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Does the Supreme Court have a "Liberal" or "Conservative" Intellectual Property Jurisprudence?: An Evening with Kenneth Starr & Martin Garbus

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DOES THE SUPREME COURT HAVE A "LIBERAL" OR "CONSERVATIVE" INTELLECTUAL PROPERTY JURISPRUDENCE?: AN EVENING WITH KENNETH STARR[†] & MARTIN GARBUS[‡]

Moderated by Melvin Simensky

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KENNETH STARR:

The Supreme Court is solidly unanimous in so many areas, which I think bespeaks the underlying and, in many respects, overriding professionalism of this very lawyerly court. The Court is made up of superb lawyers. Whether one agrees or disagrees with them on abortion, affirmative action, and the like, it is a very lawyerly court. As a result, it is quite challenging to argue before it, as I had the privilege of doing this last term. More broadly, it is important for there to be a debate as to the appropriate role of the courts. Even though there is an overriding professionalism that exists throughout the federal judiciary, which I find to be splendid and of very high quality, the number of people who essentially speak the same language and look to the same sources tends to be relatively limited.

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[‡] Martin Garbus has been a law professor at Yale and Colombia. Mr. Garbus's clients have included Soviet dissident Andrei Sacharov, Nelson Mandela, and Vaclav Havel, for whom he drafted the section on civil liberties in the Czech constitution. Mr. Garbus has represented the comedian Lenny Bruce, the advocate of psychedelics Timothy Leary, Viking Penguin in the Salman Rushdie case, and African-American people in Mississippi wanting to exercise their right to vote. Mr. Garbus's books include 'Ready for the Defense' (1987) and 'Traitors and Heroes.

speak the same language and look to the same sources tends to be relatively limited.

When the federal judiciary is presented with issues such as affirmative action, abortion, school prayer, and the like, the divisions emerge just as they do over the kitchen table. *The Washington Post*[1] did an analysis some years ago by looking at the then composition of the United States Court of Appeals for the District of Columbia Circuit, which included such persons as Ruth Ginsberg, Antonin Scalia, Robert Bork, and the like. It was a professional piece; it was thoughtful. However, it looked at the Court through a lens, and that lens was quite ideological. Persons were categorized. This concerned Harry Edwards,[2] who recently stepped down as the Chief Judge of the Court of Appeals for the District of Columbia Circuit, because, in his view as a practicing judge, he and the categorized judges (e.g., Ruth Ginsberg, Antonin Scalia, Robert Bork and so forth) were all doing the same thing in essentially the same way.[3] So, he undertook an empirical study[4] of voting behavior, which demonstrated that in 85 to 90 percent of the cases, all of the judges on that court agreed.[5]

Although the Court has not enjoyed unanimity in the world of intellectual property, the judiciary will talk about *Tasini.*[6] In certain other areas, such as

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[1] Al Kamen, *U.S. Court's Liberal Era Ending: Reagan Nominees Seen Giving Conservatives a Majority*, THE WASHINGTON POST, Jan. 27, 1985, at A1.

[2] Harry T. Edwards was appointed to the U.S. Court of Appeals, D.C. Circuit, in February 1980 and served as Chief Judge from September 1994 to July 2001. *See,* United States Court of Appeals for the District of Columbia Circuit, *Judges*, *available at* http://www.cadc.uscourts.gov/court_offices/judges/judges.asp#THE (last visited Feb. 25, 2003).

[3] *Id.*

[4] Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985).

[5] *Id.*

[6] *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

patent law, the doctrine of equivalents, whether one agrees with it or not, speaks quite unanimously. So, I hope that there is more than a nod, at least in professional discussions, toward the opinion that the federal judiciary, including the Supreme Court, is highly proficient and does quite an excellent job in its lawyer-like way.

MARTIN GARBUS:

One point of distinction between Ken and me, which is kind of interesting and also a point of distinction on the present Supreme Court, is that although I am considered a First Amendment defender with respect to the First Amendment jurisprudence of this Court, I find myself on the other side of the First Amendment issues here. The Supreme Court and the conservatives may be greater protectors of the idea of commercial speech than I would be.

Issues dealing with the rights of judges to take political position or to advocate certain things can sometimes create a split five to four dividing the conservatives against the liberals. The Conservative majority advocated for free speech by striking down the judicial canon at issue. The dissenters, or the minority, took an anti-free speech position. When, for example, state activities and religion intersect, frequently the conservative justices will speak up for the First Amendment so as to break down the wall between church and state.

The First Amendment jurisprudence of this Court is interesting, as is the way that Ken and I would wind up on different sides of it. Ken and I may also disagree on the whole question of Robert Bork.[7]

The Court, at the end of the day, makes judgments that are more political than legal.[8] At the end of the day, the Supreme Court is as result-oriented as many

[7] Judge Robert H. Bork served on the U.S. Court of Appeals for the District of Columbia Circuit from 1982 to 1988. *See* United States Court of Appeals for the District of Columbia Circuit, *RobertHeronBork, available*http://www.cadc.uscourts.gov/court_offices/courthouse/Virtual_Tours /Courtroom/Judges/judge_bork.asp (last visited Feb. 25, 2003).

[8] *Id.*

other courts. The Warren Court was result-oriented.[9] When cases are presented, whether they involve abortion, fair use, or cases that end up like *Harper & Roe v. Nation Enterprises*, [10] and an abortionist school is sitting, for example, five district court judges say "this," while ten district court judges say "that."

Then you go up to the circuits and seventeen judges go one way, while fourteen go the other. Finally there is the Supreme Court and it is five to four. So at the end of the day, it is thirty-two judges against thirty-one. It is hard to say that either side is wrong. In reality, biases and preconceptions rule the day. I agree with Charles Evans Hughes,[11] who claimed that ninety percent of judging is bias and preconceptions,[12] and that the law is underdetermined by precedent.

KENNETH STARR:

Not surprisingly, I have a different view. I think that judges are genuinely trying to restrain themselves. I know there is a great deal of skepticism about that. Our role is to determine from sources of law, as best we can, what the correct answer is. So let me take free speech first. There is, in fact, a guiding spirit on the Supreme Court that does cut strongly across the usual ideological lines. It is a strongly libertarian force, since it is viewed as the value that is embodied in the

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[9] *See, e.g.*, J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 771 (1971), *quoting* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 12-13 (1970).

[10] *Harper & Row Publishers, Inc. v. Nation Enter*, 471 U.S. 539 (1985).

[11] Charles Evans Hughes served on the Supreme Court from 1910 to 1916 as an Associate Justice and from 1930 to 1941 as Chief Justice. *See,* Supreme Court of the United States, *Members of the Supreme Court of the United States*, *available at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/www.supremecourtus.gov/about/members.pdf (last visited Feb. 25, 2003).

[12] In a speech delivered in 1907, when Charles Evens Hughes was Governor of New York, he said, "The Constitution is what the judges say it is." Speech before the Elmira [N.Y.] Chamber of Commerce, May 3, 1907, *in* ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 133, 139 (1908).

text. Justice Scalia nicely lays this out in his very thoughtful book, *A Matter of Interpretation.*[13]

It is really an essay[14] with various commentaries, including one by Professor Laurence Tribe, which articulates a rather unified approach to interpretation, or as Scalia dubs it, "rules of reasonable construction."[15] Freedom of speech conveys a value. That value, as Thomas Emerson[16] of Yale Law School would have said, is a system of free expression.[17] This is why the Court tends not to struggle, as did the court of 50 or 60 years ago, with respect to commercial or symbolic speech.

When I am with high school students, I love to mention the case of John Tinker[18] and his arm band. Many high school students know about John Tinker and his arm band. However, they are a little taken aback to know that one of the great Warren Court liberals, Hugo Black, said that wearing a black arm band to protest the Vietnam War did not qualify as speech.[19] I do not warmly accept categorizations of justices, but I will use them for purposes of discussion.

Black would protect in an absolutist way the freedom of speech, but, according to

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[13] ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

[14] *See generally id.*

[15] *Id.*

[16] Thomas I. Emerson was a noted First Amendment scholar, who served as a member of the Yale Law School faculty for three decades. *See, e.g.*, Glenn Fowler, *Thomas I. Emerson, 83, Scholar Who Molded Civil Liberties Law*, N.Y. TIMES, June 22, 1991, at A21.

[17] *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION (1970).

[18] John Tinker was one of the students who challenged the Des Moines school board's policy against wearing black armbands to protest the Vietnam War. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District.*, 393 U.S. 503, 506 (1969).

[19] *See id.* (Black, J., dissenting).

him, wearing an arm band was not speech. Justice Scalia would say, "I respectfully disagree," and thus flag burning according to his view of reasonable construction is protected.[20] And he so voted.[21] In contrast, Justice Stevens, whom we tend to identify as on the fence, voted as a liberal in favor of criminally punishing flag burning,[22] quite an interesting break. One may wonder, "what are the unifying principles?" Is it just, "do I like flag burning or not?"

Surely that cannot be. It is rather an underlying vision of what freedom of speech means. In terms of the Establishment Clause,[23] and Marty and I do have a pretty firm disagreement there. If one looks at the entirety of the Court's work, one sees, in essence, two principles. One is freedom of conscience and the other is freedom of speech.

Related to these principles is the equality principle that finds expression in doctrines such as overbreadth and under-inclusiveness. One can look at it in terms of doctrinal holds, but what it really boils down to is "treat everyone alike." The Court's work on prayer in schools has been pretty consistent, ruling, based on freedom of conscience concerns, that prayer in school is just plain bad. The most recent case dealing with prayer in school was *Santa Fe Independent School District v. Doe*,[24] where the Court held six to three[25] that student-led prayer at high school football games was unconstitutional.[26] The record drove the opinion,

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[20] *See* SCALIA, *supra* note 32.

[21] *Texas v. Johnson*, 491 U.S. 397 (1989). Justice Scalia voted with the majority in invalidating a Texas flag desecration statute.

[22] *See id.* (Stevens, J., dissenting).

[23] U.S. CONST. amend I.

[24] *Santa Fe Independent. School. Dist. v. Doe*, 530 U.S. 290 (2000).

[25] *Id.* Justices Stevens, O'Connor, Kennedy, Souter, Ginsberg and Breyer made up the majority. Chief Justice Rehnquist as well as Justices Scalia and Thomas dissented.

[26] *Id.*

because it was student prayer – indeed, "voluntary student prayer."[27] Under these circumstances, in which members of the Court said, "I don't think so," there is what I call a Madisonian,[28] a freedom of conscience or a memorial and remonstrance kind of concern that was articulated at the founding and that is part of the values of the First Amendment.[29]

In contrast, activities probably of concern to Marty are activities deal with the equality principle, such as the recent school vouchers case.[30] For example, the Court is saying to parents in a failed school district, such as Cleveland:[31] "You choose. We did not create the schools, that is the private school system. We did not ordain that Cleveland would be heavily Catholic, as opposed to Columbus, which is much more secular in their many truly independent, non-religiously affiliated schools than Cleveland, which is a more ethnic community."

It so happens that the schools in that failed public school district are overwhelmingly Catholic. And so the Court says: "look, it is the equality principle. The school district did not create those schools. They did not skew Cleveland so that it would be heavily Catholic." As long as there is genuine private choice and the libertarian dimension that Justice O'Connor has articulated strongly in the case law,[32] and if parents are choosing, then it is all right for the

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[27] *Id.*

[28] *See, e.g.*, Public Interest Council, *Critique of the Madisonian Theory of Free Expression Embodied in the Gore Commission's Final Report*, *available at* http://www.mediainst.org/gore/01_07_99b.html (discussing Madison's theory of the First Amendment) (last visited Feb. 28, 2003).

[29] *See id.*

[30] *See Zelman v. Simmons-Harris*, 122 U.S.2460 (2002) (upholding the use of public money for religious school tuition).

[31] *Id.*

[32] *See, e.g., Witters v. W.A. Dep't of Services for the Blind*, 474 U.S. 481, 483 (O'Connor, J., concurring) ("The aid to religion at issue here is the result of petitioner's private choice. No

state to make the full panoply of educational choices available pursuant to the equality principle. Now, is that a breakdown? Even if one says that is a breakdown? Justice Stevens talked about taking out a very important brick, more than one brick in the wall of separation. We can talk about the wall of separation,[33] but if one analyzes what is really going on, Stevens is essentially employing a "thou shall not discriminate" principle and thereby informing what the Court has done in a lot of the religion clause cases.

MARTIN GARBUS:

Both Ken and I sharply disagree about The *Zelman* case.[34] It is worth talking about, because it shows the feelings of the Court. The case cuts across different areas of law. It is not just a religion case. It also deals with the free market.[35] And, in my opinion, it shows the many biases of this Court.

In *Zelman*, Ohio did not put much money into its public schools.[36] The public schools in the urban areas of Ohio were as terrible as they are in many major cities.[37] Instead of putting money into the public schools, Ohio developed a

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reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief").

[33] *Zelman*, 122 U.S.at 2485 (2002) (Stevens, J., dissenting) ("Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy").

[34] *Id.* State taxpayers brought action challenging voucher portion of Ohio Pilot Scholarship Program as violation of the Establishment Clause. Supreme Court held that where a government aid program is neutral with respect to religion, and provides assistance directly to broad class of citizens who, in turn, direct government aid to religious schools wholly as result of their own genuine and independent private choice, program is not readily subject to challenge under Establishment Clause.

[35] *See id.* at 2477 (O'Connor, J., concurring) ("At a national level, nonreligious private schools may target a market for different, if not higher, quality of education").

[36] *See generally id* at 2477.

[37] *See generally id* at 2477

voucher program whereby if parents wanted to send their child to a "private school," then the state would pay them $2,500, or some such amount, to send their child to a private school.[38]

So, one of the issues you are dealing with is in the area of education. Which system provides a better education, a public one or a private one? The issue of public versus private systems seeps into other areas as well. It is basically a free market theory that one can do better in a private system than in a public system. I disagree with this theory and find it dangerous. In any event, the state would give me $2,500 if I did not want to send my child to a public school,[39] and I could use that $2,500 at any school I wanted.[40] O'Connor was the swing vote[41] in this case, and both of our books discuss this.

O'Connor said that I have a choice.[42] I can send my child to this school or that school, and thus the state is not coercing me when I receive $2,500. In fact, all of us want to give our children better educations. $2,500 is not going to go a long way in New York, for example, when paying to send our kids to Dalton[43] or Fieldston.[44] Nor is it going to go a long way in setting up a new school system.

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[38] *See generally id* at 2477

[39] *See generally id* at 2477

[40] *See generally id* at 2477.

[41] *See id* at 2477. The Court split 5-4, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas in the majority. Justices Stevens, Souter, Ginsburg and Breyer dissented.

[42] *Zelman*, 122 U.S. at 2473 (O'Connor, J., concurring).

[43] The Dalton School is a New York City-based private school with annual tuition of $23,620. *See* The Dalton School, *at* www.dalton.org (last visited Feb. 28, 2003).

[44] Fieldston is a New York City-based private school. Tuition ranges from $20,100 to $22,800 per year, depending on grade level. *See* Ethical Culture Fieldston School, www.ecfs.org (last visited Feb. 28, 2003).

Most often, what happens is that the $2,500 ends up going to a parochial school.[45] Then, a parent is faced with a decision: "do I want to send my child to a parochial school, even though I do not believe with the religion to which the school adheres?" Let us assume that I am Jewish, and there is a cross hanging on the wall of the parochial school. The parochial schools do, in fact, teach better. So, do I send my child to that school, or do I send my child to the public school? The Court found that in most of the cases where vouchers were handed out, parents sent their child to the parochial school. Now, that seems to me a very dangerous case.

Zelman was a five to four decision. I was there at the time of the argument. The people who argued against the vouchers were really banged around.[46] It seemed very clear at that point where the Court was going to come out. So, *Zelman* is a horrific case because it can lead ultimately to the depletion of the public school system and the creation of a parochial school system. [47] Most of the time, "parochial school" means "Catholic school."

There is one other interesting issue that Ken raised – the question of how judges react and whether they have a certain end result. Ken mentioned Hugo Black.[48] Justice Black, for a long time, was the great defender of the First Amendment.[49] He happened to be a defender of the First Amendment in the '50s and '60s like

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[45] *See generally, Zelman*, 122 U.S. at 2473 (O'Connor, J., concurring). In its decision, the Court reviewed evidence indicating that more than three thousand, seven hundred students participated in the voucher program, and ninety-six percent of those enrolled in religiously affiliated schools.

[46] *See, e.g.*, Linda Greenhouse, *Cleveland's School Vouchers Weighed by Supreme Court*, N.Y. TIMES, February 21, 2002, at A1 (describing the oral argument in *Zelman*).

[47] *Id.*

[48] Justice Hugo Black served on the Supreme Court from 1937 to 1971. *See* Supreme Court of the United States, *Members of the Supreme Court (1789-present), at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/ www.supremecourtus.gov/about/members.pdf (last visited Feb. 28, 2003).

[49] *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994).

few others. However, I think that to some extent, Justice Black saw the violence and demonstrations of the civil rights movement, and the anti-war movement. At that point, I think he started to narrow the definition of what free speech is.[50] So, I look upon someone like Hugo Black as someone that I revered in law school and still do in many ways, as ultimately coming to different conclusions based less on the law and more on his own personal biases.

KENNETH STARR:

Certainly, free speech was taking some very serious hits in the latter years of the Warren Court.[51] There was a strangely odd, grudging attitude toward human liberty, which has gone under-noticed. As a result, and ironically, the Rehnquist Court, which tends to be almost purely libertarian, applauded. There are obvious exceptions. Bert Neuborne[52] of the ACLU, for example, contends that this is a very powerful First Amendment Court. I think Nadine Strossen, a member of the New York Law School faculty,[53] would agree with Mr. Neuborne, [54] if she were here. Well, that tells you something about this Court. They are putting up with

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[50] *See, e.g.*, Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960).

[51] Chief Justice Earl Warren served from 1953-1959. *See* Supreme Court of the United States, *Members of the Supreme Court (1789-present)*, *at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/ www.supremecourtus.gov/about/members.pdf (last visited Feb. 28, 2003).

[52] Burt Neuborne is a professor at New York University School of Law and the director of the Brennan Center for Justice. *See* New York University School of Law, *at* http://www.law.nyu.edu/faculty/profiles/ fulltime/ neubornеb.html (last visited Feb. 28, 2003).

[53] Nadine Strossen is a professor of law at New York Law School and President of the American Civil Liberties Union. *See, e.g.*, Freedom Forum, *2001-02 High Court Deals First Amendment Wins, Losses, available at* http://www.freedomforum.org/templates/document.asp?documentID=16535 (quoting Professor Strossen's comments on the Rehnquist Court: "This is the most speech-protective court in history, bar none. And that includes the Warren Court") (last visited Feb. 28, 2003).

[54] Burt Neuborne, *Free Expression and the Rehnquist Court*, *in* 538 PLI/P at 1273, 1275 (1998) ("The Rehnquist Court has been among the strongest free speech courts in the nation's history").

speech that they, as conservatives, do not particularly care for.

I am reminded of the *O'Brien* test,[55] which is based on one's conduct and demands intermediate scrutiny. There is certain artificiality about it. Essentially, the government wanted to throw O'Brien in the slammer for burning his draft card.[56] This was a case of a totally trumped-up governmental interest, which was supposed to justify a person having to keep his draft card on his person.[57] O'Brien was engaged in symbolic speech.

The *O'Brien* decision was very anti-libertarian, and I think it would come out quite differently today. Consider the Rehnquist Court's flag burning decisions.[58] One can say they were decided based upon a governmental interest in preventing people from burning the American flag. However, Congress stepped in and enacted the Flag Protection Act, thereby indicating that there was something very special about the flag that uniquely merits protection. Congress did not do this for the draft cards.[59] Just a couple of comments about the Cleveland case[60] and then I will move back to *Eldred v. Ashcroft*,[61] which is so intriguing and tells us a great deal about this Court and its attitude in the arena of intellectual property.

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[55] *See United States v. O'Brien,* 391 U.S. 367, 382 (1968).

[56] *Id.* at 376.

[57] *Id.* at 374.

[58] *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

[59] *See United States. v. O'Brien,* 391 U.S. at 382.

[60] *Zelman*, 122 U.S. 2460.

[61] *Eldred v. Ashcroft,* 123 U.S. 769 (2003). Copyright Term Extension Act (CTEA) provision extending copyright term for existing copyrighted works by same 20-year period did not violate First Amendment free speech rights of persons who were utilizing works that had fallen into publicdomain; provision did not alter traditional contours of copyright protection.

During the Cleveland *Zelman* case,[62] I served as outside counsel to the State of Ohio. There were greater per capita expenditures in Cleveland than in any other district in the State of Ohio.[63] That was undisputed. What also was clear, and the reason the State of Ohio became involved in the first instance, is that the school district was placed into receivership by the United States District Court judge in a long-running desegregation case.[64]

The judge fired the school board for being entirely ineffectual,[65] and the General Assembly and then-Governor Voinovich[66] (now Senator Voinovich) accepted that decision. They did not even consider mounting an appeal.[67] It was an interesting issue of judicial power. However, they accepted that the school district was, and had been, extremist. I guide you to the facts of the case to see the context within which choice was introduced into the Ohio system. I think that is a point of reassurance for those who are really concerned that this is just the beginning of a long trend. I tend to doubt that it is.

As a matter of public policy, the idea that many jurisdictions will be reserved for

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[62] *Zelman*, 122 U.S. 2460.

[63] *See generally*, *Zelman*, 122 U.S. 2460.

[64] *See Reed v. Rhodes*, 455 F. Supp. 569 (N.D. Ohio 1978) (asserting jurisdiction to oversee the execution of recommendations made by a special master in desegregating Cleveland's public schools).

[65] District Judge Krupanski issued an order for state authorities to take over the Cleveland public school system. *Reed v. Rhodes*, 1 F. Supp. 2d 705, 713-15 (N.D. Ohio 1995).

[66] George V. Voinovich served as the Governor of Ohio from 1990 to 1998 and was elected to the United States Senate in 1999. *See* United States Senate, *George V. Voinovich*, *at* http://www.senate.gov/~voinovich/ (last visited Feb. 28, 2003).

[67] Governor Voinovich was a proponent of the school voucher system. *See* Catherine Candiski, *School Vouchers Fate Expected in July*, COLUMBUS DISPATCH, May 27, 1996, at 1C ("[t]he dismal performance of the bankrupt Cleveland school district, now under court-ordered state supervision, has provided state officials much ammunition to support the voucher program").

situations like Milwaukee is off.[68] Milwaukee, in contrast to Cleveland, is a failed system. The Milwaukee community was really of one accord with a progressive, Democratic mayor (Mayor Norquest)[69] and a conservative Republican governor (Tommy Thompson)[70] The business community in Milwaukee was very supportive of implementing a choice program that was expanded to include the religiously affiliated schools.[71]

Let me move on to *Eldred v. Ashcroft.* I think *Eldred v. Ashcroft*[72] is quite intriguing in a number of respects including, the mere fact that the Supreme Court took the case.[73]

It is very hard, as everyone knows, to get the Supreme Court to grant certiorari on a case.[74] I have practiced in the intellectual property area. The Supreme Court of the United States now grants certiorari and hears argument on seventy-five or

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[68] The Milwaukee Parental Choice Program, the first school voucher program in the United States, was implemented in 1990. *See* Pam Belluck, *School Ruling Shakes Milwaukee*, N.Y. TIMES, June 15, 1998, at A12.

[69] John O. Norquist has been serving as Mayor of the City of Milwaukee since 1988.*See* City of Milwaukee,*Mayor JohnONorquist*,http://cmkeweb.ci.mil.wi.us/MayorJohnO.Norquist/index.jsp (last visited Feb. 28, 2003).

[70] Tommy G. Thompson served as Governor of Wisconsin from 1987 to 2002. As Governor, he created the nation's first school voucher program. Mr. Thompson is currently the United States Secretary of Health and Human Services. *See* United States Department of Health & Human Services, *Biography of Tommy G. Thompson, at* http://www.hhs.gov/about/bios/dhhssec.html (last visited Feb. 28, 2003).

[71] *Jackson v. Benson*, 578 N.W.2d 602 (1998); See also *Belluck, supra* note 90.

[72] *Eldred*, 123 U.S. 769.

[73] *Id.* at 778.

[74] *See* The Supreme Court of the United States, *2002 Year-end Report on the Federal Judiciary, available at* http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html.

eighty cases per year.[75] That is considerably down from the good old days of one-hundred and fifty to one hundred and eighty.[76] It can reasonably be argued by thoughtful people that that was too many.

But is seventy five too few? This is not the occasion for that debate. The point is that the Supreme Court is taking half the number of cases they were taking when then-Justice Rehnquist had his confirmation hearings.[77] When Rehnquist was asked about the caseload of the Supreme Court during his confirmation hearings, the now-Chief Justice responded, "Oh, I think it is about right."[78] This is very intriguing. Well, it was twice the caseload as it is now. Does that mean there is much less litigation in the system now? I do not think so. Does that mean that the Supreme Court is cheerfully agreeing with everything the Courts of Appeals are doing out there? I do not think so. Does it mean there are no conflicts to resolve? I do not think so.

Studies suggest, although there have not been many, that there are a lot of unresolved conflicts.[79] My information comes from the most authoritative study done by scholars at the University of Pittsburgh. This fact puts *Tasini*[80] in a very interesting light; the Supreme Court took *Tasini* in order to resolve a circuit court

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[75] *Id.*

[76] Arthur D. Hellman, *The Supreme Court, The National Law, And The Selection Of Cases For The Plenary Docket*, 44 U. PITT. L. REV. 522, 526 n.19 (1983), citing 49 U.S.L.W. 3050 (Aug. 12, 1980) (totals for 1977 through 1979 Terms); 46 U.S.L.W. 3133 (Aug. 13, 1977) (totals for 1974 through 1976); 43 U.S.L.W. 3086 (Aug. 13, 1974) (1971 through 1973).

[77] In 1986, the year Rehnquist was appointed Chief Justice, the Court disposed of one hundred and seventy three cases. LEE EPSTEIN ET AL., SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 212 (2d ed. 1996).

[78] *Rehnquist Confirmation Hearings*, Committee on the Judiciary, 99th Congress, S. Hrg. 99-1067, July 29-31, Aug. 1, 1986.

[79] *See* Arthur D. Hellman, *By Precedent Unbound: The Nature And Extent Of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 715-18 (1995).

[80] *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

split.

HOWEVER, THE SUPREME COURT UPHELD THE CONSTITUTIONALITY OF THE SONNY BONY COPYRIGHT EXTENSION ACT, WHICH EXTENDS THE LIFE OF EXISTING COPYRIGHTS.[81] THIS ACT GRANTS THE AUTHOR PROTECTION FOR THE DURATION OF HIS LIFE PLUS SEVENTY YEARS FOLLOWING HIS DEATH. THE COPYRIGHT DURATION IS KNOWN AS "LIFE PLUS SEVENTY."

Essentially, it extends the duration of a copyright for new authors and retroactively extends the duration of existing copyrights. Why did the Court accept that? Who knows? I think that there are two arguments. The fundamental argument is that Congress has exceeded its powers. Again, I think this tells us something very interesting about the Rehnquist Court and the check on Congress.[82] The other argument deals with free information values embodied in the First Amendment. The Court may be somewhat intrigued by *Harper & Row*[83] types of concerns. (*Harper & Row*concerned *The Nation* magazine's preemptive publication ("scooping") of the soon-to-be-published Ford memoirs.[84]) The Supreme Court held that use of a copyrighted manuscript in another work was not a fair use. The Court stated that whether a publication was commercial as opposed to non-profit was a separate factor that tended to weigh against finding a fair use. Where there is an actual effect on the market, there is no fair use because such use disrupts the exclusive contract between the parties.

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[81] Sonny Bono Copyright Term Extension Act (CTEA), 105 Pub. L. 298, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 302, 304) [hereinafter "Sonny Bono Act"].

[82] *See Eldred*, 123 U.S. at 774.

[83] *Harper & Row*, 471 U.S. at 556-58.

[84] *Id.*

MARTIN GARBUS:

Allow me to give you some of the background for the *Eldred* case.[85] In seeking to strike down the extension of the copyright law, the petitioners *in Eldred*[86] argued that the function of the copyright section of the Constitution is to promote creativity. They also argued that extending the copyrights hampered First Amendment values, in that creativity was tied up for too long. The Court had to balance the First Amendment value of creativity with property rights, they averred, since property rights were being granted more protection via an the extension.[87]

Now, one of the issues presented in the case is the length of time for which Congress can extend the right to copyright.[88] Can Congress extend copyright for 1,000 years or one year less than infinity? Can the Supreme Court get involved in, or will the Supreme Court get involved in, evaluating Congress's judgment?

The Constitution says that copyrights can be set for a "limited term."[89] How is "limited term" defined? Is it one thousand years? Is there a relationship between creativity and the length of copyright? What happened in Congress, and, interestingly, Ken and I take a different approach to this,[90] was that Walt Disney and other large corporate interests lobbied for the extension of the Copyright Act because Mickey Mouse was about to fall into the public domain and Disney did not want to lose such a valuable expression.

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[85] *See Eldred,* 123 U.S. at 774.

[86] *Id.* at 775-77

[87] *Id.* at 788-89.

[88] *Id.* at 782 n. 11.

[89] U.S. CONST. art. I, § 8, cl. 8.

[90] *See generally* KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE (2002); MARTIN GARBUS, COURTING DISASTER (2002).

Nor did the global communications companies want to lose their valuable assets. So to protect these assets, Congress lengthened the Copyright Act. If you look at the testimony in Congress, the testimony tended to favor one side. Now, I, at one point, litigated the DVD case and other cases.[91] Again, the DMCA are laws put in place, one could argue, by substantial corporate interests at the expense of the First Amendment.[92] Napster gets thrown into this too, and raises many separate issues.[93]

KENNETH STARR:

Extending copyright is a good thing to do. The Constitution talks in terms of: "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." What is quite interesting textually is that there is a certain nineteenth century quality about authors and inventors.

We think of Nathaniel Hawthorne writing,[94] or the Wright Brothers[95] inventing.

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[91] Mr. Garbus, in the last several years has litigated a variety of copyright issues, most recently, the "DVD case," Universal City Studios, Inc. v. Reimerdes, 104 F. Supp. 2d 334 (S.D.N.Y. 2000), *aff'd* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2002). *See* also Esquivel v. Arau 913 F. Supp. 1382 (C.D. Calif. 1996); Wildmon v. Berwick Universal Pictures 803 F. Supp. 1167 (N.D. Miss. 1992); Cheever v. Academy Chicago Ltd., 690 F.Supp. 281 (S.D.N.Y. 1988).

[92] The successful appellees in the case were the major Hollywood studios - namely, Universal, Time Warner, Walt Disney and 20th Century Fox.

[93] *See A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. Cal. 2002).

[94] Nathaniel Hawthorne is a classic American novelist and short story writer. His best-known works include *The Scarlet Letter* (1850) and *The House of Seven Gables* (1851). *See* COLUMBIA ENCYCLOPEDIA (6th ed. 2001), *available at* http://www.bartleby.com/65/ha/HawthornN.html (last visited Mar. 1, 2003).

[95] Orville and Wilbur Wright designed the "Kitty Hawk," the first powered airplane, and made the first successful controlled, powered airplane flight from ground level in 1903. *See* National Inventors Hall of Fame, *Orville Wright: Flying-Machine Airplane, at* http://www.invent.org/hall_of_fame/156.html (last visited Mar. 1, 2003).

What you have is a solitary or partnership type enterprise. When, in fact, so much of modern expression in mass society, as we all know, is an enormously capital-intensive enterprise with a high frequency of losses.

Look at the movie industry, for example. It is very, very expensive. Nothing in the movie industry happens with the work of one or two people. You do not succeed in the movie industry by being the lonely writer, such as John Grisham,[96] dreaming of something and publishing your own initial book, and then, all of a sudden, are discovered. This is a corporate enterprise.

Think of the amount of collective collegial effort it takes to create something like *Lord of the Rings*[97] or *Harry Potter*,[98] or what have you. That is one of the most intriguing things about this. The Court is faced with a very different technological and economic setting than existed at the founding of the Copyright Act, when one could think more in terms of Ben Franklin[99] or Thomas Paine.[100]

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[96] John Grisham is a novelist, best known for his modern legal thrillers. Some of his works include: *A Time to Kill, The Firm, The Pelican Brief, The Client,* and *The Rainmaker,* all of which have been adapted into successful Hollywood films. *See* Bookbrowse.com, *John Grisham, at* http://www.bookbrowse.com/index.cfm? page=author&authorID=246 (last visited Mar. 1, 2003).

[97] "The Lord of the Rings" is a theatrical motion picture trilogy based on J.R.R. Tolkien's eponymous book. The trilogy was filmed in a one and one half year period. The first film in the trilogy, "Lord of the Rings: Fellowship of the Ring," was released in December 2001, and was nominated for thirteen Academy Awards in March 2002. The second film in the trilogy, "Lord of the Rings: The Two Towers," was released in December 2002, and was nominated for six Academy Awards in March 2003. The first film in the trilogy garnered $860 million worldwide. The final film in the trilogy will be released in December 2003. *See* Lord of the Rings, *The Story, at* http://www.lordoftherings.net/index_synopsis_ttt.html (last visited Mar. 1, 2003).

[98] Harry Potter is the title character in a series of books by J.K. Rowling of the same name. Ms. Rowling's books were adapted into major theatrical motion pictures. *See* Warner Brothers, *The Official Harry Potter Web Site, at* http://harrypotter.warnerbros.com/home.html (last visited Mar. 1, 2003).

[99] Benjamin Franklin was an inventor, writer, diplomat, businessman, musician, scientist, humanist and civic leader. Available at http://www.pbs.org/benfranklin/ (last visited April 1, 2003).

MARTIN GARBUS:

Yet, the other side from the free speech point of view and the technological perspective is that the Internet allows hundreds of millions of people to have some degree of creativity. To take something, transpose it, change it, and do something different with it is a form of creative expression. So one of the questions that arises, although was not raised in *Eldred*,[101] is how much can you change something before it becomes a new property?

Of course, the corporate interests are going to try and make it clear that the changes have to be dramatic. You cannot make minor changes and then have the right to copyright the material as your own. So although I do not agree with Lessig[102] and others who advocate the abolition of copyright, because that would be dangerous, I do think that this is really the new frontier in copyright law, with *Eldred*[103] leading the pack.

In reality, *Eldred*[104] is just a flyspeck that is going to be swatted down. However, it deals with the fundamental issues in our country, the balance between free

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[100] Thomas Paine was an author and political theorist who challenged slavery in America and helped to draft the French Constitution, but objected to the King's execution. His most famous work is *Common Sense*. *See* USHstory.org, *Thomas Paine: Brief Biography*, *at* http://www.ushistory.org/paine/ (last visited Mar. 1, 2003).

[101] *Eldred,* 123 U.S. 769.

[102] See Lawrence Lessig, *The Limits of Copyright*, THE STANDARD, at http://www.thestandard.com/article/ 10,1902,16071,00.html (June 19, 2000); Lawrence Lessig, *Intellectual Property and Code*, 11 ST. JOHN'S J. LEGAL COMMENT, 635, 637 (1996) (observing that limitations, like fair use, built into intellectual property laws, will become irrelevant unless replicated in code); *Symposia: The Constitutionality Of Copyright Term Extension: How Long Is Too Long?* 18 CARDOZO ARTS & ENT LJ. 651 (2000).

[103] *Eldred,* 123 U.S. 769.

[104] *Id.*

speech and copyright. If I could just read again the clause that Ken read. The Constitution says, "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their writings."[105] One of the questions is whether there is a relationship between the duration of copyright and creativity.

In *Eldred*,[106] the petitioners argued that this relationship does not exist. If you believe that constitutional interpretation involves looking at the text, and Ken and I fundamentally disagree as to how you interpret the Constitution, then it is difficult to say there is a causal relationship. I think that there is a causal relationship, and that is the argument that was made in *Eldred*.[107]

KENNETH STARR:

It was interesting that the "promote the progress of" argument did not completely surface in the oral argument, and I thought it was really quite important. It helped explain the reason why members of Congress did not cast a single vote against the Sonny Bono Act.[108] So what is going on here? We all love Mickey Mouse, but is that what is really driving this?

Another important fact was that Congress was very mindful of what our trading partners were doing. The Berne Convention[109] had long since moved the life of

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[105] 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").

[106] *Eldred,* 123 U.S. 769.

[107] *See Eldred,* 123 U.S. at 788-89.

[108] The Sonny Bono Copyright Term Extension Act was passed by a unanimous vote in the House and Senate. *See* 144 CONG. REC. H 9946; 144 CONG. REC. S 11673 (Oct. 7, 1998).

[109] The Berne Convention for the Protection of Literary and Artistic Works (Brussels Text, 1948), *reprinted in* PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 368 (2001).

copyrights to lifetime plus seventy years. It is in the best interests of the United States to be compatible with our trading partners, and especially our European Union trading partners – as the Supreme Court seemed to indicate.

Certain disadvantages flow from not having that compatibility. Interestingly enough, I do not even remember it being mentioned in the oral argument. But with respect, let me test my "libertarian theory," and say it is one of the things that is rich about the Court. The Court's libertarian theory enables First Amendment victories. But *Harper & Row*[110] has been hovering in the background. There, we see another dimension of what I view as a richly dimensioned and very professional Court.

In *Harper & Row*, the Court was, in essence, tipping its hat to the common law, as well as to Congress' acceptance of the common law doctrine of fair use, saying that it was accommodation for the First Amendment.[111] In the copyright laws, Congress essentially ordained and approved what the courts have done.

KENNETH STARR:

Of course the challenge in *Harper & Row* was the protection of First Amendment rights.[112] This *Nation Magazine's* printing very substantial portions of the Ford memoirs prior to their publication. The publisher, Harper & Row, was very distressed over this because *Nation* was not authorized to publish them.

Was that protected by the First Amendment? The Supreme Court said no,[113] it was not a fair use. I think the Court was showing giving a great deal of respect for Congress. The Court and Congress have affected that appropriate balance between the public's interests and needs and the rights of authors and publishers.

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[110] *Harper & Row*, 471 U.S. 539.

[111] *Id.*

[112] *Id.*

[113] *Id.*

MARTIN GARBUS:

I think one area where Ken and I disagree, and where I disagree with the Supreme Court, although the majority of the Supreme Court, even the liberals, has voted against my position, is commercial speech. In two cases, the Supreme Court struck down laws and members of the traditional liberal minority joined the conservative majority.[114]

One case dealt with pharmaceutical ads.[115] The question was whether you would protect the public, which is how I would phrase it, from ads that were not helpful.[116] The second case dealt with, amongst other things, whether you could limit tobacco companies from having billboard advertising within 1,000 feet of the schools.[117]

In both of those cases you could say the free speech won. You could also say the free market won. Stanley Fish says it very nicely in his book, *No Principles*, [118] where he discusses how you can be totally committed to the First Amendment in certain areas like political speech, and not come to the same absolute conclusions as you would in commercial speech, for example. Although one can also argue to use that word that it becomes a slippery slope.

KENNETH STARR:

Yes, regarding commercial speech, I find that evolution to be quite demonstrative

[114] *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

[115] *See Bolger*, 463 U.S. 60.

[116] *Id.*

[117] *See Lorillard Tobacco Co.*, 533 U.S. 525 (2001).

[118] STANLEY FISH, THE TROUBLE WITH PRINCIPLE, 83-92 (1999).

and illuminating as to the nature of this Court. The Court captured something very fundamental in the text of the Constitution – the values in the text of the First Amendment. It was Justice Blackmun who first gave voice to this in *Bolger Pharmaceuticals*[119] by recognizing that the price of and information about pharmaceuticals are a matter of life and death for many individuals. It may be as important as public policy debates, foreign policy debates, and war or peace debates. It very well may rise, shall I say, to the level of a compelling individual interest. People need this type of information. Now, one might say, "well, that is a relativist attitude informing jurisprudence. We do not want to be judgmental nor do we want to have their values superimpose our values."

I do not really think that this what is going on. Rather, the basic insight is that the First Amendment protects communication. There must be a very powerful reason, such as fighting words, to bring communication outside the ambit of protection. We certainly have seen this in the Rehnquist Court, with respect to decency on the Internet.

The Court has been striking down what Congress has seen fit to do,[120] regardless of whether Congress enacted a statute with a very substantial bipartisan majority. This includes some of the conservative justices, most notably, Justice Thomas, who is just decidedly libertarian. He is sympathetic at a social level. He is a self-proclaimed "soccer mom" because of his adopted nephew, Mark. He goes to all of Mark's soccer games now, which is an interesting experience for him. However, as a soccer dad, as it were, he simply has no use for this stuff in his home. As a justice, he says that is what the First Amendment is there for - overbreadth. The Court is taking these First Amendment [121]doctrines very seriously.

Before we open the floor for questions, I do want to say a word about the doctrine

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[119] *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

[120] *See e.g., Ashcroft v. A.C.L.U.*, 535 U.S. 564 (2002).

[121] *See* Laura A. Till, *Justice Clarence Thomas: The Emerging "New Federalist" on the Rehnquist Court*, 12 REGENT U. L. REV. 585 (1999).

of equivalents in the Court.[122] This moves us into patent law ever so briefly.

Here, again, the Court has been unanimous regarding this very important judge-made doctrine.[123] Beginning in the 1850s, the Supreme Court of the United States ordained this doctrine borne of equity.[124] The doctrine allows one to take the text of a patent document. However, you cannot be too rigid in interpreting the document. To do so would enable anyone to make the slightest adjustment to it, and then design around it, thereby throwing out the window the creativity, engineering, and rights involved in the text of the patent.

The Court has been quite firm in saying it will not depart from the doctrine of equivalents, even though a major textualist assault was mounted in the *Warner-Jenkinson* case.[125] The argument was that the 1952 Patent Law should be the governing text, and that it admits of no possibility for this somewhat ancient doctrine to express in words what the invention enables the user to do.[126]

So, the message is, hire a good patent lawyer. Unanimously speaking through Justice Thomas, the Court said they were going to stay the course.[127] This is part of my thesis in *First Among Equals.*[128] It is a stay-the-course, non-rock-the-boat-type Court, save with respect to federalism, which we have not talked about at all.[129] This has been recently rearticulated in the *Festo*[130] case, a unanimous

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[122] *See Winans v. Adam*, 56 U.S. 330 (1853).

[123] *Id.*

[124] *See id.*

[125] *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997).

[126] *See id.* at 27-29.

[127] *See id.*

[128] STARR, *supra* note 91, at 17-18.

[129] *Id.*

opinion by Justice Kennedy.

In *Festo*[131], you have a very interesting conversation between the Specialist Court, created by Congress in 1982, the United States Court of Appeals for the Federal Circuit,[132] and the Supreme Court. It is an interesting opinion articulating the rules with respect to the doctrine of equivalents. The Federal Circuit laid down some very bright line rules. Kathleen Sullivan, Dean of Stanford Law School, has written a wonderful piece about a court of rules versus a court of standards.[133] It is a terrific article to focus on and study as a means of understanding the dynamics and tensions at play in the Court.

The Federal Circuit gave rise to a very rules-based approach to this doctrine of equivalents[134]. The Supreme Court reversed, saying, "You are being too wooden. You are being too rigid. You are trying to control the litigation. We understand that there has been this proliferation of litigation, but you are being too rigid."[135] This brings me back to the Justice Scalia articulation.[136] If one wants to understand the majority thrust in the Supreme Court, one will read *A Matter of Interpretation*.[137] One will see that this is what this Court does. It is quite sophisticated, quite lawyerly, quite supple, and subtle with text. Surprisingly, this achieves unanimity.

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[130] *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002).

[131] *Id.*

[132] *Id.*

[133] *See generally,* Kathleen M. Sullivan, *The Rehnquist Years: A Supreme Court Retrospective: The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 743 (1998).

[134] *Festo*, 122 U.S. 1831.

[135] *Id.* at 1839-1842.

[136] SCALIA, *supra* note 14.

QUESTION AND ANSWER SESSION

QUESTION:

What are your views on claims that our current administration is limiting our constitutional rights and that the Supreme Court will not address that at all?

MARTIN GARBUS:

Chief Justice Rehnquist wrote a book called *All the Laws But One*,[138] in which he talked about what happened during World War II. In the book, he discussed the suspension of habeas corpus during the Civil War.[139] I think it is very, very clear which side he is going to come out on.

The Chief Justice spoke approvingly of the internment cases, as well as of giving the Executive nearly unrestricted power. My suspicion is that the Supreme Court is going to be a very restrictive Court, aside from the free speech area. They have discussed open access.

KENNETH STARR:

I think the most likely issue to come up, and it may come up this term, is the right of access to deportation proceedings. Both the Sixth and the Third Circuits have gone in diametrically opposite positions within very short order. It is a very important and current kind of issue. I do not know whether the government has, in fact, filed a petition for certiorari in the Sixth Circuit, which handed down a decision before the Third Circuit did.

So, I will just say stay tuned for that. I think that will be the Court's first cut at it. Let me pick up on Marty's comment that this is a stable, "don't-rock-the-boat

[138] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (2000).

[139] *Id.*

Court." In addition to Chief Justice Rehnquist, of course, you have to have four votes one way or the other. Remember Justice Brennan's famous admonition, "the rule of five?"[140] With five votes you can do anything.

I think this Court has shown in recent years that it is very guided by precedent, though not unfailingly, not rigidly. These justices are not automatons, but they tend to be quite respectful of precedent. *Roe v. Wade*,[141] *Planned Parenthood*,[142] *Miranda*,[143] and *Dickerson*,[144] were big cases and exceptions, to be sure. However, I think those are pretty good examples of the Court saying, "we are going to stay the course, even if we have current reservations about the correctness of those decisions."

As you know, there was, in fact, a case during World War II, *Quirin*[145] which involved German saboteurs, who came onshore in Long Island and Florida, but were not especially effective. They made a fundamental mistake. As anyone who has been in the Service knows, keep your uniform on.

If you are in combat do not say, "Gee, I think I'll wear my civilian clothes today." That is really a no-no. You're trained to wear a uniform. Why is that? Because the rules of war require it. If you are not in uniform, and these chaps were not,

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[140] The "rule of five" relates to the number of votes on the Court. Justice Brennan thought that the "rule of five" was the most important rule in constitutional law. As such, he sought to get five votes for the doctrine that he found most compatible with his vision of the law. *See* Mark Tushnet, *Members of the Warren Court in Judicial Biographies: Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763-67 (1995) (discussing Justice Brennan and the rule of five).

[141] *Roe v. Wade*, 410 U.S. 113 (1973).

[142] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[143] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[144] *Dickerson v. United States*, 530 U.S. 428 (2001).

[145] *Ex Parte Quirin*, 317 U.S. 1, (1942).

then you are an enemy combatant under the law of war, which means you get no rights under the Geneva Convention. Whatever rights you get are the rights afforded to you as a matter of grace.

As it turns out, John Walker Lindh[146] was an enemy combatant. He was not in uniform. Now, you can say, "Well, wait. Did the Taliban attack the United States?" No, but under Article 54 of the United Nations Charter,[147] this is war. I know there has been no formal declaration, but you do not need a formal declaration of war, in my judgment, when the United Nations is involved. You do not go out and commit acts of war. It is a crime under international law to declare and wage war.

We are engaged in self-defense, which is recognized by the United Nations under the Charter. I think we are going to see the Executive Branch make more prudential judgment calls. The *Padilla* [148] case may be the case that raises some issues that might find their way up to the Supreme Court. John Walker Lindh could have been tried as an enemy combatant in a military tribunal. The decision was made at the Presidential level not to do so. Instead, he was tried in the courts of the United States.

I think that is going to tend to happen. There must be something going on with the *Padilla* [149] case that is causing the Executive to treat Padilla differently from Lindh. I am not saying that the Executive always behaves consistently with our

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[146] John Walker Lindh is an American citizen caught fighting with the Taliban in Afghanistan. In November 2001, the Northern Alliance turned him over to the United States military. In October 2002, Lindh plead guilty to providing services to a terrorist group and carrying explosives while in the commission of a felony, and was sentenced to twenty years in prison. He is now referred to as the "American Taliban." P. Mitchell Prothero, *John Walker Lindh Gets 20 Years*, THE WASH. TIMES, Oct. 4, 2002, *available at* http://www.washtimes.com/upi-breaking/20021004-114946-6311r.htm (last visited Mar. 2, 2003).

[147] U.N. CHARTER art. 54.

[148] *Padilla v. Bush*, 23 F. Supp. 2d 564 (S.D.N.Y. 2002).

[149] *Id.*

fundamental notions of fairness. However, in light of the Executive's conduct vis a vis Lindh, one could say, "Lindh was a kid from San Marin County, whereas Padilla was from Chicago and had no means."

I do not know. Maybe that is what is going on. I tend to doubt it. Thus, I think that we will probably see the Executive branch managing to avoid some of these issues that the Supreme Court may address, based on the Executive's prudential determination of whom to try and where to try them. What about the folks at Guantanemo? Well, Cuba exercises sovereignty. We do not have sovereignty. We are lessees. So, we do not have sovereignty over Guantanemo.[150] Thus, under international law, the detainees are not within the jurisdiction of the United States.[151]

MARTIN GARBUS:

I would just add one thing. The whole question of terrorism, in its own peculiar way, has already come up before the Supreme Court. Based on their questions from the Bench, I think the Justices have certainly been cognizant that some of the defendants in criminal cases may be terrorists in the future. In those few cases, the Court expands the law against the rights of individual defendants in ways that I might not be happy with.

In the *Printz*[152] case, Justice Stevens, in discussing the Brady Act,[153] questioned how the responsibilities of crime and gun regulation should be allocated among the federal and state governments. Justice Stevens was in the minority, when he

[150] It is reported that more than six hundred illegal combatants are being held by the United States military at Guantanamo Bay, Cuba. The detainees are suspected members of terrorist organizations. *See* BBC News, *U.S. Court Rejects Cuba Camp Challenge, at* http://news.bbc.co.uk/2/hi/americas/2490893.stm (last visited Mar. 2, 2003).

[151] *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1164 (2002).

[152] *Printz v. United States*, 521 U.S. 898 (1997).

[153] 18 U.S.C. § 921 (2003).

asked the question, "Why can't we extend federal power? Terrorism is a national problem."[154] Stevens continued by saying that the federal government must be able to work with the states in a collaborative effort. The federalism of the present Supreme Court would be inappropriate if we had to fight terrorism on a national level.

KENNETH STARR:

Can I add one footnote to that, just to remind us all that so much of the colloquy that has taken place over recent months, with respect to the situation in Iraq really has taken place against the backdrop of the Supreme Court's pronouncements in cases such as the *Steel Seizure* case?[155] The Supreme Court held, six to three, that President Truman had exceeded his powers as Commander in Chief, his "inherent powers," when, in 1952, during the Korean War, he issued an Executive Order for the federal government to seize all steel mills in order to prevent a looming strike by steel workers.[156] Now, that is pretty exigent.

The Executive Order was very stark, in terms of the need to keep the steel mills open and running because of hostilities in the field and the need to supply the troops. Lives were going to be lost. But, even so, the Court struck down the *Order*, holding that the President exceeded his powers.[157] This is a very rich topic for discussion.

It brings us back to one of the issues that is part of the brooding omnipresence in the War Against Terrorism: "what kind of inherent powers does the President of the United States have?" If I were advising him, which I am not, I would not be too sanguine. I would tell him that based on his "inherent powers," he can take certain actions as President. It is quite interesting that, historically, Presidents

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[154] *Id.*

[155] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[156] *See id.*

[157] *See id.* at 584.

have taken actions that they have had their own Constitutional doubts about.

Thomas Jefferson believed that the Louisiana Purchase,[158] his own action, was ultra vires, but he did it. His correspondence is quite moving. He was quite a genius of a man for his failings, a towering genius. In his correspondence, he expressed his thought process which was, essentially, that he was going to look to public approbation to vindicate what he felt, given that his own interpretation of the founding document led him to believe that he had exceeded his powers.

Jefferson did not have power under Article Two[159] to do what he did, but a history professor at the University of Virginia summarized by saying, "This is all very simple. Remember, above all, Thomas Jefferson was a very smart real estate man." I think I just justified Marty's view that it is all results-oriented. This is terrible.

MELVIN SIMENSKY:

Marty wrote the following in the first chapter of his book, *The Unmaking of American Law*:[160]

> As I write this, the United States Supreme Court is seizing power. And in doing so it is radically changing the law in this country. The Rehnquist Court rejects much of the last 65 years of America's Constitutional law – rejects the balance between Congress, the Court and the President – and rejects the form of our democracy that these cases established. It does so to protect entrenched interests at the expense of unpopular minorities. It attempts to justify its new position by discarding prior cases, and

[158] In 1803, the United States purchased Louisiana from France for $15,000,000. This purchase doubled the size of the United States. COLUMBIA ENCYCLOPEDIA (6th ed. 2002), *available at* http://www.bartleby.com/65/lo /LouisianP.html (last visited Mar. 2, 2003).

[159] U.S. CONST. art. II.

[160] GARBUS, *supra* note 91.

> by looking to resurrect and reinterpret the Constitution as no other court has ever done. Instead of the balance of power, we have an attempt at judicial exclusivity at the expense of the Congress and 'We the People.'"[161]

Do you really believe this, Marty, and, if so, how do you justify it?

MARTIN GARBUS:

If you wanted to take the other side of the coin, the people who wrote about the Warren Court spoke of it in the same terms. They said that the Warren Court was a judicial activist Court and was disregarding certain states' rights. Consider *Brown v. Board of Education*.[162] Felix Frankfurter said there really was no clear history of the 14th Amendment.[163] There was some question about whether the Warren Court could do what it did in *Brown v. Board of Education*.

Similar statements were made by the other side, if you will, regarding cases such as *Roe v. Wade*,[164] namely, the argument against *Roe v. Wade*. I do not know if Ken does this in his book, but other people do. Bork[165] certainly did it in the article where he reviews my book. I think he calls it one of the worst decisions ever made, and he talks about how the Court, even then, just reached out and did certain things. [166]

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[161] U.S. CONST. pmbl.

[162] *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954).

[163] U.S. CONST. amend. XIV.

[164] *Roe v. Wade*, 410 U.S. 113 (1973).

[165] *See* Dismantling the Law by Bork (Nov. 2002).

[166] The New Deal Court refers to the Court during Franklin Delano Roosevelt's presidential term, which is viewed as a revolutionary Court. The Court made many sweeping changes in the law which allowed Congress to regulate the economy according to President Roosevelt's New Deal. *See* Andrew R. Rutten, Book Review, 6 INDEP. REV. (2001), *available at* http://www.independent.org/tii/content/pubs/review/books/tir61_cushman.html (last visited

I think that the language that I have used is not dissimilar to language that has been used to criticize the Warren Court. I also think such language was used when people saw the New Deal Courtfrom 1937 striking down and fundamentally changing the economic nature of this country. The book discusses the possibility that if Bush were to stay in office for another four years, assuming he has a Republican Senate, the probabilities are that he will have one appointment every two years. This is an average. Sometimes presidents appoint more and sometimes they appoint less, but it is an average.

So, if he were in office another six years, he would have three appointments. Putting aside the question of whom he would reappoint to the Supreme Court, although you can never guess what will happen, I think the most likely people would have judicial philosophies similar to are O'Connor, Rehnquist and Stevens. If he were to appoint people of the Scalia/Thomas mold, people who have a very clear position on abortion and other things, then you would see an extraordinary shift in the legal landscape.

One could argue that we had that kind of shift in the Warren Court. One could argue we had that kind of shift in the New Deal Court.[167] What the book tries to do is to trace cycles. It says we are in a cycle now that could easily get much worse. The book asks the reader to pay attention to judicial appointments when they go into the ballot box. So, yes, this is a fair description of what may happen with respect to the Court.

KENNETH STARR:

Well, I enjoyed Mel's dramatic reading, and Marty does feel strongly about this. I know it is heartfelt. Marty is a very, very thoughtful person, and is a terrific lawyer. However, with all due respect, I think it is alarmist to say there is a seizing of power. I do understand the concern in one area, the federalism area.

Mar. 2, 2003).

[167] *Id.*

I think reasonable minds can disagree pretty fervently here. So, what is going on? It is hard to say. Although Marty has said, very powerfully, that there are other areas we should be concerned about, let me begin with federalism and what the Court has been doing over these last ten years.

Even if you feel strongly, as the Justices do, that the Court has improperly intruded or inserted itself in our system of government, into arenas properly given to Congress, I would invite you to think about the question of "what is the limiting principle?"

One of the earlier clauses is the Commerce Clause.[168] It is common ground that ours is a system where the federal government is a government of enumerated powers coupled with the Necessary and Proper Clause.[169] However, this does not mean that the federal government can regulate everything.

I am going to use *Lopez*[170] *as* a very specific example to show how guns, and more specifically, guns near schools, troubled the Court. I do not think anyone is in favor of gun toting in schools. I have never heard anyone say, "I think the Second Amendment establishes the right to carry your six-shooter into school without being disarmed." Maybe someone feels that way, but he or she should move out to Montana and join the militia.

In civil society, I do not know anyone who would say thoughtfully, rationally, sanely, "Great, arm all those kids. Give every high school kid a weapon." Well, Congress was concerned about weaponry in and around schools. The statistics were quite alarming. No one could quarrel with them. It is quite interesting when you analyze what the court did in striking down the gun act.[171]

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[168] *Id.* at art. I, § 8, cl. 3.

[169] *Id.* at art. I, § 8, cl. 18.

[170] *Lopez*, 514 U.S. 549.

[171] Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A).

The Court did not say that Congress could not do it, but Congress did not even seek to find an interstate commerce nexus. Here are the lawyers again. Now, the limiting principle point is: both the majority and the Kennedy concurrence, which was joined by Justice O'Connor, invited the dissent to provide them with the limiting principle. They wanted to be persuaded that Congress would not have the power take over the American education system if it was given the power to regulate guns around schools. Consider *Morrison*,[172] where the Court struck down a portion of the Violence Against Women Act.[173] This decision upset a lot of people. There were very condemnatory, harshly worded editorials around the country. *The New York Times* harshly condemned it.

Again, the Court was saying through the five-person majority, if we accept this, Congress can take over family law. We are not France; we are a federal republic, and that is our system. People, at times, get very concerned that the Court is just imposing. They are all members of the NRA who just love weapons in and around schools. I do not think that is what is driving it.

I think, rather, it is a principle about which the Court feels very strongly. It is a principle that is not only rooted in the Constitution, but also in tradition and history. The last thing I will say on that front is that at the founding itself, slavery was an issue that would have torn the nation apart. The founding was imperfect because of slavery, but was made perfect by the shedding of blood in the Civil War and by the three post-Civil War amendments, which eradicated slavery. So people can be condemnatory of the Court not saying slavery is over right now. However, the Court struggled with essentially two principles, the separation of powers and federalism.

That is what Madison said was so very important. Colonel George Mason was saying that we needed a bill of rights. They were soon to get the Bill of Rights, and Madison recognized it was a political mistake in not having the Bill of Rights

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[172] *U.S. v. Morrison*, 529 U.S. 598 (2000).

[173] Violence Against Women Act, 28 U.S.C. § 2412(b).

on the floor of the Convention in Philadelphia.[174] However, as he wrote to Jefferson (and Jefferson borrowed this language), he thought a bill of rights was a "parchment barrier." Madison thought that Jefferson needed the *Federalist Papers* and Mr. Hamilton writing remarkable defenses of the structural principles. Federalism is a structural principle that, since Franklin Delano Roosevelt, we have been somewhat ambivalent about because he convinced us that we are all Americans, and we are.

> We have been through two world wars and the shedding of blood, and we have embraced the very nature of the great, commercial republic, and so forth. However, we have never abolished that part of the flag that has a star for each of the states. We are one out of many, but, yes, we are 50 states.

Think of the power of the United States Senate and think of all the fly-over country. I hate to use that term because I am sort of from that area originally. As you are flying to have your weekend in Carmel, notice all the places you are flying over. They all have Senators. This is where the disproportionality comes from. This disproportionality gives Joe Biden,[175] because of seniority, the same voting power as a Senator from a state that elects only one member of the House of Representatives because they don't have enough population for two. This tells us that federalism is inherent in our system. After *Bush v. Gore*,[176] many thought that we should abolish the Electoral College and have a popular election. That idea did not get very far because we are a federal republic. That is what the Court

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[174] *See* The Bill of Rights Institute, *Founder of the Month: James Madison, at* http://www.billofrightsinstitute.org/ article.php? sid=169 (last visited Mar. 2, 2003).

[175] Senator Joseph R. Biden, Jr. is one of the most respected voices on national security and civil liberties and has earned national and international recognition as a policy innovator, effective legislator and party spokesman on a wide range of key issues. He is the top Democrat on both the Senate Foreign Relations Committee and the Judiciary Subcommittee on Crime and Drugs, and is a central player on some of the most important issues facing the nation, from crime prevention and constitutional law to international relations and arms control. Senator Biden of Delaware, *Biography, at* http://biden.senate.gov/bio.html (last visited Mar. 2, 2003).

[176] *Bush v. Gore*, 531 U.S. 1048 (2000).

is standing up for in federalism.

MARTIN GARBUS:

Ken and I argue both sides of this issue in the book. One of the interesting things in Ken's book as well as mine, is that we refer to a 1941 case, *Wickard v. Filburn*,[177] as a predicate for the argument about the gun laws and the Violence Against Women Act.[178] I would approve of *Wickard*[179] as being the outmost extension of the Commerce Clause,[180] while Ken would be equally disapproving of it.

KENNETH STARR:

That is correct. Congress can regulate Rosco Filburn's 23-acre farm. Filburn said, "The government cannot do that. I am growing food for my own family's consumption and to feed my own livestock." However, the Court adopted the aggregate effects test in that case[181]. Justice Thomas has most roundly challenged it, which is one of the reasons why I identify Justice Thomas as the most original Justice.

This is an example of his originality, of his going back and looking at the aggregate effects test and saying, "This cannot be right because it really does allow Congress to regulate anything, such as the education system, marriage, child custody, and so forth."

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[177] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[178] 28 U.S.C. § 2412(b).

[179] *Wickard,* 317 U.S. 111 (1942).

[180] U.S. CONST. art I, § 8, cl. 3.

[181] The Supreme Court in *Wickard*, held that the growing of wheat for personal consumption can be regulated because it contributes to the aggregate amount of wheat grown and consumed, and that in turn substantially affects interstate commerce in wheat. 317 U.S. 111 (1942).

QUESTION:

I thought we might return to intellectual property in the Supreme Court and the *Tasini*[182] decision. There seems to be a certain irony in the New York Times Company being involved in a suit against authors before the Supreme Court. I wondered if you would like to comment on who are the conservatives and who are the liberals in this particular case.

MARTIN GARBUS:

I do not think it is a question of liberals and conservatives, but rather a question of property ownership. In *Tasini,*[183], the New York Times Company is a property owner trying to protect its property. In this case, the Times Company is acting similarly to MGM or Walt Disney trying to get an extension of CTEA[184]. For the Times Company, it was embarrassing to find themselves in this position from the beginning. On the other hand, asset management requires them to be in it.

KENNETH STARR:

I was somewhat privy to *The New York Times* thinking. You know, there is a very fine law firm here in this great city that had issued opinion letters to various newspapers saying that the use of freelance photography and articles was, in fact, permissible, since it was a question.

As I understand it from Professor Tribe's brief argument,[185] *The New York Times*

[182] *Tasini* 533 U.S. 483.

[183] *Tasini*, 533 U.S. 483.

[184] *See* CTEA, *Supra* note 102

[185] Laurence H. Tribe is the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard Law School. He is a renowned legal scholar. His works include, *American Constitutional Law*, *On Reading the Constitution* and *Abortion: The Class of Absolutes*. *See* Harvard Law School,

was sending information electronically to Dayton, Ohio, where the disaggregation occurred. Even there, it is said, there is a disaggregation, so it is no longer the complete *New York Times*. It is a new form or medium.

What do you do under those circumstances? You see how disaggregated it is. Judge Sotomayor's opinion[186] was quite illuminating in saying that it is not totally disaggregated because it is identified in *The New York Times* that the article appeared in X column on X day. The freelance piece does not lose its identity; it is not a total disaggregation.

As with *Feist*,[187] I think that a lot of thought was given. Again, Marty is saying, "Well, this is just a property interest and so forth." But what do you do when you want to make those who are interested in access to information that is electronically available and retrievable? Shouldn't you be able to send it? Now, I do not know what kind of fees they were getting. Maybe they received huge fees from Lexis. I really do not know. Maybe it is more equitable to share. I think the Court was interpreting what their rights were.

QUESTION:

What we are talking about here is contract terms, existing use of other rights. For example, publishing contracts are carefully broken down and delineated into rights transferred between the copyright holder and its publisher. *The New York Times'* use of the material was totally unanticipated. No contract was revised. No subsequent agreement or post-contract was made. It seems to me that was a prima facie case of abuse.

Laurence H. Tribe, at http://www.law.harvard.edu/faculty/directory/facdir.php?id=74 (last visited Mar. 2, 2003).

[186] *See Tasini v. New York Times Co.*, 972 F. Supp. 804 (S.D.N.Y. 1997).

[187] *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340 (1991).

KENNETH STARR:

So, in your view, it sounds to me as if there was bad lawyering.

MARTIN GARBUS:

No, in defense of lawyering, no one ever contemplated over the past thirty to fifty years that these different technologies would be available.

KENNETH STARR:

In the debates about revision of the copyright law, that was a central point. There was a strong desire to make this media-neutral. There are quotations from Representative Kastenmeier, a longtime, distinguished member of Congress from Madison, Wisconsin, who talked with the Register of Copyrights.

There it is on the legislative record. It was not the Register of Copyrights, but whomever the Administration's representative was from the Copyright Office. This was all very carefully analyzed. Now, we cannot look into the future. For example, how could we have known in the 1970s that computers were going on-line? However, we want this to be media-neutral, right? Exactly. So, is this still that? It is almost metaphysical. Is this still *The New York Times*, but in an electronic form?

MARTIN GARBUS:

I just want to say something to end upon *Bush v. Gore*.[188] It is possible to think that the Justices are so far removed from reality that they do not realize the consequences of their decisions. Ken was not using that language. We know Justice O'Connor's reaction to the possibility of a Gore victory. We know that each of these Justices was sensitive to the fact that the difference between Bush and Gore meant that they would be sitting on a very different kind of Supreme Court.

[188] *Bush v. Gore*, 531 U.S. 1048 (2002).

It is impossible to conceive that these Justices, be it Chief Justice Rehnquist or Thurgood Marshall, who promised to stay on the court until a Democrat was in office so that he could be appointed, did not consider extending their legacy. I think Richard Posner,[189] a conservative who authored *Breaking the Deadlock*, faults the decision of the Court, finding it wrong.[190] However, he justifies the decision on the grounds that there was a constitutional crisis, which I think is nonsense. I think Scalia's early rulings in this case were an indication of where he was going to come out.

Again, I think you can have decisions come out five to four, or as in this case, seven to two, but at the end of the day, one cannot be oblivious to the reality of the consequences of their decisions. I do not think that they were, and I do not think one can easily be.

[189] Richard A. Posner served as an appellate judge on the Seventh Circuit Court of Appeals from 1981 to 1993. In 1993, he was appointed Chief Judge and served in that position until 2000. Judge Posner has written over thirty books and authored more than three hundred articles and book reviews. His specialty area of study is law and economics. Judge Posner is a part-time professor at University of Chicago Law School . *See* University of Chicago, *Judge Richard A. Posner: Brief Biographical Sketch*, at http://home.uchicago.edu/~rposner/biography (last visited Mar. 2, 2003).

[190] RICHARD A. POSNER, BREAKING THE DEADLOCK (2001).