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n196 See, e.g., DERRICK BELL, RACE, RACISM & AMERICAN LAW 856-57 (3d ed. 1992); David C. Baldus, The Death Penalty Dialogue Between Law and Social Science, 70 IND. L.J. 1033, 1039-40 (1995); Stephen L. Carter, When Victims Happen to Be Black, 97 YALE L.J. 420 (1988); A. Leon Higginbotham, Jr., Racism in American and South African Courts: Similarities and Differences, 65 N.Y.U. L. REV. 479 (1990); Kennedy, supra note 188.

n197 See, e.g., Zant v. Stephens, 462 U.S. 862, 885 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gregg v. Georgia, 428 U.S. 153, 187 (1976).

n198 Batson v. Kentucky, 476 U.S. 79, 97-99 (1986).

n199 McCleskey, 481 U.S. at 287, 291 n.7.

n200 As noted previously, this was the conceptually more difficult claim. The Baldus Study indicated that the race of the defendant did matter in that African-American defendants "were 1.1 times as likely to receive a death sentence as other defendants" but these results were not statistically significant. Id. at 287. African-American defendants who killed white victims had the highest probability of receiving a death sentence, and by implication, white defendants who killed African-American victims had the lowest.

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Indeed, from the Court's decision, it appears a criminal defendant such as McCleskey would have to produce direct evidence of discrimination in his particular case, such as statements by the prosecutor or by jury members, or perhaps clear statistical evidence demonstrating that no white had ever been given a death sentence. This is the same kind of evidence the Court seemed to demand in its earlier equal protection cases such as Mobile v. Bolden and Memphis v. Greene, which suggests that while the McCleskey Court may have reversed its doctrinal presumption regarding drawing inferences from unexplained events, the conclusions remained the same. As discussed in the next section, the reason McCleskey is ultimately consistent with the Court's prior doctrine is that the Court never took this presumption seriously when applying it concretely. Accordingly, McCleskey simply made explicit what had previously been implicit in the Court's doctrine -- that the Court was loathe to see discrimination absent overwhelming proof.

Of course, one problem with McCleskey's challenge was that the Baldus study proved too much. Because McCleskey based his claim on general rather than specific data, sustaining his challenge would have indicted the entire Georgia death penalty scheme -- clearly an indictment the Court was not prepared [\*323] to hand down. n201 Again, this concern represents a repeated theme in the Court's cases. For example, in Washington v. Davis the Court feared that allowing a disparate effect challenge under the Constitution would necessarily result in invalidating an extensive array of social services. n202 In Mobile v. Bolden, the Court was likewise troubled by the number of jurisdictions employing multimember voting districts that might be affected if the Court sustained the plaintiff's challenge. But as Justice Stevens commented in his dissenting opinion in McCleskey, this was a peculiar concern for the Court to express:

"The Court's decision appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia. If society were indeed forced to choose between a racially discriminatory

death penalty . . . and no death penalty at all, the choice mandated by the Constitution would be plain." n203

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n201 See id. at 297-99. Justice Scalia most emphatically expressed the concern with the pervasiveness of discrimination in his now famous internal Memorandum on the case. In that Memorandum Justice Scalia wrote: "I do not share the view, implicit in [Justice Powell's draft] opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof." Memorandum to the Conference, re: McCleskey v. Kemp, January 6, 1987, located in The Papers of Thurgood Marshall, Box 425, Folder 7.

n202 See supra note 96.

n203 McCleskey, 481 U.S. at 367 (Stevens, J., dissenting). Justice Stevens, of course, offered a different view in his concurring opinion in Mobile v. Bolden, discussed supra text accompanying notes 139-52. This may be a function of either the different contexts -- voting and the death penalty -- or it might be a result of Justice Stevens's evolving views of racial discrimination. Compare Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting) (voting to strike down federal set-aside program) with Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting) (voting to uphold federal set-aside program).

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The Court, however, made a different choice by choosing to preserve Georgia's death penalty system despite evidence that it was administered in a racially discriminatory manner. To be sure, only six years earlier the Court had reinstated the death penalty as a sentencing option available to states n204 and was unlikely to condemn so quickly death penalty systems across the country. In this respect, McCleskey's challenge may have come too early, but the real lesson seems to be that the Court is willing to see discrimination only when other values are not implicated by the case, or when the only plausible conclusion is that discrimination caused the result that is in question. n205 In this light, perhaps [\*324] the best way to reconcile Batson with McCleskey is to suggest that for the Court, stating a claim of discrimination is one thing, while proving a claim is something altogether different.

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n204 See Gregg v. Georgia, 428 U.S. 153 (1976).

n205 See Duren v. Missouri, 439 U.S. 357 (1979) (finding that state failed to offer any proof for significant underrepresentation of women on jury venires); Castaneda v. Partida, 430 U.S. 482 (1977) (finding that statistical disparities demonstrated discrimination against Hispanics); Turner v. Fouche, 396 U.S. 346 (1970) (invalidating jury selection process based on substantial deviations

from what would have been expected in a random process). For example, in *Hernandez v. New York*, 500 U.S. 352 (1991), the Court failed to equate excluding individuals from a petit jury because of their Spanish-language abilities with discrimination based on national origin, as the Court failed to see the one as a proxy for the other.

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3. Burdens of Proof and Employment Discrimination

Since the early 1970s, the Supreme Court has devoted more attention to employment discrimination than to any other branch of discrimination law, and it is in this area that the Court's model for proving individual cases of discrimination has been developed most extensively. At the same time, the question the Court has been addressing in the context of employment discrimination is the same question that lurks in *Arlington Heights*, *Mobile v. Bolden*, and *Batson*: what evidence will give rise to an inference of discrimination? The primary difference between these contexts is that in the area of employment discrimination, the Court has developed its doctrine by means of statutory interpretation, rather than constitutional analysis; as I shall demonstrate, however, the Court's approach in the statutory and constitutional areas is; for all practical purposes, identical. That is, just as it did in *Arlington Heights*, the Court announces evidentiary principles in its employment decisions that are designed to ferret out subtle discrimination, but that repeatedly fail to identify discrimination that is subtle rather than overt.

a. Framing the Inquiry: *McDonnell Douglas* to *Furnco*. In a series of cases beginning in 1973, the Court created what has become a familiar proof structure for individual cases of employment discrimination. n206 The structure is familiar not only because it has become an entrenched part of employment discrimination law, but also because it was developed based on familiar principles of evidence, including the use of presumptions to control the order of proof. Moreover, just as is true in the other areas in which the Court has developed standards for proving discrimination, the evidentiary presumptions obtain their meaning from the Court's understanding of history and experience. n207

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n206 The following is a list of the principal cases: *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

n207 Unfortunately, those who discuss the Court's proof structure routinely ignore this important aspect of that structure's development. See, e.g., *Krieger*, supra note 25, at 1178-81 (discussing pretext model but not focussing on its basis); *Malamud*, supra note 25, at 2245-54, 2264-69 (discussing the *McDonnell Douglas-Burdine* standard without exploring its origin).

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The proof structure for individual cases of intentional employment discrimination consists of a three-step process. The first step is to

establish a prima facie case of discrimination by establishing that the plaintiff is a member of a protected group, that she was qualified for the job, and that she did not get the job while someone else did. n208 Although meeting these requirements is generally not a burdensome task, each part of the inquiry serves a defining purpose. [\*325] Establishing that the plaintiff is part of a protected group introduces race into the process -- not in any definitive way, but as a possible explanation for the employer's actions. The next two steps eliminate the most common reasons for why a person did not receive the job -- she was unqualified or no job was available. n209 As a result, the prima facie case includes what might be considered -- or more accurately, what the Court considered -- the three most common reasons on which employers base their hiring decisions: the person's race, the person was unqualified, and there was no job available. As was true in the cases discussed earlier, the Court's proof structure for employment discrimination cases is premised on a notion that employers take race into account in order to disadvantage African-Americans, and race is thus treated as a relevant explanatory variable -- one that has the power to explain results that could otherwise be attributed to any number of other plausible reasons. This, of course, is the very same presumption underlying the Court's decision in Yick Wo. n210

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n208 McDonnell Douglas, 411 U.S. at 802.

n209 Burdine, 450 U.S. at 253-54 ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.").

n210 See supra text accompanying notes 64-71.

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Although the Court has never fully articulated the rationale behind its proof structure, its decision in Furnco Constr. Corp. v. Waters n211 offers a partial explanation. In discussing the function of the prima facie case, the Supreme Court explained:

A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race. n212

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n211 438 U.S. 567 (1978). Furnco involved three bricklayers who alleged that they had been subjected to discriminatory treatment in employment and assignments primarily as a result of the company's policy to hire by word-of-mouth rather than through other available means. Id. at 571-72. The

Court's opinion, written by Justice Rehnquist and issued one day after the Court's decision in Bakke, chastised the appellate court for requiring the employer to engage in the most efficient employment practice. Id. at 576. A more charitable reading of the lower court opinion would be that the lower court found the employer's word-of-mouth recruiting policy to be a pretext for discrimination, on the basis that the more common practice of hiring those who appeared for work at the gate would have yielded less discriminatory results at lower costs.

n212 Id. at 577.

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Two important propositions are implicit in the Court's analysis. The first is that employers are generally able to offer explanations for their actions. n213 In other words, we do not expect employers to act in a purely arbitrary fashion. [\*326] The second is that when employers are unable to provide a convincing explanation for their actions, a court may infer that the true reason was discrimination.

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n213 The structure also places the burden on the party that has access to the information as to the employer's rationale. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977).

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Several commentators have recently suggested that neither of these propositions is empirically plausible. n214 Yet, the proposition that people are rational, at least in the limited sense that they act for articulable reasons even if the underlying reasons may not themselves be rational, informs almost all of law. n215 Surely we would not expect an employer to respond "I don't know" when asked why she fired a particular employee, and all the prima facie proof structure requires is that the employer be able to articulate a reason for its action. n216 In addition, it seems that the recent critique of rationality misunderstands what the Court meant by "rational" in the proof process. The assumption of rationality implies only that the employer is able to articulate a reason, or reasons, for her decision, not that the particular decision is, in and of itself, rational. n217

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n214 See Krieger, supra note 25, at 1181-82 (challenging the notion that "absent discriminatory animus, employment decisionmakers are rational actors"); Malamud, supra note 25, at 2255 (disputing the idea that "absent discrimination, employment decisions are -- and can be proved to be -- fair and reasonable").

n215 Indeed, an even stronger presumption of rationality underlies economic analyses of law. See, e.g., John J. Donohue, III, Employment Discrimination Law in Perspective: Three Concepts of Equality, 92 MICH. L. REV. 2583, 2590-2605 (1994) (discussing and critiquing economic perspective on labor markets); Richard A. Posner, An Economic Analysis of Sex Discrimination Laws, 56 U. CHI. L. REV. 1311, 1318-21 (1989) (describing theories of discrimination); Cass R. Sunstein, Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies,

79 CAL. L. REV. 751 (1991) (describing principles).

n216 Nor is there any requirement that the reason be singular; an employer can articulate as many reasons as it has for its decision. For example, in Hicks, the employer identified two reasons for firing the employee -- the frequency and severity of violations. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); see also Tye v. Board of Educ. of Polaris Joint Vocational Sch. Dist., 811 F.2d 315, 318 (6th Cir.) (providing ten reasons for employer's action), cert. denied, 484 U.S. 924 (1987).

n217 Both Professors Krieger and Malamud seem to confuse this distinction, as their critiques equate "rational" with "reasonable" rather than "articulable" -- a proposition the Court has expressly disavowed. See Purkett v. Elem, 514 U.S. 765, 767-68 (1995) (noting that "the second step of this process does not demand an explanation that is persuasive, or even plausible"). At one point in her article, Professor Malamud seems to acknowledge as much when she identifies the employer's burden as "so light as to be trivial." Malamud, supra note 25, at 2302. There may be times when the employer does not know the reason for its action -- the records, for example, may have been destroyed in a fire -- but in the ordinary course of events it does not seem too much to expect an employer to be able to provide a reason for its decision.

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The second proposition -- that discriminatory impulses often provide the rationale for an employer's decision -- is more controversial, but remains essential to understanding the Court's model for analyzing allegations of intentional employment discrimination. Within the framework developed by the Court in McDonnell Douglas and its progeny, once an employer articulates the reason for its decision, the legal battle becomes one between discrimination, on the one hand, and the employer's asserted rationale on the other. This principle flows from the initial prima facie case: given that the other likely explanations (the plaintiff's lack of qualifications and the absence of a job) have been eliminated, and that discrimination has been introduced as a relevant variable, the court is effectively [\*327] left to choose between a discriminatory motive and the employer's asserted, nondiscriminatory one. n218 In this way, the prima facie case narrows the universe of possible explanations to encompass only the two proffered hypotheses. n219

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n218 This point was highlighted by Justice O'Connor in her controversial concurring opinion in Price Waterhouse v. Hopkins: "The prima facie case . . . [is] based only on the statistical probability that when a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision." Price Waterhouse v. Hopkins, 490 U.S. 228, 270 (1989).

n219 See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

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This binary nature of the Court's model is central to understanding how the Court intended discrimination to be proven. By separating the world into

"discrimination" and "nondiscrimination," the Court's model resembles hypothesis testing, a statistical procedure in which a researcher sets out to prove a proposition by attempting to disprove it. n220 In the employment context, the hypothesis of discrimination is, therefore, tested against a hypothesis of nondiscrimination (in statistical terms, the null hypothesis). n221 Implicit in the binary nature of hypothesis testing is the fact that the researcher is only seeking to establish whether a particular hypothesis is true and is not trying to answer the larger question of "what is truth." To accomplish this goal, the researcher collects sufficient information, as measured against the acceptable standards of proof within the particular discipline, to confirm or disprove the null hypothesis. The McDonnell Douglas proof structure asks a similar question: was discrimination the cause of the action that is under investigation? In conducting this inquiry, a court is not concerned with what the real reason was in some absolute or abstract sense, but only with whether discrimination can be established as the employer's motive consistent with the applicable standard of proof; that is, in the context of a civil lawsuit, the preponderance of the evidence standard. n222

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n220 See CHARLES M. JUDD ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 46 (1991) (noting that "when we are interested in one hypothesis, we start with its opposite in statistical inference"); D.H. Kaye, What is Bayesianism? A Guide for the Perplexed, 28 JURIMETRICS J. 161, 162 (1988) (noting the comparison between trials and the testing of statistical hypotheses).

n221 See JUDD ET AL., supra note 220, at 50-51.

n222 In Anderson v. Bessemer City, 470 U.S. 564 (1985), the Court made this presumption explicit, noting that

even the trial judge, who has heard the witnesses directly and who is more closely in touch than the appeals court with the milieu out of which the controversy before him arises, cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not.

Id. at 580.

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The Court's proof structure differs from the model used in the social sciences in that the employer, after the plaintiff establishes a prima facie case, is required to articulate alternative explanations for the challenged decision. Thus, rather than measuring discrimination against nondiscrimination in a statistical manner, the Court measures discrimination against the employer's asserted reasons, testing those explanations against the discrimination hypothesis. So if the employer states that [\*328] an individual was fired because of her poor attendance, the legal inquiry concerns which hypothesis is more likely than not true: discrimination or poor attendance.

It is important to emphasize that the entire McDonnell Douglas proof structure was premised on a belief in the power of discrimination as an explanatory variable -- a belief that is central to the Court's entire

antidiscrimination doctrine because otherwise that proof structure would be of limited value. Yet, despite the Court's purported fidelity to that principle, there is a real question whether the Court was willing to follow its principle to its logical conclusion. Moreover, as should be clear, the Court's standards of proof for discrimination in other contexts have always been exceptionally demanding. n223 In addition, I would suggest that all of the attention that has been paid to the McDonnell Douglas proof structure has, in large measure, masked the substantive conclusion that the standard of proof in cases purportedly applying this framework has likewise been very difficult to meet. n224 The Court's recent decision in St. Mary's Honor Center v. Hicks, n225 in many ways, removed that mask.

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n223 It is worth keeping in mind that the plaintiffs failed to establish a claim in Feeney, Furnco, and in Arlington Heights. See Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581 (1978); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

n224 Professor Theodore Eisenberg has documented that employment discrimination cases tried before a judge tend to have a lower success rate than many other kinds of civil actions. See Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, 77 GEO. L.J. 1567, 1588 (1989). Interestingly, when employment discrimination cases are tried to a jury, the success rate improves although it is still lower than most other causes of action. See id. at 1591.

n225 509 U.S. 502 (1993).

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b. The Hicks Case. The Court's decision in the Hicks case has already been the subject of extensive commentary, most of it critical. n226 There is, however, a notable exception. Professor Deborah Malamud has written a lengthy and generally approving analysis of the Court's decision, which has itself received considerable attention. n227 In this section, I hope to show where the Court went wrong in the Hicks case, and by implication how Professor Malamud likewise errs in her analysis. At the same time, I will try to place the decision in the larger context of the Court's discrimination doctrine, for it provides an apt summary of the issues and conflicts that appear throughout that doctrine and speaks to the very essence of what it means to prove discrimination.

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n226 See Deborah A. Calloway, St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption, 26 CONN. L. REV. 997 passim (1994); William R. Corbett, The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks, 30 GA. L. REV. 305, 342-58 (1996); Jerome McCristal Culp, Jr., The Michael Jackson Pill: Equality, Race, and Culture, 92 MICH. L. REV. 2613, 2621-22 (1994); Krieger, supra note 25, at 1209-24; Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII, 35 WM. & MARY L. REV. 805, 841-42 (1994).

n227 See Malamud, supra note 25. For references to and commentary on Professor Malamud's article, see Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061 (3rd Cir. 1996); Smith v. F.W. Morse & Co., 76 F.3d 413 (1st Cir. 1996); Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996); Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 TEX. L. REV. 1655, 1692 n.56 (1996) (referring to Professor Malamud's "thoughtful defense of [a] much maligned decision").

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[\*329] The Hicks case raised an important and difficult question in employment discrimination law: what inference should a court draw when the plaintiff has successfully disproved the employer's asserted reason for its decision? n228 The plaintiff in the case, Melvin Hicks, was an African-American who worked at a correctional institution, where he had a number of confrontations with his boss. Hicks's supervisor disciplined him for workplace infractions and then demoted him from shift commander to correctional officer. Following an argument with his supervisor, Hicks was terminated altogether. n229 As the only African-American among the six shift commanders at the facility, Hicks alleged he had been subjected to discriminatory treatment because he had been disciplined more severely than white shift commanders who had committed similar or more serious offenses. n230

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n228 This is also known as "proving pretext." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

n229 Hicks, 509 U.S. at 502.

n230 Id. at 503-04.

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Hicks had no difficulty establishing a prima facie case: he was African-American, he was qualified for the position by virtue of the fact that he had been promoted, and he was demoted and then discharged while the position remained open. n231 The burden of articulating a reason for Hicks's demotion and firing then shifted to the defendant. St. Mary's Honor Center responded by asserting two justifications: the frequency and severity of Hicks's offenses. n232 Hicks, in turn, established that these were not the true reasons for the defendant's actions. He used circumstantial evidence to demonstrate that "similar and even more serious violations committed by [his] co-workers were either disregarded or treated more leniently," and that his supervisor had provoked the confrontation in order to create a reason to fire Hicks. n233 In the language of employment discrimination law, Hicks had proven pretext; he had demonstrated that the employer's reasons were not worthy of credence. n234 But the question remained whether Hicks had proven race discrimination, and the district court held that he had not. Sitting as the trier of fact, the district court concluded that Hicks's supervisor was motivated by a personal vendetta against Hicks -- a motivation that the employer had explicitly disclaimed during the trial. n235

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n231 The prima facie cases in discharge and promotion cases differ somewhat from the hiring cases because there is generally a presumption that the person was qualified for the position he was holding.

n232 Id. at 507.

n233 Id. at 508.

n234 See Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1251 (E.D. Mo. 1991) (noting that plaintiff had "carried his burden in proving that the reasons given for his demotion and termination were pretextual"). In this way, Hicks had also presumably satisfied the Feeney question by proving that if he had been white, he would not have been disciplined so severely.

n235 Hicks, 509 U.S. at 543 (Souter, J., dissenting).

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As framed by the Supreme Court, the question presented in Hicks was whether a finding of pretext required, or merely allowed, the trier of fact to infer discriminatory intent. n236 This was a question on which the Court's prior employment [\*330] discrimination doctrine was decidedly equivocal. As noted earlier, the Court had set forth its elaborate structure for proving discrimination in a series of cases, all of which used the language of pretext though many of the cases varied in their specific usage. n237 At times the Court had suggested that proving pretext was the equivalent of proving discrimination. n238 At other times, the Court had stated that the plaintiff's burden was to prove that the employer's decision was a pretext for discrimination, thereby suggesting that there might be a distinction between pretext and discrimination. n239 Lower courts were likewise split on the issue. n240 As is so often the case, the only thing made clear by the Court's earlier decisions was that the Court had never paid close attention to the distinction between pretext and pretext for discrimination. n241 In Hicks, the Court resolved the matter by holding that a finding of pretext may, but need not, suffice to prove discrimination, thereby leaving the ultimate finding of discrimination to the discretion of the factfinder. n242

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n236 Id. at 511 (choice was between whether the presumption "permits" or "compels" a finding of discrimination).

n237 See supra note 206.

n238 In Burdine, for example, the Court described the plaintiff's burden as follows:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. . . . She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). As the

Supreme Court noted in Hicks, the clearest statement equating pretext with discrimination came in a concurring opinion by Justice Blackmun, in which he noted that a plaintiff must have the opportunity to prove that the employer's proffered reason "is pretextual, that is, it is 'not the true reason for the employment decision.'" United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717 (1983) (Blackmun, J., concurring) (quoting Burdine, 450 U.S. at 256) (cited in Hicks, 509 U.S. at 519-20).

n239 See Aikens, 460 U.S. at 715 (noting that plaintiff must prove that "the rejection was discriminatory within the meaning of Title VII"); Furnco Const. Corp. v. Waters, 438 U.S. 567, 578 (1978) ("The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination."). The Court made a number of statements that were contradictory on this point. See Aikens, 460 U.S. at 716 ("the district court must decide which party's explanation of the employer's motivation it believes"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805-07 (1973) (plaintiff must show that employer's rationale was "a pretext or discriminatory in its application" and must show that "his rejection [was] in fact a coverup for a racially discriminatory decision").

n240 Compare Pollard v. Rea Magnet Wire Co., 824 F.2d 557 (7th Cir.), cert. denied, 484 U.S. 977 (1987) (reasoning proof of pretext is not necessarily sufficient to establish discrimination) with Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir. 1987) (proving employer's justification is unworthy of credence establishes liability).

n241 Indeed, both the majority and dissenting opinion arguably conceded as much. See Hicks, 509 U.S. at 518 ("Our interpretation of Burdine creates difficulty with one sentence; the dissent's interpretation causes many portions of the opinion to be incomprehensible or deceptive."); id. at 530-31 (Souter, J., dissenting) (discussing majority's interpretation of precedent).

n242 Id. at 511.

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Casting aside the entirely inconclusive and muddled precedent, which both Court opinions took great pains to reconcile with their respective positions, the dissent surely had the better logic on its side. Following the statistical analogy discussed earlier, a prima facie case of discrimination establishes a hypothesis of discrimination, which is then opposed by a theory of nondiscrimination, the null hypothesis. In Hicks, the plaintiff's hypothesis of discrimination opposed [\*331] the employer's asserted, nondiscriminatory justifications for its decision. In symbolic terms, at issue in Hicks was "D" and "not D," where "D" represents discrimination. When the plaintiff disproved the employer's hypothesis of "not D," that left "D" as the only remaining alternative. After all, these were the only possibilities that the McDonnell Douglas framework had placed on the table, which is, of course, different from saying that what was on the table included all of the possible alternatives. In the abstract, there were many reasons that could have supported the employer's decision (perhaps Hicks was left-handed and the jail keys were designed for a right-handed person). However, the case had not focussed on these alternate, unstated reasons, and consequently Hicks had no reason to try to refute them.

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n243 In this case, the situation was actually more complicated, given that the defendant specifically disclaimed the reason the court ultimately accepted. Professor Malamud finds this aspect of the district court's decision unremarkable because she assumes that it was premised on its finding that the employer lied about everything. See Malamud, supra note 25, at 2240 n.38. Actually, it might be more accurate to say that the Court found that the employer lied about everything other than whether it had discriminated. Be that as it may, it is worth considering the difficulty of trying to disprove a theory the employer has disavowed. During cross-examination, would it be necessary to press the issue, such as the personal vendetta against the plaintiff, in order to ensure that the employer really means it when she says that she had no personal vendetta? Many other proof problems arise when the district court is allowed to scour the record for rationales that were never asserted by the employer. For example, on remand the defendant prevailed largely by disavowing the testimony of its primary witness. See Hicks v. St. Mary's Honor Ctr., 90 F.3d 285, 290 (8th Cir. 1996) (noting that "defendants' counsel now abandons the rule violations explanation (even though [the witness] himself does not) and astutely embraces 'personal animosity' as the justification for defendants' actions").

-End Footnotes-

In her recent article, Professor Malamud contends that this binary approach to discrimination issues is deficient as a model of proof because the world in which employment decisions are made is not readily divisible into discriminatory and nondiscriminatory segments. In the realm of employment, Malamud argues, there are too many alternative explanations for an employer's decision to allow inferences of discrimination based solely on proof of pretext. Although Malamud's careful analysis deserves close attention, she ultimately fails to make the case that the underlying presumption of discrimination is either unrealistic or valueless. Despite the various arguments she provides to support her conclusion that discrimination is not the cause of all unjustified actions against members of protected classes, implicit in her argument is a belief that race discrimination no longer offers the explanatory power required to support an inference of discrimination once the plaintiff disproves the employer's articulated reason. Even after an employee disproves all of the employer's proffered reasons, Malamud concludes, there remain many possible explanations for an employer's actions for the court to consider. n244

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n244 Much of Professor Malamud's argument on this point is difficult to follow. For example, Professor Malamud notes that many individuals file claims under the Merit Systems Protection Act (MSPA) and the National Labor Relations Act, and she concludes from this that discrimination cannot explain all workplace decisions in which the employer's reasons are disproved. Malamud, supra note 25, at 2256-58. Yet, this argument is an apparent non-sequitur -- presumably the individuals who file claims under the MSPA do not file the same claim under all the various statutes, and if they do not, it is difficult to see the relevance of the fact that in unrelated cases there are other governing statutes that may provide a cause of action. Professor Malamud may be trying to get at a different concern: that employers may be hesitant to state the real reasons for their employment decisions when those reasons may violate a

different statute, such as the MSPA. This was clearly a concern of the Court in Hicks. See Hicks, 509 U.S. at 521 ("Title VII is not a cause of action for perjury; we have other civil and criminal penalties for that."). If that is the case, then the question for the Court is whether it ought to take steps to protect those employers who are reluctant to disclose the true reasons for their actions, or whether it will require employers to come forward with the best evidence as to the rationale for the decision. That is ultimately an issue that neither the Hicks Court nor Professor Malamud adequately addresses, other than to suggest that proof that an employer violated the MSPA is not equivalent to proving discrimination. Malamud, supra note 25, at 2257. But no one would argue the contrary; rather, the issue is what evidence will lead to an inference of discrimination and whether the Court ought to consider the theoretical possibility that there might be an unstated rationale lurking somewhere in the record.

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[\*332] Although Professor Malamud accurately captures the Court's rationale, her argument seems premised on the notion that there is something unique about discrimination cases that would render the rules and procedures governing civil disputes inoperative. For example, rather than requiring a mere preponderance of the evidence, she mentions "certainty" as the defining legal standard of proof. n245 Even though she likely does not intend to suggest certainty as the appropriate standard of proof, her word choice reveals that she believes discrimination is often too easy to prove. Moreover, like the Hicks Court, she spends an inordinate amount of energy suggesting that the Hicks decision is consistent with the burden-shifting structure originally articulated by the Court in McDonnell Douglas. n246 When all is said and done, however, Hicks is not really about the appropriate burden of proof, nor about whether the Court's decision is consistent with precedent. Instead, the Hicks case is about how discrimination is proved; what evidence will give rise to inferences of discrimination, and where the Court will draw the line. It is, in that respect, about the same question that was at issue in Arlington Heights, and the result, not surprisingly, turns out to be the same. In both instances, the Court creates structures for proving discrimination through the use of circumstantial evidence, but which in reality turn out to be exceedingly difficult to meet. The primary reason, in both cases, is that the Court is unwilling to accept the necessary implication of its proof structure: that discrimination remains a vital explanation for workplace and other social and political decisions. Without that presumption, the proof structures become empty formalities that provide little evidentiary guidance, and discrimination becomes something akin to left-handedness: a possible but by no means expected or convincing explanation.

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n245 She writes: "It is by no means certain that any particular unexplained adverse act toward a woman or a member of a minority group is the result of discrimination." Malamud, supra note 25, at 2254 (emphasis in original). This statement recalls the Court's standard as applied in McCleskey. See supra text accompanying note 195.

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But there is more to this dispute. In Hicks, the Court was faced with the difficult question of where to draw the line in discrimination cases, and the majority's approach unquestionably offers employers some protection against [\*333] unfounded judgments of discrimination -- an aim that the Court explicitly acknowledged. n247 And yet the Hicks Court fails to acknowledge that, as a result of its decision, some deserving plaintiffs will lose out. n248 That is, after all, the unavoidable result of drawing lines. Because it is impossible to draw a line that is perfectly accurate and thus would prevent all erroneous decisions, line-drawing requires deciding upon which side it is better to err. In Hicks, the Court had to choose between protecting unfounded judgments against employers on the one hand or ensuring maximum protection to the victims of discrimination on the other. No other choice is available, and this is a choice upon which the preponderance of the evidence standard is notably agnostic. n249

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n246 See Malamud, supra note 25, at 2264-69 (attempting to reconcile Hicks with McDonnell Douglas, Aikens, Furnco, and Burdine).

n247 See Hicks, 509 U.S. at 514-15.

n248 In contrast to the Court, Professor Malamud expressly acknowledges this problem. See Malamud, supra note 25, at 2262 (acknowledging that "it is inevitable that some discriminatory employers will not be held liable for their actions").

n249 See In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) ("In a civil suit between two parties . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor."); Schauer & Zeckhauser, supra note 60, at 34 ("The preponderance of evidence standard used in most civil litigation reflects the view that a failure to find for a deserving plaintiff is no less harmful than holding liable a nonculpable defendant.").

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Though the evidentiary standard may not compel a choice, many other reasons should have suggested to the Hicks Court that a mandatory inference of discrimination should follow from proof of pretext. First, holding that a lower court "may but need not" enter a finding of discrimination when the plaintiff disproves the employer's proffered reasons vests a great deal of discretion in the factfinder to draw the necessary inference of discrimination. n250 However, as the Supreme Court explained most clearly in Batson, n251 discretion is often the means through which discrimination enters the process, and by protecting a discretionary sphere the Court provides too much interpretive room for judgment, especially for those courts that may not be sensitive to the complexities of discrimination. n252 It allows, in this sense, too much politics into the process.

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n250 Professor Malamud expressly approves of this aspect of the Court's decision. Malamud, supra note 25, at 2272 (concluding that vesting discretion in the trier of fact was the right thing to do).

n251 See supra text accompanying notes 183-84.

n252 Cf. McCleskey v. Kemp, 481 U.S. 279, 313 (1987) ("Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.").

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Moreover, adopting the position of the dissent would not have unfairly burdened employers. As a practical matter, the dissent's rule would do little more than force employers to come forward with the actual reasons for their decisions. If those reasons turned out to violate another statute, the employer would be subject to suit under that statute. It is difficult to see how such a result could be construed as unfair; after all, the employers in this scenario would have broken the law, and there is no readily apparent reason why a court would want to protect an employer under those circumstances.

Yet Hicks is ultimately consistent with the Court's long-standing refusal to expand the definition of discrimination and the Court's inability to recognize [\*334] discrimination absent some clear evidence of exclusion. Much as Arlington Heights and McCleskey did in the context of equal protection, the Hicks case offers a lesson in the difficulty of proving an employment discrimination claim when the causal inference necessary to establish intent is left to the expectations and assumptions of the decisionmaker. Ultimately, the Court's skepticism about the force of discrimination in the world, forcefully present in Hicks, serves as a unifying theme across the Court's discrimination doctrine.

III. THE LESSONS AND IRONIES OF THE COURT'S DOCTRINE

The prior sections of this article sought to demonstrate the guiding principles that have animated the Court's requirements for proving intentional discrimination in both the constitutional and statutory contexts. From the time of Yick Wo to the present, we have seen the Court confront the critical question of how plaintiffs can prove an intent to discriminate based on circumstantial evidence. As I have argued, for at least the last twenty years the Court has recognized that discrimination has become more subtle -- and correspondingly more difficult to prove. Likewise, the Court has repeatedly suggested that the pervasiveness of discrimination in our society requires that courts treat discrimination as a relevant explanatory variable. And yet, despite these oft-professed principles, the Court consistently fails to find discrimination unless it is overt; subtle discrimination continues to elude the Court's understanding of intentional discrimination.

In this light, perhaps the most important lesson offered by my analysis of the Court's doctrine is that its antidiscrimination doctrine has not evolved. From the 1950s, when the Court first defined separate but equal facilities as discriminatory, the Court has seen discrimination only when there are formal barriers predicated on race or when ostensibly neutral practices have led to the total, or near total, exclusion of African-Americans. The Court's reluctance to draw inferences of discrimination is evidenced by the fact that the Court has never invalidated a statute or practice based on the factors articulated in its Arlington Heights decision. That is, when the Court engages in the "sensitive inquiry" of circumstantial proof mandated by Arlington Heights, it invariably fails to find intentional discrimination and upholds the challenged

governmental practice. n253 In contrast, the Court is quick to find unlawful discrimination in the affirmative action and redistricting cases because there the use of race is overt. n254 Increasingly, [\*335] then, the Court sees discrimination only in practices intended to remedy past, or present discrimination, but is unable to recognize discrimination when it is subtle in form.

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n253 See Hernandez v. New York, 500 U.S. 352, 371 (1991) (rejecting challenge to prosecutor's peremptory challenges); Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (establishing standard for determining when school district may dissolve or terminate desegregation order); McCleskey, 481 U.S. at 319 (rejecting racial discrimination challenge to death sentence); City of Memphis v. Greene, 451 U.S. 100, 128-29 (1980) (upholding City's decision to close street); Mobile v. Bolden, 446 U.S. 55, 80 (1980) (upholding at-large election scheme).

n254 The conclusion that race was a factor in drawing the voting districts that the Supreme Court invalidated in Shaw v. Reno seems inescapable despite the state's efforts to suggest otherwise. In Shaw, the state contended that it drew its districts as it did in order to protect incumbents, Shaw v. Reno, 509 U.S. 630, 637 (1993), but the shape of the district could only be explained by suggesting that this particular district, as opposed to some other majority-black district, was drawn so as to protect incumbents. It is quite possible that had the state been more open about its use of race in the initial decision, the Court's doctrine may have developed in a different manner, focusing more on the remedial justifications for the district rather than on whether the district was premised on racial considerations.

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As a practical matter, the Court's unwillingness to infer discrimination from circumstantial evidence means that there are only two situations in which the Court will find discrimination. The first and more rare of these occurs when the factual circumstances "bespeak discrimination" and no other plausible explanation presents itself. n255 The redistricting cases can perhaps be seen as fitting within this classification given that the Court treats the shape of the district as indicative of an intent to discriminate. n256 The second kind of case in which the Court might see discrimination turns out to be more theoretical than real and is presented most clearly by the discussion of Batson and McCleskey, and to a lesser extent by Hicks. In this category of cases, the Court pronounces principles that govern identifying discrimination based on circumstantial proof, but invalidates legislation, or practices, only when the evidence indicates that the legislation results in the total, or near total, exclusion of African-Americans. Short of outright exclusion, the Court is unlikely to find a violation. n257 In this respect, the Court's doctrine regarding what constitutes intentional discrimination remains fixed in its segregation mentality. Once the signs denominating "colored" and "white" facilities were taken down, it has been difficult for the Court to understand what legal problem remained.

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n255 The Court was presented with such a case in Washington v. Seattle School District No. 1, 458 U.S. 457 (1982). In that case, the Court invalidated an initiative that prohibited busing as a means to address segregation. Id. at 487. In so doing, the Court suggested that race was inherent in the busing issue. Id. at 483 (noting that the initiative "burdens all future attempts to integrate Washington schools"). Nevertheless, on the same day, the Court upheld a similar California initiative, though in that case the language was broader in that it affected other issues in addition to race. See Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 532, 545 (1982). While one might succeed in distinguishing these cases, it is also possible to see Crawford as significantly limiting the potential import of the Washington v. Seattle School District case. See Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 705-06 (9th Cir. 1997) (discussing tension between Crawford and Seattle Sch. Dist.), cert. denied, 1997 WL 589411 (U.S., Nov. 3, 1997) (No. 97-369).

n256 See supra text accompanying notes 169-71.

n257 This analysis is consistent with the results of an empirical analysis of cases raising claims of intentional discrimination. See Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How Legal Standards Work?, 76 CORNELL L. REV. 1151 (1991). In their study, Professors Eisenberg and Johnson conclude that at the district court level "intent claimants need 'smoking gun' evidence of discrimination to prevail." Id. at 1187-88.

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A. AN EFFECTS TEST WOULD NOT HAVE MATTERED

Importantly, the Court's doctrine has not gone awry because of its focus on intent. The Court's restricted notion of intentional discrimination suggests that [\*336] even if it had adopted an effects test, the results would likely have been the same. As previously noted, many commentators have argued that the Court has been wrong to hold that the Constitution reaches only intentional discrimination. n258 A number of these commentators have further suggested that had the Court adopted an effects test, its doctrine would have played a stronger role in eradicating intentional racial discrimination. n259 More recently, commentators have made a similar claim with respect to unconscious discrimination, contending that the Court's focus on intent rather than effect has caused it to gloss over the unconscious origins of discrimination. n260 As Professor Charles Lawrence argues, the Court's intent requirement "ignores much of what we understand about how the human mind works." n261

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n258 See sources cited supra note 30.

n259 Id.

n260 As applied to law, the seminal article in this area is by Charles Lawrence, supra note 30; see also Jody D. Armour, Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes, 46 STAN. L. REV. 781, 795-816 (1994) (discussing unconscious discrimination); Johnson, supra note 187, at 1029-31 (discussing unconscious discrimination as it relates to criminal law); Krieger, supra note 25, at 1186-1211 (discussing the role of cognitive bias in discrimination); Oppenheimer, supra note 30, passim

(discussing what he terms "negligent discrimination").

n261 Lawrence, supra note 30, at 323 (footnote omitted).

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Professor Lawrence has provided a powerful critique of the Court's failure to fully understand the nature of contemporary discrimination. It does not necessarily follow from Lawrence's analysis, however, that had the Court adopted an effects test or acknowledged the unconscious origins of discrimination, the results of its cases would have been any different. The fact that the Court chose such a limited definition of intent suggests that it would not have been any more receptive to claims of discrimination based on the disparate effects of a policy. Instead, had the Court chosen an effects test for constitutional challenges, the likely result would have been that courts in most cases would have allowed plaintiffs to state claims; ultimately, however, the Court would have determined that the challenged practices were justified, and therefore that the plaintiffs were not entitled to any relief from those practices.

The reason an effects test would not have altered the outcome has to do with the nature of an impact claim, which can best be explained through the Court's disparate impact employment discrimination cases. Although it is unnecessary for the plaintiff to prove intent under an effects test, the defendant is nevertheless offered an opportunity to justify the challenged practice. And in the context of Title VII, the Court has demonstrated a willingness to accept most asserted justifications. n262 In fact, the Supreme Court has interpreted Title VII impact [\*337] claims almost as restrictively as it has interpreted intent in its constitutional equal protection cases.

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n262 See Wards Cove v. Atonio, 490 U.S. 642, 659 (1989) (altering the standard for proving disparate impact claims). Were the Court to adopt an effects test in the constitutional equal protection context, it would be interesting to see whether the Court would require a neutral practice -- challenged for its disparate effects -- to meet the strict scrutiny test applicable in the constitutional context, or whether it would borrow from the employment context the more lenient business necessity test developed initially in Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which case the employer's practices would be more likely to be upheld. Under the strict scrutiny test, an employer's practice would have to be shown to be narrowly tailored to serve a compelling governmental interest. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989). In contrast, under statutory law, the employer would only need to show that the practice was justified as job-related and consistent with business necessity. See 42 U.S.C. @ 2000(k)(1)(A) (1994).

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That an impact standard would have had little practical significance on the outcome of most discrimination cases is further demonstrated by analysis of those cases in which the Court rejected the applicability of the impact standard. For example, in Washington v. Davis the Court intimated that it was reasonable for a police department to require that its officers have certain reading skills; n263 consequently, it seems highly likely that the Court would have upheld the use of the reading test even under an effects analysis. n264

Similarly, the Court in Feeney expressed its approval of legislation that rewarded veterans for the service they had rendered, thereby suggesting that the practice would have survived an effects analysis. n265 Likewise, the Court treated the traffic barriers at issue in Memphis v. Greene as part of a rational plan to control the city's traffic flow; had the Court employed disparate impact analysis, it doubtless would have found the city's justification sufficient, and the result would have been the same. n266 Furthermore, in Mobile v. Bolden, six members of the Court labeled the city's interests in the at-large voting scheme weighty enough to survive a challenge even under a disparate impact theory. n267

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n263 Washington v. Davis, 426 U.S. 229, 245-46 (1976) (noting that "it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees").

n264 In his analysis of Washington v. Davis, Paul Brest noted that the Court "went on to state that the verbal-ability test was valid even under the Title VII standard." Brest, supra note 62, at 121.

n265 Personnel Administrator v. Feeney, 442 U.S. 256, 265-66 (1979) (discussing history of statute). In its concluding paragraph, the Court did note, however, that public opinion varied regarding the wisdom of veteran's preferences, and it might be more accurate to suggest that the Court registered some ambivalence regarding the practice. Id. at 280-81.

n266 See Memphis v. Greene, 451 U.S. 100, 127 (1981) ("The residential interest in comparative tranquility is also unquestionably legitimate.").

n267 The six Justices include the four members of the plurality as well as the concurring Justices, Stevens and Blackmun. See supra text accompanying notes 148-51.

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The only case for which it is difficult to determine the likely outcome under an effects test is Arlington Heights, although even in that case there are clear indications that the Court would have approved the city's zoning decision under an impact analysis. One such indication is the Court's long-standing reluctance to interfere with private housing decisions absent some clear evidence of racial bias -- especially when it comes to local zoning decisions. n268 Moreover, it seems clear from the decision that the Court did not view the city's actions as discriminatory, as the Court saw the city's decision as part of its growth plan. "Single-family homes surround the [proposed] site," the Court wrote "and the Village is undeniably committed to single-family as its dominant residential [\*338] land use." n269 Given this perspective, the Court again would have likely upheld the action in Arlington Heights based on the city's preference for single-family homes, even under the test applied in disparate impact cases.

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n268 See Memphis v. Greene, 451 U.S. at 126; Milliken v. Bradley, 418 U.S. 717, 752-53 (1974) (rejecting interdistrict remedy for public school segregation in the city of Detroit).

n269 Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 269 (1977).

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Because the Court has premised its antidiscrimination doctrine on a limited vision of discrimination, it should come as little surprise that had the Court chosen a different legal standard, it would not have significantly changed the course of its analysis. In some ways this conclusion follows insofar as the same Court would be applying whatever standard it chose, and, the Court's restrained vision would have limited the successful application of any such standard. Substantially different results would have required a different Court rather than a different legal standard. In addition, it is important to note that in each of the cases just discussed, as well as in McCleskey and Hicks, n270 there was sufficient evidence to establish an intent to discriminate, and in all but Arlington Heights a lower court found that the evidence constituted intentional discrimination. n271 Although in some of the cases the lower court applied a different legal standard than that mandated by the Supreme Court, the difference in interpretations had more to do with the varying visions of what acts constituted discrimination than in the application of the legal standard. In the end, it was not the lack of "intent" that led the Court to reject the plaintiffs' challenges in these cases; rather, the Court was guided by its normative conclusion that the challenged practices were acceptable. n272

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n270 See supra notes 198-200, 236-43 and accompanying text.

n271 See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980); Greene v. City of Memphis, 610 F.2d 395, 403 (6th Cir. 1979); Bolden v. City of Mobile, 571 F.2d 238, 244 (5th Cir. 1978).

n272 Shifting the analytical focus to unconscious or subtle discrimination yields the same conclusion, but for a slightly different reason. The Court's concept of intent is theoretically broad enough to encompass claims of unconscious discrimination. Indeed, in the context of stereotyping in the workplace, the Court has suggested that the fact that discrimination is unconscious does not make it any less intentional. See Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (relying on employer's use of stereotyping to establish intentional discrimination claim). As is true with disparate effects claims, the problem is not that intentional discrimination cannot encompass subtle or unconscious discrimination, but that the Court has refused to accept circumstantial proof of subtle discrimination as sufficient to establish intentional discrimination.

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B. EXPLAINING THE COURT'S DOCTRINE

We have seen that courts subject discrimination claims to standards that are far more rigorous than those applied to other civil actions and that the Supreme Court has repeatedly failed to identify subtle discrimination -- long after acknowledging that most discrimination is subtle in form. What remains to be explored, however, is why this is so. In this section, I will explore several explanations for this phenomenon, beginning with the theory that I find most

convincing -- which I have not encountered elsewhere -- and then moving on to consider other, more familiar, explanations.

[\*339] · 1. The Historical Development of the Court's Incongruous Theory of Discrimination

The Court's incongruous approach to discrimination is perhaps best explained by the fact that its doctrine came of age in the 1970s, n273 in the shadow of affirmative action. As already discussed, the Court's antidiscrimination doctrine took shape primarily in the 1970s and at about the same time, the Court began to address claims related to affirmative action. The Court confronted its first claim of reverse discrimination in 1974, n274 two years later the Court affirmed the right of white men to bring claims under Title VII, n275 and two years after that the Court issued its decision in the Bakke case. n276 To complicate matters further, these cases arose just as the Court was confronting the most difficult desegregation cases it had yet to encounter, involving segregated schools in the North and the phenomenon of white flight. n277 Significantly, the Court responded to these complex desegregation problems by retreating from its short-lived interventionist approach. The combination of these complicated discrimination issues, arising just as the Court was beginning to explore the complexities of discrimination against African-Americans, may have suggested to the Court that the question of discrimination was more intricate and enigmatic than was originally envisioned. Thus, it may be that the Court, consciously or otherwise, developed its doctrine of discrimination so as to avoid directly confronting other controversial areas of social or political life.

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n273 See supra notes 93-99 and accompanying text.

n274 See *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The Court avoided resolving the affirmative action question, however, by holding that the case was moot because the plaintiff was in the last semester of his final year of law school. *Id.* at 319-20.

n275 See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Men also brought many of the early claims of gender discrimination under the Equal Protection Clause. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

n276 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

n277 See *Milliken v. Bradley*, 418 U.S. 717 (1974); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

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The social context of the times may have facilitated the Court's retreat. The 1970s were a time not only of difficult and novel remedial questions for the Court, but also of significant progress for African-Americans. The tumultuous sixties were receding, and in the seventies African-Americans made more progress in terms of wages and integration of the workforce than at any other time in our history. n278 The view from the 1970s, particularly among those who were skeptical or ambivalent of the propriety of the Court's role in social change, was one of hope and progress, and prompted by this hope for

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progress the Court may have adopted a stance whereby by identifying less discrimination it was able to avoid having to face broad-based remedial issues. n279

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n278 See Ronald F. Ferguson, Shifting Challenges: Fifty Years of Economic Change Toward Black-White Earnings Equality, in AN AMERICAN DILEMMA REVISITED: RACE RELATIONS IN A CHANGING WORLD 76, 84 (Obie Clayton, Jr. ed., 1996) ("Relative improvements in black earnings between 1960 and 1980 were concentrated between the late 1960s and the early 1970s."); John Bound & Richard B. Freeman, What Went Wrong? The Erosion of Relative Earnings and Employment Among Young Black Men in the 1980's, 107 Q.J. ECON. 201 passim (1992) (arguing that relative advances in black economic progress ended in mid-1980s); John J. Donohue III & James Heckman, Continuing Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks, 29 J. ECON. LIT. 1603, 1632 (1991) (finding that most of the progress with respect to wages occurred during the 1970s).

n279 This issue is explored further in text accompanying notes 323-24.

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This perspective on the historical development of the Court's approach to discrimination provides a convincing account of its evolution. There remain, however, two other, more familiar explanations for this phenomenon: the declining discrimination hypothesis, and the institutional concern theory. In the sections that follow, I explore each of these theories in turn.

2. The Declining Discrimination Hypothesis

A related and tempting explanation for the Court's discrimination doctrine is that it simply reflects a reduction in the level of discrimination present in our society. Thus, the theory goes, all that the Court has done in its discrimination cases is to recognize that discrimination has lost much of its previous power as an explanatory variable. Although at one time it may have been appropriate to divide the possible explanation for an employer or legislator's actions into discrimination and nondiscrimination, this is no longer true. n280

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n280 These sentiments clearly seem to animate the philosophies of Justices Scalia and Thomas. See, e.g., Holder v. Hall, 512 U.S. 874, 895 (1994) (Thomas, J., concurring) (suggesting a narrowing of voting rights statute based in part on progress African-Americans have made); Freeman v. Pitts, 503 U.S. 467, 506 (1993) (Scalia, J., concurring) ("At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President . . . continue to have an appreciable effect upon current operation of schools.").

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This hypothesis, however superficially plausible, is mistaken on at least two levels. First, it assumes that whatever reduction in discrimination has occurred has been so extreme as to lessen the probative value of the indicia of

discrimination. Although it is true that certain forms of discrimination have declined and that substantial progress was made in the 1970s, there is little evidence that discrimination has declined sufficiently to justify altering the evidentiary principles that compel inferences of discrimination. In any given month, for example, sophisticated statistical studies document the clear disadvantages experienced by African-Americans in housing, employment, education, and consumer affairs. n281 Interestingly, many of these studies document discrimination [\*341] in "rational" endeavors such as mortgage lending, in which discrimination is thought to be inefficient and therefore unlikely to persist. n282 In addition, an impressive array of recent books have documented the persistent and powerful influence of discrimination on American society. n283 With respect to national statistics, African-Americans continue to experience unemployment at rates that are twice those encountered by whites, n284 while salary disparities between whites and African-Americans persist at every education level. n285 Reviewing the data, Harvard Sitkoff recently noted that "in every occupation and region of the country, and at every educational level, the median African-American income is lower than for whites." n286

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n281 See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (documenting discrimination in car sales); Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (documenting discrimination in the setting of bail rates for African-Americans); Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data*, 86 AM. ECON. REV. 25, 30-41 (1996) (documenting patterns of discrimination in mortgage lending); Carol Rapaport, *Apparent Wage Discrimination When Wages Are Determined by Nondiscriminatory Contracts*, 85 AM. ECON. REV. 1263, 1264-68 (1995) (documenting lower salaries for African-American school teachers). There are an equal, if not greater, number of recent studies involving gender discrimination. See, e.g., Jo Dixon & Carroll Seron, *Stratification in the Legal Profession: Sex, Sector, and Salary*, 29 L. & SOC'Y REV. 381, 392-404 (1995) (documenting gender disparities in legal profession in New York); David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. ECON. 915 (1996) (documenting discrimination in Philadelphia restaurant industry).

n282 See Munnell et al., *supra* note 281, at 51 (explaining how discrimination can influence process and cause banks that issue mortgage loans to forego profitable opportunities). A particularly interesting study recently documented widespread gender discrimination in the hiring and promotion practices of economics departments. See Van W. Kolpin & Larry D. Singell, Jr., *The Gender Composition and Scholarly Performance of Economics Departments: A Test for Employment Discrimination*, 49 INDUS. & LAB. REL. REV. 408 (1996).

n283 See, e.g., MARTIN CARNOY, *FADED DREAMS: THE POLITICS AND ECONOMICS OF RACE IN AMERICA* (1994); JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS & THE SOUL OF THE NATION* (1995); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); DONALD TOMASKOVICDEVEY, *GENDER & RACIAL INEQUALITY AT WORK: THE SOURCES AND CONSEQUENCES OF JOB SEGREGATION* (1993).

n284 In 1995, African-American males had an unemployment rate of 10.6% compared to a rate of 4.9% for white males. See BUREAU OF THE CENSUS, UNITED

STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 401 tbl.628 (116th ed., 1996).

n285 The disparities do vary, however, by level of education. For discussions of wage disparities, see Reynolds Farley, The Common Destiny of Blacks and Whites: Observations About the Social and Economic Status of the Races, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 197, 206-07 (Herbert Hill & James E. Jones, Jr. eds., 1993) (documenting wage disparities holding education constant); Bennett Harrison & Lucy Gorham, What Happened to African-American Wages in the 1980s?, in THE METROPOLIS IN BLACK AND WHITE: PLACE, POWER AND POLARIZATION 56 (George C. Galster & Edward W. Hill eds., 1992) (1987 white college graduates were twice as likely to have jobs that paid at least \$ 35,000 a year than African-American college graduates).

n286 HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY 1954-1992, at 225 (rev. ed. 1993).

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It is beyond the scope of this article to address the various criticisms of these studies, n287 and it would be fruitless, although relatively easy, to cite more of them in the vain hope of convincing the inherently skeptical that discrimination remains prevalent. Experience has shown that preconceptions about discrimination are remarkably resilient to empirical proof. n288 The important point about these studies for my purposes is that, at the very least, they demonstrate the [\*342] extent to which the persistence of discrimination in our society remains a contested issue. Those who would dismantle the traditional structures for drawing inferences of discrimination from circumstantial evidence ought to bear the burden of establishing that such evidence no longer supports findings of discrimination. That burden has yet to be satisfied.

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n287 Many of the studies previously noted have their critics. See, e.g., Pinelopi Koujianou Goldberg, Dealer Price Discrimination in New Car Purchases: Evidence from the Consumer Expenditure Survey, 104 J. POL. ECON. 622, 624 (1996) (criticizing Ayres's car study); David Horne, Evaluating the Role of Race in Mortgage Lending, 7 FDIC BANKING REV. 1 passim (1993) (critiquing Boston Fed. study on mortgage lending discrimination).

n288 One reason for this resistance is the normative baseline in which any perspective is inevitably steeped. No study has yet been able to offer such compelling evidence, either for or against the prevalence of discrimination, as to command ascension. And as long as the data leave room for interpretation -- no matter how little -- individuals are likely to find what they are looking for.

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There is a second flaw in the argument that the Court's doctrine has changed over time in response to changed social conditions because the Court's doctrine has been remarkably stable. Commentators often express nostalgia for a lost era when the Court stood as the guardian of equality. Yet, it is worth remembering that the Court's doctrine relating to subtle forms of discrimination developed under the Burger Court; the Warren Court dealt primarily with cases of overt

discrimination. Even under the Warren Court, a strong argument can be made that when it came to remedying racial discrimination, the Warren Court failed in its duty to ensure that adequate remedies would follow the identification of constitutional violations. n289 Moreover, although the Burger Court found for the plaintiff in the important and controversial Griggs case, n290 in the vast majority of its other seminal discrimination cases, the plaintiffs lost. n291 To be sure, there were some important victories for the plaintiffs, particularly in the employment discrimination area, n292 but it would be a mistake to suggest that the seventies were a golden era for antidiscrimination law. The truth is, there never has been such an era, and the Court's doctrine has not changed in response to changing social conditions. Far from changing, the Court has resisted evolution in the discrimination context because of the substantial challenges, both legal and moral, to the status quo that such change would have required.

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n289 For a trenchant and insightful discussion of the effect of the Warren Court's refusal to act in the face of Southern recalcitrance, see Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423 (1994).

n290 *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (allowing for disparate impact challenges under Title VII). So much has been made of the Griggs case that it is relatively easy to forget that, although important, Griggs "presented about as easy a case as one could imagine." Brest, *supra* note 62, at 121. The defendant had implemented the literacy test at issue in Griggs the day after Congress passed the Civil Rights Act. Moreover, the defendant's workforce remained almost entirely segregated into the 1970s. *Id.*

n291 See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Memphis v. Greene*, 451 U.S. 100 (1981); *Mobile v. Bolden*, 446 U.S. 55 (1980); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

n292 See, e.g., *City of Los Angeles v. Manhart*, 435 U.S. 702, 711 (1978) (invalidating use of sex-based pension tables); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 780 (1976) (allowing employment discrimination plaintiffs to recover retroactive seniority); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (reaffirming disparate impact approach). Even these cases were largely about facial classifications -- in Manhart women were explicitly treated differently and in Albemarle there had been strict segregation prior to 1964.

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### 3. The Institutional Concern Theory

Another tenaciously popular explanation for the Court's doctrine -- one that is often tied to defenses of the Court's decision in *Brown v. Board of Education* -- is what can be defined as the institutional concern theory. According to [\*343] this theory, the Court's discrimination doctrine is best explained by the Court's concern that, were it to invalidate such legislative policy choices as the multimember districts at issue in *Mobile v. Bolden*, or the death penalty sentencing scheme at issue in *McCleskey*, its ruling would constitute a massive

intervention in practices that are best left to the political branches of government. n293 Adherents to this theory use it as the basis for two very different types of arguments. According to the first, the Supreme Court should not, as a normative matter, interfere in political decisions that are the purported province of the legislature absent clear and compelling justification, such as an exceptionally clear demonstration that the legislature has engaged in a pattern of discrimination. n294 The second type of argument is grounded on the perceived inefficacy of the Court's efforts. According to this position, the Court is most effective when it prods rather than leads the people to a particular result. n295 Although scholars approach the issue of the Court's proper role in fostering equality from a variety of perspectives, they all suggest that the Court's legitimacy depends upon its playing a limited role in bringing about social change. n296

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n293 This theory has been aided by the recent resurgence of interest in the legal process school. William Eskridge and Philip Frickey are, at least in substantial part, responsible for some of the renewed interest as a result of their 1994 edition of Henry Hart and Albert Sacks' fabled *The Legal Process: Basic Problems in the Making and Application of Law*. See also William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 77-95 (1994) (developing a theory that incorporates process theory with other political theories to describe what they term "a strategic Court"); cf. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1094-1118 (1997) (relying on legal process school to develop theory on retroactivity).

n294 See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

n295 See generally ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994)..

n296 For example, Robert Burt has recently written:

The common criticism today . . . that the Court was wrong in principle to withhold its coercive mandate in *Brown II*, suggests an even deeper tragedy: we have lost the ideal -- the very ideal on which our moral condemnation of the racial caste system is based -- that social relations should not rest on force but on mutual respect among equals.

Robert A. Burt, *Brown's Reflection*, 103 YALE L.J. 1483, 1494 (1994).

-End Footnotes-

Despite its continued appeal, the argument grounded in the institutional perspective is deficient both descriptively and normatively. As a descriptive matter, suggesting that the Court has been primarily concerned with ensuring that it does not unduly interfere with majoritarian decisions is patently inconsistent with the Court's treatment of affirmative action statutes. For example, in *City of Richmond v. J.A. Croson Co.* the Court displayed a ready willingness to invalidate hundreds (or perhaps thousands) of local set-aside

programs, even though all of those programs were instituted by democratically elected political institutions. n297 Similarly, in the voting rights context, the Court continually [\*344] invalidates voting districts that are the product of a careful compromise between the executive and legislative branches. n298 Institutional theorists argue that the Court's jurisprudence is principled, but surely a hallmark of principled jurisprudence would be consistency across contexts. It seems difficult, if not impossible, to mount a persuasive argument that the Court ought to be hesitant to interfere with the autonomy of school boards, but quick to intervene in the contracting decisions of local governments.

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n297 By the time of the Court's decision in Croson, contract set-aside programs were well-established and prevalent across the country, and the vast majority of those programs were adopted by a governmental agency. See, e.g., United Fence & Guard Rail Corp. v. Cuomo, 878 F.2d 588 (2nd Cir. 1989) (New York state construction program); Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583 (6th Cir. 1987) (Michigan construction program), aff'd, 489 U.S. 1061 (1989); H.K. Porter Co. v. Metropolitan Dade County, 825 F.2d 324 (11th Cir. 1987) (Dade County construction program), vacated & remanded, 489 U.S. 1062 (1989); Associated General Contractors, Inc. v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (San Francisco County ordinance), petition dismissed, 493 U.S. 928 (1989); J. Edinger & Son, Inc. v. City of Louisville, 802 F.2d 213 (6th Cir. 1986) (Louisville Minority Vendors ordinance); Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084 (6th Cir. 1981) (Shelby County, Tennessee construction program).

n298 See Shaw v. Hunt, 116 S. Ct. 1894 (1996); Bush v. Vera, 116 S. Ct. 1941 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

-End Footnotes-

It might be possible to reconcile the affirmative action cases with the institutional concern theory by suggesting that the Court refuses to see the political practices implicated in its affirmative action cases as legitimate. This attempt at reconciliation, however, works like a boomerang. Although it is likely true that the Court regards affirmative action plans as the product of illegitimate political practices, the basis for this belief is far less clear. Why, for example, is a set-aside program instituted by a local government due any less deference than a zoning ordinance? n299 On the surface, the answer appears to be that the set-aside was motivated by intentional discrimination, while the zoning decisions at issue in Memphis v. Greene and Arlington Heights were not. But this argument clearly begs the question -- for example, in Mobile v. Bolden and McCleskey the Court generally conceded the presence of some discrimination in the decisionmaking process but ultimately deferred to what it considered larger institutional concerns. n300 From this perspective, the question is not so much whether intentional discrimination infected the legislature's decision, but rather under what circumstances the Court is willing to defer to which legislative branches. The Court's decisions suggest the following answer: Legislative acts designed to remedy past discrimination are worthy of no particular deference, while traditional practices that perpetuate segregation require deference -- an answer that is difficult to reconcile with any proper notion of institutional deference.

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n299 Again, the Court's institutional concern proves a bit transparent when one considers that in the takings context the Court has shown no particular deference to local governments when it comes to exactions. See Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (invalidating local exaction on takings ground).

n300 See McCleskey v. Kemp, 481 U.S. 279, 287 (1987); Memphis v. Greene, 451 U.S. 100, 126 (1981); Mobile v. Bolden, 446 U.S. 55, 92 (1980) (Stevens, J., concurring). Girardeau Spann has argued that in McCleskey the Court "insisted on the need for jury discretion, even though it knew such discretion was likely to be exercised in a racially discriminatory manner." GIRARDEAU A. SPANN, RACE AGAINST THE COURT 51 (1993) (footnote omitted).

-End Footnotes-

Alternatively, it might be possible to reconcile institutional concern theory [\*345] with the Court's affirmative action cases by suggesting that the Court defers to political institutions with respect to race-neutral policies, but not to explicit racial classifications. After all, the zoning cases required the court to infer discrimination by means of circumstantial evidence, while in the affirmative action cases the legislatures' use of race is overt. Here, the institutional perspective might suggest that the Court should permit the political branches to experiment with various methods of fostering racial equality -- but only within a designated sphere of race-neutral alternatives.

This explanation of the Court's approach may be descriptively accurate, but its weaknesses are easily exposed. First, although the Court might properly defer to governmental entities that are seeking to remedy discrimination, it is an altogether different matter for the Court to defer to agencies accused of discriminatory practices. By deferring to legislatures under these circumstances, the Court provides legislatures the opportunity to evade constitutional mandates and engage in discriminatory practices so long as those practices are not overtly discriminatory. This kind of deference is the equivalent of a presumption that the governmental entity acts in good faith as long as it does not enact laws that are explicitly race-based. Surely this would be an odd message for the Court to send, particularly given its repeated recognition that discrimination has become more subtle. n301

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n301 I do not mean to suggest that any of the process theorists would applaud such a message; what I do mean to suggest is that the theory they support has very little to do with institutional deference.

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By concentrating on institutional concerns, legal process scholars also overlook the Court's role in establishing the boundaries within which local governments may legitimately experiment. Allowing legislatures to experiment only with remedial practices that are facially neutral severely limits the discretion of local governments to choose what they deem to be the most effective remedies for persistent discrimination. Justice Blackmun expressed this concern most eloquently in his concurring opinion in Bakke. In the

section of that opinion that immediately precedes his oft-quoted aphorism, "to get beyond racism, we must first take account of race," n302 Justice Blackmun argued that affirmative action was necessary because it was the only proven remedy for past discrimination. n303 Indeed, Justice Blackmun argued that even if affirmative action had not been proven effective, as the choice of the local administrative body it was deserving of the Court's deference and respect. n304 The majority in Bakke clearly shared neither Justice Blackmun's sense of deference to local policymakers, nor his willingness to accept race-conscious affirmative action programs. n305 The majority failed to offer a better alternative, however, and as the various briefs in [\*346] the Bakke case demonstrated, race-neutral alternatives such as class-based affirmative action, would not have been as effective as the race-conscious means chosen by the University. n306

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n302 Regents of Univ. of CA v. Bakke, 438 U.S. at 407 (Blackmun, J., concurring).

n303 Id. at 406-07 (Blackmun, J., concurring).

n304 Id. at 405-06 (Blackmun, J., concurring).

n305 It should be noted that it is not clear that the other Justices would have upheld the Davis plan even if they concurred with Justice Blackmun's sentiment that the set-asides were the only feasible means of achieving the school's goal. See id. at 308 n.44 (Powell, J.).

n306 See, e.g., Brief of the Association of American Medical Colleges, Amicus Curiae 18, reprinted in 99 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 686 (Philip B. Kurland & Gerhard Casper eds., 1978) (noting that "without special admissions programs it is not unrealistic to assume that minority enrollments could return to the distressingly low levels of the early 1960's").

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In addition to affirmative action programs, the Court has invalidated several other means of combatting past discrimination that have been proven comparatively effective, including interdistrict busing in the school desegregation context n307 and race-conscious redistricting in the voting context. n308 To be sure, it is possible to argue about whether the policies at issue in these cases were the most effective means to remedy past discrimination or to prevent its reoccurrence, but to focus on the efficacy of these policies is to obscure the meaning of deference. The concept of institutional deference surely loses its meaning if the Court defers only to those practices that it believes to be effective or wise. Thus, the Court's deference to the discretion of local decisionmakers appears to evaporate in its affirmative action decisions, in which the Court has consistently invalidated policies deemed by local legislators and district court judges to be an effective means of eradicating intractable problems.

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n307 *Milliken v. Bradley*, 418 U.S. 717 (1974). The efficacy of busing as a means of desegregating schools is a hotly contested issue, to say the least. However, my point here is that, at least with respect to integrating schools, no one has developed a better alternative, and the Court's decision in *Milliken* may have deprived school districts of their most effective remedy. None of this answers the question whether integration is a social good that we ought to strive for; for a recent balanced, yet skeptical, argument concerning the value of integration, see ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* (1996).

n308 *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). For more on the effectiveness of racial redistricting, see *supra* note 173.

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There is another, more important reason why it would be a mistake to explain the Court's doctrine as the product of institutional concerns. A review of the Court's discrimination doctrine indicates that the Court acted like a political branch; that it took the same actions, the same risks, and was likely motivated by the same concerns as the executive and legislative branches. Those who have analyzed the political branches' civil rights enforcement efforts have generally concluded that the federal government has lacked any solid commitment to racial equality; a commitment, in other words, that does not waver in the face of potentially conflicting political or social values. n309 For example, the executive branch was hesitant to enforce the Court's *Brown* mandate, and after passage of the Civil Rights Acts, the executive branch enforced those statutes with less [\*347] vigor than it might have if enforcement had been a top government priority. n310 In addition, although Congress passed a number of civil rights laws in the 1960s, those laws frequently lacked such important and basic remedies as damages. Indeed, Title VII was one of the few federal statutes that denied plaintiffs the opportunity to seek damages, and even today remains one of the few federal statutes for which Congress has placed a cap on damages. n311

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n309 See, e.g., THOMAS BYRNE EDSALL, *CHAIN REACTION* 172-97 (1991) (discussing the role race has played as a political tool); HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972*, at 233-345 (1990) (describing early history of civil rights enforcement and how politics often limited enforcement and remedial efforts); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 177-221 (1996) (describing President Nixon's use of affirmative action as a political force to split liberals).

n310 See, e.g., MANNING MARABLE, *RACE, REFORM & REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1982*, at 160-67 (1984) (documenting the absence of governmental efforts at racial justice); GARY ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980*, at 1-12 (1983) (documenting limited governmental efforts). For a revealing look at the government's efforts under Title VI, particularly with respect to the effect different administrations can have on a case, see STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1995).

n311 See 42 U.S.C. @ 1981(a). It has always appeared incongruous that a plaintiff obtains treble damages for antitrust violations whereas a civil rights plaintiff until recently has been limited to equitable relief.

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The Supreme Court behaved similarly in the course of developing its discrimination doctrine. Every time there was a conflict between racial equality and some other identifiable value, the Court was quick to compromise the pursuit of racial equality. The Court's willingness to compromise antidiscrimination values is amply illustrated by the desegregation cases, in which the Court has repeatedly deferred to local school autonomy as the issue of primary importance and has increasingly suggested that its primary mission in the desegregation context is to return the schools to local control. n312 Surely, one would expect the Court to regard as its primary role ensuring that local governments do not violate the Constitution. n313 Similarly, in the area of housing discrimination, the Court has repeatedly deferred to local zoning ordinances and private preferences over fair housing or integrated neighborhoods. n314 In the context of criminal procedure, the Court chose to preserve peremptory challenges rather than to eradicate discrimination, while in McCleskey the Court chose to risk executing criminal defendants on the basis of their race or the race of their victim, rather than sacrifice prosecutorial discretion. n315 In employment, employer autonomy often trumps the need to eradicate discrimination in the workplace, n316 and in the area of hate speech the Court has chosen to emphasize [\*348] freedom of speech over racial equality, even though there is nothing in the Constitution to suggest that when speech and equality conflict, speech should win. n317

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n312 See Freeman v. Pitts, 503 U.S. 467, 489 (1992) (noting that the ultimate objective is "to return school districts to the control of local authorities"); Milliken v. Bradley, 418 U.S. 717, 742-43 (1974) (stressing the importance of local autonomy). For a discussion regarding how the Court's doctrine has been driven largely by concerns other than the welfare of African-Americans in the school desegregation context, see Derrick A. Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 523-26 (1980).

n313 Cf. Gary Orfield, Housing and the Justification of School Segregation, 143 U. PA. L. REV. 1397, 1398 (1995) (arguing that with Milliken "the primary constitutional value became the autonomy of the suburban school districts rather than the correction of unconstitutional segregation").

n314 See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 252 (1977).

n315 See McCleskey v. Kemp, 481 U.S. 279, 313 (1987).

n316 In Hicks the Court went so far as to wonder aloud about how it might protect an employer whose personnel manager has died or been fired thus making access to information regarding the employment decision more difficult. See Hicks, 509 U.S. at 513-14.

n317 See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); cf. Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A

Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1108-13 (1978) (arguing that antidiscrimination law loses its bite when it conflicts with other values such as local autonomy).

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One important exception to the Court's general willingness to compromise equality is its decision in Griggs v. Duke Power Co., in which the Court established an impact test under Title VII, and thereby could be said to have restricted employer autonomy in the name of racial equality. Although Griggs was undoubtedly an important decision, it is also important to take note of the factors limiting its significance. As already discussed, the Court has declined to apply Griggs in other contexts, and over the last twenty-five years the Court has restricted the reach of the Griggs decision to such an extent that it took an act of Congress to restore the original scope of the Court's decision. n318 There are other exceptions to the general principle that the Court has been willing to compromise race for other values, but most of those cases are either aberrational or involved discrimination too stark to be ignored. n319

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n318 See Civil Rights Act of 1991, @ 703(k)(1), 42 U.S.C. @ 2000e-2(k)(1) (1994) (overturning part of the Supreme Court's decision in Wards Cove).

n319 The aberrational cases tend to have their contradictory analogues: Rogers v. Lodge is confounded by Mobile v. Bolden, and Washington v. Seattle School District is matched on the other side by Crawford v. Los Angeles Board of Education. See supra Part IIC1 and note 255.

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The Supreme Court has acted like the political branches in another way as well. Long implicit in the Court's decisions was a hope that the good graces of the people would bring racial discrimination to an end. The Court has vested a high level of hope that its belief would ultimately prove true, as the following comment from a speech by Justice Powell tellingly illustrates:

It is of course true that we have witnessed racial injustice in the past, as has every country with significant racial diversity. But no one can fairly question the present national commitment to full equality and justice. Racial discrimination, by state action, is now proscribed by laws and court decisions which protect civil liberties perhaps more broadly than in any other country. But laws alone are not enough. Racial prejudice in the hearts of men cannot be legislated out of existence; it will pass only in time, and as human beings of all races learn in humility to respect each other -- a process not furthered by recrimination or undue self-accusation. n320

Justice Powell's statement would be remarkable under any circumstances, but the fact that he made it in 1972 during a time of considerable turmoil, particularly around school desegregation, makes it all the more extraordinary. Nevertheless, Justice Powell's statement provides insight into how the Court approached issues of racial equality: cautiously, with a faith that ultimately the good-hearted would prevail.

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n320 Lewis F. Powell, Jr., *The Ethics of the Home*, N.Y. TIMES, Aug. 31, 1972, at 33.

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[\*349] Justice Powell's insistence that the end of racial prejudice cannot be legislated recalls the Supreme Court's use of the impotent "all deliberate speed" standard to implement its decision in *Brown*. Legal process scholars applaud this formulation as a product of keen judicial compromise; n321 and yet their approbation prompts the following question: in what sense is state-sponsored race discrimination a proper subject for compromise? This is a point Thurgood Marshall expressed at oral argument in *Brown II*, when he asked the Court why it was that whenever an African-American plaintiff, and only an African-American plaintiff, came before the Court he was always told that he would have to wait for relief? n322 The Court did not then answer, and has not since answered, Justice Marshall's question -- perhaps because there is no satisfactory explanation for the Court's willingness to compromise when it comes to racial equality.

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n321 See BURT, *supra* note 295, at 309 (defining *Brown* as principled because it was practical); Paul Gewirtz, *Remedies & Resistance*, 92 YALE L.J. 585, 609-28 (1983) (defending "all deliberate speed" formula).

n322 See ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUC. OF TOPEKA*, 1952-55, at 525 (Leon Friedman ed., 1969) ("But I don't believe any argument has ever been made to this Court to postpone the enforcement of a constitutional right. The argument is never made until Negroes are involved.").

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The Court's sense of its institutional limitations clearly plays a role in its eagerness to rely on democratic processes -- it would certainly be better for the country and the Court if social change, or racial equality, came through the people. But this hope must give way to the reality that it was the American people who have perpetuated segregation and it is the people who have so often opposed legislative and judicial efforts to end segregation -- particularly in the areas of housing and education.

In our post critical legal studies world, it is easy to be cynical about the workings of the Supreme Court, particularly the current Court, which can be vituperatively conservative and so often overtly political. It is important to recall, however, that at its best the Court stands for something apart from politics -- particularly in the eyes of the American people. After all, in the 1970s it was the Burger Court that reigned in an errant executive, n323 and the people often looked to that Court for moral leadership on questions involving racial equality. As a result, when the Court compromised racial equality in the name of other values, its political act had an impact on society that was all the more powerful for the public's perception that it was nonpolitical. When the Court limited the available remedies in its school desegregation cases, or when it restricted the force of affirmative action, it legitimized a conservative

approach to racial equality in a way that the political branches could never have accomplished. Because the Court was generally regarded as a leader in the fight against discrimination, when it restricted the remedial options of the lower courts or legislatures, it sent a message to the American people that they need do no [\*350] more -- that their obligations were limited and, in many respects, had been met. n324

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n323 United States v. Nixon, 418 U.S. 683 (1974).

n324 Del Dickson has recently suggested that the Supreme Court's refusal to act on a number of cases following Brown for fear "that a showdown with the Southern states . . . would cost the Court too dearly in terms of image and authority" effectively emboldened those who sought to evade the Court's mandate. See Dickson, supra note 289, at 1478, 1479-81.

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The ultimate lesson of the Court's discrimination doctrine is that the Court largely mirrored American society in its desire to wish away racial injustice. Since at least the 1960s, there has been a longing in America to get beyond race, and an impatience with the struggles of minorities, that have repeatedly manifested themselves as a general reluctance to disturb existing social institutions. Related to this longing has been a hope that proclaiming equality of opportunity would make it a reality -- that it would put our racist past behind us. One way the Court has chosen to help put race behind us is by seeing less discrimination and by using restrictive legal standards to send the message that discrimination is now the exception rather than the rule. But this is another way in which the institutional perspective fails, for implicit in the theory is a suggestion that the Court would have liked to do more in the name of racial equality but was restrained by its circumscribed role. The better interpretation seems to be that the Court did all that it desired and was restrained by little more than its own normative vision.

CONCLUSION

We are now in a position to provide an answer to the question with which we began: what would a nondiscriminatory world look like? Based on the Court's doctrine, the answer seems to be that it would look much like it does today. Certainly there would be some isolated differences; some individuals might switch places here and there, but for the most part, the world would look as it does. Congress would be dominated by white men, while women and people of color would continue to be underrepresented for reasons that have, at most, only a tangential relation to discrimination. That whites consistently vote for white candidates would be the norm, consistent with our expectations, and unrelated to discrimination. In the world of contracting, we would expect that the vast majority of contracts go to whites, but not as a result of discrimination.

If the law is to offer any hope for greater racial equality in American society, the Court must be made to understand that the world today is not simply the product of fair procedures and that discrimination remains pervasive and complex. Unfortunately, it may be too late to expect the Court to change. Particularly in its recent cases, the Court seems to be suggesting that the current state of racial equality is as good as we are likely to get, and that

we can no longer rely on the Court to encourage greater equality. This message might not be quite so disturbing had it been the result of the Court's exasperation or despair at the futility of its efforts to promote racial progress. But the Court's message takes on a different meaning, one that is profoundly disturbing, once we realize that the Court gave up without ever trying.

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ARTICLE: OF COMMUNISTS AND ANTI-ABORTION PROTESTORS: THE CONSEQUENCES OF FALLING INTO THE THEORETICAL ABYSS

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SUMMARY:

... United States, the Court demonstrated an increased commitment to the protection of advocacy via the use of the "clear and present danger" test. ... As the Madsen Court noted, the injunction before it was a bit of a hybrid-content-neutral but posing some danger of government abuse, a concern with content-based statutes. ... Second, in refusing to uphold the fifteen-foot floating buffer zone, the Schenck Court relied solely on the difficulty of compliance with that injunctive provision, finding that such difficulty violated Madsen's requirement that the injunction burden no more speech than necessary to serve a significant government interest. ... Though Madsen and Schenck do not parallel the doctrinal aspects of the earlier communist decisions, the Court is not wholly without fault regarding protestor manipulation of the abortion protest decisions. ... While acknowledging that "[p]rior restraints do often take the form of injunctions," citing New York Times v. United States and Vance v. Universal Amusement Co., the Madsen majority ruled that this particular injunction was not a prior restraint, noting that "[n]ot all injunctions which may incidentally affect expression . . . are 'prior restraints' as that term was used in New York Times Co. or Vance." ...

TEXT:  
[\*1]

In 1951, in the midst of the Red Scare and at the height of McCarthyism, the Supreme Court of the United States decided the fate of several American leaders of the Communist Party who were convicted under the Smith Act of conspiring to advocate forcible overthrow of the government. n1 In the years preceding Dennis v. [\*2] United States, the Court demonstrated an increased commitment to the protection of advocacy via the use of the "clear and present danger" test. n2 The Dennis Court, however, perverted that test, finding that the convictions did not violate the First Amendment, even though there were serious questions "as to whether sufficient- or, indeed, any-evidence of [criminal wrongdoing] had been introduced at the Dennis trial." n3 The public exalted the Court's decision. n4 Justice Black, however, deplored its political nature, commenting that

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n1 Dennis v. United States, 341 U.S. 494 (1951) (plurality opinion). The Smith Act makes it a crime to "knowingly . . . advocate[], abet[], advise[] or teach[] the duty, necessity, desirability or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence . . ." 18 U.S.C. 2385 (1994). It further prohibits citizens from "organiz[ing] or help[ing] or attempt[ing] to organize" any group which engages in such advocacy. Id.

n2 The test was the modern Court's first attempt to determine when the First Amendment permitted punishment of speech. Specifically, it required the Court to ask "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919); see also Harry Kalven, Jr., A Worthy Tradition 123-91 (1988) (discussing Court's application of test in different cases).

n3 Marc Rohr, Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era, 28 San Diego L. Rev. 1, 47-48 (1991); see also Michal R. Belknap, Cold War Political Justice: The Smith Act, the Communist Party and American Civil Liberties 6 (1977) (noting that only way to uphold convictions was "by modifying the accepted interpretation of the First Amendment").

n4 See, e.g., Freedom With Security, Wash. Post, June 6, 1951, at 12 ("The Supreme Court's decision upholding the conviction of the 11 Communist leaders is the most important reconciliation of liberty and security in our time."); see also infra notes 33-34 and accompanying text (describing public reaction).

-End Footnotes-

[p]ublic opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society. n5

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n5 Dennis, 341 U.S. at 581 (Black, J., dissenting).

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Eventually, calmer times prevailed and the Supreme Court backed away from Dennis. Only six years after that decision, the Court in *Yates v. United States* n6 reversed the convictions of several Communist Party leaders even though the case involved issues almost identical to Dennis. The Yates Court arrived at its ruling "as a [\*3] matter of statutory interpretation, albeit with constitutional principles hovering closely above." n7 Thus, although the Court did not explicitly overrule the constitutional decision in Dennis, it nevertheless largely "eliminat[ed] the Smith Act as a weapon in the campaign against American Communism." n8

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n6 354 U.S. 298, 303 (1957), overruled in part by *Burks v. United States*, 437 U.S. 1 (1978).

n7 Rohr, *supra* note 3, at 68.

n8 Kalven, *supra* note 2, at 220.

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The Court's free speech jurisprudence has evolved significantly since Dennis and Yates. The decade of the 1960s and the Warren Court era saw notable expansion and entrenchment of the First Amendment rights of political speakers. n9 The once malleable "clear and present danger" test evolved into far more rigid rules designed to protect speech from government censorship. n10 Moreover, the Court's rhetoric in this period further signified its strong commitment to free speech. n11 Thus, the First Amendment rights of political speakers are now firmly entrenched. The political persecution and manipulation of precedent that occurred in the earlier cases involving communists simply could not happen in this arena of rigidly protective rules. Or could it?

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n9 See Suzanna Sherry, *All the Supreme Court Really Needs to Know it Learned from the Warren Court*, 50 Vand. L. Rev. 459, 468-72 (1997) (discussing Warren Court's free speech decisions); Nadine Strossen, *Freedom of Speech in the Warren Court*, in *The Warren Court: A Retrospective* 68, 68-81 (Bernard Schwartz ed., 1996) (discussing emergence of free speech tradition under Warren Court).

n10 The "clear and present danger" test eventually evolved into the relatively stringent test announced in *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969), which allows suppression of subversive advocacy only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Moreover, the Court in recent decades has adopted more explicit rules prohibiting, both directly and indirectly, government suppression of particular viewpoints. See Christina E. Wells,

Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence, 32 Harv. C.R.-C.L. L. Rev. 159, 173-75 (1997) (discussing Court's stringent review of content-based and viewpoint-based regulations of speech).

n11 For examples of the Court's more enduring rhetoric see New York Times v. Sullivan, 376 U.S. 254, 270 (1964), illustrating the Court's commitment "to the principle that debate on public issues should be uninhibited, robust, and wide-open," and Texas v. Johnson, 491 U.S. 397, 414 (1989), stating that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

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Two recent cases involving anti-abortion protestors, another unpopular group, arguably present a pattern similar to Dennis and Yates. The Court in Madsen v. Women's Health Center, Inc. n12 both [\*4] upheld and struck down portions of an injunction restricting the speech of anti-abortion protestors. Those subject to the injunction and their supporters lambasted the decision to uphold it, arguing that the Court was motivated by anti-abortion protestor animus. n13 In addition, Justice Scalia accused the Madsen majority of ignoring past precedent and allowing the "ad hoc nullification machine" of abortion to override the Court's First Amendment jurisprudence. n14 Three years later, the Court again faced the constitutionality of injunctions restricting the speech of anti-abortion protestors. As in Madsen, the Court in Schenck v. Pro-Choice Network, n15 upheld and struck down portions of an injunction. The reaction to Schenck, however, differed from the reaction to Madsen. Focusing on the Court's decision to strike down portions of the injunction, the protestors lauded it as a recognition by the Court that its earlier decision unfairly restricted their First Amendment rights. n16 Even neutral observers characterized Schenck as a strong affirmation of the rights of speakers. n17

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n12 512 U.S. 753 (1994).

n13 Craig Crawford, A Victory for Abortion-Rights Activists, Orlando Sentinel, July 1, 1994, at A1 (noting that in Madsen "[t]he U.S. Supreme Court blunted the free speech claims of anti-abortion demonstrators").

n14 512 U.S. at 784-85 (Scalia, J., concurring in the judgment in part and dissenting in part).

n15 117 S. Ct. 855 (1997).

n16 See, e.g., David G. Savage, Justices Rule Abortion Protest Is Free Speech, L.A. Times, Feb. 20, 1997, at A1 (quoting Jay Sekulow, attorney for protestors, as stating that Court had finally recognized that "the [First] Amendment applies to the pro-life message").

n17 See, e.g., David G. Savage, "In-Your-Face" Speech Wins in Supreme Court, L.A. Times, Feb. 22, 1997, at A1 (characterizing Schenck as win for "[f]ree

speech of the loud, aggressive, in-your-face variety").

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Judging from the above reactions, Madsen and Schenck appear to parallel the pattern exhibited in Dennis and Yates. The protestors' response to Madsen intimates that the Madsen Court, like the Dennis Court before it, deviated from its previous staunch protection of political expression as a result of political opposition to abortion protestors. Similarly, protestor and public response to Schenck indicate parallels to Yates insofar as Schenck represents the Court's implicit acknowledgment that Madsen had gone too far. But a closer examination of Madsen and Schenck reveals that they are unlike Dennis and Yates. Though one might argue that the Madsen Court ultimately erred in upholding the injunction, given [\*5] the relative uniqueness of the issue facing that Court, it is difficult to say that past doctrine compelled a different result. Moreover, Madsen and Schenck are not inconsistent with one another. Schenck is essentially a straightforward application of the earlier decision.

Why, then, do the above-described reactions to Madsen and Schenck paint such a contrasting picture? Ironically, the answer is that the Court's opinions lend themselves to this kind of public manipulation. Though the Court has embraced doctrine and rhetoric regarding the protection of speech, it has never developed a coherent and explicit philosophical theory underlying its decisions. n18 As Professor Post noted, "contemporary First Amendment doctrine is . . . striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech . . . . [It] has become increasingly a doctrine of words merely, and not of things." n19 Thus, the Court's decisions have evolved haphazardly and are empty and easily manipulable, as Madsen and Schenck aptly illustrate. n20 Both cases epitomize [\*6] the Court's tendency to focus on minutiae rather than on the difficult philosophical and doctrinal issues raised in so many free speech cases. They further reflect the Court's habit, when it does discuss such questions, of supporting its decisions by simply citing to past precedent with little or no explanation. Moreover, that reliance on precedent is often selective and ignores (or only superficially attempts to reconcile) the numerous, potentially contradictory precedents that exist. The ultimate result of such actions is the public manipulation of Court decisions referred to above—a dangerous and, perhaps, increasingly common reaction given "the cynical view, already popular among [the Court's] critics, that constitutional law is only a matter of which president appointed the last few justices." n21

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n18 To be sure, the Court has announced "general principles" supporting protection of speech. For example, the Court often bases its decision to protect speech upon the notion that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Similarly, the Court has intimated that the protection of speech is necessary to facilitate

democratic self-governance. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51 (1988). Finally, the Supreme Court sometimes notes that protection of speech is necessary to facilitate notions of personal autonomy and self-expression. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). But it has never attempted to explain when these different principles come into play or how they propel its doctrine. Moreover, the Court does not consistently describe even a single principle from opinion to opinion. See Wells, *supra* note 10, at 172 & nn.53-54 (citing cases in which Court has sometimes described its autonomy rationale as speaker's right of self-expression and at other times has characterized it as listener's right to receive information).

n19 Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1249-50 (1995).

n20 The abortion protest cases are by no means the only evidence of this emptiness. As another example, one need only look to the increasing fragmentation of the Court's recent free speech decisions which are often comprised of five-to-four or plurality opinions. See, e.g., *Glickman v. Wileman Bros. & Elliott*, 117 S. Ct. 2130 (1997); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Florida Bar v. Went For It*, 515 U.S. 618 (1995); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Rust v. Sullivan*, 500 U.S. 173 (1991).

n21 Ronald Dworkin, *The Great Abortion Case*, *N.Y. Rev. Books*, June 29, 1989, at 53.

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Part I of this article briefly reviews the legal and social context of *Dennis* and *Yates*. Parts II and III similarly review *Madsen* and *Schenck* in order to show potential parallels to the earlier communist decisions. Part IV further examines both *Madsen* and *Schenck*, demonstrating that, from a doctrinal standpoint, they are far removed from the earlier communist cases. Finally, Part V explains how the Court in *Madsen* and *Schenck* actually contributed to misconceptions or manipulation of its opinions. Specifically, Part V examines the *Madsen* and *Schenck* Courts' approaches to three of the more difficult doctrinal issues facing them—prior restraint, the place of motive in content-discrimination, and regulation of offensive speech in the public forum—and concludes that the Court's tendency to rely blindly on rhetoric and precedent without further discussion leaves its decisions vulnerable to misconstruction and manipulation.

#### I. A Brief Review of *Dennis* and *Yates*

A. Dennis v. United States: A Political Decision in the Making

In 1949, after a nine-month trial, a federal jury convicted eleven leaders of the Communist Party USA of conspiring "to advocate and [\*7] teach the duty" of forcible overthrow of the government in violation of the Smith Act. n22 Significantly, the defendants were not charged with or convicted of attempting to overthrow the government or of actually advocating overthrow of the government. n23 Even the government attorneys were aware that no evidence existed to support either of those charges. n24 Instead, the defendants were charged with and convicted of a crime one step removed-conspiring to advocate the forcible overthrow of the government. The conviction rested on evidence showing that the defendants, in the course of organizing and advancing the Communist Party, did nothing more than distribute pamphlets and organize classes to teach Marxist-Leninist doctrine. n25 According to the courts and the government, however, such doctrine involved the teaching of forcible overthrow as a necessary aspect of the communist revolution. As Judge Hand described the evidence, Marxist-Leninist doctrine held that

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n22 Dennis v. United States, 341 U.S. 494, 497-98 (1951) (describing trial and convictions). For text of the Smith Act, see supra note 1.

n23 Dennis, 341 U.S. at 497.

n24 As one author noted, "[i]f the Justice Department had possessed evidence that the CPUSA was plotting a revolt, it could have prosecuted the organization's leaders for seditious conspiracy. 'However, it is highly doubtful-at least on the basis of presently available evidence- . . . that a case could be made out against such individuals.' " Belknap, supra note 3, at 80-81 (quoting unidentified government attorney); see also Peter L. Steinberg, The Great "Red Menace": United States Prosecution of American Communists, 1947-1952 166 (1984) (discussing testimony of Communist Party witnesses).

n25 See United States v. Dennis, 183 F.2d 201, 206 (2d Cir. 1950), aff'd 341 U.S. 494 (1951) (noting numerous pamphlets regarding Marxist-Leninist doctrine put forth as evidence at trial); United States v. Foster, 9 F.R.D. 367, 382 (S.D.N.Y. 1949) (referring to evidence of "an elaborate and far-reaching network of schools and classes established for the propagation of the Marxist-Leninist principles"). The grand jury indictment of the defendants set the stage for a conviction based on such evidence by grounding its allegations of a conspiracy on the facts that defendants "published and circulated books, articles, magazines and newspapers advocating the principles of Marxism-Leninism" and "conducted schools and classes for the study of the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence." Harold Faber, 400 Police on Duty as 12 Communists Go on Trial Today, N.Y. Times, Jan. 17, 1949, at 1 (listing contents of indictments).

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capitalism inescapably rests upon, and must perpetuate, the oppression of those who do not own the means of production; that to it in time there must [\*8] succeed a "classless" society, which will finally make unnecessary most of the paraphernalia of government; but that there must be an intermediate and transitional period of the "dictatorship, of the proletariat," which can be established only by the violent overthrow of any existing [capitalistic] government. n26

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n26 Dennis, 183 F.2d at 206 (emphasis added) (summarizing evidence in support of Judge Hand's conclusion that it was sufficient to support convictions). Throughout their trial and appeals the defendants maintained that they did not teach forcible overthrow as a necessary aspect of their doctrine but rather that it was a possible result of the clash between the proletariat and ousted capitalistic rulers. Id.

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Thus, it was enough to sustain the Smith Act convictions that the defendants had formed a group to engage in advocacy of a doctrine favorably referring to the need for forcible overthrow at some undetermined point in the future.

Because the charges against the Dennis defendants essentially amounted to "organizing a group to commit a speech crime," n27 the Supreme Court reviewed the convictions in order to evaluate their legitimacy under the First Amendment. By a six-to-two vote, the Court ruled that the convictions did not violate the defendants' free speech rights. n28 Chief Justice Vinson, writing for the plurality, ostensibly applied the "clear and present danger" test, which he believed originated in the Court's earlier decision in Schenck v. United States n29 and which had been applied in numerous subsequent decisions. n30 Drawing on Judge Hand's enunciation of the test below, Chief Justice Vinson noted that "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." n31 In this instance, the significant danger posed by the communist conspiracy far outweighed the lack of imminence with respect to potential overthrow of the government:

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n27 Kalven, supra note 2, at 193.

n28 Dennis, 341 U.S. at 516.

n29 249 U.S. 47 (1919).

n30 Dennis, 341 U.S. at 504 (citing Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1920); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919)).

n31 Dennis, 341 U.S. at 510 (quoting Dennis, 183 F.2d at 212).

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[\*9]

Obviously, the [clear and present danger test] cannot mean that before the Government may act, it must wait until the putsch is about to be executed . . . . If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required. . . .

. . . .

. . . The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members . . . , coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. n32

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n32 Id. at 509-11.

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The public strongly supported the Court's decision. Indeed, almost all major newspapers in the country lauded it, n33 claiming that "[t]he American people in overwhelming majority will rejoice in this judicial affirmation of the nation's right and power." n34 Such claims mirrored the response of the public to the earlier trial verdict, after which the trial judge "quickly became a national hero, reportedly receiving fifty thousand congratulatory letters within a week of the trial's end." n35 On the other hand, most contemporary legal commentators criticized the decision, claiming that the Court had perverted the "clear and present danger" test in order to uphold the convictions. n36 Dennis did have its supporters in the [\*10] legal arena, however. n37 And, at least superficially, the plurality opinion was not utterly inconsistent with prior decisions. After all, it was never clear that Schenck's iteration of the "clear and present danger" test was especially speech-protective in the subversive advocacy context-especially given that early applications of the test in the subversive advocacy context almost always resulted in affirmation of convictions. n38 Furthermore, two of the Court's most significant cases in the subversive advocacy context did not even apply the test to statutes specifically criminalizing speech and advocacy, instead deferring to legislative determinations that the speech posed a danger necessitating prohibition. n39 In fact, the Dennis plurality was forced to overturn both cases in order to apply the test to the Smith Act. n40 Thus, the "clear and present danger" test had

little actual content in terms of its application in this particular context and one could argue that Chief Justice Vinson [\*11] faithfully attempted to apply a relatively amorphous and standardless test.

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n33 See *Belknap*, supra note 3, at 141-42 (noting that such papers as *New York Times*, *Washington Post*, *Chicago Tribune*, *Los Angeles Times*, *Denver Post*, *San Francisco Chronicle*, and *New Orleans Times-Picayune* reacted favorably to decision). Public support was so strong that only five major newspapers dared to express opposition to the decision. *Id.* at 141.

n34 *Id.* (quoting *New Orleans Times-Picayune*).

n35 Gerald Gunther, *Learned Hand: The Man and the Judge* 608 (1994).

n36 See, e.g., Chester James Antieau, *Dennis v. United States—Precedent, Principle or Perversion?*, 5 *Vand. L. Rev.* 141, 146-47 (1952); Louis B. Boudin, "Seditious Doctrines" and the "Clear and Present Danger" Rule, 38 *Va. L. Rev.* 143, 154-57 (1952); John A. Gorfinkel & Julian W. Mack, Jr., *Dennis v. United States and the Clear and Present Danger Rule*, 39 *Cal. L. Rev.* 475, 488-96 (1951); Robert McCloskey, *Free Speech, Sedition and the Constitution*, 45 *Am. Pol. Sci. Rev.* 662, 667-69 (1951); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 *Harv. L. Rev.* 193, 217-23 (1952); Francis D. Wormuth, *Learned Legerdemain: A Grave But Implausible Hand*, 6 *W. Pol. Q.* 543, 554 (1953).

n37 See, e.g., Wallace Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 *Colum. L. Rev.* 313, 330-31 (1952) (discussing *Dennis* and noting that Communist leaders "sought to bypass the democratic processes, not to use them").

n38 For examples of such affirmations, see *Pierce v. United States*, 252 U.S. 239 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

n39 See, e.g., *Gitlow v. New York*, 268 U.S. 652, 670 (1925); *Whitney v. California*, 274 U.S. 357, 370 (1927), overruled in part by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The *Gitlow* Court acknowledged that the "clear and present danger" test was appropriate when evaluating whether speech could be punished under statutes making certain acts unlawful: [W]here the statute merely prohibits certain acts involving the danger of substantive evil, . . . if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech . . . , it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. 268 U.S. at 670-71. In contrast, the Court believed that a legislative determination "that utterances advocating the [forcible] overthrow of organized government . . . involve such danger of substantive evil that they may be penalized in the exercise of its police power . . . must be given great weight." *Id.* at 668.

n40 See *Dennis v. United States*, 431 U.S. 494, 507 (1951) (noting that no case had expressly overruled *Gitlow* and *Whitney*, but emphasizing that subsequent opinions "inclined toward the Holmes-Brandeis rationale" in contrast to

rationale of majority opinions in those two cases).

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But a closer examination of the broader legal and social contexts framing Dennis lends far more credence to the dissenting Justices' claim that "present pressures, passions and fears" infected the plurality's reasoning, causing it to alter the "clear and present danger" test for political reasons. n41 First, Chief Justice Vinson's application of that test, though giving a nod to Justices Holmes and Brandeis, the fathers of "clear and present danger," ignored their interpretation of that test. Justice Holmes, the author of Schenck, believed that "clear and present danger" required both imminence and a substantive evil. n42 Justice Brandeis similarly argued that "the necessity which is essential to a valid restriction [did] not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil." n43 Such iterations are quite different from Chief Justice Vinson's pliable test balancing danger against imminence. n44 Second, outside of the subversive advocacy context, the Court had applied a strict version of the test, as in Bridges v. California which held that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." n45 In the decade prior to Dennis, such application increasingly resulted in significant protection of speech. n46 Thus, it was not as if Chief Justice Vinson [\*12] lacked sources from which to draw to determine which version of the test to apply. His decision to pick a version that appeared nowhere in the Court's jurisprudence supports the notion that anti-communist sentiment infected the Court's decision- especially since such sentiment was unquestionably strong at that time.

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n41 Id. at 581 (Black, J., dissenting); see also id. at 589-90 (Douglas, J., dissenting) ("Neither prejudice nor hate nor senseless fear should be the basis of this solemn act. Free speech . . . should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners . . . have even the slightest chance of achieving their aims.").

n42 Gitlow, 268 U.S. at 672-73 (Holmes, J., dissenting).

n43 Whitney, 274 U.S. at 373 (Brandeis, J., concurring).

n44 Surely Chief Justice Vinson was correct in noting that "neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." Dennis, 341 U.S. at 508. There is, however, no evidence that either of them would have actually changed their announced rule on a case-by-case basis.

n45 314 U.S. 252, 263 (1941).

n46 See Schneiderman v. United States, 320 U.S. 118, 157 (1943) ("There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or

other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite time. . . ."); Board of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943) (applying clear and present danger test to find compulsory flag salute and pledge unconstitutional); Taylor v. Mississippi, 319 U.S. 583, 589-90 (1943) (setting aside convictions under Mississippi statute making it a crime to teach disloyalty because no clear and present danger existed); Bridges v. California, 314 U.S. 252, 263 (1941) ("What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (reversing conviction for breach of peace because no clear and present danger existed and "[s]tate may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions"); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (holding that danger of injury to industrial concern is neither sufficiently serious nor imminent to pass clear and present danger test).

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Though communists enjoyed some measure of relief from public hostility during World War II while the United States was allied with the Soviet Union against Germany, n47 after the war U.S.-Soviet relations deteriorated rapidly, rekindling anti-communist sentiment. n48 Moreover, a series of local and world events in the years immediately preceding Dennis fueled anti-communist fervor. In 1948, the Soviet Union not only backed a coup that toppled Czechoslovakia's democratic government, n49 it also blockaded West Berlin. n50 In 1949, the Soviet Union detonated an atomic bomb, thus undoing "America's military advantage over the Soviet's [sic] larger army" and spurring rumors that Americans had provided them with the technology. n51 In that same year, Mao Zedong took over China. n52 In 1950 Ethel and Julius Rosenberg were accused [\*13] of spying for the Soviets. n53 The early 1950s also saw the beginning of the Korean War, which by 1951 was going quite badly for the United States. n54

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n47 See Belknap, supra note 3, at 35, 37-38 (discussing improved relations between Communists and United States government during World War II).

n48 See id. at 41, 42 (discussing relations between United States and Soviet Union after the War).

n49 Albion Ross, Czech Reds Seizing Power, Occupy Some Ministries; Socialist Party Taken Over, N.Y. Times, Feb. 25, 1948, at 1; cf. Drew Middleton, Benes Bows to Communists, Gottwald Forms Cabinet; One Slain in Prague Protest, N.Y. Times, Feb. 26, 1948, at 1 (mentioning coup in Czechoslovakia and shock to British).

n50 See Herbert L. Matthews, Moscow Rejects Parley on Berlin to Break Impasse, N.Y. Times, July 15, 1948, at 1 (discussing Soviet Union's rejection of demands to lift blockade on West Berlin); Drew Middleton, Berlin Ban Stands as Russia Rebuffs Western Leaders, N.Y. Times, July 4, 1948, at 1 (discussing Russia's refusal to reopen Berlin).

n51 Albert Fried, *McCarthyism, The Great American Red Scare: A Documentary History* 70 (1997).

n52 Id.

n53 See David Cate, *The Great Fear* 62-69 (1978) (detailing Rosenberg trial).

n54 See Truman Orders U.S. Air, Navy Units to Fight in Aid of Korea, *N.Y. Times*, June 28, 1950, at 1 (reporting Truman's speech on Korean War); *War is Declared by North Koreans; Fighting on Border*, *N.Y. Times*, June 25, 1950, at 1 (discussing declaration of war by North Korea against South Korea); see also Fried, *supra* note 51, at 71 (discussing war developments and state of conflict in 1951).

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Political actions taken in the United States further exacerbated public fears caused by these events. During this period, the House Committee on Un-American Activities (HUAC) began full-blown and very public investigations of alleged communist sympathizers. n55 Among the most famous of these was the investigation of Alger Hiss, a former official of the Departments of State and Justice who was accused of spying for the Soviets, and later jailed. n56 President Truman issued an executive order establishing federal loyalty review boards which provided for the expulsion from federal jobs of anyone "disloyal" to the United States, and which victimized thousands of people during the boards' existence. n57 Congress also joined the action by enacting restrictive legislation aimed at communists. n58 And, of course, there was Senator Joseph McCarthy, whose famous "Wheeling" speech identifying "205 . . . [State Department employees known] to the Secretary of State as being members of the communist party," n59 kicked off an era of anti-communist hysteria that eventually took his name. n60 Thus, by the time the Supreme Court considered *Dennis*, Americans bore [\*14] great antipathy to communists. A 1949 Gallup poll revealed that sixty-eight percent of Americans wanted to outlaw the Communist Party USA n61 and at least thirty-five percent feared that the Communist Party "controlled important segments of the economy and was getting stronger all the time." n62

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n55 See Cate, *supra* note 53, at 491-502 (addressing HUAC activities regarding film industry).

n56 Id. at 58-61; Milton R. Konvitz, *Expanding Liberties* 114-15 (1966).

n57 Exec. Order No. 9,835, 3 C.F.R. 627 (1947). For a review of the results of the loyalty board implementations, see Cate, *supra* note 53, at 268-92; Fried, *supra* note 51, at 31-37.

n58 See generally Rohr, *supra* note 3, at 10-17 (reviewing federal anti-communist legislation).

n59 Jim Tuck, *McCarthyism and New York's Hearst Press* 69 (1995). Though it is unclear if McCarthy actually used the number "205" or the number "57" in his speech, see Edwin R. Bayley, *Joe McCarthy and the Press* 20-21 (1981), it

remains undisputed that he accused a substantial number of State Department employees of being communists.

n60 On the McCarthy era in general, see Robert Griffith, *The Politics of Fear* (1970); Richard M. Fried, *Men Against McCarthy* (1976); Richard M. Freeland, *The Truman Doctrine and the Origins of McCarthyism* (1972); James Rorty & Moshe Decter, *McCarthy and the Communists* (1954).

n61 George H. Gallup, *The Gallup Poll: Public Opinion 1935-71* 873 (1972). Indeed, communists were so unpopular that the ACLU refused to follow through on a promise to defend the eleven Dennis defendants at trial and worked heartily to disassociate itself from them. Belknap, *supra* note 3, at 212. At least one member of the ACLU during this period claims that anti-communist sentiment caused the organization to "compromise[] on many basic issues and often [take] an apologetic attitude in defending the Bill of Rights." Corliss Lamont, *Yes to Life* 136-37 (1981).

n62 Belknap, *supra* note 3, at 44.

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The events prior to Dennis and the overwhelming popular sentiment against the communists simply could not have gone unobserved by the Justices. The tone of the plurality arguably evidences its own anti-communist hysteria in its repeated references to petitioners' "highly organized conspiracy, with rigidly disciplined members subject to call," n63 even though all indicators showed that the Communist Party had a relatively weak hold in the United States. n64 Such sentiment, combined with the plurality's perversion of the "clear and present danger" test and the surrounding social context, led scholars of the Court to agree with the dissenting Justices regarding the role of anti-communist hysteria in the decision. As one scholar noted,

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n63 *Dennis v. United States*, 341 U.S. 494, 511; see also *id.* at 509. Justice Frankfurter's calmer concurring opinion also referred to contemporaneous events in support of his claim that Congress was reasonable in finding the Communist Party to be a substantial threat. *Id.* at 547-48 (Frankfurter, J., concurring).

n64 Even President Truman, who issued the executive order regarding loyalty oaths, never believed that the Communist Party in the United States posed much of a threat, instead dismissing it as "a contemptible minority in a land of freedom." Belknap, *supra* note 3, at 44. However, he apparently encouraged "acceptance of the notion that American Communists must be extremely dangerous" in order to advance opposition to Soviet expansion elsewhere. *Id.* at 45; see also *Dennis*, 341 U.S. at 588 (Douglas, J., dissenting) ("If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that as a political party they are of little consequence." (emphasis in original)).

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the history of the McCarthy period was part of the provenience of the decision in Dennis v. United States-as were also the investigations by the House [\*15] Committee on Un-American Activities, the Chambers-Hiss drama and the conviction of Alger Hiss, and the tensions of the Cold War. It is difficult to believe that this complex of events had no bearing on how . . . Chief Justice Vinson resolved the issue of the clear-and-present-danger test. n65

-Footnotes-

n65 Konvitz, supra note 56, at 122; see also Kalven, supra note 2, at 190-91 (stating that the Dennis Court "acknowledge[d] clear and present danger as the constitutional measure of free speech, but in the process, to meet the political exigencies of the case, . . . officially adjust[ed] the test").

-End Footnotes-

B. Backing Away From Dennis: Yates v. United States

Justice Black, dissenting in Dennis, expressed the hope that "in calmer times, . . . this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." n66 Such times did not come soon. After Dennis, the government prosecuted communists in earnest. Between 1951 and 1956, the Justice Department charged at least 126 communists with violations of the Smith Act. n67 Most defendants were convicted and their convictions were universally affirmed by appellate courts; n68 the Supreme Court essentially abstained from involvement in such cases. n69 Yet over the course of this period, many of the events that led to anti-communist hysteria in the early 1950s began to reverse themselves. In 1953 the Korean War ended after a lengthy negotiated settlement. n70 In that same year, tensions with the Soviet Union eased after the death of Joseph Stalin. n71 [\*16] By 1955, the Soviets agreed to negotiate with the United States regarding ending the Cold War and further agreed to sign a peace treaty setting up such negotiations. n72 Perhaps most importantly, Senator McCarthy's influence began to wane. Once considered a national hero, a public confrontation with the Department of the Army in 1954 n73 eventually "exposed him . . . as a crude and vicious demagogue." n74 In December of 1954, the Senate voted to censure McCarthy-an exceedingly rare action on its part. n75 McCarthy never recovered. His popularity, which reached an all-time high in 1953, eventually plummeted and McCarthyism gradually died out. n76

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n66 Dennis, 341 U.S. at 581.

n67 Belknap, supra note 3, at 156-57.

n68 Id. at 158; Robert Mollan, Smith Act Prosecutions: The Effect of the Dennis and Yates Decisions, 26 U. Pitt. L. Rev. 705, 710-16, 723 (1965) (discussing specific convictions and subsequent history).

n69 Mollan, supra note 68, at 723 ("[I]n none of these cases did the Supreme Court, prior to Yates, seriously question the results reached by the lower courts as to first amendment claims.").

n70 Lindsay Parrott, Ceremony is Brief: Halt in 3- Year Conflict for a Political Parley Due at 9 A.M. Today, N.Y. Times, July 27, 1953, at 1; Lindsay Parrott, Truce Unit Meets: Enemy Chiefs Complete Signing-Copies of Accord Exchanged, N.Y. Times, July 28, 1953, at 1.

n71 See Harrison E. Salisbury, Premier Ill 4 Days: Announcement of Death Made by Top Soviet and Party Chiefs, N.Y. Times, Mar. 6, 1953, at 1; see also Belknap, supra note 3, at 213 ("On the Soviet side of the Iron Curtain, where Joseph Stalin had died a few months earlier, the new Russian leadership evidenced a belief in the possibility of peacefully resolving that country's differences with the United States . . . .").

n72 Belknap, supra note 3, at 213-14.

n73 For a general description of such events see Fried, supra note 51, at 178-81; Tuck, supra note 59, at 135-39. McCarthy's run-ins with the Army eventually sparked the Senate to hold hearings regarding his conduct. See generally Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel, and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr before the Special Subcomm. on Investigations of the Senate Comm. on Gov't Operations, 83d Cong. (1954).

n74 Belknap, supra note 3, at 215.

n75 S. Res. 301, 83d Cong., 100 Cong. Rec. 16392 (1954).

n76 In 1953, 50% of Americans held a favorable opinion of Senator McCarthy while only 29% held an unfavorable view of him. His popularity fell steadily so that by mid-1954 only 36% of the public reacted favorably to him while 51% viewed him unfavorably. See Gallup, supra note 61, at 1201, 1220, 1225, 1237, 1241 and 1263.

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It appears that Justice Black's "calmer times" were approaching as the decade of the 1950s passed. This is not to say that anti-communism was dead; in fact, much anti-communist sentiment existed well into the next decade. But the easing tensions and fall of McCarthyism apparently led to a decline in hysteria and a re-evaluation of subversive activity. n77 During this period, at least a few of the Justices expressed unhappiness with the government's pursuit of communists and lower court complicity therein. n78 Thus, in 1955 the Court agreed to hear Yates v. United States, and in [\*17] 1957 the Yates Court issued a ruling that substantially curtailed Dennis's reach. n79

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n77 Belknap, supra note 3, at 215 ("The fall of McCarthy did not put an end to everything connoted by the term 'McCarthyism,' but it did indicate that the

times were changing.").

n78 Id. at 245 (noting that Justices Harlan and Frankfurter and Chief Justice Warren were especially concerned with "the excesses of the anti-communist crusade"); Konvitz, supra note 56, at 126 ("One can only conjecture as to why the Court acted as it did in the Yates case. [But after] an endless series of prosecutions of Communists . . . clear and present danger was not the Communist conspiracy against the government, but the Communist conspiracy cases, in their threat to the integrity of the First Amendment.").

n79 Yates v. United States, 354 U.S. 298 (1957); overruled in part by Bucks v. United States, 437 U.S. 1 (1978).

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Yates presented the Court with a scenario almost identical to Dennis. Fourteen leaders of the Communist Party stood accused of conspiring to advocate the forcible overthrow of the government, with the conspiracy taking the form of "writ[ing] and publish[ing] . . . articles on the proscribed advocacy and teaching" and "conduct[ing] schools for the indoctrination of Party members in such advocacy and teaching." n80 In fact, the charges and evidence in both cases were so similar that Justice Clark characterized the Yates defendants as "engaged in this conspiracy with the [Dennis] defendants, . . . serv[ing] in the same army and engag[ing] in the same mission." n81 Nevertheless, the Yates Court reversed all of the defendants' convictions. It did so not by overruling the obviously applicable principles of Dennis; Justice Harlan's lead opinion never mentioned the "clear and present danger" test. Instead, Justice Harlan focused on the lower court's jury instruction, n82 holding, as a matter of statutory interpretation, that it did not comport with the requirements of the Smith Act. According to Justice Harlan, the instruction implied that the Act "prohibit[ed] advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching [was] engaged in with evil intent." n83 The instruction's failure to acknowledge that the Act required some form of incitement to action rendered it fatally flawed. Justice Harlan also reviewed the evidence supporting the conviction and pronounced that the record was insufficient to establish the required incitement; he further ordered the lower court to enter acquittals for five of the defendants and to grant new trials for the remaining nine defendants. n84

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n80 Id. at 301-02 (citing to petitioners' indictment).

n81 Id. at 344-45 (Clark, J., dissenting). The Dennis defendants were named as unindicted co-conspirators in Yates. Id. at 344.

n82 Id. at 313-14 n.18 (setting forth relevant portions of trial court's jury instruction).

n83 Id. at 318. In explaining his distinction between advocacy of action and advocacy of doctrine, Justice Harlan noted that the Court "need not . . . decide the issue . . . in terms of constitutional compulsion, for our first duty is

to construe this statute. In doing so, we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked." Id. at 319.

n84 Id. at 327-35.

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[\*18]

Justice Harlan's decision contrasts significantly with Chief Justice Vinson's opinion in Dennis. Vinson was never concerned with incitement to action; he instead found that the danger posed by a conspiracy to advocate the use of violence, even absent incitement, was sufficient to justify conviction of the defendants. n85 In addition, Chief Justice Vinson specifically refused to review any evidence, thereby rendering his decision relatively abstract. n86 Harlan's reading of the Smith Act, on the other hand, deliberately placed significant evidentiary hurdles in the prosecutor's path even though the evidence in both cases was essentially similar. n87 Justice Harlan's actions led most scholars to believe that he "effect[ed] a bloodless revolution" against Dennis without actually overruling it. n88 As Professor Gunther noted,

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n85 See Dennis v. United States, 341 U.S. 494, 511 (1951) ("It is the existence of the conspiracy which creates the danger.").

n86 Id. at 497 (noting that "limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence"); see also Kalven, supra note 2, at 194 ("As a consequence of this move, the justices [were] cut off from the political realities of the speech they [were] adjudicating, and we get a curiously abstract discussion of the limits of political dissent.").

n87 As Professor Kalven noted, "[i]n view of the fact that the trial in Dennis was completed in 1949 and the indictment in Yates was handed down in 1951, it is difficult to believe that the prosecution in Yates did not have access to the best evidence used in Dennis. Accordingly, the Court's response to the quality of proof in Yates must also be read as a commentary on the quality of proof in Dennis." Kalven, supra note 2, at 195.

n88 Id. at 214.

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Harlan found a way to curtail prosecutions under the Smith Act even though the constitutionality of the Act had been sustained in Dennis. He did it by . . . [reading] the statute in terms of constitutional presuppositions; and he strove to find standards "manageable" by judges and capable of curbing jury discretion. He insisted on strict statutory standards of proof emphasizing the actual speech of the [defendants] . . . Harlan claimed to be interpreting Dennis. In fact, [Yates] represented doctrinal evolution in a new direction . . . n89

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n89 Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 753 (1975); see also Cauter, supra note 53, at 208 (noting that Yates "effectively revers[ed] the seminal ruling of the Vinson Court in the Dennis case, which had opened the door to the legal persecution of the communist party"); Konvitz, supra note 56, at 126 ("The Court could not, in 1957, overrule the Dennis decision . . . . [S]o it acted to leave the statute and its earlier decision intact but pulled their teeth.").

-----End Footnotes-----

[\*19]

The social and political context in which Dennis and Yates occurred are critical to understanding the outcome of each opinion and the claims of later scholars that the Court essentially engaged in political decisionmaking. The protestors in Madsen and Schenck make similar claims. Thus, the following sections review both Madsen and Schenck, as well as the political and social context in which they arose in order to examine the potential parallels to Dennis and Yates.

## II. Madsen v. Women's Health Center, Inc.

### A. The Legal Framework

Madsen arose from the efforts of Operation Rescue to shut down the Women's Health Center in Melbourne, Florida. n90 As part of those efforts, members of Operation Rescue and their supporters demonstrated outside of the clinic and engaged in other conduct, including blocking access to the clinic, abusing persons entering and leaving the clinic, and trespassing on clinic grounds. As these activities became increasingly disruptive, the clinic sought and received a temporary injunction barring Operation Rescue's members from engaging in violent and intrusive conduct outside of the clinic. n91 After a lengthy hearing, the trial court concluded that its initial injunction proved insufficient "to protect the health, safety and rights of women . . . seeking access to [medical and counseling services]." n92 Specifically, the court found that the [\*20] protestors continued to block access to the clinic, continually jammed the telephone system of the clinic, provided literature identifying the staff of the clinic as "baby killers," followed doctors and pretended to shoot them from adjacent vehicles, stalked clinic staff, and forced those seeking the services of the clinic to "run a gauntlet" of protestors shouting epithets and personal abuse. n93 In light of the protestors' continued actions, the trial court amended its original injunction to include not only bans on certain conduct but on some expressive activity as well. The new injunction thus added provisions prohibiting Operation Rescue from (1) congregating or demonstrating within thirty-six feet of the property line of the clinic, (2) shouting, chanting, singing, or using noise amplification

equipment or observable images within earshot of clinic patients during the clinic's surgical hours, (3) physically approaching, within 300 feet of the clinic, any person seeking the services of the clinic unless that person manifested consent to be approached, and (4) demonstrating, congregating, or using sound amplification equipment within 300 feet of the residence of any clinic employee. n94

-Footnotes-

n90 During the course of the lawsuit, all parties agreed that Operation Rescue's "desire was to close down 'abortion mills' by various means" and specifically that it desired "to close down abortion clinics in the Central Florida area." Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 667 n.2 (Fla. 1993) (citing parties' stipulated facts), aff'd in part, rev'd in part sub nom. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

n91 The Florida trial court enjoined Operation Rescue members from blocking access to the clinic, physically abusing persons entering, leaving or otherwise connected with the clinic, or inciting such actions by others. Id. at 667 n.4. The trial court's order also specifically noted that it "should [not] be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate" other provisions of the injunction. Id.

n92 Id. at 667.

n93 Id. at 667-69.

n94 Id. at 669.

-End Footnotes-

The amended injunction produced mixed results at the appellate level. The Supreme Court of Florida upheld the lower court's decision and found the injunction to be a neutral, necessary, and reasonably tailored regulation of speech. n95 Almost simultaneously, a federal appellate court, hearing a separate challenge to the same injunction, held that it was impermissibly viewpoint-based in violation of the First Amendment. n96 The United States Supreme Court granted Operation Rescue's petition for a writ of certiorari in order to resolve the conflict.

-Footnotes-

n95 Id. at 671-74.

n96 See Cheffer v. McGregor, 6 F.3d 705, 710-12 (11th Cir. 1993). The plaintiff in Cheffer sought an order in federal district court blocking enforcement of the state court injunction, claiming that it "acted as a prior restraint on her free speech rights, and that the threat of arrest chilled her ability to exercise those rights." Id. at 707-08. The federal district court refused to stay the state court order but the federal appellate court ordered the district court to reconsider its refusal and to examine further the constitutionality of the injunction. Id. at 712.

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[\*21]

Before the Supreme Court, Operation Rescue attempted to cast the injunction as impermissibly viewpoint-based n97 and as a prior restraint, n98 characterizations that, if successful, almost certainly would have resulted in its demise. n99 The Court dismissed the prior restraint argument in a single footnote n100 but devoted some attention to the viewpoint-discrimination argument. While acknowledging that the injunction affected only anti-abortion protestors, the majority rejected the petitioners' argument that it was therefore necessarily viewpoint-based. Rather, because the injunction was issued as a result of "the group's past actions in the context of a specific dispute between real parties" and not with reference to the protestors' message, the Court ruled it to be content-neutral. n101 Recognizing, however, that even content-neutral injunctions "carry greater risks of censorship and discriminatory application than do general ordinances," n102 the Court deemed it necessary to apply a new, slightly higher standard of review than it typically used for content-neutral regulations of speech. The majority thus held that such injunctions were constitutional only if they "burden[ed] no more speech than necessary to serve a significant government interest." n103

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n97 Brief for Petitioners at 8-20, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (No. 93-880).

n98 *Id.* at 37-43.

n99 The Court views regulations which prohibit citizens from expressing a particular point of view with particular disfavor and rarely, if ever, upholds them. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). The Court has an equal if not greater antipathy toward prior restraints (i.e., government attempts to suppress expression prior to its dissemination). *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

n100 *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 756, 763 n:2 (1994). Although admitting that "[p]rior restraints do often take the form of injunctions," the majority refused to find that "all injunctions which may incidentally affect expression . . . are 'prior restraints.'" *Id.* Because the *Madsen* injunction was neither content-based nor wholly suppressive of speech, it did not fall into the prior restraint category. *Id.*

n101 *Id.* at 762-64.

n102 *Id.* at 764.

n103 *Id.* at 765. The Court judges content-neutral standards by asking if they "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, . . . and leave open ample alternatives for communication of information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

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The majority spent the remainder of its opinion applying this standard, with mixed results. It easily found the government [\*22] interests-protecting women's freedom to seek lawful medical or counseling services regarding their pregnancies, ensuring public safety and order, and protecting medical privacy-to be significant. n104 The question for the Court then became simply whether the various provisions of the injunction were sufficiently tailored to meet those interests. The Court held that the thirty-six-foot buffer zone was constitutional, n105 noting that the protestors' repeated interference with access to the clinic left the lower court with few options regarding protection of its state interests. n106 That petitioners did not merely protest abortion but actually engaged in "focused picketing" aimed directly at clinic patients and staff further bolstered the majority's conclusion. n107 Presumably, such focused picketing was too intrusive on the privacy interests of unwilling listeners who were "captive" in the medical facility. n108 The privacy interests of patients also spurred the Court to uphold a provision of the injunction prohibiting high noise levels near the clinic. n109 On the other hand, the Court struck down the "images observable" portion of this provision, noting that the clinic could simply pull its curtains to keep such images out. Though potentially offensive, the images represented a much less significant invasion of privacy than high noise levels. n110 Finally, the Court found the 300-foot "no approach" zone unconstitutional. Although that provision was designed to prevent stalking and harassment, its prohibition on even "peaceful, uninvited approaches" violated [\*23] the Court's longstanding principle that "in public debate our own citizens must tolerate insulting, and even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." n111 Absent evidence that speech was independently proscribable or suffused with violence (as opposed to merely offensive), the "no approach" zone was overly broad. n112

-Footnotes-

n104 Madsen, 512 U.S. at 767-68.

n105 Id. at 768-70. While upholding this provision as applied to public property, the Court struck down the buffer zone to the extent it entered private property, noting that there was insufficient evidence that the protestors used such property to express their message. Id. at 771.

n106 Id. at 769.

n107 Id.

n108 Id. The Court alluded to its decision in *Frisby v. Schultz*, 487 U.S. 474 (1988), where it upheld an ordinance banning focused picketing of residences based upon a strong interest in residential privacy. Madsen, 512 U.S. at 769. The Madsen Court struck down a provision of the injunction banning protestors from demonstrating within 300 feet of the residence of any clinic staff though the Court noted that it might have upheld a provision more directly aimed at preventing "focused picketing." Id. at 775. The size of the zone, however, precluded any conclusion that the provision applied only to focused picketing. Id.