

RECENT DEVELOPMENTS

ABORTION PARENTAL NOTIFICATION STATUTES: *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990).

Whether there exists a constitutionally protected right to abort a pregnancy has received more public attention during the past decade than any other area of Supreme Court jurisprudence. Until the Court's decision in *Webster v. Reproductive Health Services*,¹ continued attempts by states to regulate the abortion process had been thwarted by a Supreme Court intent on interpreting the Constitution as protecting rights and values based only upon the individual justices' conception of general principles of political morality.² In *Webster*, however, the Court signalled a new willingness to tolerate at least minimal regulation of the availability of an abortion.

In the October 1989 Term, the Supreme Court considered the constitutionality of two parental notification statutes,³ both

1. 109 S. Ct. 3040 (1989).

2. See generally Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). Professor Monaghan states that the Supreme Court is plainly committed to an endeavor of nullifying

the results of the political process on the basis of general principles of political morality not derived from the constitutional text or the structure it creates . . . in the sex-marriage-child area, where some fifty written opinions order these relationships ostensibly in the name of securing due process and equal protection. Indeed, the court seems well on its way to 'constitutionalizing' the entire subject of family law, which two short decades ago was bereft of constitutional restraints.

Id. at 353 (footnotes omitted). Professor Monaghan coined the phrase "due substance" in this article, which concludes that the Supreme Court's use of substantive due process is an abuse of the judicial power assigned to the Supreme Court by the Constitution. See *id.* at 355.

3. The Minnesota statute, MINN. STAT. § 144.343 (1988), provides that no abortion shall be performed on a woman under 18 years of age until 48 hours after both of her parents are notified. The statute provides exceptions from the notification requirement in cases in which (1) the attending physician certifies that an immediate abortion is required to prevent the death of the woman; (2) both of her parents have consented in writing; or (3) the woman claims that she is a victim of parental abuse or neglect and notice of such is given to the proper authorities, as statutorily defined. The statute also includes a judicial bypass procedure, which provides that if a pregnant woman under 18 years of age does not wish to notify both of her parents, she can petition a court for a hearing to authorize a physician to perform the abortion if the judge determines that "the pregnant woman is mature and capable of giving informed consent." *Id.* § 144.343(c)(i). If the pregnant woman is not found to be mature, or does not claim to be so, the judge shall determine whether the abortion without notification of her parents is in her best interests. See *id.*

The Ohio parental notification bill, which amended OHIO REV. CODE ANN. § 2919.12 (1987) and created Sections 2151.85 and 2505.073 of the Ohio Revised Code, OHIO REV. CODE ANN. §§ 2151.85, 2505.073 (Supp. 1988), makes it a criminal offense, ex-

of which would require notification of one or both parents before a doctor can perform an abortion upon a minor.⁴ In *Hodgson v. Minnesota*,⁵ a five-to-four majority held that a two-parent notification requirement is unconstitutional; however, a different five-to-four majority held that such a two-parent notification is constitutional when supplemented with a judicial bypass procedure that provides a means for a minor to avoid the notification requirements.⁶ In *Ohio v. Akron Center for Reproductive Health*,⁷ a six-to-three majority held that a one-parent notification requirement with a bypass procedure is constitutional.⁸

In both cases, the Court considered the claim that the parental notification statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁹ With such an attenuated constitutional textual basis for the rights allegedly

cept in specified circumstances, for a physician to perform an abortion on an unemancipated minor. Unlike the Minnesota statute, however, the Ohio statute requires the notification of only one parent; an exception is provided in the case of feared parental abuse, in which case an adult brother, sister, step-parent, or grandparent can be notified. See *id.* § 2919.12. The bypass procedure in the Ohio statute allows three cases in which notification can be judicially waived: (1) The woman proves she is mature enough and has sufficient information to make an intelligent decision; (2) the woman's parents have engaged in abuse against her; or (3) notice is not in the woman's best interests. See *id.* § 2151.85.

4. The Supreme Court had previously considered the constitutionality of parental notification or consent statutes in six cases: *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 490-93, 505 (1983); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 439-42 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*); and *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72-75 (1976).

5. 110 S. Ct. 2926 (1990).

6. Justice O'Connor held the position that two-parent notification is constitutional only if accompanied by a judicial bypass procedure. Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, concluded that a two-parent notification requirement is constitutional with or without a judicial bypass procedure. Justices Stevens, Brennan, Blackmun, and Marshall considered a two-parent notification requirement unconstitutional even with a judicial bypass procedure.

7. 110 S. Ct. 2972 (1990).

8. In *Akron*, Justice Kennedy wrote for the majority, joined by Chief Justice Rehnquist and Justices White, Stevens, and O'Connor. Justice Scalia filed a concurring opinion. Justice Blackmun was joined in dissent by Justices Brennan and Marshall.

9. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). The Due Process and Equal Protection Clauses provide the constitutional textual bases for nearly all "due substance" claims. See Monaghan, *supra* note 2. The "open texture" of these clauses provide them with "a sponge-like quality capable of absorbing any subject matter analytically outside the boundaries of other constitutional limitations." *Id.* at 364. Neither of these clauses, although drafted broadly, was intended to be interpreted in such a manner. See Curtis, *Review and Majority Rule*, in *SUPREME COURT AND SUPREME LAW* 177 (E. Cahn ed. 1954) (due process is limited to procedure); R. BERGER, *GOVERNMENT BY JUDICIARY* 20-51 (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1,

violated by parental notification statutes, the primary focus of the Court's analysis sets a precedent that is constitutionally suspect,¹⁰ and fundamentally supported by political considerations. Such an approach naturally leads to divided results, depending upon the political views of the individual justices. The holding in *Hodgson* is an especially clear illustration of this; sharp political divisions on the Court produced a deeply divided opinion.

In *Hodgson*, the majority, in an opinion written by Justice Stevens, first summarily dismissed several cases of possible precedential value in resolving this case.¹¹ The majority went on to hold, based upon the extensive findings of the district court,¹² that the two-parent notification requirement is overly burdensome¹³ and that Minnesota failed to prove that the statute is reasonably related to any legitimate state interest.¹⁴ In actuality, the same findings that led the court to find the statutory requirements unreasonably burdensome led it to conclude that the state interest in the welfare of the minor was not served by the statute.¹⁵ Justice Stevens also dismissed the state interest in

56-59 (1955) (discussing the Equal Protection Clause's design to extend political equality to black Americans).

10. See, e.g., *Hodgson*, 110 S. Ct. at 2961 (Scalia, J., concurring in judgment in part and dissenting in part) ("I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so."); R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 169 (1990) ("*Roe* became possible only because *Griswold* had created a new right, and anyone who reads *Griswold* can see that it was . . . the creation of a new principle by *tour de force* or, less politely, by sleight of hand.").

11. Two of the parental notification or consent cases previously reviewed by the court actually required two-parent notification; however, the majority dismissed these on the basis that "none of the opinions in any of those cases focused on the possible significance of making the consent or the notice requirement applicable to both parents instead of just one." *Hodgson*, 110 S. Ct. at 2938.

12. See *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986).

13. The two-parent notification requirement was found to be particularly burdensome in dysfunctional family structures, in which violence is often present. In cases where the parents are separated and one parent has ceased to remain in contact with the family, a loss of privacy is also a concern to the remaining parent and the pregnant minor. "[T]he two-parent notification requirement had particularly harmful effects on both the minor and the custodial parent when the parents were divorced or separated." *Hodgson*, 110 S. Ct. at 2938-39.

14. In a portion of the opinion joined only by Justice O'Connor, Justice Stevens indicated that "[t]hree separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of . . . the two-parent notification requirement." *Id.* at 2941-42 (Stevens, J.). Although divided over the question of what constitute legitimate state interests in this context, the majority was united in holding that, whatever the state interest, it was not reasonably furthered by the Minnesota statute. See *id.* at 2945-46.

15. According to the majority's opinion, no state interest is furthered because in

protecting a parent's interest in "shaping a child's values and lifestyle"¹⁶ and, in addition, questioned the legitimacy of "a state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal."¹⁷ The test of constitutionality that Justice Stevens employed is at best ambiguous;¹⁸ the majority, however, obviously considered sufficient for a ruling of unconstitutionality the district court's findings that the statute is both unreasonably burdensome and fails to further a legitimate state purpose.¹⁹

Although joining the opinion of Justice Stevens, Justice Marshall, in a separate opinion, found the statute unconstitutional under a seemingly stricter standard of review. Justice Marshall stated that "most exacting scrutiny" is the standard of review necessary for minors²⁰ as well as adults²¹ because "[n]either the scope of a woman's privacy right nor the magnitude of a law's burden is diminished because a woman is a minor."²²

dysfunctional families, the two-parent notification requirement can be "positively harmful to [both] the minor and her family." *Id.* at 2945. This is essentially the same finding that was made regarding the burden on the minor. *See supra* note 13.

16. *Id.* at 2946 (citing *Bellotti II*, 443 U.S. 622 (1979); *Bellotti I*, 428 U.S. 132 (1976); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) ("Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right to privacy of the competent minor mature enough to have become pregnant.")).

17. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923)).

18. Justice Stevens stated that "the Minnesota statute unquestionably places obstacles in the pregnant minor's path to an abortion. . . . *Under any analysis*, [therefore,] the . . . statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests." *Id.* at 2937 (Stevens, J.) (emphasis added) (citing *Turner v. Safley*, 482 U.S. 78, 97 (1987); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 704 (1977) (Powell, J.); *Doe v. Bolton*, 410 U.S. 179, 194-95, 199 (1973)).

19. Ambiguity in abortion cases finds its roots in *Roe v. Wade*, 410 U.S. 113 (1973), where, as Robert Bork states, the majority did not even bother to

settle the question of where the right of privacy or the subsidiary right to abort is to be attached to the Constitution's text. The opinion seems to regard that as a technicality that really does not matter, and indeed it does not, since the right does not come out of the Constitution but is forced into it.

R. BORK, *supra* note 10, at 114.

20. *Hodgson*, 110 S. Ct. at 2952 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part).

21. According to Justice Marshall, strict scrutiny of statutes regulating adult conduct in this area is necessary because "[o]nly such strict judicial scrutiny is sufficiently protective of a woman's right to make the intensely personal decision whether to terminate her pregnancy." *Id.* (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983)).

22. *Id.* (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part).

Justice Marshall also wrote separately because he disagreed with Justice Stevens's conclusion as to the constitutionality of one-parent notification procedures.²³ Indeed, Justice Stevens's analysis of whether the Minnesota statute reasonably furthered a state interest admitted the constitutionality of a one-parent notification requirement; the holding that the two-parent notification requirement was unconstitutional was based on the finding that a two-parent notification requirement is substantially more burdensome than a one-parent notification requirement but no more effective in furthering the state interest.

Addressing the constitutionality of the two-parent notification requirement in his opinion, Justice Kennedy indicated that he viewed the statute as effectively serving two state interests: the welfare of the pregnant minor and the interest of the parents. He observed that precedent supports the notion that notification of parents serves the interests of a pregnant minor.²⁴ Justice Kennedy stated that the statutory exceptions allowing a minor to avoid the notification requirements by reporting parental abuse to the appropriate authorities were an effective statutory response to the majority's concern about any potentially harmful effects the notification requirement might have on a minor. Finally, Justice Kennedy summarized constitutional and statutory differences between the legal treatment of minors and adults. Noting the fact that "[a]ge is a rough, but fair approximation of maturity and judgment,"²⁵ he observed that legislation restricting the rights of minors in many contexts is both constitutional and based upon sound policy. Justice Ken-

23. See *id.* at 2953 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part).

24. Justice Kennedy relied heavily on Justice Stevens's concurring opinion in *H.L. v. Matheson*, 450 U.S. 398 (1981), for the proposition that "[i]t is beyond dispute that in many families" two-parent notification is in the pregnant minor's best interest and that deference to the judgment of a state legislature is necessary in such cases. *Hodgson*, 110 S. Ct. at 2965 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy addressed the main concern of the majority by citing Justice Stevens in *Matheson*:

The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Id. at 2966 (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting *Matheson*, 450 U.S. at 423-24 (Stevens, J., concurring)).

25. *Hodgson*, 110 S. Ct. at 2962 (Kennedy, J., concurring in judgment in part and dissenting in part).

nedy provided support for the state's interest in protecting parents' participation in the upbringing of their children by appealing to common-law notions, history and culture, common sense, precedent, and other aspects of state legislation that advance similar policy goals.²⁶

Even though a majority of the Court found the two-parent notification requirement unconstitutional, a different majority considered the judicial bypass procedure sufficient to save the statute as a whole. In a series of precedents,²⁷ the Court had addressed the concern that parental consent statutes granted a parent, in the form of a veto power, an absolute limitation on the minor's right to obtain an abortion. The majority in *Hodgson*, according to Justice Kennedy, considered the judicial bypass section of the Minnesota statute to do "nothing other than . . . fit . . . into the framework that we have supplied in our previous cases."²⁸ As such, Justice O'Connor observed, the Minnesota statute "passes constitutional muster because the interference with the internal operation of the family . . . simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure."²⁹

Justice Stevens indicated that the judicial bypass procedure does not save the statute as a whole because, regardless of the constitutionality of the bypass procedure, the State is still not furthering a legitimate interest.³⁰ Justice Marshall, in his opinion, stated "that a judicial bypass procedure of this sort is itself unconstitutional because it effectively gives a judge 'an absolute veto over the decision of the physician and his patient.'"³¹ In other words, Justice Marshall saw no constitutional signifi-

26. See *id.* at 2962-65 (Kennedy, J., concurring in judgment in part and dissenting in part).

27. See *Bellotti II*, 443 U.S. 622 (1979); *Bellotti I*, 428 U.S. 132 (1976); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

28. *Hodgson*, 110 S. Ct. at 2970 (Kennedy, J., concurring in judgment in part and dissenting in part).

29. *Id.* at 2951 (O'Connor, J., concurring in part and concurring in judgment in part).

30. Justice Stevens stated:

A judicial bypass that is designed to handle exceptions from a reasonable general rule, and thereby preserve the constitutionality of that rule, is quite different from a requirement that a minor—or a minor and one of her parents—must apply to a court for permission to avoid the application of a rule that is not reasonably related to legitimate state goals.

Id. at 2948-49 (Stevens, J.).

31. *Id.* at 2957 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 504 (1982) (Blackmun, J., concurring in part and dissenting in part)).

cance in the distinction between allowing such veto power to reside with a judge, as opposed to a parent. Even admitting the facial constitutionality of a bypass procedure, Justice Marshall would still find this particular procedure unconstitutional because it is "far too burdensome to remedy an otherwise unconstitutional statute."³²

Justice Marshall also dedicated a portion of his opinion to express concern about the forty-eight hour delay required before an abortion can be performed, after notice is given to the parents. The purpose of the delay, according to the State, is to provide time for family consultation.³³ Justice Marshall's analysis, however, primarily focused on health risks associated with delaying the abortion.³⁴

In *Ohio v. Akron Center for Reproductive Health*,³⁵ in an opinion authored by Justice Kennedy, the majority held that the judicial bypass provision of the Ohio statute requiring one-parent notification is consistent with the requirements set forth for such procedures in parental-consent precedent.³⁶ The majority found the Ohio statute to conform with the requirements for a bypass procedure set forth in *Bellotti II*; those requirements include allowing the minor to show she is sufficiently mature to make the decision herself, allowing the minor to show that an abortion would be in her best interest regardless of her maturity, assuring anonymity, and expediting the judicial process.³⁷ The Court refused to extend the *Bellotti* criteria by imposing additional requirements on bypass procedures.³⁸ Finally, the

32. *Id.* at 2958 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part). In essence, Justice Marshall's concerns centered on the delay inherent in the bypass procedure, which would "significantly increase the health risk to the minor." *Id.* (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part). Justice Marshall also stated that travel expenses, as well as the trauma of appearing in court before strangers regarding such a personal matter, were significant burdens imposed by the bypass procedure on the pregnant minor.

33. *See id.* at 2944 (Stevens, J.).

34. "The District Court specifically found as a matter of fact that '[d]elay of any length in performing an abortion increased the statistical risk of mortality and morbidity.'" *Id.* at 2954 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986)).

35. 110 S. Ct. 2972 (1990).

36. Justice Kennedy explicitly reserved the question of whether a notice statute without a bypass procedure would be constitutional. *See Akron*, 110 S. Ct. at 2978.

37. *See generally Bellotti II*, 443 U.S. 622 (1979).

38. *See Akron*, 110 S. Ct. at 2981-82. The Court rejected contentions that the constructive authorization provisions would deter the physician from acting without express judicial approval, that the clear and convincing evidence standard required is

Court summarily rejected the contention that the bypass procedure violates the procedural guarantees of the Due Process Clause and dismissed the notion that requiring the physician to provide the parental notice, thereby subjecting him to potential liability for failure to comply with the statute, is unconstitutional.³⁹

Justice Stevens concurred, arguing that because the statute was challenged facially, he was unwilling "to reach [the] conclusion before the statute has been implemented and the significance of its restrictions evaluated in the light of its administration" that the bypass procedure "is so obviously inadequate that the entire statute should be invalidated."⁴⁰

Writing in dissent, Justice Blackmun first equated notice with consent by stating, "[a]s a practical matter, a notification requirement will have the same deterrent effect on a pregnant minor seeking to exercise her constitutional right as does a consent statute."⁴¹ Thereafter, he expressed concern regarding whether the pleading procedures amount to an "obstacle course,"⁴² whether the statute effectively assures anonymity,⁴³ whether the delay inherent in the procedure excessively increases health risks,⁴⁴ whether the constructive notice provision would be efficacious,⁴⁵ and whether the clear-and-convincing standard of proof is excessive.⁴⁶

These two cases illustrate that four coalitions are forming on the Court in which differing political views of the wisdom of parental notification provide the bases for distinguishing among the various holdings of these cases. One of the four groups staunchly supports the legitimacy of *Roe* and resolutely opposes any legislation that even minutely interferes with the

overly burdensome, and that the pleading requirements are an unconstitutionally "tortuous maze." *Id.* at 2985 (Blackmun, J., dissenting).

39. *See id.* at 2982-83.

40. *Id.* at 2993 (Stevens, J., concurring in part and concurring in judgment).

41. *Id.* at 2985 (Blackmun, J., dissenting) (citing *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 441 n.31 (1983); *H.L. v. Matheson*, 450 U.S. 398, 420 n.9 (1981)).

42. *Id.* at 2985 (Blackmun, J., dissenting).

43. *See id.* at 2986-87 (Blackmun, J., dissenting).

44. *See id.* at 2988 (Blackmun, J., dissenting).

45. *See id.* at 2989 (Blackmun, J., dissenting).

46. *See id.* at 2989-91 (Blackmun, J., dissenting). The majority considered the clear-and-convincing standard appropriate, in view of the ex parte nature of the proceedings. The alternative would have been a preponderance of the evidence standard, under which, if the minor presented any evidence at all, the burden would be satisfied. *See id.* at 2981-82.

process of obtaining an abortion.⁴⁷ At the other extreme is Justice Scalia, who has explicitly called for overruling *Roe*.⁴⁸ Between these two extremes are two groups, one apparently unwilling to call into question the constitutional legitimacy of *Roe* until such time as judicial restraint will allow,⁴⁹ and the other apparently accepting the legitimacy of *Roe* but nevertheless finding constitutional justification for at least minimal restrictions on the exercise of the abortion right.⁵⁰

Analysis of the composition of these coalitions provides insight into how the court would currently decide a direct challenge to *Roe*. Justice O'Connor, in recent years considered the swing vote in abortion cases, further illuminates her position with her analysis in *Hodgson*, which implicitly relied upon abortion as a constitutionally protected right. Logically, it would be impossible to find a two-parent notification statute unconstitutional without accepting the premise that the right to an abortion is constitutionally protected. Because Justice O'Connor now seems to be aligning herself with the liberal wing of the Court in this regard, newly seated Justice Souter may displace Justice O'Connor as the perceived crucial swing vote in future cases addressing abortion as a constitutional right. The Senate confirmation hearings for Justice Souter, however, yielded little insight into his inclinations on the matter.⁵¹

Although the Court appears to be striking a relatively conservative pose by upholding the constitutionality of the two statutes, this is, in large part, merely a manifestation of the conservative political views of a majority of the justices. While serving the goals of judicial restraint and stare decisis, the position of the conservative majority in these cases is inappropriate.⁵² By refusing to address the constitutionality of the right to an abortion, which is the ultimate foundation upon which the analysis of the liberal minority rests, the conservative majority actu-

47. This group is composed of Justices Blackmun, Brennan, and Marshall.

48. See *Hodgson*, 110 S. Ct. at 2960-61 (Scalia, J., concurring in judgment in part and dissenting in part); *Akron*, 110 S. Ct. at 2984 (Scalia, J., concurring).

49. This group is composed of Chief Justice Rehnquist and Justices Kennedy and White.

50. This group is composed of Justices O'Connor and Stevens.

51. See, e.g., *Souter Deflects Senators' Questions on Abortion Views*, N.Y. Times, Sept. 14, 1990, at A1, col. 6 (Souter "would not provide even an indirect hint of his views on the constitutional right to an abortion.").

52. See generally Crain, *Judicial Restraint and the Non-Decision in Webster v. Reproductive Health Services*, 13 HARV. J.L. PUB. & POL'Y 263 (1990).

ally plays the same activist political game as the liberals, effectively engaging in political debate through the guise of constitutional analysis. Such an activist analysis is forced upon the conservative majority when it chooses not to address the constitutionality of the precedent with which the statutes are found to be consistent. Because that analysis is fundamentally "due substance," even the conservative majority is undemocratically usurping the power constitutionally assigned to the States.⁵³

Justice Kennedy closed his opinion in *Akron* eloquently, with several compelling arguments for the wisdom of the Ohio statute.⁵⁴ Unfortunately, such conclusions are legitimately drawn by a legislature, not the Supreme Court. Because a majority of the Court possesses similar political views as those held by the state legislatures in Minnesota and Ohio, *Hodgson* and *Akron* largely upheld the results of the political process in those two states. Although Justice Kennedy expressly recognized a distinction between the legislative and judicial function,⁵⁵ his analysis goes no further than recognizing the wisdom of deference to the legislature; it does not acknowledge that, as a constitutional matter, such deference is absolutely required.

At a minimum in these cases, the approach of finding legislation consistent with *Roe*'s progeny, though prudent from a standpoint of judicial restraint, avoids the constitutional issue of whether a fundamental right to an abortion exists. Although

53. The undemocratic nature of substantive due process has been well argued. See, e.g., Monaghan, *supra* note 2.

54. See *Akron*, 110 S. Ct. at 2983-84 (Kennedy, J.):

A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society's most intimate association. It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature.

55. "[W]e must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."'"

Hodgson, 110 S. Ct. at 2966-67 (Kennedy, J., concurring in judgment and dissenting in part) (quoting *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (O'Connor, J., dissenting) (quoting *Maher v. Roe*, 432 U.S. 464, 479-80 (1977) (quoting *Missouri, K&T R.R. Co. v. May*, 194 U.S. 267, 270 (1904))).

not explicitly supporting such a right as constitutional, the Court's approach indirectly lends credibility to the precedent and the questionable constitutional right upon which that precedent is based.

Only Justice Scalia, in illustrating the various distinctions between the different holdings, called for an end to " 'constitutionalizing' the entire subject of family law":⁵⁶

One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find in our society's tradition regarding abortion no hint that the distinctions are constitutionally relevant, much less any indication how a constitutional argument about them ought to be resolved. The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.⁵⁷

As Judge Bork has written, "[t]here is no room for argument about the conclusion that the decision [in *Roe v. Wade*] was the assumption of illegitimate judicial power and a usurpation of the democratic authority of the American people."⁵⁸ In engaging in its analysis in these cases, the Court lends legitimacy to the assumption of judicial power to determine the validity of legislative decisions not infringing upon any express or logically implied constitutional mandates. The longer the court waits to adopt the position advocated by Justice Scalia, and consequently the more the court engages in political determinations, the more entrenched will become the notion that the court actually has such authority. Such a scenario only erodes the role of the Supreme Court as contemplated by the Constitution.

J. William Goodwine, Jr.

56. Monaghan, *supra* note 2, at 353.

57. *Hodgson*, 110 S. Ct. at 2960-61 (Scalia, J., concurring in judgment in part and dissenting in part).

58. R. BORK, *supra* note 10, at 115-16.

CONSTITUTIONAL PROTECTION OF THE "REFUSAL-OF-TREATMENT": *Cruzan v. Director, Missouri Department of Health*, 110 S. Ct. 2841 (1990).

Advances in medical science may enable some individuals to recover from illness or accident and resume productive, meaningful lives. For others, however, technological assistance is not so clearly beneficial. An individual who survives a medical crisis may be left in a profoundly debilitated condition that, until recently, would have resulted in death. With modern medical technology, however, the physiologic functions of an individual's body may be artificially maintained for an indefinite period.¹ Choices regarding medical treatment are difficult when life may be continued beyond the point where most people would want to continue living. The question whether a patient has the right to refuse such medical treatment is further complicated when the patient is incompetent and unable to express any preference.

*Cruzan v. Director, Missouri Department of Health*² placed this troubling social issue squarely before the United States Supreme Court in its first consideration of whether the Constitution protects a "right to die." Nancy Beth Cruzan suffered serious injury in an automobile accident on January 11, 1983. By the time she received medical attention, her injuries had been complicated by a significant interval of oxygen deprivation, and, for approximately three weeks following the accident, she remained in a comatose state.³ In February 1983, at which time it was still hoped that she might eventually recover, doctors surgically implanted a gastrostomy tube to serve as a conduit for food and water into her stomach.⁴ Despite attempts at rehabilitation, Nancy Cruzan did not improve and was subsequently diagnosed as having permanent, irreversible brain degeneration.

At the time of the trial and appellate proceedings, Nancy Cruzan existed in a persistent vegetative state. She was bedridden in a Missouri state hospital unaware of her environment.

1. See Spencer & Palmisano, *Specialized Nutritional Support of Patients—A Hospital's Legal Duty?*, 11 QUALITY REV. BULL. 160, 160-61 (1985).

2. 110 S. Ct. 2841 (1990).

3. See *Cruzan*, 110 S. Ct. at 2845.

4. See *id.* This procedure was performed with the consent of her then-husband. See also *Cruzan v. Harmon*, 760 S.W.2d 408, 431 (Mo. 1988).

She did not speak or make any spontaneous movements, although she appeared to respond reflexively to sound and noxious or painful stimulation.⁵ Her limbs were contracted and stiff, she could not chew or swallow, and she received all of her nutrition and hydration through the gastrostomy tube. Ironically, in other respects, she was healthy. Her respirations were not artificially maintained, and her heart and other vital organs functioned normally. In fact, her life expectancy was relatively normal; twenty-five years old at the time of the accident, her doctors estimated that she could continue to live another thirty years or more if artificially supplied with nutrients and hydration.⁶

When it became clear that Nancy Cruzan would never improve, her parents requested that the state hospital remove the gastrostomy feeding tube. Because removing the gastrostomy tube would result in Nancy Cruzan's death, hospital employees refused to comply without a court order.⁷ At trial, evidence was offered that Nancy Cruzan, in a "somewhat serious conversation," had made statements to a housemate about a year before the accident indicating that, if sick or injured, she would not want to continue living unless she could do so "halfway normally."⁸ The trial court held that a fundamental right exists under the Missouri and United States Constitutions to refuse medical treatment.⁹ The court found further that the evidence presented was sufficient to show that Nancy Cruzan would not have desired to continue receiving food and water.¹⁰ Accordingly, the trial court granted her parents' request, issuing an order that medical treatments, including the gastrostomy tube feedings, be discontinued.¹¹

On appeal, however, the Missouri Supreme Court reversed the trial court's decision. The Missouri high court indicated that Missouri's policy in this context, as embodied in its living will statute, strongly favors the preservation of life.¹² The court found that Nancy Cruzan's statements, upon which the trial

5. See *Cruzan*, 110 S. Ct. at 2845 n.1.

6. See *Cruzan v. Harmon*, 760 S.W.2d at 432.

7. See *Cruzan*, 110 S. Ct. at 2846.

8. *Cruzan v. Harmon*, 760 S.W.2d at 411.

9. See *id.* at 410.

10. See *id.*; see also *Cruzan*, 110 S. Ct. at 2846.

11. See *Cruzan v. Harmon*, 760 S.W.2d at 411-12.

12. The Missouri living will statute is found at MO. REV. STAT. §§ 459.010-459.055 (1986). See also *Cruzan*, 110 S. Ct. at 2846; *Cruzan v. Harmon*, 760 S.W.2d at 419-20.

court relied to determine her intent, fell short of the "clear and convincing" standard Missouri requires for proof of a decision to forego life-sustaining treatment.¹³ Under these circumstances, the court held, no one could assume the choice for the incompetent patient.¹⁴

In a five-to-four decision, the United States Supreme Court affirmed, upholding the constitutionality of Missouri's rigorous procedural scheme for substitute decisionmaking. Writing for the Court,¹⁵ Chief Justice Rehnquist found that the Constitution does not forbid Missouri either from having such a law regarding substitute judgment or from requiring the application of a "clear and convincing" standard.¹⁶

Chief Justice Rehnquist acknowledged that the problem the Court confronted was "perplexing" and had "unusually strong moral and ethical overtones."¹⁷ Specifically at issue was "whether the United States Constitution grants what is in common parlance referred to as a 'right to die'"¹⁸ that would prohibit the rule of law embodied in the Missouri scheme.

Chief Justice Rehnquist began by surveying previous state and federal court opinions concerning the right of incompetent individuals to refuse medical treatment, including the seminal case involving Karen Ann Quinlan.¹⁹ Although these cases have almost uniformly found a "right to die," courts alternatively have based their decisions on a constitutional right to privacy,²⁰ on a common-law right to informed consent to medical treatments,²¹ or on both a constitutional privacy right and a right of informed consent.²² Courts have also relied on the stat-

13. See *Cruzan v. Harmon*, 760 S.W.2d at 424.

14. See *id.* at 425.

15. Justices White, O'Connor, Scalia, and Kennedy joined the majority opinion. Justices O'Connor and Scalia filed concurring opinions. Justice Brennan, joined by Justices Marshall and Blackmun, dissented. Justice Stevens filed a separate dissent.

16. See *Cruzan*, 110 S. Ct. at 2852-53.

17. *Id.* at 2851.

18. *Id.*

19. See *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (allowing respirator to be disconnected from patient in persistent vegetative state), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976).

20. See, e.g., *id.*

21. See, e.g., *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (refusing to prevent blood transfusions for 52-year-old man with incurable bladder cancer who had been profoundly retarded for most of his life), *cert. denied*, 454 U.S. 858 (1981).

22. See, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (allowing chemotherapy to be withheld from profoundly retarded 67-year-old man suffering from leukemia).

utory law of their own states to decide these cases.²³ The Chief Justice pointed out that none of these statutory sources is available to the Supreme Court, which must instead base its decision on the Constitution.²⁴

The Court declared that previous Supreme Court decisions established that the Due Process Clause of the Fourteenth Amendment²⁵ protects a competent person's "liberty interest" in refusing unwanted medical treatment.²⁶ The *Cruzan* majority did not decide, however, whether this liberty interest extends to the refusal of lifesaving hydration and nutrition. In a carefully worded passage, the majority assumed only "for the purposes of this case" that this constitutionally protected liberty interest for competent persons includes the "right to refuse lifesaving hydration and nutrition."²⁷ A constitutionally protected liberty interest, however, is not absolute. To determine whether the Missouri mechanism comports with the United States Constitution, Chief Justice Rehnquist wrote, the Court must perform a balancing test, weighing the constitutionally protected interest of the individual against the relevant countervailing state interests.²⁸

The majority found that the state has a general interest in "protecting and preserving life."²⁹ This interest is demonstrated by the fact that homicide is treated as a serious crime and that one who helps another commit suicide is subject to criminal penalties.³⁰ Furthermore, this interest may be asserted by a state without any judgment about the quality of life that is being preserved.³¹

The Court found that a state may legitimately seek to safeguard the personal element of a patient's choice to withhold treatment and stated that Missouri had permissibly advanced

23. See, e.g., *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (authorizing removal of nasogastric feeding tube from 44-year-old man in persistent vegetative state), *cert. denied*, 488 U.S. 958 (1988).

24. See *Cruzan*, 110 S. Ct. at 2851.

25. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

26. See *Cruzan*, 110 S. Ct. at 2851.

27. *Id.* at 2852.

28. See *id.*

29. *Id.* In addition to this general interest, the Court observed that the state also has a particular interest in protecting an incompetent from representation that may not promote her interests and in guaranteeing the accuracy of the fact-finding process in a judicial proceeding in which an incompetent's wishes are determined. See *id.*

30. See *id.*

31. See *id.* at 2853.

the state's interests by adopting the "clear and convincing" standard of proof to govern proceedings to determine an incompetent patient's wishes.³² This heightened standard, the Chief Justice explained, reflects both the importance of the interest at stake as well as a judgment by society as to how the risk of error should be distributed.³³ Noting that an erroneous decision to withdraw life-sustaining treatment is final and irrevocable, the Court found that Missouri had permissibly placed "the risk of an erroneous decision"³⁴ on those seeking to terminate an incompetent individual's life-sustaining treatment.

The Court did not find support for the assertion that an incompetent person possesses the same right to refuse treatment as a competent person.³⁵ The Chief Justice pointed out that an incompetent person is unable to make her wishes known and may not exercise a "right" that requires informed consent; any right to refuse treatment would have to be exercised by another.³⁶ The State of Missouri adopted a substituted judgment procedure, the Court noted, in which a guardian may make decisions in accordance with the prior expressed wishes of the patient. The Court found nothing wrong with this scheme or the requirement that the patient's wishes must be established by evidence that meets the "clear and convincing" standard.³⁷ The Court rejected the argument that Missouri must accept the "substituted judgment" of Nancy Cruzan's parents in the absence of substantial proof that their views reflect the views of the patient and determined that the state could require that the statements be those of Nancy Cruzan herself.³⁸ Finally, the Court held that the Supreme Court of Missouri did not err within this scheme in finding that Nancy Cruzan's statement to a housemate did not constitute clear and convincing evidence.³⁹

In her concurring opinion, Justice O'Connor agreed with the

32. *See id.*

33. *See id.* at 2854.

34. *Id.*

35. *See id.* at 2852.

36. *See id.*

37. *See id.*

38. *See id.* at 2855. While a state may rely on family decisionmaking, the Court noted, it is certainly not a constitutional requirement.

39. *See id.* at 2855. The Court acknowledged that Missouri's requirement of proof may have frustrated the effectuation of Nancy Cruzan's desires in this case, but asserted that the Constitution does not require general rules promulgated by the state to work faultlessly. *See id.* at 2854.

result reached by the majority but went further, specifically recognizing a patient's liberty interest in rejecting the "artificial delivery of food and water."⁴⁰ Concerned that there be means available to protect an individual's liberty interest to refuse medical treatment, she pointed out that the Court had decided "only that one state's practice does not violate the Constitution" and that the ruling "does not preclude a future determination that the Constitution requires states to implement the decisions of a patient's duly appointed surrogate."⁴¹

In his concurring opinion, Justice Scalia indicated that he approved of the Court's analysis but would have preferred that the Court "announce, clearly and promptly, that the federal courts have no business in this field."⁴² The justices of the Supreme Court, he asserted, can be expected to know no more about these matters "than nine people picked from the Kansas City telephone directory."⁴³ Rather, he indicated, it is "up to the citizens of Missouri to decide, through their elected representatives,"⁴⁴ whether a wish to refuse life sustaining treatment should be honored.

Justice Brennan dissented.⁴⁵ In his view, Nancy Cruzan "has a fundamental right to be free of unwanted artificial nutrition and hydration,"⁴⁶ and Missouri's rule of decision impermissibly burdens the patient and family by requiring clear and convincing evidence of an incompetent individual's wishes. The state's general interest in the preservation of life "must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment."⁴⁷ Consequently, the state should assert its interest only "if and when it is determined that Nancy Cruzan would want to continue treatment."⁴⁸ Although Justice Brennan agreed that states should be able to fashion procedural protections to safeguard the interests of incompetents, he argued that "accuracy"⁴⁹ must be the touchstone. Justice Brennan expressed his doubt that the

40. *Id.* at 2856 (O'Connor, J., concurring).

41. *Id.* at 2858-59 (O'Connor, J., concurring).

42. *Id.* at 2859 (Scalia, J., concurring).

43. *Id.* (Scalia, J., concurring).

44. *Id.* (Scalia, J., concurring).

45. Justices Marshall and Blackmun joined Justice Brennan's dissenting opinion.

46. *Cruzan*, 110 S. Ct. at 2864 (Brennan, J., dissenting).

47. *Id.* at 2870 (Brennan, J., dissenting).

48. *Id.* at 2871 (Brennan, J., dissenting).

49. *Id.* (Brennan, J., dissenting).

state, a stranger to the patient, would be more likely than close family members to make a choice that the patient would have made.⁵⁰ Instead, he argued that a state should merely "ensure that the person who makes the decision on the patient's behalf is the one whom the patient would have selected to make that choice for him."⁵¹

In a separate dissent, Justice Stevens asserted that the critical question is not the standard of proof for the controlling facts, but rather "what proven facts should be controlling."⁵² In his view, the Constitution requires Missouri "to care for Nancy Cruzan's life in a way that gives appropriate respect to her own best interests."⁵³ He objected to the majority's decision, which he characterized as permitting "the State's abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan."⁵⁴

Cruzan was decided narrowly; the Court held simply that the Constitution does not forbid a state from establishing a procedural requirement that evidence of an incompetent's wishes regarding the withdrawal of treatment be proved by a "clear and convincing" standard.⁵⁵ The penumbral "right of privacy," in which many commentators and courts have found a right to refuse treatment, did not enter the Court's analysis.⁵⁶ Indeed, the majority explicitly declined to find a right to refuse treatment "encompassed by a generalized constitutional right to privacy," indicating that "this issue is more properly analyzed in terms of the Fourteenth Amendment liberty interest."⁵⁷ Because a ruling based on the right of privacy was not necessary to reach a judgment, the Court may have wished to avoid creating precedent that would restrict it in future rulings. Alternatively, the Court's opinion may signal that, for the time being, the law re-

50. *See id.* at 2877 (Brennan, J., dissenting).

51. *Id.* (Brennan, J., dissenting).

52. *Id.* at 2889 (Stevens, J., dissenting).

53. *Id.* at 2889 (Stevens, J., dissenting).

54. *Id.* at 2879 (Stevens, J., dissenting).

55. *See id.* at 2852.

56. The Court had previously "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152 (1973). In its most recent major "privacy" decision, however, the Court resisted expansion of the privacy right. *See Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986). *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-11 (2d ed. 1988).

57. *Cruzan*, 110 S. Ct. at 2851 n.7.

volving around the controversial privacy right is not going to be developed further.

Chief Justice Rehnquist acknowledged that the Court would not attempt to address all situations in its analysis.⁵⁸ Consequently, it is essential to identify with specificity the type of case the Court did consider, because what has "in common parlance" been "referred to as a 'right to die'"⁵⁹ does not have a precise definition. For example, the phrase has been used to refer to situations in which a physician administers an intentionally lethal overdose to a patient who is in excruciating, intractable pain, a competent patient who is terminally ill and wishes to have medical treatments stopped so that the disease may take its natural course, or a patient who has no brain wave activity and is removed from the equipment that artificially maintains her circulation, respiration, and feeding.⁶⁰ Nancy Cruzan's case did not fall into any of these categories. She was not "dead" by any of the accepted criteria,⁶¹ she was not terminally ill, and she was not thought to be in pain. Rather, she was an incompetent individual in a debilitated condition with no hope of improvement. She was kept alive by feedings through a surgically implanted gastrostomy tube. When these feedings were eventually withheld,⁶² Nancy Cruzan died from starvation and dehydration, not the progression of any disease.

In reaching its result, the Court implicitly rejected any categorical distinction between medical treatments and the artificial administration of nutrition by noting that the logic of the cases that implicate a liberty interest in refusing medical treatment would also implicate an interest in refusing artificially delivered

58. *See id.* at 2851.

59. *Id.*

60. *See generally* D. HUMPHRY & A. WICKETT, *THE RIGHT TO DIE: UNDERSTANDING EUTHANASIA* (1986) (discussing the complex moral and legal issues associated with dying).

61. The relevant Missouri statute provides that, for legal purposes, "death shall not be determined to have occurred unless . . . there is an irreversible cessation of spontaneous respiration and circulation." MO. REV. STAT. § 194.005 (1986).

62. After the Supreme Court handed down its decision in *Cruzan*, which had the effect of preventing Nancy Cruzan's parents from obtaining a court order instructing the hospital to withhold nutrition and hydration, the parents petitioned the Jasper County, Missouri Probate Court for a second hearing to present additional evidence of their daughter's wishes. Based on the testimony offered at that hearing, Judge Teel found "clear and convincing" evidence that Nancy Cruzan would not have wished to continue the artificial nutrition and hydration. Accordingly, on December 14, 1990, the court authorized the hospital to remove Nancy Cruzan's gastrostomy feeding tube. She died 12 days later. *See Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. Times, Dec. 27, 1990, at A1, col. 1.

food and water. The dramatic consequences involved in withdrawing nutrients and hydration essential to life would merely 'inform the inquiry' as to its constitutional permissibility.⁶³ This stance accords with an opinion recently issued by the American Medical Association that explicitly rejects a distinction between artificial feeding and other medical treatments.⁶⁴ This issue, however, has been the source of much disagreement among courts and commentators.⁶⁵

Although the Court's determination merely involved the constitutionality and not the desirability of Missouri's scheme, the Court's decision may have some unfortunate policy implications. In view of the ever-increasing costs of medical care, "erring on the side of life" will certainly place additional strains on the already limited resources of our health care system. In its analysis of risk allocation resulting from the imposition of a "clear and convincing" evidence standard, the Court considers only the direction and magnitude of a potential error, not the frequency of an erroneous judgment.

There is a cost associated with the Court's determination that a state may elect to prolong life without regard to its quality. Because funds are finite, this policy may lead to a misallocation of limited medical resources. Disproportionate amounts may be expended to maintain people in vegetative states who have no prospect of cure or recovery. In the case of Nancy Cruzan, the State of Missouri is bearing the cost of care. In other situations, extended medical care may cause serious economic burdens for the family that bears the cost.

Individuals who are concerned that there may come a time when they are no longer able to make decisions regarding their medical treatment may wish to avoid a fate like that of Nancy Cruzan. The Court's decision encourages these individuals to make their wishes known in advance, either by executing living wills or by appointing someone to make treatment decisions for them.⁶⁶ It is noteworthy, however, that had Nancy Cruzan exe-

63. See *Cruzan*, 110 S. Ct. at 2852. Other members of the Court explicitly acknowledged that there is no analytical difference between withholding sustenance and any other "life-sustaining" therapy, such as artificial respiration or circulation. See *id.* at 2856-57 (O'Connor, J., concurring); *id.* at 2866-67 (Brennan, J., dissenting).

64. See Council on Ethical and Judicial Affairs, Am. Medical Ass'n, Ethical Op. 2.20, Withholding or Withdrawing Life-Prolonging Medical Treatment (1989), reprinted in 263 J. AM. MED. A. 426 (1990).

65. See L. TRIBE, *supra* note 56, § 15-11, at 1364-65.

66. Indeed, within days of the announcement of the Court's decision, requests for

cuted a living will under the Missouri living will statute, it would not have been sufficient to cause the hospital to remove her gastrostomy tube. This is because the Missouri statute does not apply to the withdrawal of nutrition and hydration or to those patients who are not terminally ill.⁶⁷ A living will might have provided "clear and convincing" evidence, however, that Nancy Cruzan's parents were acting according to her wishes—the crucial evidence the Missouri Supreme Court found lacking.⁶⁸

In 1985, the Uniform Law Commissioners drafted the Uniform Rights of the Terminally Ill Act (Uniform Act),⁶⁹ which provides a mechanism for patients to leave instructions regarding their medical care prior to when they are incapable of participating in these decisions. This model legislation allows a patient to draft a declaration specifying that life-sustaining medical treatment, including food and water, be withheld if the patient has reached the last stages of a terminal condition.

Versions of the Uniform Act have been substantially adopted in eight states, including Missouri.⁷⁰ Thirty-three other states and the District of Columbia have adopted some form of "Living Will" or "Natural Death Act."⁷¹ These statutes differ significantly, however, among states and may not be applicable if the individual is in a persistent vegetative state, or is seeking the withdrawal of nutrition and hydration but is not in immediate danger. Thus, even a patient who executes a living will may not be protected from the imposition of some unwanted medical treatments if she becomes incompetent.

Another problem associated with living wills is their limited use. It is estimated that "only 8 to 15 percent of the general population has put its health-care wishes in writing."⁷² Further-

living wills at health agencies increased significantly. See, e.g., *In Leaner Health Budget, Programs Lose Ground*, N.Y. Times, Aug. 19, 1990, § 12Nj, at 1, col. 4.

67. See MO. REV. STAT. §§ 459.010-459.055 (1986); *Cruzan v. Harmon*, 760 S.W.2d 408, 442 (Mo. 1988) (Welliver, J., dissenting).

68. But see *supra* note 62.

69. 9B U.L.A. 609 (rev. 1989).

70. Other states adopting the Uniform Act include Alaska, Arkansas, Iowa, Maine, Montana, North Dakota, and Oklahoma.

71. See 9B U.L.A. 609 (Supp. 1990).

72. Chauvin & Pickering, *Living, Dying and the Written Word*, TEX. LAW., July 23, 1990, at 25. See also AM. MEDICAL ASS'N, SURVEYS OF PHYSICIAN AND PUBLIC OPINION ON HEALTH CARE ISSUES 29-30 (1988) (finding that only 15 percent of those surveyed had completed a living will specifying their wishes concerning the use of life-sustaining treatment if they entered an irreversible coma).

more, it may be unreasonable to expect people to be aware of the capabilities of modern medicine and to choose intelligently the treatment options that they would forego before the specific circumstance arises. Certainly, few physicians discuss these choices with patients beforehand. If, as some have suggested, living wills were provided along with other forms to be completed during a patient's admission to the hospital, it would be unlikely that the declaration would be truly representative of a patient's informed decision to forego certain treatments.⁷³

As an alternative to a living will, a patient may execute a durable power of attorney. This option was endorsed by Justice O'Connor in her concurrence as "a valuable additional safeguard of the patient's interest in directing his medical care."⁷⁴ Through a durable power of attorney, a patient can designate family members, a friend, or any other person to make decisions regarding health care should she become incompetent. A durable power of attorney also has the advantage of being flexible enough to adapt to a situation that the patient might not have specifically contemplated. Because it allows for a decision by someone other than the patient herself, however, the durable power of attorney carries with it the potential for abuse.

For the purposes of deciding this case, eight of the nine justices recognized what might be termed a conditional "right to die" protected by the Constitution.⁷⁵ Only four justices, however, believed that the "right to die" was broad enough to override the state interest in prolonging the lives of incompetent individuals who have not left clear instructions. Missouri's

73. See, e.g., *Hospitals Confronting the "Right to Die" Issue*, Chicago Tribune, July 26, 1990, News Section, at 1, col. 5 (suburban Chicago hospitals to "include forms for drawing up living wills and assigning medical power of attorney in every admissions packet given to patients").

The Patient Self-Determination Act was introduced in the United States Senate in 1989 by John C. Danforth (R-Mo.) and Daniel P. Moynihan (D-N.Y.), S. 1766, 101st Cong., 1st Sess. (1989), and in the United States House of Representatives in 1990 by Sander M. Levin (D-Mich.), H.R. 5067, 101st Cong. 2d Sess. (1990). The bill would require hospitals and nursing homes to provide information regarding living wills to patients and residents or risk losing Medicare and Medicaid benefits. See Levin, *So That There Will Be No More Nancy Cruzans*, Wash. Post, July 6, 1990, at A23, col. 5.

74. *Cruzan*, 110 S. Ct. at 2858 (O'Connor, J., concurring). The most recently revised edition of the Uniform Act contains additional provisions authorizing the appointment of a proxy or surrogate of the patient to make the necessary medical care choices that would permit a physician, in the absence of an effective declaration by the patient, to obtain consent from a patient's closest relatives to withhold or withdraw treatment. See UNIF. RIGHTS OF TERMINALLY ILL ACT § 7, 9B U.L.A. 609 (Supp. 1990).

75. This qualified "right to die" was unequivocally recognized by at least five justices: Justices O'Connor, Brennan, Marshall, Blackmun, and Stevens.

procedural scheme, which the Court upheld as constitutional, is one of the most stringent nationwide. Most states permit a patient to withdraw life-sustaining treatment on terms that are less demanding. Consequently, the debate over the "right to die" will likely shift to the courts and legislatures of the States, where an individual's right to refuse treatment may be afforded greater protection under state constitutions, statutes, and common law.

William L. Leschensky

EQUAL PROTECTION AND AFFIRMATIVE ACTION IN BROADCAST LICENSING: *Metro Broadcasting, Inc. v. Federal Communications Commission*, 110 S. Ct. 2997 (1990).

As the Supreme Court's 1989 Term reached its conclusion, observers expected the Court to follow *City of Richmond v. J.A. Croson Co.*¹ and invalidate two Federal Communications Commission (FCC) minority preference policies aimed at promoting broadcast diversity. Instead, in one of the major surprises of the Term,² the Court upheld both FCC racial preference programs in *Metro Broadcasting, Inc. v. Federal Communications Commission*.³ Finding no equal protection violation, the Court ruled that "benign" race-conscious programs designed by Congress to "serve important governmental objectives" are constitutional if they are "substantially related to [the] achievement of those objectives."⁴ The Court's application of an intermediate-scrutiny test to evaluate the FCC's race-conscious measures, in direct contradiction of *Croson*, has destabilized affirmative action jurisprudence. The intermediate-scrutiny test does not require that programs be narrowly tailored to remedy identified past discrimination. Thus, this standard of review will justify

1. 488 U.S. 469 (1989). In *Croson*, the Court, applying a strict-scrutiny test, invalidated a Richmond, Virginia ordinance that required construction firms receiving city contracts to set aside 30 percent of the value of a contract for minority-owned or controlled subcontractors.

2. See, e.g., *Vacancy of the Court: An Activist's Legacy*, N.Y. Times, July 22, 1990, § 1, at 22, col. 3.

3. 110 S. Ct. 2997 (1990). The decision addressed two cases before the Court that had been consolidated, *Winter Park Communications, Inc. v. Federal Communications Comm'n*, 873 F.2d 347 (D.C. Cir. 1989), and *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, 876 F.2d 902 (D.C. Cir. 1989).

4. *Metro Broadcasting*, 110 S. Ct. at 3008-09.

many suspect uses of racial classifications merely because the government claims that the created programs serve an important governmental interest.

Since gaining exclusive authority to license broadcast stations, the FCC has attempted to increase minority involvement in the broadcast industry. Minorities owned only ten of the approximately 8,500 American radio and television stations in 1971; as of 1986, they owned only 2.1 percent of the country's 11,000 stations.⁵ Concluding that audience interests were under-served by the lack of minority participation in the industry,⁶ the Commission promulgated new employment rules in the hope that increased minority employment would promote programming diversity.⁷

Although these rules initially enjoyed some success, the FCC soon determined "that the views of racial minorities continue[d] to be inadequately represented" and decided that "ownership . . . is another significant way of fostering the inclusion of minority views in . . . programming."⁸ The Commission then developed two methods to increase minority ownership. First, it revised its comparative hearing proceedings. When issuing a new license in a particular area, the Commission now evaluates competing companies based on certain factors and awards licenses through a weighted lottery system.⁹ Aiming to increase minority participation in the industry, the FCC added minority ownership or involvement in station management to the list of relevant factors considered in the comparative hearings.

Second, the Commission enacted new measures to increase the likelihood that licenses of existing stations would be transferred or reassigned to minorities. Previously, when an existing license-holder's qualifications were questioned, a transfer or assignment could not occur until the FCC held a hearing.¹⁰

5. *See id.* at 3003.

6. *See id.* (citing MINORITY OWNERSHIP TASK FORCE, FEDERAL COMMUNICATIONS COMM'N, REPORT ON MINORITY OWNERSHIP IN BROADCASTING I (1978)).

7. *See id.* at 3003 & n.3.

8. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 42 Rad. Reg. 2d (P & F) 1689, 1691 (1978) [hereinafter *Statement on Minority Ownership*].

9. *See Metro Broadcasting*, 110 S. Ct. at 3004-05. The six factors include: "diversification of control of mass media communications, full-time participation in station operations by owners . . . , proposed program service, past broadcast record, efficient use of the frequency, and the character of the applicants." *Id.*

10. *See id.* at 3005.

The Commission now gives station owners the option to avoid a hearing by engaging in a "distress sale" to "an FCC-approved minority enterprise."¹¹

In 1983, Metro Broadcasting, Inc. (Metro) and several other companies applied for an FCC license to construct and operate a new television station in Orlando, Florida.¹² The Commission initially awarded Metro the license because its primary competitor, Rainbow Broadcasting (Rainbow), an Hispanic-owned company, was disqualified. The FCC's review board reinstated Rainbow's application, however, and after a comparative hearing granted Rainbow the license because "Rainbow's minority credit outweighed Metro's local residence and civic participation advantage."¹³

Metro appealed to the United States Court of Appeals for the District of Columbia Circuit. At the FCC Commissioner's request, the court of appeals remanded the case for further consideration in light of an ongoing FCC investigation into the validity of minority preference policies. Before the study was completed, however, Congress passed appropriations legislation prohibiting the use of appropriated FCC funds to evaluate minority ownership policies.¹⁴ The FCC curtailed its investigation and reaffirmed its grant of the license to Rainbow. Citing circuit precedent and Congress's desire to increase minority representation in the broadcasting industry, the court of appeals affirmed Rainbow's license grant.¹⁵

In the other case considered in *Metro Broadcasting*, Faith Center, Inc. (Faith Center) twice sought FCC approval, in February 1981 and again in September 1983, to transfer its Hartford, Connecticut station's license in a distress sale. Both

11. *Id.* The three criteria necessary for a "distress sale" are: (1) Minority ownership of the buyer must exceed 50 percent or be controlling; (2) the license must be purchased before the start of the hearing; and (3) the price for the license must not exceed 75 percent of fair market value. *See id.*

12. The facts of the consolidated cases are drawn from the Court's opinion in *Metro Broadcasting*. *See id.* at 3005-08.

13. *Id.* at 3005-06.

14. *See* Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). The Act stated in pertinent part: "[N]one of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the [FCC] with respect to comparative licensing [or] distress sales" *Id.*

15. *See* *Winter Park Communications, Inc. v. Federal Communications Comm'n*, 873 F.2d 347, 353 (D.C. Cir. 1989) (quoting *West Michigan Broadcasting Co. v. Federal Communications Comm'n*, 735 F.2d 601, 613 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)), *cert. granted*, 110 S. Ct. 715 (1990).

attempts, however, proved unsuccessful. Meanwhile, in December 1983, Shurberg Broadcasting of Hartford, Inc. (Shurberg) applied for a license to construct a new television station in Hartford. Shurberg sought a comparative hearing when Faith Center, unable to transfer its license, filed for a license renewal. In June 1984, Faith Center again requested approval for a distress sale—this time to Astroline Communications Company, Limited Partnership (Astroline), another minority-owned applicant. Although Shurberg claimed that the distress sale violated its right to equal protection, the FCC permitted the license transfer to Astroline.¹⁶

Shurberg appealed to the United States Court of Appeals for the District of Columbia Circuit, but the appeals court similarly delayed deciding this case until the FCC completed its minority preference study. When Congress prohibited further use of appropriated funds for the investigation, the FCC reaffirmed the distress sale. A divided court of appeals invalidated the distress sale policy, however, holding that it unconstitutionally “denies [Shurberg Broadcasting] equal protection under the due process clause of the Fifth Amendment.”¹⁷

By a five-to-four vote,¹⁸ the Supreme Court affirmed the District of Columbia Circuit’s decision upholding the use of race as a factor in comparative hearings and reversed the same court’s invalidation of the distress sale program. Writing for the majority, Justice Brennan maintained that neither FCC policy violated notions of equal protection.

After discussing FCC efforts to increase programming diversity through minority involvement in the broadcast industry, the Court noted that “[i]t is of overriding significance in these cases that the FCC’s minority ownership programs have been specifically approved—indeed, mandated—by Congress.”¹⁹ This comment underscored the important role that deference

16. See *Metro Broadcasting*, 110 S. Ct. at 3000.

17. *Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Comm’n*, 876 F.2d 902, 934 (D.C. Cir. 1989). The court found an equal protection violation because “the program [was] not narrowly tailored to remedy past discrimination or to promote programming diversity . . .” *Id.*

18. Justice Brennan filed the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined. Justice Stevens delivered a brief concurring opinion. Justice O’Connor filed a dissenting opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined. Justice Kennedy, joined by Justice Scalia, filed a separate dissent.

19. *Metro Broadcasting*, 110 S. Ct. at 3008.

to Congress played in the opinion. Justice Brennan opined that while evaluating racial classifications normally demands a high level of scrutiny, *Fullilove v. Klutznick*²⁰ required that “a program employing a benign racial classification . . . adopted by an administrative agency at the explicit direction of Congress” be viewed “with appropriate deference.”²¹ More importantly, Justice Brennan noted that benign race-conscious programs may be constitutionally acceptable even if they are not specifically aimed at remedying the effects of past discrimination.²²

Deeming the FCC minority ownership policies benign, the Court applied a two-part test to determine whether the programs were constitutionally permissible.²³ The Court first examined whether the race-conscious measures served important governmental objectives. Although the Court recognized that societal discrimination is primarily responsible for the lack of minority involvement in broadcasting, it accepted the conclusion of Congress and the Commission that programming diversity is itself an important governmental objective because the public has a “right to receive a diversity of views and information over the airwaves.”²⁴ Justice Brennan concluded that preference programs designed to augment minority ownership will diversify the limited number of broadcasters on the airwaves, just as “a diverse student body” will encourage “a robust exchange of ideas”²⁵—a constitutionally acceptable justification for including race as a factor in university admissions decisions.

The second prong of the Court’s test consisted of evaluating whether the programs substantially relate to fulfilling the government’s objective. The Court examined whether there is a nexus between minority ownership and broadcast diversity. Justice Brennan noted that both Congress and the Commission

20. 448 U.S. 448 (1980). In *Fullilove*, the Court rejected a challenge to the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977. The Act dictated that at least 10 percent of federal funds for local public works projects be set aside to acquire services or supplies from MBEs, unless an administrative waiver is granted. Congress justified this provision with a finding of past discrimination in the construction industry nationwide.

21. *Metro Broadcasting*, 110 S. Ct. at 3008 (quoting *Fullilove*, 448 U.S. at 472 (plurality opinion)).

22. *See id.* at 3008-09.

23. The test that the Court applied was the same one advocated by Justices Brennan, White, Marshall, and Blackmun in their opinion in *University of Cal. Regents v. Bakke*, 438 U.S. 265, 359 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).

24. *Metro Broadcasting*, 110 S. Ct. at 3010.

25. *Id.* (citing *Bakke*, 438 U.S. at 311-13 (Powell, J.)).

had found a correlation between the two,²⁶ and that such a finding should be accorded "great weight."²⁷ To avoid the appearance of simply deferring to the dictates of Congress and the FCC, however, Justice Brennan recounted the numerous acts and reports that had concluded that minority ownership polices were necessary to achieve broadcast diversity.²⁸

The Court worried that the finding of such a relationship would be perceived as based on stereotyping.²⁹ To dispel such notions, Justice Brennan noted that "[c]ongressional policy does not assume that in every case minority ownership and management will lead to minority-oriented programming or to . . . a discrete 'minority viewpoint'"³⁰ Instead, he said, the programs will lead to diversity "in the aggregate."³¹ He buttressed this conclusion by citing various studies and the Court's reasoning in *Bakke*.³²

The final section of the Court's opinion served two purposes: to show that the FCC had rejected more extreme actions to achieve programming diversity and to prove that the methods chosen would not unduly burden non-minorities. The Court noted that although the Commission had concluded that race-neutral methods such as equal employment rules were unsuccessful, it was unwilling to invoke more extreme policies such as set-asides.³³ Justice Brennan also insisted that consideration of race as a factor is fair to minorities and non-minorities alike for two reasons. First, companies competing for licenses through the lottery system have no guarantee of receiving one; thus, no legitimate expectations have been dashed.³⁴ Second, the FCC has a responsibility to license in the "public interest, convenience, or necessity," and because there are a limited number of electromagnetic frequencies, "[n]o one has a First Amendment right to license."³⁵ Thus, the FCC was fulfilling its

26. See *id.* at 3011.

27. *Id.* (quoting *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

28. See *id.* at 3011-16. See, e.g., *Statement on Minority Ownership*, *supra* note 8, at 1692-93.

29. See *Metro Broadcasting*, 110 S. Ct. at 3016.

30. *Id.*

31. *Id.*

32. See *id.* at 3017-18 & n.33.

33. See *id.* at 3022-23.

34. See *id.* at 3026.

35. *Id.* (quoting *Red Lion Broadcasting Co., Inc. v. Federal Communications Comm'n*, 395 U.S. 367, 389 (1969)).

mission to support the "public interest."

In a brief concurring opinion, Justice Stevens emphasized that affirmative action policies should not aim to remedy past wrongs, but instead should "focus on future benefit."³⁶ He stressed, however, that racial distinctions should rarely be used, and then only for "clearly identified and unquestionably legitimate"³⁷ purposes.

Justice O'Connor dissented, recalling that last Term the Court required that a strict-scrutiny test be applied when evaluating racial classifications.³⁸ In contrast to the majority view, she argued that the congressional actions involved in *Metro Broadcasting* should be judged with this same level of review.³⁹ Justice O'Connor warned that by failing to strike down the FCC's policies, the Court was "[endorsing] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."⁴⁰

A significant portion of Justice O'Connor's dissent attacked the Court's reliance on *Fullilove* to justify "benign" race-conscious policies. First, she pointed out that Congress's remedial powers under Section Five of the Fourteenth Amendment were central to the decision in *Fullilove*;⁴¹ they were not at issue in *Metro Broadcasting*.⁴² Second, *Fullilove* insisted "that careful review was essential to ensure that Congress acted solely for remedial rather than other, illegitimate purposes."⁴³ Broadcast diversity, she noted, is obviously a forward-looking, not remedial, purpose. Finally, in *Fullilove* the Court had already rejected the intermediate-scrutiny approach adopted by the Court in *Metro Broadcasting*.⁴⁴

After rejecting the Court's approach, Justice O'Connor ana-

36. *Id.* at 3028 (Stevens, J., concurring).

37. *Id.* (Stevens, J., concurring) (quoting *Fullilove*, 448 U.S. at 535 (Stevens, J., dissenting)).

38. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

39. See *Metro Broadcasting*, 110 S. Ct. at 3030 (O'Connor, J., dissenting).

40. *Id.* at 3029 (O'Connor, J., dissenting).

41. See *id.* at 3031 (O'Connor, J., dissenting). Section Five of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

42. See *Metro Broadcasting*, 110 S. Ct. at 3030-31 (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials.").

43. *Id.* at 3031 (O'Connor, J., dissenting). See *Fullilove*, 448 U.S. at 486-87 (plurality opinion).

44. See *Metro Broadcasting*, 110 S. Ct. at 3032 (O'Connor, J., dissenting).

lyzed the case using a strict-scrutiny test. She found that the FCC programs failed to satisfy the test's first prong—that there be a compelling government interest—because “[m]odern equal protection doctrine [recognizes] only one such interest: remedying the effects of racial discrimination.”⁴⁵ Broadcast diversity did not qualify as a compelling interest because she viewed the concept as “too amorphous, [and] too insubstantial.”⁴⁶ Compelling interests must be “specific and verifiable,”⁴⁷ according to Justice O’Connor, and cannot be based on generalized notions of remedying societal discrimination.⁴⁸

Justice O’Connor determined that the FCC policies also did not satisfy the test’s second prong because they were not narrowly tailored to achieve the governmental interest. The FCC’s programs are premised on the notion that different racial groups possess distinct viewpoints.⁴⁹ These policies do not guarantee that a license grant to a minority firm would increase the expression of minority viewpoints, however, because many factors, such as market forces, affect programming decisions.⁵⁰ Moreover, she noted that in *Bakke*, the Court rejected the supposition that there are distinct racial viewpoints.⁵¹ Finally, Justice O’Connor indicated that race-neutral approaches exist that would more effectively further the FCC’s goal of programming diversity.⁵²

In a scathing dissent, Justice Kennedy compared the Court’s reasoning in *Metro Broadcasting* to the rationale used in *Plessy v. Ferguson*⁵³ and a quotation from a publication of the South African government.⁵⁴ With these analogies he sought to demon-

45. *Id.* at 3034 (O’Connor, J., dissenting).

46. *Id.* (O’Connor, J., dissenting).

47. *Id.* (O’Connor, J., dissenting).

48. *See Croson*, 488 U.S. at 505; *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion). In *Wygant*, the Court held unconstitutional the layoff provision of a collective-bargaining agreement between the teachers’ union and the board of education. Under the layoff provision, teachers with the most seniority would be retained, except that the percentage of minority teachers laid off could not exceed the percentage of minority teachers employed at the time of the layoff. In so holding, the Court rejected the theory that the minority teachers were needed as role models to remedy past societal discrimination.

49. *See Metro Broadcasting*, 110 S. Ct. at 3037 (O’Connor, J., dissenting).

50. *See id.* (O’Connor, J., dissenting).

51. *See University of Cal. Regents v. Bakke*, 438 U.S. 265, 310-11 (1978) (Powell, J.).

52. *See Metro Broadcasting*, 110 S. Ct. at 3039 (O’Connor, J., dissenting).

53. 163 U.S. 537 (1896).

54. “The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development.” *Metro Broadcasting*, 110 S. Ct. at

strate how policies that are justified as benign invariably harm someone.⁵⁵ He concluded by observing that the Court has shifted from endorsing *Plessy*'s "separate but equal" standard to *Metro Broadcasting*'s "unequal but benign."⁵⁶

The Court's holding in *Metro Broadcasting* has placed affirmative action jurisprudence in conflict. Had the Court followed the precedent of *Croson*, it would have applied a routine strict-scrutiny analysis and struck down the FCC programs. Instead, by employing an intermediate-scrutiny test because the programs were deemed "benign," a term the Court never bothered to define, the outcome of future cases seems likely to be determined by the personal opinion of the judge hearing the case as to whether the program in question is invidious or benign. In other words, the fate of affirmative action programs may now turn on the personal whims of judges.

Applying a strict-scrutiny test to racial preference programs requires that some minimal level of objectivity be maintained in a court's decision. As Justice O'Connor noted, only remedying the effects of past racial discrimination would serve as an adequate compelling interest to satisfy the first prong of a strict-scrutiny analysis.⁵⁷ Speaking for the Court in *Croson*, she recognized that "the purpose of strict-scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool."⁵⁸ Thus, a court must first make an objective determination of whether a minority preference program was designed to remedy specific past discrimination. Then, it can analyze whether the program is narrowly tailored to achieve that goal.

To the extent that a finding of specific past discrimination is no longer required under *Metro Broadcasting*, courts will be asked to judge a program in the context of generalized, societal discrimination. The Supreme Court itself, however, has rejected this approach on numerous occasions for two persuasive

3046 (Kennedy, J., dissenting) (quoting *SOUTH AFRICA AND THE RULE OF LAW* 37 (1968)).

55. *See id.* (Kennedy, J., dissenting).

56. *Id.* at 3047 (Kennedy, J., dissenting).

57. *See id.* at 3034 (O'Connor, J., dissenting).

58. *Croson*, 488 U.S. at 493.

reasons.⁵⁹ First, as Justice Powell commented in *Bakke*, societal discrimination is "an amorphous concept of injury that may be ageless in its reach into the past."⁶⁰ It simply would justify too many suspect uses of race classifications. Similarly, in *Croson*, the Court concluded that a claim of societal discrimination "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'"⁶¹

The second and related reason for rejecting a societal discrimination justification is that its use will increase the need for racial classifications. Benign race-conscious measures necessitate dividing people into racial blocs: victim blocs and oppressor blocs. When remedying identified, particular discrimination, the beneficiary of such a policy can point to the specific wrong to highlight the obstacles to his achievement. The beneficiary of a program based on societal discrimination, however, cannot do the same. Instead, the program will "only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."⁶²

The Court in *Metro Broadcasting* attempted to avoid the societal discrimination dilemma by labelling the programs "benign" and by noting that *Congress* had created them. Thus, the Court asserted that only intermediate scrutiny need be applied when evaluating the FCC measures. In failing to define what constitutes "benign race-consciousness," however, the Court has left no guidelines for lower courts to follow in determining what is a legitimate race-based decision. For example, suppose a school district, alarmed by the high attrition rate and the low sense of self-esteem of its black male students, decides to create special schools for these youths to combat these problems.⁶³ A judge may conclude that under the intermedi-

59. See *id.* at 498-506; *Wygant*, 476 U.S. at 274-76 (plurality opinion); *Bakke*, 438 U.S. at 307-10 (Powell, J.).

60. *Bakke*, 438 U.S. at 307 (Powell, J.).

61. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275 (plurality opinion)).

62. *Bakke*, 438 U.S. at 298 (Powell, J.).

63. See *Schools Segregate Black Male Pupils*, Wash. Times, Oct. 19, 1990, at A1, col. 5. Milwaukee has established separate facilities for black male students, although the schools will be open to all students. Chicago has a program that takes black boys in the fourth-through-eighth grades out of their classrooms two or three times a week. In Baltimore, three elementary schools have separate classes for black males. New York City is considering establishing separate schools for black boys. See Jordan, *Segregation Won't Work*, N.Y. Times, Oct. 21, 1990, § 4, at 19, col. 5.

ate-scrutiny standard of *Metro Broadcasting*, the program is valid because the district's benign and sincere approach supports an important governmental interest and is substantially related to the achievement of that interest. If the school district never stated its reason for establishing the separate schools, though, would intermediate or strict scrutiny be applied?⁶⁴ Such difficulties could arise for all sorts of programs, regardless of whether such programs were created by Congress or by a local governmental unit.

In addition, the Court's reliance on *Fullilove* to support the application of intermediate scrutiny in this case is misplaced. *Fullilove* stands for the proposition that when Congress identifies specific discrimination within an industry, Congress can exercise its "unique remedial powers . . . under § 5 of the Fourteenth Amendment."⁶⁵ Unlike the discrimination identified in the construction industry in *Fullilove*, Congress found no specific discrimination in the broadcast industry. Because Congress here merely seeks to enhance programming diversity and not to remedy particular discrimination, the Court cannot invoke *Fullilove* to justify the FCC policies.

The Court analogized the FCC's goal of broadcast diversity to the classroom diversity it sought to attain in *Bakke*. This analogy seems premised on the belief that there are a limited number of broadcast frequencies, just as there are a limited number of admissions slots. This comparison fails for two reasons, however. First, Justice Powell explicitly stated in *Bakke* that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."⁶⁶ Instead, the uniqueness of the academic environment and academic freedom associated with it permits a "university to make its own judgments as to education includ[ing] the selection of its student body."⁶⁷ Second, advances in technology have removed most practical limitations on the number of broadcast frequencies.⁶⁸ Thus, the Court has no real justifica-

64. How should a judge evaluate a program that has a benign stated purpose that may actually benefit the minority group, but in fact was created for an invidious reason?

65. *Crosen*, 488 U.S. at 488.

66. *Bakke*, 438 U.S. at 307 (Powell, J.).

67. *Id.* at 312 (Powell, J.).

68. The Court's adherence to the view that there are a limited number of broadcast frequencies follows the approach of such cases as *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367 (1969). Because the Court has attached importance to this limitation, the broadcast industry has been treated differently than

tion for endorsing these FCC diversity efforts.

In conclusion, *Metro Broadcasting* conflicts with the Court's prior affirmative action decisions because it lowers the standard of review necessary for evaluating racial preference programs. If it continues to apply intermediate scrutiny to affirmative action programs, the Court will severely weaken contemporary notions of equal protection. With the retirement of Justice Brennan and the elevation of Judge Souter to the Supreme Court, however, *Metro Broadcasting's* influence may be quite limited—and quite short-lived.

Michael B. Bressman

FEDERAL JUDICIAL AUTHORITY TO INCREASE LOCAL TAXES: *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

Ever since the Supreme Court in *Brown v. Board of Education of Topeka*¹ gave the federal courts a broad mandate to desegregate public school systems "with all deliberate speed,"² federal judges have struggled to do so.³ Because the management of public schools was formerly considered to be the province of state and local governments,⁴ judges faced a controversial and unfamiliar task. In their efforts to desegregate schools, they ex-

other press media in First Amendment analysis. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-25, at 1001-10 (2d ed. 1988). The Court has permitted content-based restrictions in the broadcasting context. See *Red Lion*, 395 U.S. at 389. In *Metro Broadcasting*, the Court essentially allowed a viewpoint restriction—the FCC is permitted by the Court's holding to enhance the speech of certain racial groups by restricting the speech of others. This sort of orchestration is "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam). With the advent of such technological advances as cable and satellite dishes, the Court should reconsider its differential treatment of broadcasters and other press media in its First Amendment jurisprudence. See, e.g., Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Under a more unified approach, the Court would not need to endorse the parcelling out of channels at the cost of the First Amendment.

1. 349 U.S. 294 (1955) (*Brown II*). The first Supreme Court decision in the *Brown* case, *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) (*Brown I*), declared that segregated schools were unconstitutional. *Brown II* implemented a desegregation remedy.

2. *Brown II*, 349 U.S. at 301.

3. See, e.g., 4 H. ABRAHAM, *FREEDOM AND THE COURT* 328-46 (1982). One of the best-known examples is Judge Garrity's management of the Boston public schools. For a popular account of his efforts, see J. LUKAS, *COMMON GROUND* (1985).

4. See J. HOGAN, *THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST* 10 (1985). The *Brown* decision spurred an explosion of education litigation in the federal courts. Between 1789 and 1956, the federal courts heard 398 cases on education issues; between 1956 and 1984, they heard at least 6,299. State courts heard 31,527 cases on

perimented with various remedies, including forced busing,⁵ redistricting,⁶ remedial measures in public housing programs,⁷ and voluntary desegregation plans involving magnet schools.⁸ The Supreme Court has not always been supportive of these efforts.⁹ The Court restricted the options available to federal judges as the hidden costs and seeming futility of many desegregation remedies became apparent.¹⁰ When remedies seem to go beyond the traditional equitable powers of the courts, the Court has been appropriately cautious.¹¹

Last Term, the Supreme Court became much less cautious. In *Missouri v. Jenkins*,¹² the Court broadened the power of federal courts to implement desegregation plans. The Court held that a federal district court may order a local government to impose taxes and may enjoin the operation of state law in order to finance a court-designed desegregation remedy.¹³ The decision departed from recent trends in the Court's jurisprudence and surprised many observers.¹⁴ The decision was particularly perplexing because the Court used flawed reasoning to justify its broad grant of taxation authority, failed to indicate how judicial taxation could be reconciled with traditional separation-of-powers principles, and neglected to explain how the federal

education issues between 1789 and 1956; between 1956 and 1984, they heard 13,873. See *id.* at 11.

5. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

6. See, e.g., *School Bd. of Richmond v. State Bd. of Educ.*, 412 U.S. 92 (1973).

7. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976).

8. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977). Magnet schools are "public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality." *Missouri v. Jenkins*, 110 S. Ct. 1651, 1657 n.6 (1990).

9. Some commentators believe that the Court's shifting attitude toward desegregation remedies reflects its frustration with the issue. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-19, at 1501 (2d ed. 1988).

10. Busing led to community upheavals and the phenomenon of "white flight." Other school integration remedies raised property taxes dramatically. Occasionally, voluntary remedies became so costly that school districts abandoned them in favor of involuntary remedies. Seattle officials, for example, concluded in 1977 that the city's magnet school program was too expensive and discarded it in favor of a mandatory program. See W. HAWLEY, R. CRAIN, C. ROSSELL, M. SMYLLIE, R. FERNANDEZ, J. SCHOFIELD, R. TOMPKINS, W. TRENT & M. ZLOTNICK, *STRATEGIES FOR EFFECTIVE DESEGREGATION* 33 (1983) [hereinafter *STRATEGIES FOR EFFECTIVE DESEGREGATION*].

11. Only three months before *Missouri v. Jenkins*, the Court ruled in *Spallone v. United States*, 110 S. Ct. 625 (1990), that a federal district court in New York abused its discretion when it imposed contempt fines on local elected officials who refused to vote for an ordinance implementing a remedy for housing discrimination.

12. 110 S. Ct. 1651 (1990).

13. See *Jenkins*, 110 S. Ct. at 1666.

14. See, e.g., *High Court Backs U.S. Judge's Authority to Order Funds for School Desegregation*, *Wall St. J.*, Apr. 19, 1990, at A16, col. 1.

judiciary was better equipped than state and local legislatures to make decisions about the imposition and allocation of taxes.

The case arose out of a 1977 complaint brought by several Kansas City students and the Kansas City, Missouri School District (KCMSD) against the State of Missouri and thirty-four other defendants, to desegregate the Kansas City school system.¹⁵ The plaintiffs alleged that the defendants had turned the KCMSD into a minority school district, thereby causing "white flight" and impairing the district's ability to raise adequate tax revenues.¹⁶ The district court found that both KCMSD and the state had operated a segregated school system within the Kansas City school district.¹⁷ As a remedy, the district court ordered KCMSD and the state to make curriculum improvements, reduce class size, implement various special programs, rehabilitate the physical facilities of the school system, and encourage students from outside the district to enroll voluntarily in KCMSD schools.¹⁸ The district court ordered KCMSD to study the possibility of operating "magnet schools" within the district,¹⁹ and KCMSD later convinced the district court to approve a massive expansion of its magnet school program.²⁰

The district court concluded that the cost of the remedy was beyond the means of KCMSD because the Missouri Constitution contained a cap on property taxes; that cap could only be exceeded with the specific approval of the voters.²¹ Voters, however, refused to approve tax increases to cover the cost of the remedy, and the school district was unable to secure fund-

15. See *School Dist. v. Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978).

16. See *id.* at 428.

17. See *Jenkins v. Missouri*, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984). KCMSD was realigned as a party defendant and cross-claimed against the state. See *id.* at 1485.

18. See *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985).

19. See *id.* at 34-35.

20. See *Missouri v. Jenkins*, 110 S. Ct. 1651, 1657 (1990). The cost of the remedy was estimated in 1985 to be at least \$500 million, but later estimates revised that figure upward to more than \$700 million. See *Test of Power: High Court to Consider if a Judge Can Raise Taxes to Pay for a Desegregation Plan*, Wall St. J., Oct. 2, 1989, at A9, col. 4.

21. The Missouri Constitution limits property taxes to \$1.25 per \$100 of assessed valuation. If a majority of voters in the relevant subdivision approve, the rate can be raised to \$3.75 per \$100 of assessed valuation. If two-thirds of the voters approve, the levy can be raised above \$3.75. See Mo. CONST. art. 10, § 11(b), (c). In 1969, KCMSD voters approved an increase in the levy to \$3.75 per \$100 of assessed valuation; this rate was effectively reduced to \$2.05 per \$100 of assessed valuation through the operation of "Proposition C," a statewide property tax roll-back referendum passed in 1982. See Mo. REV. STAT. §§ 163.087, 164.013 (Supp. 1989); Brief for Respondents at 27-28, *Jenkins* (No. 88-1150).

ing from either the city council or the state legislature.²² The district court held that the state and KCMSD were jointly and severally liable for the cost of the plan but that the state should pay seventy-five percent of the cost and KCMSD should pay twenty-five percent.²³ When the district court determined that KCMSD had "exhausted all available means of raising additional revenue,"²⁴ it refused to increase the state's share of the cost. Instead, the district court ordered an income tax surcharge, the issuance of capital improvement bonds, and an increase in the property tax beyond that permitted by the Missouri Constitution.²⁵

The state appealed, claiming that the tax increase was unconstitutional, the desegregation remedy was too broad in scope, and the allocation of the cost between the state and KCMSD was in error.²⁶ A panel of the Eighth Circuit Court of Appeals reversed the imposition of the income tax surcharge but upheld the allocation of costs and the property tax increase.²⁷ The court of appeals rejected the state's argument that a federal court does not have the power to impose a tax increase, holding that the state law limitation on tax increases "must fall to the command of the Constitution."²⁸ The court of appeals "affirm[ed] the actions that the [district] court has taken to this point,"²⁹ but cautioned the district court in the future to use less obtrusive methods than direct imposition of a tax, such as enjoining the operation of state laws that barred a tax increase and ordering KCMSD to set the levy itself.³⁰

Upon the denial of the state's petition for a rehearing, the state filed a petition for certiorari, arguing that the tax increase violated Article III of the United States Constitution,³¹ the

22. See *Jenkins*, 110 S. Ct. at 1657.

23. See *id.* Previously, the Eighth Circuit Court of Appeals had, for the most part, affirmed the district court's decision; the appellate court, however, had ordered the district court to divide the cost of the remedy equally between the state and KCMSD. See *Jenkins ex rel. Agyei v. Missouri*, 807 F.2d 657, 685 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987).

24. *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987).

25. See *id.* at 412, 413. The court set the property tax levy at \$4.00 per \$100 of assessed valuation.

26. See *Jenkins ex rel. Agyei v. Missouri*, 855 F.2d 1295 (8th Cir. 1988).

27. See *id.* at 1301-08, 1315-16.

28. *Id.* at 1313.

29. *Id.* at 1314.

30. See *id.*

31. Section One of Article III provides in part that "[t]he judicial Power of the

Tenth Amendment,³² and principles of federal-state comity.³³ The state also argued that the desegregation remedy was excessive in scope.³⁴ The Supreme Court granted certiorari on the question whether the tax increase was within the district court's authority but not on the question whether the actual remedy was excessive in scope.³⁵ In a five-to-four decision, the Supreme Court concluded that the district court had the authority to suspend application of state law and order KCMSD to levy taxes in order to fund its desegregation remedy.³⁶ All nine justices agreed that the district court had abused its discretion when it imposed the tax increase directly;³⁷ only four of the justices concluded that the district court had no authority whatsoever to order a tax increase.³⁸

Justice White, writing for the majority,³⁹ agreed with the state's argument that the tax increase the district court had imposed violated principles of federal-state comity. Acknowledging that the "imposition of a tax increase by a federal court was an extraordinary event,"⁴⁰ Justice White stated that the district court should not have imposed the tax unless "no permissible alternative would have accomplished the required task."⁴¹ Justice White noted that there were two options: (1) ordering KCMSD to levy property taxes at an adequate rate and enjoining the operation of state laws that prevented KCMSD from

United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

32. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

33. Principles of comity find expression in the philosophy of "judicial federalism," the idea that federal courts should respect the institutional autonomy of state governments. See L. TRIBE, *supra* note 9, § 3-28, at 197.

34. See *Missouri v. Jenkins*, 110 S. Ct. 1651, 1659 (1990).

35. See *id.* at 1659-60.

36. See *id.* at 1666.

37. See *id.* at 1655. The district court had also ordered an income tax surcharge and the issuance of \$150 million-worth of capital improvement bonds. See *Jenkins v. Missouri*, 672 F. Supp. 400, 412-13 (W.D. Mo. 1987). Neither of these orders was at issue in the appeal to the Supreme Court. The income tax surcharge had been reversed by the Eighth Circuit Court of Appeals. See *Jenkins ex rel. Agyei v. Missouri*, 855 F.2d 1295, 1315-16 (8th Cir. 1988). The district court had directed that the revenues from the property tax increase be used to retire the bonds. See *Jenkins*, 110 S. Ct. at 1658.

38. See *Jenkins*, 110 S. Ct. at 1667 (Kennedy, J., concurring in part and concurring in judgment). In addition to Justice Kennedy, Chief Justice Rehnquist and Justices O'Connor and Scalia held the view that the district court was unauthorized to order a tax increase.

39. Justice White was joined by Justices Brennan, Marshall, Blackmun, and Stevens.

40. *Jenkins*, 110 S. Ct. at 1663.

41. *Id.*

raising taxes on its own; and (2) directly imposing a tax increase.⁴² He asserted that the difference between the two actions was not merely formal. "Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."⁴³

Justice White upheld the modifications by the court of appeals to the district court's order, thereby allowing the district court to indirectly impose taxes.⁴⁴ Noting the limited grant of certiorari, he refused to address the state's contention that the scope of the remedy ordered was excessive and focused only on the manner in which the remedy was to be funded.⁴⁵

Justice White explained that *Milliken v. Bradley*⁴⁶ did not hold that a district court could never set aside state laws that barred local governments from raising taxes to satisfy constitutional obligations.⁴⁷ Rather, he stated, Section 1983⁴⁸ requires each tortfeasor to pay its share of the remedy if it can, and "apportionment of the cost is part of the equitable power of the district court."⁴⁹ Justice White rejected any claim that the Tenth Amendment had been violated, asserting that the Fourteenth Amendment "permits a federal court to disestablish local government institutions that interfere with its commands."⁵⁰ In response to the state's argument that Article III had been

42. Another alternative, which was mentioned in the dissenting opinion of the court of appeals, see *Jenkins ex rel. Agyei v. Missouri*, 855 F.2d 1295, 1318 (8th Cir. 1988) (Lay, C.J., dissenting), was to hold KCMSD and the state jointly and severally liable and leave the state to determine how to pick up the tab if KCMSD could not.

43. *Jenkins*, 110 S. Ct. at 1663.

44. See *id.* at 1664. The court of appeals had suggested that the district court should, in the future, authorize KCMSD to submit a levy to state tax authorities and should enjoin the operation of state laws that would reduce the levy below the required amount. See *Jenkins ex rel. Agyei v. Missouri*, 855 F.2d at 1314.

45. Justice White rejected the state's argument that the district court should have placed responsibility for funding the remedy on the state when it determined that KCMSD could not afford its portion. See *Jenkins*, 110 S. Ct. at 1664. This would have been the result under general principles of tort law because the district court had found the state and KCMSD jointly and severally liable. Justice White rejected this reasoning because the state had until now resisted any attempts to make it pay more than its share. Justice White noted that implementing the remedy would be delayed even further "if the State resisted efforts by KCMSD to obtain contribution." *Id.*

46. 433 U.S. 267 (1977).

47. See *Jenkins*, 110 S. Ct. at 1664-65.

48. 42 U.S.C. § 1983 (1988).

49. *Jenkins*, 110 S. Ct. at 1665.

50. *Id.*

violated because the judiciary had no power to tax, Justice White stated that a federal court has the power to order a local government to levy taxes.⁵¹

Although concurring in the judgment that the district court should be reversed, Justice Kennedy wrote a separate opinion criticizing the majority's reasoning and result.⁵² Calling the majority holding "an expansion of power in the federal judiciary beyond all precedent,"⁵³ Justice Kennedy stated that "[t]oday's casual embrace of taxation imposed by the unelected, life-tenured federal judiciary disregards fundamental precepts for the democratic control of public institutions."⁵⁴

Justice Kennedy decried the formalistic distinction between a court order increasing taxes and an order commanding local government officials to increase taxes. Noting that KCMSD had no authority to impose any taxes except that derived from the sovereign State of Missouri, he accused the majority of refusing to confront the real question in the case: "whether a district court possesses a power to tax under federal law, either directly or through delegation to the KCMSD."⁵⁵

Justice Kennedy noted that Article III places an absolute ban on the power of the judiciary to tax. The intent of the framers of the Constitution was to give the power to tax to the legislature, and previous case law confirmed this separation of power. "[T]he judiciary is not free to exercise all federal power; it may exercise only the judicial power."⁵⁶

Justice Kennedy disagreed with the Court's reliance on dicta in *Griffin v. School Board of Prince Edward County*.⁵⁷ In *Griffin*, a school board had refused to operate public schools for minority students while at the same time providing financial support to private schools for white students. Justice Kennedy noted

51. See *id.* Justice White cited a number of cases to support this proposition, including *Griffin v. Prince Edward County School Bd.*, 377 U.S. 218 (1964), and "a long and venerable line of cases in which this Court held that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations." *Jenkins*, 110 S. Ct. at 1665.

52. Justice Kennedy was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. Justice Kennedy also read his opinion from the bench, indicating the strength of his feelings about the case. See *Judges May Order Tax Rise to Remedy Bias*, *Court Says*, N.Y. Times, Apr. 19, 1990, at A22, col. 1.

53. *Jenkins*, 110 S. Ct. at 1667 (Kennedy, J., concurring in part and concurring in judgment).

54. *Id.* (Kennedy, J., concurring in part and concurring in judgment).

55. *Id.* at 1670 (Kennedy, J., concurring in part and concurring in judgment).

56. *Id.* at 1672 (Kennedy, J., concurring in part and concurring in judgment).

57. 377 U.S. 218 (1964).

that the Court in *Griffin* ordered the school board to exercise the taxing power it already had; it did not give the school board new taxing power. Because there was no allegation that Missouri state tax limitations were themselves unconstitutional, wrote Justice Kennedy, the Court in *Missouri v. Jenkins* was forced to rely on a vague constitutional justification for overriding state law.⁵⁸ Moreover, according to Justice Kennedy, the long line of cases the Court cited in support of its opinion was misapplied.⁵⁹

Justice Kennedy accused the Court of departing from its holding in *Milliken v. Bradley*,⁶⁰ where the Court was careful not to mandate the method of financing a school desegregation plan. If the state tax limitation violates the Constitution, then the specific remedy ordered by the district court is required; however, "a failure to fund this particular remedy would [not] leave constitutional rights without a remedy."⁶¹ Noting that the Court had in the past approved many inexpensive remedies for desegregation, he argued for a requirement that, before a court may impose taxation, there be a finding that there was no less costly a remedy to rectify the constitutional violation.⁶²

Emphasizing the "friendly adversary" nature of the suit, which students and the KCMSD originally brought together, Justice Kennedy wondered if the plaintiffs and KCMSD might have joined forces in the beginning in order to extract funds from the state treasury.⁶³ KCMSD had shown no concern for the financial consequences of the proposed plan and had in fact added increasingly expensive features.⁶⁴ Justice Kennedy noted that the final plan was the most expensive desegregation remedy ever proposed in any school district nationwide.⁶⁵

Noting that Missouri taxpayers, the people whom the major-

58. *See Jenkins*, 110 S. Ct. at 1674 (Kennedy, J., concurring in part and concurring in judgment).

59. *See id.* (Kennedy, J., concurring in part and concurring in judgment).

60. 433 U.S. 267, 291 (1977).

61. *Jenkins*, 110 S. Ct. at 1677 (Kennedy, J., concurring in part and concurring in judgment).

62. *See id.* (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy also noted that the district court in this case had looked at funding alternatives but not at alternative, less costly remedies.

63. *See id.* at 1676 (Kennedy, J., concurring in part and concurring in judgment).

64. Justice Kennedy mentioned a 25-acre farm, planetariums, and a model United Nations wired for language translation, among other items. *See id.* at 1676-77 (Kennedy, J., concurring in part and concurring in judgment).

65. *See id.* at 1668 (Kennedy, J., concurring in part and concurring in judgment).

ity's decision most affected, were not even before the Court, Justice Kennedy criticized the Court for violating due process by denying the taxpayers notice and the opportunity to be heard.⁶⁶ Justice Kennedy thought that the Court's decision blurred the lines of accountability by cloaking judicial orders in the guise of decisions of local officials.⁶⁷ Reminding the Court of the lessons of the American Revolution, which was in part triggered by unrepresentative taxation, Justice Kennedy warned that "imposition of taxes by an authority so insulated from public communication or control can lead to deep feelings of frustration, powerlessness, and anger on the part of tax-paying citizens."⁶⁸ Justice Kennedy noted that the judiciary was not equipped to administer a tax system, and giving the court the authority to do so detracted from its dignity and independence.⁶⁹

Justice Kennedy acknowledged that eliminating racial discrimination in the public schools is essential, but he asserted that implementing desegregation did not require the federal judiciary to overstep its traditional authority.⁷⁰ In conclusion, he noted that the majority's holding would allow federal judges to order taxation to remedy constitutional violations in prisons, hospitals, or other public institutions, and "could threaten fundamental alteration of the form of government our Constitution embodies."⁷¹

Justice Kennedy's rejoinder exposes several weaknesses of the majority's opinion. The majority declined to address Justice Kennedy's argument that it was necessary to examine the scope of the remedy before approving the district court's holding. Instead, the majority based its decision to uphold the district court's indirect imposition of taxes upon faulty and inconsistent reasoning. This reasoning failed to justify the broad and unprecedented expansion of judicial power. The majority also ignored the fact that its decision might have an adverse impact

66. *See id.* at 1670-71 (Kennedy, J., concurring in part and concurring in judgment). The taxpayers could have intervened in the suit but failed to do so. They did file an amicus brief. *See Jenkins ex rel. Agyei v. Missouri*, 855 F.2d 1295, 1316-17 (8th Cir. 1988).

67. *See Jenkins*, 110 S. Ct. at 1673 (Kennedy, J., concurring in part and concurring in judgment).

68. *Id.* at 1672 (Kennedy, J., concurring in part and concurring in judgment).

69. *See id.* at 1673 (Kennedy, J., concurring in part and concurring in judgment).

70. *See id.* at 1678 (Kennedy, J., concurring in part and concurring in judgment).

71. *Id.* at 1679 (Kennedy, J., concurring in part and concurring in judgment).

on the viability of local governments or might ultimately fail to alleviate the real problem, segregation. In general, the Court failed to articulate why every court-designed remedy for unconstitutional segregation supersedes the constitutional right to representative taxation. When constitutional rights clash, as they did in this case, the role of the court is to draw the lines between them, using sound reasoning. The *Jenkins* Court failed to draw such lines; in fact, it simply ignored the clash of rights that it faced.

The Court also used inconsistent reasoning to support its final result. The majority stated that “[t]he very complexity of the problems of financing and managing a . . . public school system suggests that ‘there will be more than one constitutionally permissible method of solving them’ ”⁷² The majority further stated that “[b]efore taking such a drastic step [as circumventing local taxing authority] the district court was obliged to assure itself that no permissible alternative would have accomplished the required task.”⁷³ Inexplicably, however, the majority only applied this test to the formalistic question of whether the court should itself impose the court-ordered tax increase or instead order local officials to do so. The substantive decision to impose the tax by judicial order was completely overlooked. By ignoring the substance of the issue, the Court ventured outside the area of the traditional judicial function without a demonstrated necessity for doing so and without an articulated theory for why it must do so.

In its analysis, the majority assumed that the possible presence of less expensive, less intrusive remedies sufficient to cure the constitutional violations had no bearing on the propriety of court-ordered taxation. By virtue of the limited grant of certiorari, the Court declined to consider the scope of the remedy, and thus insulated from review a remedy of unprecedented magnitude and cost. In this way, the Court avoided answering the key question of whether a far-reaching plan like the one designed for Kansas City was really the only remedy available to rectify constitutional violations. Without analysis or explanation, the Court implicitly concluded that the scope of the remedy (even if itself insulated from review) was not a factor in

⁷² *Id.* at 1663 (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972))).

⁷³ *Id.*

determining whether the lower court had properly invoked the "extraordinary" and "drastic" power of court-ordered taxation.⁷⁴

The Court's opinion embraced an unprecedented expansion of judicial power. In effect, the majority affirmed the power of a federal judge to determine what remedies for a constitutional problem are available, select one of those remedies, and order state and local officials to implement those remedies, no matter how costly the remedies might be and without any input by the other branches of government. This form of judicial decision-making calls to mind Montesquieu's warnings of judicial oppression.⁷⁵ It also raises troubling questions of how well the courts are equipped to allocate tax revenues without input from the legislature, the only branch of government with the broad perspective and accountability needed to make resource-allocation decisions.⁷⁶

The Court's decision is likely to hinder the viability of local governments. The accountability of local officials is necessarily reduced if local officials, unable to mobilize community support for expensive projects, can run to the nearest federal judge for funding. Nor is accountability enhanced if local officials can blame the federal courts for resulting tax increases. Federal judges will no doubt bear the brunt of community anger, making local officials even less responsive to their constituents.⁷⁷ The decision is also likely to aggravate voter apathy;

74. The majority also suggested that state-imposed tax limitations barred local efforts to raise the necessary taxes. The Court stated that "here, those [local government] institutions are ready, willing, and—but for the operation of state law curtailing their powers—able to remedy the deprivation of constitutional rights themselves." *Id.* The majority concluded that "the State cannot hinder the process by preventing a local government from implementing that remedy." *Id.* at 1666. The local government referred to, however, was the school board. Kansas City voters, along with the Kansas City Council, rejected the tax increases necessary to pay for the court-imposed remedy. *See id.* at 1657.

75. "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." THE FEDERALIST No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original) (quoting Montesquieu).

76. The Court's approach is particularly ironic because the Court has traditionally faulted the other branches of government whenever they reach decisions without devoting adequate attention to the costs, benefits, and other alternatives; such decisions are often labelled "arbitrary and capricious." Here, the Court did no cost-benefit analysis, and did not require the district court to perform such an analysis, either.

77. After the district court decision was announced, some Missouri citizens threw "tea parties" to symbolize their anger. *See Test of Power: Can a Federal Judge Raise Property Taxes? One in Missouri Did*, Wall St. J., Oct. 2, 1989, at A1, col. 1.

most voters will see little point in voting for their preferred allocation of public revenues when a federal judge may override their votes.

Missouri v. Jenkins represents a broad and unprecedented expansion of the power of the federal courts; unfortunately, it also probably represents a futile one. The remedy the Court affirmed is not likely to be efficacious. Numerous studies have shown that voluntary school desegregation plans simply do not result in integrated schools.⁷⁸ Magnet school plans unaccompanied by mandatory desegregation remedies are particularly ineffective.⁷⁹ This was borne out in August 1989, when several black parents in KCMSD filed another lawsuit, alleging that the school desegregation plan was victimizing their children rather than eradicating illegal discrimination.⁸⁰ The KCMSD Superintendent acknowledged that despite the creation of expensive magnet schools, the district had been unable to attract enough white students.⁸¹

Traditional separation-of-powers doctrine would hold that a federal judge could not impose a tax increase, directly or indirectly, absent a showing that a tax increase was the only possible remedy for a constitutional violation. This criterion was not met in *Jenkins*. No one can fault the justices' intentions, and Kansas City can surely use a state-of-the-art school system. But the manner in which this result has been achieved is alarming. In American democracy, the power to tax and distribute public revenues has always rested in the hands of our elected legislators; after *Missouri v. Jenkins*, federal judges have the power of the purse as well.

Margaret D. Stock

78. See STRATEGIES FOR EFFECTIVE DESEGREGATION, *supra* note 10, at 9, 27.

79. See *id.* at 31.

80. See *Suit Says Magnet Schools Bar Black Children*, N.Y. Times, Aug. 3, 1989, at A10, col. 4. The lawsuit alleges that the children are being denied the benefit of the new magnet schools. Many minority children have been turned away from the magnet schools, while slots for white students go unfilled.

81. See *id.*

FREE EXERCISE OF RELIGION: *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990).

In the constitutional realm of religion, citizens often look to the courts for protection against governmental encroachments upon their religiously motivated behavior. Obviously, the courts cannot countenance every claim of religious liberty. If they did, our system of generally applicable laws would cease to function under the weight of exceptions. Equally obvious, however, is that a society that purports to value religious liberty must countenance at least some of those claims. *Employment Division, Department of Human Resources of Oregon v. Smith*¹ provides the most recent indication of how the Supreme Court perceives its role in this area, and what it considers to be the guarantees safeguarded by the Free Exercise Clause of the First Amendment.²

Unfortunately for religious practitioners, the Court neither perceives itself as a guardian of religious liberty nor considers the safeguards of the Free Exercise Clause to extend very far. This ruling, which has the unsavory effect of relegating the first liberty protected in the Bill of Rights to a decidedly second-class status, has left even conservatives troubled and wondering about the ramifications of the precedent the Court has set. One commentator has speculated that under *Smith*,

[l]abor-relations laws [might] apply to clergy and church workers, including those who take a vow of poverty. State regulations [might] turn religious schools into clones of public schools. Anti-discrimination laws [might] make illegal the exclusion of homosexuals, and for that matter atheists, from positions of religious leadership. [And] "discrimination" that prevents women from being ordained in some churches [might] be unlawful.³

Smith involved a religious liberty claim by practitioners of the Native American religion. Respondents Alfred L. Smith and Galen W. Black were employees of a private drug and alcohol rehabilitation organization. They were fired when their em-

1. 110 S. Ct. 1595 (1990) (*Smith II*).

2. The First Amendment's Free Exercise Clause guarantees that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. The Free Exercise Clause was made applicable to state governments through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

3. Neuhaus, *Church, State, and Peyote*, NAT'L REV., June 11, 1990, at 40, 40.

ployer learned they had ingested peyote, a hallucinogenic drug, during religious ceremonies of the Native American Church.⁴ The Employment Division of Oregon's Department of Human Resources subsequently refused to grant unemployment benefits to the respondents because their discharges were considered the result of misconduct connected with their employment at the rehabilitation center.⁵ The Oregon Court of Appeals reversed the Employment Division's rulings, holding that the denial of benefits infringed upon the respondents' First Amendment right to the free exercise of their religion.⁶ The Oregon Supreme Court affirmed.⁷

The case first came before the United States Supreme Court in 1988.⁸ The Court vacated the judgment below and remanded for a determination as to whether the sacramental use of peyote was proscribed by Oregon's controlled substance law.⁹ On remand, the Oregon Supreme Court determined that the respondents' acts fell within the prohibitions of the state's statutes but concluded that the statutes, as applied, violated the Free Exercise Clause of the United States Constitution.¹⁰

The United States Supreme Court again granted certiorari,¹¹

4. See *Smith II*, 110 S. Ct. at 1597.

5. See *id.* at 1598. Under Oregon law, "[a]n individual shall be disqualified from the receipt of [unemployment] benefits . . . if . . . the individual . . . [h]as been discharged for misconduct connected with work." OR. REV. STAT. § 657.176(2)(a) (1989). "Misconduct" is defined as "a wilful violation of the standards of behavior which an employer has a right to expect of an employee. An act that amounts to wilful disregard of an employer's interest . . . is misconduct." OR. ADMIN. R. 471-30-038(3) (1988). The employer in this case, ADAPT, "views its counselors as role models for the persons they treat and therefore enforces a policy of abstinence from alcohol and mind altering drugs." *Smith v. Employment Division, Dep't of Human Resources*, 301 Or. 209, 210, 721 P.2d 445, 446 (1986).

6. See *Smith v. Employment Div., Dep't of Human Resources*, 75 Or. App. 764, 709 P.2d 246 (1985); *Black v. Employment Div., Dep't of Human Resources*, 75 Or. App. 735, 707 P.2d 1274 (1985).

7. See *Smith v. Employment Div., Dep't of Human Resources*, 301 Or. 209, 721 P.2d 445 (1986); *Black v. Employment Div., Dep't of Human Resources*, 301 Or. 221, 721 P.2d 451 (1986).

8. See *Employment Div., Dep't of Human Resources v. Smith*, 485 U.S. 660 (1988) (*Smith I*).

9. Oregon's statute makes it a Class B felony to knowingly or intentionally possess certain "controlled substances." OR. REV. STAT. § 475.992(4) (1987). The drug peyote is included among the controlled substances the possession of which is proscribed by that statute. See OR. ADMIN. R. 855-80-021(3)(s) (1988). The Oregon Court of Appeals had previously ruled that the ingestion of a controlled substance into the bloodstream did not constitute possession within the meaning of a more restrictive predecessor statute. See *State v. Downes*, 31 Or. App. 1183, 572 P.2d 1328 (1977).

10. See *Smith v. Employment Div., Dep't of Human Resources*, 307 Or. 68, 763 P.2d 146 (1988).

11. *Employment Div., Dep't of Human Resources v. Smith*, 109 S. Ct. 1526 (1989).

ostensibly to decide “[w]hether the Free Exercise Clause of the First Amendment permits the State of Oregon to [criminalize] religiously inspired peyote use . . . and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.”¹² The Court’s analysis of the issue was based on the assumption that “if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.”¹³ Consequently, even though *Smith* was a civil suit for the collection of unemployment benefits, the focus of the Court’s decision was a determination of whether Oregon could criminalize the respondents’ use of peyote without violating the First Amendment.¹⁴

12. *Smith II*, 110 S. Ct. at 1597. The first time the Court had addressed the respondents’ claims, it had held that “if Oregon . . . prohibit[s] the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon . . . [and] the State is free to withhold unemployment compensation from respondents for [using peyote], despite [their] religious motivation.” *Smith I*, 485 U.S. at 672. The rationale behind this analysis is intuitively appealing insofar as it is difficult to justify rewarding criminal activity that results in discharge from work with unemployment benefits. This analysis rests on the assumption, however, that benefits may be denied on the basis of *any* illegal conduct—something that the Oregon statute itself declines to do.

In this respect, the Oregon statute provides: “If the authorized representative designated by the assistant director finds an individual was discharged for misconduct because of the individual’s commission of a felony . . . *in connection with the individual’s work*, all benefit rights based on wages earned prior to the date of the discharge shall be cancelled” OR. REV. STAT. § 657.176(3) (1989) (emphasis added). Hence, the Employment Division conceded that “the commission of an illegal act is not, in and of itself, a ground for disqualifying a discharged employee from benefits.” *Smith v. Employment Div., Dep’t of Human Resources*, 301 Or. 209, 219, 721 P.2d 445, 450 (1986). Because the case at bar did not concern *Smith’s* peyote ingestion at work or while working, the Employment Division relied on the theory that the greater power to criminalize the conduct includes the lesser power to deny unemployment benefits.

13. *Smith II*, 110 S. Ct. at 1598. While it is true that the State of Oregon certainly may impose a lesser burden *in lieu of* a greater one, it does not necessarily follow that it may impose a lesser burden *in addition to* a greater one. Hypothetically, a thief statutorily deprived of his left hand would legitimately be deprived also of the fingers on that hand. But that statute would not license the taking of the fingers on his right hand as well. The right hand’s fingers might legitimately be taken in lieu of the left hand, but not in addition to it. In *Smith*, the Court sanctioned the denial of unemployment benefits as a mechanism, in addition to the criminal law, to discourage the ingestion of peyote. But by imposing a lesser burden in addition to a greater one, it simply begged the question of at what point additions of “lesser burdens” become intolerable. To answer “When the conscience is shocked,” or “When the total amount is cruel and unusual,” only worsens epistemological problems insofar as “knowing” when either threshold is crossed raises complex philosophical issues.

14. While the Supreme Court found constitutional significance in the fact that the respondents’ “misconduct” was a criminal act, the State of Oregon had not found that

The majority, in an opinion authored by Justice Scalia,¹⁵ held that criminal laws of general applicability that have the incidental effect of burdening the free exercise of religion do not violate the First Amendment. Unless the free exercise burden is magnified by the correlative burdening of another constitutional right, such as that of free speech, the State need not justify its regulation by demonstrating that it promotes a compelling governmental interest by narrowly tailored means. Regarding the Court's putative role as the guardian of religious liberty, the majority took the position that if a criminal law of general applicability has the incidental effect of burdening the free exercise of religion, that is a concern of the body politic, and not of the courts.

It is ironic that a Court that is routinely characterized as "conservative" should turn such a thoroughly deaf ear to pleas for religious liberty. To be sure, the ruling has its conservative elements: it rebuffs a back-door threat to the administration's war on drugs,¹⁶ and it allows a popular majority to insulate itself from demands for special accommodation. The decision also marks a further retreat from the practice of scrutinizing statutes for a "compelling governmental interest" *solely* on the basis of those statutes' impact—a favorite device of activist courts.¹⁷ But whatever conservative triumphs the decision might contain, *Smith* could prove a Pyrrhic victory—at least for

distinction significant to the application of its unemployment benefits law. *See infra* text accompanying note 23.

15. Justice Scalia was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy.

16. Had the Court constitutionally exempted religiously motivated peyote use from general drug use proscriptions, any subsequent efforts to restrain other purportedly "religious" uses of drugs would likely have proven awkward since "[i]t is [an] overriding interest [to keep] the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of . . . differing religious claims. . . ." *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring). *See also* *Hobbie v. Unemployment Appeals Comm'r*, 480 U.S. 136 (1987) (establishing that the fact of recent conversion to a faith does not alter a claimant's eligibility for an otherwise valid free-exercise exemption to regulations); *United States v. Ballard*, 322 U.S. 78 (1944) (holding that courts may inquire into the sincerity of putatively religious beliefs, but not into their accuracy or truthfulness).

17. *Compare* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (finding that disparate impact without any accompanying showing of business justification established the existence of remediable discrimination in violation of Title VII) *with* *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (declining to apply compelling-interest scrutiny under the First Amendment to a statute that required the closure for one year of any building in which public health violations had occurred, under which statute an adult bookstore was closed).

religiously minded conservatives—if its ultimate consequence is an emasculated Free Exercise Clause.

In *Smith*, Justice Scalia promulgated a narrow interpretation of the Free Exercise Clause, describing its provisions as protecting only “[t]he right to believe and profess whatever religious doctrine one desires”¹⁸ He noted that the Court has “[n]ever held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”¹⁹ Though Justice Scalia noted that other decisions had applied the First Amendment to require the exemption of religiously motivated conduct from the provisions of a neutral, generally applicable law,²⁰ he distinguished those cases as “hybrids” that “involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunc-

18. *Smith II*, 110 S. Ct. at 1599. If the Free Exercise Clause protects only belief and profession, however, it is redundant. No law, however ubiquitous, can compel belief, and professions of belief are separately protected under the Free Speech Clause. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech”).

19. *Smith II*, 110 S. Ct. at 1600. See *Hernandez v. Commissioner*, 109 S. Ct. 2136 (1989) (rejecting a free-exercise challenge to income tax provisions alleged to deter adherents from engaging in certain church-related activities); *United States v. Lee*, 455 U.S. 252 (1982) (granting no relief to an Amish employer who failed, for religious reasons, to contribute to the social security tax system); *Gillette v. United States*, 401 U.S. 437 (1971) (sustaining the military selective service system against the claim that it violated the Free Exercise Clause by conscripting persons who opposed a particular war on religious grounds); *Braunfield v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (upholding Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a mother could be prosecuted under child labor laws for using her children to dispense religious literature in the streets); *Reynolds v. United States*, 98 U.S. 145 (1879) (finding that criminal laws against polygamy could be constitutionally applied to those whose religion compelled the practice).

Also cited and quoted in support of the proposition was *Minersville School Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940) (announcing that conscientious scruples do not relieve the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs). *But see West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (expressly overruling *Gobitis* in invalidating a compulsory flag-salute statute challenged by religious objectors).

20. See *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (invalidating a tax on solicitation as applied to the dissemination of religious materials); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding the same); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (acknowledging the right of parents to direct the education of their children in accordance with their religious beliefs).

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court invalidated a compulsory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. “[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.” *Id.* at 220.

tion with other constitutional protections, such as freedom of speech and of the press."²¹ Hence, the majority concluded that since there was "no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs,"²² the First Amendment was not violated, and the State of Oregon was free to criminalize religiously inspired peyote use. Consequently, three previous unemployment compensation decisions, holding that a state could not condition its benefits on an individual's willingness to forego conduct required by his religion, were distinguished on the ground that the religiously motivated conduct at issue in those earlier cases was not criminal.²³

The Court then addressed the appropriate standard of review for generally applicable criminal laws that incidentally burden the free exercise of religion. The respondents had argued that the Court's decision in *Sherbert v. Verner*²⁴ required the government to demonstrate an interest sufficiently compelling to justify the burden this statute placed on the free exercise of religion. The majority responded that in recent years it had abstained from applying the *Sherbert* test.²⁵ The Court stated

21. *Smith II*, 110 S. Ct. at 1601. *But cf. id.* at 1609 (O'Connor, J., concurring) (arguing that both *Cantwell* and *Yoder* "[e]xpressly relied on the Free Exercise Clause" and that the Court "[h]as consistently regarded those cases as part of the mainstream of [its] free exercise jurisprudence").

22. *Id.* at 1602.

23. See *Hobbie v. Unemployment Appeals Comm'r*, 480 U.S. 136 (1987) (Seventh-Day Adventist, whose religion precluded work between sundown on Friday and sundown on Saturday, discharged because she could not work during all of her scheduled shifts); *Thomas v. Review Bd. of Ind. Employment Secur. Div.*, 450 U.S. 707 (1981) (Jehovah's Witness who quit his job because it was contrary to his religious convictions to work in a weapons production unit); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh-Day Adventist discharged by her employer for refusing to work on Saturday, the Sabbath day of her faith).

24. 374 U.S. 398 (1963).

25. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (declining to apply *Sherbert* analysis to the government's logging and road construction activities on sacred Indian lands); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (sustaining, without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements in order to attend worship services); *Bowen v. Roy*, 476 U.S. 693 (1986) (plurality opinion) (declining to apply *Sherbert* analysis to a federal statutory scheme requiring benefit applicants and recipients to obtain social security numbers); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting the application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes).

But see Smith II, 110 S. Ct. at 1611 (O'Connor, J., concurring) ("Recent cases have instead affirmed [the compelling-interest] test as a fundamental part of our First Amendment doctrine."). Justice O'Connor pointed out that *Roy* and *Lyng* involved the government's management of its own internal affairs, while *Smith* involved governmental restrictions on the conduct of individuals. She further argued that *Goldman* and

that "the approach in accord with the vast majority of our precedents . . . is to hold the test inapplicable" ²⁶ Accordingly, a state need not justify an incidental burden on the free exercise of religion by demonstrating a compelling governmental interest promoted by narrowly tailored means. Such a requirement, the Court stated, would result in religious exemptions from an impermissibly broad spectrum of laws. ²⁷ The Court ended its opinion by counseling that the appropriate forum through which to seek redress is the legislature, noting that "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process." ²⁸

Justice O'Connor concurred in the judgment but vigorously criticized the majority's analysis. ²⁹ The core of her disagreement with the majority is her belief that a burdensome "effect"

O'Lone arose in "narrow, specialized contexts"—that is, military and prison—in which the Court "ha[s] not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest." *Id.* at 1612 (O'Connor, J., concurring).

26. *Smith II*, 110 S. Ct. at 1602-03. *But cf. id.* at 1611 (O'Connor, J., concurring) (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Bd. of Ind. Employment Secur. Div.*, 450 U.S. 707, 718 (1981)):

Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest" or represents "the least restrictive means of achieving some compelling state interest."

27. *See Smith II*, 110 S. Ct. at 1605-06. Justice O'Connor pointed out that Justice Scalia's "parade of horrors," a listing of prior cases in which untenable consequences might have been reached had compelling-interest scrutiny been applied and not been satisfied, merely serves to illustrate "that courts have been quite capable of applying [the Supreme Court's] free exercise jurisprudence to strike sensible balances between religious liberty and compelling state interests." *Id.* at 1613 (O'Connor, J., concurring). Justice Scalia rejoined that "[t]he cases [the majority] cite[s] have struck 'sensible balances' only because they have all applied the general laws, despite the claims for religious exemption." *Id.* at 1606 n.5. Justice O'Connor rebutted: "It is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before [the Court]." *Id.* at 1610 (O'Connor, J., concurring).

28. *Id.* at 1606. *But cf. West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943):

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

29. Justices Blackmun, Brennan, and Marshall joined in Justice O'Connor's method of analysis, but reached a different conclusion. *See infra* notes 33-38 and accompanying text.

on religious conduct, whether intentionally or incidentally caused, triggers strict First Amendment scrutiny. She pointed out that because "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such,"³⁰ limiting the protections of the Free Exercise Clause to situations where a statute is intentionally aimed at religiously motivated conduct will rob the clause of its significance.³¹ Applying the strict-scrutiny test to the respondents' claim, however, Justice O'Connor concluded that allowing "a religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs."³²

Justice Blackmun's dissent³³ also advocated a strict-scrutiny analysis, but proposed a balancing of the "[r]espondents' clear interest in the free exercise of their religion against . . . the State's narrow interest in refusing to make an exception for [it]."³⁴ Not surprisingly, Justice Blackmun found no government interest sufficiently compelling to deny the respondents unemployment benefits. His opinion is noteworthy for its vacillation of principle. First, Justice Blackmun concurred with Justice O'Connor that statutes with a burdensome *effect* on religious practice should be subject to strict-scrutiny, even where those statutes have been consistently *applied*.³⁵ Conversely, he dismissed the concern that exempting peyote use but not other purportedly religious drug uses would violate the Establishment Clause³⁶ by arguing that consistency in the *application* of the strict-scrutiny test—and not in the resulting *outcome* or *effect* of the test's application—is all that is necessary to satisfy claims of a violation based on the disparate treatment of various religions.³⁷ Finally, Justice Blackmun shifted focus

30. *Smith II*, 110 S. Ct. at 1608 (O'Connor, J., concurring).

31. Presumably, a law designed to prohibit a particular religious practice, as such, would be a violation of the Equal Protection Clause, which states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

32. *Smith II*, 110 S. Ct. at 1615 (O'Connor, J., concurring).

33. Justice Blackmun was joined in dissent by Justices Brennan and Marshall.

34. *Smith II*, 110 S. Ct. at 1616-17 (Blackmun, J., dissenting).

35. *See id.* at 1616 (Blackmun, J., dissenting).

36. "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

37. "Though [the Establishment Clause requires that] the State must treat all religions equally, . . . this obligation is fulfilled by the uniform application of the 'compelling interest' test to all free exercise claims, not by reaching uniform results as to all claims." *Smith II*, 110 S. Ct. at 1621 (Blackmun, J., dissenting).

But see County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3105

again to assert that, in cases involving Native Americans, the actual harmful *effect* or "impact" of the disputed governmental action on them is the relevant factor to consider—not the equal *application* of judicial scrutiny.³⁸ Thus, to Justice Blackmun, "effect" or "impact" is *constitutionally* significant at some times, but not at others. In either case, we are left without a consistent or coherent rule to justify the differentiation.

Smith will undoubtedly revive accusations of discrimination against Native Americans by the "dominant" Christian culture.³⁹ Ultimately, however, it will not be Native Americans who suffer the most from this decision. Accommodation of religiously motivated peyote use is not uncommon,⁴⁰ and one might imagine that Oregon, a putatively liberal state, will "[b]e solicitous of [accommodating religious belief] in its legislation"⁴¹ In any event, as Justice Blackmun notes, because it is rarely enforced, the Oregon law is a law in name only.⁴²

(1989) (Blackmun, J.) (holding that a crèche displayed on the grand staircase of the county courthouse violated the Establishment Clause):

[G]overnment may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message [N]othing more is required to demonstrate a violation of the Establishment Clause.

Id. (emphasis added).

38. Justice Blackmun stated:

Th[e] potentially devastating impact [of the Oregon statute] must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans [T]his Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be.

Smith II, 110 S. Ct. at 1622 (Blackmun, J., dissenting).

39. Cf. *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 241 n.62 (1988) (commenting on *Lyng v. Northwest Indian Cemetery Protective Association*):

The harshness of the Court's decision raises the disturbing question whether familiarity with the infringed religion breeds more accommodating first amendment treatment. If, for example, the government pursued some policy of questionable value that, as an incidental effect, rendered the production of alcohol impossible, it seems likely that a court would be more sympathetic to a free exercise challenge from the Catholic Church, which has for thousands of years used wine in the Eucharist, than was the Supreme Court to the challenge of the Native American respondents in *Northwest Indian*.

40. "Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years" *Smith II*, 110 S. Ct. at 1620 (Blackmun, J., dissenting).

41. *Id.* at 1606.

42. Oregon case law reflects only one reported case in which the State of Oregon sought to prosecute a person for religious peyote use. See *id.* at 1617 n.3 (Blackmun, J., dissenting). Additionally, the Oregon Supreme Court reserved for itself the prerogative to protect religious peyote use under the Oregon Constitution. See *Smith v. Employment Div., Dep't of Human Resources*, 307 Or. 68, 73 n.3, 763 P.2d 146, 148 n.3 (1988) ("Because no criminal case is before us, we do not give an advisory opinion on

The role of the Oregon Supreme Court in *Smith* cannot be overlooked. The Supreme Court remanded the case in 1988 for a determination of whether Oregon's controlled substance law encompassed sacramental peyote use.⁴³ Oregon precedent suggested that the peyote use involved in a Native American eucharistic ceremony was readily distinguishable from the possession that Oregon's statutes proscribe. Hence, this case could easily have been disposed of in favor of Smith and Black upon remand to the Oregon Supreme Court. The Oregon court, however, eschewed that moderate and simple approach to protecting Native Americans' religious liberty and instead needlessly reached constitutional issues of enormous significance to the proscription of drugs in general.⁴⁴ Thus, one explanation for the harshness of the second *Smith* opinion might simply be the Court's loss of patience with an activist Oregon court.⁴⁵ Be that as it may, *Smith* was an egregious overreaction.

In *Smith*, the Court entertained a question of doubtful relevance, rendered a highly strained reading of precedent, and announced what appears to many to be a radically altered version of free exercise jurisprudence—all purportedly to escape the evils of “[a] system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”⁴⁶ One glaring risk of the decision is that of discrimination against unpopular “traditional” religions by the truly dominant secular culture, as legislatures enact facially neutral, generally applicable laws that “incidentally” burden religion, while courts turn a deaf ear to pleas for constitutional protection. *Smith* forces members of unpopular religions to look to a secularized polity for protection against encroachments by that same polity, and for the guarantee of their religious liberty. Neither conservatism, majoritari-

the circumstances under which prosecuting members of the Native American Church under ORS 475.992(4)(a) for sacramental use of peyote would violate the Oregon Constitution.”).

43. See *supra* notes 8-9 and accompanying text.

44. See *supra* note 16 and accompanying text.

45. *But cf. The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 208-09 (1990) (“*Smith*’s distortion of precedent and evisceration of religious liberty thus accomplishes nothing except the advancement of cultural hegemony. . . . [It] destroys an entire faith . . . [and] portends an ominous era of constitutional jurisprudence by the new, activist Rehnquist Court.”).

46. *Smith II*, 110 S. Ct. at 1606.

anism, the drug war, adherence to precedent, nor intellectual consistency required such a result.

Maximilian B. Torres

POLITICAL PATRONAGE AND THE FIRST AMENDMENT: *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990).

In *Rutan v. Republican Party of Illinois*,¹ the United States Supreme Court extended the rule set forth in *Elrod v. Burns*² and *Branti v. Finkel*³ that the patronage practice of dismissing public employees on the basis of their political affiliation violates the First Amendment. In *Rutan*, the Court held that the rule applies also to patronage practices involving promotions, transfers, recalls, and hiring decisions. Even so, the strict-scrutiny approach adopted by the majority in *Rutan* fails to define and protect adequately the First Amendment rights of public employees.

The dispute in *Rutan* arose from the issuance of an executive order by the Republican Governor of Illinois, James Thompson, proclaiming a hiring freeze for every state agency, bureau, board, or commission subject to his control.⁴ No exceptions to this hiring freeze were allowed without the Governor's "express permission."⁵ Requests for permission became routine, and a special agency, the Governor's Office of Personnel (Governor's Office), was organized to screen these requests.⁶ After this office was established, an agency with personnel needs screened its applicants in accordance with Illinois civil service practices, made its personnel choices, and forwarded them to the Governor's Office for approval.⁷

The five plaintiffs in *Rutan* filed suit in United States district court, alleging that the Governor had been using the Governor's Office to operate a political patronage system in which new jobs, beneficial transfers, and promotions were reserved

1. 110 S. Ct. 2729 (1990).

2. 427 U.S. 347 (1976).

3. 445 U.S. 507 (1980).

4. See *Rutan*, 110 S. Ct. at 2732.

5. *Id.*

6. See *id.*

7. See *id.*

for supporters of the Republican Party.⁸ Furthermore, the plaintiffs alleged that they had suffered discrimination with respect to state employment opportunities because they had not been supporters of the Illinois Republican Party, and they alleged further that their First Amendment right to associate with the political party of their choice had been violated.⁹

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted.¹⁰ The United States Court of Appeals for the Seventh Circuit initially issued a panel opinion,¹¹ and then reheard the appeal en banc and affirmed in part and reversed in part.¹² Noting that the Supreme Court in *Elrod* and *Branti* had determined that the practice of discharging public employees on the basis of their political affiliation violated the First Amendment, the Seventh Circuit held that other patronage practices violated the First Amendment only when they "could reasonably be thought to be the substantial equivalent of dismissal."¹³ The court ruled that an employment decision was equivalent to dismissal when it would "le[ad] a reasonable person to quit."¹⁴ The court remanded the case for further proceedings, but affirmed the dismissal of Moore's claim because it found that basing hiring decisions on political affiliation did not violate the First Amendment.¹⁵

Rutan, Taylor, and Moore petitioned the Supreme Court to review the constitutional standard set forth by the Seventh Cir-

8. *See id.* The plaintiffs alleged that, in reviewing an agency's request, the Governor's Office only approved the applications of candidates who had voted in Republican primaries, had provided support to Republican candidates or the Party, had promised to support the Republican Party in the future, or had the support of Republican Party officials at the state and local levels. *See id.*

9. *See id.* The plaintiffs were state employees or prospective state employees holding or seeking non-policymaking positions. Rutan worked for the state as a rehabilitation counselor and claimed that she had been denied supervisory positions because she did not support the Republican Party. Taylor, a road equipment operator for the Illinois Department of Transportation, claimed he was denied a promotion because he lacked the support of the local Republican Party and that he was denied a transfer to an office nearer his home because of opposition from the local Republican Party chairman. Moore claimed that he had been denied employment as a prison guard because he did not have the support of local Republican officials. Standefer and O'Brien claimed that they were not recalled after layoffs because they had supported the Democratic Party. *See id.* at 2733.

10. *See* Rutan v. Republican Party of Ill., 641 F. Supp. 249 (C.D. Ill. 1986).

11. *See* Rutan v. Republican Party of Ill., 848 F.2d 1396 (7th Cir. 1988).

12. *See* Rutan v. Republican Party of Ill., 868 F.2d 943 (7th Cir. 1989) (en banc).

13. *Id.* at 956 (emphasis in original).

14. *Id.* at 956.

15. *See id.* at 954.

cuit and the dismissal of Moore's claim. The Supreme Court granted certiorari and held, five-to-four, that the First Amendment's proscription of patronage dismissals, as recognized in *Elrod* and *Branti*, extended to promotion, transfer, recall, and hiring decisions involving non-policymaking public employment positions.

The majority opinion, authored by Justice Brennan and joined by Justices White, Marshall, Blackmun, and Stevens, reasoned that the practice of basing the employment decisions implicated in this case on political affiliation had the same coercive effect on employees' First Amendment freedom of political association that dismissal decisions so based were found to have in *Elrod* and *Branti*. In *Elrod* and *Branti*, the Court determined that conditioning continued public employment on the provision of support for the favored political party "unquestionably inhibits protected belief and association."¹⁶ Similarly, the *Rutan* majority relied upon the doctrine of unconstitutional conditions, which prohibits the state from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."¹⁷ Because the Republican administration in Illinois was conditioning the receipt of employment benefits upon the employees' waiver of their First Amendment right to associate, the government was attempting to "produce a result which [it] could not command directly."¹⁸

Addressing first the claims of the four plaintiff employees, the majority rejected the respondents' argument that *Elrod* and *Branti* were inapplicable because the patronage dismissals in those cases were different from failure to promote, transfer, or recall after layoff.¹⁹ The respondents argued that the employees' First Amendment rights had not been infringed because they had no entitlement to promotion, transfer, or rehire. This argument, however, had already been rejected in *Elrod* and *Branti*, because the employees in those cases had no entitlement to continued employment.²⁰ The employees in *Rutan* who refused to compromise their political beliefs stood to lose the considerable increases in pay and job satisfaction associated

16. *Rutan*, 110 S. Ct. at 2734 (quoting *Elrod v. Burns*, 427 U.S. 347, 359 (1976)).

17. *Id.* at 2736 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

18. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

19. *See id.* at 2735.

20. *See id.*

with promotions or transfers and even their jobs if they were not recalled after being laid off.²¹ The majority found that these were significant penalties for the exercise of rights guaranteed by the First Amendment, and that such practices could be justified only if they were narrowly tailored to further vital government interests.²²

The majority found that the employees' First Amendment rights had been violated under this standard, because of the availability of less restrictive alternatives to denying employment benefits on the basis of political affiliation that would still meet the respondents' interests in maintaining efficient government and nurturing the political parties. For example, the State could simply deny employment based on deficient job performance, and thus affect only those employees whose political beliefs actually contribute to inefficient government, and not those performing adequately in spite of their political differences with the administration.²³ Implementation of the administration's policies could also be accomplished with less infringement on employees' First Amendment rights by choosing or dismissing only certain high-level employees on the basis of their political views.²⁴ Because patronage impairs the political process by discouraging free expression by public employees, the majority determined that the patronage system practiced by the Republican administration in Illinois served no vital government interest that could not be met with less intrusion on the First Amendment rights of state employees.²⁵

Finally, the majority rejected the "substantial equivalent of dismissal" test set forth by the Seventh Circuit. The Court found this test unduly restrictive because it failed to recognize that "there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy."²⁶ The Court concluded that this interference by the government with employees' freedom to believe and associate is not allowed by the First Amendment except in the most compelling

21. *See id.* at 2736.

22. *See id.*

23. *See id.* at 2737.

24. *See id.*

25. *See id.*

26. *Id.*

circumstances.²⁷

With respect to Moore's claim that the state's refusal to hire him because of his political beliefs violated his First Amendment rights, the majority reversed the Seventh Circuit's dismissal of the claim.²⁸ The Court stated that the denial of a government job was a serious deprivation and found that the loss of a job opportunity for failure to compromise one's convictions supported a constitutional claim.²⁹ Under *Elrod*, "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."³⁰ In *Branti*, the Court had stated that the State demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved."³¹ As it found for patronage promotions, transfers, and recalls, the majority found that, in this case, no vital government interest was served by the refusal to hire.³²

The Court avoided the issue of whether denying employment for political reasons could be distinguished under the First Amendment from firing employees for political reasons. In this regard, the majority found it "unnecessary here to consider whether not being hired is less burdensome than being discharged because the government [was not forced] to do either on the basis of political affiliation."³³ The Court saw the proper question not to be which denial is more acute, but rather whether the government, without sufficient justification, has pressured employees to discontinue the free exercise of their First Amendment rights.³⁴

27. *See id.* at 2738.

28. *See id.* at 2739.

29. *See id.* at 2738. *See also* *Keyishian v. Board of Regents of Univ. of New York*, 385 U.S. 589 (1967) (holding law affecting appointment and retention of teachers invalid because it unconstitutionally restricted political belief and association); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (striking down loyalty oath requirement for public employees); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that appointment to a notary public position could not be based on declaration of belief in God); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (holding that federal employment cannot be denied on the basis of political party affiliation).

30. *Rutan*, 110 S. Ct. at 2739 (citing *Elrod*, 427 U.S. at 362-63; *Branti*, 445 U.S. at 515-16).

31. *Branti*, 445 U.S. at 518.

32. *See Rutan*, 110 S. Ct. at 2739.

33. *Id.* (emphasis in original).

34. *See id.*

Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, and joined in part by Justice O'Connor, filed a lengthy dissent in which he argued that the constitutional restrictions on the government as employer are not the same as the restrictions on the government in its capacity as lawmaker.³⁵ Justice Scalia cited *Connick v. Myers*³⁶ and *United Public Workers v. Mitchell*³⁷ to support the proposition that public employees may be dismissed or punished for private speech or for partisan political activity when private citizens may not.³⁸ Once it is clear that the government is treated differently in its capacity as employer, it is difficult to assess which employment practices are permissible and which are not.³⁹

Justice Scalia would resolve this ambiguity in favor of patronage employment practices where there is no express prohibition in the Bill of Rights, and where there is a long tradition of open, widespread, and unchallenged use of patronage as a basis for government employment.⁴⁰ Justice Scalia argued that the Court should look to such traditions when trying to determine the constitutional legitimacy of a government practice:

When it appears that the latest "rule" or "three-part test" or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens.⁴¹

In the absence of tradition, Justice Scalia would use a rational-relationship test to examine the government's interest in promoting efficient government, instead of the strict-scrutiny test applied by the majority. When the government operates not in its capacity as regulator or lawmaker, but as manager of its internal affairs, Justice Scalia argued that the Court has consistently applied a lower level of scrutiny.⁴² The government may not deal with its employees in an arbitrary or capricious manner, but its regulations are valid if they bear a "rational

35. *See id.* at 2747 (Scalia, J., dissenting).

36. 461 U.S. 138 (1983).

37. 330 U.S. 75 (1947).

38. *See Rutan*, 110 S. Ct. at 2748 (Scalia, J., dissenting).

39. *See id.* (Scalia, J., dissenting).

40. *See id.* (Scalia, J., dissenting).

41. *Id.* (Scalia, J., dissenting).

42. *See id.* at 2749 (Scalia, J., dissenting) (citing *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961)).

connection"⁴³ to the governmental end sought to be served.

Although Justice Scalia was confident that strict scrutiny was not the proper test, he was uncertain about the correct standard to use, because the Court had used various formulations in the past.⁴⁴ He asserted that, based on *Public Workers*, the test of whether the practice could be "reasonably deemed"⁴⁵ by the government to further a legitimate goal was the most meritorious test. To remain in closer accord with the majority's general balancing test, however, he chose to apply a less permissive test: Can the governmental advantages of this employment practice reasonably be deemed to outweigh its coercive effects?⁴⁶

Applying this test, Justice Scalia noted the great benefits to the political parties provided by the practice of patronage hiring; these benefits include maintaining the interest of the "rank-and-file" members between elections by offering employment rewards, maintaining party discipline and loyalty, and fostering the two-party system by encouraging workers to work for the major parties instead of parties that they philosophically may favor more.⁴⁷ He expressed fear that the majority's decision would make politicians more susceptible to capture by special-interest groups, because they would be unable to rely on support from party members.⁴⁸ Justice Scalia also claimed that a primary beneficiary of the patronage system, traditionally excluded minorities, would have more difficulty achieving power in the absence of patronage. He argued that the political in-roads made by blacks in recent times through their support of "a particular party 'machine,'" would be damaged as politicians were forced to seek support from the monied interest groups "downtown."⁴⁹

Although the patronage system "influences or redirects, perhaps to a substantial degree, individual political expression and political association,"⁵⁰ Justice Scalia did not consider it to be a significant impairment of free speech or free association.⁵¹ In

43. *Id.* (Scalia, J., dissenting) (quoting *Kelley v. Johnson*, 425 U.S. 238, 247 (1976)).

44. *See id.* at 2751-52 (Scalia, J., dissenting).

45. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 101 (1947).

46. *See Rutan*, 110 S. Ct. at 2752 (Scalia, J., dissenting).

47. *See id.* at 2752-54 (Scalia, J., dissenting).

48. *See id.* at 2754 (Scalia, J., dissenting).

49. *Id.* at 2755 (Scalia, J., dissenting).

50. *Id.* (Scalia, J., dissenting).

51. *See id.* at 2755-56 (Scalia, J., dissenting).

essence, Justice Scalia argued not that patronage is the best system for government hiring, but only that it may be a reasonable choice for elected representatives to make.⁵² Unlike the majority, he found it impossible to say that all possible uses of patronage hiring fail the “balancing test” that should be used to judge such systems.⁵³

In the final portion of his opinion, Justice Scalia concluded that *Elrod* and *Branti* should not be extended to prohibit patronage practices other than dismissal, but rather that *Elrod* and *Branti* should be overruled.⁵⁴ He observed that, although it has been unwilling to allow political bodies to draw a line between permissible and impermissible patronage hiring practices, the Court has been equally unwilling to rule that no such line exists—and unable to draw a predictable line itself that judges, lawyers, and public employees can understand.⁵⁵ Uncertainty about the application of the *Branti* rule, argued Justice Scalia, undermines the very purpose of the rule: preventing coercion of public employees’ political beliefs.⁵⁶ He stated that, if employees cannot be confident that their job is not one for which party affiliation is an appropriate requirement, then they may succumb to pressure to conform their political beliefs to those of the ruling party rather than risk an adverse ruling in the courts.⁵⁷ The political parties, on the other hand, will be unwilling to fire those in jobs for which political affiliation may be an appropriate consideration, for fear of exposing themselves to potential liability. Consequently, less efficient government will be the result of unenthusiastic implementation of administration policies. Because of the chaos and confusion the *Rutan* decision is likely to cause, Justice Scalia prophesied that the majority’s decision ultimately may be the first step on the road to overruling *Elrod* and *Branti*.⁵⁸

Justice Stevens filed a concurring opinion in which he denied Justice Scalia’s charge that the majority was, in effect, instituting a civil service system in Illinois that grants de facto tenure to all public employees.⁵⁹ Justice Stevens noted the clear dis-

52. *See id.* at 2756 (Scalia, J., dissenting).

53. *See id.* (Scalia, J., dissenting).

54. *See id.* (Scalia, J., dissenting).

55. *See id.* (Scalia, J., dissenting).

56. *See id.* at 2757 (Scalia, J., dissenting).

57. *See id.* (Scalia, J., dissenting).

58. *See id.* at 2758-59 (Scalia, J., dissenting).

59. *See id.* at 2740 (Stevens, J., concurring).

inction between the grant of tenure to an employee and the prohibition of discharge for a particular impermissible reason.⁶⁰

Justice Stevens responded to Justice Scalia's argument that the Court should look to the long tradition of patronage hiring to determine its constitutionality by noting that racial discrimination could be upheld under a similar standard.⁶¹ Furthermore, he argued that when patronage was widely accepted, it was assumed that there was no valid constitutional objection to an employee's summary removal because there was no constitutional right to the job.⁶² Justice Stevens argued that the Court's line of "unconstitutional condition" cases has rejected that fundamental assumption under which patronage prospered for so many years.⁶³

Justice Stevens then criticized Justice Scalia's balancing test, which would weigh the state's interest in patronage hiring against the aggregated interests of the many public employees affected by the practice, because it embodies the assumption that "governmental power and public resources—in this case employment opportunities—may appropriately be used to subsidize partisan [political] activities even when the political affiliation of the employee or the job applicant is entirely unrelated to his or her public service."⁶⁴ Justice Stevens likened this assumption to using public funds to compensate party members for campaign work or to a legislative enactment denying employment to members of the minority party—acts that would be clearly unconstitutional.⁶⁵ Justice Stevens ended his concurrence by stating that although patronage is defended in the name of democratic tradition, its true impact on the body politic is to inhibit or manipulate the political choices of public servants by the selective award of public benefits; it represents a "paternalistic impact on the political process at war with the

60. *See id.* (Stevens, J., concurring) (quoting *Illinois State Employees Union, Council 34 v. Lewis*, 473 F.2d 561, 567-68 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)).

61. *See id.* at 2741 (Stevens, J., concurring) (quoting *Lewis*, 473 F.2d at 568 n.14).

62. *See id.* (Stevens, J., concurring).

63. On this point, Justice Stevens quoted an opinion written by Justice Marshall when he was a United States Court of Appeals judge, in which then-Judge Marshall stated that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.* at 2742 (Stevens, J., concurring) (quoting *Keyishian v. Board of Regents of Univ. of New York*, 45 F.2d 236, 239 (2d Cir. 1965) (Marshall, J.)).

64. *Id.* at 2744-45 (Stevens, J., concurring).

65. *See id.* at 2745 (Stevens, J., concurring).

deeper traditions of democracy embodied in the First Amendment."⁶⁶

Patronage hiring at *some* level is both necessary and desirable in government. The Court accepted this fact when it promulgated the "appropriate requirement" test in *Branti*, and the policymaking test in *Elrod*.⁶⁷ Both of these tests imply acceptance of the notion that there are some governmental positions for which political affiliation is an appropriate consideration. Congressional staff jobs and Cabinet positions are obvious examples. The majority and the dissent differ in their characterizations of where the line between patronage and non-patronage jobs should be drawn and in their determinations of who should draw the line.

The majority, using strict scrutiny, favors a case-by-case approach in which the courts will examine each patronage dismissal or denial of public employment to determine whether political affiliation is an "appropriate requirement" for that particular job, and whether there is an alternative to dismissal or denial that would be less restrictive of First Amendment rights. Because of the test's manifest indeterminacy, however, this approach fails to prevent the chilling effect on public employees' First Amendment rights that it is designed to correct.

In clear-cut cases, the test may prevent state and local governments from instituting patronage practices for some clearly non-political, non-policymaking jobs, and, at the same time, allow newly elected governments to fill policymaking posts with party members. In many borderline cases, however, the test will provide little guidance to either the public employee or to the government. As Justice Scalia pointed out, prior to adjudication, the employee will not know whether his job will be found to meet the "appropriate requirement" test.⁶⁸ Consequently, the employee will often be unwilling to risk losing his job by exercising his First Amendment rights. The government, on the other hand, will be uncertain whether it will incur substantial liability for dismissing an employee for political reasons and thus may not replace some employees whose jobs actually meet the "appropriate requirement" test, thereby making im-

66. *Id.* at 2746 (Stevens, J., concurring) (quoting *Illinois State Employees Union, Council 34 v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)).

67. See *supra* notes 30-31 and accompanying text.

68. See *Rutan*, 110 S. Ct. at 2756 (Scalia, J., dissenting).

plementation of the incoming administration's program more difficult. Additionally, courts in various jurisdictions will apply the "appropriate requirement" test differently, producing inconsistent decisions for similar jobs—as Justice Scalia argued, a problem in political dismissal cases ever since the *Elrod* and *Branti* cases were decided.⁶⁹

The state legislatures appear to be in a much better position than the courts to determine the political requirements of the endless array of jobs in a particular state's government. State legislatures are better able to classify jobs as suitable or unsuitable for patronage hiring and to codify such determinations, so that both employees and the government may know their respective rights.⁷⁰ Only a system in which determinations are made in advance, and are ascertainable by all parties involved, will serve the dual purposes of maintaining optimal First Amendment protection for public employees and promoting efficient government.

Such determinations made by state legislatures should be subject to a relaxed level of judicial review. Challenged determinations should be subjected to a rational-relationship review, one that would require that government regulation of its employees must not be "patently arbitrary or discriminatory,"⁷¹ and must bear a "rational connection"⁷² to the governmental end sought to be served. This process would protect public employees from such flagrant abuses of patronage hiring as occurred in *Rutan*.

Applying this proposed test to the facts in *Rutan*, it is difficult to see how patronage hiring for such positions as rehabilitation counselor, road equipment operator, prison guard, garage worker, and dietary manager are rationally connected to efficient government. Justice Scalia argued that the governmental interest involved is the promotion of the two political parties

69. *See id.* at 2756-57 (Scalia, J., dissenting).

70. The federal government has adopted this approach. The Office of Personnel Management has composed Schedule C, which lists positions of a "confidential or policy-determining character" that are excepted from the competitive civil service system. 5 C.F.R. § 213.3301 (1990).

71. *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 898 (1961) (upholding denial of continued employment for cook at naval base so long as reason for denial was not "patently arbitrary or discriminatory").

72. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (upholding county regulation limiting length of policemen's hair against Fourteenth Amendment challenge so long as regulation had "rational connection" to legitimate government interest in promoting public safety).

and that patronage hiring even for such politically neutral positions promotes that goal.⁷³ As Justice Stevens pointed out, though, patronage has not been shown to have played a meaningful role in the preservation of the two-party system.⁷⁴ Moreover, while maintaining a two-party system is arguably a desirable goal, it is clearly not a constitutional mandate like the protection of an individual's freedom of political association and speech. Indeed, even if a rational relationship were established in this case, it seems entirely improper to sacrifice public employees' freedom of political expression in the interest of fostering the two political parties' well-being.

The government jobs at issue in the *Rutan* case should certainly lie outside the appropriate reach of any patronage hiring system, even under rational-relationship review. The majority reached the correct result, but in doing so, they extended the reach of *Elrod* and *Branti*—decisions that had already created a hopelessly inconsistent and unpredictable jurisprudence in this area that fails to protect the very interests *Elrod* and *Branti* rightly seek to uphold. The test chosen by the majority in *Rutan* has proven impossible to apply in a consistent and logical manner, because determining whether a particular government job is appropriately a “political” appointment is an inherently political question—one poorly suited for judicial determination. First Amendment rights of public employees would be better protected by allowing state legislatures to determine which jobs are appropriate for patronage practices, subject only to rational-relationship review by the courts. This approach would most effectively serve the dual purposes of allowing patronage hiring for those jobs in which political partisanship is desirable and of minimizing the chilling effects on public employees' political associations by apprising employees whether their job is one in which they may be dismissed for not supporting the party in power.

Steven G. Heinen

73. See *Rutan*, 110 S. Ct. at 2754 (Scalia, J., dissenting).

74. See *id.* at 2742 n.4 (Stevens, J., concurring).

