

CONSTITUTIONAL LAW

Cases, History, and Practice

Fourth Edition

2011 Supplement

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PREFACE TO THE 2011 SUPPLEMENT

At first glance, the October 2010 Term would not appear to have been notable for constitutional decisions outside the First Amendment. However, closer examination reveals cases raising important doctrinal and substantive issues, and a continuation of familiar voting patterns.

First, the Court continued to focus on federalism issues. In particular, it decided a number of preemption cases, three of which are discussed in this supplement. Some of these raise important doctrinal issues. In *Williamson v. Mazda Motor of America*, the Court continued its examination of when a federal agency regulation will be held to preempt state law. In *Pliva v. Mensing*, the Court returned to the question of when the Court should apply a presumption that federal law does not preempt state law, an issue that has sharply split the Court in recent years. *Chamber of Commerce v. Whiting* dealt with the politically controversial issue of state laws making it harder for undocumented workers to find work, and considered whether such laws were preempted by federal immigration law. Turning to a distinct federalism issue, in *Virginia Organization for Protection and Advocacy v. Stewart*, the Court rejected a state's call to craft another exception to the *Ex parte Young* theory of avoiding state sovereign immunity. Other important constitutional cases decided this year dealt with standing to challenge alleged Establishment Clause and federalism violations, the permissible scope of Article I courts' jurisdiction, and the procedural due process right to an attorney in civil contempt proceedings.

Second, *Whiting* illustrated this term's focus on immigration issues. Whether by accident or design, the 2010 Term raised the prospect of the Court deciding two important immigration issues. In addition to *Whiting's* consideration of Arizona's limits on employing undocumented workers, the Court in *Flores-Villar v. United States* returned to the question of constitutional limits on sex classifications affecting transmission of citizenship by U.S. citizen-parents to their nonmarital children born abroad. However, the Court in *Flores-Villar* split 4-4 (Justice Kagan not participating), and thus affirmed the lower court without an opinion.

The 4-4 split in *Flores-Villar* illustrated the third theme of the 2010 Term: the continuation of the close division on the Court in high-profile constitutional cases, and Justice Kennedy's continued role as the swing vote. Many of the cases excerpted or discussed in this supplement were decided on 5-4 votes. In each of those cases, Justice Kennedy was in the majority. Litigants in major constitutional cases today continue to rely on Justice Kennedy's vote.

CHAPTER I: THE JUDICIAL POWER

B. CONGRESSIONAL CHECKS ON THE JUDICIAL POWER

Page 119: *Add after CFTC v. Schor*:

Note: Bankruptcy Courts and Article III

In *Stern v. Marshall*, ___ U.S. ___ (2011), the Court again took up the question of Article III-based limits on the jurisdiction of Article I courts, this time in the context of bankruptcy courts. Federal bankruptcy courts, which are not Article III courts, have often been the subject of cases raising this question: by their very nature, as tribunals intended to allow a consolidated resolution of all of the bankrupt party's affairs, they adjudicate a wide variety of claims. This practice leads to arguments that those courts are unconstitutionally playing the role Article III reserved for the federal courts. One bankruptcy court case, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, [458 U.S. 50](#) (1982), is discussed in the *Schor* case excerpted in the casebook. Another such case, *Granfinanciera S.A. v. Nordberg*, [492 U.S. 33](#) (1989), considered an issue closely related to the Article III issue.

Stern grew out of a bitter family dispute between the bankrupt party, Vickie Marshall (a celebrity better known as Anna Nicole Smith), and Pierce Marshall. Vickie married Pierce's father and eventually sued Pierce, alleging that Pierce had interfered in his father's plans to provide for Vickie in his will. After the father died, Vickie filed for bankruptcy. Pierce made a claim against her estate in the bankruptcy court, alleging that Vickie had defamed him in the press. Vickie counterclaimed, again in the bankruptcy court, alleging tortious interference with the plans Pierce's father had to provide for Vickie. The bankruptcy court ruled in Vickie's favor on her counterclaim.

Pierce appealed to federal court, arguing that the bankruptcy court could not exercise jurisdiction over Vickie's counterclaim. When his appeal reached the Supreme Court, it agreed with him. Writing for the five-justice majority, Chief Justice Roberts first wrestled with whether Vickie's counterclaim constituted a "public right." After a long discussion of cases dating back to the Nineteenth Century and including *Northern Pipeline*, *Schor* and *Granfinanciera*, the Court concluded that her counterclaim "does not fall within any of the varied formulations of the public rights exception [to the prohibition on Article I courts] in this Court's cases." He wrote: "It is not a matter that can be pursued only by the grace of the other branches . . . or one that historically could have been determined exclusively by those branches. . ."

Chief Justice Roberts continued:

In addition, Vickie’s claimed right . . . does not flow from a federal statutory scheme [and] is not completely dependent upon adjudication of a claim created by federal law And in contrast to the objecting party in *Schor*, Pierce did not truly consent to resolution of Vickie’s claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie’s estate.

Furthermore, the asserted authority to decide Vickie’s claim is not limited to a particularized area of the law, as in . . . *Schor*. . . . This is not a situation in which Congress devised an expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task. . . .

Chief Justice Roberts then cautioned that the unique context of bankruptcy courts distinguished this case from those cases (presumably including *Schor*) where the agency was given the power to adjudicate claims under a statute the agency was tasked with implementing:

We recognize that there may be instances in which the distinction between public and private rights – at least as framed by some of our recent cases – fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme. Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.

Justice Scalia concurred, but expressed concern with what he called “[t]he sheer surfeit of factors that the Court was required to consider in this case.” He wrote:

Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, [285 U.S. 22](#) (1932), in my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason – and not because of some intuitive balancing of benefits and harms – I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true “public rights” cases.

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, dissented. He relied heavily on *Schor*, which he described as a case where the Court:

took a more pragmatic approach to the constitutional question. It sought to determine whether, in the particular instance, the challenged delegation of

adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch.

He noted that under *Schor* “[t]he presence of ‘private rights’ does not automatically determine the outcome of the question but requires a more ‘searching’ examination of the relevant factors” from that case. Applying those factors, he concluded that bankruptcy court adjudication of the claim at issue was constitutional. He conceded that the right at issue was private. But he noted that bankruptcy court judges “enjoy considerable protection from improper political influence.” He noted the control Article III courts had over bankruptcy proceedings, in particular, the power of an Article III district court to withdraw any case from a bankruptcy court, on the district court’s own motion or the motion of any party, for cause shown. He also argued that the parties consented to bankruptcy court jurisdiction, arguing that Pierce had litigation options other than filing in that court. Finally, he noted the importance of allowing bankruptcy courts to exert maximum control over the bankrupt estate’s litigation, in order to ensure orderly disposition of the estate’s assets.

C. SELF-IMPOSED LIMITS ON THE JUDICIAL POWER

2. The Case or Controversy Requirement

b. Standing

i. The Basic Requirements

Page 162: Add after *Singleton v. Wulff*:

Note: Whose Legal Rights Are Infringed By Structural Violations?

In later chapters you will read about the Constitution’s rules governing federalism, that is, the rules governing the balance between federal and state power in our system. In [*Bond v. United States*, 180 L. Ed. 2d 269 \(U.S. 2011\)](#), (2011), the Court explicitly answered a question that, at most, had only been implicitly answered in previous cases: for standing purposes, whose legal rights are infringed when the federal government allegedly violates states’ constitutional autonomy?

Bond involved a federal criminal prosecution of a woman who had allegedly used a chemical to harm a romantic rival. The federal statute under which she was charged was enacted in order to implement a chemical weapons treaty ratified by the United States. (As you will learn in Chapter II, Congress is authorized to enact statutes that implement treaties ratified by the Senate.) Bond pleaded guilty, but reserved the right to argue that the federal statute exceeded Congress’s power to enact laws implementing U.S. treaty obligations. The district court denied

her motion. On appeal, the appellate court held that Bond lacked standing to claim that the statute exceeded Congress's Article I power to implement treaties.

As relevant for our purposes, the dispute at the Court centered not on whether Bond had Article III standing, but rather, on whether Bond violated "the prudential rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Bond* (quoting *Warth v. Seldin*). The Court unanimously held that Bond satisfied this requirement, because federalism-based limits on congressional power protected not just states' autonomy interests, but individuals' legal interests as well. Writing for the Court, Justice Kennedy explained as follows:

Federalism has more than one dynamic. . . . The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. . . .

But that is not its exclusive sphere of operation. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from this diffusion of sovereign power.

Thus, he concluded, "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." He then expanded on this idea, citing examples where the Court had heard individuals' challenges to laws alleged to violate the separation of powers between the various branches of the federal government. (Chapter I addresses separation of powers issues involving the federal courts; Chapter III will address similar issues arising between Congress and the President.) He concluded: "If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." The Court remanded the case to consider the merits of Bond's federalism argument.

Justice Ginsburg, joined by Justice Breyer concurred. Her short separate opinion began with the following two sentences: "I join the Court's opinion and write separately to make the following observation. Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law." She continued:

If a law is invalid as applied to a criminal defendant, the defendant is entitled to go free.

For this reason, a court has no "prudential" license to decline to consider whether the statute under which the defendant has been charged lacks constitutional application to her conduct.

iii. Modern Applications

Page 181: Add after the last paragraph on the page:

The Court again cut back on *Flast* in *Arizona Christian School Tuition Organization v. Winn*, [179 L.Ed.2d 523](#) (2011). In *Winn* the taxpayer-plaintiffs challenged, as violating the First Amendment’s Establishment Clause, an Arizona law that provided a dollar-for-dollar income tax credit for contributions to “school tuition organizations” or “STOs.” In order for contributions to qualify for the tax credit an STO had to allocate at least ninety percent of its annual revenue for educational scholarships or tuition grants to “qualified schools.” “Qualified schools” were defined, *inter alia*, as private schools that did not discriminate on the basis of race, color, handicap, family status, or national origin. The plaintiffs alleged that “qualified schools” included religious schools, some of which discriminated on the basis of religion in selecting their students. The district court held that the plaintiffs lacked standing, and the Ninth Circuit reversed, concluding that the plaintiffs had standing under *Flast*.

The Supreme Court reversed the appellate court, and held that the plaintiffs lacked standing. Writing for the five-Justice majority, Justice Kennedy distinguished tax credits of the sort at issue in *Winn* and direct government expenditures on religion of the sort that gave rise to the taxpayer-plaintiffs’ standing in *Flast*. He recognized that both types of provisions “can have similar economic consequences.” However, he concluded that “tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities.” According to Justice Kennedy, “[w]hen the government declines to impose a tax . . . there is no . . . connection between dissenting taxpayer and alleged establishment” because the government is not extracting money from an objecting taxpayer and spending that money on supporting religion. Thus, he concluded, “[t]he STO tax credit is not tantamount to a religious tax or a tithe and does not visit the injury identified in *Flast*.”

Justice Kennedy also argued that the plaintiffs could not satisfy the causation and redressability prongs of standing. He observed that, with extraction of taxes and the use of that money to support religion, “governmental choices are responsible for the transfer of wealth” to religious institutions. Thus, challenges to such actions would satisfy causation (and also redressability, since an injunction against that use of tax revenue would address the plaintiffs’ conscience-based objections). By contrast, under the Arizona law “contributions [to religion] result from the decisions of private taxpayers regarding their own funds.”

Justice Scalia, joined by Justice Thomas, concurred. As he did in *Hein*, he called for the overruling of *Flast*, which he described as “an anomaly in our jurisprudence, irreconcilable with the Article III restriction on federal judicial power that our opinions have established.”

However, unlike in *Hein*, he joined the majority opinion “because it finds respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds.”

Justice Kagan dissented for four justices. She wrote:

Cash grants and targeted tax breaks are means of accomplishing the same government objective – to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of [sic] religion have equal reason to protest whether that aid flows from the one form of subsidy or the other.

She argued that “tax expenditures” (the economic term for preferential tax treatment of the type in the Arizona law) were indistinguishable from direct government spending, noting that they were tabulated by government budgeting offices in the same manner as direct spending. She criticized the majority’s attempt to distinguish the claim in *Winn* from that in *Flast* on the ground that in the former there was no extraction of actual funds from the taxpayer-plaintiffs, characterizing that analysis as inconsistent with *Flast*’s holding. She concluded by arguing that the majority’s decision “devastates taxpayer standing in Establishment Clause cases”:

The Court’s opinion . . . offers a roadmap – more truly, just a one-step instruction – to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* will not stand in the way.

CHAPTER II: FEDERAL REGULATORY POWER

F. FEDERAL PRE-EMPTION OF STATE LAW

Page 412: *Add after the Note on The Continued Battle Over the Presumption Against Preemption:*

Note: Preemption in the 2010 Term

1. In the October 2010 Term the Court decided three preemption cases dealing with important regulatory areas where at least some authority is shared between the federal government and the states.

2. In *Williamson v. Mazda Motor of America*, [131 S.Ct. 1131](#) (2011), the Court considered the preemptive effect on a state-law tort suit of a regulation issued by the federal agency responsible auto safety. The National Traffic and Motor Safety Vehicle Act of 1966 authorizes a federal agency to promulgate auto safety regulations. It also provides that “compliance with” any such regulation “does not exempt any person from any liability under common law.”

In *Williamson* a federal regulation allowed auto makers to install only lap seat belts in certain auto seats. After a fatal auto accident a plaintiff sued the auto maker, alleging that the auto maker should have installed lap-and-shoulder belts rather than the simple lap belt which the victim was wearing. The manufacturer argued that the federal regulation preempted any state tort law that might find it liable for failing to do more. The state appellate court agreed.

The Court unanimously disagreed with the lower court and rejected the manufacturer’s preemption claim. Writing for seven justices Justice Breyer began by distinguishing a case relied on by the lower court, *Geier v. American Honda Motor Co.*, [529 U.S. 861](#) (2000), where the Court had held a different portion of an earlier version of the same regulation preempted the state law. The Court explained that the regulation in *Geier* – which gave auto makers the choice between installing airbags or other passive restraints – was intended to give manufacturers a choice between different restraint systems. According to Justice Breyer, providing manufacturers that discretion was an important part of the policy underlying the regulatory scheme. For example, the agency had expressed concern that a rule requiring airbags would engender public resistance. The Court thus concluded in *Geier* that a state court’s imposition of liability for a manufacturer’s decision to install one system rather than another would frustrate that federal policy.

Justice Breyer then contrasted the seat belt rule at issue in *Williamson*. He reviewed the regulatory history of the seat belt rule, and concluded that the agency had required only lap belts simply because it did not consider more elaborate systems to be cost-effective. According to the Court, “that fact – the fact that [the agency] made a negative judgment about cost effectiveness – cannot by itself show that [the agency] sought to forbid common-law tort suits in which a judge or jury might reach a different conclusion.” The Court noted that the costs of such systems were falling. It also refused to allow “the mere existence of such a cost-effectiveness judgment” to bar tort liability, in light of the statute’s non-preemption provision. Thus, the Court concluded, the tort suit in *Williamson* did not risk frustrating the policy objectives of the federal law, as had the suit in *Geier*.

Justice Sotomayor concurred “to emphasize the Court’s rejection of an overreading of *Geier* that ha[d] developed since that opinion was issued.” She explained that

the mere fact that an agency regulation allows manufacturers a choice between [compliance] options is insufficient to justify implied pre-emption; courts should only find pre-emption where evidence exists that an agency has a regulatory objective . . . whose achievement depends on manufacturers having a choice between options.

Justice Thomas concurred only in the judgment. He relied on the statute’s express provision allowing common law suits to go forward. He criticized the majority’s reliance on the theory that the tort suit did not frustrate the purposes or objectives of the federal law, calling such an inquiry “utterly unconstrained” and deriding it as requiring “psychoanalysis of the regulators.” Justice Kagan did not participate in the case.

3. The Court considered preemption of another type of state-law tort suit in *Pliva, Inc. v. Mensing*, ___ U.S. ___ (2011). In *Pliva*, individuals who had suffered adverse side effects from a generic version of a drug sued the manufacturers on the theory that the manufacturers should have provided better warnings of possible side effects. The manufacturers alleged that the complex body of federal drug law prevented enhanced warnings. In particular, they argued that generic drug labels were governed by the labels the federal Food and Drug Administration (FDA) established for the name-brand versions of those drugs. In other words, if the FDA required particular safety information on the label of the name-brand drug, then the generic version of the drug had to have the same information. Thus, the generic manufacturers argued, it was physically impossible for them to comply with both the federal regulatory scheme and a state tort law duty to provide enhanced warnings.

By a 5-4 vote, the Court agreed, and held the tort lawsuits to be preempted. Writing for the majority, Justice Thomas argued that even if it was possible for the generics manufacturers to ask the FDA to approve a more informative label, they would still be liable under the failure to

warn theory. More generally, he rejected the argument that the manufacturers could have sought regulatory or statutory changes that would have allowed them to comply with tort law's duty to warn. He concluded that accepting such an argument would render "physical impossibility" preemption illusory, since under the plaintiffs' theory it would always be "possible" to lobby the federal government to change its requirements to make them consistent with state law requirements. He concluded: "it is enough to hold that when a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for preemption purposes."

In a part of his opinion that spoke for only four Justices, Justice Thomas again returned to the presumption against preemption. (See Casebook, page 411). He described the concluding phrase of the Supremacy Clause – "any [state law] to the Contrary notwithstanding" – as a *non obstante* provision, *i.e.*, a provision that "instructed courts not to apply the general presumption against implied repeals." He thus stated that this wording "suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." Rather, he concluded, "[t]he *non obstante* provision of the Supremacy Clause indicates that a court need look no further than the ordinary meaning of federal law, and should not distort federal law to accommodate conflicting state law." Justice Kennedy, who joined the rest of Justice Thomas's opinion, did not join this discussion.

Justice Sotomayor dissented for Justices Ginsburg, Breyer and Kagan. She began by stating what she described as "[t]wo principles [that] guide all pre-emption analysis. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." She then described impossibility preemption as "a demanding defense" to a claim of violation of state law.

Applying these understandings, Justice Sotomayor concluded that the manufacturers' failure to invoke FDA procedures for changing their labels meant that they had "demonstrated only a hypothetical or potential conflict," rather than actual impossibility. She conceded that the manufacturers could have shown impossibility if, for example, they had proposed a label change to the FDA but that it had rejected their proposal. She described the federal law's provision for such label changes as "a mechanism for complying with state law," which in turn gave the "presumption against preemption . . . particular force." She also criticized the plurality's *non obstante* analysis, arguing that it conflicted with the presumption against preemption that she described earlier as a basic principle of the Court's preemption jurisprudence.

4. Finally, in [*Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 \(U.S. 2011\)](#), the Court considered whether federal immigration law preempted an Arizona law dealing with the employment of undocumented workers. The Arizona law provided for the revocation of the business licenses of businesses that knowingly employed undocumented workers. It also required all Arizona employers to use the federal government’s “E-Verify” system to check potential employees’ work authorization status. The relevant federal immigration law expressly preempted “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”

By a vote of 5-4 the Court upheld the Arizona law in its entirety. With regard to its provision for the revocation of business licenses, the majority, speaking through Chief Justice Roberts, concluded that the statute fell within the federal law’s allowance of state “licensing and similar laws,” thus defeating the plaintiffs’ express preemption claim. It held that the state law’s definition of “license” “largely parrots” the definition of the same word in an important federal statute, the Administrative Procedure Act (APA). It also concluded that the state law’s inclusion of particular documents within the definition of “license” comported with the APA’s and dictionary definitions of that word.

Writing now for four Justices, Chief Justice Roberts rejected the plaintiffs’ argument that federal immigration law impliedly preempted the Arizona law. He argued that the Arizona law “tracks [the federal law’s] provisions in all material respects.” Further, he concluded that the Arizona law did not obstruct federal purposes. For example, he noted that federal and state anti-discrimination law continues to promote the immigration law’s objective of balancing immigration enforcement with discouraging racial discrimination in employment. He concluded this part of the opinion as follows:

Implied preemption analysis does not justify a free-wheeling judicial inquiry into whether a statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law. Our precedents “establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.” That threshold is not met here.

Justice Thomas, who joined the rest of the majority, did not join this discussion.

Again writing for a majority, the Chief Justice also upheld the state law’s requirement that that all employers use the federal E-Verify system to determine whether an employee is authorized to work in the country. The plaintiff argued that mandatory use of E-Verify

conflicted with the federal purpose of “develop[ing] a reliable and non-burdensome system of work-authorization verification.”

The Court rejected that argument. Chief Justice Roberts noted that the relevant part of the statute did not constrain state action at all, but simply imposed restrictions on *federal* immigration officials requiring use of E-Verify. He concluded that the state law’s required use of e-Verify did not frustrate the federal purpose of ensuring reliable verification of work authorization status. He observed that the federal government had encouraged use of E-Verify.

Justice Breyer dissented for himself and Justice Ginsburg. With regard to the express preemption argument, he argued that the majority had read the term “license” too broadly and out of context. He argued that the majority’s broad definition disrupted the federal law’s attempt to balance a number of goals, including efficient immigration and enforcement and non-discrimination in employment, by allowing the state to impose the severe penalty of revocation of a business license as a sanction for violating the law. He argued:

[T]he Arizona statute will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens – without counterbalancing protection against unlawful discrimination. And by defining “licensing” so broadly . . . Arizona’s statute creates these effects statewide.

He concluded that the history of the federal immigration law suggested that the “licensing and similar laws” carve-out from the preemption provision was best read as referring to employment-related licensing systems – that is, systems that license firms who recruit or refer workers for employment.

With regard to the state law’s mandated use of the E-Verify system, Justice Breyer argued that Congress understood this system as a pilot program, subject to error; thus, he concluded, Congress insisted that participation be voluntary.

Justice Sotomayor dissented separately. She argued that the preemption carve-out “can only be understood to preserve States’ authority to impose licensing sanctions after a final federal determination that a person has violated [the federal law]. Because the [state law] instead creates a separate state mechanism for Arizona state courts to determine whether a person has employed an unauthorized alien, I would hold that it falls outside [the carve-out] and is pre-empted.” In support of this conclusion she argued that Congress intended uniform application of immigration laws, a goal she said would be frustrated if, as under the Arizona law, state officials also could make determinations about work authorization status.

With regard to the E-Verify system, she agreed with “much” of Justice Breyer’s reasoning. She argued that, “[b]y requiring Arizona employers to use E-Verify, Arizona has

effectively made a decision for Congress regarding use of a federal resource, in contravention of the significant policy objectives motivating Congress' decision to make participation in the E-Verify program voluntary.” She also distinguished *Williamson v. Mazda Motor of America* (Item 2 of this Note, above):

As we have recently recognized, that a state law makes mandatory something that federal law makes voluntary does not mean, in and of itself, that the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Williamson*.

This case, however, is readily distinguishable from cases like *Williamson*, in which state law regulates relationships between private parties. Here, the Arizona Act directly regulates the relationship between the Federal Government and private parties by mandating use of a federally created and administered resource. This case thus implicates the uniquely federal interest in managing use of a federal resource.

Justice Kagan did not participate in the case.

G. FEDERAL REGULATION OF THE STATES

3. Constitutional Limits on Judicial Remedies Against States

- a. The *Young* Doctrine**
- b.**

Page 470: Add after *Idaho v. Coeur d’Alene Tribe*:

In 2011 the Court considered whether *Young* relief was available when one instrumentality of a state sued another in federal court.

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY v. STEWART [179 L.Ed.2d 675](#) (2011)

Justice SCALIA delivered the opinion of the Court.

We consider whether *Ex parte Young* allows a federal court to hear a lawsuit for prospective relief against state officials brought by another agency of the same State.

I
A

The Developmental Disabilities Assistance and Bill of Rights Act of 2000 offers States federal money to improve community services, such as medical care and job training, for individuals with developmental disabilities. As a condition of that funding, a State must establish a protection and advocacy (P & A) system “to protect and advocate the rights of individuals with developmental disabilities.” The P & A system receives separate federal funds, paid to it directly. A second federal law, the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), increases that separate funding and extends the mission of P & A systems to include the mentally ill. At present, every State accepts funds under these statutes.

Under the DD and PAIMI Acts, a P & A system must have certain powers. The system “shall ... have the authority to investigate incidents of abuse and neglect ... if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.” Subject to certain statutory requirements, it must be given access to “all records” of individuals who may have been abused, as well as “other records that are relevant to conducting an investigation.” The Acts also require that a P & A system have authority to “pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of” its charges. And in addition to pressing its own rights, a P & A system may “pursue administrative, legal, and other remedies on behalf of” those it protects.

A participating State is free to appoint either a state agency or a private nonprofit entity as its P & A system. But in either case, the designated entity must have certain structural features that ensure its independence from the State's government. . . .

Virginia is one of just eight States that have designated a government entity as their P & A system. . . .

* * *

B

In 2006, VOPA opened an investigation into the deaths of two patients and injuries to a third at state-run mental hospitals. It asked respondents—state officials in charge of those institutions—to produce any records related to risk-management or mortality reviews conducted by the hospitals with respect to those patients. Respondents refused, asserting that the records were protected by a state-law privilege shielding medical peer-review materials from disclosure.

VOPA then brought this action in the United States District Court for the Eastern District of Virginia, alleging that the DD and PAIMI Acts entitled it to the peer-review records, notwithstanding any state-law privilege that might apply. It sought a declaration that respondents' refusal to produce the records violated the DD and PAIMI Acts, along with an injunction requiring respondents to provide access to the records and refrain in the future from interfering with VOPA's right of access to them. Respondents moved to dismiss the action on the grounds that they are immune from suit under the Eleventh Amendment. The District Court denied the motion. In its view, the suit was permitted by the doctrine of *Ex parte Young*, which normally

allows federal courts to award prospective relief against state officials for violations of federal law.

The Court of Appeals reversed. . . .

We granted certiorari.

II

A

Sovereign immunity is the privilege of the sovereign not to be sued without its consent. The language of the Eleventh Amendment only eliminates the basis for our judgment in the famous case of *Chisholm v. Georgia*, which involved a suit against a State by a noncitizen of the State. Since *Hans v. Louisiana*, however, we have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant. Our cases hold that the States have retained their traditional immunity from suit, “except as altered by the plan of the Convention or certain constitutional amendments.” *Alden v. Maine*, 527 U.S. 706 (1999). A State may waive its sovereign immunity at its pleasure, *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, and in some circumstances Congress may abrogate it by appropriate legislation.² But absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State.

B

In *Ex parte Young* we established an important limit on the sovereign-immunity principle. That case involved a challenge to a Minnesota law reducing the freight rates that railroads could charge. A railroad shareholder claimed that the new rates were unconstitutionally confiscatory, and obtained a federal injunction against Edward Young, the Attorney General of Minnesota, forbidding him in his official capacity to enforce the state law. When Young violated the injunction by initiating an enforcement action in state court, the Circuit Court held him in contempt and committed him to federal custody. In his habeas corpus application in this Court, Young challenged his confinement by arguing that Minnesota's sovereign immunity deprived the federal court of jurisdiction to enjoin him from performing his official duties.

We disagreed. We explained that because an unconstitutional legislative enactment is “void,” a state official who enforces that law “comes into conflict with the superior authority of [the] Constitution,” and therefore is “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.”

This doctrine has existed alongside our sovereign-immunity jurisprudence for more than a century, accepted as necessary to “permit the federal courts to vindicate federal rights.” *Pennhurst State School & Hosp. v. Halderman*. It rests on the premise—less delicately called a

² We have recognized that Congress may abrogate a State's immunity when it acts under § 5 of the Fourteenth Amendment, *Seminole Tribe of Fla. v. Florida*, but not when it acts under its original Article I authority to regulate commerce, *id.*

“fiction,” *id.*—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation, and does not apply “when the state is the real, substantial party in interest,” as when the “judgment sought would expend itself on the public treasury or domain, or interfere with public administration.”

C

This case requires us to decide how to apply the *Ex parte Young* doctrine to a suit brought by an independent state agency claiming to possess federal rights. Although we have never encountered such a suit before, we are satisfied that entertaining VOPA's action is consistent with our precedents and does not offend the distinctive interests protected by sovereign immunity.

1

In *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002), we held that “[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” *Id.* (quoting *Idaho v. Coeur d'Alene Tribe of Idaho* (O'Connor, J., concurring in part and concurring in judgment)). There is no doubt VOPA's suit satisfies that straightforward inquiry. It alleges that respondents' refusal to produce the requested medical records violates federal law; and it seeks an injunction requiring the production of the records, which would prospectively abate the alleged violation. Respondents concede that were VOPA a private organization rather than a state agency, the doctrine would permit this action to proceed.³

We see no reason for a different result here. Although respondents argue that VOPA's status as a state agency changes the calculus, there is no warrant in our cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff. To be sure, we have been willing to police abuses of the doctrine that threaten to evade sovereign immunity. . . . But (as the dissent concedes) the limits we have recognized reflect the principle that the “general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought,” *Pennhurst*, not who is bringing the lawsuit. Thus, *Ex parte Young* cannot be used to

³ The dissent is mistaken when it claims that applying the *Verizon Maryland* test would mean two of our cases were “wrongly decided.” We discuss the first of those cases, *Coeur d'Alene Tribe*, below. As for the second, *Seminole Tribe*, it is inapposite. The reason we refused to permit suit to proceed in that case was that the Indian Gaming Regulatory Act created an alternative remedial scheme that would be undermined by permitting *Ex parte Young* suits; *Congress*, we said, had foreclosed recourse to the doctrine.

Respondents now argue—for the first time in this litigation—that the DD and PAIMI Acts have the same effect here. We reject that suggestion. The fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds—which are the chief statutory features respondents point to—does not demonstrate that Congress has “displayed an intent not to provide the ‘more complete and more immediate relief’ that would otherwise be available under *Ex parte Young*.” *Verizon Maryland* (quoting *Seminole Tribe*).

obtain an injunction requiring the payment of funds from the State's treasury, see *Edelman v. Jordan*; or an order for specific performance of a State's contract, see *id.*.

Coeur d'Alene Tribe, on which respondents heavily rely, is an application of this principle. There we refused to allow an Indian Tribe to use *Ex parte Young* to obtain injunctive and declaratory relief establishing its exclusive right to the use and enjoyment of certain submerged lands in Idaho and the invalidity of all state statutes and regulations governing that land. We determined that the suit was “the functional equivalent of a quiet title suit against Idaho,” would “extinguish ... the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory,” and thus was barred by sovereign immunity.

Respondents have advanced no argument that the relief sought in this case threatens any similar invasion of Virginia's sovereignty. Indeed, they concede that the very injunction VOPA requests could properly be awarded by a federal court at the instance of a private P & A system.

2

Respondents and the dissent argue that entertaining VOPA's lawsuit in a federal forum would nevertheless infringe Virginia's sovereign interests because it diminishes the dignity of a State for a federal court to adjudicate a dispute between its components. As an initial matter, we do not understand how a State's stature could be diminished to any greater degree when *its own agency* polices its officers' compliance with their federal obligations, than when *a private person* hales those officers into federal court for that same purpose—something everyone agrees is proper. And in this case, of course, VOPA's power to sue state officials is a consequence of Virginia's own decision to establish a public, rather than a private, P & A system. We fail to perceive what Eleventh Amendment indignity is visited on the Commonwealth when, by operation of its own laws, VOPA is admitted to federal court as a plaintiff.

But even if it were true that the State's dignity were offended in some way by the maintenance of this action in federal court, that would not prove respondents' case. Denial of sovereign immunity, to be sure, offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity. The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent. That effectively occurs, our cases reasonably conclude, when (for example) the object of the suit against a state officer is to reach funds in the state treasury or acquire state lands; it does not occur just because the suit happens to be brought by another state agency. Respondents' asserted dignitary harm is simply unconnected to the sovereign-immunity interest.

The dissent complains that applying *Ex parte Young* to this lawsuit divides Virginia against itself, since the opposing parties are both creatures of the Commonwealth. Even if that were a distinctive consequence of letting this suit proceed in federal court, it would have nothing to do with the concern of sovereign-immunity—whether the suit is against an unconsenting State, rather than against its officers. . . .

We do not doubt, of course, that there are limits on the Federal Government's power to affect the internal operations of a State. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (Congress may not commandeer state officers). But those limits must be found in some textual provision or structural premise of the Constitution. Additional limits cannot be smuggled in under the Eleventh Amendment by barring a suit in federal court that does not violate the State's sovereign immunity.

3

A weightier objection, perhaps, is the relative novelty of this lawsuit. Respondents rightly observe that federal courts have not often encountered lawsuits brought by state agencies against other state officials. That does give us pause. Lack of historical precedent can indicate a constitutional infirmity, see, e.g., *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. —, —, 177 L.Ed.2d 706 (2010), and our sovereign-immunity decisions have traditionally warned against “ ‘anomalous and unheard-of proceedings or suits,’ ” *Alden* (quoting *Hans*).

Novelty, however, is often the consequence of past constitutional doubts, but we have no reason to believe that is the case here. . . .

* * *

We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Justice KAGAN took no part in the consideration or decision of this case.

Justice KENNEDY, with whom Justice THOMAS joins, concurring.

* * *

In this case, in my view, the Virginia Office for Protection and Advocacy may rely on *Young*, despite the somewhat striking novelty of permitting a state agency to sue officials of the same State in federal court. In the posture of the case as it comes before the Court, it must be assumed that VOPA has a federal right to the records it seeks, and so the extension of *Young* would vindicate the Supremacy Clause. To be balanced against this important interest is the need to preserve “the dignity and respect afforded a State, which the immunity is designed to protect.” *Coeur d'Alene*. Permitting a state agency like VOPA to sue officials of the same State does implicate the State's important sovereign interest in using its own courts to control the distribution of power among its own agents. But the affront to the State's dignity is diminished to some extent when it is noted that if the State had elected the alternate course of designating a private protection and advocacy system it then would have avoided any risk of internal conflict while still participating in the federal program. The availability of that alternate course does not, in my view, weigh much in favor of the validity of the underlying federal scheme, but the only question here is the reach of the *Young* exception.

* * *

Chief Justice ROBERTS, with whom Justice ALITO joins, dissenting.

Today the Court holds that a state agency may sue officials acting on behalf of the State in federal court. This has never happened before. In order to reach this unsettling result, the Court extends the fiction of *Ex parte Young*—what we have called an “empty formalism”—well beyond the circumstances of that case. Because I cannot subscribe to such a substantial and novel expansion of what we have also called “a narrow exception” to a State’s sovereign immunity, I respectfully dissent.

I
A

* * *

Because of the key role state sovereign immunity plays in our federal system, the Court has recognized only a few exceptions to that immunity. The sole one relevant here is the “narrow exception,” *Seminole Tribe of Fla. v. Florida*, established by our decision in *Ex parte Young*. . . . As we have often observed, *Ex parte Young* rests on the “obvious fiction,” *Coeur d’Alene Tribe*, that such a suit is not really against the State, but rather against an individual who has been “stripped of his official or representative character” because of his unlawful conduct, *Ex parte Young*.¹

While we have consistently acknowledged the important role *Ex parte Young* plays in “promot[ing] the vindication of federal rights,” we have been cautious not to give that decision “an expansive interpretation.” *Pennhurst*. Indeed, the history of our *Ex parte Young* jurisprudence has largely been focused on ensuring that this narrow exception is “narrowly construed,” *Pennhurst*. We have, for example, held that the fiction of *Ex parte Young* does not extend to suits where the plaintiff seeks retroactive relief, *Edelman v. Jordan*; where the claimed violations are based on state law, *Pennhurst*; where the federal law violation is no longer “ongoing,” *Green v. Mansour*, 474 U.S. 64 (1985); “where Congress has prescribed a detailed remedial scheme for the enforcement against a State” of the claimed federal right, *Seminole Tribe*; and where “special sovereignty interests” are implicated, *Coeur d’Alene Tribe*.

We recently stated that when “determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon*. But not every plaintiff who complies with these prerequisites will be able to bring suit under *Ex parte Young*. Indeed, in *Verizon* itself the Court went beyond its so-called straightforward inquiry in considering whether *Ex parte Young* applied. After deciding the plaintiffs “clearly satisfie[d]” the “straightforward inquiry,” the Court went on to examine whether Congress had created a detailed remedial scheme like the one in

¹ *Ex parte Young* also rests on the “well-recognized irony that an official’s unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment.” *Pennhurst*.

Seminole Tribe. Only after determining that Congress had not done so did the Court conclude that the suit could go forward under *Ex parte Young*.

If *Verizon's* formulation set forth the only requirements for bringing an action under *Ex parte Young*, two of our recent precedents were wrongly decided. In *Seminole Tribe*, the Court acknowledged that it had often “found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law.” The Court held, however, that the “situation presented” there was “sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine.” *Ibid.*²

In *Coeur d'Alene Tribe*, the Court recognized that an “allegation of an ongoing violation of federal law where the requested relief is prospective is *ordinarily* sufficient to invoke the *Young* fiction.” (emphasis added). The Court held, however, that the action could not proceed under *Ex parte Young* because it implicated “special sovereignty interests”—in that case, the State's property rights in certain submerged lands.

As we explained in *Papasan v. Allain*, 478 U.S. 265 (1986), there are “certain types of cases that formally meet the *Young* requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies.” This is one of those cases.

In refusing to extend *Ex parte Young* to claims that involve “special sovereignty interests,” the Court in *Coeur d'Alene Tribe* warned against a rote application of the *Ex parte Young* fiction:

“To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism”

B

. . . If this were a “traditional *Ex parte Young* action,” *Seminole Tribe*, petitioner might very well be able to pursue its claims under that case. This, however, is anything but a traditional case—and petitioner is anything but a typical *Ex parte Young* plaintiff.

Unlike the plaintiffs in *Ex parte Young*—and, for that matter, unlike any other plaintiff that has ever sought to invoke *Ex parte Young* before this Court—petitioner is a state agency seeking to sue officials of the same State in federal court. The Court is troubled by this novelty, but not enough. This is especially true in light of the “presumption” we articulated more than 120 years ago in *Hans v. Louisiana*, that States are immune from suits that would have been

² While I agree that in *Seminole Tribe* “we refused to permit suit to proceed” under *Ex parte Young* because Congress “had foreclosed recourse to the doctrine,” that simply confirms my point that the availability of *Young* depends on more than just whether *Verizon's* prescribed inquiry is satisfied. In short, *Seminole Tribe* makes clear that a plaintiff who files a “complaint alleg[ing] an ongoing violation of federal law and seeks relief properly characterized as prospective,” *Verizon*, may nonetheless be barred from pursuing an action under *Young*.

“anomalous and unheard of when the Constitution was adopted.” *Hans*.

* * *

The Court speculates that these suits have not previously arisen because the necessary conditions—state agencies pursuing a federal right free of internal state veto—are themselves novel. Even if true, that simply highlights the fact that this case is not suitable for mere rote application of *Ex parte Young*.

In addition to its novel character, petitioner's complaint “conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” *Pennhurst*. In *Alden*, we held that state sovereign immunity prohibited Congress from authorizing “private suits against nonconsenting States in their own courts.” We explained that such power would permit one branch of state government, the “State's own courts,” “to coerce the other branches of the State” and “to turn the State against itself.”

Here the Court goes further: this suit features a state agency on one side, and state executive officials on the other. The objection in *Alden* was that the Federal Government could force the State to defend itself before itself. Here extending *Young* forces the State to defend itself *against* itself in federal court.

* * *

The Court is wrong to suggest that Virginia has no sovereign interest in determining *where* such disputes will be resolved. It is one thing for a State to decide that its components may sue one another in its own courts (as Virginia did here); it is quite another thing for such a dispute to be resolved in federal court against the State's wishes. For this reason . . . examples of other suits pitting state entities against one another are inapposite. In each of those hypotheticals, the State consented to having a particular forum resolve its internal conflict. That is not true here.³

In sum, the “special sovereignty interests” implicated here make this case “sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine.” *Seminole Tribe*. I would cling to reality and not extend the fiction of *Ex parte Young* to cover petitioner's suit.

II

The Court offers several justifications for its expansion of *Ex parte Young*. None is

³ Sovereign immunity principles would of course not prohibit this Court from reviewing the federal questions presented by this suit if it had been filed in state court.. We have held that “it is inherent in the constitutional plan that when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case whoever may be the parties to the original suit, whether private persons, or the state itself.” *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) (internal quotation marks and citation omitted). By contrast, there is nothing “inherent in the constitutional plan” that warrants lower federal courts handling intrastate disputes absent a State's consent.

persuasive.

The Court first contends that whether the *Ex parte Young* fiction should be applied turns only on the “relief sought” in a case. The Court is correct that several of our prior cases have focused on the nature of the relief requested. See, e.g., *Edelman*. That may well be because “the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night.” *Id.* But the Court is wrong to draw a negative implication from those cases and categorically conclude that there can be no other basis for determining whether to extend *Ex parte Young* 's fiction.

The thrust of the Court's argument appears to be that, because the relief sought here is no different from that which could be sought in a suit by a private protection and advocacy system, the doctrine of *Ex parte Young* should also apply to a suit brought by a state system. But private entities are different from public ones: They are private. When private litigants are involved, the State is not turned against itself.

Contrary to the Court's suggestion, there is indeed a real difference between a suit against the State brought by a private party and one brought by a state agency. It is the difference between eating and cannibalism; between murder and patricide. While the ultimate results may be the same—a full stomach and a dead body—it is the means of getting there that attracts notice. I would think it more an affront to someone's dignity to be sued by a brother than to be sued by a stranger. While neither may be welcomed, that does not mean they would be equally received.

* * *

Because I believe the Court's novel expansion of *Ex parte Young* is inconsistent with the federal system established by our Constitution, I respectfully dissent.

CHAPTER III: THE DISTRIBUTION OF NATIONAL POWERS

C. PRESIDENTIAL IMMUNITIES

Page 583: Add as Item 4 to Note:

The Court has since explained that “qualified immunity shields . . . officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, [130 S.Ct. 2074](#) (2011). *Al-Kidd* applied these principles. The facts of the case also reflect a difficulty in their application.

In *al-Kidd* an American citizen filed suit against the then-Attorney General, alleging that the Attorney General had violated his constitutional rights by abusing the detention power under the federal material witness statute. (That statute authorizes arrest of witnesses whose testimony might otherwise be lost, for example, because of flight.) *al-Kidd* alleged that the Attorney General had ordered federal prosecutors and law enforcement personnel to detain persons under the statute even though he had no intention of ever calling them as witnesses, as a way of detaining persons suspected of terrorism but against whom there was insufficient evidence. *Ashcroft* pleaded qualified immunity as a defense, which the Court of Appeals rejected.

A unanimous Supreme Court reversed the appellate court. Writing for five justices, Justice Scalia explained the “clearly established right” requirement as follows: “We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” So understood, he chided the Court of Appeals for finding such a clearly established right based on unsupported *dictum* from a footnote in a district court opinion, irrelevant cases, and broad language about the underlying purpose of the Fourth Amendment. On the last point, Justice Scalia noted that the Court has “repeatedly told courts . . . not to define clearly established law at a high level of generality.” He concluded as follows, referring to the eight Court of Appeals judges who had called for *en banc* rehearing of the appellate panel’s decision in this case:

Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law. *Ashcroft* deserves neither label, not least because eight Court of Appeals judges agreed with his judgment in a case of first impression.

Justice Kennedy concurred. In a part of his opinion joined by no other justice, he raised the problem of how an official occupying a “national office” can determine whether a right is clearly

established, given that federal appellate courts often disagree with each other on the correct interpretation of a legal provision:

The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one Court of Appeals has approved a certain course of conduct, other Courts of Appeals may have disapproved it, or at least reserved the issue.

To resolve this problem, Justice Kennedy wrote the following:

When faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken. . . .

A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States. And the national officeholder need not guess at when a relatively small set of appellate precedents have established a binding legal rule. If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security.

Justice Kennedy concluded:

[N]ationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.

Justice Ginsburg, joined by Justices Breyer and Sotomayor, concurred in the judgment, agreeing with the Court's qualified immunity holding but questioning its analysis of the underlying Fourth Amendment issue. Justice Sotomayor, joined by Justices Ginsburg and Breyer, concurred in the judgment. She also agreed with the Court's qualified immunity holding, but she criticized the Court's decision to analyze the underlying Fourth Amendment issue, describing it as unnecessary to resolve the case. Justice Kagan did not participate.

CHAPTER V: DUE PROCESS

D. PROCEDURAL DUE PROCESS

Page 936: Add after Notes and Questions:

In [*Turner v. Rogers*, 180 L. Ed. 2d 452 \(U.S. 2011\)](#), the Court applied the *Mathews v. Eldridge* factors to determine whether an indigent noncustodial parent facing incarceration in a civil contempt proceeding for failing to pay child support was entitled to court-appointed counsel. Turner, the noncustodial parent, had been ordered to pay \$51.73 per week to the custodial parent. He had been held to be in contempt five times and had been jailed for up to six months prior to the contempt order before the Court. In the case before the Court, Turner had served a year in prison after being found to be in contempt for failure to pay \$5,728.76 in child support at a brief hearing. Neither parent was represented by counsel at the hearing.

Justice Breyer, writing for a five-justice majority, held that the Due Process Clause did not guarantee a right to court-appointed counsel in child support contempt proceedings, where the parent entitled to receive the support was not represented by counsel. However, the Court stated, more procedures than those provided by the court below were necessary if court-appointed counsel was not made available.

Justice Thomas, joined by Justice Scalia, and in part by Chief Justice Roberts and Justice Alito, dissented. He reasoned that to read the Due Process Clause to provide protection in this context rendered the Sixth Amendment right to counsel superfluous. Moreover, he rejected the majority's holding that additional procedural safeguards were required because the issue had not been raised by the parties but in the *amicus* brief filed by the U.S. Government.

In explaining its decision, the Court reviewed prior cases on the right to court-appointed counsel in civil proceedings.

TURNER v. ROGERS

___ U. S. ___, 180 L. Ed. 2d 452; 2011 U.S. LEXIS 4566 (2011)

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR AND KAGAN, J.J. joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which RORBERTS, C.J. and ALITO, J.J. joined as to Parts I-B and II.

* * *

We must decide whether the Due Process Clause grants an indigent defendant, such as Turner, a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration. This Court's precedents provide no definitive answer to that question. This Court

has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a *criminal* case. *Gideon v. Wainwright*, 372 U. S. 335 (1963). And we have held that this same rule applies to *criminal contempt* proceedings (other than summary proceedings).

But the Sixth Amendment does not govern civil cases. Civil contempt differs from criminal contempt in that it seeks only to “coerc[e] the defendant to do” what a court had previously ordered him to do. A court may not impose punishment “in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.” *Hicks v. Feiock*, 485 U. S. 624, n. 9 (1988). And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free.

Consequently, the Court has made clear (in a case not involving the right to counsel) that, where civil contempt is at issue, the Fourteenth Amendment’s Due Process Clause allows a State to provide fewer procedural protections than in a criminal case. *Id.* at 637–641 (State may place the burden of proving inability to pay on the defendant).

This Court has decided only a handful of cases that more directly concern a right to counsel in civil matters. And the application of those decisions to the present case is not clear. On the one hand, the Court has held that the Fourteenth Amendment requires the State to pay for representation by counsel in a *civil* “juvenile delinquency” proceeding (which could lead to incarceration). *In re Gault*, 387 U. S. 1, 35–42 (1967). Moreover, in *Vitek v. Jones*, 445 U. S. 480, 496–497 (1980), a plurality of four Members of this Court would have held that the Fourteenth Amendment requires representation by counsel in a proceeding to transfer a prison inmate to a state hospital for the mentally ill. Further, in *Lassiter v. Department of Social Servs. Of Durham Cty.*, [452 U. S. 18](#) (1981), a case that focused upon civil proceedings leading to loss of parental rights, the Court wrote that the

“pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.” *Id.* at 25.

And the Court then drew from these precedents “the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Id.* at 26–27.

On the other hand, the Court has held that a criminal offender facing revocation of probation and imprisonment does *not* ordinarily have a right to counsel at a probation revocation hearing. *Gagnon v. Scarpelli*, [411 U. S. 778](#) (1973); see also *Middendorf v. Henry*, [425 U. S. 25](#) (1976) (no due process right to counsel in summary court-martial proceedings). And, at the same time, *Gault*, *Vitek*, and *Lassiter* are readily distinguishable. The civil juvenile delinquency proceeding

at issue in *Gault* was “little different” from, and “comparable in seriousness” to, a criminal prosecution. In *Vitek*, the controlling opinion found *no* right to counsel. 445 U. S. at 499–500 (Powell, J., concurring in part) (assistance of mental health professionals sufficient). And the Court’s statements in *Lassiter* constitute part of its rationale for *denying* a right to counsel in that case. We believe those statements are best read as pointing out that the Court previously had found a right to counsel “*only*” in cases involving incarceration, not that a right to counsel exists in *all* such cases (a position that would have been difficult to reconcile with *Gagnon*).

* * *

We here consider an indigent’s right to paid counsel at such a contempt proceeding. It is a civil proceeding. And we consequently determine the “specific dictates of due process” by examining the “distinct factors” that this Court has previously found useful in deciding what specific safeguards the Constitution’s Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of “the private interest that will be affected,” (2) the comparative “risk” of an “erroneous deprivation” of that interest with and without “additional or substitute procedural safeguards,” and (3) the nature and magnitude of any countervailing interest in not providing “additional or substitute procedural requirement[s].” *Ibid.*

The “private interest that will be affected” argues strongly for the right to counsel that Turner advocates. That interest consists of an indigent defendant’s loss of personal liberty through imprisonment. The interest in securing that freedom, the freedom “from bodily restraint,” lies “at the core of the liberty protected by the Due Process Clause.” *Foucha v. Louisiana*, [504 U. S. 71, 80](#) (1992). And we have made clear that its threatened loss through legal proceedings demands “due process protection.” *Addington v. Texas*, [441 U. S. 418, 425](#) (1979).

Given the importance of the interest at stake, it is obviously important to assure accurate decisionmaking in respect to the key “ability to pay” question. Moreover, the fact that ability to comply marks a dividing line between civil and criminal contempt . . . reinforces the need for accuracy. That is because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding. See, e.g., *Dixon*, [509 U. S., at 696](#) (proof beyond a reasonable doubt, protection from double jeopardy); *Codispoti v. Pennsylvania*, 418 U. S. 506, 512–513, 517 (1974) (jury trial where the result is more than six months’ imprisonment). And since 70% of child support arrears nationwide are owed by parents with either no reported income or income of \$10,000 per year or less, the issue of ability to pay may arise fairly often. See E. Sorensen, L. Sousa, & S. Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation 22* (2007) (prepared by The

Urban Institute), online at <http://aspe.hhs.gov/hsp/07/assessing-CS-debt/report.pdf> (as visited June 16, 2011, and available in Clerk of Court's case file); *id.*, at 23 (“research suggests that many obligors who do not have reported quarterly wages have relatively limited resources”); Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 *Cornell J. L. & Pub. Pol'y* 95, 117 (2008). See also, *e.g.*, *McBride v. McBride*, [334 N. C. 124, 131, n. 4](#), 431 S. E. 2d 14, 19, n. 4 (1993) (surveying North Carolina contempt orders and finding that the “failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent”).

On the other hand, the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened. And in determining whether the Clause requires a right to counsel here, we must take account of opposing interests, as well as consider the probable value of “additional or substitute procedural safeguards.” [Mathews, supra at 335](#).

Doing so, we find three related considerations that, when taken together, argue strongly against the Due Process Clause requiring the State to provide indigents with counsel in every proceeding of the kind before us.

First, the critical question likely at issue in these cases concerns, as we have said, the defendant's ability to pay. That question is often closely related to the question of the defendant's indigence. But when the right procedures are in place, indigence can be a question that in many—but not all—cases is sufficiently straightforward to warrant determination *prior* to providing a defendant with counsel, even in a criminal case. Federal law, for example, requires a criminal defendant to provide information showing that he is indigent, and therefore entitled to state-funded counsel, *before* he can receive that assistance. See [18 U. S. C. §3006A\(b\)](#).

Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un* represented by counsel. See Dept. of Health and Human Services, Office of Child Support Enforcement, *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* 5, 6 (2004) (51% of nationwide arrears, and 58% in South Carolina, are not owed to the government). The custodial parent, perhaps a woman with custody of one or more children, may be relatively poor, unemployed, and unable to afford counsel. Yet she may have encouraged the court to enforce its order through contempt. Cf. *Tr. Contempt Proceedings* (Sept. 14, 2005), App. 44a–45a (Rogers asks court, in light of pattern of nonpayment, to confine Turner). She may be able to provide the court with significant information. Cf. *id.* (Rogers describes where Turner lived and worked). And the proceeding is ultimately for her benefit.

A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would “alter significantly the nature of the

proceeding.” [Gagnon, supra, at 787](#). Doing so could mean a degree of formality or delay that would unduly slow payment to those immediately in need. And, perhaps more important for present purposes, doing so could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis.

Third, as the Solicitor General points out, there is available a set of “substitute procedural safeguards,” [Mathews, 424 U. S. at 335](#), which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. See Tr. Of Oral Arg. 26–27; Brief for United States as *Amicus Curiae* 23–25. In presenting these alternatives, the Government draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders. It does not claim that they are the only possible alternatives, and this Court’s cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient. But the Government does claim that these alternatives can assure the “fundamental fairness” of the proceeding even where the State does not pay for counsel for an indigent defendant.

While recognizing the strength of Turner’s arguments, we ultimately believe that the three considerations we have just discussed must carry the day. In our view, a categorical right to counsel in proceedings of the kind before us would carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned. We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).

We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson v. Zerbst*, 304 U. S.

458, 462–463 (1938) (“[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel* ” (emphasis added)). And this kind of proceeding is not before us. Neither do we address what due process requires in an unusually complex case where a defendant “can fairly be represented only by a trained advocate.” *Gagnon*, [411 U. S. at 788](#).

IV

The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant “finding” section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances Turner’s incarceration violated the Due Process Clause.

We vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

Justice THOMAS, with whom Justice SCALIA joins, and with whom THE CHIEF JUSTICE and Justice ALITO join as to Parts I–B and II, dissenting.

The Due Process Clause of the Fourteenth Amendment does not provide a right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings. Therefore, I would affirm. Although the Court agrees that appointed counsel was not required in this case, it nevertheless vacates the judgment of the South Carolina Supreme Court on a different ground, which the parties have never raised. Solely at the invitation of the United States as *amicus curiae*, the majority decides that Turner’s contempt proceeding violated due process because it did not include “alternative procedural safeguards.” Consistent with this Court’s long-standing practice, I would not reach that question.

I

The only question raised in this case is whether the Due Process Clause of the Fourteenth Amendment creates a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. It does not.

A

Under an original understanding of the Constitution, there is no basis for concluding that the guarantee of due process secures a right to appointed counsel in civil contempt proceedings. .

..

* * *

B

Even under the Court’s modern interpretation of the Constitution, the Due Process Clause does not provide a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. Such a reading would render the Sixth Amendment right to counsel—as it is currently understood—superfluous. Moreover, it appears that even cases applying the Court’s modern interpretation of due process have not understood it to categorically require appointed counsel in circumstances outside those otherwise covered by the Sixth Amendment.

1

Under the Court’s current jurisprudence, the Sixth Amendment entitles indigent defendants to appointed counsel in felony cases and other criminal cases resulting in a sentence of imprisonment. Turner concedes that, even under these cases, the Sixth Amendment does not entitle him to appointed counsel He argues instead that “the right to the assistance of counsel for persons facing incarceration arises not only from the Sixth Amendment, but also from the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment.” Brief for Petitioner 28. In his view, this Court has relied on due process to “rejec[t] formalistic distinctions between criminal and civil proceedings, instead concluding that incarceration or other confinement triggers the right to counsel.”

But if the Due Process Clause created a right to appointed counsel in all proceedings with the potential for detention, then the Sixth Amendment right to appointed counsel would be unnecessary. Under Turner’s theory, every instance in which the Sixth Amendment guarantees a right to appointed counsel is covered also by the Due Process Clause. The Sixth Amendment, however, is the only constitutional provision that even mentions the assistance of counsel; the Due Process Clause says nothing about counsel. Ordinarily, we do not read a general provision to render a specific one superfluous. . . . The fact that one constitutional provision expressly provides a right to appointed counsel in specific circumstances indicates that the Constitution does not also sub silentio provide that right far more broadly in another, more general, provision.

...

2

Moreover, contrary to Turner’s assertions, the holdings in this Court’s due process decisions regarding the right to counsel are actually quite narrow. The Court has never found in the Due Process Clause a categorical right to appointed counsel outside of criminal prosecutions or proceedings “functionally akin to a criminal trial.” *Gagnon v. Scarpelli*, [411 U. S. 778, 789, n.](#)

[12](#) (1973). This is consistent with the conclusion that the Due Process Clause does not expand the right to counsel beyond the boundaries set by the Sixth Amendment.

After countless factors weighed, mores evaluated, and practices surveyed, the Court has not determined that due process principles of fundamental fairness categorically require counsel in any context outside criminal proceedings. Even when the defendant’s liberty is at stake, the Court has not concluded that fundamental fairness requires that counsel always be appointed if the proceeding is not criminal. Indeed, the only circumstance in which the Court has found that due process categorically requires appointed counsel is juvenile delinquency proceedings, which the Court has described as “functionally akin to a criminal trial.” [Scarpelli, supra at 789](#), n. 12.

Despite language in its opinions that suggests it could find otherwise, the Court’s consistent judgment has been that fundamental fairness does not categorically require appointed counsel in any context outside of criminal proceedings. The majority is correct, therefore, that the Court’s precedent does not require appointed counsel in the absence of a deprivation of liberty. But a more complete description of this Court’s cases is that even when liberty is at stake, the Court has required appointed counsel in a category of cases only where it would have found the Sixth Amendment required it—in criminal prosecutions.

II

The majority agrees that the Constitution does not entitle Turner to appointed counsel. But at the invitation of the Federal Government as *amicus curiae*, the majority holds that his contempt hearing violated the Due Process Clause for an entirely different reason, which the parties have never raised: The family court’s procedures “were in adequate to ensure an accurate determination of [Turner’s] present ability to pay.” Brief for United States as *Amicus Curiae* 19. . . . I would not reach this issue.

There are good reasons not to consider new issues raised for the first and only time in an *amicus* brief. As here, the new issue may be outside the question presented. See Pet. For Cert. I (“Whether . . . an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration”) As here, the new issue may not have been addressed by, or even presented to, the state court. As here, the parties may not have preserved the issue, leaving the record undeveloped. As here, the parties may not address the new issue in this Court, leaving its boundaries untested. Finally, as here, a party may even oppose the position taken by its allegedly supportive *amicus*. See Tr. Of Oral Arg. 7–12, 14–15 (Turner’s counsel rejecting the Government’s argument that any procedures short of a categorical right to appointed counsel could satisfy due process); Reply Brief for Petitioner 14–15.

Accordingly, it is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an *amicus*. . . .

The majority errs in moving beyond the question that was litigated below, decided by the state courts, petitioned to this Court, and argued by the parties here, to resolve a question raised exclusively in the Federal Government's *amicus* brief. . . .

. . . The Federal Government's interest in States' child support enforcement efforts may give the Government a valuable perspective, but it does not overcome the strong reasons behind the Court's practice of not considering new issues, raised and addressed only by an *amicus*, for the first time in this Court.

III

For the reasons explained in the previous two sections, I would not engage in the majority's balancing analysis. But there is yet another reason not to undertake the *Mathews v. Eldridge* balancing test here. That test weighs an individual's interest against that of the Government. It does not account for the interests of the child and custodial parent, who is usually the child's mother. But their interests are the very reason for the child support obligation and the civil contempt proceedings that enforce it.

When fathers fail in their duty to pay child support, children suffer. Nonpayment or inadequate payment can press children and mothers into poverty.

The interests of children and mothers who depend on child support are notoriously difficult to protect. Less than half of all custodial parents receive the full amount of child support ordered; 24 percent of those owed support receive nothing at all. In South Carolina alone, more than 139,000 non-custodial parents defaulted on their child support obligations during 2008, and at year end parents owed \$1.17 billion in total arrears.

That some fathers subject to a child support agreement report little or no income "does not mean they do not have the ability to pay any child support." Rather, many "deadbeat dads" "opt to work in the underground economy" to "shield their earnings from child support enforcement efforts." Mich. Sup. Ct., Task Force Report: The Underground Economy 10 (2010) (hereinafter *Underground Economy*). To avoid attempts to garnish their wages or otherwise enforce the support obligation, "deadbeats" quit their jobs, jump from job to job, become self-employed, work under the table, or engage in illegal activity.

Because of the difficulties in collecting payment through traditional enforcement mechanisms, many States also use civil contempt proceedings to coerce “deadbeats” into paying what they owe. The States that use civil contempt with the threat of detention find it a “highly effective” tool for collecting child support when nothing else works. . . .

. . . Although I think that the majority’s analytical framework does not account for the interests that children and mothers have in effective and flexible methods to secure payment, I do not pass on the wisdom of the majority’s preferred procedures. Nor do I address the wisdom of the State’s decision to use certain methods of enforcement. Whether “deadbeat dads” should be threatened with incarceration is a policy judgment for state and federal lawmakers, as is the entire question of government involvement in the area of child support. This and other repercussions of the shift away from the nuclear family are ultimately the business of the policymaking branches.

Note: A Right to Counsel in Removal Proceedings?

The Supreme Court treats deportation or removal hearings as civil in nature. Detention pending removal or deportation is permitted to ensure that the person appears at the removal hearing and to ensure that if they are ordered removed from the United States the removal is carried out. As a practical matter, the government detains thousands of noncitizens throughout the country, often in state prison facilities, pending removal hearings.

The federal statute that stipulates the process for removal hearings grants noncitizens facing removal a statutory right to counsel but not at government expense. Noncitizens facing deportation are not accorded the right to counsel at government expense, regardless of the length of time they have resided in the United States or the strength of their ties to the United States; regardless of whether they were admitted as permanent residents or whether they entered the country without inspection; and regardless whether they are making a claim for asylum because they fear being returned to a country that will torture or persecute them. In many cases they are subject to mandatory detention during the course of their removal proceedings. In 2007, 42 percent of noncitizens in removal hearings were detained.

Most noncitizens in removal hearings are unrepresented by counsel because they cannot afford to hire counsel and cannot find one to represent them pro bono. For fiscal year 2007 the Department of Justice reported that counsel represented less than half of persons whose removals were completed that year. Does *Turner* have any application in the removal context? How may *Turner* be distinguished from deportations? What kind of cases might justify an argument that a noncitizen is entitled to counsel at government’s expense in a removal hearing?

CHAPTER VI: THE EQUAL PROTECTION CLAUSE: EQUALITY CONCEPTS

E. GENDER-BASED DISCRIMINATION

3. “Real” Differences or Stereotypes?

Page 1187: *Add after Nguyen v. INS:*

Note: Derivative Citizenship, Gender Discrimination and Real Differences

This past term the Court again considered the statutory framework that distinguishes between nonmarital U.S. citizen-fathers and nonmarital U.S. citizen-mothers in determining whether their children born abroad derive U.S. citizenship. In *Flores-Villar v. United States*, [131 S.Ct. 2312](#) (2011), an equally-divided Court affirmed *per curiam* a judgment by the Ninth Circuit that the statutory provision at issue in the case did not constitute unconstitutional gender discrimination under *Nguyen*. With Justice Kagan recusing herself, the Court split four to four on the case.

The provision at issue made it impossible for the nonmarital U.S. citizen-father to pass U.S. citizenship on to his child. Flores-Villar, the son, challenged the provision as invalid under the equal protection guarantee of the Due Process Clause, as a defense when he was indicted for illegal re-entry into the United States. The statute provided that nonmarital U.S. citizen-fathers (as well as mixed-marriage parents of either sex-mixed marriages referring to marriages between a U.S. citizen and a noncitizen) had to have resided in the United States for more than ten years after the child’s birth, five of which had to have occurred after the father was 14 years old in order to transmit citizenship to their born-abroad children. The father in *Flores-Villar*, however, had been 16 at the time of the child’s birth. Thus, it was physically impossible for him to satisfy the required physical presence (five years after age 14) for the child to derive citizenship. In contrast, nonmarital mothers were required under the statute to have been present in the U.S. for a period of only one year. Flores-Villar, the nonmarital son of U.S. citizen-father who did not satisfy the residency requirement to pass on citizenship to his son, argued that the difference in treatment could not be justified as reflecting a real difference between mothers and fathers, unlike the difference in the *Nguyen* case. Aggressive federal enforcement of immigration laws has generated substantial litigation over derivative citizenship; the statutory framework is complicated and individuals facing criminal charges or removal proceedings often may not realize that they are, under the statute, U.S. citizens. The issue is likely to return to the Court.

At oral argument, counsel for Flores-Villar argued as follows:

In *Nguyen*, the Court approved the imposition of the legitimation requirement only upon fathers on nonmarital children born abroad. That was

based on biological differences between men and women. It provided proof of parentage and proof of an opportunity to make a relationship with the child that adhered in birth as to the mother.

But here, the residential requirements that are at issue here have no biological basis. They set up barriers to the transmission of citizenship by younger fathers, but not younger mothers, and they are based upon gender stereotypes that women, not men, would care ... for nonmarital children.

An *amicus* brief filed on behalf of the American Civil Liberties Union Foundation noted that:

... The Petitioner's father is just one of millions of American fathers who are primary caretakers of their children. In 2007, there were 5.2 million households with children headed by males with no spouse present, representing a two million household increase from 1995. A 1996 federal study found that approximately 18% of children five years old or younger had fathers as primary caregivers, and fathers with less than a high school education were primary caregivers to 27% of preschool age children. In 2008, about 1.8 million paternities were established and acknowledged in the United States. (citations omitted)

The government defended the statutory provision that made it easier for nonmarital mothers to pass on derivative citizenship to their children on the grounds that it was a benefit to deal with the problem of statelessness.. Persons who are stateless are deemed not to be citizens of any country.

Does the difference at issue in this case lack a biological basis? Does it rest on outdated stereotypes about mothers and fathers?