

agreed, arguing that “[t]he declarant’s intent is what counts.”¹¹¹ Since the issue of whose purpose matters does not arise in the forensic-analyst context, the Court did not address the issue directly in *Bullcoming* and the breadth of the primary-purpose test remains an open question. Expanding the scope of the primary-purpose test to include the purpose of the interrogator increases the possibility of future disputes between members of the *Bullcoming* majority.

After *Bullcoming*, no clear majority position exists on the definition of “testimonial.” Justices Scalia and Ginsburg are committed to the logic of *Crawford*. They are often joined by Justice Thomas (except when the statement at issue lacks strict formality).¹¹² The two newest members of the Court, Justices Sotomayor and Kagan, joined the *Bullcoming* majority, but Justice Kagan’s views remain largely unknown¹¹³ and Justice Sotomayor’s views do not completely align either with the views of Justices Scalia and Ginsburg or with those of the *Bullcoming* dissenters. Due to this lack of consensus and to the fact-intensive nature of the testimonial inquiry, the Court may take varied positions before a consistent doctrine emerges.

E. Eighth Amendment

Prison Population Reduction Order. — Critics of judicial activism have condemned politically driven Supreme Court opinions at least since the era of the Warren Court.¹ Justifiable concerns about sweeping judicial proclamations on political issues, however, occasionally may conflate politically liberal results with judicially liberal modes of interpretation.² In hesitating to implement a costly or intrusive remedy, for example, courts may alter their approach to the recognition of substantive rights³ — but this avoidance of politically unpopular rem-

¹¹¹ *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting) (arguing that other inquiries “cannot substitute for the declarant’s intentional solemnity or his understanding of how his words may be used”); *id.* at 1176 (Ginsburg, J., dissenting); see *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (“[T]he analysts were aware of the affidavits’ evidentiary purpose . . .”).

¹¹² See *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring in the judgment); *Melendez-Diaz*, 131 S. Ct. at 2543 (Thomas, J., concurring).

¹¹³ Justice Kagan took no part in the consideration or decision of *Bryant*.

¹ See J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 1 (1968) (noting that “the apostles of restraint warn that even though we may approve the results that the Warren Court has decreed, we still must chastise the Court for assuming an activist role”); see also Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1139–40 (2002).

² Of course, judicial activism need not be limited to politically liberal judges. See Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 121 (1987); see also William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1217 (2002) (noting that “the subjects (and the originators) of the activism charge have continually shifted with changes in political and judicial power”).

³ Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635 (2006).

edies is by no means a hallmark of a conservative jurisprudence. Last Term, in *Brown v. Plata*,⁴ the Supreme Court affirmed a special three-judge court's order requiring a 46,000-person reduction in California's prison population. Justice Scalia's dissent characterized this order as "perhaps the most radical injunction issued by a court in our Nation's history,"⁵ and his alarm was echoed around the country.⁶ Yet, the "radical" result in *Plata* did not stem from an opinion embodying politicized judicial activism; rather, it reflected measured deference to the text of the governing statute, to the relevant state officials, and to the lower court's factual findings.

Over the last two decades, two federal cases have held that conditions in California's prison system resulted in unconstitutional deprivations of inmates' rights. *Coleman v. Wilson*,⁷ filed in 1990,⁸ found that the inadequate delivery of mental health care to a class of inmates with serious mental disorders violated the Eighth Amendment.⁹ After determining that the prison system faced significant staff shortages, delayed access to mental health care, provided insufficient medication and supervision, and medicated inmates involuntarily,¹⁰ the *Coleman* court entered an order for injunctive relief to remedy the constitutional violations under the supervision of a special master.¹¹ Several years later, the special master reported increased deficiencies in care and attributed this "backward slide" to the prison system's population growth.¹² Similarly, in *Plata v. Schwarzenegger*,¹³ filed in 2001,¹⁴ a class of inmates with serious medical conditions filed a claim against California. The state conceded Eighth Amendment violations in its failure to "properly care for and treat the prisoners in [its] custody," and the parties stipulated to a remedial injunction.¹⁵ Three years later, however, the *Plata* district court found a continued failure to deliver adequate medical care "beyond reasonable dispute" and placed the prison health care delivery system in receivership.¹⁶

⁴ 131 S. Ct. 1910 (2011).

⁵ *Id.* at 1950 (Scalia, J., dissenting); see also *id.* at 1959 (Alito, J., dissenting) (characterizing the order as "radical").

⁶ See, e.g., Terry Eastland, *Let Our Criminals Go?*, WKLY. STANDARD, June 6, 2011, http://www.weeklystandard.com/articles/let-our-criminals-go_571611.html.

⁷ 912 F. Supp. 1282 (E.D. Cal. 1995).

⁸ *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 WL 2430820, at *12 (E.D. Cal. Aug. 4, 2009).

⁹ *Coleman*, 912 F. Supp. at 1308-09.

¹⁰ *Id.* at 1307-13.

¹¹ *Id.* at 1323-24.

¹² *Coleman*, 2009 WL 2430820, at *18.

¹³ No. C01-1351, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

¹⁴ *Coleman*, 2009 WL 2430820, at *3.

¹⁵ *Id.*

¹⁶ *Plata*, 2005 WL 2932253, at *1.

The plaintiffs in both cases moved to convene a three-judge court, required under the Prison Litigation Reform Act¹⁷ (PLRA) to order prison population reductions;¹⁸ both motions were granted and the two cases were consolidated.¹⁹ The PLRA authorizes a three-judge court to enter a prison release order only after determining that (1) “crowding is the primary cause of the violation of a Federal right” and (2) “no other relief will remedy the violation of the Federal right.”²⁰ Finding these prerequisites fulfilled, the court ordered the progressive reduction of California’s prison population to 137.5% of the system’s design capacity, leaving the manner of reduction to state discretion but requiring submission of a compliance plan for court approval.²¹

The Supreme Court affirmed.²² Writing for the Court, Justice Kennedy²³ held that the court-mandated population reduction order was both necessary to remedy the constitutional violations and authorized by the PLRA.²⁴ He began by detailing the crowded conditions in California prisons, which had operated at almost double their design capacity for over a decade.²⁵ The Court cited one expert who had opined that deficiencies in the provision of medical care had led to preventable deaths and prolonged suffering.²⁶ Justice Kennedy explained that “[i]f government fails to fulfill [its basic obligations to prisoners], the courts have a responsibility to remedy the resulting Eighth Amendment violation.”²⁷ He additionally asserted that courts should not abdicate this role in enforcing constitutional rights, even when doing so would interfere with prison administration.²⁸ After re-

¹⁷ 18 U.S.C. § 3626 (2006).

¹⁸ *Id.* § 3626(a)(3)(B).

¹⁹ *See Plata*, 131 S. Ct. at 1922.

²⁰ 18 U.S.C. § 3626(a)(3)(E)(i)–(ii). The PLRA further requires: “The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” *Id.* § 3626(a)(1)(A).

²¹ *See Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 WL 2430820, at *83–84 (E.D. Cal. Aug. 4, 2009).

²² *Plata*, 131 S. Ct. at 1923.

²³ Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

²⁴ *Plata*, 131 S. Ct. at 1923.

²⁵ *See id.* at 1923–24. Among the troubling conditions listed, “[a]s many as 200 prisoners may live in a gymnasium,” “[a]s many as 54 prisoners may share a single toilet,” and “suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets.” *Id.* at 1924. Because the plaintiffs alleged systemic deficiencies in care, the Court did not consider whether any particular deficiency rose to the level of a constitutional violation. *Id.* at 1925 n.3.

²⁶ *Id.* at 1925–26.

²⁷ *Id.* at 1928.

²⁸ *Id.* at 1928–29.

citing these principles, the Court dismissed the government's several contentions of error committed by the three-judge court.²⁹

The Court then examined in detail the prerequisites to the three-judge court's imposition of a population limit. In addressing the "primary cause" prong, the Court noted that the text of the PLRA did not preclude court-ordered population limits even where overcrowding was not the *sole* factor causing the constitutional deficiencies and where a population reduction would not alone cure the violations.³⁰ Instead, under the accepted meaning of "primary," overcrowding need be only "the foremost, chief, or principal cause of the violation."³¹ The Court pointed out that the PLRA contemplated the possibility of a prison release order, as "Congress limited the availability of limits on prison populations, but it did not forbid these measures altogether."³² Turning to the "no other relief" prong, the Court observed that no less restrictive means for effectively remedying the violations was readily available.³³ Construction of new facilities presented a hypothetical remedy, but there was "no realistic possibility that California would be able to build itself out of this crisis," in light of the state's fiscal woes.³⁴ Ultimately, there would be no plausible opportunity to remedy the constitutional violations without first reducing overcrowding.³⁵

The Court next addressed the PLRA's requirement that prospective relief be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation."³⁶ While Justice Kennedy noted that a release order must be determined on the basis of violations established by the specific plaintiffs, the release order itself need not be limited to those plaintiffs. Instead, he argued that all prisoners within

²⁹ As a preliminary issue, the government contended that it should have been afforded more time to comply with the prior district court orders. *Id.* at 1930; *see also* 18 U.S.C. § 3626(a)(3)(A)(ii) (2006). While the Court agreed that each order "must be given a reasonable time" to remedy a violation, it observed that "reasonableness must be assessed in light of the entire history of the court's remedial efforts." *Plata*, 131 S. Ct. at 1931. Thus, after twelve years of the *Coleman* litigation and five years of the *Plata* litigation, the district courts acted reasonably when they convened a three-judge court without permitting further, likely futile, delays. *Id.* Similarly, given ongoing conditions impeding "effective delivery of medical and mental health care," *id.* at 1933, the Court held that the three-judge court had also properly established an end to discovery, even though the government argued that it had been unable to present the most current evidence on prison conditions, *id.* at 1935. The need for "[o]rderly trial management" and "discovery deadlines" committed this decision to "the sound discretion of the three-judge court." *Id.*

³⁰ *Plata*, 131 S. Ct. at 1936.

³¹ *Id.*

³² *Id.* at 1937.

³³ *Id.* A population limit would, in fact, permit less drastic measures than release, including transfers to county or out-of-state facilities. *Id.* at 1937–38.

³⁴ *Id.* at 1938.

³⁵ *Id.* at 1939.

³⁶ 18 U.S.C. § 3626(a)(1)(A) (2006).

the California system could move in and out of the plaintiff classes, and that a release order limited to the current plaintiffs “would, if anything, unduly limit the ability of State officials to determine which prisoners should be released.”³⁷ The Court also recognized that the PLRA requires courts to give “substantial weight” to public safety but that the definition of “substantial” indicates that a court need not ensure that its order has *no* negative impact whatsoever on the public.³⁸ In fact, the decision to leave the implementation of the population limit to state officials’ discretion “protected public safety by leaving sensitive policy decisions to responsible and competent state officials.”³⁹

Finally, the Court approved the three-judge court’s choice of a population maximum of 137.5% of design capacity and a deadline for relief of two years because the choice was not clearly erroneous based on the evidence presented.⁴⁰ The Court observed that this deadline was flexible and that the state could move for modification if an extension of time should become necessary to develop a system of relief.⁴¹ Such an extension could allow the state to incorporate changing circumstances and “to take advantage of opportunities for more effective remedies that arise” during the implementation of relief.⁴² Moreover, if the state were to make significant progress in remedying violations, “the three-judge court should evaluate whether its order remains appropriate” or whether continued population reductions “are not necessary or are less urgent than previously believed.”⁴³

Justice Scalia, joined by Justice Thomas, dissented. He first argued that the existence of some Eighth Amendment violations did not subject the entire prison population to constitutional violations, and that a class of plaintiffs should not have been certified to assert a claim of systemic unconstitutionality.⁴⁴ If the “only viable constitutional claims” could have been brought by individuals alleging mistreatment, “then a remedy reforming the system as a whole goes far beyond what

³⁷ *Plata*, 131 S. Ct. at 1940. The Court added that “[i]f the State truly believes that a release order limited to sick and mentally ill inmates would be preferable,” it could move the three-judge court to modify the order. *Id.*

³⁸ *Id.* at 1941.

³⁹ *Id.* at 1943. Emphasizing the exhaustiveness of the factfinding conducted by the three-judge court, the Court noted that nearly ten days of trial and numerous expert witnesses focused entirely on the issue of public safety. *Id.* at 1941–43.

⁴⁰ *Id.* at 1945–46.

⁴¹ *Id.* at 1947. The Court also admonished the three-judge court to remain open, in the exercise of its discretion, to “other modifications” necessary to “address contingencies that may arise during the remedial process.” *Id.*

⁴² *Id.* at 1946.

⁴³ *Id.* at 1947.

⁴⁴ *Id.* at 1951–52 (Scalia, J., dissenting).

the [PLRA] allows.”⁴⁵ Justice Scalia also argued that the majority’s endorsement of a “structural injunction” exceeded the appropriate power of an Article III court by permitting judges to make empirical decisions that placed them in “a role essentially indistinguishable from the role ordinarily played by executive officials.”⁴⁶ The kind of factual findings in *Plata*, he asserted, rendered it inevitable that judges would insert their own policy judgments into what are fundamentally policy-making decisions.⁴⁷ Consequently, the “policy preferences of three District Judges now govern the operation of California’s penal system.”⁴⁸

Justice Alito, joined by Chief Justice Roberts, also filed a dissent. He would have reversed the decision below for three reasons: (1) the three-judge court’s refusal to consider evidence of current conditions, (2) its holding that the prison release was necessary to remedy constitutional violations, and (3) its inadequate weighing of public safety.⁴⁹ In his first point, Justice Alito asserted that the scope of relief remains intimately intertwined with the nature of the violations, criticizing the Court’s reliance on dated lower court findings and pointing out the apparent decline in the rate of potential violations.⁵⁰ Second, he argued that the deficiencies in the prison health care system were not of such a nature that they could be alleviated by a reduction in overcrowding: the population reduction order did not mandate that “a single prisoner in the plaintiff classes . . . be released” and “at best only a modest improvement in the burden on the medical care system” could be expected.⁵¹ Third, he characterized the three-judge court as pursuing “its own criminal justice agenda” and suggested that the court should have given more consideration to the consequences of a massive prisoner release.⁵² In pursuing its political ideals, the Court had “gambl[ed] with the safety of the people of California.”⁵³

The *Plata* dissenters portrayed the majority opinion as radically activist — but its politically liberal result was not, on its face, the prod-

⁴⁵ *Id.* at 1952. Justice Scalia argued that many of the inmates who will be released will not be members of the class of plaintiffs; instead, “many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.” *Id.* at 1953.

⁴⁶ *Id.* at 1953.

⁴⁷ *Id.* at 1954.

⁴⁸ *Id.* at 1955. Justice Scalia continued to note that judges unfamiliar with managing social institutions would also be more likely to make incompetent policy choices. *Id.* All of these limiting principles “apply doubly to a prisoner-release order.” *Id.* at 1956.

⁴⁹ *Id.* at 1959–60 (Alito, J., dissenting).

⁵⁰ *Id.* at 1961–62.

⁵¹ *Id.* at 1963. Instead, for example, programs targeted at medical facilities or reductions in certain components of the prison population should have been considered. *Id.* at 1964.

⁵² *Id.* at 1966. For his part, Justice Alito examined the results of a previous prison release order in Philadelphia and discussed research linking crime rates and incarceration lengths. *Id.* at 1965–66.

⁵³ *Id.* at 1967.

uct of a liberal judicial philosophy.⁵⁴ Judicial activism has been characterized by, among other traits, the failure to adhere to the text of a statute, the reluctance to defer to democratically elected branches, and the unwillingness to observe limits on a court's power.⁵⁵ These are precisely the maneuvers that Justice Kennedy eschewed in *Plata*. Though the dramatic result of potentially requiring the release of 46,000 prisoners was harshly criticized for its apparent lack of judicial restraint, the majority opinion actually applied a number of conservative judicial principles — while the dissenters insisted that legal principles be shaped by results. Far from exemplifying judicial activism, then, the Court deferred to the text of the legislation, to the discretion of the state, and to the factual findings of the lower courts.

First, the Court gave careful deference to the specific terms of the PLRA.⁵⁶ The PLRA was designed to limit courts' remedial powers and circumscribe judges' powers to craft broad equitable relief.⁵⁷ Nevertheless, the *text* of the statute clearly contemplates that Congress has, in the certain limited circumstances precisely outlined by the Court, continued to sanction the use of prison release orders.⁵⁸ In comparison, despite their protestations about the political motivations of the three-judge court,⁵⁹ both dissents argued for interpreting the PLRA with an eye toward the *outcome* of the case. Justice Scalia, for

⁵⁴ Cf. Marshall, *supra* note 2, at 1219 (“A non-conservative result, in short, can be the product of a conservative opinion.”).

⁵⁵ See *id.* at 1220 (listing non-originalist activism, counter-majoritarian activism, and jurisdictional activism among the seven types of judicial activism); see also Young, *supra* note 1, at 1141 (defining activism variously to include a court's willingness to depart from the text or to announce sweeping rules). See generally Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CALIF. L. REV. 1441 (2004).

⁵⁶ As an initial matter, the Court has, over the last two decades, shifted its interpretive focus from the purpose of the legislature to the text of the statute. See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2013 (2009) (observing “the Court's new propensity to favor letter over spirit when the two conflict”). Though perhaps not with equal vigor, Justice Kennedy has often allied himself with Justice Scalia on this front. Compare *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (Kennedy, J.) (observing that the text of a statute must be respected as “the result of compromise between groups with marked but divergent interests”), with *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring) (describing a statute as “often the result of compromise among various interest groups, resulting in a decision to go so far and no farther”). In *Plata*, however, the two Justices diverged sharply — but not because of a deviation in textualist philosophy on Justice Kennedy's part.

⁵⁷ See Vicki C. Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts — Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2446 (1998) (calling the PLRA one of the “most significant” instances of “congressional jurisdiction-stripping” in decades); see also *Gilmore v. California*, 220 F.3d 987, 998–99 (9th Cir. 2000) (describing the PLRA as designed “to restrict the equity jurisdiction of federal courts,” *id.* at 999).

⁵⁸ See 18 U.S.C. § 3626(a)(3) (2006). Indeed, Justice Scalia's dissent appears to recognize as much. See *Plata*, 131 S. Ct. at 1958 (Scalia, J., dissenting) (noting “the objection that the PLRA appears to contemplate structural injunctions in general and mass prisoner-release orders in particular”).

⁵⁹ See *Plata*, 131 S. Ct. at 1954 (Scalia, J., dissenting); *id.* at 1966 (Alito, J., dissenting).

example, uncharacteristically opined: “There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa.”⁶⁰ In such a case, he argued, the Court should “bend every effort to read the law in such a way as to avoid [an] outrageous result.”⁶¹ Yet, the text of the PLRA not only permits judicial action in specified circumstances, but also codifies the legislature’s balancing of weighty public safety concerns.⁶² The policy arguments noted by the dissent, then, had already been incorporated into the standards set forth in the statute, rendering judicial inaction inspired by an unpalatable result (that is, the release of potentially dangerous prisoners) an extratextual judicial policy choice.

It is worth contrasting *Plata*’s implementation of a seemingly undesirable but textually authorized remedy with *Boumediene v. Bush*,⁶³ in which the Court held that the Constitution forbade Congress from eliminating habeas corpus for aliens detained as enemy combatants.⁶⁴ As he did in *Plata*, Justice Scalia began his dissent with “a description of the disastrous consequences of what the Court has done.”⁶⁵ Yet, the error charged was precisely the opposite: the Court had “second-guess[ed] the judgment of Congress and the President” in handling enemy prisoners and had placed responsibility “with the branch that knows least about the national security concerns.”⁶⁶ In *Plata*, by contrast, the majority did not strike down a statute and contravene legislative command; it implemented a remedy that Congress had contemplated in certain explicit (albeit limited) circumstances. If Congress thought that judges were institutionally incompetent to grant the relief described in the PLRA, it likely would have attempted to foreclose

⁶⁰ *Id.* at 1950 (Scalia, J., dissenting).

⁶¹ *Id.*; *see also id.* at 1959 (Alito, J., dissenting) (suggesting that “[c]ommon sense and experience counsel greater caution” in these circumstances).

⁶² *See id.* at 1967 (Alito, J., dissenting) (recognizing “the reasonable policy view that is implicit in the PLRA — that prisoner release orders present an inherent risk to the safety of the public”); *see also* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 444 & n.52 (2001) (observing that public safety concerns have traditionally informed an equitable court’s calculus and that the PLRA codified this practice).

⁶³ 553 U.S. 723 (2008).

⁶⁴ *See id.* at 732. The *Boumediene* Court overturned section 7 of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e) (Supp. 2007), which purported to deny federal courts the jurisdiction to hear habeas corpus actions filed by aliens detained by the United States as enemy combatants. *Boumediene*, 553 U.S. at 736.

⁶⁵ *Boumediene*, 553 U.S. at 827 (Scalia, J., dissenting).

⁶⁶ *Id.* at 831; *see also id.* at 801 (Roberts, C.J., dissenting) (“The majority merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date.”).

such a result,⁶⁷ and a court's subsequent decision to the contrary would have been more susceptible to charges of judicial activism.

Second, the majority deferred to state authorities — to the maximum extent allowable given the constraints of its Eighth Amendment holding — in crafting a remedy that left the state with broad discretion to decide how to reduce overcrowding. Both *Plata* dissents argued that the Court should have instituted a narrower remedy, focused only on the release of those prisoners who had been provided constitutionally deficient medical care. While the dissents portrayed the general population limit approved by the Court as not narrowly tailored to the violations alleged, the Court's broader remedy of a release or transfer of prisoners reflected its desire to avoid the institutional competence problems inherent in structural injunctions, as highlighted in Justice Scalia's dissent.⁶⁸ The majority recognized the extreme nature of the relief and sought to provide maximum flexibility to state actors, who would have the room to determine which class of prisoners constituted the lowest risk to the public and could be safely released.⁶⁹ It also encouraged the three-judge court to oversee the flexible implementation of this relief, responding to the state's request for more time by permitting extensions and other modifications to the order.⁷⁰

In previously upholding California's three-strikes law,⁷¹ a sentencing scheme that played a significant role in causing prison overcrowding,⁷² the Court recognized its “tradition of deferring to state legisla-

⁶⁷ Whether the legislature could, in fact, constitutionally prohibit all prison release orders is a question not presented by *Plata* or this comment. See *Plata*, 131 S. Ct. at 1937 (“A reading of the PLRA that would render population limits unavailable in practice would raise serious constitutional concerns.”).

⁶⁸ See *id.* at 1953–54 (Scalia, J., dissenting). Though the Court engaged relatively little with the standing issue, Justice Scalia offered a principled reading of aggregation as a procedural device that cannot create otherwise uncognizable substantive rights. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (observing that the Rules Enabling Act permits rules that govern the enforcement of rights but not those that alter the adjudication of those rights). If the case had turned on the proper certification of the class, his standing argument would have found some support in *O’Shea v. Littleton*, 414 U.S. 488 (1974), which held that standing requires a “real and immediate threat” that a plaintiff will suffer future injury, *id.* at 496, and that “[p]ast exposure to illegal conduct” alone does not meet this standard, *id.* at 495. Nevertheless, once the Court accepted the certified classes of prisoners with serious mental disorders and medical conditions, it was not limited to remedies solely affecting the members of those classes. Neither the PLRA nor the narrow-tailoring analysis categorically prohibits release orders that extend beyond “a particular plaintiff or plaintiffs” — so long as that broader relief is necessary to remedy the plaintiffs’ rights. Cf. 18 U.S.C. § 3626(a)(1)(A) (2006).

⁶⁹ But see William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 658–59 (1982) (describing the release of those specific prisoners held under unconstitutional conditions as the most principled result in prison conditions cases).

⁷⁰ See *Plata*, 131 S. Ct. at 1946–47; see also *supra* note 38.

⁷¹ *Ewing v. California*, 538 U.S. 11 (2003).

⁷² See Solomon Moore, *The Prison Overcrowding Fix*, N.Y. TIMES, Feb. 11, 2009, at A17 (“California’s 13-year-old three-strikes law . . . increased the prison population by thousands.”).

tures in making and implementing such important policy decisions.”⁷³ With the public safety concerns caused by a court order possibly effecting the release of thousands of convicted prisoners, a holding affording greater flexibility for state actors must be considered a less drastic result than one mandating the specific prisoners to be released back into California communities. The Court has, in fact, repeatedly embraced “a broad hands-off attitude” in prison administration cases,⁷⁴ yet this deference remains cabined by its duty “to take cognizance of valid constitutional claims.”⁷⁵ Thus, courts must engage in a careful balancing act: they should not ignore valid constitutional claims, but they also should not “thrust [themselves] into prison administration.”⁷⁶ In *Bounds v. Smith*,⁷⁷ for example, the Court recognized that states are constitutionally required to provide meaningful access to the courts, but it left the government as much flexibility as possible to determine the form of a legal access program.⁷⁸ The *Plata* Court sought to strike a similar balance by requiring reductions in the prison population while still providing prison administrators with flexibility in selecting the targets of these reductions.⁷⁹

Finally, the Court exercised restraint in deferring to the three-judge court’s extensive factual findings rather than reviewing the evidence anew. Justice Alito’s dissent, in contrast, jettisoned notions of deference to the lower courts that had grappled with the issues for years and instead implemented an unusually stringent standard of review.⁸⁰ In refusing to second-guess the three-judge court’s imposition of inevitable timelines, the majority recognized “the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial.”⁸¹ Justice Alito, however, brushed aside the majority’s con-

⁷³ *Ewing*, 538 U.S. at 24.

⁷⁴ *Procunier v. Martinez*, 416 U.S. 396, 404 (1974). As the *Procunier* Court explained, “the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.” *Id.* at 404–05.

⁷⁵ *Id.* at 405.

⁷⁶ *Bounds v. Smith*, 430 U.S. 817, 832 (1977).

⁷⁷ 430 U.S. 817.

⁷⁸ *See id.* at 832. According to the *Bounds* Court, “judicial restraint” could best be practiced by allowing prison administrators to “exercise[] wide discretion within the bounds of constitutional requirements.” *Id.* at 832–33.

⁷⁹ One could argue, of course, that courts may not always be able to have it both ways. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 287 (1989) (“Judges should not be encouraged to duck the responsibility for their choices.”).

⁸⁰ *Compare supra* note 40 (describing the majority’s acknowledgement of the lower court’s exhaustive fact-finding), *with supra* note 53 (noting Justice Alito’s review of empirical evidence).

⁸¹ *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). The majority does seem to stray from this deferential approach at the end of its opinion, as noted in Justice Scalia’s dissent. *See Plata*, 131 S. Ct. at 1956–57 (Scalia, J., dissenting) (noting the Court’s “bizarre coda,” *id.* at 1956, which implied that the lower court may need to modify its injunction at the state’s request).

cerns for “[o]rderly trial management” and instead inserted his own opinion about the date the evidentiary presentation should have concluded.⁸² He also characterized as “a fundamental and dangerous error” the majority’s deference to the lower court’s factual findings in light of the broad empirical questions at hand, noting that the politically charged issues are “very different from a classic finding of fact and [are] not entitled to the same degree of deference on appeal.”⁸³ This argument baldly accuses lower court judges of abdicating their objective role and gives short shrift to the notion that trial court judges “play a special role in managing ongoing litigation.”⁸⁴ And the more stringent review the dissent advocated “merely adds the discretion of appellate judges to the discretion of the district judge.”⁸⁵

It is possible that affording different levels of deference to the text, state, or three-judge court would not have ultimately changed any Justice’s opinion on the appropriate outcome in the case.⁸⁶ But a recognition that the majority’s circumscribed approach yielded what may otherwise be perceived as a “radical” result suggests that interpretive methods alone cannot be blamed for potentially untenable outcomes. To the contrary, unwieldy laws, intransigent legislatures, and unforeseeable events may place courts in the uncomfortable position of determining the appropriate — even if pragmatically worrisome — interpretation of the law.

F. Separation of Powers

Displacement of Federal Common Law. — Although “[t]here is no federal general common law,”¹ Article III courts have long asserted their prerogative to fashion federal common law in certain circumstances,² such as when it is deemed necessary “to effectuate congres-

⁸² *Plata*, 131 S. Ct. at 1961 (Alito, J., dissenting).

⁸³ *Id.* at 1966.

⁸⁴ *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (citation omitted) (internal quotation marks omitted).

⁸⁵ Fletcher, *supra* note 69, at 662.

⁸⁶ See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1182 (2008) (observing in the agency context that the application of a particular level of deference does not often make an empirical “difference in how the Justices decide actual cases”); Young, *supra* note 1, at 1141 (arguing that scholars and political commentators “generally use ‘judicial activism’ as a convenient shorthand for judicial decisions they do not like”).

¹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

² *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (“[A]bsent some congressional authorization . . . , federal common law exists only in such narrow areas as those . . . [where] either . . . the authority and duties of the United States as sovereign are intimately involved or . . . the interstate or international nature of the controversy makes it inappropriate for state law to control.”).