

SCALIA, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 96-976

JOHN HUDSON, LARRY BARESEL, AND JACK BUT-
LER RACKLEY, PETITIONERS v.
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[December 10, 1997]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,
concurring.

I wholly agree with the Court's conclusion that *Halper's* test for whether a sanction is "punitive" was ill-considered and unworkable. *Ante*, at 7-8. Indeed, it was the absurdity of trying to force the *Halper* analysis upon the Montana tax scheme at issue in *Department of Revenue of Mont. v. Kurth Ranch*, 511 U. S. 767 (1994), that prompted me to focus on the prior question of whether the Double Jeopardy Clause even contains a multiple-punishments prong. See *id.*, at 802-803. That evaluation led me to the conclusion that the Double Jeopardy Clause prohibits successive prosecution, not successive punishment, and that we should therefore "put the *Halper* genie back in the bottle." *Id.*, at 803-805. Today's opinion uses a somewhat different bottle than I would, returning the law to its state immediately prior to *Halper*- which acknowledged a constitutional prohibition of multiple punishments but required successive criminal prosecutions. So long as that requirement is maintained, our multiple punishments jurisprudence essentially duplicates what I believe to be the correct double-jeopardy law, and will be as harmless in the future as it was pre-*Halper*. Accordingly, I am pleased to concur.