The inverse was not true. Merely because Section 881(h) did not apply until the actual forfeiture decree was granted did not necessarily imply that anyone who obtained an interest in the res prior to that point was considered an "owner" under the innocent owner defense. In the words of Justice Scalia, "[t]o assume that is simply to beg the question." *Id.* at 1139. Instead, Justice Scalia hung his hat on the legislative intent regarding the term "owner."

49. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1138-39 (1993)(Scalia, J., concurring in the judgment)(quoting Henderson's Distilled Spirits, 81 U.S. (14 Wall.) 44, 56 (1871); Confiscation Cases, 74 U.S (7 Wall.) 454, 460 (1869); United States v. Grundy, 7 U.S. (3 Cranch) 337, 350-351 (1806)).

50. 7 U.S. (3 Cranch) 337, 350-351 (1806)(holding that "the doctrine of relation *carries back* the title to the commission of the offense" (emphasis added)).

51. 113 S. Ct. at 1140 (Scalia, J., concurring in the judgment).

ing,"[52] namely, even "persons holding title after the forfeiture-producing offense."[53] As a preforfeiture title holder and, hence, an "owner" under Section 881(a)(6), Ms. Goodwin should have been afforded an opportunity to raise the innocent owner defense.

Justice Kennedy, in an animated dissent,[54] vigorously criticized the plurality for "rip[ping] out the most effective enforcement provisions in all of drug forfeiture laws."[55] In fact, Justice Kennedy contended that once the case left the district court, "the appellate courts and all counsel began to grapple with the wrong issue, one that need not be addressed."[56] The determinative issue in this case, Justice Kennedy insisted, was not the proper application of the relation back doctrine to a donee holding a post-crime interest in property, but rather whether such a donee could ever obtain a superior interest in property sufficient to defeat a forfeiture order.[57] Justice Kennedy's answer to this latter question was an unequivocal "no." Under well-settled principles of voidable title, only a purchaser for value could improve the defect in a transfer from a holder of voidable title.[58] Because a donor could not give what he did not have, Justice Kennedy reasoned that where the donor held a voidable title that must fall before the government's superior forfeiture claim, that same title in the hands of a donee would

52. *Id.* at 1142 (Scalia, J., concurring in the judgment).

53. *Id.* at 1139 (Scalia, J., concurring in the judgment). In support of his reading of the civil forfeiture statute, Justice Scalia pointed to the use of the term "owner" in Section 881(a)(6), in contradistinction to the use of the term "transferee" in the corresponding criminal forfeiture statute under 21 U.S.C. § 853(c). *Id.* at 1141 (Scalia, J., concurring in the judgment). As opposed to civil forfeiture, criminal forfeiture did indeed vest title in the government before a third party was permitted to assert property rights and a concomitant "innocent transferee" defense. *Id.* (Scalia, J., concurring in the judgment). Thus, Justice Scalia reasoned, a third party in a criminal forfeiture proceeding was not called an "owner," because the government's title vested before the third party could raise a defense. *Id.* (Scalia, J., concurring in the judgment). Having been wrested of the title, the third party claimants were at most "transferees." Conversely, the term "owner" denoted a current ownership interest. As such, Justice Scalia explained, Congress's use of the term "owner" in the civil forfeiture statute manifested a congressional intent to codify the common-law rule of retroactive vesting in civil forfeitures, allowing claimants to retain their property interest until after the judicial condemnation. *Id.* at 1141-42 (Scalia, J., concurring in the judgment).

54. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1143 (1993)(Kennedy, J., dissenting). Chief Justice Rehnquist and Justice White joined in the dissent.

55. *Id.* at 1146 (Kennedy, J., dissenting).

56. *Id.* at 1143 (Kennedy, J., dissenting).

57. *Id.* (Kennedy, J., dissenting).

58. *Id.* at 1144 (Kennedy, J., dissenting)(citing U.C.C. § 2-403(1) (Official Draft 1978)); James Barr Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887)).

just as surely fall.[59] Simply stated, the donee, having provided no value to eliminate the defect in title, merely stood in the donor's shoes. Consequently, Ms. Goodwin, a mere donee, could not assert rights that the donor, an alleged drug dealer, could not assert. In Justice Kennedy's eyes, by allowing a donee the benefit of the innocent owner defense, the plurality afforded drug offenders a new avenue to "wash" their ill-gotten gains and elude the civil forfeiture laws. The plurality, as Justice Kennedy bemoaned, undermined the civil forfeiture mechanism itself, leaving the drug enforcement system in "quite a mess."[60]

Despite Justice Kennedy's stern reproof of the plurality's holding, the Court correctly interprets the civil forfeiture statute and its innocent owner defense, providing a critical and indispensable safeguard against the government's overzealousness in enforcing civil forfeitures. While Justice Kennedy justifiably criticizes the plurality for off-handedly dismissing the question of a donee qua innocent owner, the dissent's belabored treatment is even less understandable. In his dissent, Justice Kennedy compares a donee to a swindler who defrauds a drug dealer of his ill-gotten gains, and then attempts to raise the innocent owner defense.[61] The con man who holds the same voidable title as the drug dealer would obviously not qualify for the innocent owner defense. By extension, Justice Kennedy argued, a donee, who, like the swindler, does not tender value for the transferred property interest, cannot raise the innocent owner defense either, because he holds inferior title when compared to the government's superior statutory interest. The analogy, however, lacks merit. While the term "owner," as the plurality held, is not limited to an interest obtained upon a transfer for value, it is limited to a bona fide transfer, that is, one conducted in good faith absent fraud or deceit.[62] The swindler's defense fails not because he does not

59. *Id.* (Kennedy, J., dissenting).

60. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1145 (1993)(Kennedy, J., dissenting).

61. *Id.* at 1143 (Kennedy, J., dissenting).

62. A bona fide party is a party acting "in or with good faith . . . without deceit or fraud." BLACK'S LAW DICTIONARY 160 (6th ed. 1990); *see* Michael J. Wietryzchowski, *Civil Forfeiture—Protecting Innocent Donees Under 21 U.S.C. § 881(a)(6)*, 65 TEMPLE L. REV. 245, 256-57 n.110 (1992)(distinguishing between bona fide party and bona fide purchaser for value in analysis of Section 881(a)(6)). As long as the transferee is a bona fide party, the statute protects his property interest under the innocent owner defense. *See* 124 CONG. REC. 23,057 (1978)(statement of Sen. Nunn)(noting that the legislation

tender value in his transfer and thus fails to eliminate the defect in title, but rather because the swindler is not a bona fide holder of title at all, and consequently is not an innocent party under the statute. The donee, on the other hand, holds a bona fide interest in the property, an interest which is protected under the innocent owner provision.

More importantly, although Justice Kennedy's interpretation of Section 881(a)(6) may comport with "settled principles of property transfers, trusts and commercial transactions,"[63] it slights the design of the legislature in enacting the innocent owner defense—to protect the rights of parties who are at most peripherally related, and usually entirely unrelated, to the drug crimes in question.[64] In essence, Justice Kennedy equates the criminal with the innocent third party.[65] An expansion of the scope of the innocent owner defense represents to Justice Kennedy yet another loophole newly available to drug dealers for laundering drug revenue. The innocent owner defense is aimed, however, not at defending the drug dealer, but rather at protecting the unwitting third party from an inequitable result. The fact that the plurality's construction of the innocent owner defense may occasionally allow drug dealers to "shelter the proceeds from forfeiture"[66] does not justify "eliminat[ing] the innocent owner defense in almost every imaginable case in which proceeds could be forfeited."[67] Under Justice Kennedy's construction of the statute, donees can never defend property in their rightful possession from a forfeiture order, not having provided value to correct the title's defect. As Justice Kennedy would have it, such donees—though as unaware of the illegal

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should "make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under [the innocent owner provision] and forfeiture would not occur").

63. 113 S. Ct. at 1143 (Kennedy, J., dissenting).

64. Neither the statute nor its legislative history intimate a legislative intent to limit the innocent owner defense to purchasers for value. *Cf.* Wietryzchowski, *supra* note 62, at 256 ("If Congress wanted to limit the innocent owner defense . . . to bona fide purchasers, it could have specifically distinguished this class of owners as it did in the innocent owner provision of the criminal forfeiture statute [21 U.S.C. § 853(c) (1988)].").

65. *Cf.* Steven L. Kessler, *Tide is Turning in Federal Forfeiture Rulings*, N.Y. L.J., Mar. 5, 1993, at 1 (arguing that "the dissent mistakenly placed its focus on the criminal").

66. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1145 (1993)(Kennedy, J., dissenting).

67. *Id.* at 1135. Admittedly, the plurality made this criticism of the government's position, not the dissent's. However, the judgment that the dissent advocated closely approximates the government's position.

drug trafficking as their bona fide purchaser counterparts—can do virtually nothing to protect their interest. If we are to allow for an innocent owner defense, which Congress clearly intends, it is difficult to imagine any legitimate policy that is served by allowing a purchaser but prohibiting a donee from raising the same innocent owner defense, save wholesale augmentation of government revenue.[68]

The plurality and concurrence, on the other hand, recognizing that the goal of civil forfeiture is to provide a disincentive for drug crimes,[69] judiciously exclude all innocent parties, whether they tender value or not. The rationale behind the innocent owner defense is that those parties who know of the drug dealers' illegal activities and yet still conduct business with that party are more likely than not complicit in the drug dealers' crimes, often assisting in the laundering of the drug proceeds. In any event, such transferees assume the risk. By authorizing the forfeiture of property acquired knowingly from a drug offender, Congress intended to render drug dealers "criminal economic pariahs."[70] Unwitting, innocent parties, however, by definition are unaware of the illegal activity and have no grounds upon which to suspect the legitimacy of the transfer. Congress has determined that the government cannot justly arrogate the property interests of such innocent parties, even in the name of the drug war.[71] Thus, to confiscate arbitrarily the property of innocent bystanders for the sake of drug enforcement contravenes the congressional objective of the in-

68. Cary Copeland, Director of the Department of Justice Office for Asset Forfeiture, has candidly praised the civil forfeiture laws which, despite their potential for violating individual rights, represent a significant source of Department of Justice income. In Copeland's words, civil forfeiture "is the goose that lays the golden egg." Kaplan, *supra* note 8.

69. *See* United States v. Certain Real Property Known as Gulfstream W., 710 F. Supp. 792, 794 (S.D. Fla. 1989)(finding civil forfeiture directed at "remov[ing] the incentive to engage in the drug trade and to deny drug dealers the use of their ill-gotten gains"); United States v. 2639 Meetinghouse Rd., 633 F. Supp. 979, 994 (E.D. Pa. 1986)(noting that civil forfeiture "purposes include removing the incentive to engage in the drug trade by denying drug dealers the proceeds of illgotten [sic] gains"); United States v. Reckmeyer, 631 F. Supp. 1191, 1196 (E.D. Va. 1986) ("purpose [of forfeiture] is to strip racketeers and drug dealers of their 'economic bases' "), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987).

70. Goldsmith & Linderman, *supra* note 4, at 1256.

71. *See* 124 CONG. REC. 23,057 (1978)(statement of Sen. Nunn)(explaining that "a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction . . . would be able the fact under [the innocent owner provision] and forfeiture would not occur").

nocent owner defense.[72]

In construing the statutory defense, the plurality aims at effectuating the statute's underlying policy—balancing the imperatives to administer the drug policy effectively and to protect innocent third parties from the brunt of the drug enforcement laws. Congress enacted the civil forfeiture laws to buttress existing drug enforcement laws which were, at the time, deemed to be vastly deficient.[73] Congress understood, however, that expanding the scope of the civil forfeiture laws would also require enacting companion legislation to protect the rights of innocent parties potentially affected by the broader forfeiture laws.[74] The opinion of the Court does more than protect donees who obtain an interest after the alleged illegal activity. The position taken by the government and adopted by the district court is that all holders of post-crime interests in property stand to lose their title to the government, be they lienholder, mortgagee, co-tenant, creditor, or spouse. Moreover, the government can theoretically appropriate the property from any subsequent owner years after the illegal act, regardless of the number of legitimate bona fide transfers that intervene. In sum, no property owner can ever be assured of his title to property, notwithstanding his pre-transfer due diligence. To the government, civil forfeiture is tantamount to a license to undermine such fundamental rights as personal property and due process in the name of eradicating the drug menace. *92 Buena Vista* is a convincing step in the direction of restoring the principles of equity and legitimacy to the arena of civil forfeiture.

In conclusion, underneath the dense, "puzzling"[75] statutory analysis, *92 Buena Vista* attempts objectively to weigh the fed-

72. *Cf.* United States v. One 1936 Model Ford V-8 Deluxe Coach, 307 U.S. 219, 229 (1939)(expressing opinion that because "forfeitures aren't favored, they should be enforced only when within both the letter and spirit of the law").

73. The 1970 Act met with limited success. *See* 124 CONG. REC. 23,055 (1978)(statement of Sen. Nunn)(lamenting that even armed with the 1970 Act, "we were losing the battles as well as the war"); S. REP. No. 225, 98th Cong., 2d Sess. 191-197 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374-80. In response, Congress added amendments to the act in 1978 (Pub. L. No. 95-633, § 301(1), 92 Stat. 3768, 3777 (1978)) and again in 1984 (Pub. L. No. 98-473, § 306(f), 98 Stat. 1837, 2050 (1984)) which, respectively, broadened the scope of civil forfeitures to reach real property used in drug crimes or purchased with the proceeds of drug crimes and codified the common-law relation back doctrine.

74. *See* O'Brien, *supra* note 5, at 522-23 & n.12.

75. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1135 n.20 (1993).

eral needs of drug enforcement against the individual rights guaranteed by the Constitution. Admittedly, the drug problem in this country continues to grow, virtually unchecked despite the myriad of statutes that intend to solve it. This is one of the foremost social ills facing our nation and we desperately need treatments that will expeditiously cure this country of its national drug addiction. Yet, in the process of procuring such poultices, we must be careful to treat the symptoms and not kill the patient. *92 Buena Vista* may ultimately stand not for the intricate machinations of the relation back doctrine, but rather for the latitude to be given the government in its pursuit of federal goals. To date, the government has interpreted the current drug enforcement laws to be a license for "zero tolerance"[76] of individual rights. By narrowly construing the statute in consonance with its legislative history, the Court's holding reaffirms the Congressional intent to temper our pursuit of drug offenders with an equally zealous protection of personal rights.

Moshe Hecking

HABEAS CORPUS AND "ACTUAL INNOCENCE": *Herrera v. Collins*, 113 S. Ct. 853 (1993).

Each year, prisoners file thousands of habeas corpus petitions in the federal courts.[1] Although habeas petitions represent a relatively small, and perhaps diminishing,[2] portion of the federal caseload, judges have often expressed concern at the strain they place on the system. As early as 1953, the Supreme Court called attention to the "floods of stale, frivolous and repetitious petitions [which] inundate the docket of the lower courts and swell our own."[3] In recent years, the Court has

76. *See supra* note 13.

1. 1980 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS A-18-A-19 (reporting that prisoners filed 8,444 habeas corpus petitions in U.S. District Courts during the twelve-month period that ended June 30, 1980).

2. *Id.* (noting that federal habeas petitions constituted 3.08% of all civil cases filed in U.S. District Courts during the twelve-month period ended June 30, 1980); *see also* 1972 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS A-14-A-15 (noting that prisoners filed 9,317 habeas petitions during the twelve-month period ended June 30, 1972, out of a total of 165,617 civil cases—5.63% of all such cases filed).

3. Brown v. Allen, 344 U.S. 433, 536 (1953)(Jackson, J., concurring).

moved to stem the tide by restricting prisoners' access to the writ.[4]

At the same time, the Court has been growing increasingly comfortable with the death penalty. The position taken by Justices Brennan and Marshall—that capital punishment violates the Eighth Amendment prohibition of "cruel and unusual punishment"[5]—is no longer represented on the nation's most powerful bench, and the moderate conservatism of justices like Potter Stewart[6] has in recent years lost ground to the "hang 'em high" philosophy of more aggressive conservatives. Recent decisions indicate a willingness to execute just about anyone unfortunate enough to wind up on death row,[7] including the mentally retarded.[8]

The United States Supreme Court confirmed both trends last Term when it declined to grant habeas relief in the case of Leonel Torres Herrera, a prisoner on death row in Texas who produced evidence tending to show that he was "actually innocent" of the crime for which he had been sentenced to die more than ten years earlier.[9] The result was a notably unen-

4. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976)(finding that the introduction of evidence obtained as the result of an illegal search and seizure is not grounds for habeas relief, so long as the state court provided a "full and fair litigation" of the Fourth Amendment claim); Teague v. Lane, 489 U.S. 288 (1989)(barring state prisoners barred from raising claims based on subsequent developments in the law, except under certain special circumstances).

5. Furman v. Georgia, 408 U.S. 238 (1972).

6. *Id.* at 309-310 (Stewart, J., concurring)(opining that death sentences imposed under rules permitting "wanton" and "freakish" sentencing are cruel and unusual punishment); *see also* Woodson v. California, 428 U.S. 280 (1976)(holding that mandatory death penalty statutes violate the Eighth and Fourteenth Amendments).

7. "One is reminded of Justice Antonin Scalia's comment on a Public Broadcasting System panel, discussing the plight of an innocent man wrongfully executed. 'Oh well,' quipped the justice, 'he was probably guilty of something else anyway.'" Monroe Freedman, *Pale Horse, Pale Justice*, LEGAL TIMES, Mar. 23, 1992, at 18.

8. Penry v. Lynaugh, 492 U.S. 302 (1989)(holding that a state may constitutionally execute those mentally retarded prisoners who are able to satisfy the culpability requirements of a capital crime). For an account of how the Court's attitude is shared by politicians at even the highest levels of government, see Anthony Lewis, *Abroad at Home; The Two Clintons*, N.Y. TIMES, Feb. 22, 1993, at A17 (reporting how President (then Governor) Clinton refused to commute the death sentence of a brain-damaged prisoner). Other decisions illustrating the Supreme Court's expansive treatment of the death penalty include Tison v. Arizona, 481 U.S. 137 (1987)(holding that a state may constitutionally execute a prisoner on the basis of "major participation in the felony committed, combined with reckless indifference to human life," though prisoner did not commit murder, nor intended to do so), and McCleskey v. Kemp, 481 U.S. 279 (1987)(holding that a capital sentence imposed on an African-American is not unconstitutional, despite statistical evidence tending to show that capital sentences reflect racial bias).

9. Herrera v. Collins, 113 S. Ct. 853 (1993).

lightening opinion. The Court muddied the waters, purporting to leave the principal question unresolved, but suggesting under cover of the confused and capacious notion of "actual innocence" that claims like Herrera's will be held to an absurdly high standard, one that bears no clear relationship to more familiar legal notions of guilt and innocence.

Mr. Herrera's legal troubles began on September 29, 1981.[10] That evening, two law enforcement officers were shot and fatally wounded in separate incidents occurring within a few minutes of each other along the same stretch of desolate Texas highway.[11] The body of the first victim, Texas Department of Public Safety Officer David Rucker, was discovered by a passerby shortly before 11:00 P.M.[12] A few miles down the same highway, Los Fresnos Police Officers Enrique Carrisalez and Enrique Hernandez pulled over a speeding motorist. Officer Hernandez watched from the patrol car as his colleague approached the motorist. There was a brief exchange, before the motorist fired one or more shots at Officer Carrisalez.

Leonel Herrera was arrested a few days later in connection with the shootings. The evidence presented against him was considerable. Though Carrisalez had been fatally wounded, he did not die immediately and was able to identify Herrera as the shooter from his hospital bed. Officer Hernandez, who had witnessed the entire incident, testified that it was Herrera who shot his partner. Herrera's social security card was found at the scene of Rucker's death. The speeding car involved in the Carrisalez shooting was traced to Herrera by a license plate check. When the police recovered the car, there were spatters of blood on it, as there were on Herrera's pants and wallet. When he was arrested, Herrera had with him a handwritten letter in which he all but confessed to the murder of Rucker and arguably to the murder of Carrisalez.[13]

On the strength of this evidence, Herrera was convicted of capital murder and sentenced to death.[14] He sought relief from several quarters: on direct appeal,[15] on an application for state

10. Herrera v. State, 682 S.W.2d 313, 316 (Tex. Crim. App. 1984).
11. *Herrera v. Collins*, 113 S. Ct. at 856-857.
12. *Id.* at 857.
13. *Id.* at 857 n.1.
14. *Id.* at 856.
15. Herrera v. State, 682 S.W.2d 313, *cert. denied*, 471 U.S. 1131 (1985).

habeas relief,[16] and on a petition for federal habeas relief.[17] Each of these efforts proved unsuccessful. In 1991, Herrera launched a second round of challenges to his conviction. He began with a second petition for state habeas relief. Relying on the affidavits of Hector Villarreal, an attorney who had represented Herrera's brother Raul Sr., and Juan Franco Palacious, who had shared a prison cell with Raul Sr., Herrera urged that he was "actually innocent" of the killings of Rucker and Carrisalez. Both Villarreal and Palacious swore that Raul Sr., who had died seven years earlier, had told them that he, and not his brother, was the killer. The state court denied the petition.[18]

Herrera took his case to the federal District Court, where he filed his second petition for federal habeas relief. He supplemented his state claim with the recently procured affidavits of Raul Sr.'s son, Raul Jr., and of one Jose Ybarra, Jr. Raul Jr. claimed to have witnessed his father shooting the two officers, and Ybarra corroborated the affidavits of Villarreal and Palacious. The District Court judge, Ricardo Hinojosa, granted a stay of execution to afford Herrera an opportunity to litigate further his "actual innocence" claim.[19] The Texas Department of Criminal Justice appealed and the Fifth Circuit Court of Appeals vacated the stay of execution.[20] Judge W. Eugene Davis, writing for a panel of three, held that Herrera's claim of "actual innocence" was not one upon which habeas relief could be granted.[21] In defense of this holding, he cited dicta from Chief Justice Warren's opinion in *Townsend v. Sain*: "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."[22] The Supreme Court granted certiorari,[23] but in a surprising move narrowly declined to grant a stay of execution. Had the Texas Court of Criminal Appeals not stepped in and granted the stay,[24] Herrera might have been executed before

16. *Ex parte* Herrera, No. 12,848-02 (Tex. Crim. App., Aug. 2, 1985).

17. *See* Herrera v. Collins, 904 F.2d 944 (5th Cir.), *cert. denied*, 498 U.S. 925 (1990).

18. *Ex parte* Herrera, No. 81-CR-672-C (Tex. 197th Jud. Dist., Jan. 14, 1991), ¶ 35, *aff'd*, 819 S.W.2d 528 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 1074 (1992).

19. No. M-92-30 (S.D. Tex., Feb. 17, 1992).

20. Herrera v. Collins, 954 F.2d 1029 (5th Cir. 1992).

21. *Id.* at 1033.

22. *Id.* at 1034 (quoting Townsend v. Sain, 372 U.S. 293, 317 (1963)).

23. 112 S. Ct. 1074 (1992)(Justices Blackmun, Stevens, O'Connor, and Souter voting to grant a stay of execution).

24. Herrera v. Collins, 113 S. Ct. at 859.

his case had been heard.[25]

The Supreme Court then affirmed the Fifth Circuit. Chief Justice Rehnquist, writing for himself and four other justices, held that Herrera's claim of "actual innocence" would not support a petition for federal habeas corpus relief.[26] Conceding that Herrera's argument—that the Eighth and Fourteenth Amendments prohibit the execution of an actually innocent person—had "an elemental appeal,"[27] the Chief Justice nevertheless found it wanting in several important respects.

Not the least of his concerns was that a decision licensing collateral attack on the basis of a claim of "actual innocence" made many years after trial would slight the work done by the state courts at trial and on review. The habeas petitioner was presumed innocent at trial, and it was only by jumping through a wide assortment of procedural hoops that the state was able to overcome that presumption and secure a conviction.[28] Consequently, the trial court's determination of guilt or innocence is "a decisive and portentous event"[29] that is entitled to deference.

The majority also relied on precedent suggesting that actual innocence was not a ground for federal habeas relief, absent an independent constitutional violation.[30] The most impressive case in this regard was *Townsend v. Sain*,[31] though the Court cited several others as well.[32]

The whole point of Herrera's argument was that a death-row prisoner's "actual innocence" should be per se evidence of at least two separate constitutional violations and therefore would

25. Kathy Fair, *Final Appeal Fails; Herrera is Executed*, HOUS. CHRON., May 13, 1993, at A32. Governor Ann Richards of Texas denied a reprieve to Herrera. A spokesman stated, "The evidence of his guilt was overwhelming. . . . Rarely do we see a case where the evidence is as staggering as this one." Herrera was executed by lethal injection on May 12, 1993, claiming his innocence to the end.

26. *Id.* at 859-870. The Chief Justice was joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justice O'Connor filed a concurring opinion, in which Justice Kennedy joined. Justice Scalia filed a concurring opinion, in which Justice Thomas joined. Justice White filed an opinion concurring in the judgment. Justice Blackmun filed a dissenting opinion, in which Justices Stevens and Souter joined.

27. *Id.* at 859.

28. *Id.* at 859-60.

29. *Id.* at 861 (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

30. 113 S. Ct. at 860-61.

31. 372 U.S. 293 (1963).

32. *E.g.*, Moore v. Dempsey, 261 U.S. 86, 87-88 (1923)(Holmes, J.)("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.").

come within the conventional doctrine of habeas corpus relief as a means of determining whether the state courts have respected a prisoner's constitutional rights. Perhaps because it recognized this possibility, the majority did consider Herrera's Eighth and Fourteenth Amendment claims. The Chief Justice set aside the Eighth Amendment claim without much discussion, concluding that it did not come within any of the previously decided cases.[33] He delayed a little longer over the Fourteenth Amendment claim, arguing that procedural, not substantive, due process analysis was appropriate, and then concluding after a comprehensive survey of state legislation that, because so many states place restrictions on the filing of new trial motions, the Texas 30-day limit did not offend any "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[34]

The Court then embarked on a short historical exercise, showing by reference to numerous authorities that clemency was the traditional Anglo-American remedy for cases like Herrera's, in which a nagging doubt still remained even after judicial process has been exhausted.[35] Nevertheless, in a strange move that seemed to betray much of what he had written before,[36] the Chief Justice conceded "for the sake of argument" that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional."[37] Because Herrera's showing did not meet this "extraordinarily high" standard, the Court declined to grant relief. The Court did not attempt to explicate the standard, nor to ground it in habeas jurisprudence, except to observe that considerations of finality and the burden placed on the states called for a high "threshold showing."[38]

Justice O'Connor, concurring in the judgment, made it clear that she accepted the basic premise that the Constitution prohibited the execution of an innocent prisoner.[39] She insisted,

33. 113 S. Ct. at 863-64.

34. *Id.* at 864 (quoting Medina v. California, 112 S.Ct. 2572, 2577 (1992)).

35. *Id.* at 866-69.

36. At least one commentator has suggested that this section was added to secure the "swing" votes of Justices O'Connor and Kennedy. *See, e.g.*, Paul M. Barrett, *Split Supreme Court Further Narrows Avenue for Appeals From Death Row*, WALL ST. J., Jan. 26, 1993, at B9.

37. *Id.* at 869.

38. *Id.* at 869.

39. *Id.* at 870 (O'Connor, J., concurring).

however, that the Court did not need to reach that question. Surveying the evidence, she concluded that Herrera's affidavits were so weak in light of the trial court record that they did not even "reveal a likelihood of actual innocence."[40]

Only Justices Scalia and Thomas dissented from the consensus that actual innocence might, under certain circumstances, justify federal habeas relief. In a colorful opinion that referred slightingly to the "calibration" of the dissenting Justices' consciences and to "Our Perfect Constitution," Justice Scalia expressed concern that the Court might appear to have placed on the lower federal courts the great burden of analyzing "newly-discovered-evidence-of-innocence" claims.[41]

Justice White, concurring in the judgment, enunciated what proved to be the most liberal standard for relief. He would have required a petitioner to show, on the basis of the newly discovered evidence together with the record, that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."[42] Because Herrera's claim did not meet that standard, Justice White voted with the majority.

The dissenters, led by Justice Blackmun, answered the majority in an unusually passionate opinion. Taking the position that the bulk of the majority's opinion was dicta, Justice Blackmun concentrated on arguments relating "actual innocence" to the Eighth and Fourteenth Amendments.[43] With regard to the Eighth Amendment, he argued that if it is unconstitutional to execute a rapist[44] or a participant in a robbery that ends in a killing,[45] it must certainly be unconstitutional to execute an "actually innocent" prisoner.[46] As for the Fourteenth Amendment, he appealed, against the majority, to substantive due process analysis. Relying on an analogy to the 1952 case of *Rochin v. California*, the dissent reasoned that if the use of a stomach pump to extract evidence from a suspected narcotics

40. *Id.* at 873 (O'Connor, J., concurring).

41. *Id.* at 874-75 (Scalia, J., concurring).

42. *Id.* at 875 (White, J., concurring)(quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

43. *Id.* at 876 (Blackmun, J., dissenting).

44. Coker v. Georgia, 433 U.S. 584 (1977), *holding limited by* Stanford v. Kentucky, 492 U.S. 361, 371 (1989)(noting that in *Coker*, Georgia was the only state that had a death penalty for rape, so it was an unusual case).

45. Enmund v. Florida, 458 U.S. 782 (1982), *holding limited by* Tison v. Arizona, 481 U.S. 137 (1987)(allowing execution of a participant in a prison escape that ended in a killing).

46. 113 S. Ct. at 876-77 (Blackmun, J., dissenting).

dealer violated the Constitution's guarantee of due process because it approached too close "to the rack and the screw," much more surely must the execution of an "actually innocent" prisoner violate that same guarantee.[47]

Rejecting the majority's appeal to executive clemency as an abandonment of judicial prerogative and duty, Justice Blackmun proceeded to articulate his own standard for granting relief. In a passage that strongly recalled Judge Henry Friendly's discussion of the same issue in his seminal article on innocence and collateral attack,[48] the dissent urged relief upon a showing that the petitioner is "probably" innocent.[49] The dissenters would have remanded Herrera's case to the District Court for further inquiry consistent with their "probable" innocence standard.[50] Justice Blackmun, writing only for himself, suggested that to do otherwise would come "perilously close to simple murder."[51]

While each of the two principal opinions in *Herrera* has a certain appeal—Rehnquist's to our sense of efficiency, Blackmun's to our sense of fair play—both rest on a dubious distinction

47. *Id.* at 878-79 (Blackmun, J., dissenting)(quoting Rochin v. California, 342 U.S. 165, 172 (1952)). The vitality of the holding in *Rochin* is subject to question, however. *See* Breithaupt v. Abram, 352 U.S. 432 (1957)(distinguishing *Rochin* in holding that blood taken from an unconscious defendant is constitutionally admissible). Both *Rochin* and *Breithaupt* were decided before the Fourth Amendment was incorporated against the states. *Cf.* Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990)(holding in civil case that state may require clear and convincing evidence of patient's desire to withdraw medical treatment and may require invasive treatment if such evidence not produced). *Compare* Washington v. Harper, 494 U.S. 210 (1990)(holding in civil case that state may force a mental patient to be treated with antipsychotic drugs against his will) *with* Riggins v. Nevada, 112 S. Ct. 1810 (1992)(holding that antipsychotic drugs may be administered by state against defendant's will in capital case, but court must first make detailed findings). Given the proper set of facts, it is possible that pumping a suspected narcotics dealer's stomach would not be considered unconstitutional under current Supreme Court jurisprudence. That qualification of *Rochin*, however, says nothing about the execution of an actually innocent prisoner, which would still be heinous for the same reasons articulated by the Court in *Rochin*.

48. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 159 n.87, 160 (1970)(arguing that federal habeas petitioners should be required to show "a fair probability that, in light of all the evidence, including . . . evidence tenably claimed . . . to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt.").

49. 113 S. Ct. at 882 (Blackmun, J., dissenting).

50. *Id.* at 883-84 (Blackmun, J., dissenting). Though the dissenters' standard is arguably tougher than Justice White's, he concurred and they dissented. The reason is that Justice White saw no need to remand; it was clear to him that Herrera's claim did not measure up. Consequently, even had the dissenters prevailed, it would probably have been little comfort to Herrera. If he could not establish an ineluctable reasonable doubt in Justice White's mind, he would probably have found it difficult to prove to a district judge that he was "probably innocent".

51. *Id.* at 884 (Blackmun, J., dissenting).

between legal and actual innocence. Neither Justice troubles to examine the critical concept of "actual innocence,"[52] though both are quite happy to bandy it about at great length. Had they taken the time to consider just what it was they were talking about, the Justices might have reached rather different decisions.

The notion of "actual innocence" appears to answer to the rather simple insight that a person who has been duly tried and convicted may nonetheless be innocent. No one doubts that very many people have been wrongfully convicted and sent to prison, or even to the gallows.[53] It is such people as these to which the Court refers when it uses expressions like "actually innocent."

The flip side of "actual innocence," thus understood, is "legal guilt." Though "actually innocent" habeas petitioners are just that—innocent in fact—it is also a fact worth observing that at some point in the past a trial court has determined that each of these people is guilty "beyond a reasonable doubt."[54] Thus, the notion of "actual innocence" presupposes a sharp distinction between the kind of guilt and innocence that sometimes escapes judges' attention—the guilt and innocence known only to God, and perhaps a few eyewitnesses—and the kind in which the lower courts deal.[55]

The problem confronting the Justices is, of course, how to reconcile the obvious truth that courts are sometimes mistaken with their own insistence that truth is the proper business of the courts. The solution recalls the position taken by Protagoras, a leader of the Sophists (and, consequently, an intellectual forebear of the legal profession), that truth is always truth for somebody.[56] The legal analogue of that proposition is that

52. However, Chief Justice Rehnquist perhaps came close in his discussion of the trial court's determination of guilt or innocence as a decisive event. *See supra* text accompanying note 27.

53. Both the majority and dissent cite the famous Bedau and Radelet study, which suggests that as many as 23 innocent people have been executed in the United States since the turn of the century. *Herrera*, 113 S. Ct. at 868 n.15, 876 n.1 (citing Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36, 173-179 (1987)).

54. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970).

55. Looked at this way, it is perhaps not surprising that a majority of the Supreme Court Justices have indicated a willingness to dabble in "actual innocence" review, without so much as pausing to consider their competence to do so—for if the highest Court in the land is not allied to God in Heaven, what court is?

56. PLATO, THEAETETUS 161d (John McDowell trans., 1973).

guilt is always guilt for some court. In a sense, some such juristic relativism is inevitable. Because the courts do not demand certainty, but for epistemological (and practical) reasons have adopted the less demanding "reasonable doubt" standard, they cannot really make any more extravagant claim than that the defendant is guilty in the eyes of the law. Guilt *simpliciter* is for other, more clairvoyant, tribunals.[57] With earthly courts, there is always a possibility that someone who is in fact innocent will be found guilty. Thus, adjudication is anchored as effectively as it can be to the pursuit of truth and the distinction between actual and legal innocence is captured and preserved, though only—and this is important—at a meta-legal level.[58] There may be people who are factually innocent despite having been found guilty beyond a reasonable doubt, but to these people the law must ever be blind. This is because these are precisely the people who are said to be guilty "in the eyes of the law."[59] It would be a strange vision indeed that permitted a court to see one and the same person as both guilty and innocent.[60]

This analysis does not seem to answer the basic injustice of denying relief to someone like Herrera, who claims to have unearthed evidence not available at trial tending to show that he is "actually innocent." However, the problem is illusory, for what Herrera sought was not to convince the court that he was one of the (vanishingly) small number of petitioners who have been convicted beyond a reasonable doubt and yet remain innocent in fact—such claims can have no substance in the eyes of the law[61]—but rather that he was one of the somewhat larger

57. Judge Marvin Frankel tells the story of a criminal defense lawyer who used to "defy and cajole juries with the reminder that the question is not at all 'guilt or innocence,' but only whether guilt has been shown beyond a reasonable doubt." As the Judge observes, whatever else one might think about the lawyer's claim, "[i]ts doctrinal soundness is clear." Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1037 (1975).

58. Because this relativism acknowledges the possibility of 'objective' guilt, it does deprive itself of an appropriate (absolute) position from which to assert its own truth—the fatal defect of most relativisms.

59. Herrera v. Collins, 113 S. Ct. 853, 860 (1993).

60. It might be argued that there is no contradiction here, that because the habeas court is not the same as the trial court, it is possible that its legal vision is the more acute. This may be conceded as a purely formal point, but against it is the Court's observation that "the passage of time only diminishes the reliability of criminal adjudications." *Id.* at 862.

61. Imagine trying to prove to a court that although evidence exists sufficient to show that you are guilty beyond a reasonable doubt, you are in fact innocent. Such a claim would manifestly contradict the legal definition of guilt, which is after all the definition that a court of *law* must apply.

number of petitioners who, if they were tried today, could no longer be found guilty beyond a reasonable doubt because of the emergence of new evidence. Thus, Herrera seeks to introduce a temporal element into legal notions of guilt and innocence. This should not really be surprising—philosophers have long recognized that the addition of a clause specifying time can go a long way toward dissolving manifest contradictions.[62] A claim that petitioner, who was legally guilty of murder in, say, 1982, is no longer guilty of the same crime in 1993, is perfectly coherent. The relevant question is simply whether any rational trier of fact, confronted with the evidence available to the original trial court together with the newly discovered evidence, could find the petitioner guilty beyond a reasonable doubt.[63]

The real problem posed by *Herrera*, then, is whether the Constitution forbids the execution of a person who would be found "legally innocent" if he were tried today.[64] The dissent's arguments seem compelling on this score.[65] If the Constitution forbids the execution of a rightfully convicted rapist, it would seem *a fortiori* to forbid the execution of a prisoner who could no longer be found guilty of the crime for which he was convicted. Similarly, even taking the majority's point that it is pro-

62. *See, e.g.*, ARISTOTLE, METAPHYSICS 1005b5 (Christopher Kirwan trans., 1971).

63. Justice White was the only one of the nine to recognize the importance of this question—a fitting tribute to his sagacity, coming as it did on the eve of his retirement. 113 S. Ct. at 875 (White, J., concurring). Justice Blackmun flirted with "reasonable doubt," only to adopt a more stringent "probable" innocence standard. *Id.* at 882 (Blackmun, J., dissenting).

64. It might seem as if a court could short-circuit this problem by simply refusing to hear a petitioner's case. If legal innocence is nothing more than a court's determination that a defendant is not guilty-beyond-a-reasonable-doubt, then the fact that no court has made such a determination suggests that the petitioner is not legally innocent, in which case there is no question of violating a legally innocent person's constitutional rights. On this view, a habeas petitioner raising a claim of contemporary legal innocence could never win relief absent an independent determination of legal innocence; but if he could secure such a determination, he would have no need of habeas relief.

The solution is to define legal innocence independently of any concrete determination of the trial courts. Thus, a defendant is legally innocent at the time of trial if and only if a hypothetical rational trier of fact hearing his case at that time could not find that he was guilty beyond a reasonable doubt. The counterfactual device of the 'rational trier of fact' ought to trouble no one, if only because the Supreme Court has posited precisely the same device in another setting. *See* Jackson v. Virginia, 443 U.S. 307, 324 (1979).

It is perhaps worth adding that this hypothetical rational trier of fact suffers none of the infirmities of flesh-and-blood juries. The passage of time does not diminish the reliability of its adjudications. Otherwise, any prisoner who was willing to wait until the key witnesses against him had died, or their memories had faded, could bring a claim five or ten years down the road that if he were tried 'today' no rational trier of fact could convict him beyond a reasonable doubt.

65. *See supra* notes 42-46 and accompanying text.

cedural and not substantive due process that is at issue, a rule that permits the execution of a prisoner who can win acquittal arguably transgresses a "recognized principle of 'fundamental fairness' in operation."[66] In any event, it appears from the opinions written in *Herrera* that as many as seven of the nine Justices would accept something like "contemporary legal innocence" as a ground for federal habeas relief, were a colorable claim brought squarely before them.[67] If the President lives up to his pledge and replaces retiring Justice Byron White with "a person that has a fine mind, good judgment, wide experience in the law and in the problems of real people, and someone with a big heart,"[68] it does not seem likely that this balance will change.

If the Justices were to see past the red herring of "actual innocence" and license federal habeas relief whenever a rational trier of fact could no longer find a prisoner guilty beyond a reasonable doubt because of the emergence of new evidence, it would not be especially troubling. The reasonable doubt standard is no stranger to the criminal justice system, and though it may strike some as unduly forgiving, its application has not resulted in any cataclysm. Moreover, a standard of review that asks whether any reasonable trier of fact could find petitioner guilty beyond a reasonable doubt is rather exacting. It would almost always be the case that a rational trier of fact could refuse to credit new evidence, or find it wanting in some way.[69] Thus, habeas relief would be unlikely to result in very many instances. The new cases that did arise would be like a raindrop compared to the "flood" envisioned by Justice Jackson and his successors.[70] More importantly, simple considerations of justice suggest that the lives of law-abiding citizens should not be

66. *Herrera*, 113 S. Ct. at 879 n.5 (Blackmun, J., dissenting) (quoting Medina v. California, 112 S. Ct. 2572 (1992)).

67. Only Justice Scalia (joined by Justice Thomas) was willing to write that "[there] is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Id.* at 874-75 (Scalia, J., concurring).

68. Thomas L. Friedman, *Clinton Expected to Pick Moderate for High Court*, N.Y. TIMES, Mar. 20, 1993, at A9 [Justice Ruth Bader Ginsburg was appointed after this Recent Development was written.—Eds.].

69. Herrera's own case is an excellent example. A rational trier of fact could easily conclude that affidavits produced more than ten years after conviction and pinning the blame on a long-dead criminal are outright fabrications—or at the very least that they are somewhat suspicious.

70. *See supra* note 3 and accompanying text.

made to depend on something as fortuitous as the availability of exculpatory evidence at trial. Any obstacle the Court can place in the way of the incomparable horror of executing a person who no longer satisfies the legal definition of guilt is a step in the right direction.

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