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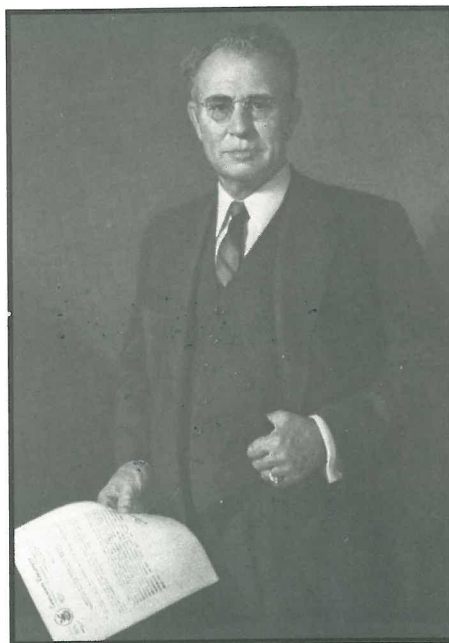
Nova Law Review Full Issue

NOVA LAW REVIEW



**The Leo Goodwin Sr.
Chair in Law
*1997 Visiting Professors***

**The Rehnquist Years:
A Supreme Court Retrospective**



Leo Goodwin Sr.



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COMMENTS OF 1997 LEO GOODWIN SCHOLAR

Nina Totenberg

I was pleased to have been invited to the Nova Southeastern University Shepard Broad Law Center to participate in the Law Center's 1997 Leo Goodwin Sr. Visiting Scholar Program.

As National Public Radio's Supreme Court correspondent, the subject—The Rehnquist Court—has been my beat for some time. But covering the Court is much different from listening to law students and attempting to answer their questions about the Court, the Justices, their decisions and the process by which they arrive at those decisions.

It was not surprising that the students at the Law Center were inquisitive. The law faculty at Nova Southeastern has a tradition of litigating cases in the Supreme Court, and many of the students have assisted the faculty in preparing Supreme Court briefs and arguments.¹

In addition the faculty have been co-counsel in *Fuentes v. Shevin*, 407 U.S. 67 (1972), and have filed Supreme Court Amicus briefs in several cases. Other Florida lawyers who are to appear in the Supreme Court regularly come to the Law Center for moot courts to prepare them for their arguments in Washington. Nova Southeastern students have accompanied faculty to Washington to watch their Supreme Court arguments. Thus, the Supreme Court is not a remote institution to Fort Lauderdale law students.

My task was not to parse the cases of the Rehnquist Court, but to parse the personalities of the Justices and the lawyers who attempt to persuade the Court that their answers are the better answers to the nettlesome legal and social issues presented by the cases the Court agrees to hear. Those cases, the honestly arguable, difficult to decide ones which admit of no single right answer are capable of being influenced by a single Justice's view of life and law. And unless a lawyer is steeped in a sense of who each Justice is, that

1. Nova Southeastern Law Center faculty members have argued *Beach v. Ocwen Fed. Bank*, 118 S.Ct. 1408(1998); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994); *McNary v. Haitian Refugee Ctr. Inc.*, 498 U.S. 479 (1991); *INS v. Jean*, 496 U.S. 154 (1990); *Jean v. Nelson*, 472 U.S. 846 (1985); *Davis v. Scherer*, 468 U.S. 183 (1984); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Francis v. Henderson*, 425 U.S. 536 (1976); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Nova Southeastern alumni have argued *Farragher v. City of Boca Raton*, argued Mar., 1998 (awaiting decision); *United States Dep't of State v. Ray*, 502 U.S. 164 (1991); *Spaziano v. Florida*, 468 U.S. 447 (1984).

lawyer may miss the opportunity to find an answer which resonates with the "swing vote."

Of course each Justice creates his or her own written record of their views—their opinions, concurrences, and dissents. But behind those pages are nine engaging people, who while similarly law conditioned, have also been shaped by forces which form all of us: education, family, religion, geography, and gender. I was not asked to "spill the beans" about my view of the Justices, not that I could or would do so, but the questions I was asked to answer made me realize how little even law students know about the human side of the Supreme Court. The grand rituals of the Supreme Court, its refusal to allow its proceedings to be seen other than in person, the remoteness of the Justices as compared to executive and legislative branch officials, combine to make the Court a mystery to most of the citizenry. Perhaps the mystique created by that aura serves the country well, for respect for the Court's authority is its only armament. However, those who seek to persuade the Court need to have it de-mystified a bit, and I did try to do that for the law students.

And I did try to share with them the strengths and shortcomings I have seen in Supreme Court advocates; the attributes and deficiencies which likely affect all lawyers at all levels of practice. Knowledge of the facts and knowledge of the law are only starting points. Knowledge of history, sensitivity, to societal needs, desires, and dilemmas of the day, and society's hopes for the future must be melded into a lawyer's arguments. And finally, the most-important skill—listening—pervades the process of advocacy. Listening to the client, listening to the witnesses, listening to the law, and listening to the Court's questions lead to the decisions which are the Supreme Court's only products: the law of the case and the law of the land.

I hope the thoughts I shared with the students left them with a sense of respect for the effort of the Justices to decide the hard cases in a way consistent with sound legal, social and economic principles. And I hope I imparted to them the intellectual challenge of Supreme Court practice, and a desire to follow the Nova Southeastern faculty and alumni to the Court's lectern.

Professor of Law
Nova Southeastern University

Bruce Rogow has been a professor of law at NSU Law since 1974 and served as Acting Dean in both 1978–79 and 1984–85. He was Supreme Court counsel in *Seminole Tribe v. State of Florida*, *Florida Bar v. Went For It, Inc.*, *Campbell v. Acuff-Rose*, *Argersinger v. Hamlin*, *Gerstein v. Pugh*, *Ingraham v. Wright*, *Mathews v. Diaz*, and *Davis v. Scherer*, co-counsel in *Fuentes v. Shevin*, and appointed by the Court to represent the petitioner in *Francis v. Henderson*.

Professor Rogow has served as President of the Legal Aid Society of Broward County, General Counsel for the American Civil Liberties Union Foundation of Florida, Special Counsel to The Florida Bar, and as Special Assistant Attorney General. He successfully defended the Chief of the Seminole Tribe of Florida against federal and state Endangered Species Act charges for killing a Florida panther on the Reservation, represented 2 Live Crew in their federal and state obscenity trials and appeals, and successfully represented the Cuban Museum against the City of Miami's attempt to evict it. In 1992 he obtained the first federal court appellate decision declaring that a musical work was not obscene; his 1994 Supreme Court success in *Campbell v. Acuff-Rose* established copyright and constitutional protections for commercial parodies.

Professor Rogow has been listed in *The Best Lawyers in America* for the past ten years and is one of the few lawyers in the United States to be named in two separate categories: Criminal Law and First Amendment Law. He is one of two lawyers in Florida to be Board Certified in both civil and criminal appellate law and is one of twelve practicing Florida lawyers elected to the American Academy of Appellate Lawyers.

COMMENTS ON THE 1997 LEO GOODWIN SR VISITING SCHOLARS PROGRAM: THE REHNQUIST COURT

Professor Bruce Rogow

I had the pleasure of hosting the 1997 Leo Goodwin Sr. visiting Scholars and attending their presentations to the Law School community. Our Scholars have different perspectives on the Rehnquist Court, and on the individual justices. Drew Days and Kathleen Sullivan are academics, but with a twist; both are Supreme Court advocates. Drew, as Solicitor General, argued seventeen cases before the Rehnquist Court. Kathleen, as a public interest litigation lawyer has argued before the Court, and has been mentioned as a potential Solicitor General, in addition to authoring articles on the Court. Their lawyer/academic commentaries on the Court fused advocacy and legal philosophy and provided our students with valuable lessons regarding the Court's work.

Nina Totenberg and Tim O'Brien are journalists, although Tim is also a lawyer. They report on the Court and its cases, seeking to inform the public about how this small and elegant institution affects the daily lives of us all. Tim must do that in television time cadences, while Nina has the luxury of National Public Radio segments. They read the Court differently from Drew and Kathleen, and they have each developed social relations with individual justices which provide for personality insights unavailable to most advocates and academics.

Peter Irons' law degree is an aid to his primary work: historian. His work, in an odd way, combines advocacy, academics, journalism and personality analysis. He is a Drew Days without court appearances; a Kathleen Sullivan without a future government portfolio; a Nina Totenberg and a Tim O'Brien without a radio or television station. Peter challenges the Court and the Government, and he informs and educates the public with his written and oral chronicles of the Court's great cases.

We brought these five people to the Law School because no law school education is complete without developing an appreciation of the Supreme Court and the justices who speak for the Court. The Law School's commitment to educating students about the Court is an ongoing process. In 1995, we presented a month long program focusing on the Florida lawyers who had argued in the Court over the proceeding twenty-five years: "Florida Lawyers In the Supreme Court of the United States 1969-1994." Some of those lawyers related stories of their cases—the incidents which led to the

cases being filed, their clients' hopes, fears, frustration, and the lawyers' own experiences in briefing and arguing a case in the Supreme Court. That program included a compilation of the cases and their holdings as well as a collection of documents from the Florida lawyers' cases and tape recordings of arguments in some of those cases. This introduction to the Court and the lawyers who appear before it has been reinforced by the opportunities many students have had to attend Supreme Court arguments and to work with the lawyers preparing for those arguments.

Thus when the 1997 Goodwin Scholars joined us to discuss the Rehnquist Court they had an audience eager to learn how these uniquely placed viewers perceived the Court, its personnel, and its opinions. The Court is not easy to know or to predict, despite the fact that unlike any other national institution, its decisions are always accompanied by written explanations. Those explanations - its opinions - allow for critiques which are often unrestrained. Indeed, the justices themselves, in dissents or concurrences, sometimes use language which academic criticism would abhor. We eagerly anticipated how an historian, journalists, law professor/advocates would assess the Rehnquist Court.

We were not disappointed. The Scholars painted vibrant pictures of the Court, its decisions and the justices. The pictures of the Court were enhanced by Peter Irons ability to bring to life the people whose names, as parties, grace some of the Court's most controversial decisions. The articles which follow are, in my view, not as interesting as the discussions which occurred in the classes and informal gatherings our Visiting Scholars hosted, but they do give the reader some idea of the provocative exchanges the scholars had with students and faculty.

Professor Days' article, drawn from his address to the Law Center, entitled "Executive Branch Advocate v. Officers of the Court: The Solicitor General's Ethical Dilemma" describes the dual obligations which inhere in the position of Solicitor General. His article uses real case examples to provide a sense of the difficulties a Solicitor General faces in discharging his duties. Though tensions arise given the duality of the Solicitor General's unique position as the government's voice in the Supreme Court, Professor Days is optimistic about the long term benefits accruing due to the office's independence. He writes: "When the Solicitor General acts in ways that may present a short-term problem for the government in the courts, it is a reflection of the tradition of the independence that has grown up around the office of the Solicitor General over the past 127 years."

Peter Irons asks, "What do opticians in Oklahoma have in common with pregnant women in Texas?" In his article "Opticians and Abortion: The Constitutional Myopia of Justice Rehnquist," Irons explores the Chief Justice's use of the *Lee Optical* decision in his *Roe v. Wade* dissent; a use

designed to defend the position that the Constitution does not imply a "right of privacy" which extends to the right to an abortion.

Irons posits that the use of *Lee Optical* was expressly a device to avoid the difficulty of finding an actual "rational basis" to support the Rehnquist view in *Roe*, and opines that Justice Blackmun's "strict scrutiny" was the proper standard. Irons' case for strict scrutiny is buttressed with the practical view that when public officials are aware their decisions will face such scrutiny they will be inhibited from enacting potentially unconstitutional legislation.

Another author, rather than focusing on a particular Justice, places the spotlight on the Court as a whole. In "The Jurisprudence of the Rehnquist Court," Kathleen Sullivan explores why the so-called "conservative" Justices have sometimes voted for "liberal" or "moderate" results. Sullivan provides several explanations for these occurrences: a President's inability to predict the judicial orientation of his nominees and more importantly, the institutional structure of the Court which constrains or systematically moderates ideological tendencies. The Justices' commitments to accepted norms of jurisprudence may limit their ideological orientation.

Further, Sullivan believes that an apparently "liberal" result sometimes only represents the dominance of one strand of conservatism. Sullivan briefly traces some of the Court's decisions and also illustrates the significance of the approaches used by the Justices in tailoring legal rules or tests. In addition, Sullivan describes the complex relationship among the many strands of Constitutional Conservatism. The strands, Sullivan proposes, may often pull the Justices in competing directions. Through institutional, jurisprudential, and ideological explanations, Sullivan manages to shed some light on why a "Court moving generally rightward might nonetheless be characterized occasionally by surprising judicial moderation."

In "The Rehnquist Court: Holding Steady on Freedom Speech," Tim O'Brien comments that the early First Amendment apprehensions about the Rehnquist Court were unjustified, demonstrating how the Rehnquist Court holds steady in its solicitude for freedom of speech. The concerns that O'Brien notes originated in part because prior to becoming Chief Justice, Justice Rehnquist authored or joined in Supreme Court opinions which had the effect of limiting press freedoms. Furthermore, in clashes between government power and individual rights, then Justice Rehnquist was among the Justices most consistently siding with the government.

The change in the Chief Justiceship from Warren E. Burger to William Rehnquist was accompanied by changes in the composition of the Court. Those changes, with the single exception of Justice Ginsberg replacing Justice White, have been perceived to represent a succession less sympathetic to First Amendment values. O'Brien believes the perception has

proved to be false because on the politically charged and socially sensitive issues (flag burning, internet indecency, hate speech) the Rehnquist Court has shown allegiance to First Amendment issues. O'Brien notes that commitment and concludes that "there has been a consistent majority of the Supreme Court on the side of a broad right to free speech."

Nina Totenberg's reflections on her visit underscore the optimism that she conveyed about the Court's efforts to decide hard cases "correctly" while acknowledging that many of these cases do not have a "single right answer." Her enthusiasm for the Court, the Justices, the Court personnel and many of the lawyers who appear before the Court is apparent.

These articles provide a sense of the institutional respect for the Court and individual admiration for the justices which permeated the classroom discussions. One may disagree with Supreme Court decisions, and one may find the justices' arguments to be forced or foundationless, and history may prove that some of the outcomes were wrong, but all of our scholars imparted a sense of optimism about the Court and its work. The premonitions and predictions which accompany a change in the Court must be tempered by a faith in the nine people who try to "get it right." As I wrote in the introduction to the program for our 1997 Visiting Scholars:

Our diverse and contentious democracy looks to the Supreme Court to resolve disputes about life and death, race and religion, speech and politics, criminal law and business law. The cases are not easy; generally they admit of no single right answer. The Court's decisions are "right" because they are final. The Court's decisions are followed because of our respect for the institution and the Justices.

This edition of the Law Review, and the presentations of the 1997 Leo Goodwin Sr Visiting Scholars will impart to our students and readers the reasons why that respect is well founded.

Former Solicitor General of the United States
Alfred M. Rankin Professor of Law, Yale Law School

Professor Drew S. Days, III, recently returned to the Yale Law School as the Alfred M. Rankin Professor of Law after serving three distinguished years as Solicitor General of the United States during President Clinton's first term. As Solicitor General, Professor Days was the Government's lawyer before the United States Supreme Court.

No stranger to government service, Professor Days served as President Carter's Assistant Attorney General for Civil Rights in the U.S. Department of Justice. A decade earlier, General Days worked as a Peace Corps Volunteer in Honduras. From the late 60s through the mid-70s, he litigated school desegregation, police misconduct, and employment discrimination cases as a staff lawyer with the prestigious NAACP Legal Defense Fund.

At Yale, Professor Days' teaching and scholarship have focused on civil procedure, federal jurisdiction, Supreme Court practice, anti-discrimination, comparative constitutional (Canada and the United States), and international human rights laws. During decades of human rights activism, he has served organizations such as the Congressional Black Caucus, the National Conference on Education for Blacks, the Lawyers' Committee for Civil Rights Under Law, the Board of Helsinki Watch, the Urban League, America's Watch, the Connecticut Civil Liberties Union, the Petra Foundation, and the John D. and Catherine T. MacArthur Foundation.

Professor Days is a 1963 honors graduate in English Literature from Hamilton College. He received his LL.B. degree from Yale in 1966. Today his name appears on almost every pundit's "short list" of potential Supreme Court nominees.

Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma

Drew S. Days, III

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I. INTRODUCTION

It is truly a pleasure to be with you at Nova Southeastern this week. I want to thank my friends, Dean Joseph Harbaugh and Professor Bruce Rogow, for all their efforts in making my visit possible. For those of you in your first year at the Law Center, let me explain how complicated those efforts were. You see, I was originally scheduled to spend several days here last March. A funny thing happened to me, however, "on my way to the forum." A disc in the lumbar region of my spine decided to herniate, break off, and put significant pressure on a nerve running to my left leg, producing excruciating pain. As a result, rather than enjoying the wonderful companionship and climate Nova Southeastern had to offer, I spent late March and early April going through surgery and recuperation. Consequently, I am especially gratified to be here and to be able to stand before you pain free and ambulatory.

I must admit, an additional reason for my finding this task so enjoyable is that I am the *former* Solicitor General—not the current incumbent. Consequently, I stand before you with *no* government crises on the horizon to which I have to respond, *no* court filing deadlines bearing down on me, *no* hours of preparation ahead of me for oral arguments, and *no* anxiety-ridden weeks until the end of the term when the most important decisions of the

Supreme Court are usually announced. I do not mean to suggest that my over three-year stint as the Solicitor General was partially unrewarding; it was far from it. I believe that being the Solicitor General is the best lawyer's job in the country.

While I was in Washington, the Legal Adviser to the State Department and I debated the question of who had the better job. The only concession I was willing to make to him was that the Legal Adviser gets better travel. He goes to London, Paris, The Hague, and Beijing. For the most part, the Solicitor General's travel entails a five-minute car ride from the Department of Justice to the Supreme Court and an equally short return trip. On my side of the ledger, of course, is the fact that the Solicitor General *dresses* better than the Legal Adviser. No other lawyer in America has the opportunity, as does the Solicitor General, to don striped pants, a cutaway dark vest, and silver and black tie for a "day at the office."

But, on a more serious note, the rewards of the Solicitor General's job come from his being able to survey the entirety of federal government litigation throughout the United States and to control the flow of that litigation up through the lower federal courts to the Supreme Court. Once cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law and can have an impact upon the establishment of constitutional and other principles that will affect our lives for years to come. This is because the Solicitor General has responsibility not only for representing the United States in the Supreme Court, but also for authorizing all appeals from federal trial courts to the courts of appeals, for all *amicus* filings in appellate courts, and for interventions by the government where the constitutionality of federal laws is drawn into question.

In order to give you some sense of the magnitude of this undertaking, during my tenure I argued seventeen cases before the Supreme Court and one before a federal court of appeals. I also personally reviewed over 3000 recommendations with respect to petitions for certiorari, appeals, *amicus* briefs, and interventions. My staff and I filed roughly 100 certiorari petitions, over 200 merits briefs, and presented oral argument to the Supreme Court in about two-thirds of all the cases the Court heard during the three terms I served as Solicitor General.

I have entitled my talk "Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma" in an effort to capture an inherent tension in the Solicitor General's role that I am certain all those who preceded me experienced. It is, I believe, a *creative* tension that, on balance, produces more responsible government advocacy before the

Supreme Court than otherwise. However, it also provides a Solicitor General with some of the loneliest and most difficult moments of his tenure. I had more than a few such moments during my time as Solicitor General, but I will not attempt to provide you this afternoon with a catalogue in that regard. Rather, I am going to discuss four occasions where this tension appeared to me particularly acute.

II. THE SOLICITOR GENERAL AS EXECUTIVE BRANCH ADVOCATE

Although the Solicitor General is appointed by the President and serves in the Justice Department headed by the Attorney General, identifying the Solicitor General as an Executive Branch advocate does not *begin* to explain the position's true function. One of the first questions that a new Solicitor General has to ask is: "Who am I representing?" The Solicitor General finds, before much time has passed, that the answer to that question is rather complicated. Indeed, the American Bar Association Model Rules of Professional Conduct note cryptically in the section on the "*Organization as Client*,"¹ defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context." The Solicitor General may, at any given point, conclude that the client is: 1) the people of the United States; 2) the federal government; 3) the administration in which he serves; 4) the President; 5) the Attorney General; 6) the Executive Branch departments and agencies; 7) individual federal employees; 8) independent regulatory agencies; and 9) the Congress.

A. *The Solicitor General and the National Rifle Association*

One of the apparent surprises on my list was more than likely independent regulatory agencies because they are, as any basic course on administrative law or civics would reveal, supposed to be substantially *independent* of Executive Branch control. For that reason, independent regulatory agencies have bipartisan memberships and terms that often extend beyond the four years of any administration. Nevertheless, with few exceptions, Congress has entrusted the Attorney General and the Solicitor General with the responsibility for representing such agencies before the Supreme Court. As my encounter in the spring of 1994 with the Federal

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995).

Election Commission ("FEC") made clear, the agencies themselves are not always amused by this arrangement.

Of all the agencies that one would think deserved to be free of any Executive Branch control, it would be the FEC, a body with responsibility for investigating and prosecuting both civil and criminal violations of the federal election laws. The FEC does things like investigating activities of the major political parties and congressional and presidential election committees. FEC litigation matters probably qualify better than most as political "hot potatoes" for Executive Branch officials and are unlikely to do much good for one's career if mishandled.

This dynamic probably contributed to the general conclusion accepted by both the FEC and the Solicitor General's office for over twenty years that the FEC had independent litigating authority in the Supreme Court. Indeed, a short written description of the Solicitor General's responsibilities that I found upon taking office explicitly singled out the FEC as one of the very few agencies with such authority. However, I was prompted by a notification from the FEC in 1994 that it intended to seek certiorari in a case involving the National Rifle Association ("NRA") to sit down and read the FEC's enabling legislation. I concluded from my research that the FEC *had* no independent litigating authority in that type of controversy. At issue was whether, as the United States Court of Appeals for the District of Columbia Circuit had held, the FEC's composition violated separation of powers.² At that time the Secretary of the Senate and the Clerk of the House of Representatives were included as nonvoting members of the Commission.³ Moreover, on the merits, I believed, contrary to the FEC's position, that the FEC's makeup *was* unconstitutional.

The FEC decided that it would file its own petition, without my authorization, but subsequently accepted a letter from me to the Supreme Court to the effect that, if the FEC were wrong on that point, it had my post hoc authorization. I then filed a brief challenging the FEC's independent litigating authority and arguing that its makeup was unconstitutional.⁴ After certiorari was granted, and full briefs and oral argument had taken place on the merits of the constitutional challenge, the Supreme Court dismissed the case on the grounds that the Commission lacked independent litigating

2. See *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993).

3. *Id.* at 823.

4. See Brief for the United States as *Amicus Curiae*, *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (No. 93-1151).

authority and that the Solicitor General's authorization came after the time for filing the petition had expired.⁵ The Supreme Court provided no guidance on the merits, whatsoever. At issue was the authority of the Solicitor General to represent independent agencies in the Supreme Court unless Congress directed otherwise. But also at stake was the ability of the Executive Branch to challenge consistently and effectively any efforts by Congress to enlarge *its* powers unconstitutionally. As curious as it may seem, I was, in a sense, both defending and attacking Congress at the same time.

B. *The Case of the Speedway Bomber*

A second example of the Solicitor General's difficulty in identifying the client arises in the context of what are called *Bivens*⁶ actions, in which federal government officials are sued for allegedly violating another person's constitutional rights. If the plaintiffs in such cases are successful, they may be able to recover money damages directly from the officials. The Justice Department usually provides federal officials with legal representation in *Bivens* actions. However, officials facing suit must devote significant time and energy to defending themselves, even if they are ultimately vindicated. Over a number of years, the Supreme Court has attempted to ensure that frivolous *Bivens* actions are identified and dismissed at the earliest possible stage in the litigation. But there are occasions where the interests of the individual official and those of the government diverge, as proved to be true during the 1994–95 Term in a case called *Kimberlin v. Quinlan*.⁷

Although the name of the case may not be familiar, the facts have been the subject of significant media attention in recent years. Kimberlin had been convicted and was serving a fifty-one-year sentence for federal drug and explosive offenses when the events of importance here allegedly took place.⁸ He had been convicted for, among other things, a series of bombings in and around Indianapolis for which he gained the name "The Speedway Bomber."⁹ Kimberlin alleged that, shortly before the 1988 presidential election, he was placed in administrative detention by Quinlan, Director of the Federal Bureau of Prisons, and other federal officials, in order to prevent

5. See *Federal Election Comm'n*, 513 U.S. at 98.

6. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

7. 6 F.3d 789 (D.C. Cir. 1993), *vacated*, 515 U.S. 321 (1995).

8. *Id.* at 791 n.3.

9. *Kimberlin v. White*, 7 F.3d 527, 528–29 (6th Cir. 1993).

him from communicating with the media.¹⁰ The story that the defendants wanted squelched, according to Kimberlin, was that he had sold marijuana during the 1970s to a law student named Dan Quayle, the Republican vice-presidential candidate in 1988.¹¹

Kimberlin sued the federal officials, alleging a violation of his First Amendment free speech rights.¹² Department of Justice lawyers defended Quinlan in the trial court, but were unsuccessful in getting the case thrown out.¹³ On appeal, the federal defendants wanted to argue that the case should have been dismissed by the trial court because Kimberlin had introduced no “direct evidence” of unconstitutional motivation on their part, as precedent required.¹⁴ The United States District Court for the District of Columbia had determined that where government officials acted in a manner that might be perfectly legal—for example, a prison official’s placing an inmate in administrative detention—but for the claim of unconstitutional motivation, the plaintiff must make more than conclusory allegations with respect to motivation.¹⁵ My predecessor, Ken Starr, had, in an earlier case,¹⁶ rejected that “direct evidence rule” as a government position, and I concurred with his view. Consequently, on appeal, the government withdrew from representing Quinlan and the other officials and authorized them to obtain private counsel at taxpayer expense. As a result of pressing that argument, the defendants won on appeal¹⁷ and Kimberlin sought Supreme Court review.¹⁸

As it does from time to time, the Supreme Court invited the Solicitor General, even though the government was no longer involved in the case, to advise it as to whether it should grant Kimberlin’s petition for a writ of certiorari.¹⁹ In so doing, the Supreme Court placed me in a rather awkward position. I could urge it not to take the case, thereby, if the Supreme Court agreed, ending the case and rendering final the federal officials’ lower court

10. *Kimberlin*, 6 F.3d at 791–93.

11. *Id.* at 791.

12. *Id.*

13. *Kimberlin v. Quinlan*, 774 F. Supp. 1, 10 (D.D.C. 1991), *rev’d*, 6 F.3d 789 (D.C. Cir. 1993).

14. *Kimberlin*, 6 F.3d at 793–94 (D.C. Cir. 1993).

15. *Kimberlin*, 774 F. Supp. at 6.

16. *See* Brief for Respondent at 11–12, *Siegert v. Gilley*, 500 U.S. 226 (1990) (No. 90-96).

17. *Kimberlin*, 6 F.3d at 798 (D.C. Cir. 1993).

18. *Kimberlin v. Quinlan*, 513 U.S. 1123 (1995).

19. *See id.*

victory. Alternatively, I could recommend that the petition be granted and argue that the dismissal by the court of appeals of Kimberlin's suit based upon the "direct evidence rule" was erroneous and should be reversed. The former approach would underscore the Attorney General's commitment to vigorous defense of federal officials in *Bivens* actions. Such an approach would be consistent with the Supreme Court's concern that baseless suits with their threat of personal liability and burdens of litigation, unless "nipped in the bud," may discourage talented individuals from entering public service or drive others from office. The latter, setting to one side the fact that it might produce headlines reading, in effect, "Government Joins Speedway Bomber in Constitutional Suit Against Federal Officials," would be consistent with the Attorney General's responsibility for ensuring that persons with legitimate civil rights claims do not have their cases, against either federal or nonfederal officials, dismissed prematurely. For the Supreme Court's prior rulings in *Bivens* cases, although involving suits against federal officials, had been readily applied to civil suits against state and local officials.²⁰

After extensive consultation with the Attorney General, I concluded that my duty was not to the specific federal defendants but to ensuring that unreasonable barriers were not placed in the path of the civil rights plaintiffs. No distinction is made anywhere else in the law between the probativeness of "direct evidence" on the one hand and "circumstantial evidence" on the other,²¹ and I saw no reason to do so in *Bivens* actions. The "direct evidence rule" would require the plaintiffs in such cases to produce a "smoking gun," something tantamount to a defendant's confession of unconstitutional motivation, in order to avoid having their suits summarily dismissed.

I must say that this decision was rendered especially difficult; first, because those of us involved in determining the government's position knew we were present or potentially future defendants in *Bivens* actions where the direct evidence rule might prove very handy. Second, we were also aware that anything other than all-out defense of government officials in such cases, even if not fully justified, has an unavoidably depressive effect upon employee morale. One may hear from other federal officials in this context: "Am I going to be left to hang out to dry by the Attorney General when a

20. See, e.g., *Butz v. Economou*, 438 U.S. 478, 504 (rejecting a distinction between state and federal government officials' liability under 42 U.S.C. § 1983 (1970) and *Bivens*, respectively).

21. See, e.g., *United States v. Hatchett*, 31 F.3d 1411, 1421 (7th Cir. 1994) (stating that "circumstantial evidence is not less probative than direct evidence, and, in some cases is even more reliable") (citing *United States v. Rose*, 12 F.3d 1414, 1417 (7th Cir. 1994)).

groundless suit is brought against me?" But here, my client turned out to be, perhaps, the citizenry at large, *not* the federal defendants.

I should report the weeks of "sturm and drang" over what position the government would take in *Kimberlin* ultimately went for naught. The case was accepted for review, oral arguments took place, and the Supreme Court, in a paragraph per curiam opinion, vacated and remanded the case back to the United States Court of Appeals for the District of Columbia Circuit for reconsideration in light of the Supreme Court's decision announced earlier that week in another *Bivens* case raising a related, but not identical, question.²²

III. THE SOLICITOR GENERAL AS OFFICER OF THE COURT

The Solicitor General's role as Executive Branch advocate, with all the complexity I have just described, is complicated further by the position's responsibilities as an officer of the Supreme Court. In this regard, the Solicitor General cannot hope to discharge these responsibilities unless he has established a reputation before the Supreme Court for absolute candor and fair dealing. One would like to think that anyone charged with representing the United States in the Supreme Court would have acquired those characteristics prior to assuming that post. But were that not the case, certain pragmatic considerations would lead a Solicitor General to acquire them rather quickly. For, as I mentioned earlier, the Solicitor General and the staff are involved in approximately two-thirds of the cases the Supreme Court hears each term. Moreover, the Solicitor General files literally hundreds of briefs each term responding to certiorari petitions by others seeking review of lower court decisions in the government's favor. The Solicitor General also periodically seeks extraordinary relief, such as a stay, from the Supreme Court or one of its Justices in lower court litigation.

The Solicitor General's traditional success in obtaining review in the Supreme Court of adverse decisions, and of resisting petitions filed against the government by others, can be attributed, I think, to the fact that the Justices *believe* the Solicitor General when the Solicitor General says that a matter warrants or does not warrant their attention; they *rely* upon the Solicitor General's reputation for telling the truth and for not hedging or distorting to gain a short-term advantage. Indeed, the Supreme Court looks to the Solicitor General to serve as a "gatekeeper" with respect to the flow of

22. *Kimberlin v. Quinlan*, 515 U.S. 321, 322 (1995) (remanding for further consideration in light of *Johnson v. Jones*, 515 U.S. 304 (1995)).

government litigation to the Court. As the Supreme Court stated only a few terms ago:

[T]he practice [of concentrating the litigating authority in the Solicitor General] also serves the Government well; an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved throughout the state and federal court systems. . . . The Government as a whole is apt to fare better if these decisions are concentrated in a single official.²³

By the same token, once a Solicitor General's word can no longer be trusted by the Supreme Court and the justices begin to think that the government briefs need to be double checked, the special relationship is likely to suffer significantly. Furthermore, to the extent that the Justices' fears are borne out, retribution may be swift and certain. Unlike most lawyers appearing before the Supreme Court who may argue there only once in their lives, the Solicitor General and staff—proverbial “repeat players”—are there on almost a daily basis during the Term. They must answer tomorrow for today's misrepresentations, if they occur. But, telling the truth is not always a painless activity, as the following two examples reflect.

A. *AIDS, AZT, and Patent Law*

During the 1995–96 Term, the Supreme Court was asked to review a dispute over patent rights to the drug azidothymidine (“AZT”).²⁴ Burroughs Wellcome's patent was being challenged by a manufacturer of generic drugs, Barr Laboratories.²⁵ Barr Laboratories contended that it had a right to share in the patent based upon a license to it granted by the United States Government.²⁶ In short, at an early stage in Burroughs Wellcome's development of the compound that became AZT, scientists at the National Institutes of Health (“NIH”) conducted tests of the drug on mice at the company's request.²⁷ Barr argued that it was only after the NIH tests, and in reliance upon their results, that Burroughs Wellcome determined that AZT

23. *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994).

24. *Burroughs Wellcome Co. v. Barr Lab., Inc.*, 40 F.3d 1223 (Fed. Cir. 1994).

25. *Id.* at 1225–27.

26. *Id.* at 1226.

27. *Id.*

was worth patenting.²⁸ Burroughs Wellcome asserted that, on the contrary, AZT was sufficiently patentable *before* the NIH tests.²⁹ The lower courts had held for Burroughs Wellcome.³⁰ If the former scenario was correct, the federal government had a right to share in the patent and to license Barr Laboratories to exploit that interest.

Once again, the Supreme Court asked for the views of the Solicitor General.³¹ Here, the tension over what position to take was caused by the administration's concern that Barr Laboratories' failure to prevail in its challenge would leave intact Burroughs Wellcome's monopoly over the production and sale of AZT. Those responsible in the government for policy on acquired immunodeficiency syndrome ("AIDS") along with public interest groups urging aggressive AIDS research and treatment believed that, were the challenge successful, the monopoly would be broken. As a result, there would be a drop in the price of AZT and a greater availability to those carrying the virus or suffering from full-blown AIDS.

But my job as Solicitor General was, while keeping those policy concerns in mind, to decide what the best *legal* answer was to the patent law question presented to the Supreme Court by Barr Laboratories' petition for certiorari. After a great deal of research and thought, my staff and I concluded that Burroughs Wellcome's position, not Barr Laboratories', was the correct one as a matter of patent law.³² Moreover, we also identified an important public policy interest consistent with our legal analysis. There was good reason to fear that the government's claim to patent rights under circumstances like those presented by this case might discourage pharmaceutical companies from seeking federal assistance altogether.³³ As a consequence, once on the market, the costs of research and of the drugs themselves might increase, as might the delay in the process, and the government might find itself denied an opportunity to have *any* impact on the development of valuable new pharmaceutical products.³⁴ I informed the

28. *Id.* at 1228.

29. *Burroughs*, 40 F.3d at 1227.

30. *Burroughs Wellcome Co. v. Barr Lab., Inc.*, 828 F. Supp. 1208, 1209 (E.D.N.C. 1993), *aff'd in part, vacated in part*, 40 F.3d 1223, 1227 (Fed. Cir. 1994).

31. *Barr Lab., Inc. v. Burroughs Wellcome Co.*, 515 U.S. 1130 (1995) (inviting the Solicitor General to file a brief expressing the views of the United States).

32. Brief for United States as *Amicus Curiae* at 990, *Barr Lab., Inc. v. Burroughs Wellcome Co.*, 116 S. Ct. 771 (1996) (No. 94-1527).

33. *Id.* at 15-17.

34. See Brief for United States as *Amicus Curiae*, *Barr Lab., Inc.* (No. 94-1527).

Supreme Court of the government's view of the law and urged the Court to deny certiorari.³⁵ It did so.³⁶

B. *Ivan the Terrible*

Here is my final example. Early in my tenure, I found myself wrestling with questions growing out of the government's handling of the case of John Demjanjuk, thought to be "Ivan the Terrible," an executioner in the Nazi death camp at Treblinka, Poland. The Justice Department determined that Demjanjuk had lied on his immigration papers by omitting his Nazi affiliation, and thereafter successfully obtained court orders denaturalizing him and directing his deportation.³⁷ But before his deportation, the Israeli government sought his extradition so that he could stand trial for genocide. Demjanjuk was tried in Israel, convicted, and sentenced to death. While his case was on appeal to the Israeli Supreme Court, however, materials from newly uncovered Soviet archives raised serious doubts about whether Demjanjuk was, in fact, "Ivan the Terrible."³⁸

Meanwhile, the federal court of appeals that had affirmed the denaturalization and deportation orders in Demjanjuk's case, upon hearing about the new Soviet records, appointed a district court judge as a special master to take evidence and to report back on the question of whether Justice Department lawyers had acted improperly in their handling of the case.³⁹ Perhaps, reinforcing the court of appeals' resolve in this regard, the Israeli Supreme Court reversed Demjanjuk's conviction and ordered him freed based upon this new evidence.⁴⁰

The special master, after conducting an extensive review, concluded that government lawyers had not violated any ethical or professional standards with respect to Demjanjuk's case, although he did identify certain instances of oversight that he found unfortunate in retrospect.⁴¹ The court of appeals, however, rejected the special master's determination, holding

35. *Id.*

36. *Barr Lab. Inc.*, 116 S. Ct. at 771.

37. *See In re Extradition of John Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985) (deporting Demjanjuk); *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981) (denaturalizing Demjanjuk).

38. *See* Clyde Haberman, *Soviet Files Presented in Appeal of War-Crimes Verdict in Israel*, N.Y. TIMES, June 2, 1992, at A3.

39. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 339 (6th Cir. 1993).

40. *Id.* at 342.

41. *Id.* at 348.

instead that the government lawyers were guilty of what could be called “good faith fraud”—an offense previously unknown to the law.⁴² This finding represented a devastating blow to the reputations of three highly regarded federal prosecutors and damaged the credibility of the entire government program to identify, denaturalize, and deport Nazi war criminals. Under the circumstances, although the odds were against us, I decided that a certiorari petition should be filed to vindicate those interests.

While I awaited the Supreme Court’s action on our petition, a lawyer on my staff walked into my office and asked to talk to me about a matter that was troubling him. I invited him to sit down. His area of responsibility among the assistants to the Solicitor General was handling tax cases, but he said that he had taken a look at our petition in the *Demjanjuk* case just out of curiosity and found himself recalling a conversation he had some fourteen years earlier. Although he admitted his memory was somewhat hazy, the conversation was with another lawyer who, at the time, had just left the Solicitor General’s office to join the “Nazi Hunter” unit in the department. According to my assistant, that lawyer mentioned in passing that he was involved in an important case in which the government team had some information that might be conflicting as to the Nazi camp where the person targeted for denaturalization and deportation had served. When asked by my tax assistant whether that was information that should be provided to that person’s lawyer, the new member of the “Nazi Hunter” team said that he did not believe so.

After hearing him out, I was faced with the question of what to do with this report. I could do nothing, for after all, the tax assistant did not recall any mention of *Demjanjuk*’s name, or of “Ivan the Terrible,” or of Treblinka; the conversation might have been about an entirely different case, even if my tax assistant’s memory was accurate as to what he did recall. But I was struck by the fact that the court of appeals had come down hard on the government lawyers primarily because it felt that they had withheld critical information from witnesses and defense counsel in *Demjanjuk*’s case. Moreover, whether John *Demjanjuk* was at Treblinka or another Nazi camp was central to establishing that he was “Ivan the Terrible.” Failure to make complete disclosure to the Supreme Court of the report I had received might, in retrospect, compound damage done by the earlier charges against the Department of Justice.

I decided, therefore, to file a supplemental brief with the Supreme Court, and to advise defense counsel by letter of my conversation with my

42. *Id.* at 354.

assistant, fully aware of the fact that such a filing was unlikely to improve our chances of having certiorari granted. I filed the brief, and shortly thereafter certiorari was denied.⁴³

IV. CONCLUSION

I have discussed four instances during my tenure in which I took positions in the Supreme Court that might appear to be inconsistent with the Solicitor General's role as Executive Branch advocate, and other instances exist that I have not mentioned. But I do not want to leave you with the false impression that Solicitors General spend most of their time devising legal arguments likely to undermine governmental programs and policies. In most cases, the Solicitor General's client is not hard to find. Indeed, were I to spread out my entire record, you might well conclude that there were too *few* occasions when I acted in the long term, rather than the short-term interests of the United States. My purpose here, however, was not necessarily to convince you of the *wisdom* of my decision-making process. Rather, it was to give you a sense of the difficulties a Solicitor General faces in carrying out his responsibilities.

Difficulties though they may be, when the Solicitor General acts in ways that may present short-term problems for the government in the courts, it is a reflection of the tradition of the independence that has grown up around the office of the Solicitor General over the past 127 years, respected with few exceptions by presidents and attorneys general alike. To quote from a 1977 Justice Department statement on the role of the Solicitor General:

It was a Solicitor General, Frederick W. Lehman, who wrote that "the United States wins its point whenever justice is done its citizens in the courts"; and the burden of history is that justice is done most often when the law is administered with an independent and impartial hand. The Nation values the Solicitor General's independence for the same reason that it values an independent judiciary.⁴⁴

So be it. Thank you.

43. See *Rison v. Demjanjuk*, 513 U.S. 914 (1994).

44. John M. Harmon, *Memorandum—Opinion for the Attorney General*, 21 LOY. L.A. L. REV. 1089, 1092 (1988).

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In one of his most influential works, *Justice at War: The Story of the Japanese American Internment Cases* (Oxford, 1983), Professor Irons chronicles the American government's detention of some 120,000 West Coast Japanese Americans during World War II and the subsequent violations of civil rights. Critically acclaimed by the *Los Angeles Times Book Review*, *The Washington Post Book World*, *The New York Times Book Review*, and *Newsweek*, the book showcased Iron's genius at investigating government misconduct and painting an ultimate portrait of injustice. The book also influenced Congress to provide \$1.2 billion in reparations to the survivors of the wartime internment camps.

Professor Irons sparked a major controversy in 1993 with the publication of *May It Please the Court* (New Press), a set of edited recordings of 23 historic Supreme Court cases that prompted a threat by the Court to sue him. After much publicity, the Justices backed down and opened the recordings for any use. The Irons tapes/book set is now used in many constitutional law courses across the country.

Professor Irons, who earned his B.A. from Antioch College, his M.A. and Ph.D. from Boston University, and his J.D. from Harvard University, has recently published *Brennan v. Rehnquist: The Battle for the Constitution* (Knopf, 1994), in which he explores the contrasting philosophies of two judicial giants through the analysis of 100 decisions in which both men express their views.

Opticians and Abortion: The Constitutional Myopia of Justice Rehnquist

Peter Irons

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I. INTRODUCTION

What do opticians in Oklahoma have in common with pregnant women in Texas? On the surface, the answer would seem to be very little, aside from a shared state border. Before I explain why the question is posed in this fashion, let me ask what pregnant women in Texas have in common with the following: men who watch dirty movies in their homes; suspicious men who “case” jewelry stores; men who place bets from telephone booths; people who import window glass; parents who want their children to study German in public schools; and convicted murderers who seek new trials? Again, the answer would seem to be very little.

The answers to both questions are: very little and a great deal. Both the Oklahoma opticians and the mixed bag of other people are connected to pregnant women in Texas by the common bond of involvement in the United States Supreme Court cases that were cited as precedent on both sides in *Roe v. Wade*.¹ Justice (now Chief Justice) William Rehnquist cited in his dissenting opinion a case involving opticians in Oklahoma as his one and only precedent for the argument that the Constitution does not provide a right of “privacy” that would protect women seeking abortions from criminal prosecution.² On the other side, Justice Harry Blackmun, writing for the majority in *Roe*, cited the cases described above among those he utilized to

1. 410 U.S. 113 (1973).

2. *Id.* at 173 (Rehnquist, J., dissenting).

argue that the Constitution does include—or at least implies—a right to privacy “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”³

It may seem a far stretch to analogize between opticians and abortion, or between abortion and such issues as pornography, bookmaking, language instruction, murder trials, and “stop and frisk” practices. If the use of precedent is thought of as a search for cases “on point,” there is little that appears “on point” in these cases. But judges in general—and Justices of the Supreme Court in particular—are not bound by any rules in citing precedent. They often cite as precedent cases that are factually dissimilar to those at issue, looking for a broadly stated principle of law that could add some authority to the argument they are constructing, or to the conclusion they have reached.

On occasion, as illustrated by the *Roe* opinions of Justices Rehnquist and Blackmun, the search for precedent becomes creative and imaginative. I do not mean this in a pejorative way, because legal reasoning is not simply a process of stacking up cases that are factually similar. Argumentation can and should be creative and imaginative; that is why we have such terms as metaphor and simile, apposition and juxtaposition. In some situations, comparing apples to oranges may prove to be fruitful; they are both fruits, roughly spherical, and grow on trees. They have more in common than opticians and abortion.

Let me start with Justice Rehnquist and the case he cited as precedent in his *Roe* opinion, *Williamson v. Lee Optical Co.*⁴ He cited this 1955 decision for the following proposition: “[T]he test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged [in *Roe*] has a rational relation to a valid state objective.”⁵ That sentence provides a good, brief statement of the so-called “rational basis” test applied by the Court to determine the constitutionality of “social and economic” legislation. In contrast, the “strict scrutiny” test is applied to legislation that is alleged to infringe on fundamental rights or to create suspect classifications. This latter jurisprudential test derives from the famous “Footnote Four” in Justice Harlan Fiske Stone’s 1938 opinion in *United States v. Carolene Products*.⁶ The “rational basis” test has earlier roots, but over the past six decades the competing tests have essentially

3. *Id.* at 153.

4. 348 U.S. 483 (1955).

5. *Roe*, 410 U.S. at 173 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)).

6. 304 U.S. 144, 152–53 n.4 (1938).

polarized the debate over the proper level of judicial scrutiny in constitutional cases.

There is nothing illegitimate in Justice Rehnquist's citation to *Lee Optical* in his *Roe* dissent. His search for precedent led him to a rather obscure, and certainly not momentous, case. However, his statement of its central principle is misleading; in fact, it is flatly wrong. The Court's opinion in *Lee Optical* did not state that the "rational basis" test applied to "social and economic legislation," as Justice Rehnquist wrote. It limited the use of that highly deferential test to state laws that regulated "business and industrial conditions," hardly the same thing as "social and economic" legislation.⁷ The case Justice Rehnquist actually should have cited in his *Roe* opinion was not *Lee Optical*, but the Court's 1979 decision in *Dandridge v. Williams*,⁸ in which Justice Potter Stewart put the *Lee Optical* decision into totally new frames, so to speak. It was Justice Stewart who cited *Lee Optical* for the proposition that in "deal[ing] with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights," the Court would apply the "rational basis" test.⁹

II. A CLOSER LOOK AT LEE OPTICAL

Let us take a closer look, through the corrective lenses of hindsight, at the *Lee Optical* case, to find out why it has become Justice Rehnquist's favorite precedent in cases dealing with issues such as abortion, nude dancing, and the rights of illegitimate children, among others. This case stemmed from a political battle over the eyeglass business in Oklahoma. The state's opticians (who grind lenses and fit them into frames) were pitted against optometrists (who have doctoral degrees and measure vision) and ophthalmologists (who are medical doctors and treat eye diseases). The Court's opinion in *Lee Optical* tells us nothing about this political battle, but it is fair to assume that Oklahoma's optometrists and ophthalmologists (call them the eye doctors) complained to state legislators that opticians (call them the grinders) were cutting into their business by duplicating eyeglass lenses without sending their clients to the doctors for prescriptions. Opticians are capable of duplicating lenses without prescriptions; this is a fairly simple task, as the many "one-hour" optical shops illustrate. However, the eye doctors argue vigorously (as my optometrist recently did to me) that new eye examinations and prescriptions are essential to correct vision changes and

7. *Lee Optical*, 348 U.S. at 488.

8. 397 U.S. 471 (1970).

9. *Id.* at 484.

detect possible eye diseases such as glaucoma. Having a lens duplicated without a prescription could endanger one's vision and eye health. That, at least, is what the eye doctors claim.

That claim persuaded the Oklahoma legislature to pass a law providing (in pertinent part, as lawyers like to say) that "it [shall be] unlawful for any person . . . to duplicate . . . [any] lenses . . . [without a] written prescripti[on] [from an] ophthalmologist or optometrist."¹⁰ The Lee Optical Company challenged the law in federal district court, filing suit against Oklahoma's Attorney General, Mac Q. Williamson. The opticians won a judgment that the law violated the Due Process Clause of the Fourteenth Amendment, in restricting their "liberty" to practice their profession. Williamson appealed to the Supreme Court on the state's behalf, and won a reversal of the lower court's decision.¹¹

This was a fairly simple case for the Justices. A long line of precedent, stretching back to the nineteenth century, proclaimed the principle—as stated by the Court in *Munn v. Illinois*¹² in 1877—that "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts."¹³ In other words, if Oklahoma's opticians did not like the new law, they should set up a political action committee (EYE-PAC, perhaps) and lobby for its repeal or revision. In many other cases, including *Carolene Products*, the Court had upheld state and federal laws that regulated "business and industrial conditions" against Due Process Clause challenges.¹⁴ In most of these cases, the Justices found a "rational basis" for the law in statements by its sponsors, either in committee hearings or during floor debate, recorded in the legislative history of the statute.

The Court faced a slight problem in the *Lee Optical* case. Apparently, the Oklahoma legislature made no record of its hearings or debates. The legislative history of the challenged statute did not exist. That did not faze Justice William O. Douglas, who wrote for the Court. He simply imagined, or invented, possible "reasons" the legislators may have advanced for the law.¹⁵ Justice Douglas began with an admission that "[t]he Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement" that opticians cannot grind lenses without a

10. *Lee Optical*, 348 U.S. at 485 (citation omitted).

11. *Id.* at 491.

12. 94 U.S. 113 (1876).

13. *Id.* at 134.

14. *United States v. Carolene Prods.*, 304 U.S. 144, 154 (1938).

15. *Lee Optical*, 348 U.S. at 487.

prescription.¹⁶ How had the legislature reached that judgment? Justice Douglas filled in the gaps with speculation. “[T]he legislature might have concluded,” he wrote, that prescriptions were necessary in enough cases to justify the law.¹⁷ He used the words “might” and “may” at least a dozen times in his opinion, with absolutely no support from any record.

What is the relevance of this repeated supposition and speculation to Justice Rehnquist’s citation of *Lee Optical* in his *Roe* opinion? It saved him the trouble of finding an actual “rational basis” for the Texas law that criminalized abortions.¹⁸ This law, first enacted in 1854, had no recorded legislative history.¹⁹ The possible reasons for the criminal abortion statute, advanced by the state’s lawyers during oral argument before the Supreme Court, were totally speculative. The lawyers guessed that “protection of the mother, at one time,” may have been the Texas legislature’s intent.²⁰ The lawyers also speculated that “when this statute was first passed, there was some concern for the unborn fetus.”²¹ Needless to say, the state’s lawyers did not have the faintest support for their speculations. This hardly constitutes, in my mind, any “rational basis” for the Texas criminal abortion statute, since no reasons were proffered in any record. Guessing the intent of long-dead legislators cannot manufacture a “rational basis” for any statute, unless Madame Blavatsky is sitting next to the judge.

Should this reliance on speculation make any difference to the legitimacy of the “rational basis” test as applied by Justice Douglas in *Lee Optical* and Justice Rehnquist in his *Roe* opinion? I suggest that it does, by allowing judges to relieve legislators from their duty to articulate, in some record, sufficient reasons for their decisions that can be examined for possible bias or error. Justice Douglas may well have been correct in imagining what the Oklahoma legislators “might have” intended in passing their law, but he might equally have been wrong, and the statute may have suffered from serious defects. We simply have no way of knowing, and the “rational basis” test does not require that judges know anything about the “real” reasons any law was adopted. Further, it implies that judges do not, and should not, care about those reasons.

16. *Id.*

17. *Id.*

18. *Roe v. Wade*, 410 U.S. 113, 117–19 (1973) (citing TEX. PENAL CODE ANN. §§ 1191–1194 (1911)).

19. *Id.* at 119 (citing 3 H. GAMMEL, LAWS OF TEXAS 1502 (1898)).

20. LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, Vol. 75, 802–03 (P. Kurland and G. Casper, eds. 1973).

21. *Id.* at 803.

This reliance on the “rational basis” test is the logical extension of legal positivism. This is the jurisprudential philosophy that any law that is duly enacted by a legislature is, *ipso facto*, constitutional. By his own admission, Justice Rehnquist is a committed legal positivist. Laws “take on a form of moral goodness because they have been enacted into positive law,” he argued in the most elaborated statement of his judicial philosophy.²² Exceptions to this jurisprudential rule would be hard to find, and would be limited to those laws that on their face violate an explicit provision of the Constitution. The “rational basis” test, as applied by Justice Rehnquist, is virtually impossible to flunk.

III. A QUICK SLAP AT JUSTICE STEWART

It is not entirely fair to blame Justice Rehnquist for his misreading of the *Lee Optical* decision, in which Justice Douglas limited the application of the “rational basis” test to laws that regulated “business and industrial conditions.”²³ Of course, Justice Rehnquist (or his clerks) should have carefully read the *Lee Optical* opinion and quoted it correctly for the principle he purported to find in it, that his favored judicial test applied to a broader range of “social and economic” legislation. For this misreading of precedent, whether deliberate or not, Justice Rehnquist deserves censure. However, the real blame for this unwarranted expansion of the *Lee Optical* principle rests with Justice Potter Stewart. His 1970 opinion in *Dandridge v. Williams* allowed the Court to evade the “strict scrutiny” test in cases that raised issues of “fundamental rights” and that challenged “suspect classifications” by legislators.²⁴

The *Dandridge* case involved a Maryland law that placed a cap on welfare payments to families with dependent children.²⁵ The law provided that families with six or more children could receive no more benefits than those with five children.²⁶ In other words, the “excess” children received no money for food or clothing. This law was clearly intended to punish families (almost all headed by single mothers) who exceeded the state legislature’s notion of proper family size. It would be fatuous to ignore the political and racial context of this legislation; states like Maryland (and Congress as well)

22. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).

23. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

24. *Id.* at 471.

25. *Id.* at 473.

26. *Id.* at 474.

were dominated in the late 1960s by conservative white voters who resented giving their tax dollars to African-American women who kept having children just to increase their welfare funding. However incorrectly the voters perceived the welfare issue (in fact, most families who received Aid to Families with Dependent Children ("AFDC") benefits were white), and however tainted by racial prejudice, they acted on their beliefs. This was the political reality of those years, however much we may want to erase it from our memories.

The Supreme Court, speaking through the patrician Justice Stewart, closed its eyes and ears to this reality. Justice Stewart conceded that the Maryland law produced "some disparity in grants of welfare payments to the largest AFDC families."²⁷ He also conceded that the case "involves the most basic economic needs of impoverished human beings."²⁸ Justice Stewart further admitted that the "rational basis" cases—including *Lee Optical*—on which he relied for precedent "have in the main involved state regulation of business or industry."²⁹ So why did he extend the *Lee Optical* principle, limited by Justice Douglas to cases involving "business and industrial conditions," to the much broader category of "social and economic" legislation? Justice Stewart did not explain this jurisprudential expansion. He simply wrote the following words: "We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard."³⁰

Why not? The Maryland legislature certainly had a "rational basis" for the law, in saving taxpayer dollars, but was that enough? Do children have a "fundamental right" to food and clothing? Or did the legislature create a "suspect classification" by discriminating between larger and smaller families, without regard to their needs? These seem to me to be relevant questions, worthy of judicial scrutiny, but Justice Stewart brushed them aside, concluding (without any discussion) that the Maryland law did "not affect[] freedoms guaranteed by the Bill of Rights," presumably the only rights protected against governmental deprivation.³¹

Am I being unfair to Justice Stewart? After all, the development and progression of constitutional doctrine requires (in appropriate cases) the expansion of principles developed in one era to cover situations that arise in later times. But I think, at least in the *Dandridge* case, that he stretched the

27. *Id.* at 484.

28. *Dandridge*, 397 U.S. at 508.

29. *Id.* at 485.

30. *Id.*

31. *Id.* at 484.

Lee Optical principle far beyond the limits that Justice Douglas had intended to impose on his fellow judges. Justice Rehnquist, in turn, stretched the *Dandridge* principle even further, since it would be difficult—if not impossible—to deny that the abortion question does not raise a “liberty” claim under the Fourteenth Amendment. Justice Rehnquist, in fact, conceded in his *Roe* dissent that the “liberty” interest “embraces more than the rights found in the Bill of Rights.”³² Whatever those rights may be, they certainly require more judicial scrutiny than the “rational basis” test provides, which is the bare minimum. To hold otherwise is to depreciate those basic constitutional rights; to see them as deserving of no more judicial scrutiny than the regulation of the Oklahoma eyeglass business.

Before I let Justice Rehnquist escape from my critical lens, let me point out that he has continued to cite the *Lee Optical* case as precedent in dozens of opinions, both before and after *Roe*. For example, writing in solo dissent in 1972, he relied on *Lee Optical* in arguing that illegitimate children (whose paternity had been acknowledged by their deceased father) had no right to benefits granted their legitimate siblings under workmen’s compensation law in Louisiana.³³ And in 1986, writing for the Court in a case that upheld the power of cities to zone “adult theaters” into the boondocks far from downtown areas, Justice Rehnquist again relied on *Lee Optical* for support.³⁴ Even on the abortion issue, Justice Rehnquist still trots out his favorite precedent. Having failed to find the indispensable fifth vote to overturn the *Roe* decision, he grudgingly bowed to reality in 1992, when Justices Sandra O’Connor, David Souter, and Anthony Kennedy wrote (delivering “the opinion of the Court” in *Planned Parenthood v. Casey*³⁵) that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”³⁶ Justice Rehnquist conceded in his *Casey* dissent that “[a] woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause,”³⁷ but he continued to insist, citing *Lee Optical*, that “[s]tates may regulate abortion procedures in ways rationally related to a legitimate state interest.”³⁸ In other words, even if a right is protected by the Constitution, and state laws that deprive someone of that right are subject to the “strict scrutiny” test, laws that limit the exercise of that right short of absolute deprivation should be examined under the highly deferential “rational basis”

32. *Roe v. Wade*, 410 U.S. 113, 172–73 (1973) (Rehnquist, J., dissenting).

33. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 179–80, 183–85 (1972).

34. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986).

35. 505 U.S. 833 (1992).

36. *Id.* at 846.

37. *Id.* at 966.

38. *Id.* (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)).

test. This seems illogical to me, but obviously not to Justice Rehnquist. Even as he retreats, he defends his remaining ground with great tenacity, inch by inch.

IV. PREGNANT WOMEN, RAILROAD BERTHS, DIRTY BOOKS, AND BOOKIES

The major purpose of this article is to explore Justice Rehnquist's use of the *Lee Optical* case to defend his position that the Constitution does not imply a "right of privacy" that extends to abortion rights. Yet, it also seems fair to question whether Justice Blackmun, writing for the *Roe* majority, misused or stretched precedent in concluding that the Constitution does imply these rights. Let us take a look (more briefly than our examination of the *Lee Optical* case) at the cases Blackmun cited as precedent in concluding that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."³⁹ The nine cases he cites for these propositions, one broad and the other more narrow, are certainly a mixed bag.⁴⁰ The "line of decisions" he cited had no chronological order (they ranged between 1886 and 1969), but they roughly tracked the provisions of the Bill of Rights, as Blackmun stacked up his precedential building blocks.

The first case seems an odd choice. Back in the nineteenth century, Clara Botsford took a trip on the Union Pacific Railroad and was smacked on the head by a Pullman berth, "causing a concussion" that left her with "great suffering and pain to her in body and mind, and in permanent and increasing injuries."⁴¹ After she filed suit for damages, the railroad's lawyers moved that Ms. Botsford be required "to submit to a surgical examination" by its doctors, who agreed not to "expose" her body "in any indelicate manner."⁴² She refused, and the trial judge upheld her objection.⁴³ The Supreme Court agreed, holding that compelling anyone, "especially a woman, to lay bare the body, or to submit it to the touch of a stranger,

39. *Roe*, 410 U.S. at 152.

40. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Olmstead v. United States*, 277 U.S. 438 (1928); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891); *Boyd v. United States*, 116 U.S. 616 (1886).

41. *Botsford*, 141 U.S. at 250.

42. *Id.*

43. *Id.* at 251.

without lawful authority, is an indignity, an assault and a trespass" in violation of "common law" principles.⁴⁴

But the Supreme Court went further in its *Union Pacific Railway Co. v. Botsford* opinion. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law," wrote Justice Horace Gray.⁴⁵ "As well said by Judge Cooley," Gray continued, "'The right to one's person may be said to be a right of complete immunity: to be let alone.'"⁴⁶ Justice Gray quoted in this passage from the leading treatise on torts by the leading constitutional scholar of those times, Judge Thomas Cooley of the Michigan Supreme Court.⁴⁷ Cooley was best known for his massive book, *A Treatise on Constitutional Limitations*, first published in 1868, which elevated the "freedom of contract" to the constitutional pantheon, from which it was finally dislodged by the Supreme Court during the "Constitutional Revolution" of 1937.⁴⁸

Judge Cooley was not, however, the judicial reactionary that his writings on economics seem to suggest. He was more of a nineteenth century "liberal;" what we might now label as a "libertarian." His term, "the right to be let alone," was later appropriated by Louis Brandeis, the "people's lawyer," who joined the Supreme Court in 1916. It is ironic that the "right to be let alone," which the Supreme Court first applied in a railroad tort case, was transmuted by Louis Brandeis into a "right of privacy" that he first applied to the field of commercial advertising. The long road from *Botsford* to *Roe* wound through some very strange byways.

Brandeis actually invented "the right to privacy" before the Supreme Court decided the *Botsford* case, in a seminal *Harvard Law Review* article he wrote (with Joseph Warren) in 1890 with that title.⁴⁹ Brandeis even used the term "the right to life" in this article, although he employed it in a much different sense than opponents of abortion now do. His article rejected the rigid formalism of nineteenth-century jurisprudence; it reflected the rapid growth of technology that propelled American society toward the twentieth

44. *Id.* at 252.

45. *Id.* at 251.

46. *Botsford*, 141 U.S. at 251 (citation omitted).

47. THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 438 (1868).

48. *Id.*

49. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (6th ed. 1890).

century. "Political, social, and economic changes entail the recognition of new rights," Brandeis wrote, "and the common law, in its eternal youth, grows to meet the demands of society."⁵⁰ He noted that "in very early times" the "right to life" afforded protection only against "battery in its various forms"⁵¹ But, he continued, "now the right to life has come to mean the right to enjoy life,—the right to be let alone."⁵²

Significantly, Brandeis did not direct this "right to be let alone" against state intrusion, but that of private individuals and corporations. He wanted the common law to protect the individual's name and likeness from commercial exploitation or exposure. "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life," Brandeis complained, "and numerous mechanical devices threaten[ed] to" invade personal privacy.⁵³ He referred to the case of Marion Manola, a Broadway actress whose "appearance in tights" had been "photographed surreptitiously and without her consent" and used for advertising purposes by the "Castle in the Air" company.⁵⁴ Long before the *National Enquirer* appeared on supermarket racks, Brandeis decried "the invasion of privacy by the newspapers" and urged that "the law must afford some remedy" to people like Marion Manola.⁵⁵

Having invented the "right to privacy" in the *Harvard Law Review*, Brandeis repeated the term (and big chunks of his article) in later Supreme Court opinions. Among the "mechanical devices" he had warned against in 1890 was the microphone, which could be attached to a telephone and hooked up to a recording machine.⁵⁶ These three "recent inventions" threatened, he wrote, "to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"⁵⁷ Prophetically, Brandeis had foreseen in 1890 the telephone wire-tapping that he denounced in 1928, dissenting in *Olmstead v. United States*,⁵⁸ in which the Court's majority upheld a federal law that authorized the interception and recording of telephone conversations in criminal cases.⁵⁹ "The makers of our Constitution," Brandeis chastised his colleagues, had "conferred, as against

50. *Id.* at 193.

51. *Id.*

52. *Id.*

53. *Id.* at 195.

54. Warren, *supra* note 49, at 195 n.7.

55. *Id.* at 195.

56. *Id.*

57. *Id.*

58. 277 U.S. 438 (1928).

59. *Id.* at 440.

the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”⁶⁰

Justice Blackmun approvingly cited Brandeis’ *Olmstead* dissent in his *Roe* opinion.⁶¹ Blackmun also cited a 1969 Supreme Court opinion that quoted extensively from this dissenting opinion, a case that reversed a criminal conviction for possession of pornographic movies.⁶² The Court’s opinion in *Stanley v. Georgia*,⁶³ holding that the First Amendment protects “the right to receive information and ideas” from state intrusion, relied on Brandeis’s *Olmstead* dissent for the proposition that the Constitution embodies a “fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”⁶⁴ Mr. Stanley certainly did not want the State of Georgia to restrict his right “to receive information and ideas” from the raunchy movies he concealed in his dresser drawers. But does this case really help Justice Blackmun to answer the abortion question?

Some of the other cases cited by Justice Blackmun in his *Roe* opinion seem even less supportive of the “right to privacy” than the *Stanley* decision. Blackmun traced one of the “roots” of privacy rights to the Fourth Amendment’s protection against “unreasonable searches and seizures” by government agents.⁶⁵ However, the Supreme Court opinions he cited on this issue have only tenuous connections to this constitutional root. Along with Brandeis’ *Olmstead* dissent, Justice Blackmun cited two later decisions, one involving a federal prosecution for placing sporting bets from a telephone booth, and the other a state prosecution for possession of concealed weapons. In the “bookie” case of *Katz v. United States*,⁶⁶ the Court adopted the position Brandeis had advocated in his *Olmstead* dissent, but with significant limitations.⁶⁷ The Court’s majority in *Katz* held that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”⁶⁸ Citing the 1890 *Harvard Law Review* article by Warren and Brandeis, the Court noted that “protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of

60. *Id.* at 478.

61. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

62. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

63. *Id.* at 557.

64. *Id.* at 564 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

65. *Katz v. United States*, 389 U.S. 347 (1967).

66. *Id.* at 347.

67. *Id.* at 352.

68. *Id.* at 350.

his property and of his very life, left largely to the law of the individual States.”⁶⁹

If the *Katz* case did not offer Justice Blackmun much support for his *Roe* opinion, the Court’s 1968 decision in *Terry v. Ohio*⁷⁰ offered even less. In this criminal case, the defendant had been convicted of carrying a concealed weapon.⁷¹ A suspicious police officer observed two men who had been pacing up and down the sidewalk outside a Cleveland jewelry store. His search revealed a loaded pistol in a pocket of Terry’s overcoat.⁷² Upholding this “stop and frisk” search against a Fourth Amendment challenge, Chief Justice Earl Warren cited and quoted from the *Botsford* and *Katz* opinions for the proposition that individuals are “entitled to be free from unreasonable governmental intrusion” into their privacy.⁷³ But Warren noted that “the specific content and incidents of this right must be shaped by the context in which it is asserted.”⁷⁴ In his *Terry* opinion, Warren did not find a “privacy” right that prevailed over the government’s interest.⁷⁵

Two of the other cases that Justice Blackmun cited for support in his *Roe* opinion did not use the term “privacy” or come even close to the abortion issue. In 1923, the Supreme Court struck down a Nebraska law—enacted during World War One—that banned the teaching of German in public schools.⁷⁶ The Court’s decision in *Meyer v. Nebraska*⁷⁷ interpreted the “liberty” interest of the Fourteenth Amendment as protecting “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁷⁸ That statement did not move Justice Blackmun very far on his journey toward abortion rights.

Even less helpful was Blackmun’s citation to *Palko v. Connecticut*,⁷⁹ decided in 1937. This bizarre case involved a man who had been convicted of murder and sentenced to life imprisonment.⁸⁰ The State appealed and was granted a new trial.⁸¹ The jury in the second trial convicted him again and

69. *Id.* at 350–51.

70. 392 U.S. 1 (1967).

71. *Id.* at 2.

72. *Id.* at 1.

73. *Id.* at 9.

74. *Id.*

75. *Terry*, 392 U.S. at 9.

76. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

77. *Id.* at 390.

78. *Id.* at 399.

79. 302 U.S. 319 (1937).

80. *Id.* at 321.

81. *Id.*

sentenced Palko to die in the electric chair.⁸² His lawyers appealed to the Supreme Court, citing the Fifth Amendment provision that protects any person from being subjected “for the same offense to be twice put in jeopardy of life or limb.”⁸³ The Supreme Court rejected Palko’s appeal, ruling that the Double Jeopardy Clause of the Constitution did not bind the states to the federal rule.⁸⁴ The Justices further held that constitutional rights such as trial by jury and prosecution by grand jury indictment “are not of the very essence of a scheme of ordered liberty.”⁸⁵ The *Palko* decision, which cost the hapless defendant his life, was a very shaky precedent for Justice Blackmun’s later claim in his *Roe* opinion that the Texas criminal abortion statute violated any right of privacy.

V. WHOSE THUMB WEIGHS HEAVIER ON THE CONSTITUTIONAL SCALE?

Justice Rehnquist cited only one case, *Williamson v. Lee Optical*, to support his proposition that the Constitution does not imply a “right of privacy” that can be extended to protect abortion rights.⁸⁶ Justice Blackmun cited nine cases to support his contrary position.⁸⁷ Which of these two Justices bested the other in this constitutional conflict? Blackmun had both cases and votes on his side in *Roe v. Wade*. Seven Justices—including Chief Justice Warren Burger—joined the majority opinion in the *Roe* decision.⁸⁸

That majority eroded as public opinion shifted on the abortion issue. Writing for the Court in 1989, Justice Rehnquist (who succeeded Burger as Chief Justice in 1986) upheld significant restrictions on abortion rights in *Webster v. Reproductive Health Services*.⁸⁹ Rehnquist employed the “rational basis” test to endorse state laws that barred doctors from “‘encouraging or counseling’ a woman to have an abortion not necessary to save her life,” and that subjected doctors to criminal penalties if they failed to perform tests of fetal “viability” on women that they had “reason to believe”

82. *Id.*

83. *Id.* at 322 (quoting U.S. CONST. amend. V).

84. *Palko*, 302 U.S. at 323.

85. *Id.* at 325.

86. *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

87. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Olmstead v. United States*, 277 U.S. 438 (1928); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891); *Boyd v. United States*, 116 U.S. 616 (1886).

88. *Roe*, 410 U.S. at 115.

89. 492 U.S. 490 (1989).

were pregnant for twenty weeks or more.⁹⁰ The *Webster* decision, which in effect stationed police officers inside doctors' offices, did not overrule *Roe*, but it deployed the "rational basis" test to undermine a ruling based on the judicial standard of "strict scrutiny" of laws that implicated constitutional rights.⁹¹

In the *Webster* case in 1989, Justice Rehnquist fell short by one vote of his long-proclaimed goal of applying the "rational basis" test to the abortion question, and thereby reversing the *Roe* decision. Three years later, in the *Casey* decision in 1992, Rehnquist lost even more ground.⁹² Only Justices Antonin Scalia and Clarence Thomas (both fervent Roman Catholics) joined Rehnquist (a Calvinist Lutheran) in voting to overturn *Roe*.⁹³ Was it religious persuasion or belief in the "rational basis" test that influenced judicial votes in the *Casey* decision? In my opinion, neither of these factors determined the outcome. Justice Anthony Kennedy, who voted in *Casey* to "reaffirm" the central holding of the *Roe* case, was an equally fervent Roman Catholic and a former altar boy. But Kennedy believed that his "personal reluctance" to uphold abortion rights must yield to his conviction that "the Court's legitimacy depends on making legally principled decisions" that will be "accepted by the Nation."⁹⁴

Justice Kennedy's reference to the public's perception of the Court's "legitimacy" introduces a new factor into the judicial balancing of individual rights and state powers. The "strict scrutiny" and "rational basis" tests of legislation both focus their judicial lenses on lawmakers. In contrast, the "legitimacy" test looks to the public for support. The triumvirate of Kennedy, O'Connor, and Souter called on "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."⁹⁵ However, that mandate was not rooted in any explicit or even implicit constitutional provision. It rested, Kennedy explained, in the Court's reluctance to "surrender to political pressure" and to "overrule under fire" a "watershed decision" upon which an entire generation of women had relied.⁹⁶

Where does the *Casey* decision leave us in deciding whether Justice Rehnquist or Justice Blackmun had the stronger argument in the *Roe* case? In my opinion, Justice Kennedy lured the Court down an enticing, but

90. *Id.* at 501.

91. *Id.* at 503.

92. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

93. *Id.* at 833.

94. *Id.* at 866.

95. *Id.* at 867.

96. *Id.*

dangerous, bypass of the constitutional crossroad that Rehnquist and Blackmun forced us to confront. The “rational basis” road on which Rehnquist travels has few bumps or potholes. Under the doctrine of legal positivism, whatever the legislature enacts is constitutional, with only the most egregious exceptions. The “strict scrutiny” road on which Blackmun crosses this judicial intersection forces judges to look closely at the “compelling state interest” in the challenged legislation. It requires more of judges, but it also requires more of legislators, which I consider a good thing. All too often, elected officials become what Justice Robert Jackson called “village tyrants” in bowing to popular demands to punish an unpopular group or criminalize unpopular behavior.⁹⁷ The more that such officials know their actions will face the “strict scrutiny” of judges who need not fear electoral retribution, the more (hopefully) they will think before they vote.

To my mind, it is ironic that Justice Rehnquist clerked for Justice Jackson, whose 1943 opinion in *West Virginia Board of Education v. Barnette*⁹⁸ remains the classic statement of the limits of the “rational basis” test. The right of a state to regulate a business (i.e., eyeglasses), includes the “power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting,” he wrote.⁹⁹ “But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.”¹⁰⁰ Jackson widened his judicial vision. “One’s right to life, liberty, and property,” he added, “and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”¹⁰¹ It may be presumptuous for me to suggest that Justice Rehnquist dig out Volume 319 of the United States Reports and read Justice Jackson’s majestic opinion in the *Barnette* case. If he does, and if he thinks about the spirit of Jackson’s words, I hope he will conclude that laws designed to punish women who choose abortion over childbirth deserve “more exacting judicial scrutiny” than laws that regulate the eyeglass industry.

97. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

98. *Id.* at 624.

99. *Id.* at 639.

100. *Id.*

101. *Id.* at 638.

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The Rehnquist Court: Holding Steady on Freedom of Speech

Tim O'Brien

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I. INTRODUCTION

Prior to his elevation to Chief Justice of the United States in 1986, Associate Justice William Hubbs Rehnquist was not often viewed as a champion of the First Amendment. He had, in fact, authored or joined in Supreme Court opinions having the effect of limiting free speech.¹ Generally, in clashes between government power and individual rights, Justice Rehnquist was among the Justices most consistently siding with the former.² Aggravating the matter, the Justice whose title Rehnquist

1. *See, e.g.*, *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Connick v. Myers*, 461 U.S. 138 (1983); *Board of Ed., Island Trees Free Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (Rehnquist, J., dissenting); *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *United States v. Orioto*, 413 U.S. 139 (1973).

2. *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Mills v. Rogers*, 457 U.S. 291 (1982); *Plyler v. Doe*, 457 U.S. 202 (1982); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Delaware v. Prouse*, 440 U.S. 648 (1979) (Rehnquist, J., dissenting); *Vance v. Bradley*, 440

was to assume, Warren E. Burger, had written or joined a number of important First Amendment opinions³ broadly interpreting the constitutional right to freedom of speech and of the press during his career as Chief Justice.⁴ Was the First Amendment in for an overhaul in the new “Rehnquist Court?”

Because the vote of the Chief Justice counts no more than the vote of any other Justice, it is unrealistic to assume that Rehnquist, even if he wanted to as the new Chief, could steer the Supreme Court in any given direction on any given issue. But Rehnquist became Chief Justice at a time when the Court was in transition. Additionally, other personnel changes in the Court did not seem to bode well for free speech advocates. Justice Potter Stewart, one of the Court’s legendary First Amendment champions, had left the bench five years earlier to be replaced by Justice Sandra O’Connor, who would be less passionate about First Amendment freedoms. The retiring Justice Warren Burger was replaced by Antonin Scalia in 1986; Justice Lewis Powell would soon be replaced by Anthony Kennedy in 1988; Justice William Brennan by David Souter in 1990; Justice Thurgood Marshall by Clarence Thomas in 1991; Justice Byron White by Ruth Bader Ginsburg in 1993; and Justice Harry Blackmun by Stephen Breyer in 1994. With the single exception of Justice White⁵ being replaced by Ruth Ginsburg, each

U.S. 93 (1979); *Paul v. Davis*, 424 U.S. 693 (1976); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (Rehnquist, J., dissenting); *Fronterio v. Richardson*, 411 U.S. 677 (1973) (Rehnquist, J., dissenting); *Roe v. Wade*, 410 U.S. 113 (1973) (Rehnquist, J., dissenting); *United States v. Robinson*, 414 U.S. 218 (1973).

3. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Chandler v. Florida*, 449 U.S. 560 (1981); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

4. Notwithstanding his appreciation for First Amendment interests, former Chief Justice Burger was notorious for his clashes with news reporters. See Nina Totenberg & Fred Barbash, *Burger Loved The Law But Not The Hassle*, WASH. POST, June 22, 1986, at C01.

5. During his tenure on the Court, Justice Byron White was considered somewhat antagonistic to the news media. See *Herbert v. Lando*, 441 U.S. 153, 176–77 (1979) (holding that it does not violate freedom of the press to allow libel plaintiffs to inquire into journalists’ “editorial thought processes”); *Zurcher v. Stanford Daily*, 436 U.S. 547, 567–68 (1978) (holding that newsrooms are not exempt from police searches, irrespective of whether anyone in the newsroom is suspected of wrongdoing, provided requirements for search warrant are met, but Justice White was mixed on issues of free speech generally); *Branzburg v. Hayes*, 408 U.S. 665, 679–80 (1972) (holding that journalists have no First Amendment right to refuse to testify before a grand jury about information obtained from confidential sources). See, e.g., *Barnes v. Glen Theater*, 501 U.S. 560 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Connick v. Myers*, 461 U.S. 138 (1983); *Widmar v. Vincent*, 454 U.S. 263, 282 (1982) (White, J., dissenting) (favoring limitations); *Branti v. Finkel*, 445 U.S. 507 (1980) (supporting free speech); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Elrod v. Burns*, 427

Justice was at least “perceived” to have been succeeded by a Justice less sympathetic to First Amendment values.

The purpose of this article is to demonstrate that early apprehensions of the Court were unjustified and to show how the Rehnquist Court today holds steady in its solicitude for freedom of speech. As are the cases before it, the Rehnquist court is surely different from the predecessor Burger Court. But on the tough, politically charged, and socially sensitive issues, the Rehnquist Court has shown impressive allegiance to First Amendment principles. While this article focuses mainly on issues of freedom of speech, it is the writer’s view that the same allegiance can be found in the Rehnquist Court’s Free Exercise and Establishment Clause jurisprudence.⁶

U.S. 347 (1976); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the FCC’s subsequently abandoned “fairness doctrine” requiring radio and television stations to air both sides of important issues).

6. It is true that the Court has allowed greater accommodation of religion by the state. *See Agostini v. Felton*, 117 S. Ct. 1997, 2018–19 (1997) (allowing public school teachers to teach remedial courses in parochial schools); *Rosenberger v. Rector*, 515 U.S. 819, 837 (1995) (requiring a state university to provide religious publication the same financial support accorded other student publications); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (requiring a school system to provide equal access for religious activities); *Board of Educ. of Westside Comm. Sch. v. Mergans*, 496 U.S. 226, 247 (1990) (requiring school systems to provide religious groups the same access accorded nonreligious groups); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) (finding no Establishment Clause violation in the state providing sign language interpreters for hearing impaired students in church run schools); But by and large, the Court has maintained a tradition of separation of church and state. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 598 (1992) (finding an Establishment Clause violation in allowing members of the clergy to offer invocations or benedictions at public school commencement ceremonies); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 730 (1994) (creating a public school district to specifically accommodate disabled children of orthodox religious sect violates the Establishment Clause); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (invalidating municipal ordinance against animal sacrifice on Free Exercise grounds). The Court’s general adherence to precedent in the above cases is remarkable given the widely acknowledged dissatisfaction by a majority of the current Justices with the still controlling “Lemon Test.” *See generally Lemon v. Kurtzman*, 411 U.S. 192 (1973). “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys.” *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

II. THE CONFLICT

Freedom of speech is as fundamental a value of American culture as it is of constitutional law. Like motherhood and apple pie, it cannot be challenged or threatened in the abstract. It never is. The most serious challenges and threats to free speech always occur when it must be balanced against other cherished values, such as protecting the American flag or insulating children from the evils of pornography and indecency. Is speech still to be deemed "free" when invoked as a weapon of racial hatred?

If the First Amendment protects the most desirable speech, it must also protect that which is least desirable or its guarantees would be meaningless. In the last decade, the Rehnquist Court was faced with balancing free speech against all of these other important, rival interests noted above and, in each case, free speech prevailed.

III. FREEDOM OF SPEECH AND FLAG DESECRATION

Few issues have given the Court more difficulty than deciding whether desecration of the American flag is protected by the First Amendment. The First Amendment literally forbids the abridgment only of "speech," but the Court has long recognized that its protection does not end at the spoken or written word.⁷ The Court has acknowledged that "conduct" may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."⁸ In *United States v. O'Brien*,⁹ the Burger Court had previously held that incidental limitations on expressive conduct, such as burning one's draft card, could be punished if doing so served an important governmental interest unrelated to suppression of expression.¹⁰

The Court's first opportunity to apply the *O'Brien* decision to the issue of flag desecration arose out of a political demonstration during the 1984 Republican National Convention to protest the policies of the Reagan administration. After a march through the streets of Dallas, Gregory Johnson burned an American flag while protesters chanted.¹¹ No one was physically injured or threatened with injury, although several witnesses were seriously

7. *Texas v. Johnson*, 491 U.S. 397 (1989).

8. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

9. 391 U.S. 367 (1968).

10. *Id.* at 377.

11. *Johnson*, 491 U.S. at 399.

offended by the flag burning.¹² Johnson was convicted of desecration of a venerated object in violation of a Texas statute.¹³

Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, there was never much question that Johnson's burning of the flag constituted expressive conduct.¹⁴ The Court invalidated Johnson's conviction, finding that it was directly related to the suppression of expression.¹⁵ Justice Brennan, for the Court, wrote: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹⁶

Justice Brennan was, in his day, the Court's premier liberal advocate and frequently its most articulate proponent of free speech. Accordingly, in *Johnson*, he waxed eloquent:

We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.¹⁷

The majority opinion in *Johnson* drew some bitter, and equally forceful, dissents.¹⁸ Chief Justice Rehnquist: "The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case."¹⁹ Justice Stevens, dissenting separately, stated:

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are

12. *Id.*

13. *Id.* at 400 (citing TEX. PENAL CODE ANN. § 42.09 (1989)).

14. *Id.* at 400–02.

15. *Id.* at 399.

16. *Johnson*, 491 U.S. at 414.

17. *Id.* at 420.

18. *Id.* at 421.

19. *Id.* at 435 (White & O'Connor, JJ., joining in dissenting opinion).

worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.²⁰

But perhaps the most intriguing, and to some surprising, opinion was authored by Justice Anthony Kennedy, who provided the crucial fifth vote for the majority:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases

. . . .

. . . I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.²¹

Kennedy's opinion was particularly curious in that he was a Reagan appointee who many anticipated would embrace the Reagan Justice Department's view that flag burning is not within free speech protection. Kennedy was the third choice for the seat vacated by retiring Justice Lewis Powell. President Reagan's first choice was Robert Bork, who has written critically of the *Johnson* decision²² and who, if confirmed, presumably would have provided the fifth vote to uphold Johnson's conviction and the Texas law.²³

20. *Id.* at 439.

21. *Johnson*, 491 U.S. at 420–21.

22. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 99–101 (1996).

23. Much to the dismay of many conservative Republicans and the Justice Department of the Bush administration, Justice Kennedy not only provided the crucial fifth vote but wrote the decision of the Court in *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (rejecting the Bush Administration's position that brief religious ceremonies at public school commencement

Public outrage over the outcome in *Johnson* was so intense and negative that, within four months of the Court's decision, Congress passed the Flag Protection Act of 1989²⁴ making it a "federal" crime, punishable by up to a year in prison, for anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States."²⁵ It would not take long for challenges to the new federal law to reach the Supreme Court, with the Bush administration urging that *Johnson* be reconsidered.²⁶ If the Court were to decline the invitation, the Administration argued that the *Johnson* decision did not foreclose the validity of the Flag Protection Act of 1989 in light of Congress' considered legislative judgment that there is a compelling national interest in protecting the flag.²⁷ The Court has, in the past, held that Congress has greater authority to define the national interest than any state.²⁸ But the Court still declined the invitation to reconsider *Johnson* and rejected the Administration's constitutional arguments on the merits.²⁹ The vote was identical to that in *Johnson*, 5-4, with Justice Brennan again writing the decision for the Court.³⁰

IV. FREEDOM OF SPEECH, INDECENCY, AND PORNOGRAPHY

In 1979, the Burger Court emphatically recognized society's interest in protecting children from indecency and pornography in *Federal Communications Commission v. Pacifica Foundation*,³¹ often referred to as "The Seven Dirty Words Case." The Court also noted special hazards posed

ceremonies do not violate the Establishment Clause). Kennedy also provided the fifth vote in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973). Both decisions have been sharply criticized by Robert Bork in *SLOUCHING TOWARDS GOMORRAH*. See BORK, *supra* note 22. Had Bork been confirmed as a Supreme Court Justice, he likely would have cast the pivotal votes to turn the Court around.

24. 18 U.S.C. § 700 (1994) (originally enacted as Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 2-3, 103 Stat. 777(1989)).

25. *Id.* § 700 (a)(1).

26. *United States v. Eichman*, 496 U.S. 310 (1990).

27. Brief for the United States, *United States v. Eichman*, 496 U.S. 310 (1990) (No. 89-1433); Brief for the United States, *United States v. Haggerty*, 496 U.S. 310 (1990) (No. 89-1434).

28. See *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (upholding federal set-aside program for minority contractors); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486 (1989) (rejecting set-aside program for minority contractors adopted by municipality).

29. *Eichman*, 496 U.S. at 312.

30. *Id.*

31. 438 U.S. 726 (1978).

by broadcasting that would resonate through later cases, including a landmark decision a generation later involving indecency on the Internet.³²

At issue in *Pacifica* was a federal regulation³³ which prohibited the use of “indecent or profane language by means of radio communications.”³⁴ A radio station owned by the Pacifica Foundation made an afternoon broadcast of a satiric monologue, entitled “Filthy Words,” which listed and repeated a variety of colloquial uses of “words you couldn’t say on the public . . . airwaves.”³⁵ The Federal Communication Committee (“FCC”) found that language in the monologue depicted sexual and excretory activities in a particularly offensive manner, and noted that they were broadcast in the early afternoon “when children are undoubtedly in the audience.”³⁶ The FCC concluded that the language as broadcast was indecent and could be prohibited.³⁷

Pacifica challenged the application of the FCC regulation to its broadcast as a violation of free speech but lost, 5–4, in the Supreme Court.³⁸ Justice John Paul Stevens, for the Court, wrote: “[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection;”³⁹ a result Justice Stevens justified, in part, by noting that radio broadcasts extend into “the privacy of the home,” where they are “uniquely accessible to children.”⁴⁰ Of the five Justices in the majority, only Justices Rehnquist and Stevens remain on the Court. All four dissenters, however, have now left the Court. The Burger Court’s resolution of the *Pacifica* case would seem to have created a framework for further regulation of electronic broadcasting by the subsequent, and decidedly more conservative, Rehnquist Court. However, that was not to be the case.

In *Sable Communications of California, Inc. v. FCC*,⁴¹ the new Rehnquist Court was confronted with a question raising issues that seemed identical to those in *Pacifica*.⁴² If Congress could prohibit or restrict the transmission of indecent radio broadcasts in the interest of protecting children, could it do the same when the transmission is of indecent interstate

32. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

33. 18 U.S.C. § 1464 (1973).

34. *Pacifica*, 438 U.S. at 731.

35. *Id.* at 729.

36. *Id.* at 732.

37. *Id.*

38. *Id.* at 751.

39. *Pacifica*, 438 U.S. at 748.

40. *Id.* at 748–49.

41. 492 U.S. 115 (1989).

42. *Id.* at 117–19.

commercial telephone messages, commonly known as "dial-a-porn?"⁴³ Relying on the Court's decision in *Pacifica*, the Justice Department argued in the affirmative.⁴⁴ However, dividing 6-3, the Rehnquist Court found in the negative.⁴⁵

The Court noted that "dial-a-porn" had become big business,⁴⁶ and in New York City alone, the "dial-a-porn" service "received six to seven million calls a month for the 6-month period ending in April 1985."⁴⁷ And much like the indecent broadcasts at issue in *Pacifica*, "dial-a-porn" services were also accessible, although not perhaps as accessible, to children in the privacy of the home.⁴⁸ The Court acknowledged that the government had a "compelling interest of preventing minors from being exposed to indecent telephone messages,"⁴⁹ but in this case Congress had gone too far, and its ban had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of 'burn[ing] the house to roast the pig.'"⁵⁰

There is no doubt that the government could not proscribe the indecent, although non-obscene, telephone messages in *Sable* from being printed in a newspaper,⁵¹ and *Pacifica* indicated the messages could be banned from radio and, presumably, television broadcasts.⁵² In 1997, the question arose as to how the Court should view "indecent" communications on the Internet.⁵³ The Communications Decency Act of 1996 ("CDA")⁵⁴ made it a crime to display "indecent" material online in a manner that might make it available to minors.⁵⁵ Key portions of the law had been found to violate free speech by a special three judge district court.⁵⁶ By the time the case reached the Rehnquist Court, there seemed to be a growing consensus that the

43. 47 U.S.C. § 223(b) (1988). "The statute, as amended in 1988, imposed an outright ban on indecent as well as obscene interstate commercial telephone messages." *Sable*, 492 U.S. at 117.

44. *Id.* at 127.

45. *Id.* at 131.

46. *Id.* at 120 n.3 (citing *Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 848 (2d Cir. 1986)).

47. *Id.*

48. *Sable*, 492 U.S. at 127-28.

49. *Id.* at 131.

50. *Id.* (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

51. See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

52. *Pacifica*, 438 U.S. at 738.

53. See *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997).

54. 47 U.S.C. §§ 223(a)(1)(B)-(2), (d)(1)(2).

55. *Id.*

56. *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996).

Justices would also find the provisions unconstitutional.⁵⁷ But what would be the basis of such a ruling? How would the Internet be viewed; what “test” would the Court apply to cyberspace speech; and should the Court treat it as it treated broadcasting in *Pacifica*? It has been argued that if there ever were a place “uniquely accessible to children”⁵⁸ in the privacy of the home, it would be cyberspace.⁵⁹ But unlike radio and television, indecent online messages are not likely to be found by accident or by merely changing stations. They must be intentionally sought, as might sexually explicit messages available through “dial-a-porn.”⁶⁰ Would that not make *Sable* the more applicable precedent?

In what has been called “the legal birth certificate of the Internet,”⁶¹ the Rehnquist Court, in a sweeping ruling, found cyberspace entitled to greater protection than either broadcasting or telephone communications.⁶² The Court struck down the CDA regulations as “content-based” and therefore subject to the most rigorous scrutiny.⁶³ The Justices were unanimous in the result, differing only on the scope of relief,⁶⁴ with Justice Stevens writing for a seven Justice majority: “The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”⁶⁵

The Court flatly rejected comparisons between the Internet and broadcasting, finding the latter considerably more accessible and intrusive, and thus more subject to regulation.⁶⁶ Veteran court watcher and author, Stephen J. Wermiel, called the decision an “intrepid First Amendment step into cyberspace” with a message that was “loud and clear that the Court views the Internet as a new forum for the open exchange of ideas and information.”⁶⁷

57. John M. Broder, *White House Is Set to Ease Its Stance on Internet Smut*, N.Y. TIMES, June 16, 1997, at 3A.

58. *Pacifica*, 438 U.S. at 749.

59. See generally *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

60. *Sable*, 492 U.S. 115.

61. Edward Felsenthal & Jared Sandberg, *High Court Strikes Down Internet Smut Law*, WALL ST. J., June 27, 1997, at B1 (quoting Bruce Ennis). Bruce Ennis argued the case in the Supreme Court on behalf of a coalition of civil rights and other groups opposed to the Communication Decency Act of 1996. *Id.*

62. *Reno*, 117 S. Ct. at 2351.

63. *Id.* at 2348.

64. *Id.* at 2351.

65. *Id.*

66. *Id.* at 2342.

67. Stephen Wermiel, “Let Them Talk Among Themselves,” LEGAL TIMES, July 14, 1997, at S46.

The Court, however, has neither been free of concerns about indecency nor entertained doubts about the right of democratically elected representatives to address its perceived harms through appropriate legislation. One of the more interesting and amusing, yet important, confrontations in this area came before the Rehnquist Court in *Barnes v. Glen Theater, Inc.*⁶⁸ The case involved a South Bend, Indiana night club, the Kitty Kat Lounge, and two of its employees, all of whom wanted to provide "totally nude dancing" as entertainment.⁶⁹ These parties claimed that the state's public indecency law, which requires dancers to wear at least pasties and a G-string, violates their First Amendment right to freedom of expression.⁷⁰

The United States Court of Appeals for the Seventh Circuit, sharply divided en banc and sided with the plaintiffs by ruling that nonobscene nude dancing performed for entertainment is protected expression and that the state law was an improper infringement on that activity "because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers."⁷¹

Dividing 5–4, the Supreme Court reversed the Seventh Circuit en banc.⁷² In his plurality opinion, Chief Justice Rehnquist agreed that totally nude dancing is "expressive conduct within the outer perimeters of the First Amendment"⁷³ but, citing the four-part "*O'Brien* test,"⁷⁴ concluded that the

68. 501 U.S. 560 (1991).

69. *Id.* at 563.

70. *Id.* at 564.

71. *Id.* at 565 (citing *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990)). The decision of the Seventh Circuit, per Judge Richard Posner, and the dissent, per Judge Frank Easterbrook, provide powerful and enlightening, but sharply opposing, viewpoints of the history and scope of freedom of expression embodied in the First Amendment. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089, 1120 (7th Cir. 1990). Could nude dancing and its "message of 'eroticism'" have been what the framers had contemplated protecting in drafting the First Amendment? *Id.* at 1118. The appeals court's conflicting rationales are highly recommended for an extensive explanation of these topics.

72. *Barnes*, 501 U.S. at 565.

73. *Id.* at 566.

74. *United States v. O'Brien*, 391 U.S. 367 (1968). The Court found that a government regulation is:

[S]ufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376–77. O'Brien burned his draft card on the steps of the South Boston courthouse in the presence of a sizable crowd; he was convicted of violating a statute that prohibited the

statute is justified despite “its incidental limitations on some expressive activity.”⁷⁵ Chief Justice Rehnquist found that “the statute’s purpose of protecting societal order and morality is clear from its text and history” and that the law “reflect[s] moral disapproval of people appearing in the nude among strangers in public places;” that it “furthers a substantial government interest in protecting order and morality;”⁷⁶ and “is unrelated to the suppression of free expression.”⁷⁷

V. FREEDOM OF SPEECH AND RACIALLY MOTIVATED HATE CRIMES

How to grapple with lingering racial hostilities in the United States has long been an issue that has divided the country. The issue generated remarkable division in the Supreme Court in 1992, when the Justices agreed to decide the constitutionality of a St. Paul, Minnesota ordinance—similar to ordinances in many cities and laws in forty states—that prohibited “hate crimes.”⁷⁸ The ordinance defined “hate crimes” as the display of a symbol which one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”⁷⁹ In *R.A.V. v. City of St. Paul, Minnesota*,⁸⁰ the ordinance was being applied for the first time against seventeen-year-old Robert A. Viktora, who had been accused of burning a cross on the front lawn of an African-American family that had just moved into the neighborhood.⁸¹ Viktora challenged the ordinance as a violation of free speech.⁸² In a 9–0 decision, the Justices agreed for sharply different reasons,⁸³ revealing a deep philosophical divide on the Court over the scope of free speech and the meaning of the Court’s own First Amendment jurisprudence.

Justice Scalia, writing for the five Justices in the majority,⁸⁴ said although the cross burning was “reprehensible,” the St. Paul ordinance violated free speech, and therefore Viktora could not be prosecuted under an

knowing destruction or mutilation of such a card. *Id.* at 369. The Supreme Court affirmed. *Id.* at 377.

75. *Barnes*, 501 U.S. at 567.

76. *Id.* at 569.

77. *Id.* at 568–70.

78. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

79. *Id.* at 380 (quoting ST. PAUL, MINN., CRIMINAL ORDINANCE CODE § 292.02 (1990)).

80. 505 U.S. 377 (1992).

81. *Id.* at 379–80.

82. *Id.* at 380.

83. *Id.* at 381.

84. Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas joined the majority opinion.

unconstitutional statute.⁸⁵ To Justice Scalia, it was as if a city council, having the authority to ban obscenity, chose to enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government.⁸⁶ "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."⁸⁷ The St. Paul ordinance, concluded Scalia, fostered an unconstitutional content-based discrimination "silencing speech on the basis of its content."⁸⁸

The Supreme Court of Minnesota sought to save the ordinance by giving it the most narrow construction,⁸⁹ concluding that it only reached those expressions that constitute "fighting words" within the meaning of *Chaplinsky v. New Hampshire*,⁹⁰ which have no First Amendment protection and which the state has the power to proscribe.⁹¹ But Justice Scalia, for the Court, said St. Paul had erred in singling out certain kinds of "fighting words" for special condemnation.⁹² The ordinance imposed special prohibitions on those speakers who express views on the "disfavored subjects" of race, color, creed, religion, or gender while at the same time the ordinance permitted displays containing abusive invective as long as they were not addressed to those topics.⁹³ In addition to "content discrimination," Justice Scalia went on to find that the St. Paul ordinance also amounted to unconstitutional "viewpoint discrimination" in that displays containing "fighting words" that do not relate to race, color, creed, or gender would seemingly be useable by those arguing in favor of racial tolerance and equality but not by their opponents.⁹⁴ "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules."⁹⁵

Seldom in the Court's history has a majority opinion evoked such vitriol in a concurring opinion, from Justices who agreed with the result but

85. *R.A.V.*, 505 U.S. at 396.

86. *Id.*

87. *Id.* at 394.

88. *Id.* at 392.

89. *Id.* at 385. It is settled that the United States Supreme Court is bound by the construction given a state law or municipal ordinance by that state's highest court. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 339 (1986); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982).

90. 315 U.S. 568, 574 (1942) (holding that "fighting words" have no First Amendment protection).

91. *R.A.V.*, 505 U.S. at 391.

92. *Id.*

93. *Id.*

94. *Id.* at 391-92.

95. *Id.* at 392.

disagreed with how the Court's majority had reached the decision.⁹⁶ Justice White, writing for the concurrence⁹⁷ dismissed the Court's opinion as "arid and folly" and "transparently wrong."⁹⁸ Where Justice Scalia seemed to view the ordinance as underinclusive, allowing offensive speech on some issues but not others, Justice White viewed the problem as one of overbreadth, allowing criminal penalties not only for unprotected expression but for expression protected by the First Amendment as well.⁹⁹ To Justice White, the problem was that speech or expressive activity that merely "causes hurt feelings, offense, or resentment" is nonetheless protected by the First Amendment.¹⁰⁰ St. Paul's proscription of such speech was thus "fatally overbroad and invalid on its face."¹⁰¹ In the view of Justice White and the three other Justices who joined his opinion, a more carefully drafted law with the same end but directed only at "fighting words" rather than words that are merely obnoxious, insulting, or otherwise offensive, would face no First Amendment obstacle.¹⁰²

Yet to the many civil rights groups that had urged the Court to uphold the St. Paul ordinance,¹⁰³ it was not the Court's hotly disputed reasoning but the result of the unanimous decision that was most worrisome. The decision had placed a constitutional cloud over another popular legislative approach to the hate crime issue: punishing existing crimes like vandalism or harassment more severely if prosecutors can show that racial, religious, or

96. See generally *R.A.V.*, 505 U.S. at 397 (White, J., concurring).

97. Justices White, Blackman, and O'Connor concurred with Justice Stevens joining in part.

98. *R.A.V.*, 505 U.S. at 398, 415 (White, J., concurring). The Court's "decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion." *Id.*

99. *Id.* at 397.

100. *Id.* at 414 (White, J., concurring).

101. *Id.*

102. *R.A.V.*, 505 U.S. at 414. Justice Scalia's concern that lawmakers may not regulate some fighting words more strictly than others might conceivably have been ameliorated had St. Paul merely added to its ordinance a catch-all phrase such as "and all other fighting words that may constitutionally be subject to this ordinance." *Id.* at 402.

103. One journalist comments:

With the desire to punish racist intimidation colliding with free speech concerns, the case split groups that are normally allied. Some organizations—the Anti-Defamation League, the NAACP and People for the American Way—supported the law's constitutionality; others, including the American Civil Liberties Union and the American Jewish Congress, argued against it.

Ruth Marcus, *Supreme Court Overturns Law Barring Hate Crimes; Free Speech Ruling Seen as Far Reaching*, WASH. POST, June 23, 1992, at A1.

gender bias was a factor in the underlying crime. Marc Stern of the American Jewish Congress told *The Washington Post* "that the penalty-enhancement statutes are 'very doubtful after today If you enhance for race and not for sexual orientation, you have the same content basis you have here'" that invalidated the St. Paul ordinance.¹⁰⁴

The answer to many of these questions would come soon enough. A year later, in 1993, the Court considered the case of *Wisconsin v. Mitchell*.¹⁰⁵ Todd Mitchell was convicted of aggravated battery in Wisconsin, where the offense ordinarily carries a maximum sentence of two years imprisonment.¹⁰⁶ But because the jury found that Mitchell had intentionally selected his victim because of race, the maximum sentence for Mitchell's offense was more than tripled to seven years under the state's enhancement statute.¹⁰⁷ Relying on the United States Supreme Court's decision in *R.A.V.*, the Wisconsin Supreme Court rejected the enhanced sentence, holding that the Wisconsin statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought."¹⁰⁸ The United States Supreme Court reversed, thus reinstating Wisconsin's law and Mitchell's seven-year sentence.¹⁰⁹ Chief Justice Rehnquist noted that sentencing judges have traditionally considered a wide variety of factors in addition to evidence bearing solely on guilt.¹¹⁰ While a judge may not take into consideration a defendant's abstract beliefs, however obnoxious to most people, the Court concluded that the Constitution "does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations . . . simply because those beliefs and associations are protected by the First Amendment."¹¹¹ The unanimous decision was devoid of the stormy rhetoric found in the *R.A.V.* case.

104. *Id.*

105. 508 U.S. 476 (1993).

106. *Id.* at 480 (citing WIS. STAT. § 940.19(2) (1997) (effective 1993) and § 939.50(3)(e) (1997)).

107. WIS. STAT. § 939.645(1)(b) (1997) (effective May 3, 1988) (enhancing the maximum penalty for an offense whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the . . . race, religion, color, disability, sexual orientation, national origin or ancestry of that person").

108. *Mitchell*, 508 U.S. at 481-82 (quoting *State v. Mitchell*, 485 N.W.2d 807, 811 (1992)).

109. *Id.* at 483.

110. *Id.* at 485.

111. *Id.* at 486.

VI. FREEDOM OF SPEECH AND PROTEST DEMONSTRATIONS

Other than *Brown v. Board of Education*,¹¹² which is now universally accepted, no other Supreme Court decision has generated more controversy than the landmark abortion ruling in *Roe v. Wade*.¹¹³ The *Roe* decision remains the focal point of heated debate throughout the country. In 1992, the Court was within one vote of overruling *Roe* in *Planned Parenthood v. Casey*.¹¹⁴ Justice Kennedy, a Reagan appointee upon whom many had counted to provide a fifth vote to overrule *Roe*, instead provided the fifth vote to reaffirm the decision. Justice White, one of the two dissenters in *Roe*,¹¹⁵ subsequently departed from the Court, and Ruth Bader Ginsburg, widely believed to be pro-choice, was appointed to his seat. The right to choose an abortion appears to be more secure today than at any point in the preceding decade, at least in the United States Supreme Court. But having lost in the courts, anti-abortionists have increasingly taken their cause to the streets and directly to the front doors of abortion clinics. In many cases, the message has not been subtle: the purpose of their presence was to prevent women from obtaining abortions.¹¹⁶

In 1994, the Supreme Court sought to balance the right to choose an abortion against the right to speak in *Madsen v. Women's Health Center, Inc.*¹¹⁷ Two years earlier, anti-abortion activists had staged a series of demonstrations at the Women's Health Center in Melbourne, Florida.¹¹⁸ Upon finding that access to the clinic was being impeded and potential patients were being discouraged from entering, a Florida state judge issued an injunction directed at the protesters.¹¹⁹ The injunction created buffer zones that protesters could not enter, noise restrictions during hours when the clinic might be providing abortions or abortion related services, and other

112. 347 U.S. 483 (1954).

113. 410 U.S. 113 (1973).

114. 505 U.S. 833 (1992).

115. The other dissenter was Justice Rehnquist, then an Associate Justice, and, at the time of this writing, the only Justice still on the Court to have participated in the *Roe* decision. *Roe*, 410 U.S. at 171.

116. Since the Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), there have been at least four fatal acts of violence at U.S. abortion clinics: in Pensacola, Florida, March 10, 1993, and again on July 29, 1994, in Pensacola; in Brookline, Massachusetts on December 30, 1994; and in Birmingham, Alabama on January 29, 1998. From Associated Press news reports.

117. 512 U.S. 753 (1994).

118. *Id.* at 758.

119. *Id.*

restrictions.¹²⁰ Abortion opponents argued that the noise restrictions violated their right to free speech.¹²¹

In an opinion by Chief Justice Rehnquist, the Court upheld most of the injunctive measures but also took special note of the free speech rights of demonstrators.¹²² The Court said that "standard time, place, and manner analysis is not sufficiently rigorous" for evaluating content-neutral injunctions that restrict speech; instead, the test is "whether the challenged provisions . . . burden no more speech than necessary to serve a significant government interest."¹²³

It would take three years to determine what these words in *Madsen* actually meant. The case, *Schenck v. Pro-Choice Network*,¹²⁴ involved a network of abortion clinics in upstate New York that the Court found had been under siege by anti-abortion activists.¹²⁵ "[T]he clinics were subjected to numerous large-scale blockades in which protesters would march, stand, kneel, sit, or lie in [clinic] parking lot driveways and doorways," blocking or hindering cars from entering the lots, and hindering both patients and clinic employees from entering the clinics.¹²⁶ In addition, smaller groups of protesters consistently attempted to stop or disrupt clinic operations by, among other things, milling around clinic doorways and driveway entrances, trespassing onto clinic parking lots, crowding around cars, and surrounding, crowding, jostling, grabbing, pushing, shoving, yelling, and spitting at women and their escorts entering the clinics.¹²⁷ Outside the clinics, anti-abortion protesters called "sidewalk counselors" used similar methods in attempting to dissuade women headed toward the clinics from having abortions.¹²⁸ The local police were ineffective in responding to the protests.¹²⁹

The district court issued a temporary restraining order and later, after the protests and sidewalk counseling continued, a preliminary injunction order.¹³⁰ The injunction banned "demonstrating . . . within fifteen feet . . . of . . . doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of [clinic] facilities," ("fixed buffer zones") similar to

120. *Id.* at 759–61 (citing *Operation Rescue v. Woman's Health Ctr.*, 626 So. 2d 644, 679–80 (Fla. 1993)).

121. *Id.* at 761.

122. *Madsen*, 512 U.S. at 793.

123. *Id.* at 765.

124. 117 S. Ct. 855 (1997).

125. *Id.* at 860.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Schenck*, 117 S. Ct. at 860.

130. *Id.* at 861.

those allowed in *Madsen*, or “within fifteen feet of any person or vehicle seeking access to or leaving such facilities” (“floating buffer zones”).¹³¹

Again, it was Chief Justice Rehnquist who wrote the Court’s majority opinion and, applying *Madsen*, upheld the fixed buffer zone but struck down the floating zone.¹³² Chief Justice Rehnquist was troubled by the fact that the floating buffer zones prevented demonstrators from communicating a message from a normal conversational distance or handing leaflets to people on the public sidewalks who were entering or leaving the clinics.¹³³ Chief Justice Rehnquist stated:

This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.¹³⁴

There was something in the decision for everyone, and abortion rights advocates as well as the foes, were all quick to declare victory.¹³⁵ But, it was a compromise ruling with freedom of speech emerging as the larger winner. *The Los Angeles Times* called the decision an important victory for “[f]ree speech of the loud, aggressive, in-your-face variety . . . one that could shape future sidewalk confrontations on matters ranging from animal rights and union picketing to street beggars and celebrity photographers.”¹³⁶

VII. FREEDOM OF SPEECH AND THE PROFITS OF CRIME

When asked to analyze a Supreme Court ruling giving extraterritorial effect to a law bashing the Philippines, the sagacious but fictitious Chicago saloon keeper, Mr. Dooley,¹³⁷ issued in Irish dialect his often quoted

131. *Id.* at 862 (quoting *Pro-Choice Network v. Project Rescue W. N.Y.*, 799 F. Supp. 1417, 1440–41 (W.D.N.Y. 1992)).

132. *Id.* at 866–67.

133. *Id.* at 867.

134. *Schenck*, 117 S. Ct. at 867.

135. See Joan Biskupic, *Court Backs Capital Fixed 15-Foot Buffer Zone at Clinics; Justices Condemn Some Antiabortion Tactics in Ruling that Reinforces a 1994 Decision*, WASH. POST, February 20, 1997, at A18; Linda Greenhouse, *High Court Upholds 15-Foot Capital Buffer Zone at Abortion Clinics*, N.Y. TIMES, February 20, 1997, at A1.

136. David Savage, *‘In-Your-Face’ Speech Wins in Supreme Court*, L.A. TIMES, February 22, 1997, at A1.

137. Peter Finley Dunne, a famous turn-of-the-century political commentator in Chicago, wrote under the pseudonym of “Mr. Dooley.”

reply: "No matter whether the Constitution follows the flag or not, the Supreme Court follows the 'iliction returns.'" In a narrow sense, Mr. Dooley may be correct for Supreme Court Justices, like all Article III judges, must be nominated by the elected President and confirmed by elected senators.¹³⁸ Those who reach the Supreme Court bench are a function of, and naturally follow from, those who reach the White House and the Senate. Mr. Dooley, however, is incorrect in every other respect. Once given the nod, federal judges serve for life and, unlike elected representatives, have the unique freedom to insulate themselves from popular opinion. The wisdom of this arrangement becomes particularly evident in matters of free speech where the Justices, with some consistency, reach decisions that are at least "arguably" faithful to the Constitution but clearly at odds with current public sentiment. Mr. Dooley might appreciate how the Supreme Court balanced New York's "Son of Sam" law with freedom of speech in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*.¹³⁹

During the summer of 1977, David Berkowitz was identified as the serial killer known as the "Son of Sam." After his arrest, Berkowitz was offered a large sum of money for the rights to his story. However, the New York legislature quickly acted to prevent such compensation since the families of the victims remained uncompensated.¹⁴⁰

The legislature enacted a statute¹⁴¹ intended to "ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering."¹⁴² The measure had overwhelming support. The author of the statute explained: "It is abhorrent to one's sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured--while five people are dead, [and] other people were injured as a result of his conduct."¹⁴³

New York's "Son of Sam" law as amended required that an accused or convicted criminal's income, from works describing his crime, be deposited in an escrow account held by the state Crime Victims Board and ultimately made available to the victims of the crime and the criminal's other creditors.¹⁴⁴ The law was seldom applied and, in 1986, the "Son of Sam"

138. U.S. CONST. art. II, § 2, cl. 2.

139. 502 U.S. 105 (1991).

140. *Id.* at 108.

141. N.Y. [law] § 632-(a)(1) (McKinney 1982 & Supp. 1991).

142. *Simon & Schuster*, 502 U.S. at 108 (citing to N.Y. [law] § 632(a)(1) (McKinney 1982 & Supp. 1991)).

143. *Id.* (quoting Senator Emanuel R. Gold), *reprinted in* N.Y. LEGISLATIVE ANN. 267 (1997).

144. *Id.* at 111. "Ironically, the statute was never even applied to the Son of Sam himself; David Berkowitz was found incompetent to stand trial, and the statute applied only to

law was challenged on free speech grounds by Simon & Schuster, Incorporated, a publishing house.¹⁴⁵ Simon & Schuster had entered into a contract with Henry Hill, a mid-level foot soldier in one of New York's Mafia families from 1955 to 1980.¹⁴⁶ Hill, who had engineered some of the most daring crimes of his day, including the theft of \$6 million from Lufthansa Airlines in 1978, was arrested in 1980 on extortion, narcotics, and a variety of other charges.¹⁴⁷ In exchange for immunity from prosecution, he testified against many of his former colleagues.¹⁴⁸ Collaborating with author Nicholas Pileggi, Hill produced a book, *Wiseguy: Life in a Mafia Family*, which depicts "in colorful detail, the day-to-day existence of organized crime."¹⁴⁹ The book was a phenomenal success—with more than a million copies in print within nineteen months of its publication.¹⁵⁰ A few years later, *Wiseguy* was converted into a feature length film called *Goodfellas*, which won a host of awards as the best film of 1990.¹⁵¹

While the notoriety may have created a windfall for Simon & Schuster, it also brought the attention of the Crime Victims Board.¹⁵² The Board notified Simon & Schuster that under New York's "Son of Sam" law the Board was entitled to any monies due to Hill.¹⁵³ In the ensuing litigation, Simon & Schuster argued that the state's law, by now duplicated in forty states and the federal government,¹⁵⁴ was inconsistent with the First Amendment.¹⁵⁵

criminals who had actually been convicted." *Id.* (citing to Dennis Hevesi, *Cases Under "Sam" Law: Notorious but Few*, N.Y. TIMES, Feb. 20, 1991, at B8). Berkowitz did assist in the writing of his story but, according to the Crime Victims Board, voluntarily paid his share of the royalties from the book SON OF SAM published in 1981 to his victims or their estates. *Id.*

145. *Simon & Schuster*, 502 U.S. at 105.

146. *Id.* at 112.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Simon & Schuster*, 502 U.S. at 114.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 123.

155. *Simon & Schuster*, 502 U.S. at 115. The federal statute, 18 U.S.C. § 3681 (1997) (effective Oct. 12, 1984), was passed, with strong bipartisan support, as part of the Victims of Crime Act of 1984 after more than a decade of congressional debate regarding the need for the federal government to provide compensation and assistance to the victims of crime. Victims of Crime Act of 1984, Title II, ch. XIV, Pub. L. No. 98-473, § 1406(a) (1984).

The Justice Department entered the case, *amicus curiae*, on the side of New York and in defense of the federal statute which had been placed in jeopardy by the case.¹⁵⁶ Government lawyers argued:

Statutes limiting the profits criminals receive from expressive works that describe their crimes substantially further government interests of the highest order . . . The spectacle of criminals profiting from books or movies recounting their unlawful actions understandably and appropriately is perceived as aggravating the harm already inflicted on the victims of those actions.¹⁵⁷

The government's brief also quoted from the testimony of a former Congressman before the Senate Judiciary Committee while the Committee was considering enacting a law similar to the one in New York: "There is something basically wrong about a system of justice which allows a criminal to profit from his crime while his victims continue to suffer."¹⁵⁸

The Supreme Court, however, saw the issue quite differently. Justice Sandra O'Connor, writing for the Court, did acknowledge that "the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them"¹⁵⁹ and "an undisputed compelling interest in ensuring that criminals do not profit from their crimes,"¹⁶⁰ but O'Connor concluded the law was not narrowly tailored to achieve the state's compelling interest.¹⁶¹ As evidence of its "overinclusiveness," O'Connor suggested that the law could have been invoked to confiscate the proceeds of *Civil Disobedience*,¹⁶² where Henry David Thoreau acknowledged his refusal to pay taxes, and even *The Confessions of Saint Augustine*,¹⁶³ where the author laments "'my past foulness and the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring vineyard."¹⁶⁴

156. Brief for the United States as *Amicus Curiae*, *Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, 502 U.S. 105 (1990) (No. 90-1059).

157. *Id.* at 6.

158. *Comprehensive Crime Control Act, 1984: Hearings on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 23 (1984) (statement of M. Butler, constitutional expert).

159. *Simon & Schuster, Inc.*, 502 U.S. at 118.

160. *Id.* at 119.

161. *Id.* at 123.

162. HENRY DAVID THOREAU, *WALDEN AND ON THE DUTY OF CIVIL DISOBEDIENCE* (New American Library 1960) (1849).

163. AUGUSTINE SAINT BISHOP OF HIPPO, *THE CONFESSIONS OF SAINT AUGUSTINE* (J.G. Pilkington trans., Heritage Press 1963).

164. *Simon & Schuster*, 502 U.S. at 121 (quoting AUGUSTINE, *supra* note 163).

Only Justice Kennedy, who concurred in the judgment, objected to the use of the “compelling state interest” test, which derives from the Court’s equal protection jurisprudence.¹⁶⁵ Justice Kennedy said the law should be rejected solely on the ground that it was a regulation based on content which has the full protection of the First Amendment.¹⁶⁶ “[R]esort to the [compelling state interest] test,”¹⁶⁷ warned Justice Kennedy, “might be read as a concession that [s]tates may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference.”¹⁶⁸ Justice Kennedy’s point on the appropriate test is all but certain to be revisited in future free speech clashes before the high Court.

The Court’s decision in the *Simon & Schuster* case did not prevent Hill or any other criminals from being sued by those they may have hurt, but it prohibited states from singling out profits from books or movies to be set aside for the victims’ benefit.¹⁶⁹ New York had the support of dozens of other states, the Justice Department, and at least half a dozen victims’ rights groups.¹⁷⁰ Two lower courts and the New York Court of Appeals,¹⁷¹ the state’s highest court, had all upheld the “Son of Sam” law.¹⁷² The United States Supreme Court was surely not following any election returns when it rejected it as a violation of free speech.¹⁷³ And at least on the Court, there were no dissents.¹⁷⁴

VIII. FREEDOM OF SPEECH AND POLITICAL PATRONAGE

More than a hundred years ago, Justice Holmes, in his famous dictum, said a policeman “may have a constitutional right to talk politics, but he has

165. *Id.* at 124 (Kennedy, J., concurring). See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

166. *Simon & Schuster*, 502 U.S. at 124.

167. *Id.*

168. *Id.* at 124–25.

169. *Id.* at 109.

170. *Id.* at 115.

171. On May 7, 1991, the New York State Court of Appeals, by unanimous vote, ruled that convicted murderer Jean Harris was not entitled to, and could not assign to others, royalties from her best-selling book *STRANGER IN TWO WORLDS*. *Children of Bedford, Inc. v. Petromelis*, 573 N.E.2d 541, 543 (1991), *vacated*, 502 U.S. 1025 (1992).

172. *Simon & Schuster*, 502 U.S. at 115.

173. *Id.* at 107.

174. Justice O’Connor delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices White, Stevens, Scalia, and Souter joined. Justices Blackmun and Kennedy filed opinions concurring in the judgment. Justice Thomas, who did not join the Court until eight days after the case was argued, did not participate. *Id.* at 123–24.

no constitutional right to be a policeman.”¹⁷⁵ The Burger Court had come a long way in modifying, if not outright rejecting, that idea. The Court has held, in effect, that while there may be no constitutional right to be a policeman, the government has no right to condition the employment of police officers or any other civil servants on what they say or believe.¹⁷⁶

The Rehnquist Court has not only embraced *Elrod v. Burns*¹⁷⁷ and *Branti v. Finkel*,¹⁷⁸ it has expanded on them, extending their free speech protections from government employees to those who merely apply for government work.¹⁷⁹ The four dissenters in *Rutan v. Republican Party of Illinois*,¹⁸⁰ led by Justice Scalia, argued that “the desirability of patronage is a policy question to be decided by the people’s representatives”¹⁸¹ and “a political question if there ever was one.”¹⁸² The dissenters were convinced that *Elrod* and *Branti* were “not only wrong, not only recent, not only contradicted by a long prior tradition, but also . . . unworkable in practice” and therefore “should be overruled.”¹⁸³

Notwithstanding that *Rutan* was decided by the thinnest of margins over the most impassioned dissent, the Rehnquist Court chose to enlarge upon the decision rather than retreat by dealing, what dissenting Justices considered, a body blow to political patronage as we have known it. The latest conflict arose in two cases in 1996, *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*¹⁸⁴ and *O’Hare Truck Service, Inc. v. City of Northlake*.¹⁸⁵

Umbehr involved an independent contractor, Keen Umbehr, who contracted with the Wabaunsee County Board of Commissioners “for him to be the exclusive hauler of trash for cities in the county.”¹⁸⁶ But “[d]uring the term of his contract, Umbehr was an outspoken critic” of the Board who voiced his criticisms at the Board’s meetings and in letters and editorials in local newspapers.¹⁸⁷ Umbehr’s allegations that the Board was in the habit of violating the state’s Open Meetings Act “were vindicated in a consent decree

175. *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

176. *See, e.g., Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

177. 427 U.S. 347 (1976).

178. 445 U.S. 507 (1980).

179. *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

180. *Id.*

181. *Id.* at 104 (Scalia, J., dissenting).

182. *Id.* at 114.

183. *Id.* at 110–11.

184. 116 S. Ct. 2342 (1996).

185. 116 S. Ct. 2353 (1996).

186. *Umbehr*, 116 S. Ct. at 2345.

187. *Id.*

signed by the Board's members."¹⁸⁸ In addition, "Umbehr also ran unsuccessfully for election to the Board."¹⁸⁹

Board members "allegedly took Umbehr's criticism badly," voting 2-1 to terminate his exclusive contract with the County.¹⁹⁰ Umbehr sued the two majority Board members under chapter 42 of the United States Code section 1983,¹⁹¹ claiming that the termination of his government contract was in retaliation to his criticism of the County and the Board.¹⁹²

The *O'Hare Truck Service* case raised similar questions about the practice of elected politicians favoring their friends and disfavoring their enemies.¹⁹³ John Gratziana owned and operated O'Hare Truck Service. The company was among those called from time to time by the City of Northlake, Illinois to perform towing services. Shortly after Gratziana refused to contribute to the incumbent mayor's reelection campaign and sided openly with his opponent, Gratziana was removed from the list of those towing companies to be called.¹⁹⁴ Consequently, Gratziana sued the City under chapter 42 of the United States Code section 1983, claiming infringement of his First Amendment rights.¹⁹⁵

Both Umbehr and Gratziana did work "for" the government, but neither were employees "of" the government. They were independent contractors.¹⁹⁶ The Court found the distinction constitutionally insignificant and went on to extend *Rutan's* First Amendment protection for job "applicants" to independent contractors.¹⁹⁷ Both the *Umbehr* case¹⁹⁸ and the *O'Hare* case¹⁹⁹ were decided by a lopsided 7-2 votes, with Justices Scalia and Thomas in dissent. This was no small matter to Justice Scalia who, in one of his most memorable, and passionate dissents, characterized the decisions as a twin assault on the American political system itself.

Justice Scalia stated:

They say hard cases make bad law. The cases before the Court today set the blood boiling, with the arrogance that they seem to display on the part of elected officials For every extreme case

188. *Id.*

189. *Id.*

190. *Id.*

191. *Umbehr*, 116 S. Ct. at 2345.

192. *Id.* at 2345-46.

193. *O'Hare*, 116 S. Ct. at 2355.

194. *Id.* at 2353-54.

195. *Id.*

196. *Id.*

197. *See Umbehr*, 116 S. Ct. at 2350; *O'Hare*, 116 S. Ct. at 2360.

198. *Umbehr*, 116 S. Ct. at 2361 (Scalia, J., dissenting).

199. *O'Hare*, 116 S. Ct. at 2361 (Scalia, J., dissenting).

of the sort *alleged* here, I expect there are thousands of contracts awarded on a "favoritism" basis that no one would get excited about. The Democratic mayor gives the city's municipal bond business to what is known to be a solid Democratic law firm—taking it away from the solid Republican law firm that had the business during the previous, Republican, administration. What else is new? . . . Hooray! Favoritism such as this happens all the time in American political life, and no one has ever thought that it violated—of all things—the First Amendment to the Constitution of the United States.

The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize. Depending upon which of today's cases one chooses to consider authoritative, it has either (*O'Hare*) thrown out vast numbers of practices that are routine in American political life in order to get rid of a few bad apples; or (*Umbehr*) with the same purpose in mind subjected those routine practices to endless, uncertain, case-by-case, balance-all-the-factors, and-who-knows-who-will-win litigation.

I dissent.²⁰⁰

Allowing those in power to award benefits and privileges to their friends and supporters has been sanctioned by history.²⁰¹ But Justice O'Connor, writing for the Court in *Umbehr*, and Justice Kennedy, writing for the Court in *O'Hare*, both felt existing precedents were sufficient to balance the interest of patronage with the right to free speech.²⁰² Both decisions rely heavily on *Pickering v. Board of Education of Township High School District 205*.²⁰³ Originally applicable only to government employees, *Pickering* held that the interests of the [employee] "as a citizen, in commenting upon matters of public concern" be balanced "against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."²⁰⁴ While the decisions in *Umbehr* and *O'Hare* clearly extend First Amendment protection to independent contractors, they leave open the possibility they may not be entitled to quite the same "degree" of protection as government employees.

In the broader context, however, *Umbehr* and *O'Hare* reinforce the perception that the Rehnquist Court views the First Amendment right to free

200. *Id.* at 2373–74 (Scalia, J., dissenting.).

201. *Elrod*, 427 U.S. at 377–78 (Powell, J., dissenting.).

202. *Umbehr*, 116 S. Ct. at 2347; *O'Hare Truck Serv.*, 116 S. Ct. at 2356.

203. 391 U.S. 563 (1968).

204. *Id.* at 568.

speech broadly. Reasonable minds can disagree over whether this is an auspicious development. Some, such as Justice Scalia in the patronage cases, would seem to believe the Court has been overprotective of speech or expressive activity at the expense of other rights and interests. I leave it to the reader to draw an independent conclusion.

The Rehnquist Court, however, does not speak with one voice on any single issue; it is, after all, a collegial body. Nor has the Rehnquist Court been uniform in its approach to freedom of speech. Freedom of speech does not always carry the day. The Court, for example, had expressed concern over whether the federal government had a sufficiently substantial interest in requiring local cable television operators to carry the programming of local broadcasters.²⁰⁵ In 1997, the Court concluded that it did, and thus the Federal Communication Commission "must carry" rule faced no First Amendment impediment.²⁰⁶ Similarly, the Court found no First Amendment violation when Florida required its lawyers to wait until thirty days after an accident or disaster before contacting victims or their relatives.²⁰⁷ Despite powerful arguments and advocacy to the contrary, the Court concluded the state's interest in discouraging "ambulance chasing" by its lawyers outweighed any free speech concerns.²⁰⁸ The Rehnquist Court reaffirmed that freedom of speech is susceptible to time, place, and manner restrictions in *Ward v. Rock Against Racism*,²⁰⁹ allowing New York City to require those desiring to stage rock concerts in Central Park to rent a city-owned sound system, a requirement the Court justified by the New York's interest in controlling noise in a public park.²¹⁰ In *Frisby v. Schultz*,²¹¹ the Court found no First Amendment violation in communities which banned picketing of private dwellings.²¹² The Court has consistently tolerated a diminished First Amendment right for students in public schools, ruling that their newspapers are subject to censorship by school officials²¹³ and that students may be disciplined for using gross sexual innuendo in a student assembly speech without violating the First Amendment.²¹⁴

205. *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997).

206. *Id.* at 1203.

207. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 620 (1995).

208. *Id.* at 628.

209. 491 U.S. 781 (1989).

210. *Id.* at 803.

211. 487 U.S. 474 (1988).

212. *Id.* at 488.

213. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

214. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *see also* *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (upholding the First Amendment right of high school students to wear black armbands to protest the Vietnam war, cited with approval in *Hazelwood* and *Bethel*).

The Court's approach to commercial speech has been somewhat schizophrenic. In 1996, the Court rejected, on free speech grounds, Rhode Island's ban on liquor price advertising in a decision that cast doubt on efforts by the Clinton administration to sharply restrict cigarette advertising.²¹⁵ The following year, however, the Court, divided 5-4, found no First Amendment obstacle in the government requiring agricultural producers to pay for generic advertising to promote their products, notwithstanding their belief that the advertising was unwanted, unnecessary, and may have even been misleading or false.²¹⁶

However, the defeats for freedom of speech in the Rehnquist Court have been truly dwarfed by the victories.²¹⁷ Although there may be shifting majorities and close votes, there can be little doubt as to where the Court is generally going in this area. And on the thorniest, most explosive case, those cases that divide lower court judges, lawyers, law students, and lay persons alike, there has been a consistent majority at the Supreme Court on the side of a broad right to free speech.

215. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996). The decision cast doubt on the viability of *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

216. Glickman v. Wileman Bros. & Elliot, Inc., 117 S. Ct. 2130, 2137 (1997).

217. See, e.g., Colorado Republican Fed. Campaign Comm. v. Federal Elections Comm'n, 116 S. Ct. 2309, 2314-15 (1996) (rejecting federal limits on "uncoordinated" expenditures by political parties on behalf of candidates as inconsistent with the First Amendment); McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 357 (1995) (rejecting Ohio's prohibition on the anonymous distribution of campaign literature); United States v. National Treasury Employees Union, 513 U.S. 454, 457 (1995) (rejecting, on free speech grounds, a federal ban on government employees accepting honoraria for speeches, writings, etc.); City of LaDue v. Gilleo, 512 U.S. 43, 58-59 (1994) (rejecting a municipal ordinance banning the posting of signs in residential neighborhoods in order to reduce "visual clutter"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 431 (1993) (rejecting a municipal ordinance banning distribution of "commercial handbills" via news racks otherwise permitted on public property); Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 137 (1992) (linking parade permit fees to anticipated costs to the county rejected as content-based violation of free speech); The Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) (stating one may not criminalize truthful publication of the names of rape victims obtained from public records); Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (holding no libel action for transparently fictitious satire of public figure); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) (holding that the burden is on libel plaintiff to prove allegedly libelous news report are false rather than on defendant to prove accuracy or absence of malice).

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The Jurisprudence of the Rehnquist Court

Kathleen M. Sullivan

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I. INTRODUCTION

Popular discourse about the Supreme Court often seeks to characterize its direction in political terms. Yet the Rehnquist Court, while it has undoubtedly turned rightward, has never turned as starkly rightward as predicted in such accounts,¹ even though Presidents Reagan and Bush between them filled five seats on the current Court.² To be sure, President Clinton—with two appointments of his own in the last five years—has had the chance to counterbalance the Reagan-Bush nominations.³ But both before and after Clinton's appointments, it was evident that Justices who were expected to be "conservative" sometimes voted for "liberal" or "moderate" results.

Why might this be so? One explanation might be that court-packing is simply harder than it looks, and a president's ability to predict the judicial orientation of his nominees is inherently prone to error.⁴ President Eisenhower is famously said to have labeled as "mistakes" his appointments

1. Compare David G. Savage, *Turning Right: The Making of the Rehnquist Court* (1992) with James F. Simon, *The Center Holds* (1995).

2. President Reagan nominated, and the Senate confirmed, Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy, in addition to elevating Justice William Rehnquist to the Chief Justiceship. President Bush nominated, and the Senate confirmed, Justices David Souter and Clarence Thomas.

3. President Clinton nominated, and the Senate confirmed, Justices Ruth Bader Ginsburg and Stephen Breyer.

4. See, e.g., Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1130 (1994).

of Chief Justice Earl Warren and Justice William J. Brennan, Jr.⁵ Likewise, President Nixon's appointment of Justice Harry A. Blackmun hardly produced, as expected, a conservative "Minnesota Twin" to Chief Justice Warren Burger. And those who predicted that Justice David Souter's appointment would be a "home run" for conservative causes later lamented that it had been something less than a bunt.

But three other explanations seem more powerful than presidential miscalculation alone. This essay seeks to explore those explanations. First, the institutional structure of the Court may constrain or systematically moderate ideological tendencies. Second, a Justice's jurisprudential commitments may limit his or her expression of ideological orientation. Finally, the very concept of conservative judicial ideology is quite complex, and thus an apparently "liberal" result sometimes represents simply the dominance of one strand of conservatism over others. These institutional, jurisprudential, and ideological factors might help explain the surprising moderation of Justices predicted to be conservative.

II. THE PHENOMENON OF IDEOLOGICAL SHORTFALL

Without doubt, the Rehnquist Court has taken positions consistent with conservative politics in a variety of constitutional areas since 1980. The Court has narrowed pregnant women's rights against state regulation of abortion⁶ and rejected the claim that consensual homosexual sex is protected by the same conception of liberty that had earlier protected access to abortion and contraception.⁷ The Court has likewise declined to extend such liberty rights to physician-assisted suicide.⁸ The Court has been increasingly willing to invalidate race-based affirmative action programs,⁹ even when implemented by the federal government.¹⁰ In an analogous line of cases, the Court has struck down several state attempts to create majority-minority

5. Asked whether he had made any mistakes as President, Eisenhower said: "Yes, two, and they are both sitting on the Supreme Court." HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 266 (3d ed. 1992).

6. See *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 521 (1989).

7. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

8. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997) (upholding state ban on assisted suicide against a substantive due process challenge).

9. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (invalidating under strict scrutiny a race-based preference in a municipal procurement program).

10. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (evaluating federal affirmative action program under strict scrutiny and remanding constitutionality of the program under appropriate standard).

electoral districts.¹¹ The Court has made it more difficult for challengers to prove that a school district is continuing to violate the requirements of *Brown v. Board of Education*.¹² For the first time in sixty years, the Court has sought to restrain federal power in relation to the power of the states by striking down a congressional assertion of power under the Commerce Clause.¹³ Similarly, the Court has struck down congressional efforts to “commandeer” state legislative or executive action.¹⁴ Perhaps nowhere has the Court’s conservative trend been more apparent than in the area of criminal justice.¹⁵ Hence, it is difficult to dispute that Presidents Reagan and Bush had considerable success in moving the Court to the political right.

The Court, however, has also issued a number of decisions disappointing conservative advocates. For instance, the Court did not, as many had predicted, overrule *Roe v. Wade*.¹⁶ Nor did it eliminate

11. See *Miller v. Johnson*, 515 U.S. 900, 927 (1995) (striking down congressional redistricting where evidence showed that race was overriding purpose); *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (striking down congressional redistricting where bizarre shape of the prescribed districts created an inference that race motivated the action).

12. 347 U.S. 483, 495 (1954). See *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (holding that district court abused discretion in ordering an interdistrict remedy for an intradistrict violation of the principles of *Brown*).

13. See *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating federal law that prohibited gun possession near a school without any requirement that the gun had moved in interstate commerce and without any congressional findings of fact on commerce effects).

14. *Printz v. United States*, 117 S. Ct. 2365, 2383–84 (1997) (invalidating a provision of the Brady Bill that imposed on state law enforcement officers the obligation to perform background checks on handgun purchasers); *New York v. United States*, 505 U.S. 144, 149 (1992) (invalidating take-title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985).

15. See, e.g., *United States v. Watts*, 117 S. Ct. 633, 636 (1997) (per curiam) (upholding sentence enhancements for conduct of which the defendant was acquitted); *Whren v. United States*, 116 S. Ct. 1769, 1777 (1996) (upholding pretextual traffic stops supported by a reasonable articulable suspicion); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11–12 (1992) (narrowing habeas corpus review); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (upholding use of victim impact statements in death penalty sentencing hearings); *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (holding that *Miranda* does not apply when one posing as a prison inmate induces a defendant to confess); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding the pretrial detention of defendants found likely to be dangerous); *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (upholding state death penalty against equal protection challenge based on social science research indicating racially disparate impact).

16. 410 U.S. 113 (1973). See *Planned Parenthood v. Casey*, 505 U.S. 833, 854–69 (1992) (reaffirming the central holding of *Roe* that the state may not criminalize abortion prior to the viability of the fetus).

Establishment Clause restrictions on school prayer.¹⁷ The Court declined to allow the states or Congress to criminalize flag burning.¹⁸ And, notwithstanding other harbingers of an antifederalist revival, the Court forbade state voters from imposing term limits on their federal legislators—albeit narrowly and over a bitter dissent.¹⁹ Some recent decisions extending the Equal Protection Clause drew a cacophony of conservative opposition—for example, a decision barring the exclusion of women from an all-male public academy²⁰ and a decision barring a state from precluding all claims of discrimination based on homosexual orientation.²¹ The Court granted free access to state appeals courts for indigent parents attempting to retain rights of relationship to their children, thus reviving a long-dormant strand of fundamental rights analysis in equal protection law.²² Finally, the Rehnquist Court has consistently interpreted the Free Speech Clause to forbid government prescriptions of orthodoxy, protecting groups as divergent as leftist flag burners²³ and white supremacist cross burners.²⁴

Even in decisions reaching conservative results, the Court has articulated doctrines that stop short of their apparent logical conclusion. For example, in the affirmative action cases, the Court has stopped short of establishing outright color blindness as a constitutional norm, intimating that race-based affirmative action might be upheld on somewhat weaker justifications than would be required of policies discriminating against racial minorities.²⁵ In cases imposing federalism-based limits on congressional

17. See *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding impermissible the official recitation of a non-denominational prayer at a middle school graduation ceremony).

18. See *United States v. Eichman*, 496 U.S. 310, 318–19 (1990) (involving a congressional statute); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (involving a state statute).

19. See *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 782–83 (1995) (holding that state-imposed term limits violated the Qualifications Clauses and infringing the interests of the national citizenry).

20. *United States v. Virginia*, 116 S. Ct. 2264, 2286–87 (1996) (striking down Virginia Military Institute's exclusion of women for lack of an "exceedingly persuasive" reason).

21. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (striking down a state constitutional amendment that denied to homosexuals the opportunity to enact or enforce local and state antidiscrimination measures).

22. See *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 559 (1996).

23. See *United States v. Eichman*, 496 U.S. 310, 318–19 (1990); *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

24. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (unanimously striking down law barring the placement of symbols likely to arouse racial anger or alarm).

25. While subjecting race-based preferences to strict scrutiny, the Court sought to "dispel the notion that strict scrutiny [in this context] is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980)). Under such strict but not fatal scrutiny, governments might permissibly adopt race preferences that are narrowly tailored to redress specifically identified

power, the Court has barred congressional acts requiring states to enact or enforce specified policies but allowed similar results to be accomplished by imposing regulatory conditions on federal funding that states find irresistible as a practical matter.²⁶ And, in free speech challenges, the Court has sometimes split the difference between the speech claim and the government. For example, the Court has struck down a hate speech law while upholding a hate crime penalty enhancement statute,²⁷ upheld some but not all regulations of anti-abortion protestors,²⁸ and permitted public airport terminals to ban the solicitation of funds but not the sale or distribution of literature.²⁹ Such decisions give greater latitude to speakers than might have been expected given the Court's starting assumptions—for example, that regulations

past discrimination — even if that discrimination was not committed intentionally by the state, or the scope of the redress is not limited to the individual victims of adjudicable discrimination. For example, a city or state might use race-conscious procurement policies where it had merely been a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry,” rather than a deliberate practitioner of racial exclusion itself. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (O'Connor, J., joined by Rehnquist, C.J. and White, J.). And, “[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion,” *id.* at 509, whether or not such preferences were limited to making particular victims of adjudicable discrimination whole. Indeed, Justice Scalia concurred separately in both *Croson* and *Adarand* to emphasize his disagreement with the Court to the extent it authorized race-conscious measures extending beyond remediation for identified victims of discrimination—the only sort of remediation he would regard as consistent with a constitutional norm of color blindness. *Id.* at 526 (Scalia, J., concurring in the judgment). *See also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and in the judgment).

26. For example, in *New York v. United States*, 505 U.S. 144, 171–77 (1992), the Court invalidated a requirement that a state take title to undisposed radioactive waste while at the same time upholding conditional funding provisions.

27. *Compare* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (unanimously striking down law barring the placement of symbols likely to arouse racial anger or alarm) *with* *Wisconsin v. Mitchell*, 508 U.S. 476, 487–90 (1993) (upholding aggravated penalty for racially motivated assault).

28. *See* *Schenck v. Pro-Choice Network*, 117 S. Ct. 855, 866–68 (1997) (striking down provisions of an injunction requiring protestors to stay a certain distance from clinic entrants but upholding provisions requiring protestors to stay a certain distance from clinic entrances); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 776 (1994) (striking down provisions of an injunction barring signs near a clinic and establishing buffer zones at back and side of building, but upholding provisions barring noise near a clinic and establishing a buffer zone at the front perimeter and entrance).

29. *See* *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992); *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (*per curiam*).

designed to protect access to abortion clinics are content neutral and that airports are not latter-day public forums.³⁰

In short, the Rehnquist Court has not simply followed but in some cases has defied and in other cases stopped short of the outcomes that might have been predicted by the election returns. These results typically depended on votes of at least one of the five Reagan-Bush nominees, necessarily so in the seven years since Justice Thomas' appointment, and in some cases received the support of several. The following sections explore the role of institutional factors, jurisprudential considerations, and ideological complexity in helping to explain such votes.

III. INSTITUTIONAL STRUCTURE

Two features of the Court's institutional situation in relation to the other branches suggest reasons why conservative Justices might vote moderate or liberal. The first and most distinctive institutional feature of the Supreme Court is its relative insulation from political pressures.³¹ Politics may play an inevitable role in the nomination and confirmation process, but constitutional guarantees of lifetime tenure and protection from salary cuts³² afford the Justices considerable opportunity to change their minds. Thus, a Justice's opinions, over time, may cease to bear much resemblance to his or her political profile at the time of nomination and appointment.

Assuming that Justices sometimes diverge from their predicted political profile while in office, is there any structural reason to suppose that the shift will be in a "liberal" rather than a "conservative" direction? To be sure, there are counterexamples. President Kennedy's only appointee, Justice Byron White, arguably grew more conservative during his long tenure on the bench,³³ except for his nearly parliamentary willingness to defer to the

30. Whether the pro-speaker position in such cases is properly denominated "liberal" is a controversial question. In cases involving racist speech and abortion clinic protests it might be argued that the free speech libertarian position has migrated from the left to the right of the political spectrum. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383-85, 393-94 (1995) (characterizing the shifting political valences of recent free speech controversies as an instance of "ideological drift").

31. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962) (famously noting the counter-majoritarian difficulty that flows from the very insulation of the Supreme Court from political pressure, coupled with the power of judicial review).

32. U.S. CONST. art. III, § 1.

33. For example, Justice White concurred in the judgment in *Griswold v. Connecticut*, 381 U.S. 479, 502-03 (1965), invalidating a prohibition of contraceptive use on substantive due process grounds, but found no similar Constitutional warrant for protecting access to

(usually Democratic) Congress.³⁴ But, it is at least plausible to suppose that insulation from political majorities typically creates a structural incentive to articulate and protect the interests of political minorities, if only through repeat exposure to such claims and a desire to distinguish the work of the judiciary from that of the political branches. This tendency will often, though not always, appear politically “liberal.”³⁵

A second and independent institutional explanation arises from the Justices’ concern to protect the Supreme Court’s credibility. The Supreme Court cannot tax,³⁶ nor does it possess armed forces to back up its decisions.³⁷ Lacking power of sword or purse, the Court depends on the power of its legitimacy.³⁸ At first glance, the legitimacy problem seems more likely to generate conservative decisions than liberal ones. After all, the Court’s legitimacy would appear most threatened when the Court protects the interests of a small minority over the intense opposition of the majority.³⁹

However, the Court’s need to preserve its legitimacy might motivate unexpectedly liberal decisions in some situations because its reputation depends on the perception that its legal pronouncements transcend ordinary politics. Conservative Justices might favor results that appear liberal in the short run in order to diffuse any suspicion that they are caving in to political pressure from their conservative sponsors and their allies. One way of doing this is to abide by *stare decisis* and entrench earlier liberal decisions even if they would not be reached again as an initial matter.

The pivotal joint opinion of Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter in *Planned Parenthood v. Casey*,⁴⁰ for example,

abortion, *see* *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J., dissenting), or consensual adult sexual conduct, *see* *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (*per curiam*) (White J.).

34. For example, Justice White voted to invalidate minority business preferences in procurement by state and local governments, *see* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989), but voted to uphold a preference for minority-owned broadcast licensees that was promulgated by the FCC at the direction of Congress, *see* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 563–66 (1990).

35. If a challenged policy is itself “liberal,” then counter-majoritarian decisionmaking will appear “conservative.” The Court’s recent affirmative action and race-based districting cases provide an illustration. The Court invalidated popularly enacted programs in order to protect individual members of the racial majority. Another example might be the Court’s recent federalism decisions, where it has struck down acts of Congress in the name of divided government.

36. U.S. CONST. art. I, § 8, cl. 1.

37. U.S. CONST. art. II, § 2, cl. 1.

38. *See* Jesse H. Choper, *Judicial Review and the National Political Process* 129–70 (1980) (discussing the legitimacy problem).

39. *See id.* at 132–33.

40. 505 U.S. 833 (1992).

declined to overrule *Roe v. Wade*⁴¹ in part on the ground that the Court ought not overturn settled law in the face of vehement public controversy over abortion, lest it appear to be doing politics rather than law.⁴² Likewise, the Court's recent decisions invalidating most affirmative action programs, but holding out the possibility that some such programs might be justified by remedial or distributive concerns expressed in earlier cases, might be read as seeking to avoid a perception that the Court interprets the Constitution in light of the latest public opinion polls. Similarly, in the area of federal-state relations, Justice Kennedy strikingly defied any preconceived label as a rigid antifederalist by casting the decisive vote in a single Term both to invalidate a federal gun-possession statute as exceeding Commerce Clause authority,⁴³ and to invalidate state-imposed term limits on members of Congress as exceeding state authority.⁴⁴

IV. CONSTITUTIONAL JURISPRUDENCE

A second explanation of why conservative Justices might vote moderate or liberal is that they have a jurisprudential orientation that moderates or constrains any ideological tendencies they might have. Justices' jurisprudential tendencies tend to follow one of two general approaches to fashioning legal directives. One approach employs bright-line rules, while the other utilizes flexible standards.⁴⁵ Rules, generally speaking, bind a legal decision-maker in a fairly determinate manner by capturing underlying principles or policies in ways that then operate independently. What gives a rule its force is that judges will follow it in fairly rote fashion even where a particularized application of the background principle might arguably yield a different result. Standards, on the other hand, allow judges to apply the background principle more directly to a fact situation.

To take a simple example; suppose you wished to ensure safe driving on a highway. You might set a rule: "drive no faster than fifty-five miles per

41. 410 U.S. 113 (1973).

42. *Casey*, 505 U.S. at 864–69.

43. *United States v. Lopez*, 514 U.S. 549, 580 (1995).

44. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995). Justice Kennedy argued that the Court ought both to stop the states from "invad[ing] the sphere of federal sovereignty," and to hold the federal government "within the boundaries of its own power when it intrudes upon matters reserved to the [s]tates." *Id.* at 841 (Kennedy, J., concurring).

45. See Kathleen M. Sullivan, *The Supreme Court: 1991 Term, Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992), and MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987), for a discussion on rules and standards.

hour.” Alternatively, you might set a standard of reasonableness: “drive safely for the highway conditions.”

What are the comparative advantages of each approach? Rules constrain the discretion of the decision-maker who applies them⁴⁶ and typically require the determination of only very limited issues of fact. For example, under the fifty-five miles per hour rule, a police officer only needs to determine at what speed the car was traveling. The fifty-five miles per hour rule also prevents two police officers from treating identical situations differently, whereas under the “reasonableness” standard, one driver might be ticketed while the other drives away free. Thus, the advantages of rules include certainty, predictability, formal fairness, clear notice to those they govern, and economy in the process of decision-making.⁴⁷

Standards, by contrast, require consideration of more facts. Under the “drive safely for the conditions” standard, for example, a police officer must take into account the time of day, the weather, the volume of traffic, and so forth. Standards thus give more discretion to the decision-maker in deciding particular cases. Though less predictable and more time-consuming to apply than rules, those who favor standards would say that they are more substantively fair and accurate than rules in capturing the relevant policy concern. For example, while the fifty-five miles per hour rule might prohibit a driver from reaching a safe sixty miles per hour on an empty straightaway under sunny skies but permit a driver to travel a treacherous fifty miles per hour on a rain-slicked curve at rush hour, the “drive safely” standard might correct such anomalous outcomes.⁴⁸ Advocates of standards also approve their flexibility and capacity to evolve in their application over time with changing mores or circumstances.

Constitutional doctrines, like traffic rules, may be expressed in the form of either rules or standards.⁴⁹ Approaches that use categorical, formal, bright-line tests are rule-like. For example, consider holdings that obscenity is unprotected speech,⁵⁰ or that the legislature may not wield executive

46. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULES-BASED DECISION-MAKING IN LAW AND IN LIFE* 157–62 (1991) (“A decision-maker not constrained by rules has the power, the authority, the jurisdiction to take everything into account. Conversely, the rules-constrained decision-maker loses at least some of that jurisdiction.”).

47. *Id.* at 96–98 (discussing the virtues of “predictability, reliability, and certainty”); Sullivan, *supra* note 45, at 62–66 (discussing substantive arguments favoring rules and standards).

48. See Sullivan, *supra* note 45, at 66–69.

49. See *id.* at 69–95.

50. See *Miller v. California*, 413 U.S. 15, 36 (1973), for the rule-like holding that obscene material is not protected by the First Amendment.

power,⁵¹ or vice versa.⁵² Almost as rule-like in practice are tests that use strong presumptions to decide cases once a threshold classification has been made. When the Court employs strict scrutiny—such as to review infringements of fundamental rights,⁵³ content based suppression of speech,⁵⁴ or suspect classifications⁵⁵—it is nearly impossible for the government to prove the law constitutional. Conversely, when the Court employs rationality review—for example, to review challenges to socioeconomic legislation⁵⁶—the Court typically defers to the judgments of the other branches so that it is difficult, if not nearly impossible, for the challenger to win. This two-tiered system of scrutiny limits judicial discretion because once the Court has sorted a challenged law into the appropriate tier, it is confined to the resulting decisional rule, as are the lower courts in deciding analogous cases.

By contrast, constitutional tests that employ balancing, intermediate scrutiny, or functional analysis operate as standards. Consider the Court's express use of intermediate scrutiny to evaluate laws that classify individuals based on gender,⁵⁷ as well as facially neutral laws with a disproportionate adverse effect on interstate commerce,⁵⁸ and facially neutral laws with a

51. See *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (invalidating a statute that delegated executive budget-cutting authority to the Comptroller General, who was subject to removal by joint resolution of Congress).

52. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952) (holding that the President may not encroach upon the legislative power by ordering takings of private steel mills without congressional authority).

53. See, e.g., *Roe v. Wade*, 410 U.S. 113, 163 (1973) (applying strict scrutiny to abortion regulations).

54. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating a Minnesota ordinance that prohibited symbols raising anger or alarm on the basis of race, color, creed, religion, or gender).

55. See, e.g., *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting the need for exacting scrutiny to protect discrete and insular minorities).

56. See, e.g., *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (rejecting claim that taking private land for immediate resale to private homeowners did not constitute a taking for public use); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178–79 (1980) (rejecting equal protection challenge to denial of retirement benefits to workers based on dates rather than length of service); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 486–88 (1955) (rejecting substantive due process challenge to law barring opticians from fitting eyeglasses without prescription).

57. See, e.g., *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996) (inquiring whether the government can offer an “exceedingly persuasive justification”).

58. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (inquiring whether the burden on interstate commerce is “clearly excessive in relation to the putative local benefits”).

substantial adverse impact on speech or expressive conduct.⁵⁹ Intermediate scrutiny, like standard-based reasoning generally, asks how strong the government's interest is in relation to the constitutional policy at stake. Functional analyses of separation of powers challenges provide another example of standard-like reasoning. Whereas formal approaches would condemn any trespass by one branch into another's powers, a functional approach invalidates only those trespasses that go too far.⁶⁰ These overtly balancing modes of analysis gives judges considerably greater discretion than the stark extremes of strict or rational review.

The Court deviates from rules to standards, if more informally, whenever it weakens the presumption traditionally embodied in strict scrutiny or rationality review. For example, applying "strict but not fatal" review to race-based affirmative action invites governments employing such measures to try to justify them in court.⁶¹ Conversely, applying aggressive rationality review to invalidate laws found to reflect irrational animus—for example, the prohibition on gay rights claims struck down in *Romer v. Evans*⁶²—invites claimants to challenge measures ranging beyond traditionally suspect classifications. Either way, the two-tier approach collapses into de facto balancing.

A preference for constitutional standards over constitutional rules will tend to register as political moderation because, generally speaking, rules are more effective than standards at effecting sharp and lasting changes in constitutional interpretation. Standards allow the Court to decide cases narrowly: for example, this waiting period is not on its face an undue burden,⁶³ this wholesale preclusion of gay antidiscrimination claims is unjustified,⁶⁴ this particular district was drawn with excessive attention to racial demographics.⁶⁵ The use of standards tends to moderate sharp swings between ideological poles; standards allow future courts more discretion to distinguish prior cases and decide cases in fact-specific fashion, and thus to afford more solace and spin opportunities to the losers.

59. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382–86 (1968) (rejecting a facial and as-applied challenge to a law criminalizing the burning of a draft card and establishing the modern Court's test for analyzing content-neutral laws as inquiring whether the law closely fits a substantial government interest).

60. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 691–93 (1988) (upholding independent counsel statute because it did not "unduly trammel on executive authority," or "unduly interfere with the role of the Executive Branch").

61. See *supra* note 25.

62. 116 S. Ct. 1620, 1628 (1996).

63. See *Planned Parenthood v. Casey*, 505 U.S. 833, 879–901 (1992).

64. See *Romer*, 116 S. Ct. at 1628–29.

65. See *Miller v. Johnson*, 515 U.S. 900, 917 (1995).

Of the five Justices Presidents Reagan and Bush appointed to the Court, only two (Justices Antonin Scalia and Clarence Thomas) turned out to favor rules;⁶⁶ the other three (Justices O'Connor, Kennedy, and Souter) have tended to favor standards.⁶⁷ The latter group's preference for standards in deciding constitutional cases furnishes one explanation for unexpectedly moderate or liberal decisions.

To take a few examples, consider first the issue of race-based affirmative action. Four Justices, including Justices Scalia and Thomas, would favor a rule that the Constitution should be color blind, and that no race-conscious measures should ever be permissible, whether aimed at subordinating or benefiting racial minorities. On the other hand, four Justices would apparently defer to many race-conscious measures designed to benefit minorities while still striking down race-conscious measures that are designed to disadvantage minorities, believing that they can perceive the difference between a no trespassing sign and a welcome mat. Between these two camps stands Justice O'Connor—the key swing vote on this issue—who would permit some limited race-conscious measures where they are shown to be closely tied to remedying past discrimination, relatively broadly defined.⁶⁸ Justice Kennedy's opinion for the Court in *Miller v. Johnson*⁶⁹ does something similar in asking whether race is the "predominant" factor in how electoral district boundaries are drawn, rather than in precluding racial considerations altogether.⁷⁰ By saying that race-conscious measures are sometimes, if rarely, permissible, such standards and race-based distinguishing plans give governments the latitude to defend some affirmative action plans and lower courts the wiggle room to uphold them.

To take another example, consider the First Amendment's bar on establishment of religion. As many as four Justices at any given time, led by Justice Scalia, have argued for a narrow rule that only sectarian preferences and outright coercion of faith ought to count as forbidden establishment.⁷¹

66. See Sullivan, *supra* note 45, at 65–95.

67. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989); Morrison v. Olson, 487 U.S. 654, 733 (Scalia, J., dissenting) (arguing that "[a] government of laws means a government of rules" and that the majority's functional analysis of separation of powers was "ungoverned by rule, and hence ungoverned by law").

68. See *supra* note 25. While agreeing that all racial classifications are subject to strict scrutiny, Justice O'Connor's view is that strict scrutiny here is no longer "fatal in fact" collapses a rule into something like a standard; affirmative action plans are evaluated by how starkly they consider race (is race merely a factor or is it dispositive?) and how closely tied they are to remedying discrimination.

69. 515 U.S. 900 (1995).

70. *Id.* at 917.

71. See, e.g., Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) (joined by Justices Rehnquist, White, and Thomas).

Justice O'Connor, however, has led a slim majority of the Court to maintain a broader and more flexible standard, holding that the Establishment Clause also forbids any government action that a reasonable observer would interpret as government "endorsement" of religion.⁷² This standard is highly fact-intensive and susceptible to shifting outcomes. For example, a publicly sponsored Christmas creche might be permissible if surrounded by reindeer and a talking wishing well in a shopping district,⁷³ but not if standing alone on a courthouse staircase.⁷⁴ This standard permits courts to invalidate more public religious expression than they would under Justice Scalia's rule.

As a further example, consider the limits of free speech in public spaces other than the traditional public forum of streets and parks. In a 1992 decision involving Hare Krishna devotees seeking to leaflet and solicit in the New York airport terminals,⁷⁵ four Justices, led by Chief Justice William Rehnquist, would have established a bright-line rule: airports are not traditional public forums for speech akin to streets and parks, and the First Amendment therefore permits unlimited regulation of speech there, so long as it is viewpoint-neutral. Justices O'Connor and Kennedy, however, steered the Court to a split result: leafleting must be permitted in the airports though soliciting need not.⁷⁶ They did so by embracing, in slightly different terms, a standard that focused on whether the particular speech was reasonably compatible with the functioning of the public space.⁷⁷ A compatibility inquiry gives more flexibility to the courts to enforce free speech rights than does a rigid hierarchy of types of public places.⁷⁸

As a final example, compare two approaches the Rehnquist Court has taken to separation of powers issues. In *Morrison v. Olson*,⁷⁹ the Court took a highly flexible balancing approach in upholding the independent counsel statute by a vote of 8-1.⁸⁰ The majority opinion by Chief Justice Rehnquist reasoned that granting authority to prosecute high-level Executive officers to appointees whom the President does not select and may not remove at will does not trench too far upon the Executive power, even if prosecution is

72. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (O'Connor, J., concurring).

73. See *id.* at 671.

74. *Allegheny v. ACLU*, 492 U.S. 573, 579 (1989).

75. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam).

76. See *id.*

77. 505 U.S. at 689 (O'Connor, J., concurring).

78. For an example of similar split results in a free speech challenge, recall Chief Justice Rehnquist's opinions for the majority in the abortion clinic protest cases. See *supra* note 28.

79. 487 U.S. 654 (1988).

81. *Id.* at 658.

inherently executive in nature.⁸¹ A scathing dissent by Justice Scalia objected to this brand of prudentialism in structural matters, arguing that the issue should be the nature and not the degree of the infringement.⁸² By contrast, last Term, in *Printz v. United States*,⁸³ the Court invalidated, by a vote of 5–4, a federal requirement that local law enforcement officers perform background checks on handgun purchasers to ensure their conformity to federal standards. The Court reasoned that structural principles of federalism forbade any conscription of state or local officers in administering federal law, however trivial the burden or desirable the end.⁸⁴ Writing this time for the majority, Justice Scalia flatly stated that any “balancing” analysis is inappropriate,” and that “no comparative assessment of the various interests” could overcome the affront to state sovereignty embodied in such a law.⁸⁵ Plainly, the *Morrison* standard afforded the government more leeway for structural innovation than the *Printz* rule, and against the political backdrop at the time, appeared unexpectedly politically moderate.⁸⁶

The embrace of standards over rules thus leads conservative Justices to reach results that, in a period when the Court is moving rightward, appear more moderate or liberal than would a rule fashioned from a similar ideological starting point.⁸⁷ This observation gives rise to an antecedent question: Why do some Justices favor rules and others favor standards? Why any particular Justice is drawn to either disposition is perhaps ultimately a psychological, biographical, or even aesthetic question. But to the extent the choice is conscious and articulate, it is likely to follow from different conceptions of the judicial role. Like the institutional considerations discussed above in Part II, the choice of rules or standards might be understood as a strategy for maintaining the Court’s legitimacy. Each camp might claim that its method facilitates greater judicial modesty than the other.⁸⁸

81. *Id.* at 679–85.

82. *See id.* at 711–12, 733–34 (Scalia, J., dissenting).

83. 117 S. Ct. 2365 (1997).

84. *See generally id.* at 2384.

85. *Id.* at 2383.

86. Whether endorsement of independent counsels is understood as politically liberal or conservative at any time period, of course, depends to some extent on the political affiliation of such counsels’ targets.

87. Of course, the choice of standards over rules might have the opposite political valence in a period when the Court is moving leftward. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 307–08 (1992).

88. *See* Sullivan, *supra* note 45, at 112–22.

Specifically, those who favor rules, like positivists and codifiers of earlier generations, seek to limit the exercise of discretion in judicial decision-making, and thus favor the reduction of constitutional propositions as much as possible to claims of fact, not value. They suspect that the context-specific application of standards will lead judges inappropriately to impose their own values. Those who favor standards, in contrast, see their role in constitutional interpretation as akin to that of common law judges, requiring reference to the accretion of past history, precedent, and collective wisdom in order to constrain the inevitable exercise of some contemporary discretionary judgment.⁸⁹ Justices who favor a common law approach to constitutional interpretation believe that they will be disciplined from imposing their own values by our traditions, social practices, shared understandings, and the process of reasoned elaboration from such starting points. They believe that it is more arrogant to assert the philosophical or interpretive certainty required by announcement of a single inflexible rule.⁹⁰

Those who choose standards over rules might believe that such a choice, in addition to embodying judicial restraint, promotes judicial legitimacy in several other ways. It might, as a type of alternative constitutional dispute resolution, help to defuse sharp ideological conflict by giving something to each side. Relatedly, it might take steps toward a desired constitutional end-state while minimizing the expressive injury to the losers.⁹¹ Finally, it might seem to facilitate democratic debate and resolution of the matters it leaves unresolved, placing conflict over values more squarely in the hands of the people than of judges.⁹² Whatever its

89. Such organicism is evident, for example, in the *Casey* joint opinion sustaining while narrowing *Roe v. Wade*, 410 U.S. 113 (1973), and in Justice Souter's concurring opinion in *Washington v. Glucksberg*, 117 S. Ct. 2258, 2283 (1997) (Souter, J., concurring in the judgment) (analogizing his approach to interpreting the Due Process Clause to the judicial method of the common law).

90. For an example of such a critique, see *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. at 852 (O'Connor, J., concurring) ("When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified.").

91. For example, the *Casey* decision overruled several post-*Roe* decisions, see *Planned Parenthood v. Casey*, 505 U.S. 833, 881–87 (1992) (upholding waiting period requirements that prior decisions had struck down), even while leaving *Roe*'s Constitutional bar to criminal prohibition intact, with the net effect that abortion must be permitted but could be discouraged. Thus an opinion that reaffirmed the right to abortion at the same time constricted the scope of that right as a practical matter.

92. See, e.g., Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15 (1996). Sunstein argues that "shallow and narrow" constitutional rulings are more desirable than "deep and broad" rulings on the ground that they remand matters for democratic deliberation. To the extent that standards are the

jurisprudential or institutional motivation, the choice of standards over rules will register on the political spectrum as unexpectedly moderate or liberal during a period of general rightward shift.

V. THE COMPLEXITY OF CONSERVATIVE IDEOLOGY

A third reason why conservative Justices might appear to vote moderate or liberal is that the very concept of constitutional conservatism is quite complex. A judicial conservative might be thought to favor, at least to some degree, any of the following: 1) originalism; 2) textualism; 3) judicial restraint (deference to legislatures); 4) libertarianism (deregulation); 5) states' rights (decentralization); 6) traditionalism; 7) stare decisis; 8) capitalism; and 9) law and order. These different strands of judicial conservatism may sometimes pull in competing directions, both among Justices, and even within a single Justice across an array of cases. And when one strand trumps others, the outcome of the case may appear surprisingly moderate or liberal.

Such tensions are easy to identify in divided decisions by the Rehnquist Court. For example, adherence to the original meaning of the Constitution may trump deference to the government for sake of law and order. Justices Scalia and Thomas, typically the Court's staunchest advocates of originalism, have sometimes voted with criminal defendants and against the government where they thought that the framers must have meant to forbid modern practices, such as videotaped testimony in child sexual abuse cases⁹³ or unannounced drug raids.⁹⁴

Original meaning may be at odds with traditionalism. For example, Justice Thomas voted to sustain a First Amendment right to distribute anonymous election leaflets, reasoning that the framers themselves had engaged in anonymous debates over the Constitution, signing their writings with a variety of pseudonyms from "Publius" to the "Federal Farmer."⁹⁵ Justice Scalia, dissenting, found the originalist record ambiguous and would have deferred instead to the long tradition and current legislative practice in nearly all states of requiring identifying information in election literature.⁹⁶

device for achieving shallow and narrow rulings; however, it is hardly obvious that ambiguities left open by the decision will be remanded for democratic resolution, as opposed to further litigation.

93. See *Maryland v. Craig*, 497 U.S. 836, 860 (1990) (Scalia, J., dissenting).

94. See *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995).

95. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359–69 (1995) (Thomas, J., concurring in the judgment).

96. *Id.* at 371 (Scalia, J., dissenting).

Stare decisis may be at odds with any of the other strands of conservatism. The decisive joint opinion in *Casey*, for example, embraced a strong if limited respect for stare decisis, reaffirming *Roe*'s central holding without regard to whether it was correct as an original matter.⁹⁷ The dissenters, in contrast, saw stare decisis as far too weak to overcome the lack of clear textual or originalist authority for invalidating popularly enacted abortion regulation. Similarly, in Establishment Clause challenges to such practices as official school prayer, invocations of original practices such as George Washington praying at his inauguration have failed to overcome precedents limiting government endorsement of religion.⁹⁸

Some opinions would seem to represent a triumph of libertarianism over textual or originalist literalism or judicial restraint. For example, all the Justices except Chief Justice Rehnquist recently proved willing to invalidate, as an unreasonable search and seizure, state-mandated drug testing for political candidates.⁹⁹ In others, strict adherence to text and original meaning may yield to some combination of stare decisis, traditionalism, and a robust view of property rights. For example, Justice Scalia, who typically favors textualist and originalist readings, exemplified this when he wrote an opinion for the Court in *Lucas v. South Carolina Coastal Council*,¹⁰⁰ calling for strict review under the Takings Clause of regulations that sharply diminish property values—even though the Takings Clause says nothing about regulation of property whose title is not transferred to the state, and even though the framers did not envision applying the Takings Clause to such regulations.¹⁰¹

These examples could be multiplied indefinitely, but suffice to illustrate that any effort to carry out a program of judicial "conservatism" in constitutional interpretation involves a simultaneous equation with multiple variables. Even a single Justice pegged as a conservative may be pulled in different directions. The outcome of a case, therefore, depends not only upon a Justice's default weighing of these variables, but on the relative strength of

97. Stare decisis, or respect for precedent, carries varying degrees of weight among the five Justices appointed by Presidents Reagan and Bush. Justices O'Connor, Kennedy, and Souter give considerable respect to at least the core of prior precedents. Justices Scalia and Thomas are more willing to overturn "unsound" precedents. See, e.g., John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 BUFF. L. REV. 187, 205–07 (1994).

98. See *Lee v. Weisman*, 505 U.S. 577 (1992) (compare Souter's concurrence at 609–10 with Scalia's dissent at 632–36, noting early historical examples of official prayer).

99. *Chandler v. Miller*, 117 S. Ct. 1295, 1305 (1997).

100. 505 U.S. 1003 (1992).

101. His reference points instead were precedent, see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and traditional cultural "understandings" of the contours of property, see *Lucas*, 505 U.S. at 1027.

each particular ideological pull in the differing circumstances of each case. To complicate matters still further, Justices may agree on a variable but disagree strenuously over its application. For example, consider the dueling originalism that has led the majority and dissent to disagree vigorously as to whether the framers did or did not intend that Congress might employ state officials to administer federal programs,¹⁰² or whether the framers did or did not intend that the Establishment Clause bar only that aid to religion which preferred one sect over others.¹⁰³

Finally, constitutional rights sometimes may undergo what might be called "ideological drift."¹⁰⁴ That is, rights once thought of as having liberal provenance are embraced by conservatives even as liberal attachment to them falters. There is no better recent example than freedom of speech.¹⁰⁵ Free speech rights were traditionally asserted in this century by anarchists, socialists, syndicalists, and communists, and closer to our own time by the pioneers of racial civil rights and opponents of the war in Vietnam. But left-wing support is not always forthcoming when free speech claims are asserted by racist cross-burners, anti-abortion demonstrators, large corporate advertisers, or donors of large sums to political campaigns. In the latter sort of case, liberals often favor government regulation designed to ensure racial dignity, reproductive privacy, or greater equality in the marketplace of ideas, and conservative groups take up the banner of free speech libertarian opposition.

In such circumstances, popular views of the political valence of decisions may lag behind the ideological drift, leading to the perception that conservative Justices have voted "liberal" on free speech, and vice versa. For example, in a recent abortion clinic protest case, the traditionally liberal Justice Stevens voted to uphold all restrictions on the protestors while the historically conservative Justice Scalia would have struck them all

102. See *Printz v. United States*, 117 S. Ct. 2365 (1997) (compare the majority opinion at 2370–75 with Stevens' dissent at 2389–94).

103. See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (compare Thomas' concurring opinion at 855–58 with Souter's dissent at 866–76).

104. See Balkin, *supra* note 31, at 393–94.

105. For another example, consider the shift from left to right on the political spectrum of the view that the Fourteenth Amendment's guarantee of equal protection is a guarantee of formal equality that bars all official use of race as a classification. Today, many conservatives use a principle once urged in the civil rights movement to reject affirmative action and aggressive interpretations of the Voting Rights Act, while many liberals eschew formal equality claims in favor of a view of the Equal Protection Clause as an antisubordination principle under which benign racial classifications should not be treated the same as invidious ones.

down.¹⁰⁶ Similarly, in a recent campaign finance case, the supposedly conservative Justices Kennedy, Thomas, and Scalia embraced vigorously the free speech rights of political parties while several supposedly liberal Justices expressed willingness to allow wide-ranging government regulation of campaign finance.¹⁰⁷ Because the press has an institutional interest in strong First Amendment protection, such decisions are apt to be reported as “liberal” victories for free speech, even if the credit must go to “conservative” Justices.

VI. CONCLUSION

This essay has suggested three possible explanations—institutional, jurisprudential and ideological—of why a Court moving generally rightward might nonetheless be characterized occasionally by surprising judicial moderation or even a liberal turn. These factors help show why it is so difficult to capture the work of the Court along a single political vector: “sharp right turn,” or “the center holds.” There is nothing mutually inconsistent among these accounts. Indeed, they may reinforce one another, as when institutional concerns influence jurisprudential orientation. And these accounts help to refute the view, sometimes expressed in popular commentary, that the moderate judicial behavior of the swing Justices on the Rehnquist Court is incoherent or inexplicable.

106. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 777 (1994). The majority in *Madsen*, steering between the poles set by Justices Stevens and Scalia, upheld some of the restrictions but not others.

107. *Colorado Republican Fed. Campaign Comm’n v. F.E.C.*, 116 S. Ct. 2309 (1996).

Defining a New Medium of Communication under the First Amendment: The Supreme Court Tackles Speech on the Internet in *Reno v. American Civil Liberties Union*

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I. INTRODUCTION

The Internet¹ has revolutionized the exchange of information by providing our society with a “new marketplace of ideas.”² As history has revealed, new methods of communication lead to differences in opinion. Consequently, differences in opinion lead to government regulation, which then lead to litigation.³ The development of the Internet

1. In *Reno v. ACLU*, the United States Supreme Court defined the Internet as “an international network of interconnected computers.” *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997) [hereinafter *Reno II*]. Although it is difficult to estimate because of its rapid expansion, the Internet connects approximately 9.4 million computers worldwide and is believed to transmit the speech of 40 million people. Brief for Appellees at *9, *Reno II* (No. 96-511), 1997 WL 74378. For extensive facts on the Internet, its history, and how it works see *Reno II*, 117 S. Ct. at 2334–36.

2. *Id.* at 2351. For the origin of this marketplace concept, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

3. See, e.g., *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374, 2381 (1996) (upholding a provision that allowed cable operators to ban indecent programming on

created relatively effortless access to adult-oriented materials for both children and adults. This fact influenced the government to enact a regulation to protect minors.⁴ This regulation spurred litigation which has made its way through the legal system, all the way to the United States Supreme Court.⁵

On June 26, 1997, in *Reno v. ACLU* ("*Reno II*")⁶ the first United States Supreme Court case involving the Internet, the Court handed down a landmark decision.⁷ Two provisions of the Communications Decency Act of 1996 ("CDA"),⁸ were declared unconstitutional in a 7-2 opinion authored by Justice Stevens.⁹ The CDA prohibited the transmission of "indecent"¹⁰ and "patently offensive"¹¹ communications to minors via the Internet. Moreover, the Court held that indecent speech on the Internet is protected by the First

leased channels); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 124 (1989) (upholding a statute making it a crime to make an indecent interstate telephone call); *FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978) (upholding a FCC order on a radio broadcast); *Young v. American Mini Theatres*, 427 U.S. 50, 72-73 (1976) (upholding a Detroit ordinance on adult films); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (upholding restrictions on the use of sound trucks); *Saia v. New York*, 334 U.S. 558, 559-60 (1948) (striking down an ordinance banning the use of amplification devices without the police chief's permission).

4. See 47 U.S.C.A. § 223 (West Supp. 1997).

5. See *Reno II*, 117 S. Ct. at 2329.

6. *Id.*

7. *Id.* at 2351.

8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 223(a)-(h) (West Supp. 1997)) [hereinafter "CDA"].

9. *Reno II*, 117 S. Ct. at 2351.

10. 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997) (providing for criminal prosecution of anyone in interstate or foreign communications who "by means of a telecommunications device knowingly . . . (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age").

11. *Id.* § 223(d)(1). Section 223(d)(1) prohibits:

Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . shall be fined under Title 18, or imprisoned not more than two years, or both.

Id.

Amendment.¹² This comment analyzes the strengths and weaknesses of the Court's rationale in *Reno II*, examines the implications of this decision, and explores its ramifications on future Internet legislation. Specifically, this author applauds the reasoning applied by the majority and questions the logic of Justice O'Connor's opinion, in which she concurred in part and dissented in part.¹³

The foundation of the Court's analysis in *Reno II* was its declaration that the Internet is a distinct medium of communication which can be distinguished from broadcast media.¹⁴ This distinction provided the Court with the framework for an analysis of the issue presented. The main issue was whether the Court should uphold "the constitutionality of two statutory provisions enacted to protect minors from 'indecent' and 'patently offensive' communications on the Internet."¹⁵

The decision in *Reno II* is extremely important for several reasons. First, the Court has provided the Internet with the broadest possible First Amendment protection.¹⁶ This opinion sends a message to the legislature that broad, content-based regulations on the Internet will be struck down.¹⁷ Second, the Court was presented with the opportunity to establish First Amendment guidelines with respect to the Internet.¹⁸ These guidelines create a new application of the traditional legal standards of the First Amendment. Finally, this case is significant because the Internet is creating a new jurisprudence.

In examining the Court's decision, Part II of this case comment reviews the factual and procedural history of the case. Although the facts of this case are brief, the procedural history plays a crucial role in the majority opinion because the Court utilizes many of the factual findings and legal arguments found in the United States district court's decision.¹⁹ Part III explains the arguments of each side and the rationale employed by both the majority opinion and the dissent. Part IV of the comment analyzes the Court's logic by focusing on the strengths and weaknesses of both the majority and the dissenting opinions. In conclusion, Part V explores the implications of the

12. *Reno II*, 117 S. Ct. at 2344.

13. *Id.* at 2351.

14. *Id.* at 2343.

15. *Id.* at 2334.

16. *Id.*

17. Content based regulations "restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95 (1972) (citations omitted).

18. *Reno II*, 117 S. Ct. at 2336.

19. *See ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997) [hereinafter *Reno I*].

Court's reasoning and the ramifications of the decision on future Internet legislation.

II. FACTUAL AND PROCEDURAL HISTORY

A. *The Origin of the Lawsuit*

On February 8, 1996, President Clinton signed into law, as Title V of the Telecommunications Act of 1996,²⁰ the CDA.²¹ Almost as soon as the President's pen left the paper, twenty plaintiffs²² brought suit against the Attorney General of the United States, Ms. Janet Reno, and the Justice Department²³ challenging the constitutionality of two provisions²⁴ of the CDA.²⁵ As a result, United States District Judge, Judge Buckwalter, entered a temporary restraining order against section 223(a)(1)(B)(ii) as it related to indecent communications.²⁶

Accordingly, a second group of twenty-seven plaintiffs²⁷ filed suit against the appellants also challenging the constitutionality of the statute on

20. 47 U.S.C.A. § 223(a)–(h) (West Supp. 1997).

21. *Reno II*, 117 S. Ct. at 2329.

22. The plaintiffs in the initial suit included the following: American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibilbytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Tyler dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc. *Id.* at 2339 n.27.

23. Hereinafter, Ms. Reno and the Justice Department will be referred to as the "appellants."

24. These challenged provisions are 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997) and 47 U.S.C.A. § 223(d)(1) (West Supp. 1997).

25. *Reno II*, 117 S. Ct. at 2339.

26. *Id.* Section 223(a)(1)(B) is the "indecent provision."

27. The plaintiffs in the subsequent suit included the following: American Library Association; America Online, Inc.; American Booksellers Association, Inc.; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; Compuserve Inc.; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures, LLC; Interactive Digital Software Association; Magazine Publishers of America; Microsoft Corp.; The Microsoft Network, LLC; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of

its face.²⁸ Both cases were consolidated into a single suit and were brought before a three-judge district court pursuant to the CDA.²⁹ The district court granted a preliminary injunction against the enforcement of the challenged provisions.³⁰

B. *The United States District Court Opinions*

The United States district court judges unanimously held the CDA to be unconstitutional.³¹ However, each of the three judges wrote a separate opinion, each using a slightly different rationale to reach their decision.³² These opinions are important because the reasoning applied in each one was influential in the Supreme Court's decision.

Consequently, Chief Judge Sloviter recognized that "there is certainly a compelling government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA."³³ However, she questioned the strength of the appellant's interest in this case.³⁴ Chief Judge Sloviter held that the CDA abridges the First Amendment because it regulates more than is necessary; thus, it "chills the expression of adults."³⁵ In addition, she was not convinced by the appellant's contention that the application of the CDA could be narrowly tailored only to commercial pornographers.³⁶ Lastly, Chief Judge Sloviter rejected the affirmative defenses³⁷ encompassed by the CDA because she felt

America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; and Wired Ventures, Ltd. *Reno II*, 117 S. Ct. at 2339 n.28.

28. *Id.* at 2339.

29. *Id.*

30. *Id.*

31. *Reno I*, 929 F. Supp. at 883.

32. *Id.* at 824. The following judges each wrote a separate opinion creating the majority opinion: Chief Judge Dolores K. Sloviter, Judge Ronald L. Buckwalter, and Judge Stewart Dalzell. *Id.*

33. *Id.* at 853. The Court in *Reno II* found the same compelling governmental interest as Chief Judge Sloviter. *Reno II*, 117 S. Ct. at 2346.

34. *Reno I*, 929 F. Supp. at 855.

35. *Id.* at 854 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989)).

36. *Id.* at 855. Chief Judge Sloviter's point is reflected in the majority opinion. *Reno II*, 117 S. Ct. at 2341.

37. The affirmative defenses include: the "verified credit card" defense, which states that a speaker has a defense from criminal liability if he/she restricts access to indecent materials "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number," and the "good faith" clause, which stated a speaker must

the defenses were neither technologically feasible nor effectively protective "from the unconstitutional reach of the statute."³⁸

Aside from Chief Judge Sloviter's opinion, Judge Buckwalter concluded, according to *Sable Communication of California, Inc. v. FCC*,³⁹ that the statute was unconstitutionally vague and failed the strict scrutiny standard.⁴⁰ Judge Buckwalter reached this conclusion by asserting that the CDA lacked "simple fairness" because the words "indecent" and "patently offensive" were not defined within the statute.⁴¹ Judge Buckwalter agreed with Chief Judge Sloviter that these provisions had a chilling effect on speech on the Internet because users would not know whether they were protected from criminal liability.⁴² He felt that the "unique characteristics" of the Internet required cautiously drafted legislation.⁴³

Similarly, Judge Dalzell concluded that the CDA was unconstitutional and that the "special attributes" of the Internet invalidated any content-based regulation on this medium.⁴⁴ Moreover, he distinguished the Internet as a "new medium of mass communication"⁴⁵ that required a "medium-specific" analysis.⁴⁶ Judge Dalzell rejected the appellants' argument that the CDA accomplished their interest of protecting minors from pornography because, according to the factual findings, the majority of adult-oriented material on the Internet is transmitted from outside the United States.⁴⁷ He concluded that the CDA may have shielded children from pornography originating in New York, but not from Amsterdam; thus, it did not accomplish the government's interest.⁴⁸

employ "in good faith, reasonable, effective, and appropriate actions . . . to restrict or prevent access by minors" 47 U.S.C.A. § 223(e)(5) (A)–(B) (West Supp. 1997).

38. *Reno I*, 929 F. Supp. at 856. Chief Judge Sloviter's logic is adopted by the Court in *Reno II*. *Reno II*, 117 S. Ct. at 2348–49.

39. 492 U.S. 115 (1989).

40. *Reno I*, 929 F. Supp. at 858.

41. *Id.* at 861–62 (quoting 47 U.S.C.A. § 223(a)–(d) (West Supp. 1997)). The Court in *Reno II* agrees with Judge Buckwalter's holding. *Reno II*, 117 S. Ct. at 2344.

42. *Reno I*, 929 F. Supp. at 865.

43. *Id.* The majority opinion utilizes Judge Buckwalter's reasoning in *Reno II*. *Reno II*, 117 S. Ct. at 2344.

44. *Reno I*, 929 F. Supp. at 867. Judge Dalzell does not define the "special attributes" he referred to in his logic. *Id.*

45. *Id.* at 872.

46. *Id.* Judge Dalzell's "medium-specific" approach is adopted in part in the majority of the Court's approach to the issue presented in *Reno II*. *Reno II*, 117 S. Ct. at 2340.

47. *Reno I*, 929 F. Supp. at 882. Approximately half of the communications that are transmitted over the Internet originate overseas. *Id.*

48. *Id.*

III. THE UNITED STATES SUPREME COURT DECISION

A. *The Appellants' Argument*

The appellants argued that both of the challenged provisions of the CDA were constitutional because they advanced the compelling governmental interest of shielding minors from exposure to adult-oriented material through narrowly tailored means.⁴⁹ Furthermore, the appellants contended that since adults and children have a First Amendment right to receive and to gain information via the Internet, parents will be afraid to use this beneficial resource if children have access to "indecent" and "patently offensive" materials.⁵⁰ Thus, the appellants stated that the CDA not only advances their compelling interest in protecting minors from harmful materials, it also advances their "equally compelling interest in furthering the First Amendment interest of all Americans to use what has become an unparalleled educational resource."⁵¹

The appellants addressed the constitutionality of both of the challenged provisions by relying on precedence involving indecency restrictions.⁵² First, they argued that since minors do not have the ability to make informed decisions on whether to view sexually explicit material on the Internet, the holding in *Ginsberg v. New York*⁵³ should be applied.⁵⁴ In order to protect the impressionable well-being of minors, the Court in *Ginsberg* upheld an indecency statute prohibiting bookstores and movie theaters from allowing minors to view indecent movies or materials.⁵⁵ The appellants contended that this principle also applied to the Internet.⁵⁶

Second, the appellants argued that the holding in *FCC v. Pacifica Foundation*,⁵⁷ which stated that government may regulate indecent communications on broadcast media so that children are not exposed to them, also applies to the Internet.⁵⁸ Third, the appellants asserted that they have an interest in creating zoning programs to curb the effects of adult-

49. Brief for Appellants at *14, *Reno II* (No. 96-511), 1997 WL 32931.

50. *Id.* at *18-19.

51. *Id.* at *14-15.

52. *Id.* at *19.

53. 390 U.S. 629 (1968).

54. Brief for Appellants at *20, *Reno II* (No. 96-511).

55. 390 U.S. at 645.

56. Brief for Appellants at *19, *Reno II* (No. 96-511).

57. 438 U.S. 726, 738 (1978). In *Pacifica*, the Court upheld the FCC's prohibition of George Carlin's "Filthy Words" monologue broadcast on radio. *Id.*

58. Brief for Appellants at *20-21, *Reno II* (No. 96-511).

oriented material on children.⁵⁹ The appellants argued that zoning ordinances, like those in *City of Renton v. Playtime Theatres, Inc.*,⁶⁰ should also apply to cyberspace.⁶¹ Similarly, the government urged that regulating cyberspace is “a zoning issue.”⁶² Thus, the appellants viewed the CDA as a time, place, and manner restriction.⁶³

The appellants also made several alternative arguments. First, they argued that the “patently offensive” provision is not vague because the same words are found in the second prong of the *Miller v. California*⁶⁴ test for obscenity.⁶⁵ Next, the appellants urged that the challenged provisions are constitutional because of the knowledge requirement and the statutory defenses.⁶⁶ Additionally, the government contended that no alternatives existed that were as effective as the CDA in advancing their interests.⁶⁷ Furthermore, they argued that technology exists for “tagging”⁶⁸ and monitoring indecent and patently offensive materials.⁶⁹

59. *Id.* at *21–22.

60. 475 U.S. 41, 43 (1986). In *Renton*, the Court upheld a zoning ordinance that prohibited adult movie theaters from being located within 1000 feet of a residential zone. *Id.*

61. Brief for Appellants at *21–22, *Reno II* (No. 96-511).

62. Transcript of Oral Argument at *19, *Reno II* (No. 96-511), 1997 WL 136253 (June 26, 1997). Time, place, and manner restrictions regulate when, where, and how speech is communicated. See *Frisby v. Schultz*, 487 U.S. 474, 488 (1989) (upholding an ordinance that prevented anti-abortion activists from picketing the residence of a doctor who performed abortions).

63. The government contended that the CDA censors places in cyberspace such as mail exploders, chat rooms, and newsgroups. Brief for Appellants at *37, *Reno II* (No. 96-511).

64. 413 U.S. 15, 24 (1973). In *Miller*, the Court created the *Miller* test, which provided the framework to determine obscenity states:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (emphasis added) (citations omitted).

65. Brief for Appellants at *42, *Reno II* (No. 96-511).

66. *Id.* at *25–27. The “verified credit card” defense and the “good faith” clause were applied in the event that prosecution occurred. 47 U.S.C. § 223(e)(5)(A)–(B) (Supp. 1997).

67. Brief for Appellants at *38, *Reno II* (No. 96-511).

68. *Id.* “Tagging” refers to a system in which the speakers would label or “tag” their speech as “indecent” so that other users would know the type of speech they are encountering. *Id.*

69. *Id.*

Lastly, according to the appellants, if the Court were to deem the provisions unconstitutional, then it should utilize the statutory “severability clause”⁷⁰ to eliminate only the unconstitutional terms and not the entire provision.⁷¹ The appellants stated that “[t]he district court threw up its hands and struck down a statute without . . . finding that any more narrowly tailored, constitutionally acceptable solution exists.”⁷²

B. *The Appellees’ Argument*

The appellees based their argument on the contention that the CDA, a content-based regulation, failed strict scrutiny on its face because it was not narrowly tailored to accomplish a substantial government interest.⁷³ The appellees offered several alternative arguments to prove this contention.⁷⁴

First, the appellees argued that the CDA was unconstitutional because it imposed criminal sanctions on the constitutionally protected speech of adults.⁷⁵ The appellees urged that even though the government interest was to protect children, the CDA abridged the First Amendment by banning the indecent speech of adults throughout cyberspace.⁷⁶ Therefore, according to the appellees, the CDA was too restrictive because it regulated more than was necessary to achieve the government’s interest.⁷⁷

70. 47 U.S.C.A. § 608 (West Supp. 1997). The “severability clause” states: “If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.” *Id.*

71. Brief for Appellants at *45–47, *Reno II* (No. 96-511).

72. Transcript of Oral Argument at *31, *Reno II* (No. 96-511). For extensive explanations of the government’s views see *The United States Department of Justice Home Page* (visited July 28, 1997) <<http://www.usdoj.gov>>.

73. Brief for Appellees at *20, *Reno II* (No. 96-511).

74. *Id.*

75. *Id.* at *20–21.

76. Transcript of Oral Argument at *59–60, *Reno II* (No. 96-511). The appellees relied on the First Amendment rule that the government may not “reduce the adult population . . . to . . . only what is fit for children.” *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374, 2393 (1996) (citations omitted). In *Denver*, the Court upheld a statute authorizing cable operators to prohibit indecent speech on television. *Id.* at 2397–98. In addition, the appellees cited *Sable*, which held that a complete ban on indecent dial-a-porn telephone conversations limited adults to what is appropriate for children. Brief for Appellees at *21, *Reno II* (No. 96-511) (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989)).

77. *Id.* at *20.

Next, the appellees argued the CDA was both substantially overbroad and unconstitutionally vague.⁷⁸ They asserted that the CDA was substantially overbroad because it neither defined its language nor its reach.⁷⁹ Furthermore, the appellees contended that the “indecent” provision⁸⁰ and the “patently offensive” provision⁸¹ were too vague.⁸² They stated that because these words were undefined, the CDA placed “millions of ordinary citizens . . . at risk of criminal prosecution merely for communicating in possibly ‘offensive’ terms online.”⁸³

Also, the appellees argued that the statutory defenses were ineffective and not technologically feasible.⁸⁴ First, they argued that the defenses did not provide speakers with guidelines on how to avoid criminal liability.⁸⁵ Second, according to the appellees, the defenses were not available and were also too expensive to the majority of speakers.⁸⁶ Third, they stated that the technological defenses such as credit card verification,⁸⁷ “tagging,”⁸⁸ and mandatory age verification were meaningless because, at the time of this case, it was impossible to effectively and economically determine the age of a speaker online in cyberspace.⁸⁹ Finally, the appellees asserted that the Supreme Court should not narrow the CDA by utilizing the

78. *Id.* at *39.

79. *Id.* at *41–42.

80. 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997).

81. *Id.* § 223(d)(1).

82. Brief for Appellees at *42, *Reno II* (No. 96-511).

83. *Id.*

84. *Id.* at *46–47.

85. *Id.* at *44 n.25.

86. *Id.* at *20.

87. Credit card verification requires an Internet speaker to provide an on-line service with a valid credit card before “signing on” to the Internet. Brief for Appellees at *14, *Reno II* (No. 96-511). Then, the on-line provider has to verify the credit card with the credit card company to determine whether or not the speaker is a minor. The appellees argued that this is an ineffective defense because credit card verification is costly to the Internet providers. In addition, credit card companies will only verify a card if the request is for a commercial transaction. The appellees also point out that credit card verification is an entirely unavailable defense to Internet users who are not charged for access. *Id.* at *14–15.

88. The appellees, relying on the United States District Court’s findings, contended that “tagging” is also not available because it is technologically impossible, burdensome on speakers, and does not prohibit minors from being sent “indecent” material. *Id.* at *16.

89. Transcript of Oral Argument at *27–29, *Reno II* (No. 96-511). For extensive explanations on the views and arguments of the appellees, see *The ACLU Freedom Network* (last modified July 23, 1997) <<http://www.aclu.org>>.

statutory severability clause. Instead, they urged that the entire CDA should be struck down if the challenged provisions were found unconstitutional.⁹⁰

C. *The Majority Opinion*

The cornerstone of *Reno II* was the majority's determination that the Internet is a distinct medium of communication which differs from broadcast media.⁹¹ In order to establish this new medium, the majority distinguished the precedence relied upon by the government.⁹²

Initially, the majority addressed *Ginsberg v. New York*.⁹³ In *Ginsberg*, the majority upheld a New York statute that prohibited the sale of obscene materials, such as magazines, to minors even if the materials were not considered obscene to adults.⁹⁴ The majority distinguished *Ginsberg* by contrasting the New York statute and the CDA.⁹⁵ First, the statute in *Ginsberg* did not ban parents from purchasing sexually-explicit materials for their children; however under the CDA, parents giving consent to their children to receive "indecent" communication could have been held criminally liable.⁹⁶ Second, the New York statute was only applicable to commercial transactions, while the CDA did not differentiate between the types of transmissions.⁹⁷ Third, the majority stated that the statute in *Ginsberg* provided a definition of the materials that were considered obscene for minors whereas the CDA left the terms "indecent" and "patently offensive" undefined.⁹⁸

Likewise, the majority also distinguished *FCC v. Pacifica Foundation* for several reasons.⁹⁹ According to the majority, the statutes in *Pacifica* targeted specific broadcasts,¹⁰⁰ but the CDA prohibited broad categories of

90. Brief for Appellees at *20, *Reno II* (No. 96-511).

91. *Reno II*, 117 S. Ct. at 2340, 2343. The Court's "medium-specific" analysis is similar to that applied by Judge Dalzell in *Reno I*. See *Reno I*, 929 F. Supp. at 872.

92. *Reno II*, 117 S. Ct. at 2341, 2343. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968).

93. *Reno II*, 117 S. Ct. at 2341.

94. *Ginsberg*, 390 U.S. at 629.

95. *Reno II*, 117 S. Ct. at 2341.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 2341-42.

100. In *Pacifica*, a listener-supported radio station broadcast George Carlin's monologue "Dirty Words" in the middle of the afternoon when minors were most likely to hear it. *Pacifica*, 438 U.S. at 729-30.

speech with no limitations.¹⁰¹ Also, the statutes differed because the FCC order was not punitive like the CDA.¹⁰² Moreover, the majority explained that the radio is a different type of communication medium than the Internet and has historically been given limited First Amendment protection.¹⁰³

Similarly, the majority distinguished the zoning ordinances in *Renton v. Playtime Theatres, Inc.* from the government's attempt to "cyberzone" by means of the CDA.¹⁰⁴ The majority found that the zoning ordinances in *Renton* only affected the location of adult movie theaters and bookstores, while the CDA zoned the content in all of cyberspace.¹⁰⁵ Since the CDA regulated "what" was transmitted and not "where" it was transmitted, the majority disagreed with the government's contention that the CDA is a time, place, and manner restriction.¹⁰⁶ Instead, the majority concluded that the CDA is a content-based regulation.¹⁰⁷

By distinguishing these authorities, the majority differentiated the Internet from other communication mediums.¹⁰⁸ Initially, the majority explained that broadcast media has historically been regulated and supervised by the government because of its "'invasive' nature."¹⁰⁹ The majority adopted the district court's finding that Internet communications do not have the ability to invade a person's computer or home.¹¹⁰ Instead, the majority determined that the Internet is different from broadcast media because encountering adult-oriented material on the Internet "'requires a series of affirmative steps more deliberate and directed than merely turning a dial.'"¹¹¹

101. *Reno II*, 117 S. Ct. at 2341-42.

102. *Id.* at 2342. There were two statutes in *Pacifica* prohibiting the use of indecent language on radio communications. *Pacifica*, 438 U.S. at 739 n.13.

103. *Reno II*, 117 S. Ct. at 2342.

104. *Id.* "Cyberzoning" is a zoning ordinance in cyberspace. *Id.*

105. *Id.* In addition, the Court also pointed out that the government interest in *Renton* was to protect children from the "secondary effects" of adult-oriented materials, but the government's interest in the CDA was to protect children from the "primary effects of 'indecent' and 'patently offensive' speech." *Id.*

106. *Reno II*, 117 S. Ct. at 2342-43.

107. *Id.* at 2342. For a good example of a case involving a content-based restriction, see *Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that "[t]he Son of Sam law is such a content-based statute" because "[i]t singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content").

108. *Reno II*, 117 S. Ct. at 2343.

109. *Id.* (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989)).

110. *Id.*

111. *Id.* at 2336 (quoting *Reno I*, 929 F. Supp. at 845).

By analogy, the majority relied on *Sable Communications of California, Inc. v. FCC* to prove this point.¹¹² The majority viewed searching for sexually explicit material on the Internet to be the same as the conduct in *Sable* of placing a “dial-a-porn” telephone call.¹¹³ Furthermore, the majority concluded that the Internet and broadcast media differ because most adult-oriented material on the Internet provides warning screens for minors whereas radio and television do not have such warning devices.¹¹⁴

Additionally, the majority ruled that First Amendment scrutiny should be applied to issues regarding freedom of speech on the Internet.¹¹⁵ First, the majority agreed with the lower court that the “indecent” provision and the “patently offensive” provision were too vague because they lacked definitions.¹¹⁶ Next, the majority established its concerns that because the CDA is an undefined, punitive content-based regulation, it would have an “obvious chilling effect on free speech.”¹¹⁷

As a result, the majority declared that the CDA was overbroad on its face because it suppressed constitutionally protected speech between adults when less restrictive alternatives existed for advancing the government’s interest.¹¹⁸ The majority recognized that there is a governmental interest in shielding minors from harmful speech.¹¹⁹ However, the majority determined that this interest did not justify molding adult speech into what is appropriate for children.¹²⁰

In addition, the majority rejects the government’s argument that the CDA’s scienter requirement and the statutory defenses save it from failing because of overbreadth.¹²¹ The majority, relying on the lower court’s factual findings, agreed that at the time of the decision, the technology for

112. *Id.* at 2343.

113. *Reno II*, 117 S. Ct. at 2343–44.

114. *Id.* at 2343.

115. *Id.* at 2344.

116. *Id.* at 2344–45.

117. *Id.* at 2344.

118. *Reno II*, 117 S. Ct. at 2347. The majority was also concerned about the issue of applying community standards of the person offended to material on the Internet. The Court explained that the application of community standards to a transmission sent to the entire nation will be judged by the community of the offended listener. *Id.* For good articles on both sides of this issue see Joanna H. Kim, Comment, *Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age*, 15 LOY. L.A. ENT. L.J. 415 (1995); and Timothy S. T. Bass, Comment, *Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard*, 1996 U. CHI. LEGAL F. 471 (1996).

119. *Reno II*, 117 S. Ct. at 2346.

120. *Id.*

121. *Id.* at 2349.

monitoring all of cyberspace did not exist and the means that did exist were too expensive for the non-commercial user.¹²² In addition, the Court refused to utilize the “severability clause” included in the CDA.¹²³ According to the opinion, even “textual surgery” could not have saved the CDA.¹²⁴

D. *The Concurring in Part, Dissenting in Part Opinion*

Chief Justice Rehnquist joined Justice O'Connor's concurring in part, dissenting in part opinion in which she declared that she would strike down the challenged provisions only to the extent that adult speech is suppressed.¹²⁵ The cornerstone of Justice O'Connor's opinion was her argument that what the majority called the “patently offensive” provision¹²⁶ was actually two separate provisions.¹²⁷ According to Justice O'Connor, these were the “‘specific person’ provision”¹²⁸ and the “‘display’ provision.”¹²⁹ Although Justice O'Connor agreed with the majority that the “display provision” was unconstitutional because it was technologically impossible to zone all of cyberspace, she argued that the other provisions were constitutional as long as the adult sending the transmission knows that the recipient of the material is a minor.¹³⁰

Justice O'Connor agreed with the majority that the provisions were overbroad; however, she argued that the appellees had not proven that they

122. *Id.* In her concurring in part, dissenting in part opinion, Justice O'Connor agreed with the majority that in cyberspace “‘there is no means of age verification,’ cyberspace still remains largely unzoned—and unzoneable.” *Id.* at 2354 (quoting *Reno I*, 929 F. Supp. at 846).

123. *Reno II*, 117 S. Ct. at 2349–50. The Court did not utilize the “severability clause” for two reasons. First, the Court stated that its jurisdictional review was limited by the CDA, to only challenges to the statute “on its face.” *Id.* at 2350; 47 U.S.C.A. § 608 (West Supp. 1997). The Court explained that severing the CDA would change the litigation into an “‘as-applied’ challenge.” *Reno II*, 117 S. Ct. at 2350. Second, the Court stated that “[t]he open-ended character of the CDA provides no guidance what ever for limiting its coverage.” *Id.*

124. *Id.*

125. *Id.* at 2357 (O'Connor, J., concurring in part, dissenting in part).

126. *See* 47 U.S.C.A. § 223(d)(1) (West Supp. 1997).

127. *Reno II*, 117 S. Ct. at 2352 (O'Connor, J., concurring in part, dissenting in part).

128. *Id.* (quoting 47 U.S.C.A. § 223(d)(1)(A) (West Supp. 1997)). Justice O'Connor stated this provision “makes it a crime to knowingly send a patently offensive message or image to a specific person under the age of 18.” *Id.*

129. *Id.* (quoting 47 U.S.C.A. § 223(d)(1)(B) (West Supp. 1997)). Justice O'Connor stated this provision “criminalizes the display of patently offensive messages or images ‘in a[n] manner available’ to minors.” *Id.* (quoting 47 U.S.C.A. § 223(d)(1)(B) (West Supp. 1997)).

130. *Reno II*, 117 S. Ct. at 2357.

were substantially overbroad.¹³¹ Furthermore, Justice O'Connor contended that the CDA could have been applied constitutionally because it was not substantially overbroad with respect to the rights of minors.¹³² Consequently, Justice O'Connor urged that the "indecent provision" and the "specific person provision" should be sustained when communication is between an adult and a minor.¹³³ Justice O'Connor concluded that the challenged provisions should only be invalidated to the extent that the provisions encroached on communication between adults.¹³⁴

IV. ANALYSIS OF *RENO V. AMERICAN CIVIL LIBERTIES UNION*

Under the CDA, a mother could be sent to prison for up to two years for sending an e-mail on birth control to her seventeen-year-old daughter at college if the community standards would define the message as "indecent."¹³⁵ Similarly under the CDA, an adult can enter an "adult only" chat room and suppress the speech of every adult present by simply saying, "my sixteen-year-old son is sitting here with me."¹³⁶ If hypotheticals like these exist, it is difficult to find flaws in the majority's decision that the CDA abridges the First Amendment. The majority opinion is well-reasoned and logical. By taking a "medium-specific" approach, the Supreme Court correctly determined that the Internet differs from broadcast media and deserves unfettered First Amendment protection.¹³⁷

In addition, both the United States district court and the Court accurately found that there is a compelling governmental interest in protecting the well-being of minors from harmful materials on the Internet because minors are extremely impressionable.¹³⁸ If the government does not prohibit minor's access to sexually explicit material on the Internet in some manner, the mental development of minors could be severely effected.¹³⁹ In

131. *Id.* at 2356.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Reno II*, 117 S. Ct. at 2348.

136. The Court calls this hypothetical situation the "heckler's veto" because any user could sign on and say that their minor son is present even if that user did not have a son. *Id.* at 2349.

137. *Id.* at 2343.

138. *Id.* at 2341. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (Justice Brennan agreed that "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate").

139. Justice Powell agreed that "children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling

addition, the Court's conclusion that the CDA did not advance this interest is on the mark. The pinnacle of the Court's rationale is the determination that the CDA was both too vague and overbroad.¹⁴⁰ Since the legislative history of the CDA showed that the definitions of "indecent" and "patently offensive" were omitted, exactly what do these terms mean?¹⁴¹ The Court has repeatedly held that "'sexual expression which is indecent but not obscene is protected by the First Amendment.'"¹⁴² Thus, in order not to chill the speech of society, it is imperative that these terms are adequately defined in the CDA.

Furthermore, the Court correctly decided that the CDA regulated more than is necessary to achieve the appellant's compelling interest because it regulated constitutionally protected speech among adults.¹⁴³ If Congress wants to permissibly prohibit this type of speech, it must show that it is trying to further a compelling governmental interest.¹⁴⁴ Although the interest asserted by the appellants was compelling, in order to withstand strict scrutiny, the government needed proof that the CDA was narrowly constructed to advance this interest.¹⁴⁵ The Court accurately reasoned that since the CDA infringed upon the constitutionally protected speech of adults, it was not narrowly-tailored and regulated more than was necessary.¹⁴⁶ Therefore, instead of referring to the CDA as failing strict scrutiny, the Court logically invalidated the challenged provisions by utilizing the overbreadth doctrine.¹⁴⁷

The Court's ruling that neither the statutory defenses nor the "severability clause" save the CDA from constitutional muster is also

through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child" *FCC v. Pacifica Found.*, 438 U.S. 726, 757-58 (1978) (Powell, J., concurring).

140. *Reno II*, 117 S. Ct. at 2344-47.

141. *Id.* at 2347.

142. *Id.* at 2346 (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

143. *Id.* at 2347. The Court stated that the "undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value." *Id.*

144. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (stating "we have required the State to show that the 'regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end'" (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983))).

145. *Reno II*, 117 S. Ct. at 2344.

146. *Id.*

147. *Id.* at 2347. The Court stated, "the breadth of the CDA's coverage is wholly unprecedented." *Id.*

sound.¹⁴⁸ Since the facts show that technology does not exist to monitor the content of cyberspace, the statutory defenses are based more on what future technology holds.¹⁴⁹ In addition, the Court correctly points out that in order for the Court to apply the CDA's "severability clause," the provisions would have to be "readily susceptible" to change.¹⁵⁰ Neither of the challenged provisions is susceptible to severability because the CDA would still be a content-based regulation even if the Court was to merely remove the undefined terms.¹⁵¹ The Court has held that most content-based regulations are analyzed under strict scrutiny.¹⁵² After applying strict scrutiny to the severed CDA, it would still likely be struck down because it does not advance a compelling interest of the government.

Unlike the majority opinion, Justice O'Connor's concurring in part, dissenting in part opinion provokes questions. For example, Justice O'Connor's contention that "the CDA can be applied constitutionally in some situations"¹⁵³ presents this question: In which situations could the CDA have been constitutionally applied? Justice O'Connor failed to give examples. If Justice O'Connor is referring to her argument that the CDA should be sustained in situations where the CDA restricts the speech of minors and not that of adults, then this argument presents another question.¹⁵⁴ How are courts going to limit the CDA from restricting only speech effecting the rights of minors and not the communication between adults? The only means available would be to utilize the CDA's "severability clause."¹⁵⁵ Incidentally, Justice O'Connor failed to address the "severability clause."¹⁵⁶

148. *Id.* at 2350-51.

149. Chief Judge Sloviter stated: "I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology . . ." *Reno I*, 929 F. Supp. at 857.

150. *Reno II*, 117 S. Ct. at 2350 (quoting *Virginia v. American Bookseller's Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (citations omitted)).

151. The CDA is regulating the content of what minors could access on the Internet; thus, it is content-based. Brief of the Volunteer Lawyers for the Arts, Various Artists and Art Organizations as *Amicus Curiae* in Support of Appellees at *16, *Reno II* (No. 96-511), 1997 WL 76015.

152. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 116 (1992); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).

153. *Reno II*, 117 S. Ct. at 2355 (O'Connor, concurring in part, dissenting in part).

154. *Id.*

155. See 47 U.S.C.A. § 608 (West Supp. 1997).

156. See Justice O'Connor's concurring in part, dissenting in part opinion in *Reno II*. *Reno II*, 117 S. Ct. at 2351-57.

Likewise, Justice O'Connor did not address the issue of the CDA's vagueness,¹⁵⁷ which presents yet another question. If the Court was, as Justice O'Connor argued, to sustain the "indecent transmission" provision,¹⁵⁸ how are people to know what "indecent" means? The CDA did not define the word.¹⁵⁹ Since the CDA is a criminal statute, people must know the definition of "indecent." Otherwise, Internet users will not know whether their communication is legal. This creates a potential violation under the Due Process Clause of the Fifth Amendment.¹⁶⁰ The Court affirmed *Shea v. Reno*¹⁶¹ which stated, "[d]ue process requires that a criminal statute 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'"¹⁶² The Court never reached a due process argument because it invalidated both of the challenged provisions of the CDA as facially overbroad.¹⁶³ If Justice O'Connor's argument prevailed that the "indecent transmission provision" was not overbroad, a due process challenge would have rendered this provision unconstitutional.

V. CONCLUSION

A. Implications and Ramifications

Reno II has defined the scope of the Internet under the First Amendment. This decision implies that speech on this new medium will receive broad First Amendment protection.¹⁶⁴ As the Internet continues to expand rapidly, the 7-2 majority sends a message that content-based restrictions on the Internet will be struck down for a long time to come. Justice Stevens concluded the majority opinion in *Reno II* by summarizing the Court's approach to content-based freedom of speech:

157. *Id.*

158. Justice O'Connor's reference to the "indecent transmission" provision is the same as what the majority opinion calls the "indecent" provision. *Id.* at 2356.

159. In *Reno II*, the majority stated "[g]iven the absence of a definition of either term . . . provoke[s] uncertainty among speakers about how the two standards relate to each other and just what they mean." *Id.* at 2344.

160. The Due Process Clause of the Fifth Amendment to the United States Constitution states: "No person shall be . . . deprived of life, liberty, or property without due process of law . . ." U.S. CONST. amend. V.

161. 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 501 (1997).

162. *Id.* at 937 (quoting *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)).

163. *Reno II*, 117 S. Ct. at 2344.

164. *Id.*

As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.¹⁶⁵

Further, by analyzing the Internet as a new specific medium, *Reno II* will have long standing ramifications on future Internet challenges and legislation. Additionally, as technology continues to evolve, there will be new constitutional concerns in cyberspace.¹⁶⁶ It is impossible to predict how the Court may resolve future challenges to the Internet under other amendments; however, for now, we can be sure the our speech is stringently protected.

B. *Future Internet Regulations*

It is easy to conclude that the CDA was merely the first piece in a long line of regulatory Internet legislation.¹⁶⁷ Many commentators have called the second wave of legislation the "son of CDA" or "CDA II."¹⁶⁸ As far up as the White House, the wheels are already in motion for new Internet restrictions.¹⁶⁹ In addition, proposals for new legislation are already being created by many state representatives.¹⁷⁰ Regardless of how many pieces of national legislation are proposed, *Reno II* helps define how these bills should be drafted in order to withstand a First Amendment challenge.¹⁷¹ The Court

165. *Id.* at 2351.

166. *See generally* Minnesota v. Granite Gate Resorts, No. C6-95-7227, 1996 WL 767431, at *10 (Minn. Dist. Ct. Dec. 11, 1996) (ruling on the development of gambling on the Internet, the United States District Court for the District of Minnesota applied its state laws to an out of state Internet gambling company).

167. *See* Wendy R. Leibowitz, *Politicians v. Technology: Why Congress Loves to Hate the 'Net*, NAT'L L.J., July 14, 1997, at B9.

168. Richard Raysman & Peter Brown, '*Reno v. ACLU*' – *The First Amendment Meets the Internet*, 218 N.Y. L.J., July 8, 1997, at 3.

169. *Id.* at 7.

170. As examples, California's Democratic Representative, Zoe Lofgren, has introduced the "Internet Freedom and Child Protection Act" (H.R. 744), Pennsylvania's Republican Representative, Joseph M. McDade, has created the "Family-Friendly Internet Access Act of 1997" (H.R. 1180), and Washington's Democratic Senator, Patty Murray, is working on the "Child Safe Internet Act of 1997." *Id.*

171. *Reno II*, 117 S. Ct. at 2348.

implied that future legislation must be narrowly-tailored.¹⁷² In order to achieve this goal, the Court suggested alternatives such as tagging, defining vague terms, “making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently than others, such as chat rooms.”¹⁷³

The Internet does need regulation to protect the well-being of minors. However, there must be a carefully crafted balance between what, how, and to whom the Internet is censored. Due to the fact that there were no alternatives, striking down the CDA worked to protect our freedom of speech.

Jeffrey L. Cox

172. *Id.*

173. *Id.*

The Doctrine of Equivalents after *Hilton Davis* and *Markman*, and a Proposal for Further Clarification

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I. INTRODUCTION

In March 1997, the United States Supreme Court issued its decision in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.* ("*Hilton Davis II*")¹ which had been eagerly anticipated in the intellectual property community. The expectations were high. It was hoped that the doctrine of equivalents would either be abolished or clarified. A degree of consistency would return to patent law which had been lacking with the ever expanding application of the doctrine. Patent practitioners would once more be able to prepare and present to their clients unambiguous and dependable infringement opinions. Some had even argued that the Court would abolish the doctrine altogether. Neither expectation came true. Instead, the case at bar was Solomonically decided on the facts, and the Court offered little else beyond a detailed analysis of earlier Supreme Court cases. The doctrine of equivalents is here to stay, and the patent bar will now have to return to the deeply divided Federal Circuit in the hope that the rift in the patent appeals court can be bridged and that the Court will exhibit a higher degree of consistency in future decisions on the doctrine of equivalents.

Part II of this article presents several concepts of patent law which are indispensable for a proper understanding of the issues presented in this article. Part III provides an overview of the doctrine of equivalents from a policy perspective and from an historical perspective. Part IV discusses various limitations on the doctrine of equivalents and several related developments in the Federal Circuit. Part V discusses the specific Supreme Court holdings in *Hilton Davis II* and attempts to reconcile this latest decision with the earlier decision in *Markman v. Westview*.² Finally, Part VI presents a proposal for a further clarification of the application of the doctrine of equivalents.

II. PRELIMINARIES

Patent law, like any area of law, can be understood only if the underlying concepts are properly understood. This part provides a brief overview of several concepts of patent law and statutory definitions pertinent to this article. Furthermore, patent prosecution and claim interpretation are

1. 117 S. Ct. 1040 (1997), *rev'g* 62 F.3d 1512 (Fed. Cir. 1995) [hereinafter *Hilton Davis II*]. This case at the appeals court level is *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512 (Fed. Cir. 1995) [hereinafter *Hilton Davis I*].

2. *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384 (1996), *aff'g* 52 F.3d 967 (Fed. Cir. 1995) (en banc).

briefly described so as to introduce the reader to those concepts from a practitioner's viewpoint.

A. *The Patent Contract*

The primary model of domestic patent theory is the so-called contract model, which essentially states that a letters patent is a contract between the United States and the patentee.³ The government, under constitutional authority,⁴ promises the inventor to grant and enforce a monopoly in the invention⁵ for a limited time. The inventor, in turn, promises to describe the invention so that it may be made and used by those skilled in the art after the monopoly is terminated.⁶ The government's side of the bargain is enforced in accordance with 35 U.S.C. § 281, which allows the patentee to bring a civil action against a suspected infringer after the patent issues.⁷ The patentee's side of the bargain comes due prior to the issuance of the patent. The patentee is required to provide a proper and enabling description of the invention and to disclose to the Patent Office all pertinent information of which the patentee is aware that could influence the granting of a

3. See PETER D. ROSENBERG, PATENT LAW FUNDAMENTALS § 1.02, at 1–4 (2d ed. 1997) (citing *In re Tenney*, 254 F.2d 619, 624 (C.C.P.A. 1958)); see also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 159 (1989) (“[T]he bargain held out by the federal patent system of disclosure in exchange for exclusive use.”).

4. U.S. CONST. art. I, § 8, cl. 8. “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.*

5. 35 U.S.C. § 271 (1994 & Supp. I 1995). The monopoly is infringed by anyone who “without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor[e],” 35 U.S.C. § 271(a) (Supp. I 1995), by anyone who induces infringement, 35 U.S.C. § 271(b) (1994), and by anyone who imports into the United States a product made abroad by a process which is patented in the United States. 35 U.S.C. § 271(g) (Supp. I 1995).

6. The term of a United States utility patent is 20 years from the date of a first application for the patent. 35 U.S.C. § 154(a)(2) (1994). The patent may lapse, however, if maintenance fees are not paid every four years. *Id.* § 151. Design patents are valid for 14 years from the issue date, *Id.* § 41(b), and are not subject to maintenance fees. It is also possible, under very restricted circumstances, to extend a utility patent term such as in the case of drug patents, wherein the invention is subject to a lengthy review process at the Food and Drug Administration and the patent owner may not be able to market the product at the time the patent issues. *Id.* § 155. A patent owner may, however, dedicate the patented invention to the public at any time during the life of the patent. *Id.* § 253 (second paragraph).

7. 35 U.S.C. § 281 (1994).

patent.⁸ The examination in the Patent Office is central to the determination of patentability. The purpose of the in-depth examination is to ascertain that the patentee is indeed entitled to each claim of the patent, that each claim is patentable in light of the prior art, and that the public can determine from the claims whether or not the patented invention is infringed.⁹

The typical application process is as follows: the inventor discloses his invention to a patent attorney.¹⁰ The latter prepares an application by describing the invention in general terms, by describing at least one preferred embodiment of the invention in detail, and by defining the invention with one or more claims.¹¹ The application is then filed in the Patent Office together with an oath or declaration by the inventor stating that he is indeed the first inventor of the subject matter for which the patent is sought.¹² The application is then subjected to an examination before a patent examiner who is an expert in the technical field to which the invention pertains.

The examiner thereby reviews the application in light of the formal requirements under 35 U.S.C. § 112, which calls for an "enabling" disclosure of the invention¹³ and for definite and distinct claims.¹⁴ The

8. 37 C.F.R. § 1.56 (1997).

9. *Hilton Davis I*, 62 F.3d at 1539 (Plager, J., dissenting) (citing Giles Rich, *The Extent of the Protection and Interpretation of Claims-American Perspectives*, 21 INT'L REV. INDUS. PROP. & COPYRIGHT L. 497, 499, 501 (1990)).

10. The United States Patent Office strongly recommends that inventors employ the services of registered patent attorneys or patent agents. See generally U.S. DEP'T OF COMMERCE, PATENT AND TRADEMARK OFFICE, GENERAL INFORMATION CONCERNING PATENTS (1990). When it is apparent that an application was filed by a pro se applicant, the patent examiners are instructed to advise the applicant as follows:

While an inventor may prosecute the application, lack of skill in this field usually acts as a liability in affording the maximum protection for the invention disclosed. Applicant is advised to secure the services of a registered patent attorney or agent to prosecute the application, since the value of a patent is largely dependent upon skillful preparation and prosecution.

MANUAL OF PATENT EXAMINING PROCEDURE, CH. 401, ¶ 17.01 (6th ed., rev. 2, July 1996).

11. 35 U.S.C. § 112 (1994).

12. 37 C.F.R. § 1.63(b)(2) (1997).

13. The first paragraph of section 112 provides:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

examiner also compares the claimed invention with the prior art, i.e., prior patents and other technical literature, and determines whether or not, in her opinion, the claims in the application attempt to monopolize something which is old.¹⁵ Anything which belongs to the prior art and has entered the public domain cannot be taken from the public and made the subject of a patent monopoly.¹⁶

Upon completing the review, the patent examiner issues an Office action,¹⁷ which is usually a rejection of the application. The most common rejections in the first Office action are based on the examiner's allegations that the claims, as presented in the application, fail to particularly point out and distinctly claim the invention,¹⁸ that the invention defined in the claims of the application is anticipated by the prior art,¹⁹ and that the claimed invention is obvious over the prior art.²⁰ The applicant then answers the Office action by responding to each of the examiner's objections. This may be done by either argumentatively traversing or satisfying the examiner's requirements and, if necessary, by suitably amending the application.²¹

Amendments often consist of a narrowing of the claims by adding limiting language. Prior art rejections under 35 U.S.C. §§ 102 and 103 are typically answered with a narrowing amendment to overcome the rejection and to remove the prior art. It is thereby paramount that any amendments

35 U.S.C. § 112.

14. The second paragraph of section 112 provides: "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." *Id.*

15. Prior art is codified in 35 U.S.C. § 102 (the claimed subject matter is anticipated by the prior art, or there exists a judicial bar against the patentability of the claimed subject matter), and § 103 (the claimed subject matter is an obvious modification of prior art). 35 U.S.C. § 102 (1994); 35 U.S.C. § 103(a) (1994 & Supp. I 1995).

16. *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 280-82 (1976). In *Sakraida*, the Court discussed the labors of Hercules in the Greek fables as the prior art. *Id.* at 275 n.1. *Sakraida* dealt with a patent claim on a water flush system for dairy farms in which dammed-up water was quickly released and conducted through the soiled areas of the stables to wash the manure away. *Id.* at 277. The claims were held to be obvious over the labors of Hercules, which included his ingenious diversion of a nearby river through the stables and the resulting removal of all impurities from the stables. *Id.* at 275 n.1.

17. 35 U.S.C. § 132 (1994).

18. *Id.* § 112.

19. *Id.* § 102.

20. 35 U.S.C. § 103(a) (Supp. I 1995).

21. 35 U.S.C. § 132 (1994). "[I]f after receiving [an Office action with a rejection], the applicant persists in his claim for a patent, with or without amendment, the application shall be reexamined." *Id.*

thus made be supported in the original application.²² If such support cannot be found, then the amendment is rejected as being directed to new matter and the applicant is required, in a further Office action, to cancel the new matter.²³ When the patent examiner is satisfied that all of the statutory and regulatory requirements have been met, the application is allowed and, subject to the payment of an issue fee by the applicant, the Patent Office issues a patent.²⁴

B. *The Patent Claim*

The invention is defined in the claims of the patent.²⁵ In terms of the above-noted contract model, the claims define the boundaries of the government's side of the bargain, and the monopoly granted to the patentee covers everything which falls squarely within the boundaries of the claims. A patent claim, which may be in independent or dependent form,²⁶ consists of an introductory phrase (the preamble), a transitional phrase, and a claim body. Generally, the preamble introduces the reader to the field to which the invention belongs, and the body defines the combination of elements or process steps which make up the invention. Alternatively, the preamble may recite the elements of a prior art product or process, and the body of the claim may recite an improvement over that prior art.²⁷ The transition between the preamble and the body of the claim may be open-ended or closed. An open-ended term such as "comprising" or "the

22. *Id.* "No amendment shall introduce new matter into the disclosure of the invention." *Id.* It is possible, however, to *force the entry* of such new matter by filing a continuing application. 37 C.F.R. §§ 1.53, -.60, -.62(a) (1997). A continuing application which adds subject matter relative to the first application, the parent application, is referred to as a continuation-in-part ("CIP"). 37 C.F.R. § 1.53. The applicant is thereby afforded the date of the parent application for any disclosure contained therein, and the date of the CIP for the subject matter added in the continuing application. 35 U.S.C. § 120 (1994).

23. *Id.* § 132.

24. *Id.* § 151. When an applicant appears to be entitled to a patent under law, the Patent Office will issue a notice of allowance and upon the payment of an issue fee within three months of the notice of allowance, a letters patent is issued to the applicant in the name of the United States. *Id.* §§ 151, 153.

25. *Id.* § 112 (second paragraph).

26. 35 U.S.C. § 112 (third paragraph). An independent claim defines a complete invention by itself. A dependent claim refers back to an independent claim (directly or indirectly) and incorporates any and all of the subject matter of that independent claim. *Id.* (fourth paragraph).

27. Improvement-type claims are also referred to as "Jepson claims." See ROBERT C. FABER, LANDIS ON MECHANICS OF PATENT CLAIM DRAFTING § 57 (4th ed. 1996) (citing *In re Jepson*, 1917 C.D. 62, 243 O.G. 525 (Ass't Comm'r Patents 1917)).

invention comprises” means that the invention requires at least all of the elements recited in the body, and maybe more.²⁸ For infringement purposes, if the accused product or process has all of the elements of such an open-ended claim, and several additional elements, the claim is still infringed.²⁹ It is only necessary for the patentee to show that the accused product or process incorporates all of the claimed elements.³⁰ If, on the other hand, the claim is written with a closed transition, such as “consisting of” or “the invention consists of,” then only exact accord between the accused product or process and the claim body, will support a holding of patent infringement.³¹

It is difficult to overstate the importance of a patent claim in modern United States patent practice. The scope of the claims alone answers the question whether or not a product or process infringes a patent.³² To be sure, during the early stages of United States patent law, the patent claim was relatively unimportant and it generally consisted of a catchall phrase which covered “the invention as described.”³³ The central claiming system for utility patents was replaced in 1836 with the peripheral claiming system, where the statute required that a patentee “particularly specify and point out the part, improvement, or combination which he claims as his own invention.”³⁴ A peripheral claim thus stakes out the boundaries within which the patentee holds his monopoly. The general description of the invention which makes up the bulk of the patent is thus considerably less important in the context of patent infringement. In the peripheral claiming system it is therefore possible for a product to be virtually identical to an invention *described* in a patent, yet the *claimed* invention is not infringed.

This proposition is best explained by way of a simple example. Assume the invention is a four-legged stool with an upholstered seat and it is defined in the following claim: “A stool, comprising: a plate having a seating surface, upholstery covering said seating surface, and four legs each screwed to said plate opposite said upholstery and supporting said seating surface in a

28. *Id.* §§ 7, 8.

29. *Id.*

30. *Lemelson v. United States*, 752 F.2d 1538, 1551 (Fed. Cir. 1985) (holding that “each element of a claim is material and essential,” and the burden is on the plaintiff to show that every element of the claim or a substantial equivalent is present in the accused product or process).

31. *FABER*, *supra* note 27 at §§ 7, 8.

32. *See Lemelson*, 752 F.2d at 1538.

33. *Hilton Davis I*, 62 F.3d at 1565 (Nies, J., dissenting). *See generally* 3 DONALD CHISUM, CHISUM ON PATENTS, § 8 (Supp.) to § 8.02 (1997).

34. *Hilton Davis I*, 62 F.3d at 1539 (Plager, J., dissenting) (citing *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U.S. 274, 278 (1877)).

substantially horizontal position.” The claim thus defines the invention as a combination of three elements, the plate, the upholstery, and the legs. In order to show infringement, the patentee must show that the accused device has all three elements in the same combination.³⁵ Any stool or chair with an upholstered seating surface and with four legs screwed to the seating plate could be shown to infringe the claim. Also, a stool with an upholstered seating surface, five or six legs, a backrest, and two arm rests would still literally infringe the claim because each of the three elements of the claim is found in the accused product.³⁶ However, a stool with an upholstered seating surface and only three legs would not literally infringe the claim. It could also be argued that, because of the use of the term, “screwed,” the claim inferentially included a fourth element, namely screws or bolts with which the legs are attached to the seating plate. Accordingly, a stool with four legs “glued” or “stapled” to the seating surface plate would not literally infringe the claim. The fact that the stool described in the patent specification (even with an express teaching that any number of legs over three would be acceptable or a statement that the legs may be glued or stapled to the seating surface plate) and the accused stool may be virtually identical is of little importance. Only the claim defines the invention.

Whether or not infringement could possibly be shown in the foregoing example under the doctrine of equivalents will be discussed later in this article. An essential point to remember in this context, however, is that if a claim is literally infringed, the doctrine of equivalents and the doctrine of prosecution history estoppel play no role in the infringement analysis.³⁷

An element in a claim may also be expressed as a means for performing a certain function.³⁸ Such *means-plus-function* recitations cover everything expressly described in the specification and their equivalents.³⁹ By way of example, the stool legs in the above claim could be recited as “means for supporting said seating surface in a substantially horizontal position,” or the like. The claim could thus be read on a swing, on a cherry picker seat, or on a camera boom support. Proper claim construction would now turn on the questions of whether or not these alternative embodiments were described in the specification and whether or not they are equivalents of the described

35. *Id.*

36. If, on the other hand, the claim were in the closed format and the term “*comprising*” were replaced with “*consisting of*,” then a stool with a fourth element such as the backrest would not read on the claim and the patented invention would not be infringed.

37. *See, e.g.,* *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1558–59 (Fed. Cir. 1985).

38. 35 U.S.C. § 112 (1994) (sixth paragraph).

39. *Id.*

stool legs.⁴⁰ The Patent Office during the patent prosecution phase and the courts in an infringement action, determine the scope of a *means-plus-function* limitation from the specific structure described in the specification and equivalents thereof.⁴¹

C. *The Enabling Disclosure*

The inventor's side of the bargain requires that he contribute to the arts a disclosure which, when read by a person of skill in the pertinent art, enables the skilled artisan to make and use the invention.⁴² The invention must be described in "full, clear, concise, and exact terms."⁴³ Finally, the inventor must present a best mode example, i.e., an exemplary embodiment of the invention which the inventor, at the time the application is first filed at the Patent Office, deems to be the best mode of the invention.⁴⁴ No proof is necessary as to how the invention was conceived.⁴⁵

It is important to note that the description of the invention must fully support and enable the claimed invention. If a patent specification fails to properly teach and enable the invention, then the contract between the patentee and the government is void for lack of consideration.⁴⁶ Similarly, if the description does not support the entire scope of the claimed invention—the claim is too broad in view of the disclosure—then the contract may be void for insufficiency of consideration.⁴⁷

Once more, this proposition may be best underscored with a simple, yet timely example: Assume the invention is for a disinfectant composition with two main components, namely a benzalkonium and a phospholipid. The specification describes and provides examples of various mixtures of 1) a benzalkonium halide in a range from 3% to 5% by weight; and 2) a synthetic phospholipid in a range from 1% to 10% by weight. The broadest claim, on the other hand, defines the benzalkonium component in a range of *up to a*

40. See, e.g., *In re Donaldson Co.*, 16 F.3d 1189, 1193 (Fed. Cir. 1994) (en banc) (holding that, similar to the courts in infringement actions, the Patent Office must consider limitations on *means-plus-function* elements as dictated by the specification, and not import into the element the broadest possible meaning which reads on anything under the sun).

41. *Id.* at 1195.

42. 35 U.S.C. § 112 (1994) (first paragraph).

43. *Id.*

44. *Id.*

45. 35 U.S.C. § 103 (Supp. I 1995). "Patentability shall not be negated by the manner in which the invention was made." *Id.* § 103(a).

46. *In re Tenney*, 254 F.2d 619, 624 (C.C.P.A. 1958); see ROSENBERG, *supra* note 3, at § 1.02.

47. See *Tenney*, 254 F.2d at 624.

maximum of 5% without providing a lower limit. Such a claim may be argued to be too broad in light of the disclosure and a patent examiner would typically require that the applicant provide a lower limit. Bound by the prohibition against the addition of new matter,⁴⁸ the applicant could only amend the claim to recite a maximum range from 3% to 5%. If such a narrow range is not acceptable, then the inventor must choose between the two alternatives of accepting the severely limited claim, or of filing a continuation-in-part application "CIP."⁴⁹ The latter alternative, however, is often avoided because of the added cost⁵⁰ and considerable delay in prosecution.⁵¹

D. *After the Grant-Reissue*

Once a patent has been issued by the Patent Office, it becomes a public document which defines the patentee's rights within the boundaries of the claims. The patentee has a right to exclude anyone from making, using, selling, or importing the claimed invention.⁵² If the patent is found to be defective, it may be surrendered and the Patent Office may reissue a corrected version of the patent.⁵³ The patent is defective if it contains mistakes in the description, in the drawing, or in the claims.⁵⁴ The claims are considered defective when they are too broad, i.e., the patentee claimed more than he had a right to claim.⁵⁵ They are also considered defective when they are too narrow, i.e., the patentee claimed less than he had a right to claim.⁵⁶ Returning briefly to the above disinfectant example, assume the original disclosure described a functional example in which the benzalkonium halide was present at 1% by weight, yet the example was overlooked by the applicant, who agreed to the limited claims reciting the range of 3% to 5%. The patentee clearly had a right to claim the broader range of 1% to 5% and, according to the reissue statute, the Patent Office

48. 35 U.S.C. § 132 (1994).

49. 37 C.F.R. §§ 1.53, -.60, -.62 (1997).

50. The Patent Office filing fee for new applications and continuing applications is currently \$790.00 (\$395.00 for independent inventors and small business concerns with fewer than 500 employees). 35 U.S.C. § 41(a), (b) (1994); *see also* 37 C.F.R. §§ 1.17-.21 (1997).

51. The filing of a continuing application typically delays the issuance of a patent by several months.

52. 35 U.S.C. § 271(a) (Supp. I 1995); *see also supra* text accompanying note 5.

53. 35 U.S.C. § 251 (1994) (first paragraph).

54. *Id.*

55. *Id.*

56. *Id.*

will reissue the patent upon the surrender of the original patent and a proper application for reissue.⁵⁷

While a reissue application to correct a defective patent in general may be filed at any time during the life of the patent,⁵⁸ it is possible to broaden the claims only if the reissue application is filed within two years of the original grant of the patent.⁵⁹ In addition, the broadened claims may be subject to the intervening rights of a person who practiced the invention prior to the reissue.⁶⁰ For instance, if someone had started to manufacture, prior to the grant of the reissue, the described disinfectant with a benzalkonium halide component of, say, 1.5%, then the patentee would have no apparent patent rights against that intervening party.⁶¹

E. *Infringement*

A patent is infringed by anyone who makes, uses, offers for sale, or sells the patented invention.⁶² The statute is simple enough. The patentee merely carries the burden of proving that the defendant's product or process is the same as the patented invention.⁶³ The patented invention, as outlined above, is defined in the claims of the patent and the metes and bounds of the monopoly granted by the patent are defined in the claims.⁶⁴ Accordingly, infringement is determined by comparing the accused product or process with the claims. Literal infringement is shown if the accused product or process incorporates each and every element of the claim.⁶⁵ However, only a slight modification in the product may move it outside of the literal scope of the patent claim,⁶⁶ while the heart of the invention is clearly copied. This is where the doctrine of equivalents comes into play: unscrupulous copycats who design around the letter of the patent claim, but otherwise copy the

57. *Id.*

58. 35 U.S.C. § 251.

59. *Id.* (fourth paragraph).

60. 35 U.S.C. § 252 (Supp. I 1995).

61. *Id.* "The court before which such matter is in question may provide for the continued manufacture . . . [if] substantial preparation was made before the grant of the reissue." *Id.* (second paragraph).

62. *Id.* § 271(a); *see also supra* text accompanying note 5.

63. *Wilson Sporting Goods Co. v. David Geoffrey & Assoc.*, 904 F.2d 677, 685 (Fed. Cir. 1990) ("The patent owner has always borne the burden of proving infringement . . .").

64. *See Zenith Lab., Inc. v. Bristol-Myers Squibb Co.*, 19 F.3d 1418, 1424 (Fed. Cir. 1994).

65. *See Lemelson v. United States*, 752 F.2d 1538, 1551 (Fed. Cir. 1985).

66. For example, an accused stool could have legs glued to the base, instead of screwed to the base as expressly required by the claim.

invention virtually identically may be stopped by this doctrine.⁶⁷ The doctrine affords the courts a vehicle with which to stave off fraud on the patent and to punish not only literal copying, but also copying by equivalent design.⁶⁸

III. THE DOCTRINE OF EQUIVALENTS

A. *Two Competing Policy Issues*

The patent statutes are founded on the constitutional dictate to promote the progress of science and the arts⁶⁹ and on the economically motivated effort to reward the diligent inventor for his contribution to the arts.⁷⁰ The primary policy argument adopted by the proponents of the doctrine of equivalents is that protection for the patentee must be the primary consideration in claim scope interpretation.⁷¹ The patentee is to be protected against copying of his invention where only minor elements of the product are changed so as to circumvent the letter of the patent claim. As stated more than 180 years ago by Judge Story: "Mere colorable differences, or slight improvements, cannot shake the right of the original inventor."⁷² The competing policy argument, adopted by the opponents of the doctrine of equivalents, is that patents fulfill an even more important function in the progress of the sciences, namely to provide notice to the public as to what is and what is not available for general use.⁷³ During the negotiation phase before the Patent Office, the applicant and the patent examiner agree on the metes and bounds of the claimed invention, and the printed patent must give fair notice as to what was contained in the agreement.⁷⁴ The law does not currently favor either proposition. Instead, the doctrine of equivalents strikes a careful balance between the two competing policies. Nevertheless, one must not overlook the clear prescription by the courts that the doctrine of equivalents must remain the exception rather than the rule.⁷⁵

67. See *Graver Tank & Mfg. Co. v. Linde Air Prods., Co.*, 339 U.S. 605, 607 (1950).

68. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991) (A patent owner "should not be deprived of the benefits of his patent by competitors who appropriate the essence of an invention while barely avoiding the literal language of the claims.").

69. U.S. CONST. art. I, § 8, cl. 8.

70. See *Hilton Davis I*, 62 F.3d at 1530 (Newman, J., concurring).

71. *Id.*

72. *Odiome v. Winkley*, 18 F. Cas. 581, 582 (C.C.D. Mass. 1814) (No. 10,432).

73. See *Hilton Davis I*, 62 F.3d at 1541 (Plager, J., dissenting).

74. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991).

75. *Id.*

Currently, a heated debate is brewing as to whether the doctrine of equivalents is an equitable doctrine that evolved out of the equity courts,⁷⁶ or a doctrine which is merely equitable in nature and which may be given to a jury in deciding infringement.⁷⁷ A detailed discussion of the issue is beyond this article and, in fact, the question may reach the Supreme Court before too long. It is even conceivable that *Hilton Davis II*,⁷⁸ the primary case in this article, could once more reach the Supreme Court with regard to this issue.⁷⁹

B. *Graver Tank*

Prior to the decision in *Hilton Davis II*, the courts applied the doctrine of equivalents and its rule of application as it was announced by the Supreme Court in *Graver Tank Manufacturing Co. v. Linde Air Products Co.*⁸⁰ There, the Court was concerned with protecting the patent holder against “the unscrupulous copyist” who would make “insubstantial changes” which add nothing to the art, yet take the product “outside the reach of law.”⁸¹ The Court further recognized that a copyist’s intent on pirating an invention should be expected to introduce a minor variation in an effort to conceal his piracy, and that direct and literal “duplication is a dull and very rare type of infringement.”⁸² *Graver Tank* established the so-called *function-way-result* test, which asked whether the accused product performed: 1) substantially the same function; 2) in substantially the same way; and 3) to lead to *substantially* the same result.⁸³ As explained in *Graver Tank*, when two devices do the same work in substantially the same way, and the result of

76. See, e.g., *Hilton Davis I*, 62 F.3d at 1543 (“The authority to exercise the unique remedy which is the doctrine of equivalents lies exclusively in courts of equity.”) (Plager, J., dissenting).

77. *Id.* at 1525–26 (pointing to the Supreme Court precedent suggesting that the doctrine of equivalents is properly handled by the jury).

78. *Hilton Davis II*, 117 S. Ct. at 1040.

79. *Id.* at 1053 (“Whether, if the issue were squarely presented to us, we would reach a different conclusion than did the Federal Circuit is not a question we need to decide today.”).

80. 339 U.S. 605 (1950).

81. *Id.* at 607.

82. *Id.*

83. *Id.* at 608. Emphasis is added to indicate that the test is sometimes stated to require not only *substantially the same result* but *the same result*. The arbitrary inclusion or omission of the additional qualifier, however, does not appear to trigger a different outcome and it may thus be considered a cosmetic difference. *Hughes Aircraft Co. v. United States*, 717 F.2d 1351, 1366 (Fed. Cir. 1983).

both is the same, then the two devices are the same, even though they may be different in appearance.⁸⁴

While the rule and its application appeared clear, the various circuits applied the rule in different ways and reached divergent results.⁸⁵ This lack of uniformity in the application of the doctrine of equivalents was one of the reasons why Congress, in the interest of promoting uniform patent laws, established the Court of Appeals for the Federal Circuit in 1982 as the only federal appeals court to hear patent appeals.⁸⁶ Dependable uniformity, however, eluded the Federal Circuit as well as did questions concerning the doctrine of equivalents. Nevertheless, two applicable standards soon crystallized in the newly created court, namely the *as-a-whole* approach and the *element-by-element* analysis.⁸⁷

The first test compares the accused product with the allegedly infringed claim as a whole.⁸⁸ The *Graver Tank* test is applied by asking whether the accused product performs substantially the same function as the patented invention, in substantially the same way, to yield substantially the same result.⁸⁹ The primary case representing the *as-a-whole* approach is *Hughes Aircraft Co. v. United States*.⁹⁰ In that case, Hughes held a patent covering satellite stabilization processes.⁹¹ The Hughes patent, among other claimed elements, required an interactive feedback system between the satellite and the ground control station so that satellite velocity and satellite orientation could be adjusted. The government satellite did not have a feedback system.⁹² Instead, the velocity and orientation control were processed internally in the satellite.⁹³ Recognizing that the *way* prong of the *function-way-result* test could not easily be satisfied, the *Hughes* court held that the

84. *Graver Tank*, 339 U.S. at 608 (citing *Machine Co. v. Murphy*, 97 U.S. 120, 125 (1877)).

85. Daniel W. McDonald et al., *Hilton Davis: The Doctrine of Equivalents Survives – Now What?*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 309, 311–12 (1997).

86. Federal Courts Improvement Act of 1982, § 127(a), Pub. L. No. 97-164 (codified as amended at 28 U.S.C. § 1295 (1988)). All appeals from final decisions of federal district courts in patent cases, and from final decisions in the Patent Office, are brought in the Court of Appeals for the Federal Circuit, located in Washington, D.C. See *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760 (Fed. Cir. 1983).

87. See Paul C. Craane, Comment, *At the Boundaries of Law and Equity: The Court of Appeals for the Federal Circuit and the Doctrine of Equivalents*, 13 N. ILL. U. L. REV. 105, 114–25 (1992).

88. *Hughes*, 717 F.2d at 1364–66.

89. *Id.* at 1363–64, 1366.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Hughes*, 717 F.2d at 1366–64.

government system was so strikingly similar to the patented system as a whole that the government system was an equivalent of the patented invention.⁹⁴

That analysis, of course, would have failed in a stringent reading of the Hughes claim on the government satellite. In fact, the dissent in *Hughes* faulted the majority for paying relatively little attention to the specifics of the claims and for instead viewing the invention as a whole.⁹⁵ In a comparison between each element of the claim and the accused device, the court would have had to find that the Hughes claim was not infringed because it lacked the required element of satellite to ground control feedback. The *element-by-element* analysis, however, had its proponents in the Federal Circuit as well, and it soon emerged as the more prevalent standard.⁹⁶

The *element-by-element* analysis engendered such mutually exclusive statements as “when an element is entirely *missing* [and the accused product] does not contain either the exact element of the claim *or* its equivalent, there is no infringement,”⁹⁷ and “[t]o require a one-to-one correspondence creates a bright line rule easier to apply, but costly in terms of unfair results in exceptional cases.”⁹⁸ It should be noted that the *element-by-element* analysis is not only easier to apply than the *as-a-whole* approach, but it also leads to more predictable results. The *element-by-element* analysis can be handled quantitatively with near mathematical and logical precision, while the *as-a-whole* analysis necessarily requires qualitative and thus subjective analysis. Furthermore, under the *element-by-element* approach, the scope of equivalence can be more easily balanced against the limits of prosecution history, guided by the maxim that “the patent applicant includes elements at his peril, and that a court is powerless to relieve him of the mistake of reciting elements which are superfluous to patentability.”⁹⁹

94. *Id.* at 1366.

95. *Id.* at 1366–68 (Davis, J., concurring in part, dissenting in part).

96. *See, e.g.,* Corning Glass Works v. Sumitomo Elec. U.S.A., Inc., 868 F.2d 1251, 1259 (Fed. Cir. 1989) (“An equivalent must be found for every limitation of the claim somewhere in an accused device . . .”); Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931 (Fed. Cir. 1987) (en banc); Perkin-Elmer Corp. v. Westinghouse Elec. Corp., 822 F.2d 1528 (Fed. Cir. 1987); Lemelson v. United States, 752 F.2d 1538 (Fed. Cir. 1985).

97. *Pennwalt*, 833 F.2d at 949 (Nies, J., additional views).

98. *Id.* at 946 (Bennet, J., dissenting in part).

99. Berkey Photo, Inc. v. Klimsch-Repro, Inc., 388 F. Supp. 586, 594 (S.D.N.Y. 1975); *see also* Fromson v. Advance Offset Plate, Inc., 219 U.S.P.Q. 83 (D. Mass. 1983), *rev’d in part, aff’d in part*, 720 F.2d 1565 (Fed. Cir. 1983), *vacated*, 755 F.2d 1549 (Fed. Cir. 1985).

IV. LIMITS ON THE DOCTRINE OF EQUIVALENTS

A. *Prosecution History Estoppel*

The Supreme Court soon recognized during the earliest stages of the development of the doctrine of equivalents that the acts by the applicant for obtaining a patent during prosecution before the Patent Office¹⁰⁰ could serve as a reliable gauge for the scope with which the range of equivalence should be applied.¹⁰¹ The rule which soon emerged was that, where an applicant for patent limits his claims to avoid prior art, the applicant cannot later "argue for a second bite at the abandoned apple."¹⁰² As a first threshold, the prosecution history¹⁰³ does not come into play if literal infringement is found.¹⁰⁴ Where it is available, the doctrine of prosecution history estoppel, also referred to as file wrapper estoppel, refers equally to amendments and to remarks made by the applicant for patent.¹⁰⁵ The threshold question often asked is whether the patent examiner would have allowed the claims and issued the patent had the amendment or the remarks not been made or, alternatively, did the patent examiner allow the application because of the amendments or the applicant's remarks.¹⁰⁶

In *Lemelson v. General Mills*,¹⁰⁷ for instance, the patent examiner rejected a claim with five elements on prior art, and suggested a more limited claim with seven elements.¹⁰⁸ Lemelson accepted the seven element claim and was granted a patent on the claim.¹⁰⁹ During a later infringement action, Lemelson tried to argue that the examiner's rejection of the five element claim was in error and that the two additional limitations did not help distinguish the claims over the prior art.¹¹⁰ That argument was summarily rejected and the applicant's acquiescence in a more limited claim was

100. According to the contract model of patents, prosecution before the Patent Office is considered the contract negotiation phase. See *supra* Part II.A.

101. *Goodyear Dental Vulcanite Co. v. Davis*, 102 U.S. 222, 227-28 (1880); see also *Smith v. Magic City Kennel Club*, 282 U.S. 784 (1931).

102. *Lemelson v. General Mills, Inc.*, 968 F.2d 1202, 1208 (Fed. Cir. 1992).

103. The official record of the *ex parte* proceeding between the applicant for patent and the Patent Office is referred to as the prosecution history, the file history, or the file wrapper. The prosecution history of any issued patent may be inspected by the public.

104. *Fromson v. Advance Offset Plate, Inc.*, 720 F.2d 1565 (Fed. Cir. 1983).

105. *Townsend Eng'g Co. v. Hitec Co.*, 829 F.2d 1086, 1089 (Fed. Cir. 1987).

106. See *Hoganas AB v. Dresser Indus. Inc.*, 9 F.3d 948, 953 (Fed. Cir. 1993).

107. 968 F.2d at 1202.

108. *Id.* at 1203.

109. *Id.*

110. *Id.* at 1207.

equated to an amendment volunteered by him and a resultant surrender of claim scope.¹¹¹ The Federal Circuit thereby emphasized the notice function of the patent, namely that competitors in the pertinent art were entitled to a determination of the scope of the claims on the record before the Patent Office.¹¹²

Claim amendments made to persuade the patent examiner to allow the claims over the prior art generally create an irrebuttable estoppel against the later broadening of the claims through the doctrine of equivalents. Additionally, it has been held that statements made by the applicant even *after* the examiner had indicated that the claims were allowable, could be equally damaging when they were directed towards an interpretation of the claims at issue.¹¹³

On the other hand, not every claim amendment automatically enjoins the patentee from relying on the doctrine of equivalents.¹¹⁴ Where a claim was amended during prosecution, the court must determine the reason for the change.¹¹⁵ The scope of prosecution history estoppel is thus determined on the basis of various factors, including all of the applicant's acts during the application phase and the reasons for those acts, the prior art removed or not applied because of those acts, and the patent examiner's objections and rejections which are removed by those acts.¹¹⁶

The Federal Circuit in 1993 clarified much of the confusion surrounding the application of prosecution history estoppel with its decision in *Texas Instruments, Inc. v. United States International Trade Commission*.¹¹⁷ There, the court held that any unambiguous assertion of patentability with regard to an element in a claim may create an estoppel against reliance on the doctrine of equivalents.¹¹⁸ The applicant in that case had not amended the claims and added the feature to overcome prior art.¹¹⁹ Further, the feature was not even necessary to overcome any prior art

111. *Id.* at 1207–08.

112. *Lemelson*, 968 F.2d at 1202.

113. *See* *Hormone Research Found., Inc. v. Genentech, Inc.*, 904 F.2d 1558 (Fed. Cir. 1990).

114. *Durango Assoc. Inc. v. Reflange Inc.*, 843 F.2d 1349, 1358 (Fed. Cir. 1988).

115. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 72 F.3d 857, 864 (Fed. Cir. 1995), *vacated*, 117 S. Ct. 1240 (1997), *and on remand vacated*, 117 F.3d 1385 (Fed. Cir. 1997).

116. *Mannesmann Demag Corp. v. Engineered Metal Prod. Co.*, 793 F.2d 1279, 1284–85 (Fed. Cir. 1986).

117. 988 F.2d 1165 (Fed. Cir. 1993).

118. *Id.* at 1175.

119. *Id.* at 1173.

reference cited by the patent examiner.¹²⁰ Yet, the applicants asserted in general that the particular feature rendered the claims patentable, and they were thus held to that assertion.¹²¹

The doctrine of prosecution history estoppel is built on the premise that a patent is a public document which provides unambiguous notice as to what is and what is not protected by the claims.¹²² The fact that an applicant makes a more limiting amendment than is necessary in light of the prior art is of no import.¹²³ Prosecution history is useful in establishing “meaningful limitations” on which the public may rely to avoid infringement.¹²⁴

B. *The Range of Equivalence Dictated by the Prior Art*

In 1990, the Federal Circuit introduced a new test for the doctrine of equivalents with the construction of the so-called “hypothetical claim.”¹²⁵ Based on the understanding that the doctrine of equivalents is equivalent to a judicial broadening of the claims of a patent, the court in *Wilson Sporting Goods*¹²⁶ suggested that the proper scope of equivalence could be determined by expanding the claims of the patent in suit towards the prior art.¹²⁷ A hypothetical claim would be tested in light of the prior art and the deciding question would be whether or not the hypothetical claim would have and could have been allowed by the patent examiner.¹²⁸ Upon the hypothetical allowance of such a broadened claim, the patent owner would then have the burden of proving that the accused product or process literally infringes the hypothetical claim.¹²⁹

The hypothetical claim construction did not fare well in subsequent litigation. Three problems with the hypothetical claim become immediately evident upon a careful review. First, it undermines the function of the Patent Office as the competent government agency in charge of negotiating the

120. *Id.*

121. *Id.* at 1174.

122. *Texas Instruments*, 988 F.2d at 1175.

123. *Wang Labs., Inc. v. Toshiba Corp.*, 993 F.2d 858, 868 (Fed. Cir. 1993); *see also* *Fromson v. Advance Offset Plate, Inc.*, 219 U.S.P.Q. 83 (D. Mass. 1983).

124. *Genentech, Inc. v. The Wellcome Found. Ltd.*, 29 F.3d 1555 (Fed. Cir. 1994) (citing *Perkin-Elmer Corp. v. Westinghouse Elec. Corp.*, 822 F.2d 1528 (Fed. Cir. 1987)).

125. *Wilson Sporting Goods Co. v. David Geoffrey & Assoc.*, 904 F.2d 677 (Fed. Cir. 1990).

126. *Id.* at 684.

127. *Id.*

128. *Id.* A hypothetical claim is in essence a claim that is broadened relative to the patent claim and which would literally read on the allegedly infringing product or process. *Id.*

129. *Wilson*, 904 F.2d at 685.

scope of patent claims.¹³⁰ Second, it violates the notice function.¹³¹ Third, it circumvents the statutory prohibition against the addition of new matter.¹³² These three factors, of course, go hand in hand. As repeatedly stressed by the Federal Circuit, competitors in the marketplace must be able to rely on the scope of the claims in an issued patent.¹³³ The very purpose of the stringent examination before the Patent Office is to determine the scope of the claims which are available to the applicant and to issue a patent with claims which are sufficiently delineated relative to the prior art. The dependence on the propriety and depth of the examination before the Patent Office is reflected in the statutory presumption that any issued patent is valid.¹³⁴ Finally, and maybe most importantly, applicants for patent are statutorily prohibited from adding anything to a claim during prosecution which was not originally contained in the application.¹³⁵ In the hypothetical claim construction, however, the patentee is in effect allowed to add limitations not found in the original specification.

For instance, the primary case at hand concerns a dispute involving a process for purifying red and yellow dyes used in the food and cosmetics industries.¹³⁶ An aqueous solution of the dye is subjected to ultrafiltration under defined process conditions. The patent claims in question define those process conditions at a hydrostatic pressure of 200 to 400 p.s.i.g. and at a pH of 6.0 to 9.0.¹³⁷ The claimed pH range was added into the independent claims during prosecution. As agreed by all parties, only the upper limit of 9.0 was necessary in light of the prior art. The lower limit of 6.0 was not required. However, simply omitting the lower limit would not be acceptable either because of the requirement that a claim of a patent must be fully enabled in the specification.¹³⁸ In other words, a lower limit of 4.0 or 3.0, or even 2.0, may work in the process described in the specification, but the process would fail at a pH below 2.0. The hypothetical claim construction in this case, therefore, would have to strike a balance between a maximum

130. *See supra* Part II.A.

131. 35 U.S.C. § 112 (1994).

132. *Id.* § 132.

133. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991) (If broadening of claims under the doctrine of equivalents is always available to the patentee, then competing market players "will never know whether their actions infringe a granted patent" and "the public comes to believe (or fear) that the language of patent claims can never be relied on.").

134. 35 U.S.C. § 282 (Supp. I 1995). "A patent shall be presumed valid." *Id.*

135. 35 U.S.C. § 132 (1994).

136. *Hilton Davis I*, 62 F.3d at 1515.

137. *Id.* at 1515.

138. 35 U.S.C. § 112 (1994).

allowed by the prior art and a minimum dictated by the scope of enablement in the specification. A hypothetical claim for Hilton Davis would recite a pH value ranging from 4.0 to 9.0. Hilton Davis, armed with such a claim would have had little difficulty in showing that Warner-Jenkinson's process, which operated at a pH of 5.0, infringed their claim.¹³⁹ However, Hilton Davis now would be awarded a claim which they could not have obtained from the Patent Office on the basis of their original application. Had they attempted, during prosecution, to amend their claims to recite a pH ranging from 4.0 to 9.0, the patent examiner would have required that the new matter entered with the amendment be canceled because it would have violated code section 132.¹⁴⁰ The hypothetical claim proposed in *Wilson Sporting Goods*, therefore, could potentially violate the statutory prohibition against the addition of new matter.

C. Hilton Davis I and the Insubstantial Changes Test

After having supported the *function-way-result* test of *Graver Tank* for years as the predominant test for the doctrine of equivalents, the en banc Federal Circuit held in *Hilton Davis I* that this test had caused as much confusion as it had cleared up.¹⁴¹ The court subsequently stated an apparently new rule which turned on the question of whether the changes made by the accused copier were *substantial* or *insubstantial*.¹⁴² The decision in *Hilton Davis I* was a narrow one.¹⁴³ The majority opinion in the Federal Circuit decision stressed that the new standard was not a revision of the test for infringement under the doctrine of equivalents, but a restatement.¹⁴⁴ Indeed, the *new* test had already been expressed in the

139. For clarity of the example, the author has disregarded the other questions concerning the possible differences between the Warner-Jenkinson process and the Hilton Davis claims. In her dissent, Judge Nies pointed out that at least one additional element of the claim, namely the recited hydrostatic pressure, was not infringed, *Hilton Davis I*, 62 F.3d at 1579 (Nies, J., dissenting), and that another element, namely the recited pore size of the membranes, had not been sufficiently proven to be infringed. *Id.* at n.34.

140. 35 U.S.C. § 132.

141. *Hilton Davis I*, 62 F.3d at 1518.

142. *Id.*

143. Seven of the twelve judges formed the majority and Judge Newman filed a concurring opinion. Five judges dissented, with Judges Plager, Lourie, and Nies each filing a dissenting opinion. While the majority opinion concentrated largely on Supreme Court precedent in formulating its opinion, Judge Newman concurred essentially only in the outcome, as her opinion was primarily based on an economic incentives analysis. *Id.* at 1512.

144. *Id.* at 1516.

seminal *Graver Tank* decision.¹⁴⁵ There, the Court warned against an overly narrow and literal reading of the patent claims which would allow an “unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent” without being liable for infringement.¹⁴⁶ The majority in *Hilton Davis I* further held that infringement, under the doctrine of equivalents, was a question of fact and thus, a question for the jury.¹⁴⁷ In fact, much of the discussion in the various opinions, and particularly Judge Plager’s dissent, deals with the judge-jury question and it was widely expected that the Supreme Court would decide that issue on appeal.¹⁴⁸ That expectancy was heightened since the Court had during the previous term affirmed the Federal Circuit in *Markman v. Westview Instruments, Inc.*,¹⁴⁹ which held that claim construction in patent infringement was exclusively within the province of the court and should not be presented to the jury.¹⁵⁰ Finally, the Federal Circuit held that the question whether or not the doctrine of equivalents was to be applied is not at the discretion of the trial judge.¹⁵¹

The decision in *Hilton Davis I* turned on the question of whether or not a pH of 5.0, as practiced by Warner-Jenkinson, was equivalent to and included in the range of 6.0 to 9.0.¹⁵² Each element of the Hilton Davis claim was analyzed and compared with the Warner-Jenkinson process.¹⁵³ Hilton Davis was held to have carried its burden of showing the presence of each element in the accused process with all but one claim element finding literal support.¹⁵⁴ The element defining the pH¹⁵⁵ in the process was found to be present, albeit outside of the claimed

145. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 607 (1950).

146. *Id.* at 607.

147. *Hilton Davis I*, 62 F.3d at 1520.

148. Both of the principal parties’ briefs and each of the 17 briefs for *amicus curiae* filed in the Supreme Court, discussed the judge-jury question at length and much of the oral hearing before the Court dealt with the question. *Hilton Davis II*, 117 S. Ct. at 1053.

149. 116 S. Ct. 1384 (1996).

150. *Id.* at 1396.

151. *Hilton Davis I*, 62 F.3d at 1521.

152. *Id.* at 1524.

153. *Id.* at 1524–25.

154. *Id.*

155. The pH scale expresses the acidity, neutrality, or basicity of dilute aqueous solutions. The scale varies within the numerical range of -1.0 to 15.0. A pH of 7.0 designates a neutral composition. The lower the number, the higher the acidity of the solution. The scale is a logarithmic scale with a base of 10. A numerical change in the pH by one designates a 10-fold increase or decrease of acidity and, similarly, a change by two designates a 100-fold increase or decrease. KENNETH W. WHITTEN ET AL., *GENERAL CHEMISTRY WITH QUALITATIVE ANALYSIS* 531–34 (1988).

range.¹⁵⁶ Hilton Davis had amended its claims during prosecution before the patent examiner by adding the numeric pH limits. The upper limit of 9.0 was necessary in delineating the claims against the prior art.¹⁵⁷ The lower limit of 6.0 was not necessary in light of the prior art. As noted above, it is questionable, however, whether the Patent Office would or could have allowed an open-ended limitation which recited only the upper limit of 9.0, but not a lower limit. Such a claim would run afoul of the distinct claiming requirement¹⁵⁸ and of the enablement requirement.¹⁵⁹ Adding an express limit other than 6.0, on the other hand, would run afoul of the prohibition against the addition of new matter.¹⁶⁰ Hilton Davis, therefore, in order to obtain a proper claim with an acceptable range of pH values, would have had to file a continuing application, with the attendant costs and the delay in the prosecution.¹⁶¹ Alternatively, Hilton Davis could have attempted to surrender their patent and obtain a broadened reissue claim within two years of the patent. Unfortunately for Hilton Davis, Warner-Jenkinson would then likely have been able to rely on intervening rights.¹⁶² But then again, none of this mattered to the en banc Federal Circuit, because a pH of 5.0 was equivalent to a pH of 6.0 and the doctrine of prosecution history estoppel did not apply where no compelling reason was evident to the court for Hilton Davis to enter the lower limit of 6.0.¹⁶³

V. HILTON DAVIS II

The Supreme Court disagreed with the Federal Circuit's majority opinion.¹⁶⁴ The Court held that prosecution history could indeed create an

156. *Hilton Davis I*, 62 F.3d at 1516.

157. *Id.* at 1515-16. The patent examiner had cited a prior art reference which disclosed a similar process operating at a pH between 11 and 13. *Id.*

158. 35 U.S.C. § 112 (1994) (second paragraph).

159. *Id.* (first paragraph).

160. *Id.* § 132. In her dissent in *Hilton Davis I*, the late Judge Nies argued that the notice function of the claims would be served yet the claims were not unduly enlarged if the courts carefully applied the doctrine of equivalents to individual elements of the claims and substituted only equivalent elements. *Hilton Davis I*, 62 F.3d at 1573-74 (Nies, J., dissenting).

161. *See supra* Part II.C.

162. The Hilton Davis patent, No. 4,560,746, issued in 1985. By the time Warner-Jenkinson learned of the existence of the '746 patent in October 1986, they had begun to commercially use the infringing process. *Hilton Davis I*, 62 F.3d at 1516. Hilton Davis learned of Warner-Jenkinson's infringement in 1989 when it was no longer possible to broaden the patent claims in a reissue. *Id.*

163. *Id.* at 1528.

164. *Hilton Davis II*, 117 S. Ct. at 1040.

estoppel and while affirming the majority of the Federal Circuit in virtually all other aspects, the Supreme Court remanded the case for further proceedings.¹⁶⁵ Specifically, the Court held that any claim amendment during prosecution, absent an explanation to the contrary on the public record, created a rebuttable presumption that the amendment was necessary for patentability.¹⁶⁶ This presumption, the Court argued, would strike a proper balance between the notice function of the claims and the primacy of the Patent Office in ensuring that patent claims do not cover more than the invention which is disclosed in the application.¹⁶⁷

A. *The Supreme Court Decision in Detail*

The question certified to the Supreme Court in *Hilton Davis II* was: “Whether patent infringement exists whenever the accused product or process is ‘equivalent’ to the invention claimed in the patent, in that the differences are not ‘substantial’ as determined by a jury, even though the accused product or process is outside the literal scope of the patent claim.”¹⁶⁸ Warner-Jenkinson’s main arguments were that the doctrine of equivalents, as defined in *Graver Tank* in 1950 cannot be reconciled with the 1952 Patent Act,¹⁶⁹ that equivalents should be limited to those explicitly mentioned in the patent,¹⁷⁰ and that Congress did not allow for infringement by equivalents in the 1952 Patent Act.¹⁷¹ *Hilton Davis*, of course, was quite satisfied with the majority opinion in the Federal Circuit and argued that the doctrine of equivalents had survived the 1952 Patent Act,¹⁷² the doctrine should be broadly applied and remain available in all infringement actions,¹⁷³ and that equivalents questions are properly presented to the jury in a jury trial.¹⁷⁴

1. The Doctrine of Equivalents and the 1952 Patent Act

Justice Thomas, writing for the unanimous Court, explained that the differences between the earlier patent statute and the 1952 Patent Act were

165. *Id.* at 1054.

166. *Id.* at 1051.

167. *Id.*

168. Brief for Petitioner at i, *Hilton Davis II* (No. 95-728).

169. *Id.* at 13.

170. *Id.* at 31.

171. *Id.* at 41.

172. Brief for Respondent at 11, *Hilton Davis II* (No. 95-728).

173. *Id.* at 23.

174. *Id.* at 36.

minimal with regard to the requirement for definite and distinct claiming.¹⁷⁵ The results reached in *Graver Tank*, Justice Thomas argued, would not have been different had the case been decided following the 1952 Patent Act.¹⁷⁶ In addition, the arguments upon which Warner-Jenkinson's contention was based had already been presented in *Graver Tank*, but had failed to garner a majority.¹⁷⁷ Accordingly, overruling *Graver Tank* on that basis was not warranted.¹⁷⁸

Next, the Court discussed Warner-Jenkinson's contention that no express mention of *Graver Tank* or its standard could be found in the legislative history of the 1952 Patent Act and that Congress had statutorily overruled *Graver Tank*.¹⁷⁹ Warner-Jenkinson had argued in their brief that it was improper to attribute a silent incorporation of the *Graver Tank* rule to Congress.¹⁸⁰ On questioning by the bench at oral argument, Warner-Jenkinson's counsel softened that argument and instead relied on his fallback position that the precedent need not be overruled in its entirety, but could serve a useful function if the precedential rule of *Graver Tank* was properly read.¹⁸¹ The Court was not convinced that Congress' silence concerning *Graver Tank* and the doctrine of equivalents spoke to a statutory overruling of the precedent. Instead, the Court opined that Congress had in fact not overruled the *Graver Tank* precedent¹⁸² and that "Congress [could] legislate the doctrine of equivalents out of existence any time it chooses."¹⁸³ The policy arguments presented by both parties in *Hilton Davis II*, Justice Thomas suggested, should be addressed to Congress instead of to the Supreme Court.¹⁸⁴

2. Element by Element Analysis

With regard to the elemental approach to the doctrine of equivalents, the Court sided with the concerns mentioned in the dissents at the Federal

175. *Hilton Davis II*, 117 S. Ct. at 1047.

176. *Id.*

177. *Id.* at n.3.

178. *Id.* at 1047-48.

179. *Id.* at 1047.

180. Brief for Petitioner at 42-45, *Hilton Davis II* (No. 95-728).

181. United States Supreme Court Official Transcript at *18, *Hilton Davis II* (No. 95-728), 1996 WL 593639 (Oct. 15, 1996) (oral argument of Richard G. Taranto, Esq., on behalf of Warner-Jenkinson) (no departure of *Graver Tank* needs to take place "depending on how broadly one reads it") [hereinafter Transcript].

182. *Hilton Davis II*, 117 S. Ct. at 1048.

183. *Id.*

184. *Id.*

Circuit level that patent claims had become too unpredictable because of the automatic and divergent application of the doctrine and that the doctrine had taken on a life of its own.¹⁸⁵ The Court thereby adopted much of the logic presented in the dissent by the late Judge Nies¹⁸⁶ and held that the doctrine could best serve its proper function if it was applied on an *element-by-element* basis.¹⁸⁷ Each element of a patent claim is material and essential, the Court held, and the doctrine of equivalents must not be applied to the claimed invention as a whole, but to each element.¹⁸⁸ Also, the doctrine must not be so broadly applied as to effectively remove a required element.¹⁸⁹ The Court cited with approval the broad proposition that the doctrine must be applied so as to carefully distinguish between substituting an equivalent component *within* an invention and enlarging an invention beyond what is claimed.¹⁹⁰ The applicant, after all, negotiates the scope of protection to which the patentee is entitled with the Patent Office. That scope of protection cannot be enlarged at a later point so as to include a competitor within the claims. Only if the competitor copies the invention, i.e., practices a fraud on the patent,¹⁹¹ and replaces within the invention a component with one which is equivalent yet does not literally read on the claimed element, should the doctrine of equivalents be applied.¹⁹² The doctrine is equitable in nature and it is to be applied so as not to “place the inventor at the mercy of verbalism and . . . subordinat[e] substance to form.”¹⁹³

3. Prosecution History Estoppel

Next, the Court discussed the position of the doctrine of prosecution history estoppel in the context of the elemental approach and the new rebuttable presumption rule. Warner-Jenkinson had argued that any surrender by the patentee during prosecution before the Patent Office was essentially equivalent to a public notice of surrender¹⁹⁴ and that any

185. *Id.* at 1048–49.

186. *Hilton Davis I*, 62 F.3d at 1573–74 (Nies, J., dissenting).

187. *Hilton Davis II*, 117 S. Ct. at 1049.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950) (“The essence of the doctrine is that one may not practice a fraud on a patent.”).

192. *Id.* at 608–09.

193. *Id.* at 607.

194. Reply Brief for Petitioner at 1, *Hilton Davis II* (No. 95-728) (“[T]he public is entitled to rely on a reading of those disclosures [made in the patent application], and not

limitation entered during patent prosecution should estop the patentee from later asserting broader coverage.¹⁹⁵ That argument, according to the Court, went too far.¹⁹⁶ The Court held that the reasons for such an amendment should have a bearing on proper claim interpretation.¹⁹⁷ First, the Court relied on its own precedent which included a line of cases in which the Court had considered the respective reasons why a certain amendment was required by the Patent Office.¹⁹⁸ Second, the Court referred to the *amicus brief* of the United States, which listed several additional reasons upon which the Patent Office may require an amendment to a claim.¹⁹⁹ The United States' *amicus brief* made reference to the testimony by one of the Hilton Davis' inventors according to whom the process could work with much lower pH values than those claimed, but that a pH below 6.0 would "cause 'tremendous foaming problems in the plant.'"²⁰⁰ Accordingly, the United States argued that the pH limit of 6.0 was added not to overcome prior art, but to limit the claims to what was enabled in the application, and therefore, the doctrine of prosecution history did not apply.²⁰¹ That conclusion, however, mischaracterizes the interplay between the enablement requirement in the first paragraph of 35 U.S.C. § 112 and the distinct claiming requirement in the second paragraph.²⁰² Only what is enabled in the specification is the applicant's invention and the claims are limited to that invention.²⁰³ To be sure, it may be true that the "purpose of the enablement requirement is not to limit the scope of the patent right" per se,²⁰⁴ but it is nevertheless the necessary result if the term *invention* is uniformly applied throughout the text of the statute.

undertake independent scientific experiments, to understand clearly the scope of the monopoly . . .").

195. *Hilton Davis II*, 117 S. Ct. at 1049.

196. *Id.*

197. *Id.*

198. *See, e.g.*, *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 136 (1942) (distinguishing a limitation in an original application claim from one which was added during prosecution); *Keystone Driller Co. v. Northwest Eng'g Corp.*, 294 U.S. 42, 42 (1935) (claims limited during prosecution could not be enlarged in infringement action because the enlarged claims would have been within the prior art which prompted the claim amendment).

199. *Hilton Davis II*, 117 S. Ct. at 1050.

200. Brief for United States as *Amicus Curiae* at 22, *Hilton Davis II* (No. 95-728) (quoting *Hilton Davis I*, 62 F.3d at 1542 (Plager, J., dissenting)).

201. *Id.*

202. 35 U.S.C. § 112 (1994).

203. *Id.*

204. Brief for United States as *Amicus Curiae* at 22, *Hilton Davis II* (No. 95-728) (citing 35 U.S.C. § 112 (1994)).

In the case at hand, the enabled *invention* was to be practiced at a pH of 6.0 to 9.0 and the Hilton Davis inventors could not teach an ordinarily skilled artisan how to make and use the invention outside that range.²⁰⁵ They were, in fact, faced with “tremendous foaming problems” below a pH of 6.0 and thus they could not teach the *invention* outside that range. The patent grant, however, is an exchange in which the inventor teaches the invention and everything outside the boundaries of that invention, belongs to the public or to a later inventor.

On questioning by the Court, counsel for Hilton Davis pursued a line of argument similar to that of the United States. Hilton Davis argued that “what the claim [sic] has to do is, it has to enable a person of ordinary skills in the art to practice the invention”²⁰⁶ and that the examiner suggested the lower pH limitation be added to the claim so as to assure the enablement requirement was satisfied.²⁰⁷ Again, the mischaracterization of the patent statutes is evident. Both the first and second paragraphs of 35 U.S.C. § 112 deal with one and the same *invention*.²⁰⁸ The first paragraph requires that the *invention* be described so that those skilled in the pertinent field could practice it, and the second paragraph requires that the same *invention* be defined and distinctly claimed.²⁰⁹

Notwithstanding the questionable line of argument, the Court reached the correct conclusion with regard to prosecution history estoppel by emphasizing the expert agency status of the Patent Office.²¹⁰ The Court “should be extremely reluctant to upset the basic assumptions” made by the Patent Office unless it had “substantial reasons to do so.”²¹¹ With special reference to the case at bar, the Court announced the rule that the burden rests on the patentee to show that the reason for the amendment during patent prosecution should not render the amendment available as a prosecution history estoppel.²¹² The Court held that the record did not contain clear enough evidence which would enable Hilton Davis to carry their burden to overcome the presumption of an estoppel.²¹³ The case was thus remanded with an invitation that the Federal Circuit study the record

205. *Id.*

206. Transcript, *supra* note 181, at *36 (oral argument of David E. Schmit, Esq., on behalf of Hilton Davis).

207. *Id.*

208. 35 U.S.C. § 112.

209. *Id.*

210. *Hilton Davis II*, 117 S. Ct. at 1051.

211. *Id.* at 1050.

212. *Id.* at 1051.

213. *Id.*

and decide whether or not Hilton Davis should be given an opportunity to proffer additional evidence.²¹⁴

4. No Equitable Threshold to Trigger Doctrine of Equivalents

Based on the premise that the *Graver Tank* rule was developed in response to problems with the “unscrupulous copyist” and “pirate,”²¹⁵ Warner-Jenkinson argued that proof of intent was a necessary threshold before the doctrine of equivalents could be triggered.²¹⁶ That argument appeared to be further supported in the Federal Circuit majority opinion which hinted to evidence of copying as being an important factor in the application of the doctrine.²¹⁷ The majority nevertheless acknowledged that intent is not an element of infringement.²¹⁸ In his dissent, however, Judge Plager vehemently argued that the doctrine of equivalents belonged entirely to the equity courts,²¹⁹ and was thus available only after a corresponding equitable threshold had been overcome.²²⁰ The Supreme Court sided with the Federal Circuit majority, yet cast a doubtful eye on the applicability of standards such as independent development and intentional designing around a patent.²²¹ It would be difficult, the Court stated, to distinguish between those who intentionally copied the invention with minor changes and those who tried to design around the claims of the patent, thus appropriating for themselves as much of the patented invention as they could.²²²

214. *Id.*

215. Brief for Petitioner at 32, *Hilton Davis II* (No. 95-728) (citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 607 (1950)).

216. *See generally id.* at 32–41.

217. *Hilton Davis I*, 62 F.3d at 1519.

218. *Id.*; *see also* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (the monopoly grant is effective regardless of whether the infringer knows of the patent).

219. *Hilton Davis I*, 62 F.3d at 1543 (Plager, J., dissenting) (“By virtue of its unique place in our legal system, and by long-standing custom and tradition, equity powers are exercisable only by judges. The authority to exercise the unique remedy which is the doctrine of equivalents lies exclusively in courts of equity.”).

220. *Id.*

221. *Hilton Davis II*, 117 S. Ct. at 1052.

222. *Id.*

5. Not Limited to Equivalents Disclosed in Specification

Next, the Court tackled Warner-Jenkinson's argument that the notice function of the claims would be best served if equivalents were limited to those disclosed in the patent.²²³ The dissenters in the Federal Circuit had argued a similar proposition, namely that equivalence should be determined with a view to what is considered equivalent at the time the patent issues.²²⁴ In oral argument, the Court presented Hilton Davis' counsel with a pertinent hypothetical: a chemical composition with five ingredients, A, B, C, D, and E, for growing hair.²²⁵ After fifteen years, new chemicals are developed which replace each of the ingredients until none of the original ingredients remain.²²⁶ On questioning whether the composition with the new ingredients were equivalent, Hilton Davis answered in the affirmative, which prompted the Court to respond:

I think the lawyers on the other side are arguing, my goodness, we're supposed to advise clients, and we have no idea how to do it, because we read the patent thing and we know with this doctrine people might discover all kinds of new chemicals in the future, and we just don't know how to do it, and so what we're groping for, is there then no limitation on this doctrine of equivalents?²²⁷

Even in the light of these apparently substantial reservations, the Court summarily rejected the argument that equivalence turned on what was known at the time the patent issued and held that the proper time for equivalence analysis was at the time of infringement.²²⁸

B. *No Ruling in the Judge-Jury Question*

The Court declined to rule on the question of whether the doctrine of equivalents was for the jury or for the judge. The issue need not be resolved, the Court stated, to answer the question presented in the case, and declined to rule on it.²²⁹ However, the Court hinted that it was in likely agreement

223. *Id.*

224. *Id.*

225. Transcript, *supra* note 181, at 39 (oral argument of David E. Schmit, Esq.).

226. *Id.*

227. *Id.* at 40.

228. *Hilton Davis II*, 117 S. Ct. at 1053.

229. *Id.*

with the Federal Circuit and that the Court's recent *Markman*²³⁰ ruling did not suggest a different outcome.²³¹

C. *Markman v. Westview*

In one of the most anticipated decisions of patent law in recent years, the Supreme Court, in 1996, affirmed a Federal Circuit en banc decision in *Markman*.²³² There, a jury had found a patent for a dry cleaning inventory system infringed and thus found for the patentee.²³³ The trial judge, however, based on his interpretation of the term "inventory" in the patent claims in question, entered judgment against the patentee, notwithstanding the jury verdict to the contrary.²³⁴ The Federal Circuit, sitting en banc, affirmed the trial judge and held that he had correctly taken the claim interpretation from the jury.²³⁵

The unanimous Supreme Court also agreed and held that patent claim construction was "exclusively within the province of the court."²³⁶ The decision affirmed three basic tenets of patent law, namely that patent infringement was subject to the right of jury trial under the Seventh Amendment,²³⁷ that the historical test of the right to jury trial did not compel a conclusion that terms of art and the claims were interpreted by the jury;²³⁸ and that precedent, judicial efficiency, reviewability issues, and policy considerations compelled a finding that claim interpretation was exclusively for the judge.²³⁹ Citing to potential uncertainty in reviewing jury verdicts and, particularly, to the virtual impossibility of establishing issue preclusion even within a given jurisdiction, the Court concluded that "treating interpretive issues as purely legal will promote (though it will not guarantee) intrajurisdictional certainty through the application of stare decisis on those questions not yet subject to interjurisdictional uniformity under the authority of the single appeals court."²⁴⁰

230. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (en banc).

231. *Hilton Davis II*, 117 S. Ct. at 1053.

232. *Markman*, 52 F.3d at 967.

233. *Id.* at 973.

234. *Id.*

235. *Id.* at 979.

236. *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1387 (1996).

237. U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved . . .").

238. *Markman*, 116 S. Ct. at 1393.

239. *Id.* at 1396.

240. *Id.*

1. The *Markman* Hearing

The decision in *Markman* soon spawned the creation of the so-called *Markman* hearing, a pretrial bench hearing during which the questions of claim interpretation are settled.²⁴¹ Following the *Markman* hearing, the trial judge decides on the proper scope and interpretation of the patent claims and, if the trial is to a jury, instructs the jury accordingly. The jury then, in the second phase of an infringement trial under the *Markman* doctrine, decides whether or not the accused product or process indeed infringes the claims as interpreted by the trial judge.²⁴²

The decision in *Markman* was not specific with regard to the issues to be resolved in the *Markman* hearing and with regard to the type of evidence to be admitted into the hearing.²⁴³ The Federal Circuit has recently shed some light on these issues.²⁴⁴ For instance, the court held in *Vitronics*²⁴⁵ that intrinsic evidence such as the patent claims, the specification, and the file history were dominant over extrinsic evidence such as prior art documents, dictionaries, and expert testimony.²⁴⁶ Extrinsic evidence should be allowed into the hearing only if ambiguities remain after considering all of the intrinsic evidence.²⁴⁷

2. Reconciling *Hilton Davis II* with *Markman*

Markman was primarily concerned with ensuring predictability and reviewability in infringement actions and thus took all of the claim interpretation from the jury.²⁴⁸ *Hilton Davis II*, on the other hand, appears to have affirmed the jury's role in claim interpretation where literal infringement could not be shown.²⁴⁹ Referring to the seminal Supreme Court decision in *Winans v. Denmead*,²⁵⁰ which hinted at the proposition that

241. See *Vitronics Corp. v. Conceptronic Inc.*, 90 F.3d 1576 (Fed. Cir. 1996); *General Am. Transp. Corp. v. Cryo-Trans, Inc.*, 93 F.3d 766 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1334 (1997); *Ethicon Endo-Surgery, Inc. v. United States Surgical Corp.*, 93 F.3d 1572 (Fed. Cir. 1996).

242. *Vitronics Corp. v. Conceptronic Inc.*, 90 F.3d 1576, 1581–82 (Fed. Cir. 1996) (citing *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995)).

243. *Markman*, 52 F.3d at 967.

244. See *Vitronics*, 90 F.3d at 1576.

245. *Id.*

246. *Id.* at 1583.

247. *Id.*

248. See *Markman*, 52 F.3d at 967.

249. See *Hilton Davis II*, 117 S. Ct. at 1053.

250. 56 U.S. (15 How.) 330 (1853).

equivalence was a question for the jury,²⁵¹ the Court in *Hilton Davis II* opined that *Markman* did not appear to necessitate a different result.²⁵² With regard to the reviewability issue, the Court suggested that procedural vehicles such as partial or complete summary judgment, judgment as a matter of law, special verdict forms, interrogatories on each claim element, and post verdict judgments as a matter of law should be considered by the Federal Circuit.²⁵³

In a realistic context, there is a curious interplay between the *Markman* hearing and the proposition that the doctrine of equivalents lies within the province of the jury. Assume, for instance, that the trial court decides on close of a *Markman* hearing for a certain construction of the patent claims and that the claims so interpreted were not literally infringed. The entire case would now be tried to the jury, including the question of equivalence and the interpretation of the specific claim element for which no literal infringement could be found. However, claim interpretation necessarily requires a review of the combination of elements and the interaction among the individual elements. The issue of claim interpretation as a whole is thus back in the jury's hands and the importance of the *Markman* hearing is effectively reduced to having a minor impact on the outcome of the infringement action. In the alternative situation, of course, where the *Markman* hearing results in an interpretation of the claims which literally encompasses the accused product or process, the jury's role is substantially reduced and infringement can often be found immediately as a matter of law.

It is also quite telling that the jury instructions in *Hilton Davis I* included several issues which, according to *Markman*, would not be given to the jury in literal infringement.²⁵⁴ The trial judge instructed the jury to interpret the claims as one with ordinary skill in the pertinent art would read the claims.²⁵⁵ He further instructed the jury to consider intrinsic evidence such as the patent specification, other claims of the patent, the prosecution history, extrinsic evidence such as expert testimony, "the circumstances surrounding the inception of the patent application," technical literature, and the prior art.²⁵⁶ Allowing the jury to consider extrinsic evidence to such a degree—and indeed the fact finding function of the jury can only be met by allowing the jury to look to extrinsic evidence—suggests that the concern

251. *Id.* at 344.

252. *Hilton Davis II*, 117 S. Ct. at 1053.

253. *Id.* at n.8.

254. See generally *Hilton Davis I*, 62 F.3d at 1520–21, 1538; *Markman*, 52 F.3d at 970–71.

255. *Hilton Davis I*, 62 F.3d at 1556 (Nies, J., dissenting).

256. *Id.*

with a lack of reviewability due to black-box jury verdicts²⁵⁷ has fallen victim to the broader proposition that the doctrine of equivalents must be given to the jury.²⁵⁸

D. *The Remand*

On remand, the Federal Circuit held that Hilton Davis, in light of the new rebuttable presumption rule, should be given an opportunity to proffer evidence in their favor.²⁵⁹ The prosecution history of the Hilton Davis patent was silent with regard to the reasons for the amendment. Accordingly, Hilton Davis was faced with the presumption that the pH was limited from 6.0 to 9.0 for patentability reasons. The court held that even if the patentee can show that the amendment was not related to patentability, the court must still settle the issue of whether that reason is sufficient to overcome prosecution history estoppel.²⁶⁰ Finally, the court specifically cautioned the district court to carefully balance between the interests of public notice and the dependability of prosecution history on the one hand, and the preliminary purpose of the doctrine of equivalents of assuring fairness to the patentee and of preventing fraud on the patent, on the other hand.²⁶¹

E. *The Argument Warner-Jenkinson Failed to Make*

The primary case at hand is quite simple. Yet, Warner-Jenkinson failed to make the very argument which won their case. Hilton Davis obtained a patent with claims calling for clear and unambiguous numerical boundaries. As noted above,²⁶² the doctrine of prosecution history estoppel is not a recent creation by any stretch of the imagination. Hilton Davis made a mistake.²⁶³ Warner-Jenkinson, on the other hand, acted prudently and

257. *Hilton Davis II*, 117 S. Ct. at 1053 n.8.

258. *Id.* at 1054 n.8.

259. *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 114 F.3d 1161, 1164 (Fed. Cir. 1997) (per curiam), *enforcing Hilton Davis II*, 117 S. Ct. 1040 (1997) [hereinafter *Hilton Davis III*].

260. *Id.* at 1163.

261. *Id.* (citing *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 117 S. Ct. 1040, 1051 (1997)).

262. *See supra* Part IV.A.

263. Transcript, *supra* note 181, at 31. On questioning by the Court, counsel for Hilton Davis quipped: "[H]ad I written the claim today knowing what I know, it would have been written differently." *Id.*

compared their process with the Hilton Davis patent.²⁶⁴ Relying on the notice content of the Hilton Davis patent, Warner-Jenkinson's patent counsel advised that a pH of 5.0 in his client's process was not equivalent to a pH of 6.0 or more.²⁶⁵ Nothing in the file wrapper of the patent indicated otherwise.²⁶⁶ Yet, the Federal Circuit would have punished Warner-Jenkinson without faulting Hilton Davis for their mistake.

The doctrine of equivalents is an equitable doctrine and it has been devised to protect the patentee against unscrupulous copycats.²⁶⁷ Here, the accused infringer did not act on inequitable principles and should therefore not be punished. Short of abolishing the doctrine of equivalents, the Supreme Court found the proper demarcation²⁶⁸ which will probably absolve Warner-Jenkinson from a holding of infringement. Whether or not the new rebuttable presumption rule is a good rule, remains to be seen. As acknowledged by the Federal Circuit, prosecution before the Patent Office will be quickly adapted to the new rule in that applicants and the Patent Office will add express statements with reasons for amendments or remarks.²⁶⁹ It appears, however, that such statements may not render the scope of equivalents easier to apply. The Patent Office, naturally, will tend to add statements which would support estoppel, while the applicant will try to add statements to the contrary. Questions of this nature are often dealt with just prior to the allowance of the application at a time when both the patent examiner and applicant's counsel are satisfied to have concluded the adverse examination phase and to have come to a mutually satisfactory agreement. Naturally, neither will at that point risk aggravating the situation and endangering the allowance.

264. Brief for Petitioner at 5-6, *Hilton Davis II* (No. 95-728). Upon learning of Hilton Davis' patent in late 1986, Warner-Jenkinson immediately had their patent counsel prepare an infringement opinion. *Id.* Counsel came to the conclusion that the patent was invalid and the claims were not infringed primarily because of the fact that Hilton Davis had added the pH range of 6.0 to 9.0 by amendment. *Id.* at 6.

265. *Id.* at 6.

266. *Id.*

267. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991).

268. *See Hilton Davis II*, 117 S. Ct. at 1040.

269. *Hilton Davis III*, 114 F.3d at 1163.

VI. A PROPOSAL

One may safely assume that the doctrine of equivalents will remain applicable into the foreseeable future, whether under judicial precedent or under statutory codification.²⁷⁰ The Supreme Court decision, while appropriately strengthening the doctrine of prosecution history estoppel as a balancing tool against the doctrine of equivalents, has not provided any guidance with regard to the division within the Federal Circuit. To the contrary, the Court essentially offered the Federal Circuit *carte blanche* for further clarification of the doctrine.²⁷¹ The difference between the *function-way-result* test and the *insubstantial changes* test does not appear to be significant beyond specific fact-driven application to a particular claimed element. Based on this premise, the courts will now have to define the interplay between the jury-exclusive *Markman* hearing and the jury-inclusive claim construction under the doctrine of equivalents. Besides the Supreme Court's suggestion towards more particularized jury verdict forms and special interrogatories,²⁷² it would appear that a more gradual approach to infringement could further aid in devising a more equitable doctrine which exhibits concern for both parties' positions. Such a gradual approach could define various levels of equivalence, ranging from virtual identity to substantially outside the range of equivalence.

By way of example, assume that following a *Markman* hearing the court comes to the conclusion that one element of the claim in question is not literally infringed. Thereupon, the patentee shifts his allegation to infringement under the doctrine of equivalents. At this point, the court conducts a further hearing during which equivalence is defined in various degrees. In *Hilton Davis*, for instance, the court could have held that a pH of 5.8 was squarely equivalent to the claimed lower limit of 6.0 and the court

270. The former situation appears to be more likely than the latter. Judge Newman wrote:

The doctrine of equivalents has neither greatly excited the centers of legal scholarship, nor seriously stirred action-oriented industry. Indeed, there remains a telling silence on the part of the technology community, for or against. Despite the controversial changes proposed in opinions of this court, there has been little objective policy exploration, economic analysis, legislative proposal, or even a search for consensus. There has, of course, been a good deal of speculation flowing from the inconsistency of our decisions.

Hilton Davis I, 62 F.3d at 1529 (Newman, J., concurring).

271. *Hilton Davis II*, 117 S. Ct. at 1054. "[W]e see no purpose in going further and micro-managing the Federal Circuit's particular word-choice for analyzing equivalence." *Id.*

272. *Id.* at 1053 at n.8.

could have thus assigned 100% equivalence to that expanded range; a lower pH of 5.5 could be assigned 80% equivalence, a pH of 5.2 could be assigned 60% equivalence, etc. The jury, however, will not learn of these discrete levels, but will determine the facts as to which pH level is prevalent in the infringing process. The jury is then regularly charged following the trial, with the various fact questions, including the graduated scale of equivalence.

The foregoing graduated equivalence model appears to be applicable in the mechanical, chemical, and electrical arts. Whether or not the model may be properly utilized in the pharmaceutical and biochemistry arts cannot be easily answered. However, it is evident that the graduated equivalence model will not apply where the question regards two discrete elements not subject to a gradual differentiation. By way of example, one chemical may be substituted for a claimed chemical in a composition; or in a mechanical device, a two-part hinge of the claim may be replaced with a weakened material structure, which allows bending similarly to a hinge, or a screw connection may be replaced with a glue connection. Similarly to an independent examination or a reexamination,²⁷³ the accused product or process may thereby be subjected to an independent review, whether by jury, judge, Patent Office, or an independent, specifically established panel. That review must be made without considering the prior art. Instead, only the claimed invention is compared with the accused product or process. If it is found in that review that the added feature²⁷⁴ renders the claim describing the accused product or process patentable over the patented invention, then the accused party will be presumed to have carried its burden of proving non equivalence. In other words, did the accused infringer substitute his own *invention* which would, had he filed an application, have resulted in the issuance of his own patent? The independent review could thereby utilize the same examination guidelines as used by patent examiners in obviousness questions with only slight modifications.²⁷⁵ The determination of the prior

273. Any patent may be reexamined upon the request of the patent owner or a third party and the patentability of the claims may thereby be reviewed in light of additional prior art. 35 U.S.C. § 302 (1994).

274. The element or elements which are the subject of the equivalence determination.

275. The practice with respect to determining whether an invention, as claimed, is obvious, generally follows the decision in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), wherein the Court stated:

Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to

art, as required in the first prong of the *Graham v. John Deere*²⁷⁶ test would be limited to determining the content and disclosure of the patent. The second prong, namely the determination of the difference between the claims and the accused device,²⁷⁷ goes to the heart of the equivalence determination. The third prong, namely the determination of the level of skill in the art,²⁷⁸ satisfies the requirement that equivalence be determined at the time of infringement.²⁷⁹ If the review is given to the jury, each of the three prongs may be separately listed on a jury verdict form, thus facilitating specific and itemized appellate review of the verdict.²⁸⁰

The independent examination review model and the graduated equivalence model may be applied separately and independently of each other, depending on the facts of a specific case. The two models may also be used in conjunction with one another, with the independent examination review model defining the outer boundaries of the range of equivalence and the graduated equivalence model defining discrete levels within that range.

VII. CONCLUSION

The doctrine of equivalents is here to stay. The Federal Circuit will probably adhere to the *insubstantial changes* test for the doctrine within the near future. Whether or not district court decisions that retain the *function-way-result* test will be reversed on this ground remains to be seen. The doctrine of prosecution history estoppel has been slightly fortified with the new rebuttable presumption rule. However, its impact will fade within the next few years as the Patent Office and applicants will ensure that explicit statements concerning the reasons for a claim amendment become part of the prosecution history.

As the interplay between the jury-exclusive *Markman* hearing and the jury-inclusive fact-finding issues surrounding the doctrine of equivalents is further defined in the courts, the doctrine of equivalents and the doctrine of prosecution history estoppel will continue to inject a certain amount of ambiguity and uncertainty into patent protection and patent infringement. Nevertheless, the additional protection afforded diligent inventors who contribute to the arts and further science against unscrupulous

the circumstances surrounding the origin of the subject matter sought to be patented.

Id. at 17–18.

276. *Id.* at 17.

277. *Id.*

278. *Id.*

279. See *supra* Part V.A.5.

280. See *Hilton Davis II*, 117 S. Ct. at 1053 n.8.

copycats and against fraud on the patent may be well worth the price for that uncertainty. The graduated equivalence model and the independent examination review model proposed above may further aid the equitable principles involved in patent protection and patent infringement without offending the notice function of the patent system.

Werner Stemer

Sentenced to Life? An Analysis of the United States Supreme Court's Decision in *Washington v. Glucksberg*

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I. INTRODUCTION

In the recent landmark decision of *Washington v. Glucksberg*,¹ the United States Supreme Court upheld a Washington statute criminalizing assisted suicide for terminally ill patients.² The Supreme Court declined to find a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment and further found that the prohibition on assisted suicide survived a rational basis test.³ In examining the Supreme Court's decision, Part II of this case comment sets forth the factual and procedural history of the case. The parties' arguments and an analysis of the Supreme Court decision are explored in Part III of this comment. Part IV discusses a recent Supreme Court of Florida case. Part V suggests that there are several conflicts with this recent decision which require resolution. Finally, the conclusion suggests possible recommendations to the legislature.

II. HISTORY OF *WASHINGTON V. GLUCKSBERG*

A. *Facts of the Case*

1. Defendant State of Washington

Despite the fact that the State of Washington does not have any law prohibiting suicide, the legislature enacted a statute which prohibits aiding or causing the suicide of another person and provides that a violation of the statute will result in imprisonment for a maximum of five years and a fine not to exceed \$10,000.⁴ Furthermore, existing law in Washington, such as the Natural Death Act, immunizes a physician from liability for carrying out a directive from a competent, terminally ill patient to withdraw hydration and nutrition.⁵ In the case at hand, the plaintiffs consisted of three patients, five

1. 117 S. Ct. 2258 (1997) [hereinafter *Glucksberg*].

2. *Id.* at 2261.

3. *Id.* at 2261-62.

4. WASH. REV. CODE § 9A.20.021(1)(c) (1994). See section 9A.36.060 of the Washington Revised Code on assisted suicide, which provides that: "(1) [a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide[, and] (2) [p]romoting a suicide attempt is a class C felony." *Id.* § 9A.36.060. In 1854, the State of Washington prohibited "'assisting another in the commission of self-murder.'" *Glucksberg*, 117 S. Ct. at 2261 n.1 (citation omitted).

5. Brief for Respondent at 1, *Glucksberg* (No. 96-110); see also WASH. REV. CODE § 70.122.010 (1994) (providing that "adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition").

physicians, and a nonprofit organization that assists and counsels terminally ill patients and family members.⁶

2. Plaintiff Patients

After enduring procedures such as chemotherapy, radiation, and surgery, Dr. Jane Roe, a retired pediatrician, was losing her life to breast cancer at the age of sixty-nine.⁷ During this time, Dr. Roe experienced extreme pain and suffering, which she tried unsuccessfully to relieve with massive doses of morphine.⁸ After several counseling sessions, and with the knowledge that there was no chance for recovery, Dr. Roe decided that she wanted to use medication prescribed by her physician for the purpose of hastening her impending death.⁹

John Doe, a forty-four-year-old painter who was diagnosed with Acquired Immune Deficiency Syndrome ("AIDS") in 1991, was losing his battle and was advised by his doctors that he was in the terminal stage of his sickness.¹⁰ Mr. Doe had sustained pneumonia, excessive fatigue, seizures, skin and sinus infections, seventy-percent blindness, and a decreased ability to care for himself.¹¹ However, he was mentally competent and aware of the pain he would have to endure since he had cared for his companion who had died from AIDS.¹² Mr. Doe, understanding that the virus was incurable, wished to take drugs prescribed by his doctor to hasten his death.¹³

James Poe, a sixty-nine-year-old retired sales representative who was in the terminal phase of chronic obstructive pulmonary disease, experienced constant suffocation, which required a permanent connection to an oxygen

6. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994), *aff'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) [hereinafter *Compassion*]. The following parties were the plaintiffs: Jane Roe, John Doe, James Poe, Dr. Harold Glucksberg, Dr. John Geyman, Dr. Thomas Preston, Dr. Abigail Halperin, Dr. Peter Shalit, and *Compassion in Dying*. *Id.* at 1456–58.

7. *Id.* at 1456.

8. *Id.*

9. *Id.*

10. *Compassion*, 850 F. Supp. at 1456.

11. *Id.*; see also Brief for Respondent at 3, *Glucksberg* (No. 96-110) (explaining that Mr. Doe was susceptible "to all manner of infection" and was expected to experience total blindness).

12. *Compassion*, 850 F. Supp. at 1456; see also Brief for Respondent at 3, *Glucksberg* (No. 96-110) (illustrating that Mr. Doe had observed the "pain, suffering, and loss of bodily function, integrity, and personal dignity" typically caused by Acquired Immune Deficiency Syndrome ("AIDS")).

13. *Compassion*, 850 F. Supp. at 1456–57.

tank.¹⁴ He endured extreme leg pain, painful swelling, and immobility due to a lack of blood flow, which resulted in the administering of morphine on a regular basis.¹⁵ Because the suffering was intolerable and the illness incurable, Mr. Poe, a mentally competent patient, wished to accelerate his impending death with the assistance of his physician.¹⁶ Prior to the Supreme Court's decision, all three of the plaintiffs died from their terminal illnesses.¹⁷

3. Plaintiff Physicians

Dr. Harold Glucksberg practices oncology at the Pacific Medical Center in Seattle and is an assistant professor at the University of Washington School of Medicine.¹⁸ He has published several articles in various medical journals concerning cancer.¹⁹ In his declaration to the United States District Court for the Ninth Circuit, Dr. Glucksberg stated that cancer patients experience "excruciating, unrelenting pain" and that the massive dosage of medication, which is administered to alleviate pain, impairs consciousness.²⁰ Dr. Glucksberg declined the request, in accordance with the criminal statute, to prescribe lethal medication for one of his terminally ill, though competent, suffering patients who wished to self-administer the drugs to hasten his death.²¹ After this refusal, the patient, wishing to commit suicide by jumping from a bridge, recruited a family member to help him do so.²²

Dr. John Geyman, a professor emeritus at the University of Washington and a practitioner of family medicine, has written numerous articles and

14. *Id.* at 1457; see also Brief for Respondent at 3, *Glucksberg* (No. 96-110) (describing that Mr. Poe was fearful due to his "constant sensation of suffocation" and that he had trouble sleeping for more than two or three hours).

15. *Compassion*, 850 F. Supp. at 1457; see also Brief for Respondent at 3, *Glucksberg* (No. 96-110) (describing that Mr. Poe took these medications to "calm his 'terror'").

16. *Compassion*, 850 F. Supp. at 1457.

17. *Compassion in Dying v. Washington*, 49 F.3d 586, 593 (9th Cir. 1995), *rev'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) [hereinafter *Compassion in Dying*].

18. *Compassion*, 850 F. Supp. at 1457.

19. *Id.*

20. *Id.* (citation omitted).

21. Brief for Respondent at 5, *Glucksberg* (No. 96-110).

22. *Id.*

books in the field of family medicine.²³ He has declared that his patients experience unnecessary extended deaths filled with suffering and humiliation, and that they attempt unsuccessful suicides, which often worsen their mental and physical conditions.²⁴

In addition, the following doctors were plaintiff physicians in the matter of *Washington v. Glucksberg*: Dr. Thomas Preston, Dr. Abigail Halperin, and Dr. Peter Shalit. Dr. Thomas Preston is the chief of cardiology at Pacific Medical Center and has written numerous articles and books in the field of cardiology.²⁵ On a regular basis, Dr. Preston treats patients who are in the terminal phase of cardiopulmonary diseases.²⁶ Dr. Abigail Halperin occasionally treats AIDS and cancer patients.²⁷ On one occasion, a mentally competent breast cancer patient requested that Dr. Halperin provide assistance in hastening her death so that she could die with dignity.²⁸ After the rejection of this request, the patient used a plastic bag to suffocate herself.²⁹ Dr. Peter Shalit, who practices internal medicine, was forced to decline a similar request for lethal medication.³⁰ This patient was suffering from pain as a result of "[o]ozing lesions," causing immobility and inability to urinate and was further forced to endure gangrenous fingers.³¹ As a result of these horrific sights, family members refused to visit because they could not tolerate observing their loved one's "physical torture."³²

4. Plaintiff Compassion in Dying

Compassion in Dying is a nonprofit organization located in Washington, which provides information, counseling, and emotional support for terminally ill patients and their families, but does not provide lethal medication.³³ The organization has stringent requirements for eligibility which include the following: 1) a determination by the patient's physician that the patient is terminally ill; 2) a mental health evaluation indicating that

23. *Compassion*, 850 F. Supp. at 1457. A professor emeritus is one who is "retired or honorably discharged from active duty because of age, infirmity, or long service, but retained on the rolls." THE RANDOM HOUSE COLLEGE DICTIONARY 432 (rev. ed. 1984).

24. *Compassion*, 850 F. Supp. at 1457.

25. *Id.* at 1458.

26. *Id.*

27. *Id.*

28. Brief for Respondent at 5, *Glucksberg* (No. 96-110).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Compassion*, 850 F. Supp. at 1458; see also *Compassion in Dying*, 49 F.3d at 588.

the patient is not suffering from mental abnormalities; 3) a finding that the demand for assisted suicide does not result from inadequate medical care or economic concerns; 4) a finding that the request must originate from the patient either in writing or by videotape; and 5) a finding that the request has been repeated three times with at least forty-eight hours between the second and third requests.³⁴ The organization has implemented other safeguards, which include the denial of services for uncertainty, family member disapproval, and a showing that the patient is not terminally ill, or has inadequate pain management.³⁵ *Compassion in Dying*, although a plaintiff in the federal district court and appellee in the appellate court, was not a party in the Supreme Court case.

B. *Procedural History*

The issue in this case was whether the State of Washington's statute prohibiting physician-assisted suicide was constitutional.³⁶ The plaintiffs sought a declaratory judgment declaring the statute to be unconstitutional and an injunction preventing enforcement of the statute.³⁷ In *Compassion in Dying v. Washington*,³⁸ the United States District Court for the Western District of Washington held that the statute was unconstitutional.³⁹ The State thereafter appealed, and the Court of Appeals for the Ninth Circuit reversed the lower court.⁴⁰ When the Ninth Circuit reversed on rehearing en banc, the plaintiff physicians petitioned the Supreme Court for a writ of certiorari, and the Supreme Court, in *Washington v. Glucksberg*, reversed, holding the statute to be constitutional.⁴¹ In the plaintiffs' initial brief to the Supreme Court, the following challenges were made: 1) Whether "The Clear Line Between Permitting Refusal Of Treatment And Prohibiting Action Intended

34. *Compassion*, 850 F. Supp. at 1458.

35. *Id.*

36. *Id.* at 1455–56. The issue is whether "Washington's prohibition against 'caus[ing]' or 'aid[ing]' a suicide offends the Fourteenth Amendment to the United States Constitution." *Glucksberg*, 117 S. Ct. at 2261.

37. *Compassion*, 850 F. Supp. at 1456.

38. *Id.* at 1454.

39. *Id.* at 1467. *Compassion in Dying v. Washington* was brought in the United States District Court for the Western District of Washington. The decision was appealed to the United States Court of Appeals for the Ninth Circuit in *Compassion in Dying v. Washington*. The Ninth Circuit reheard the case en banc. Finally, the case was appealed to the United States Supreme Court.

40. *Compassion in Dying*, 49 F.3d at 588.

41. 117 S. Ct. at 2258.

To Cause Death Is Based On Well-Settled Legal Doctrines”⁴²; 2) “Whether That Line Should Be Disturbed To Allow Physician-Assisted Suicide Is A Complex And Controversial Issue Of Public Policy Which Is Vigorously Debated Throughout The Land”⁴³; 3) Whether “State Legislatures Should Be Allowed To Resolve The Issue Without Having Their Policy Choices Limited”⁴⁴; 4) Whether “The Decision Below [Was] A Radical Departure From Our Nation’s Legal Traditions”⁴⁵ and “[The] Court’s Fourteenth Amendment Jurisprudence.”⁴⁶

C. *Analysis of the Western District of Washington Decision*

1. Due Process/Liberty Interests

The Western District of Washington examined liberty interests under *Planned Parenthood v. Casey*⁴⁷ and *Cruzan v. Director, Missouri Department of Health*.⁴⁸ In *Casey*, the Supreme Court explained that a terminally ill person’s decision to terminate his or her life “‘involv[es] the most intimate and personal choices a person may make in a lifetime’ and constitutes a ‘choice[] central to personal dignity and autonomy.’”⁴⁹ In *Compassion*, the federal district court held the suffering of a terminally ill patient to be as important and worthy of protection from governmental intrusion as that of a pregnant woman.⁵⁰ The federal district court distinguished *Casey* by determining that the life interests of the pregnant woman and the potential life “which cannot speak for itself” are at risk concerning an abortion, whereas there is only one life at stake, which can “voice his or her wishes,” in the present case.⁵¹ Therefore, according to the

42. Brief for Petitioner at 10, *Glucksberg* (No. 96-110).

43. *Id.*

44. *Id.*

45. *Id.* at 16.

46. *Id.*

47. 505 U.S. 833, 846 (1992) (upholding a woman’s right to terminate her pregnancy pre-viability without undue influence from the government, establishing the state’s authority to restrict abortions post-viability, and acknowledging the state’s interest in protecting both the health of the fetus and woman).

48. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (recognizing that a mentally competent, terminally ill adult has the right to refuse unwanted life-sustaining medical treatment).

49. *Compassion*, 850 F. Supp. at 1460 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

50. *Id.*

51. *Id.*

federal district court, because it was decided that there is a liberty interest with respect to a woman's right to terminate her pregnancy, a dilemma which brings about more complex issues concerning governmental competing interests than does physician-assisted suicide, there should be a fundamental liberty interest in assisted suicide.⁵²

The federal district court next focused on *Cruzan*, where the Supreme Court assumed that a mentally competent individual has a constitutionally protected liberty interest in declining "the artificial delivery of food and water."⁵³ The federal district court reasoned that liberty interests which warrant protection by the Fourteenth Amendment concern matters "which are essential to personal autonomy and basic human dignity" and that "[t]here is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death."⁵⁴ The federal district court noted Justice O'Connor's concurring opinion in *Cruzan* which explained that requiring a mentally competent adult to sustain unwanted procedures burdens his or her "liberty, dignity, and freedom to determine the course of her own treatment" and that the liberty protected under the Due Process Clause must at least guarantee a patient's right to reject medical treatment.⁵⁵ The federal district court could not find a differentiation between the refusal of life-saving treatment and the request for assisted suicide by a voluntary, mentally competent adult.⁵⁶

2. Undue Burden Test

The Western District of Washington used the standard set forth in *Casey*, in which the court must determine whether the questionable statute would operate as "a substantial obstacle" for an individual who is seeking to commit physician-assisted suicide.⁵⁷ The federal district court reasoned that the Washington statute "not only places a substantial obstacle in the path of a terminally ill, mentally competent person wishing to commit physician-assisted suicide, but entirely prohibits it," thus placing an undue burden on the individual's constitutionally protected liberty interest.⁵⁸ The federal district court responded to the State's argument, that there are legitimate state

52. *Id.*

53. *Id.* at 1461 n.4 (quoting *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring)).

54. *Compassion*, 850 F. Supp. at 1461.

55. *Id.* at 1461 n.4 (citation omitted).

56. *Id.* at 1461.

57. *Id.* at 1465 (citation omitted).

58. *Id.*

interests in preventing suicide and protecting vulnerable individuals at risk for suicide from undue influence, by holding that the legislature can formulate safeguards and define the limitations of physician-assisted suicide.⁵⁹ These regulations would provide a mechanism which would guarantee that individuals are not acting according to “abuse, coercion or undue influence from third parties.”⁶⁰ The federal district court pointed out that the Supreme Court of Washington and Washington law have not only acknowledged the right of a mentally competent, terminally ill patient to withhold life-sustaining treatment, but have further recognized the authority of a surrogate or representative to withhold treatment, acting on behalf of the patient’s interests.⁶¹ The federal district court reasoned that the potential abuse for disconnection from a life support system might be even greater than that suspected of physician-assisted suicide when the patient is competent and a surrogate is acting on his or her behalf.⁶²

3. Equal Protection

In the federal district court, the plaintiffs argued that the Washington statute denied two similarly situated groups of terminally ill adults equal protection of the law as guaranteed under the Fourteenth Amendment of the United States Constitution.⁶³ The defendants argued that there is no distinction because death resulting from the withdrawal of life-sustaining systems is natural, whereas death resulting from other means is artificial.⁶⁴ The federal district court found, according to Washington case law and the Washington Natural Death Act, that the state has taken the first step in acknowledging that “its interest in preventing suicide does not require an absolute ban.”⁶⁵ The federal district court was not convinced that the distinction between “natural” and “artificial” death justified “disparate

59. *Compassion*, 850 F. Supp. at 1465.

60. *Id.* at 1465 n.10.

61. *Id.* at 1466 n.11 (citing *In Re Guardianship of Grant*, 747 P.2d 445, 446 (Wash. 1987), amended by 757 P.2d 534 (Wash. 1988) (holding that the legal guardian of an incompetent patient suffering from Batten’s disease had the right to terminate life supporting medical procedures)); see also *In Re Guardianship of Hamlin*, 689 P.2d 1372, 1376 (Wash. 1984) (holding that an incompetent, terminally ill patient may be withdrawn from life support by an immediate family member or an appointed guardian ad litem); Natural Death Act, WASH. REV. CODE § 70.122.010 (1994) (describing the legal prerequisites a person must fulfill for carrying out a written request for refusal of life-supporting procedures).

62. *Compassion*, 850 F. Supp. at 1465.

63. *Id.* at 1459.

64. *Id.* at 1467.

65. *Id.*

treatment” among the two groups in that both individuals are terminally ill, both individuals are enduring pain and humiliation, and both individuals would be exposed to a prolonged death process without medical interference.⁶⁶ The federal district court concluded that the Washington statute violated the Equal Protection Clause of the Fourteenth Amendment by allowing the withdrawal of life-support systems, but prohibiting physician-assisted suicide for mentally competent, terminally ill adults.⁶⁷ The federal district court subsequently entered final judgment declaring the Washington statute unconstitutional and the court declined to grant injunctive relief.⁶⁸

D. *Analysis of the Ninth Circuit*

1. Majority Opinion

On appeal, the Ninth Circuit reversed the federal district court’s decision and held the Washington statute, which prohibits assisted-suicide, to be constitutional.⁶⁹ First, the Ninth Circuit explained that the federal district court relied on language from the *Casey* opinion and applied this out of the context for which these principles were originally intended within the meaning of abortion.⁷⁰ The court reasoned that “[i]t is commonly accounted an error to lift sentences or even paragraphs out of one context and insert the abstracted thought into a wholly different context.”⁷¹ Second, *Cruzan* did involve the cessation of life; however, the Ninth Circuit noted that the federal district court improperly declined to differentiate between those individuals withdrawing life support and those seeking medical assistance to assist in self-killing.⁷² Third, the Ninth Circuit accused the federal district court of “invent[ing] a constitutional right unknown to the past and antithetical to the defense of human life.”⁷³ Fourth, with respect to the federal district court’s undue burden analysis, the Ninth Circuit found that the quotation from *Casey* regarding the abortion issue was again extended to a field where it has no

66. *Id.*

67. *Compassion*, 850 F. Supp. at 1467.

68. *Id.* at 1467–68.

69. *Compassion in Dying*, 49 F.3d at 588.

70. *Id.* at 590.

71. *Id.*

72. *Id.* at 591.

73. *Id.* The Ninth Circuit stated that the lower court’s decision was groundless in the history and traditions of the United States. *Compassion in Dying*, 49 F.3d at 591. According to the Ninth Circuit: “In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction.” *Id.*

application and that the conclusion that the statute was facially invalid was unfounded.⁷⁴

Next, the Ninth Circuit focused its examination on the interests of the State of Washington and concluded that these interests outbalanced any asserted liberty interest.⁷⁵ The Ninth Circuit reasoned that preserving the integrity of the medical profession and preventing physicians from participating in the suicide of their patients was an important state interest, which if ignored, could result in impeding the physician's continual quest for cures.⁷⁶ The Ninth Circuit claimed that patients will be unduly influenced by their physicians because of "pressure to consent to their own deaths."⁷⁷ The Ninth Circuit further alleged that the poor, handicapped, and underprivileged will suffer exploitation and abuse if there are laws permitting physician-assisted suicide.⁷⁸

Finally, the Ninth Circuit explained that there exists disagreement among the states as to the definition of "terminally ill" and that the federal district court, in not certifying a class, failed to identify the persons for which judgment was entered.⁷⁹ The Ninth Circuit stated that the plaintiffs did not meet the burden of proving "that the legislature's actions were irrational" in enacting the statute and that there was no foundation in criminal or tort law that supported the federal district court's decision.⁸⁰ The Ninth Circuit further explained that a license does not grant a physician the right to expose a patient to unwanted medical procedures and that an individual has "the right to be let alone" if he or she desires.⁸¹ According to the Ninth Circuit, the distinction between the patient who directs that lifesaving treatment be terminated and a patient who seeks assisted suicide is rooted in the common law and tradition of the United States; more specifically, there has not existed an acknowledged right to have another "enslave you, mutilate you, or kill you."⁸² The court characterized assisted suicide as having the right to seek out another individual to cooperate in one's self-killing as opposed to seeking

74. *Id.*

75. *Id.*

76. *Id.* at 592.

77. *Compassion in Dying*, 49 F.3d at 592.

78. *Id.*

79. *Id.* at 593. The district court had entered judgment for Jane Roe and John Doe even though they had already died. The judgment of James Poe lapsed upon his death; thus, the judgment was entered on behalf of the respondents' future terminally ill patients. *Id.*

80. *Id.* (quoting *Kadramus v. Dickinson Pub. Sch.*, 487 U.S. 450, 463 (1988)).

81. *Compassion in Dying*, 49 F.3d at 594 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

82. *Id.*

the termination of unwanted medical treatment.⁸³ The Ninth Circuit did not decide the question of whether the Washington statute violated equal protection.⁸⁴

2. Dissenting Opinion

In the Ninth Circuit Court of Appeals, Judge Eugene Wright dissented, finding that the Washington statute violated the “plaintiffs’ privacy and equal protection rights.”⁸⁵ Judge Wright explained that the federal district court’s application of *Casey* was entirely appropriate and not limited only to abortion cases, but originates from Supreme Court precedent and involves matters concerning intimate decisions which deal with “marriage, procreation, contraception, family relationships, child rearing, and education.”⁸⁶ Judge Wright further agreed with the federal district court that there cannot be a distinction between refusing unwanted treatment and seeking physician-assisted suicide.⁸⁷

3. En Banc Opinion

A limited en banc Ninth Circuit Court of Appeals reversed the three-judge panel’s decision and affirmed the federal district court.⁸⁸ The court focused on *Casey* and *Cruzan*, holding that there is a constitutionally recognized right to die.⁸⁹ Upon a petition, the United States Supreme Court granted certiorari.⁹⁰ In *Compassion in Dying II*, Judge Beezer dissented, finding that mentally competent, terminally ill individuals do not have a

83. *Id.*

84. *Glucksberg*, 117 S. Ct. at 2262 (citing *Compassion in Dying v. Washington*, 79 F.3d 790, 838 (9th Cir. 1996)) [hereinafter *Compassion in Dying II*].

85. *Compassion in Dying*, 49 F.3d at 594 (Wright, J., dissenting).

86. *Id.* at 595 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)). Judge Wright explained that an individual’s right to privacy consists of “the interest in independence in making certain kinds of important decisions.” *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

87. *Id.* Judge Wright commented that “[s]uch a distinction yields patently unjust results.” *Id.* at 596. According to the majority view, if an individual is dependent on a respirator and the suffering is intolerable, that person may direct the physicians to withdraw life-support. *Compassion in Dying*, 49 F.3d at 596. However, a similarly situated patient who does not depend on life-sustaining medical treatment, does not have that same right. *Id.*

88. *Compassion in Dying II*, 79 F.3d at 839.

89. *Id.* at 799–801.

90. *Glucksberg*, 117 S. Ct. at 2262.

fundamental liberty interest, and that the state's interests "are sufficiently strong to sustain the constitutionality"⁹¹ of the statute.

III. THE SUPREME COURT DECISION

A. *Plaintiffs' Argument before the Supreme Court*

The plaintiffs urged that the Ninth Circuit ignored the Supreme Court's analytical approach to substantive due process claims and invented a liberty interest which has no foundation in our nation's tradition, characterizing it as a "radical departure."⁹² The plaintiffs further argued that there is a distinct difference between allowing the withdrawal of medical treatment and disallowing conduct which brings about death, and that this distinction is rooted in "well-settled legal doctrines."⁹³ This argument is based on the fact that, at common law and in most states today, treatment without informed consent is considered a battery, whereas an individual who causes another's death would be criminally liable.⁹⁴ Additionally, there are existing statutes in the majority of states which criminalize assisted suicide.⁹⁵ The plaintiffs argued that *Cruzan* stands for the proposition that one has a constitutionally recognized right to refuse unwanted life-sustaining medical treatment, which allows the illness to "follow a natural course to death."⁹⁶

B. *Defendants' Argument before the Supreme Court*

The defendants argued that the Supreme Court has, on prior occasions, acknowledged that an individual has a liberty interest in making personal decisions regarding the manner of one's death.⁹⁷ They claimed that the individual has a right to decide this matter according to his or her beliefs and values and that he or she should have the option of declining to endure suffering and loss of dignity.⁹⁸ The defendants argued that there is discrimination between mentally competent, terminally ill patients requiring life-sustaining medical treatment and those patients who do not necessitate

91. *Compassion in Dying II*, 79 F.3d at 857 (Beezer, J., dissenting).

92. Brief for Petitioner at 9, *Glucksberg* (No. 96-110).

93. *Id.*

94. *Id.* at 11.

95. *Id.* (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 280 (1990)).

96. *Id.* at 12.

97. Brief for Respondent at 7, *Glucksberg* (96-110).

98. *Id.* In permitting this right, the State argued that safeguards may be enacted to prevent abuse and undue influence. *Id.*

it.⁹⁹ They alleged that there is a violation of equal protection because those individuals who are dependent upon constant medical procedures to sustain life are presented with the option of directing a physician to withdraw or withhold this support, whereas those terminally ill patients who do not require such care may not exercise the same option.¹⁰⁰

C. *Majority Opinion*

The Supreme Court heard oral arguments on January 8, 1997.¹⁰¹ William L. Williams presented on behalf of the defendants, Walter Dellinger as *amicus curiae* on behalf of the United States supporting Defendants, and Kathryn Tucker on behalf of the plaintiffs.¹⁰² For the Supreme Court's review, *amicus curiae* briefs were filed on behalf of several organizations.¹⁰³ Chief Justice Rehnquist wrote the opinion, holding that the

99. *Id.* at 8.

100. *Id.*

101. *Glucksberg*, 117 S. Ct. at 2258.

102. *Id.* at 2261.

103. The following briefs are the amicus briefs which were filed: Brief for Physicians for Compassionate Care, *Glucksberg* (No. 96-110), 1996 WL 647921; Brief for Members of the New York and Washington State Legislatures, *Glucksberg* (No. 96-110), 1996 WL 648005; Brief for the United States Catholic Conference, New York Catholic Conference, Washington State Catholic Conference, Oregon Catholic Conference, California Catholic Conference, Michigan Catholic Conference, Christian Life Commission of the Southern Baptist Convention, National Association of Evangelicals, Lutheran Church-Missouri Synod, Wisconsin Evangelical Lutheran Synod-Lutherans for Life, Evangelical Covenant Church, and American Muslim Council, *Glucksberg* (No. 96-110), 1996 WL 650919; Brief for Gary Lee, M.D., William Petty, M.D., Fritz Beck, June Beck, Willows Residential Care Facility, Sister Geraldine Bernards, Maryville Nursing Home, Inc., Janice Elsner, Claudine Stotler, Jeffrey M. Weinkauff, and Physicians for Compassionate Care, *Glucksberg* (No. 96-110), 1996 WL 647921; Brief for the States of California, Alabama, Colorado, Florida, Georgia, Illinois, Iowa, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New York, South Carolina, South Dakota, Tennessee, and Virginia, and the Commonwealth of Puerto Rico, *Glucksberg* (No. 96-110), 1996 WL 650921; Brief for the Schiller Institute, *Glucksberg* (No. 96-110), 1996 WL 656260; Brief for the American Medical Association, American Nurses Association, and American Psychiatric Association, *Glucksberg* (No. 96-110), 1996 WL 656263; Brief for Family Research Council, *Glucksberg* (No. 96-110), 1996 WL 656275; Brief for Choice in Dying, *Glucksberg* (No. 96-110), 1996 WL 656277; Brief for the American Hospital Association, *Glucksberg* (No. 96-110), 1996 WL 656278; Brief for American Geriatrics Society, *Glucksberg* (No. 96-110), 1996 WL 656290; Brief for Richard Thompson Oakland County Prosecuting Attorney, *Glucksberg* (No. 96-110), 1996 WL 656291; Brief for the National Association of Pro-life Nurses, National Association of Directors of Nursing Administration in Long Term Care, Philippine Nurses Association of America, Scholl Institute of Bioethics, California Nurses for Ethical Standards, *Glucksberg*

(No. 96-110), 1996 WL 656299; Brief for the Southern Center for Law and Ethics, *Glucksberg* (No. 96-110), 1996 WL 656302; Brief for the Legal Center for Defense of Life, Inc. and the Prolife Legal Defense Fund, *Glucksberg* (No. 96-110), 1996 WL 656314; Brief for the National Right to Life Committee, Inc., *Glucksberg* (No. 96-110), 1996 WL 656315; Brief for the International Anti-Euthanasia Task Force, *Glucksberg* (No. 96-110), 1996 WL 656322; Brief for the American Association of Homes and Services for the Aging, et al., *Glucksberg* (No. 96-110), 1996 WL 656324; Brief for the Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America (UOJCA) and the Rabbinical Council of America, *Glucksberg* (No. 96-110), 1996 WL 656330; Brief for the National Legal Center for the Medically Dependent & Disabled, Inc., the Disabilities Perspectives, Ethics and Advocacy Task Force of the Nursing Home Action Group, and Michigan Handicapper Caucus, *Glucksberg* (No. 96-110), 1996 WL 656336; Brief for the Christian Legal Society, Christian Medical and Dental Society, Christians Pharmacists Fellowship International, Nurses Christian Fellowship, and Fellowship of Christian Physician Assistants, *Glucksberg* (No. 96-110), 1996 WL 656337; Brief for the National Hospice Organization, *Glucksberg* (No. 96-110), 1996 WL 656338; Brief for the Catholic Medical Association, *Glucksberg* (No. 96-110), 1996 WL 656339; Brief for the American Center for Law & Justice, *Glucksberg* (No. 96-110), 1996 WL 656340; Brief for the Evangelical Lutheran Church in America, *Glucksberg* (No. 96-110), 1996 WL 656341; Brief of the National Catholic Office for Persons with Disabilities and Knights of Columbus, *Glucksberg* (No. 96-110), 1996 WL 656342; Brief of the Catholic Health Association of the United States, *Glucksberg* (No. 96-110), 1996 WL 656343; Brief for Bioethics Professors, *Glucksberg* (No. 96-110), 1996 WL 657754; Brief of Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, Representative Henry Hyde, Chairman of the House Judiciary Committee, and Representative Charles Canady, Chairman of the Subcommittee on the Constitution of the House Judiciary Committee, *Glucksberg* (No. 96-110), 1996 WL 657755; Brief of the District Attorney of Milwaukee County, Wisconsin, *Glucksberg* (No. 96-110), 1996 WL 657807; Brief of the Project on Death in America, Open Society Institute, *Glucksberg* (No. 96-110), 1996 WL 658736; Brief for the United States, *Glucksberg* (No. 96-110), 1996 WL 663185; Brief of the State of Oregon, *Glucksberg* (No. 96-110), 1996 WL 663194; Brief for the National Spinal Cord Injury Association, Inc., *Glucksberg* (No. 96-110), 1996 WL 664997; Brief of the American Suicide Foundation, *Glucksberg* (No. 96-110), 1996 WL 665436; Brief of the American College of Legal Medicine, *Glucksberg* (No. 96-110), 1996 WL 668827; Brief of the Center for Reproductive Law & Policy, *Glucksberg* (No. 96-110), 1996 WL 708943; Brief for Council for Secular Humanism and International Academy of Humanism, *Glucksberg* (No. 96-110), 1996 WL 708950; Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson, *Glucksberg* (No. 96-110), 1996 WL 708956; Brief of the Washington State Psychological Association, the American Counseling Association, the Association for Gay, Lesbian, and Bisexual Issues in Counseling, and a Coalition of Mental Health Professionals, *Glucksberg* (No. 96-110), 1996 WL 708960; Brief of the American Medical Student Association and a Coalition of Distinguished Medical Professionals, *Glucksberg* (No. 96-110), 1996 WL 709332; Brief of Americans for Death with Dignity and the Death with Dignity Education Center, *Glucksberg* (No. 96-110), 1996 WL 709335; Brief of Bioethicists, *Glucksberg* (No. 96-110), 1996 WL 709337; Brief of State Legislation, *Glucksberg* (No. 96-110), 1996 WL 709339; Brief for the National Women's Health Network and Northwest Women's Law Center, *Glucksberg* (No. 96-110), 1996 WL 709341; Brief of

Washington statute, which prohibits the act of causing or aiding a suicide, does not violate the Fourteenth Amendment of the United States Constitution.¹⁰⁴

The opinion begins by examining a history of suicide law in the State of Washington, including section 9A.36.060 of the *Revised Code of Washington*, enacted in 1975, and Washington's Natural Death Act, enacted in 1979.¹⁰⁵ After Washington voters had declined an initiative which would have allowed a form of physician-assisted suicide, the legislature amended the Natural Death Act to specifically exclude it.¹⁰⁶ The Court, in Part I of the opinion, explored the historical and legal doctrines of the United States, noting that in forty-four states, the District of Columbia, and the two territories, it is a crime to assist in suicide.¹⁰⁷ The Court commented that these laws reflect the commitment of the states in preserving and protecting life and that the Anglo-American common law for over 700 years has either

the Coalition of Hospice Professionals, *Glucksberg* (No. 96-110), 1996 WL 709342; Brief of 36 Religious Organizations, Leaders and Scholars, *Glucksberg* (No. 96-110), 1996 WL 711178; Brief of the American Civil Liberties Union, American Civil Liberties Union of Washington, National Gray Panthers Project Fund, Gray Panthers of Washington, Gray Panthers of New York, Japanese American Citizens League, Pacific Northwestern District of the Japanese American Citizens League, Humanists of Washington State, Hemlock Society USA, Hemlock Society of New York State, Hemlock Society of Washington State, Euthanasia Research Guidance Organization, AIDS Action Council, Northwest AIDS Foundation, Seattle AIDS Support Group, Local 6 of the Service Employees International Union, Temple De Hirsch Sinai Social Action Committee, Seattle/King County Chapter of the Older Women's League, *Glucksberg* (No. 96-110), 1996 WL 711194; Brief of Julian Whitaker, M.D., *Glucksberg* (No. 96-110), 1996 WL 711203; Brief for the Gay Men's Health Crisis and Lambda Legal Defense and Education Fund, *Glucksberg* (No. 96-110), 1996 WL 711205; Brief of Wayne County, Michigan, *Glucksberg* (No. 96-110), 1996 WL 722030; Brief of Surviving Family Members in Support of Physician-Assisted Dying, *Glucksberg* (No. 96-110), 1996 WL 722032; Brief for John Doe, *Glucksberg* (No. 96-110), 1996 WL 743345; Brief of the Rutherford Institute, *Glucksberg* (No. 96-110), 1996 WL 752715.

104. *Glucksberg*, 117 S. Ct. at 2261.

105. *Id.*

106. *Id.* at 2266. Initiative 119 provided for an amendment to Washington's Natural Death Act and allowed for "aid in dying." *Id.* at 2266 n.13. "Aid in dying" is:

[A]id in the form of a medical service provided in person by a physician that will end the life of a conscious and mentally competent qualified patient in a dignified, painless and humane manner, when requested voluntarily by the patient through a written directive in accordance with this chapter at the time the medical service is to be provided.

Id. (citation omitted).

107. *Glucksberg*, 117 S. Ct. at 2263 n.8 (quoting *Compassion in Dying II*, 79 F.3d at 847).

penalized or objected to suicide and assisted-suicide.¹⁰⁸ In fact, the Court points out that the first state to prohibit assistance in suicide was New York in 1828, which was followed by many other states enacting similar laws.¹⁰⁹ The Court noted that each state has submitted numerous proposals to permit physician-assisted suicide, but they are continually rejected by the state legislatures.¹¹⁰ As evidenced by the New York State's Task Force, some states are actively involved in studies regarding physician-assisted suicide.¹¹¹ In conclusion, the Supreme Court was unconvinced that it should depart from centuries of well settled legal tradition. The Court then focused its attention toward the due process claim.¹¹²

The Court explained that not only does the Due Process Clause “protect[] individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them,’” but it also affords protection against intervention with fundamental liberty interests.¹¹³ These interests have been defined through an extensive series of United States Supreme Court cases and include the right to marry,¹¹⁴ the right to procreate,¹¹⁵ the right to bodily integrity,¹¹⁶ the right to control the education and upbringing of one's children,¹¹⁷ the right of privacy during one's marriage,¹¹⁸ the right to use contraception,¹¹⁹ and the right to terminate one's

108. *Id.* at 2263 (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 294–95 (1990) (Scalia, J., concurring)).

109. *Id.* at 2265 (citations omitted).

110. *Id.* at 2266 n.15. The following states have submitted proposals: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, New York, Nebraska, Rhode Island, Vermont, Washington, and Wisconsin. *Id.*

111. *Glucksberg*, 117 S. Ct. at 2267. The New York State's Task Force on Life and the Law is “an ongoing, blue-ribbon commission” which consists of attorneys, physicians, ethicists, religious leaders, and other interested individuals and was convened in 1984. *Id.* It was created to make public policy recommendations on questions of medical technological developments. *Id.* It has determined that the potential risks of permitting physician-assisted suicide would outweigh any benefits, thus exposing vulnerable individuals to a tremendous amount of abuse. *Id.*

112. *Id.*

113. *Glucksberg*, 117 S. Ct. at 2267 (citations omitted).

114. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

115. *Id.* (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

116. *Id.* (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

117. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 401, 403 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)).

118. *Glucksberg*, 117 S. Ct. at 2267 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)).

119. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972)).

pregnancy.¹²⁰ Particularly relevant to the case at hand, the Supreme Court has strongly implied that one has the right to refuse “unwanted life-saving medical treatment.”¹²¹

The Supreme Court explained that it must “exercise the utmost care” when examining liberty interests afforded protection by the Due Process Clause and turned its discussion to *Casey* and *Cruzan*.¹²² The liberty interest inferred from *Cruzan*, to refuse unwanted medical treatment, was grounded in the nation’s historical and legal doctrines in that coerced treatment was traditionally considered a battery; however, the Supreme Court distinguished the instant case because states have always declined to permit assisted suicides.¹²³ The Court replied to the plaintiffs’ argument, explaining that not all personal and intimate decisions are sheltered by the Due Process Clause just by virtue of the fact that most liberties and rights have their basis in personal autonomy.¹²⁴ Finally, the Supreme Court concluded that the right to die is not a fundamental liberty interest protected by the Fourteenth Amendment and turned its attention to whether the Washington statute could nonetheless pass a rational basis test.¹²⁵

The Supreme Court next explained that the Washington statute must be rationally related to legitimate government interests and then referred to the federal district court’s decision identifying these interests.¹²⁶ The Court commented that the state has a legitimate interest in preserving life and preventing suicide, as illustrated by laws protecting human life, and that permitting physician-assisted suicide would subject especially vulnerable people to suicidal deaths.¹²⁷ The Court suggested that legalization of assisted suicide would complicate the treatment of depressed, mentally unstable, or

120. *Id.* (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

121. *Id.* (citing *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 278–79 (1990)). However, the Supreme Court held that the State of Missouri could require clear and convincing evidence of an incompetent patient’s wishes regarding the termination of life support. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 280–81 (1990).

122. *Glucksberg*, 117 S. Ct. at 2268 (citation omitted).

123. *Id.* at 2270.

124. *Id.* at 2271 (citation omitted).

125. *Id.*

126. *Id.* at 2271–72 (citing *Compassion in Dying II*, 79 F.3d at 816–17). The interests are as follows: 1) preservation of life; 2) prevention of suicide; 3) avoiding undue influence from third parties; 4) protecting the family members of terminally ill patients; 5) preserving the righteousness of the medical profession; and 6) avoiding trends towards euthanasia and abuse. *Glucksberg*, 117 S. Ct. at 2271 n.20.

127. *Id.* at 2273. The Supreme Court notes that research has suggested that depression and inadequate pain management highly contribute to requests for physician-assisted suicide. *Id.* (citations omitted).

suicidal individuals.¹²⁸ Furthermore, the Court reasoned that the state has an obligation in preserving the integrity of the medical profession and that permitting physician-assisted suicide is completely contradictory to a physician's interests in healing their patients.¹²⁹ The trust between a patient and the patient's doctor, the Supreme Court claimed, may be greatly jeopardized as a result of legalizing physician-assisted suicide.¹³⁰ The State argued that it had interests "in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes."¹³¹ Although the Ninth Circuit rejected this argument, the Supreme Court focused on this interest, stating that terminally ill and disabled individuals need protection from the abuse associated with the right to assisted suicide.¹³² With respect to the final state interest, the Court noted that extending a constitutional right for mentally competent, terminally ill patients to direct physicians to assist in their suicides may prove to be a "much broader license" which would be an impossibility for the state to control.¹³³ In addition, the Supreme Court examined various studies that were conducted in the Netherlands and in New York, and commented that there is a great potential for abuse and undue influence, and that the Washington statute banning assisted suicide is, at a minimum, rationally related to the state's legitimate interests.¹³⁴ Thus, the Supreme Court reversed the decision of the Ninth Circuit Court of Appeals and remanded for further proceedings.¹³⁵

128. *Id.*

129. *Id.* (citing AMERICAN MEDICAL ASSOCIATION, CODE OF ETHICS, § 2.211 (1994)).

130. *Glucksberg*, 117 S. Ct. at 2273 (quoting *Assisted Suicide in the United States: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 355–56 (1996)). The hearing before the Subcommittee explained that "[t]he patient's trust in the doctor's whole-hearted devotion to his best interests will be hard to sustain." *Id.*

131. *Id.* at 2273.

132. *Id.* (citing *Compassion in Dying*, 49 F.3d at 592–93); see also *Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady*, at 9, 20 (discussing biases towards disabled individuals and negative messages resulting from assisted suicide). Specifically, the Supreme Court reasoned that it is necessary to prevent actions based on financial incentives to decrease "end-of-life health-care costs" and to avoid the danger of adopting policies which may favor the "young and healthy." *Glucksberg*, 117 S. Ct. at 2273.

133. *Id.* at 2274.

134. *Id.* at 2274–75.

135. *Id.* at 2275.

D. *Concurring Opinions*

1. Justice O'Connor: State Interests Outweigh Individual Liberty

Justice O'Connor framed the question before the Court as whether "the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."¹³⁶ Although sympathetic to the idea that death may be painful and humiliating, Justice O'Connor explained that there is great difficulty in determining the boundaries of terminal illness and that some decisions to hasten death may result from mistake or pressure.¹³⁷ Justice O'Connor concluded that Washington's interests in protecting vulnerable individuals from hastening death "are sufficiently weighty" to warrant the state's banning of assisted suicide.¹³⁸ Justice Ginsburg also concurred in the Court's judgment for the foregoing reasons.¹³⁹

2. Justice Stevens: Placing Values on Human Life

In his concurring opinion, Justice Stevens analogized those cases in which courts have concluded that a state has the authority to allocate lesser values on certain lives, specifically referring to capital punishment cases.¹⁴⁰ According to these decisions, "there is no absolute requirement that a state treat all human life as having an equal right to preservation."¹⁴¹ Although the state was engaged in the valuation of human life, the state legislatures "had sufficiently narrowed the category of lives" deserving termination by establishing safeguards to ensure that the defendants actually "belonged in that limited category."¹⁴² Although the Supreme Court has found that the statute is not facially invalid, Justice Stevens did not restrict the prospect that some operations of the statute may

136. *Id.* at 2303 (O'Connor, J., concurring). Concurring opinions were filed at 117 S. Ct. 2302 by Justices O'Connor, Ginsburg, and Breyer for both *Washington v. Glucksberg* and *Vacco v. Quill*.

137. *Glucksberg*, 117 S. Ct. at 2303.

138. *Id.*

139. *Id.* at 2310 (Ginsburg, J., concurring).

140. *Id.* at 2304 (Stevens, J., concurring). See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The Supreme Court upheld the constitutionality of capital punishment in these three cases by placing lesser values on the lives of criminals as opposed to non-criminals. *Glucksberg*, 117 S. Ct. at 2304.

141. *Id.*

142. *Id.*

prove to be unconstitutional.¹⁴³ In authorizing punishment of the death penalty, the State of Washington has determined that “the sanctity of human life does not require that it always be preserved,” and it must recognize that there will be circumstances where accelerating death will be justifiable.¹⁴⁴ Justice Stevens next focused on *Cruzan*, referring to the freedom which encompasses an individual’s “interest in dignity” and deciding “the character of the memories that will survive long after her death.”¹⁴⁵ Although in *Cruzan* the Court did not decide the issue at hand, it acknowledged a liberty interest in deciding the manner in facing an impending death.¹⁴⁶ Justice Stevens brilliantly explained that the deceased plaintiffs in the present case “may in fact have had a liberty interest even stronger than Nancy Cruzan’s because, not only were they terminally ill, they were suffering constant and severe pain.”¹⁴⁷ Justice Stevens further opined that eluding unbearable pain and loss of dignity is undoubtedly “[at] the heart of [the] liberty . . . to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁴⁸

Next, the state’s interests are discussed and Justice Stevens pointed out that the prevention of abuse is not applicable, as in the case at hand, to a mentally competent person who makes a voluntary choice.¹⁴⁹ Confusion will surely arise as a result of permitting physician-assisted suicide with respect to the physician’s traditional healing role.¹⁵⁰ However, Justice Stevens noted that there is already a significant amount of friction between the established role and present practice because physicians are already engaged in withholding life-sustaining medical treatment, and, more relevant to the present case, administering “terminal sedation.”¹⁵¹ Justice Stevens concluded that it “is not itself sufficient to outweigh the interest in liberty that may

143. *Id.* Justice Stevens comments that the Ninth Circuit en banc court did not have to decide the case based on a particular plaintiff who had violated the statute for assisting a patient’s suicide; thus, the court’s finding was not confined to “a particular set of plaintiffs before it.” *Id.*

144. *Glucksberg*, 117 S. Ct. at 2305.

145. *Id.* at 2306.

146. *Id.* at 2305.

147. *Id.* at 2307.

148. *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

149. *Glucksberg*, 117 S. Ct. at 2308.

150. *Id.*

151. *Id.* at 2309. Terminal sedation is the “administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain” even though this will bring about a hastened death. *Id.* at 2310. The argument is that the “intent and causation” are both identical to the circumstances addressed in the case at bar; that is, both deal with the advancement of death in efforts to mitigate pain. *Id.*

justify the only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering."¹⁵²

3. Justice Souter: Physician's Role in Ministering Patient

Justice Souter agreed that there was no showing that the statute was unconstitutional, but he first examined the history of the United States Supreme Court in deciding due process claims from the *Slaughter House Cases*¹⁵³ through the *Lochner*¹⁵⁴ era, to *Griswold*¹⁵⁵ and *Casey*.¹⁵⁶ Focusing much on the notion of "'ordered liberty,' comprising a continuum of rights to be free from 'arbitrary impositions and purposeless restraints,'" Justice Souter analyzed the due process claim accordingly.¹⁵⁷ Acknowledging that there is no precise formula with which one may use in examining liberty interests, Justice Souter commented that due process involves a balancing test between the individual's liberty and that of "'organized society.'"¹⁵⁸ The boundaries of substantive due process are derived from "'careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'"¹⁵⁹ Next, Justice Souter examined the state's interests and stated that "[i]t is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way."¹⁶⁰ The fate of determining if an individual has a protected liberty interest demands "explicit analysis" when that asserted right could be portrayed as "belonging to different strands of our legal tradition requiring different degrees of constitutional scrutiny."¹⁶¹ For example, the abortion debate could have been considered according to a woman's freedom of reproduction, requiring a "substantial burden of justification on the [s]tate,"

152. *Glucksberg*, 117 S. Ct. at 2310.

153. 83 U.S. 36 (1873).

154. *Lochner v. New York*, 198 U.S. 45 (1905).

155. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

156. *Glucksberg*, 117 S. Ct. at 2275–80 (Souter, J., concurring); see also *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (holding that the Fourteenth Amendment includes the "right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will . . . [and] to enter into all contracts which may be proper, necessary, and essential").

157. *Glucksberg*, 117 S. Ct. at 2281–82 (citations omitted).

158. *Id.* at 2282 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961)).

159. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (citation omitted)).

160. *Id.* at 2283.

161. *Id.* at 2285 n.11.

or according to laws prohibiting feticide except by the mother, requiring rationality on the state's part.¹⁶²

In his analysis, Justice Souter explored the legal doctrines which have "long condemned" suicide and its assistance, noting that the deceased's survivors were once punished by forfeiture of property to the state.¹⁶³ Most states today have enacted statutes which are similar to the Washington statute, namely criminalizing assistance in the suicide of another person.¹⁶⁴ Justice Souter brilliantly explained that a physician's assistance is encompassed in the recognized role not as "a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient."¹⁶⁵ The *Casey* Court determined that "physicians are fit assistants" with respect to the decision to abort potential life, which includes the abuses associated with assisted suicide; specifically, there exists the possibility of irresponsibility and influence from others.¹⁶⁶ Without the assistance of a physician, "the woman's right would have too often amounted to nothing more than a right to self-mutilation," and similarly, without the assistance of a physician in the

162. *Glucksberg*, 117 S. Ct. at 2285 n.11 (citing Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1091 (1990) (suggesting that "reasoned judgment" is necessary in determining which principle suits the specific claim)).

163. *Id.* at 2286 (citations omitted). This was abolished because it was unfair to expose the innocent survivors to such penalties. *Id.* (citation omitted).

164. *Id.* at 2287 n.14. See, e.g., ALASKA STAT. § 11.41.120(a)(2) (Michie 1996); ARIZ. REV. STAT. § 13-1103(A)(3) (1996-97); ARK. CODE ANN. § 5-10-104(a)(2) (Michie 1993); CAL. PENAL CODE § 401 (West 1988); COLO. REV. STAT. § 18-3-104(1)(b) (Supp. 1996); CONN. GEN. STAT. § 53a-56(a)(2) (1997); DEL. CODE ANN. tit. 11, § 645 (1995); FLA. STAT. ch. 782.08 (1991); GA. CODE ANN. § 16-5-5(b) (1996); HAW. REV. STAT. § 707-702(1)(b) (1993); ILL. COMP. STAT. ch. 720, § 5/12-31 (1993); IND. CODE §§ 35-42-1-2 to 35-42-1-2.5 (1994 and Supp. 1996); IOWA CODE § 707A.2 (1997); KAN. STAT. ANN. § 21-3406 (1995); KY. REV. STAT. ANN. § 216.302 (Michie 1994); LA. REV. STAT. ANN. § 14:32.12 (West Supp. 1997); ME. REV. STAT. ANN. tit. 17-A, § 204 (West 1983); MICH. COMP. LAWS § 752.1027 (1997-98); MINN. STAT. § 609.215 (1996); MISS. CODE ANN. § 97-3-49 (1994); MO. REV. STAT. § 565.023.1(2) (1994); MONT. CODE ANN. § 45-5-105 (1995); NEB. REV. STAT. § 28-307 (1995); N. H. REV. STAT. ANN. § 630:4 (1996); N.J. STAT. ANN. § 2C:11-6 (West 1995); N.M. STAT. ANN. § 30-2-4 (Michie 1996); N.Y. PENAL LAW § 120.30 (McKinney 1987); N.D. CENT. CODE § 12.1-16-04 (Supp. 1995); OKLA. STAT. tit. 21, §§ 813-15 (1983); ORE. REV. STAT. § 163.125(1)(b) (1991); PA. CONS. STAT. ANN. tit. 18 § 2505 (West 1983); R.I. GEN. LAWS §§ 11-60-1 through 11-60-5 (Supp. 1996); S.D. CODIFIED LAWS § 22-16-37 (Michie 1988); TENN. CODE ANN. § 39-13-216 (Supp. 1996); TEX. PENAL CODE ANN. § 22.08 (West 1994); WASH. REV. CODE § 9A.36.060 (1994); WIS. STAT. § 940.12 (1993-94); see also P. R. LAWS ANN. tit. 33, § 4009 (1984).

165. *Glucksberg*, 117 S. Ct. at 2288 (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

166. *Id.*

suicide of a terminally ill individual, the dying patient's privilege will also be restricted "to crude methods of causing death, most shocking and painful to the decedent's survivors."¹⁶⁷ As set forth in the plaintiffs' case, for example, the physicians' patients were compelled to self-kill in crude manners, sometimes enlisting the assistance of their loved ones to commit suicide.¹⁶⁸ Justice Souter further illustrated that physicians are generally allowed to provide terminal sedation to their patients even though this "medication is so powerful as to hasten death."¹⁶⁹ Justice Souter concluded that the State of Washington's interests are "sufficiently serious" to overpower the assertion that the statute is "arbitrary or purposeless" but also acknowledged that the legislative process is "preferred" to handle these types of claims.¹⁷⁰

4. Justice Breyer: Right to Die with Dignity

Justice Breyer joined the concurring opinion of Justice O'Connor, excepting the parts which join the majority, and chose to call this asserted right the "right to die with dignity."¹⁷¹ Justice Breyer explained that it is not necessary to decide whether there is a recognized fundamental liberty interest because "the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim."¹⁷² New York and Washington have enacted laws which allow physicians to administer pain-alleviating medication "despite the risk that those drugs themselves will kill."¹⁷³ Justice Breyer concludes by stating that the Court may find the need to "revisit its conclusions in these cases."¹⁷⁴

167. *Id.*

168. *Compassion*, 850 F. Supp. at 1457.

169. *Glucksberg*, 117 S. Ct. at 2289. The following states have authorized pain treatment which hastens death: Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, New Mexico, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, and Virginia. *Id.* at 2289 n.15.

170. *Id.* at 2290-93.

171. *Id.* at 2311 (Breyer, J., concurring).

172. *Id.* Justice Breyer, in expressing Justice O'Connor's ideas, states that the "laws before us do not force a dying person to undergo that kind of pain." *Glucksberg*, 117 S. Ct. at 2311 (emphasis omitted). Justice Breyer further explains that the statutes under review do not ban physicians from administering such medication which alleviates pain, but, at the same time, which hastens death. *Id.*

173. *Id.* (citation omitted).

174. *Id.* at 2312 (expressing Justice O'Connor's opinion).

IV. ANALYSIS OF A RECENT SUPREME COURT OF FLORIDA CASE

On July 17, 1997, the Supreme Court of Florida upheld the constitutionality of a Florida statute that prohibits assisted suicide.¹⁷⁵ Charles E. Hall and his physician, Cecil McIver, M.D., sought a declaratory judgment that section 782.08 of the Florida Statutes offended the Fourteenth Amendment of the United States Constitution as well as the Privacy Clause of the Florida Constitution.¹⁷⁶ The plaintiffs brought the action for injunctive relief against the prosecution of a physician for providing assistance to a patient in committing suicide.¹⁷⁷ Mr. Hall was a mentally competent, thirty-five-year-old who had contracted AIDS from a blood transfusion.¹⁷⁸ The trial court determined that Dr. McIver found, in his professional judgment, that "it was medically appropriate and ethical to provide Mr. Hall" with assistance in committing suicide.¹⁷⁹ The trial court further determined that the statute could not be "constitutionally enforced" against the physicians and that the prosecutor was enjoined from enforcement of the statute.¹⁸⁰ The trial court set forth guidelines to ensure that any fatal medication was to be administered only upon a showing that: 1) Mr. Hall was competent; 2) he was "imminently dying;" and 3) he was "prepared to die."¹⁸¹ The State Attorney appealed the decision of the trial court and the Supreme Court of Florida accepted jurisdiction.¹⁸²

The Supreme Court of Florida focused on the recent United States Supreme Court cases of *Vacco v. Quill*¹⁸³ and *Washington v. Glucksberg*.¹⁸⁴ In *Vacco*, the Supreme Court had distinguished *Cruzan* by

175. *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997). The statute provides that "[e]very person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter." FLA. STAT. ch. 782.08 (1995).

176. *Krischer*, 697 So. 2d at 99.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* The trial court grounded its decision upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Privacy Clause of the Florida Constitution. *Krischer*, 697 So. 2d at 99. The trial court, in accordance with the Supreme Court's decision in *Washington v. Glucksberg*, did not find a federal liberty interest protected by the Due Process Clause. *Id.*

181. *Id.* at 100 (quoting *McIver v. Krischer*, No. CL-96-1504-A.F., 1997 WL 225878, at *11 (Fla. Cir. Ct. Jan. 31, 1997), *rev'd*, 697 So. 2d 97 (Fla. 1997)).

182. *Id.*

183. 117 S. Ct. 2293, 2296 (1997) (reversing the United States Court of Appeals for the Second Circuit and upholding New York's ban on assisted suicide).

184. *Glucksberg*, 117 S. Ct. at 2262 (reversing the United States Court of Appeals for the Ninth Circuit and upholding Washington's ban on assisted suicide).

finding that there was a significant distinction between the right to have assistance in committing suicide and the right to refuse life-sustaining medical procedures.¹⁸⁵ The Supreme Court of Florida then reasoned in *Krischer* that the assistance which Mr. Hall requested was not "treatment in the traditional sense of that term;" rather, the administration of lethal medication is equivalent to "an affirmative act designed to cause death."¹⁸⁶ Thus, the court explained that its prior decisions concerned only the rejection of medical procedures,¹⁸⁷ whereas the present case involved medical interference which will bring about death in a manner other than the "natural course of events."¹⁸⁸

The court next focused its attention to whether Mr. Hall had a right to assisted suicide under the Privacy Clause of the Florida Constitution.¹⁸⁹ It is evident that the public policy of the State of Florida looks upon assisted suicide with disfavor.¹⁹⁰ The court then concentrated on *Donaldson v. Van de Kamp*¹⁹¹ and explained that there are state interests in preserving the lives of those persons who desire to live, and in protecting members of society

185. *Vacco*, 117 S. Ct. at 2299.

186. *Krischer*, 697 So. 2d at 102.

187. See *In re Dubreuil*, 629 So. 2d 819, 828 (Fla. 1993); *In re Guardianship of Browning*, 568 So. 2d 4, 7-8 (Fla. 1990) (recognizing surrogate asserted right of woman who was vegetative but not terminally ill to remove nasogastric feeding tube); *Public Health Trust v. Wons*, 541 So. 2d 96, 97 (Fla. 1989) (holding that a mentally competent individual may refuse blood transfusions for religious reasons); *Satz v. Perlmuter*, 379 So. 2d 359, 360 (Fla. 1980) (recognizing that a patient may withdraw life-sustaining medical treatment).

188. *Krischer*, 697 So. 2d at 102. The American Medical Association described the distinction by stating:

When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease. The illness is simply allowed to take its natural course. With assisted suicide, however, death is hastened by the taking of a lethal drug or other agent. Although a physician cannot force a patient to accept a treatment against the patient's will, even if the treatment is life-sustaining, it does not follow that a physician ought to provide a lethal agent to the patient. The inability of physicians to prevent death does not imply that physicians are free to help cause death.

Id. at 102-03 (quoting AMA Council on Ethical and Judicial Affairs, Report I-93-8, at 2).

189. *Id.* at 100. See FLA. STAT. ch. 782.08 (1995) (banning assisted suicide); see also FLA. STAT. ch. 458.326 (1995) (allowing pain treatment but barring euthanasia and mercy killing).

190. *Krischer*, 697 So. 2d at 100.

191. 4 Cal. Rptr. 2d 59, 63 (Cal. Ct. App. 1992).

from abuse.¹⁹² Several Florida organizations which are highly opposed to assisted suicide filed *amicus* briefs in regard to this matter.¹⁹³ There is the concern that persons with physical and mental disabilities will be exposed to undue influence as well as mistake.¹⁹⁴ The court mentioned the New York State Task Force on Life and the Law, which had framed the risks associated with the legalization of assisted suicide.¹⁹⁵ The court concluded that the State of Florida's interests "clearly outweigh" any benefit which would arise from permitting assisted suicide.¹⁹⁶ First, because the state has "an unqualified interest in the preservation of life," the state must prevent the "affirmative destructive act" of allowing a physician to administer a "'death producing agent' with the intent of causing certain death."¹⁹⁷ Second, the state has "a compelling interest in preventing suicide," and must protect those individuals who may be affected by mistake or pressure to commit suicide.¹⁹⁸ Moreover, research has demonstrated that there are a great deal of individuals who have requested assisted suicide, but who would retract their requests if they received adequate pain management and treatment for depression.¹⁹⁹ Finally, the state has an interest in preserving the integrity of the medical profession

192. *Krischer*, 697 So. 2d at 101 (quoting *Donaldson v. Van de Kamp*, 4 Cal. Rptr. 2d 59, 63 (Cal. Ct. App. 1992) (holding that "the nature of Donaldson's right of privacy" cannot be extended to "provide a protective shield for third persons who end his life")).

193. *Id.* at 102. The following organizations strongly object to assisted suicide: the Advocacy Center for Persons with Disabilities, Inc.; the American Disabled for Attendant Programs Today; Not Dead Yet; and the National Legal Center for the Medically Dependent and Disabled, Inc. *Id.* The Advocacy Center, in its *amicus curiae* brief, stated that "[i]f assisted suicide is permitted in Florida, Floridians will be put on the so-called slippery slope of determining the relative value of life." *Id.*

194. *Id.*

195. *Krischer*, 697 So. 2d at 101. The task force grouped the following risks:

(1) undiagnosed or untreated mental illness; (2) improperly managed physical symptoms; (3) insufficient attention to the suffering and fears of dying patients; (4) vulnerability of socially marginalized groups; (5) devaluation of the lives of the disabled; (6) sense of obligation; (7) patient deference to physician recommendations; (8) increasing financial incentives to limit care; (9) arbitrariness of proposed limits; and (10) impossibility of developing effective regulation.

Id. (citation omitted).

196. *Id.* at 103.

197. *Id.* In *Perlmutter*, the Supreme Court of Florida distinguished the removal of a respirator from an "'unnatural death by means of a 'death producing agent.'"' *Id.* (quoting *Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. 4th Dist. Ct. App. 1978)).

198. *Krischer*, 697 So. 2d at 103.

199. *Id.* (citations omitted).

and the physician's role as a healer.²⁰⁰ The court explained that principal healthcare associations are unified in objecting to physician-assisted suicide and posed the question: "Who would have more knowledge of the dangers of legalizing assisted suicide than those intimately charged with maintaining the patient's well-being?"²⁰¹ Furthermore, the court reasoned that the "Hippocratic Oath" itself illustrates that physician-assisted suicide is completely incompatible with a physician's purpose.²⁰² The oath states that a physician "will neither give a deadly drug to anybody if asked for it, nor . . . make a suggestion to this effect."²⁰³ The court concluded that it does "not hold that a carefully crafted statute authorizing assisted suicide would be unconstitutional," and explained that if the court viewed the Privacy Amendment of the Florida Constitution to include a right to assisted suicide, it "would run the risk of arrogating to [themselves] those powers to make social policy that as a constitutional matter belong only to the legislature."²⁰⁴

V. CONFLICTS WHICH REQUIRE RESOLUTION

A. *Liberty Interest According to History and Tradition*

1. Distinguishing *Casey*

In *Washington v. Glucksberg*, the majority opinion examined the nation's legal history and tradition and found that because suicide and assisted suicide have always been looked upon with disfavor, as evidenced by prohibition laws, there was no liberty interest in the right to die by the hand of a physician.²⁰⁵ It is interesting to note that many states outlawed abortion until the decision of *Roe v. Wade*, but yet a liberty interest was found with respect to a woman's right to terminate her pregnancy.²⁰⁶

200. *Id.*

201. *Id.* at 104. These organizations include: the American Medical Association, the Florida Medical Association, the Florida Society of Internal Medicine, the Florida Society of Thoracic and Cardiovascular Surgeons, the Florida Osteopathic Medical Association, the Florida Hospices, Inc., and the Florida Nurses Association. *Id.*

202. *Krischer*, 697 So. 2d at 104.

203. *Id.* (citation omitted).

204. *Id.* (citation omitted).

205. *Glucksberg*, 117 S. Ct. at 2263 (citation omitted).

206. *Roe v. Wade*, 410 U.S. 113, 153 (1973). The following states had abortion laws which were effective in 1868 and remained effective as of August 1970: Arizona, Connecticut, Florida, Idaho, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, Texas, Vermont, West Virginia, and Wisconsin. *Id.* at 176-77 n.2 (Rehnquist, J., dissenting).

The decision of a woman to have an abortion affects not only the life of the mother but also the life of the fetus.²⁰⁷ In that situation, there is more than one interest at stake and yet the Supreme Court has still declined to protect the liberty interest of the fetus which appears to be stronger than a mother's right to seek an abortion.²⁰⁸ In the case of assisted suicide there is one life involved which can "voice his or her wishes,"²⁰⁹ as opposed to abortion where there is the unspoken voice of potential life.²¹⁰ It seems unreasonable and illogical to conclude that the right to determine one's own fate is not afforded that same protection. These terminally ill individuals are making decisions which affect their own lives and there is the absence of other interests; that is, the fetus or potential life.²¹¹ As the United States District Court for the Western District of Washington pointed out in *Compassion in Dying*, there is surely a stronger argument with respect to the right to die issue.²¹²

Furthermore, the *Casey* Court found that "physicians are fit assistants" concerning the decision to abort potential life.²¹³ It is interesting to note that the abuses associated with assisted suicide are similar to those associated with abortion; that is, irresponsibility and undue influence from others.²¹⁴ The *Roe* Court found that the liberty interest in terminating a woman's pregnancy would have resulted in "self-mutilation" if a woman were not permitted to enlist the assistance of a physician.²¹⁵ Following this reasoning, terminally ill patients who are denied the assistance of a physician will surely resort to other "crude methods" of dying, as exemplified in the plaintiffs' case where a physician's terminally ill patient, who was denied assistance, requested a loved one to help him in jumping from a bridge.²¹⁶ It is enough that family members have to watch their loved ones both suffer and lose all sense of dignity; however, it is even more appalling that these family members are now forced into awkward and difficult situations in providing assistance.

To further illustrate this point, it is disturbing to note that a Florida company is offering something called an "Exit Bag" kit to assist in

207. *Compassion*, 850 F. Supp at 1460.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Compassion*, 850 F. Supp at 1460.

213. *Glucksberg*, 117 S. Ct. at 2288 (citation omitted).

214. *Id.*

215. *Id.*

216. Brief for Respondent at 5, *Glucksberg* (No. 96-110).

committing suicide.²¹⁷ For thirty dollars, terminally ill individuals can purchase a durable plastic bag with a soft elastic neckband and Velcro clasps.²¹⁸ For an additional ten dollars, these individuals can purchase a book which describes exactly how to commit suicide.²¹⁹ Even for right to die organizations such as Washington's Compassion in Dying, this concept is horrifying. Denying terminally ill patients the right to assisted suicide forces these individuals to consider hideous measures such as the "Exit Bag."²²⁰

There comes a time when a physician has exhausted all possibilities to cure his patient. The doctor's role should then transform into that of making the patient more comfortable. Physicians are more qualified and better able to comfortably treat their patients during these excruciatingly painful periods of terminal disease. If treatment should include complying with a mentally competent person's desire to die, then that individual should have the right to control his own life.

2. Distinguishing *Cruzan*

In *Cruzan*, the United States Supreme Court recognized a liberty interest to refuse unwanted medical treatment protected by the Fourteenth Amendment of the United States Constitution.²²¹ In that case, the legal history and tradition was grounded in the fact that coerced medical treatment was always considered a battery.²²² Likewise, in *Compassion in Dying*, the majority in the Ninth Circuit explained that there has never existed a right to have another "enslave you, mutilate you, or kill you."²²³ What physicians would actually do is prevent harm by respecting the wishes of their patients when both the physician and patient have faced the reality that there is absolutely no chance for recovery. Physicians are looking out for their patients' best interests in relieving their agonizing pain and loss of dignity. As Justice Souter eloquently explained in *Glucksberg*, a physician is not simply "a mechanic of the human body," but he is "one who ministers to the patient."²²⁴ The physician provides comfort and support for the patient even when all hope is lost with respect to a chance for recovery. The "Hippocratic Oath," which states that a physician will not administer a

217. Diane C. Lade, *Society Defies Courts With Offer of Exit Bag*, SUN-SENTINEL, July 19, 1997, at 1A.

218. *Id.* at 12A.

219. *Id.*

220. *Id.*

221. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 262 (1990).

222. *Glucksberg*, 117 S. Ct. at 2770.

223. *Compassion in Dying*, 49 F.3d at 594.

224. *Glucksberg*, 117 S. Ct. at 2288 (citations omitted).

deadly drug,²²⁵ was written on the basis of outdated medicine and not on the medical technological advancements which have occurred to date.²²⁶ Consequently, patients are able to live longer than they would have absent this technology.²²⁷ Thus, to argue that there is a distinction between the refusal of life-sustaining measures which allow the natural progression of death and the affirmative act of intending to cause death by lethal medication is groundless in common sense.²²⁸ Absent these technological breakthroughs, patients would be able to let their diseases take a natural course. However, due to medications which prolong life, terminally ill patients are living longer, thereby suffering miserably. Although there has been a great deal of discussion concerning this distinction, both acts produce the same result.²²⁹ In both cases, medical personnel are intending to bring about death. In the case of the withdrawal of medical treatment, the physician is certain that artificial means are the only sustenance for their patient and that if these medical procedures are terminated, the patient will surely die. In the case of physician-assisted suicide, doctors are carrying out their patients' wishes by providing medication which will bring about their death. There is no doubt about the intended result. In both cases, the physician is carrying out the directive of the patient and causing that patient's death.

Another troubling aspect of the right to die issue is that terminal sedation is already permitted in New York and Washington;²³⁰ that is, physicians are empowered to provide dosages of medication which alleviate pain, but at the same time cause the patients' death to occur prematurely.²³¹ Most of the time, the levels of painkilling medication which will mitigate the dying patient's pain will result in unconsciousness and ultimately, a shortened death.²³² It is ludicrous that physicians are able to provide these medications while fully aware of the consequences of a hastened death, yet the Supreme Court declines to recognize a right to avoid the agonizing and humiliating period which patients must endure before their impending death arrives.

225. MELVIN KONNER, M.D., *BECOMING A DOCTOR: A JOURNEY OF INITIATION IN MEDICAL SCHOOL* viii (1988).

226. *Id.*

227. Kathy L. Cerminara, *In the U.S. Supreme Court: Can States Prosecute Physicians for Assisting Their Competent, Terminally Ill Patients in Committing Suicide?*, WEST'S LEGAL NEWS, January 3, 1997, at *4.

228. Brief for Petitioner at 12, *Glucksberg* (No. 96-110).

229. *Krischer v. McIver*, 697 So. 2d 97, 102-03 (Fla. 1997).

230. *Glucksberg*, 117 S. Ct. at 2311 (Breyer, J., concurring) (citation omitted).

231. *Id.*

232. *Id.*

B. *State Interests are Insufficient to Outweigh Individual Liberty*

Several state interests have been found to outweigh any individual notion of liberty with respect to physician-assisted suicide.²³³ The first argument which asserts that the state has an unqualified interest in preserving life, is carelessly flawed.²³⁴ As Justice Stevens explained in his concurring opinion in *Glucksberg*, the state already has the power to place different values on human lives in the context of criminals facing the death penalty.²³⁵ The state cannot claim that there is an “absolute requirement that a State treat all human life as having an equal right to preservation” because it has already devalued the lives of a certain group of persons by allowing the death penalty.²³⁶ Furthermore, just as there are limitations and safeguards imposed in capital punishment cases, there should be no concern for assigning lesser values on terminally ill persons who wish to end their own lives.²³⁷ By authorizing capital punishment, the State of Washington has in essence already conceded that there will be times when the state will assign lesser values on human life.²³⁸ It is utterly absurd to believe that a state has an absolute obligation to treat all life on an equal playing field.

Second, preserving both the integrity of the medical profession and the physician's traditional role as a healer were found to be significant state interests.²³⁹ The “Hippocratic Oath” states that the physician “will prescribe regimen for the good of [his] patients according to [his] ability and [his] judgment and never do harm to anyone. To please no one will [he] prescribe a deadly drug, nor give advice which may cause his death.”²⁴⁰ Although it may appear that this solves the dilemma of whether a physician would be contradicting his oath, it is not so simple. If one were to read on, he or she would find that the “Hippocratic Oath” further states that “[n]or will [he] give a woman a pessary to procure abortion.”²⁴¹ It seems that the “Hippocratic Oath” is inapplicable to the current law in that physicians may perform abortions and not face criminal liability. Furthermore, the “Hippocratic Oath” specifically states that a physician will use his judgment in determining the best treatment for his patient and that the physician “will

233. *Id.* at 2272–74.

234. *Id.* at 2272–73.

235. *Glucksberg*, 117 S. Ct. at 2304 (Stevens, J., concurring).

236. *Id.*

237. *Id.*

238. *Id.* at 2305.

239. *Id.* at 2273.

240. KONNER, *supra* note 225, at viii.

241. *Id.*

enter [houses] only for the good of [his] patients.”²⁴² It hardly benefits a mentally competent incurable person who is experiencing excruciating pain, loss of dignity, and humiliation, to deny them the right to assisted suicide. To deny this right to dying persons is to strip them of their autonomy and thwart their ability to make decisions which affect “intimate and personal” matters.²⁴³

Third, to address the concern that vulnerable persons, including the elderly, handicapped, and economically disadvantaged, will be subject to mistake, abuse, or pressure, the legislature must carefully formulate a statute which provides limitations and safeguards for assistance with suicide in the case of mentally competent, terminally ill individuals.²⁴⁴ Justice Souter’s concurring opinion in *Glucksberg*, properly suggests that the legislature should deal with these situations because it is not a matter for the judiciary.²⁴⁵

VI. CONCLUSION

Nothing could be more devastating than to endure the suffering and humiliation which accompanies a terminal illness. The ultimate fate of these patients’ lives are put in hands other than their own and they are left without recourse.

The solution is for state legislatures to formulate detailed statutes which outline the procedures a terminally ill patient must undergo in order to have assistance from a physician in committing suicide.²⁴⁶ State legislatures should use the following seven criteria as a guideline in formulating a statute:

- 1) the decision must be a voluntary one that the patient repeatedly initiates;
- 2) the patient must be competent and capacitated;
- 3) the patient must be suffering from an incurable disease;
- 4) the physician must know that the patient is not suffering from inadequate comfort care;
- 5) there must be a meaningful relationship between the doctor and the patient;

242. *Id.*

243. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

244. *Compassion*, 850 F. Supp. at 1465.

245. *Glucksberg*, 117 S. Ct. at 2293.

246. *Id.*

- 6) second opinions are necessary prior to the assistance in suicide; and
- 7) clear documentation that the above criteria have been satisfied is both prudent and ethically mandatory.²⁴⁷

Carefully constructed statutes, which incorporate the above procedures and further require clear and convincing evidence that terminally ill individuals have satisfied these requirements, are the only answer. State legislatures must devise safeguards to ensure that abuse is prevented and that only those individuals who satisfy the prerequisites receive assistance in ending their pain and suffering. The State has a significant interest in protecting vulnerable individuals, and these cautiously formulated statutes will provide the necessary protection.

Nicole Testa

247. BRENDAN MINOGUE, *BIOETHICS: A COMMITTEE APPROACH* 81 (1996) (citation omitted); *see also Compassion*, 850 F. Supp. at 1458 (explaining the organization Compassion in Dying's stringent eligibility requirements).