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# COLUMBIA UNDERGRADUATE LAW REVIEW

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## MISSION STATEMENT

The goal of the Columbia Undergraduate Law Review is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

- i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.
- ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.
- iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history and political science will also be considered.
- iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our *alma mater*, Columbia University.

## SUBMISSIONS

The submission of articles must adhere to the following guidelines:

- i) All work must be original.
- ii) We will consider submissions of any length. Quantity is never a substitute for quality.
- iii) All work must include a title and author biography (including name, college, year of graduation, and major.)
- iv) We accept articles on a continuing basis.

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Dear Reader:

We are happy to present to you the fourth issue of the Columbia Undergraduate Law Review.

Our Fall 2009 issue features five exciting papers. Boin Cheong's paper entitled, "Pursuit of Justice or Reflection of Political Reality? Why it is Unrealistic to Prosecute Winners," examines the concept of "victor justice" and the extent to which victorious protagonists have been held accountable for atrocities committed during wartime. The paper does so by recounting the early beginnings of victor justice starting from the end of World War II and analyzing its role in modern-day situations such as Iraq.

Robyn Gordon has written two articles for the Review. The first portrays Abraham Lincoln's roles as both a politician and lawyer. Through analyzing three of Lincoln's cases, the essay posits that Lincoln's career as a lawyer provided him with the skills necessary to launch his political career.

Rachel Mark's article explores the role and significance of *Brown v. Board of Education*. In so doing, the paper examines the implications of the decision with respect to the process of desegregation, as well as to its effects on racist ideology.

James Dawson's article takes a closer look at the *Bush v. Gore* case, which ruled in favor of George W. Bush when it declared that the Florida Supreme Court's for recounting ballots during the 2000 presidential election was a violation of the Equal Protection Clause of the Fourteenth Amendment. The paper argues that the court's decision stands as an outlier along the arc of equal protection jurisprudence and has important consequences for the future of the Fourteenth Amendment in the American election process.

Lastly, Robyn Gordon's second paper analyzes *Washington v. Glucksberg*, a case involving four Washington state physicians and their three terminally ill patients. The case questioned whether the Due Process Clause of the 14th Amendment protects a citizen's "right to die." Through an examination of the history of federal jurisprudence as it relates to inherent rights, public attitude during the second half of the 20th century, and legal precedents set by court decisions, this article seeks to explain the Supreme Court's decision that the Due Process Clause does not protect the "right to die."

We hope you enjoy the articles.

Sincerely,

Madeleine Goldstein

Solomon Kim

*Co-Editors-in-Chief*



# Pursuit of Justice or Reflection of Political Reality? Why it is Unrealistic to Prosecute Winners

*Boin Cheong*

## Abstract

Referred to as ‘victor’s justice’, there often arises the question of to what extent the victorious protagonists can be held accountable for atrocities committed during wartime. In this essay, I argue that despite recent attempts, especially with the International Criminal Tribunals for the Former Yugoslavia and Rwanda, not much has changed in practice since the International Military Tribunals in Nuremberg and Tokyo. Victor’s justice cannot be the solution to finding justice, nor the excuse for not being able to prosecute the winners. However, in our world today, political reality often outbids the pursuit of justice. What we have in our world of international criminal tribunals, then, is a reflection of the power politics that takes place between and among governments. To begin, I review the historical background of today’s legal culture and note how the unrealistic scenario of prosecuting winners goes back to the first establishments of international war tribunals following the end of World War II. The legacies of Nuremberg and Tokyo have made it difficult for us to grow out of the victor’s justice problem. Then, I turn to the assessment of more contemporary establishments in The Hague and Arusha. Although they were founded by the United Nations, a body that was not a direct party to either of the conflicts, their undertakings of realizing justice are still limited through tactics used by the directly involved parties. Lastly, I conclude by reviewing the findings in light of the situation in Iraq today and look at the implications of the victor’s justice problem and what legacy the problem has left for the future generations.

When Saddam Hussein’s Deputy Prime Minister Tariq Aziz was brought before Iraq’s special criminal court in the American-controlled Green Zone, this immediately raised questions among the anti-Iraq War advocates. Conor Foley of *The Guardian* points out that the final charge that centers on Aziz’s role in launching the invasions of Iran and Kuwait is directly comparable to US invasion of Iraq in 2003. Indeed, on legal grounds, there is little distinction between Iraq’s invasion of Iran in 1980 and the US-led invasion of Iraq. What are the chances, though, that George W. Bush or Tony Blair would face similar charges in front of a special tribunal someday? When an international criminal tribunal is inaugurated with the aim of establishing international justice and ethics, could it be possible that it really just comes down to politics? Many observers may argue that justice on the international level has been transformed into power politics.

For many scholars and observers, the treatment of the Iraqi officials on trial is reminiscent of what happened to the Nazi officials and the Japanese army commanders post World War II. These commentators refer to the situation in Iraq as a case of Victor’s Justice, and question as to what extent the victorious protagonists can be held accountable for atrocities committed during wartime. Kingsley Moghalu, a former Special Counsel for the International Criminal Tribunal for Rwanda (ICTR), observes, “the perfect Victor’s Justice appears to have been handed down [at the ICTR], with only Hutus prosecuted so far.”<sup>1</sup> Such endorsement of selective justice is common among legalists. Numerous human rights groups and practitioners of international criminal law

believe that Victor's Justice is completely acceptable. Yet is this truly an adequate definition of justice?

In order to combat such accusations, the drafters of the statutes of the contemporary international criminal tribunals deliberately took necessary steps to improve on the flaws of past tribunals. At first glance, by ensuring that the same rules applied to both sides of the war, today's war tribunals appear to have transcended the Victor's Justice problem. Differing from the past tribunals in their origin, structure, and guidelines, the contemporary tribunals seek to investigate and prosecute serious violations of international humanitarian law on all sides of the conflict. Yet how successful are they? How likely is it that the winners of war will be prosecuted the same way as the losers?

Despite recent attempts, especially with the International Criminal Tribunals for the Former Yugoslavia and Rwanda, not much seems to have changed in practice since the International Military Tribunals in Nuremberg and Tokyo. Victor's Justice cannot be the solution to finding justice, nor the excuse for not being able to prosecute the winners. However, in our world today, political reality often outbids the pursuit of justice. What we have in our world of international criminal tribunals, then, is a reflection of the power politics that takes place between and among governments. When reviewing the historical background of today's legal culture and it becomes evident how the first establishments of international war tribunals following the end of World War II has rendered the prosecution of winners unrealistic in modern times. The legacies of Nuremberg and Tokyo have made it difficult for us to grow out of the Victor's Justice problem. Next, one must assess the more contemporary establishments in The Hague and Arusha. Although these were founded by the United Nations, a body that was not a direct party to either of the conflicts, their undertakings of realizing justice are still limited by tactics used by the directly involved parties. Lastly, after reviewing the findings in light of the situation in Iraq today the implications of the Victor's Justice problem can be better assessed and what legacy the problem has left for future generations.

### **The Legacies of The International Military Tribunals**

Almost immediately after the end of World War II, the victorious Allies established the two forerunners of today's United Nations ad hoc war crimes tribunals, the International Military Tribunals of Nuremberg and of the Far East. This marked the beginning of an era for Victor's Justice. The international tribunals were "shaped by powerful states and focused on individuals from regimes either defeated in war or otherwise out of favor with influential states."<sup>2</sup> This tradition has passed down to us today as Gary Bass notes in *Stay The Hand of Justice: The Politics of War Crimes Tribunals*: all international criminal tribunals have engaged in "selective prosecution of war criminals and perpetrators of crimes against humanity" but he finds nothing wrong with it. For him, "waiting for perfectly comprehensive justice could mean waiting forever."<sup>3</sup> After all, he is of the opinion that even incomplete justice is justice. Richard Goldstone, the first chief prosecutor for the ad-hoc tribunals, echoes such sentiment when he says, "it seems to me better to have an imperfect, or less than perfect, permanent court, than not have one at all."<sup>4</sup> Because our ancestors left us their definition and understanding of international justice, our contemporary society seems to have inherited it without altering it according to the new changing standards.

Today's existing war tribunals follow the example of Nuremberg and Tokyo; established by liberal democratic states under the leadership of the United States, these post-WWII war tribunals drafted and followed certain sets of legal rules and procedures. The founders also defined what would later become the groundwork for international customary law: international standards for human rights, humanitarian law and crimes against humanity, among others. This implies that the decisions of the war tribunals fell under the category of "punishment", rather than "vengeance". Punishment assumes that there are certain standards of behavior according to international customary law that were violated. Vengeance, on the other hand, does not presume the existence of such laws and simply means retaliation: you hurt me, now it's my turn to hurt you. For vengeance, there does not need to be a violation of international laws, customs, or even people's rights. With the establishment of the tribunals at Nuremberg and Tokyo, and the international laws that came with them, the Allies completed the legitimization of the international justice system.

Still, such a definition of global justice based on vengeance is by no means the perfect one. Since pragmatism enables "a desirable legal order to take shape", Graubart refers to such form of global justice as "pragmatic legalism".<sup>5</sup> The fact that this is what happened does not justify it, however. As Graubart argues, "the pragmatic legalists [turned] the relationship between law and power politics on its head."<sup>6</sup> The submission to power politics, Graubart adds, "overwhelms and distorts the legal process."<sup>7</sup> As a result, the "claimed goals of accountability, truth telling, reconciliation, and respect for an impartial rule of law" are undermined.<sup>8</sup> Unfortunately, the current situation of the ICTY and the ICTR is an indication of how the "pursuit of a 'pragmatic' system of global 'justice' has produced an institutionalized and distorted legal system profoundly detrimental to the cause of genuine justice."<sup>9</sup>

## **Nuremberg**

The judgments of Nuremberg especially are now regarded as milestones in global criminal justice. For many legal scholars, Nuremberg is the basis of our current understanding of global justice. Yet what lies beneath the surface is that the two military tribunals in Nuremberg and Tokyo were set up to serve a very specific purpose: Article 6 of the Nuremberg Charter declared as its aim the adjudication of crimes against peace, war crimes, and crimes against humanity. The International Military Tribunal for Nuremberg was the product of the cooperation of four 'Victor States': Great Britain, France, the Soviet Union, and the United States in 1945; the political setting at the time permitted the Allies to have complete control over the decisions and outcomes. Each victor state was allotted one judge and one prosecutor. Needless to say, the outcome of the Nuremberg Tribunal is not surprising: twelve of the twenty-two surviving defendants were sentenced to death, seven to varying prison terms, and a mere number of three were acquitted. What the judges and prosecutors of the victor states didn't realize at the time, however, is that this was to start a trend of global legal procedure shaped and influenced by Victor's Justice. As pragmatic legalists would argue, "Nuremberg and, to a lesser extent, Tokyo provided a generalized legal benchmark by which to judge future war crimes and crimes against humanity."<sup>10</sup>

## **Tokyo**



What distinguishes the International Military Tribunal for the Far East (IMTFE) from the Nuremberg Tribunal is that the IMTFE was “almost exclusively a creature of the United States” while the latter was still a joint effort.<sup>11</sup> Eleven judges from eleven different countries constituted the tribunal. In its two and a half years of existence, the IMTFE declared death sentences to seven, life sentences to sixteen, and limited sentences to two defendants.

Given the post-war political situation of the time, the pragmatic but selective judicial process was the only option at hand. Even Graubart admits that “pragmatic legalists are correct that Victor’s Justice was the only viable, global legal option” as the other choice would have been “falling back on a mix of vengeance and *realpolitik*.”<sup>12</sup> Yet the times have changed since the 1940’s. Today, we live in a world where the same old ideas and principles should not be applied when seeking global justice. After all, what happened immediately after World War II is not a justification of why even today, we have to rely on Victor’s Justice. When we ask ourselves if any of the leaders from the victor state would be prosecuted for his or her crimes of war, the answer is more likely to be ‘no’, given the historical background of our international criminal legal culture.

Regardless of whether Victor’s Justice was the only option or not, it is not a secret that “the victor-controlled legal process was far from a neutral display of fairness.”<sup>13</sup> What took place here was political manipulation, largely steered by the United States when gathering evidence and arresting suspects. Through such efforts, the United States government attempted to “justify to the American and global audiences the US decision to go to war and its wartime behavior.”<sup>14</sup> By shifting the focus from the dropping of the atomic bombs to the atrocities committed by the Japanese, the Americans succeeded in escaping war crimes charges. As it was at the victor’s digression to form the basis of the post-war society, one could safely say that what happened at the Nuremberg and Tokyo tribunals formed the foundation of today’s concept of international criminal justice.

### **Prosecuting Winners in The Hague and Arusha**

While it is true that the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) are inherently different from their forerunners, they share great similarities. After all, the historical tribunals did provide the backbone for the contemporary tribunals. Despite the fact that it is the neutral body of the United Nations Security Council that established the ICTY, the ICTR, and even the most recent Extraordinary Chambers in the Courts of Cambodia (ECCC), it is still practically impossible to prosecute winners in this world. In fact, critics of the United Nations would argue that the organization is just a puppet figure under the influence and control of the Western powers. Indeed, Gwyn states that, “the UN’s special tribunals for Yugoslavia and Rwanda, and eventually the International Criminal Court, in effect extend the rule of law of democratic states to those parts of the world where to be in power has been, until now, to be free to do almost anything.”<sup>15</sup> For example, when the United Nations Security Council deliberately chose to create the two ad hoc tribunals, it was acting selectively and politically; if international criminal tribunals are created only when the interests of major powers have been affected, “their institutional structure and their decisions are compromised.”<sup>16</sup>

The question then remains: are international criminal trials legalistic exercises that cloak a Victor’s Justice, or can such courts reach decisions that are fair and

impartial? Further, could it be that the founders of the various ad hoc tribunals are simply pushed by the weight of political and social pressure toward harshness? Under such circumstances, is leniency even an option?

What is interesting, though, is that it is not only the Western liberal democracies that can intervene in the process of realization of international justice. In the contemporary tribunals, process for achieving justice are further limited through tactics used by the directly involved parties.

### **The Former Yugoslavia**

Having seen the lasting legacies of the Nuremberg and Tokyo tribunals, there is “widespread agreement that the verdicts and punishment meted out by the ICTY will be among its most lasting and visible accomplishments.”<sup>17</sup> With the ICTY being the first tribunal since Tokyo, there is great pressure on the judges to ensure that fair and impartial decisions are reached; if the ICTY’s judgments are perceived as “unfair, biased, or ad hoc, the consequences could be harmful.”<sup>18</sup> In fact, some go as far as to claim that “the future of international human rights enforcement in the next one hundred years will hinge on the ICTY’s efforts to provide justice.”<sup>19</sup> Such expectations, however, have the danger of exercising even greater implicit and explicit pressure on the tribunal. On one had, the judges of the ICTY will try to break away from the legacies of Victor’s Justice from Nuremberg and Tokyo; but the efforts of creating an impartial tribunal may not always be successful given the political reality.

When the ICTY was first founded, it faced a great number of political and legal challenges establishing its legitimacy. As Meernik admits, “of critical importance to the ICTY and international criminal law in general is the development of impartial criteria for judging those accused of international crimes.”<sup>20</sup> Some legal scholars assume that the judges of the ICTY are exclusively guided by the ICTY Statute and the Rules of Procedure and Evidence; as a result, these judges should believe in impartial and fair decisions. Indeed, some like Goldstone observe that “the decisions of ICTY judges are fair and based on legally defensible criteria.”<sup>21</sup> Goldstone even ensured that “at all times, in the Office of the Prosecutor (OTP), the primary goal was not to achieve convictions, but rather to ensure that those indicted would enjoy fair processes and procedures.”<sup>22</sup>

Meernik refers to this as the “legal model” as it emphasizes the legally relevant factors that are “most predictive of judicial behavior in a variety of settings but especially in trial courts.”<sup>23</sup> The nations that were most instrumental in creating and staffing the ICTY are liberal, democratic nations; for these, the norm of judicial independence was one of the most important factors behind establishing the ICTY. Supporters of this view find that judges will act as independent arbiters of the law and “base their decisions on impartial legal criteria” (Meernik 149).

Yet whatever the arguments for a legal model under the guidance of the Statute, the facts show a different face. After all, there is an official Office of the Prosecutor (OTP) situated within the ICTY, whereas there is no “Office of Defense Counsel” (Meernik 146). Staffed by international lawyers of substantial expertise and institutional experience, the OTP in many ways has a great advantage over the defense counsels. This is evidently a systematic flaw in the administration of justice that may potentially hurt the defendants.

Further, although the Statute explicitly guarantees that everyone, regardless of ethnicity or nationality, can be found guilty of any crimes under its jurisdiction, there is a strong belief among many Serbs “and even some international commentators that

Serbs cannot get a fair hearing at the ICTY because they have been singled out as the villains and losers of the wars in the former Yugoslavia.”<sup>24</sup> For example, in 2001, Richard Gwyn of the *Toronto Star* wrote the following regarding the case against Slobodan Milosevic in the ICTY: “While of course, innocent until proven guilty, the case against Milosevic is overwhelming. An eventual guilty verdict is all but inevitable.”<sup>25</sup> And this is precisely one of the charges leveled most frequently against the ICTY: some believe that the creation of the tribunal was driven by “the political interests of the United States and its European allies in NATO.”<sup>26</sup>

Additionally, these states, unlike the former Yugoslavia, have the possibility and ability of electing their own nationals to the trial chambers. To please their home governments or win reelection to the ICTY, these judges may “render verdicts and punishments in keeping with the expectations of these major powers.”<sup>27</sup> Overall, many of the arguments for an impartial and fair international tribunal of the legal model fall apart when faced with the political reality of our times. Although the drafters of the ICTY Statute tried their utmost in establishing an independent and unbiased tribunal, on practical terms, the efforts weren’t met with much success.

One of the reasons why it has been impossible to prosecute war crimes suspects from all sides of the Bosnian conflict have been the difficulties provided by the lack of cooperation from the directly involved victor parties. For example, when Goldstone aimed to investigate the war crimes committed by the Bosnian Croat soldiers in Bosnia, the ICTY faced great obstacles. Until the death of the Croatian leader President Franjo Tudjman in 1999, the Homeland War atrocities committed by Croatians remained off limits to ICTY investigators. Because of the “mythic status” the struggle for independence and the victory in Operation Storm acquired in Croatia, the newly established government in Croatia was reluctant to cooperate with the ICTY in prosecuting the individuals who contributed to this memorialization of the Homeland War. After all, this was a meaningful cornerstone for the nation-building project after the military conflict, as well as of the party’s legitimacy. Consequently, for the Croatian nationalists, it was paramount that the dignity of the Homeland War be defended. After all, as Peskin notes, “permitting tribunal investigators access to national archives and key witnesses could lead to the indictments of top military and political leaders, including Tudjman himself.”<sup>28</sup>

Some of the measures that the government under Tudjman and his successor Racan employed to circumvent the investigations regarding the Croatian military personnel included a legal approach and accusation against the ICTY, as well as distracting the attention of the ICTY from the Croatian suspects. Knowing that the United Nations would not impose any serious sanctions on the Croatian government immediately after the already disastrous Balkan Conflict, Tudjman could afford to challenge the ICTY’s hopes of bringing the victors to justice. For such behavior, he was frequently criticized by tribunal officials. Tudjman didn’t only dispute the tribunal’s jurisdiction over Operations Flash and Storm, but also managed to come up with a justification for his conduct: Peskin remembers how Tudjman argued that Operations Flash and Storm were “legitimate police actions and of short duration.”<sup>29</sup> In addition, the Croatian government even managed to accuse the ICTY for failing to prosecute Serbian suspects of committing atrocities against Croats. These were deliberate measures the government under Tudjman took to impede the trial processes specifically against Croatian war crime suspects.

With the death of Tudjman in December 1999 came a domestic political change and the emergence of a “more cooperative government” in Zagreb; for the ICTY,

the new leadership of Ivica Račan brought hope of better cooperation with the Croatian government. Indeed, the new government did seem promising at first: Račan pledged “increased cooperation with the ICTY as a way to repair the country’s war-torn economy and speed the country’s entry into the European Union (EU) and other Western institutions.”<sup>30</sup> Yet behind this façade of willingness to cooperate hid Račan’s concern for holding his six-party coalition together. His attempts to maintain public support and not provoke a nationalist backlash prevented him from fulfilling his promise of full cooperation.

Especially when it came to the arrest and transfer of indicted war crimes suspects to the ICTY in The Hague, Račan was first and foremost concerned about the government’s domestic stability; as the nationalists still retained “significant sway over issues relating to the celebrated Homeland War”, the government soon “found itself buffeted by conflicting forces”: To the world, it “portrayed itself as a strong proponent of cooperation; to its people, it posed as a strong defender of the memory of the Homeland War and the indicted Croatian generals who enjoyed the status of national heroes.”<sup>31</sup> As a matter of fact, the ICTY has had to make “major strides in its pursuit of war crimes suspects from the winning side of the Balkan conflict given the arrests of four Croatian generals, Rahim Ademi, Mladen Markac, Ivan Cermak, and Mirko Norac.”<sup>32</sup> Such reality reflects the belief and opinion of many legal scholars that Victor’s Justice is difficult to overcome. In addition to the possibility that the ICTY is politically inspired and manipulated, there is also evidence that the winning parties can also directly limit the tribunal’s ability to bring justice in a fair and even-handed manner. Given the difficulties and challenges on these two levels, it has been practically impossible to prosecute winners according to the same standards as with the losers.

## **Rwanda**

When the International Criminal Tribunal for Rwanda (ICTR) was first established and its Statute and Rules of Procedure drafted, it was important for all parties involved that a new pattern be signaled to the world. For the first time, there was a geographical relocation of global justice to the periphery; for the United States and other Western states, it was paramount that the correct notions of international justice be established in a region that had perhaps little understanding or experience of such liberal democratic concepts. After all, many Western countries, especially the United States and Great Britain, saw this as an opportunity to establish a democracy in Rwanda. What challenged the involved parties was, however, that this was a *civil* conflict without any intervention of the Western world until after the conflict was over. Some of the questions that arose in relation to this are: What must the Western states do in order to respect the autonomy and sovereignty of Rwanda, while ensuring that the correct liberal democratic principles are being established? What gives them the right to come in and impose a Western system suddenly after the war? The challenges remained: while struggling with maintaining political stability on one hand, the international community also simultaneously had to ensure that this political stability wasn’t coming at the cost of justice.

In order to remain as fair as possible, the Statute of the International Criminal Tribunal for Rwanda (ICTR) explicitly stated:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international

humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.<sup>33</sup>

This clause does not limit the prosecution of war criminals to solely Rwandan citizens; in fact, even in geographical terms, in order to cover all war crimes related to the genocide of 1994, the Statute addresses all crimes committed by Rwandans and non-Rwandans alike, whether inside or outside the Rwandan borders. This is undoubtedly a great improvement from the Nuremberg or Tokyo military tribunal statutes.

A further improvement compared to the post-WWII tribunals is that a model for the Statute and other guidelines already existed prior to the actual establishment of the ICTR. The ICTR Statute is in many ways similar to that of the ICTY and none of the concepts that come up in the Statute are new. Consequently, the situation could be avoided where *ex post facto* laws are applied. After all, in the past, this was often the case and, Sarkin points out that as a result, the trials were “nothing more than Victor’s Justice.”<sup>34</sup> Such improvements indicate that the founders of the ICTR really wanted to establish a tribunal strictly according to the legal model; they aimed to leave as little loophole as possible and to ensure that Victor’s Justice be avoided.

What ended up happening in the ICTR in Arusha, Tanzania, though, is a different picture. Despite such attempts to establish a fair and impartial court, the political reality made things difficult for the ICTR officials to work things out as they had initially planned. For example, although both sides were responsible for some of the crimes that were committed, the political situation in Rwanda in the post-conflict years did not provide much room for real impartial judicial processes to be carried out.

Although it is widely recognized that given the brutal and complex history of the conflict between the Hutus and the Tutsis, it is impossible to blame merely one side for what happened in Rwanda, once the government was handed over to the Rwandan Patriotic Front (RPF), it became complicated to realize justice for all involved parties. As a matter of fact, for the prosecution, the question of RPF investigations became a growing concern. The tribunal was very much aware of the political challenges and dangers it would encounter upon embarking on RPF investigations. As Goldstone’s successor, Louise Arbour of Canada, remembers, even in her position as the chief prosecutor of the ICTR, she feared “that the Rwandan government might carry out reprisals against her investigators based in Rwanda to derail the investigations of RPF officers.”<sup>35</sup> “The Rwandan government was reading my mail,” recalls Arbour. She continues: “We were infiltrated. They knew what I was doing. So if I sent someone off to do an investigation of the RPF, they might be killed. I wouldn’t do it.”<sup>36</sup> While it is true that some former ICTR officials are skeptical that the Kigali government would have actually harmed investigators, Arbour’s statement reveals a serious concern and the sense of fear. At least some ICTR officials believed that “the government was determined to intimidate the tribunal to keep it focused exclusively on Hutu suspects.”<sup>37</sup>

That the Kigali government in fact had the possibility of doing so is reflected in its hindering the new chief prosecutor, Del Ponte, from traveling to Rwanda for two weeks. Had the RPF really been interested in establishing fair and equal justice for everyone, the cooperation efforts would have been stronger; yet the government in Rwanda knew that the ICTR had some investigation plans that were in conflict with the government’s best interests. What eventually permitted Del Ponte’s blocked entrance was the reversal of the original decision by the Appeals Chamber regarding Jean-Bosco

Barayagwiza. This incident demonstrates the government's "willingness to withhold cooperation as a means to force the tribunal's hand."<sup>38</sup>

There are further instances where the Rwandan government showed its reluctance to cooperate with the ICTR officials. In fact, some of these are quite reminiscent of what happened previously between Croatia and the ICTY. For instance, as Peskin recalls, Rwandan President Paul Kagame initially assured the ICTR of his full cooperation. With time, however, the government "subsequently derailed Del Ponte's investigations."<sup>39</sup> Ultimately, Del Ponte "issued a statement criticizing the Rwandan government for its noncooperation and indicated plans to issue the first indictments against RPF officers by the end of the year."<sup>40</sup> Unfortunately for Del Ponte and the ICTR, this statement only pushed the Kigali government to attack the court's credibility, pointing out its "poor administrative performance and slow progress on genocide cases on trial" in an effort to "deflect attention from the government's refusal to cooperate."<sup>41</sup>

As Zorbas remembers, the tribunal's relationship with the government was a "tormented one". Zorbas further observes:

The ICTR's mandate covers the period of January to December 1994, during which RPF soldiers allegedly carried out several massacres. The ICTR's insistence that these crimes should be investigated led to moral outrage from the RPF leadership, accusing the Court of putting the RPF on the same level as the *génocidaires*.<sup>42</sup>

Such statements, of course, made it extremely difficult for the ICTR officials to seek cooperation with the newly established Rwandan government. Although the legal framework may have been established in order to ensure impartial prosecution of all war criminals, this attitude of the government hindered all of ICTR's efforts.

A further parallel between Croatia and Rwanda is that both governments could afford to deny its full cooperation without having serious concerns about sanctions. As mentioned above in the example of Croatia, Rwanda, too, had the support of its trustworthy allies, Great Britain and the United States. Because both states had an interest in "bolstering the Rwandan government and obtaining its cooperation on issues of more importance to Washington and London, such as Rwanda's withdrawal from the Congo where a regional war had raged since 1998," Kagame could rest assured that the two Western powers would not take any strong steps to support Del Ponte's pursuit of RPF crimes. Furthermore, once American diplomats expressed concern that "RPF indictments could weaken the Kagame regime and, in turn, potentially destabilize Rwanda," it was quite unlikely that RPF suspects would be prosecuted.<sup>43</sup>

Only to make things worse, what complicated matters even more was Kigali's decision to bar witness travel to the ICTR in Arusha, Tanzania. By restricting travel for Tutsi genocide survivors selected by the prosecution, the government forced the tribunal to adjourn two trials; the Rwandan government showed with this example of noncompliance that it could "effectively hold witnesses hostage and virtually bring the wheels of justice to a halt."<sup>44</sup> The lack of media attention let the case pass by without much international criticism, and Western policymakers could downplay "both the threat to the tribunal's viability and the question of RPF indictments."<sup>45</sup> As the tension between Del Ponte and Kigali increased, the United Nations under Kofi Annan ultimately decided to appoint a new chief prosecutor to the ICTR. For Del Ponte, this was a "political decision."<sup>46</sup> Regardless of the reasons behind this Security Council decision, this may jeopardize further investigations in the future, both in the ICTR and in

any other tribunals. What this event reflects, though, is the costs to the tribunal of pursuing the victors. The incidents in Rwanda tell that Victor's Justice is not completely over. As Serbian nationalists and exiled Hutu extremists rail against the tribunals in an effort to diminish their own culpability, and even succeed at it, this only continues the troublesome pattern of the military tribunals of Nuremberg and Tokyo and show that this has unfortunately become the political reality of our world today. International justice, in this sense, is none other than the product and subject of international politics.

### **Selective Justice in the Global Periphery**

The two military tribunals in Nuremberg and Tokyo, as well as the two contemporary criminal tribunals in The Hague and Arusha have all shown that Victor's Justice is not a historical phenomenon in global justice. In fact, many scholars believe that these tribunals have set a certain example, and with that a direction, of what international justice is to mean in our world. It even appears that international justice has created a "disturbing legacy of subordinating law to power."<sup>47</sup> What is interesting about the development of the concept of international justice since Nuremberg, though, is the new meaning of Victor's Justice.

Supporters of the ICTR believe that a "viable means of ethical and legal-based global governance to address threats to human rights in the most neglected parts of the globe, particularly in sub-Saharan Africa" has been inaugurated by the ICTR. Since the establishment of the ICTR in Arusha, Tanzania, much of the focus of international justice has indeed been on the "relocation of Victor's Justice to the global periphery."<sup>48</sup> As mentioned above, though, the plans and goals of genuine global legal justice – namely, impartial accountability, vindication for all victims, truth telling, or reconciliation – easily got lost between the political interests of the Western states on one end, and the interests of a directly involved party in a civil conflict on the other.

With the increasing concern for human rights and international justice arose a recent trend of establishments of additional ad hoc tribunals. In addition to serving the purpose of realizing justice, these tribunals are also expected to "contribute to the development and consolidation of democratic norms by demonstrating ... how a fair and impartial justice system operates."<sup>49</sup> In this sense, the tribunals also act as a showcase for the rule of law, and further provide a model for other peoples "who may one day hope to bring their own leaders to justice."<sup>50</sup> To these leaders, such trials are like wake-up calls, "much as the public executions of Nicolai Ceausescu and his wife were" in Romania.<sup>51</sup> Of course, such expectations put great pressure on the newly established tribunals. After all, today's new tribunals have the information of past tribunals' successes and failures, and should theoretically be aware of the areas for improvement in order to fight the past criticisms of Victor's Justice. What the Supreme Iraqi Criminal Tribunal has shown thus far, though, makes observers wonder if any of the past flaws have been taken into account when creating the court, and if it is perhaps too late to erase the legacy of Victor's Justice.

### **Iraq**

The Supreme Iraqi Criminal Tribunal, or what was formerly known as the Iraqi Special Tribunal (IST), was established in 2003 by the Iraqi Governing Council (IGC) with the support of the Bush administration. The IST Statute reviews the detailed and virtually identical definitions of international crimes of genocide, crime against

humanity and war crimes, as those in past Statutes, yet in the area of jurisdiction, observers deem some changes necessary.

This national tribunal's main objective was to prosecute members of Saddam Hussein's regime, and Article 1 of the Statute explicitly only mentions under its jurisdiction crimes committed by Iraqis, including crimes committed by Iraqis outside the territory of Iraq:

- (b) The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis) whether or not committed in armed conflict.
- c) The Tribunal shall only have jurisdiction over natural persons.<sup>52</sup>

For scholars like Dougherty, this Article 1 raises multiple red flags. For one, the Statute covers crimes committed over 35-year period of Baath party control, from July 1968 through May 2003. The Statute also encompasses crimes committed in Iraq or elsewhere, with the specific mention of wars against Iran and Kuwait. It also does not distinguish – like the ICTY or the ICTR did - a soldier in the army from a high official; according to this Statute, all Iraqi nationals or residents of Iraq can be prosecuted. While this is truly an ambitious goal, critics are quite skeptical as to how realistically feasible it is.

A further problem with this Statute is that its personal jurisdiction is “oddly circumscribed.”<sup>53</sup> In the ICTY or ICTR statutes, the language “covers crimes committed by any individual, regardless of nationality, on the territory of the specified state, but the Iraqi tribunal reverses this formula.”<sup>54</sup> According to this Statute, the war crimes committed by foreign nationals on Iraqi soil, therefore, are not under the jurisdiction of the tribunal. Dougherty points out that this language was chosen presumably because it ensures that “members of the coalition cannot be tried by the IST.”<sup>55</sup> This fact is not only reminiscent of the Nuremberg or Tokyo tribunals, but furthermore, it is a clear indication of the IST as an instrument of Victor's Justice.

To give the drafters of the IST Statute the benefit of the doubt, it is true that they sought to improve on certain areas. Seeing how the international intervention and power politics in the proceedings of the ICTR only impeded the trials, the IST Statute relies on domestic resources only. Though, as Beth Dougherty points out, “relying almost exclusively on domestic resources is not a viable strategy, given the state of the Iraqi judiciary.”<sup>56</sup> Because this is a national court, the involvement of the international community has been relegated to the status of advisers and observers. As a result, the IST will not be able to take advantage of the experience and expertise of those who have worked for the ICTY, the ICTR, or any other ad hoc tribunals. This becomes a greater problem when we look at the low requirements and qualifications of personnel. Unlike the language used for the statutes of the ICTY and the ICTR, the IST Statute does not establish any standards regarding the key court personnel. As Dougherty elucidates:



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Judges and investigative judges do not need to have *any* experience in international law, including international humanitarian and human-rights law.... There are no standards for the selection of prosecutors or the chief prosecutor. The other ... tribunals require the chief prosecutor to possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The other courts have found that proceedings run more smoothly with experienced, competent judges and prosecutors.<sup>57</sup>

Although there is shortage of human and physical resources in the Iraqi judicial system, the process of rebuilding these to withstand international and domestic scrutiny will take years. Without any professional expertise, qualifications, or knowledge, however, it is much more conceivable that the judges of the IST will be making biased decisions. Under such circumstances, in such sensitive and specialized area of international criminal law, Victor's Justice is more likely to occur.

### **Conclusion**

Looking back at the development of the notion of international justice since the military tribunals of Nuremberg and Tokyo, it is true that we have come a long way. Pragmatic legalists, for one, would argue that "even if selective, justice has been applied to egregious human rights abusers."<sup>58</sup> Further, even if flawed, our society today has established a globalized legal system that strives for a genuinely impartial and universal legal order. Despite the rather disappointing outcome, Del Ponte's endless efforts in investigating RPF crimes are an example of such developments. She has shown that there is potential for "a genuinely impartial legal process to assert itself."<sup>59</sup> These pragmatic legalists agree that "waiting for a perfect international justice would probably mean getting no justice at all."<sup>60</sup>

After all, as shown in the examples above, "international criminal tribunals can never escape the political interests that led to their creation."<sup>61</sup> This was especially the case with the Military Tribunals of Nuremberg and Tokyo. Translated into today's terms, international laws continue to be enforced only when "states are subjugated to those laws by more powerful states, the power to enforce and interpret the law resides with war's winning coalition or a winning collation on the UN Security Council."<sup>62</sup>

Moreover, as we have seen with the examples of the International Criminal Tribunals of the Former Yugoslavia and Rwanda, because the tribunals are established on an ad hoc basis, they lack enforcement powers. Consequently, in practice, states cannot be compelled to cooperate with the investigations. As Peskin points out, "states can attempt to hide the extent of their noncompliance or claim that cooperation has been provided when in fact little or none has been forthcoming."<sup>63</sup> Further, states can seek to justify their noncompliance, finding the excuse in lack of state capacity to arrest fugitive suspects, as well as the potential of political instability, should the suspect be captured and turned over to the tribunal. These are only some of the tactics states can use to "disrupt tribunal efforts to bring a semblance of balance to prosecutions."<sup>64</sup> The examples of the Former Yugoslavia and Rwanda, however, confirm that states can deliberately limit the tribunals' ability to bring justice in a fair and even-handed manner.

Although it may be too early to assess the effectiveness of the Iraqi Special Tribunal, when looking at the past international tribunals, chances are fairly slim that the IST will overcome the barriers of Victor's Justice. In fact, some of the systematic flaws

in the Statute point out that the IST may struggle with more difficulties than its forerunners did. Although the arguments and evidence presented in this essay may seem cynical, the facts show that Victor's Justice has truly been inescapable - at least up to date. At the same time, however, this essay has also brought to light the efforts and measures taken by individuals and the international community at large to fight the path towards Victor's Justice. Whether it was Del Ponte or the drafters of the various statutes, the efforts were there, and the essay also praises such efforts. What the factual evidence presented in the essay shows is why it has been impossible to prosecute winners in the tribunals until today. Whether it is due to the historical legacy of Nuremberg and Tokyo, or the political reality as seen in The Hague and Arusha, or even the systematic flaws as evident in the Statute of the Iraqi Special Tribunal, the situation created in this world today is that of selective justice.

## Endnotes

<sup>1</sup> Moghalu, Kingsley. *Global Justice: The Politics of War Crimes Trials*. Stanford: Stanford University Press, 2008, p 107.

<sup>2</sup> Graubart, Jonathan. "Why Liberal-Style 'Victor's Justice' is Not the Solution: Pragmatic Legalism and the ICTR." p 1.

<sup>3</sup> Bass, Gary Jonathan. *Stay the Hand of Vengeance*. Princeton, NJ: Princeton University Press, 2000.

<sup>4</sup> Goldstone, Richard. "The United Nations' War Crimes Tribunals: An Assessment." Connecticut Journal of International Law 12:237-238.

<sup>5</sup> Graubart, 24.

<sup>6</sup> *ibid* 2.

<sup>7</sup> *ibid* 2.

<sup>8</sup> *ibid* 3.

<sup>9</sup> *ibid* 3.

<sup>10</sup> Ratner, Steven and Jason Abrams. *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy, 2<sup>nd</sup> Ed*. Oxford: Oxford University Press, 2001, p 189-190.

<sup>11</sup> Graubart, 4.

<sup>12</sup> Graubart, 5.

<sup>13</sup> *ibid* 7.

<sup>14</sup> *ibid* 7.

<sup>15</sup> Gwyn, Richard. "International Law Should Not be Victor's Justice." Toronto Star Jul 4 2001.

<sup>16</sup> Meernik, James. "Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia." Journal of Conflict Resolution 47 (2003): 145.

<sup>17</sup> *ibid* 141.

<sup>18</sup> *ibid*.

<sup>19</sup> *ibid*.

<sup>20</sup> *ibid* 140.

<sup>21</sup> Quoted in Meernik, 141.

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid* 149.

<sup>24</sup> *ibid* 147.

<sup>25</sup> Gwyn.

<sup>26</sup> Meernik, 148.

<sup>27</sup> *ibid*.

<sup>28</sup> Peskin, Victor. "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda." Journal of Human Rights 4 (2005): 218.

<sup>29</sup> *ibid*.

<sup>30</sup> *ibid* 219.

<sup>31</sup> *ibid*.

<sup>32</sup> *ibid* 221.

<sup>33</sup> International Criminal Tribunal for Rwanda. Statute of the International Criminal Tribunal for

Rwanda. 1994.

<sup>34</sup> Sarkin, Jeremy. "The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide." Journal of African Law 45.2 (2001): 147.

<sup>35</sup> Peskin, 223.

<sup>36</sup> Off, C. *The Lion, the Fox & the Eagle: A Story of Generals and Justice in Yugoslavia and Rwanda*. Canada: Random House Canada, 2000, p 331.

<sup>37</sup> Peskin, 223.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid* 224.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> Zorbas, Eugenia. "Towards Justice and Reconciliation in Rwanda: Taking Stock." First appeared in Pambazuka News. Available online at: [http://www.peace.ca/aftowards\\_justice\\_and\\_rec\\_rwa.htm](http://www.peace.ca/aftowards_justice_and_rec_rwa.htm)

<sup>43</sup> Peskin, 225.

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> Quoted in Peskin, 226.

<sup>47</sup> Graubart, 3.

<sup>48</sup> *ibid.*

<sup>49</sup> Dougherty, Beth. "Victims' Justice, Victors' Justice: Iraq's Flawed Tribunal." Middle East Policy XI.2 (Summer 2004): 61.

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*

<sup>52</sup> The Statute of the Iraqi Special Tribunal.

<sup>53</sup> Dougherty, 62.

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid* 61.

<sup>57</sup> *ibid* 64.

<sup>58</sup> Graubart, 24.

<sup>59</sup> *ibid.*

<sup>60</sup> Bass, 1040.

<sup>61</sup> Meernik, 145.

<sup>62</sup> *ibid.*

<sup>63</sup> Peskin, 217.

<sup>64</sup> *ibid.*

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# Abraham Lincoln: The Whig Lawyer

Robyn Gordon

*“There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence, and honors are reposed in, and conferred upon lawyers by the people, it appears improbably that their impression of dishonesty is very distinct and vivid. Yet the impression, is common—almost universal. Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.”*

~Abraham Lincoln, “Notes for a Law Lecture,” July 1, 1850?

## Abstract

In this piece, I examine Abraham Lincoln's expansive, yet little-explored 25-year legal career. Lincoln's presidency is celebrated as one of, if not, the greatest in American history, and I argue that his presidency and the lasting appreciation history has for Lincoln could not have been established without this foundation in law. As a politician first and lawyer second, Lincoln learned and espoused himself to the ideals of the Whig party--commitment to tradition and order, neutrality in solving issues, and preservation of the Union—and applied these principles to the clients he defended and the cases in which he participated. Most notably, many Lincoln enthusiasts would be surprised to learn that he, in fact, defended a slave owner in one of his most celebrated cases. Using his "Whiggish" values, Lincoln was able to suspend his moral judgment when taking on clients and was more concerned with solving legal disputes in an orderly fashion, making his decision to defend a slave owner more understandable. By exploring three specific cases that Lincoln argued during his career, I argue that Lincoln was able to build his abilities in oration and persuasion and hone his steadfast conviction to the preservation of the Union above all, features that are translated to his presidency and could not have been established without his 25-year law career.

Despite Abraham Lincoln's twenty-five year practice of law, during which he handled thousands of civil and criminal cases ranging from bad debt to bestiality and more, his legal career is largely glossed over by American memory in favor of his celebrated, albeit short, presidency and political career. But history cannot fully appreciate Lincoln's presidency without first acknowledging the extent of his work as a lawyer. William H. Herndon, Lincoln's fiery law partner in Illinois observed that, “Mr. Lincoln was an extremely ambitious man and that ambition found its gratification only in the political field. Politics were his life and newspapers his food, merely using the law as a stepping stone to a political life.”<sup>1</sup> Lincoln was a politician first, a Whig in the Illinois legislature, before becoming a lawyer. This experience and affiliation with the Whig party translated itself to his practice of law. By adopting a “Whiggish” mentality towards both law and politics—commitment to order and tradition, suspension of moral

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judgment, and neutrality in solving community disputes—Lincoln established firm beliefs in honesty, hard work, and justice, qualities that would be mirrored later in his presidency. Most importantly, through such famous legal cases as *Ashmore v. Bryant* (1847), *Thomas v. Wright* (1846), and *Hurd v. Rock Island Bridge Company* (1857), Lincoln demonstrated both his emerging abilities of persuasion, perseverance, and oration, and his conviction in the necessity of preserving the Union above all. These were features of his presidency that could not have been established without his twenty-five year career in the study and practice of law.

Mark E. Steiner in his *An Honest Calling*, a biography of Lincoln's law career, observes how "in an age of lawyer-politicians, Lincoln's pursuit of twin careers in law and politics appears...to be typical. But unlike most lawyer-politicians of his day, he became a lawyer after he had become a politician."<sup>2</sup> This distinction is significant, as it demonstrates the "symbiotic relationship between law and politics in the antebellum period" for Lincoln.<sup>3</sup> His only legal training involved reading law books, which he began in 1831 around age 22 (he would later assert that to be a successful lawyer, "work, work, work is the main thing," specifically, "reading" the law).<sup>4</sup> Prior to that, his only formal education included about eighteen months of traditional schooling, supplemented by his own extensive reading and self-education. Shortly thereafter, during his 1834 election campaign for the Illinois legislature (two years after his first unsuccessful try for political office), Lincoln decided to pursue a career in law after encouragement by John T. Stuart, a Whig legislator from Sangamon County, Illinois.<sup>5</sup> Stuart would later go on to become Lincoln's first law partner. The exact reasons behind this decision remain rather unclear, but it seems implied, as Billy Herndon would say, that a man of such "ambition" and ability would find that pursuing a law career could keep "an aspiring politician in the public eye" while also ensuring him a steady income.<sup>6</sup>

From his earliest endeavors into politics and law, Lincoln was a party man who "adhered to his political affiliation," the Whig party.<sup>7</sup> Steiner explains how "the Whig Party attracted lawyers because of the congruence between the Whig commitment to order and tradition and the lawyers' attachment to order and precedent."<sup>8</sup> Lincoln advocated strict adherence to the law, urging self-control and restraint, and believed that lawyers were to act as "peacemakers" or mediators in community disputes. This attitude toward law and order can be seen in his early writings; in his "Address Before the Young Men's Lyceum of Springfield, Illinois" in 1838, Lincoln writes:

Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others...-let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own and his children's liberty...<sup>9</sup>

Lincoln goes on to urge that reverence to laws should become "the political religion of the nation."<sup>10</sup> Additionally, following the "Whiggish conception of a lawyer's proper role," Lincoln was ready to represent either side of a dispute, throughout his career, both "individuals and corporations, plaintiffs and defendants. He prosecuted murderers and defended them, and argued for slave owners while he disagreed with the Supreme

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Court's Dred Scott decision that supported slave owners."<sup>11</sup> Whig lawyers, Lincoln among them, refused to turn away clients on the basis of moral reasons, believing that it was not the attorney's place to make moral judgments. Rather, this should be left to judges and juries. Lincoln "cared more whether a dispute was settled in an orderly manner through the courts than whether they represented a particular side."<sup>12</sup> His emerging ideology of order, precedent, and neutrality is echoed later in both his cases and during his presidency, when he emphasized preservation of the Union above all, and a stringent espousal to the laws of the nation, and respect toward tradition.

I would like first to turn to one of Lincoln's most notorious cases when he defended a Kentucky slaveowner in the 1847 case *Ashmore v. Bryant*. This particular defense may seem especially puzzling to historians, Lincoln scholars and enthusiasts, and students who view Lincoln as the president who publicly denounced slavery and, more importantly, issued the Emancipation Proclamation to free the slaves. But his participation in this case harkens back to his Whiggish outlook on law and the suspension of moral judgment. In this case, Lincoln represented Robert Matson, a Kentucky slaveholder in an unsuccessful attempt to establish Matson's property rights to an African-American woman, Jane Bryant, and her four children.<sup>13</sup> In 1845 Matson brought five of his slaves, Jane and her children, from Kentucky, a slave state, into Illinois, a free state in the union. Two years later, Matson wanted to bring them back to Kentucky; however, Jane believed that, since she and her children had lived in a free state for two years, they were free in the eyes of the law, and she subsequently sought refuge with Matt Ashmore and Hiram Rutherford, two Illinois abolitionists. Ashmore, on behalf of Jane, sued for a writ of habeas corpus to free her and her children. Consequently, Matson retained Lincoln as his defense attorney, who unsuccessfully argued for Matson that slave owners could use their slaves for labor in Illinois as long as they were "in transit." The court ruled in favor of Ashmore and set Jane and her children free.

Why would Lincoln agree to defend a slave owner when he personally despised slavery? In an 1837 protest to the Illinois Legislature on slavery, Lincoln's earliest recorded statement on the institution, Lincoln supported the notion that "the institution of slavery is founded on both injustice and bad policy."<sup>14</sup> Later, in an 1855 letter to close friend Joshua Speed of Kentucky, Lincoln stressed that "you know I dislike slavery; and you fully admit the abstract wrong of it... But you say that sooner than yield your legal right to the slave . . . you would see the Union dissolved. I also acknowledge your rights and my obligations, under the constitution, in regard to your slaves."<sup>15</sup> So while Lincoln believed slavery to be morally wrong, he did contend that it was constitutionally protected, and therefore believed he was in no position to challenge the supreme law of the land despite his personal beliefs. Additionally, Whigs traditionally were considered "constitutional unionists," and supported, for example, the fugitive slave law. Whigs were ready to defend slave owners on the basis of a Whig attorney's dedication to professional responsibility, orderly resolution to disputes, and unionism.<sup>16</sup> Lincoln was no exception to this and reluctantly accepted this law because he and other Whig lawyers believed that "effective enforcement of the fugitive slave law was essential for the Union."<sup>17</sup> It seems that a combination of Lincoln's ability to suspend moral judgment when defending clients and his practical stance toward support for the laws of the nation can make his involvement in the *Ashmore* case more understandable and justifiable. It also resonates later in his firm anti-secessionist sentiments during the Civil War, particularly in his *A House Divided* speech and his declaration that his "paramount object . . . is to save the Union."<sup>18</sup>



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Another notable case in 1846, *Thomas v. Wright*, demonstrated Lincoln's powerful skills in the courtroom and his ability to persuade a jury, talents that transmuted to the political arena and were useful in persuading audiences, politicians, and generals at political meetings, debates, and conferences. This case involved Rebecca Thomas, the widow of a Revolutionary War veteran, and Erastus Wright, a local pension agent. Rebecca approached Wright to help recover her husband's \$400 pension. He recovered the pension, but also charged an inordinate sum for the service.<sup>19</sup> Billy Herndon described how Rebecca, "an old woman crippled and bent with age, came hobbling into the office and told her story. It stirred Lincoln, and he walked over to the agent's office and made a demand for a return of the money, but without success."<sup>20</sup> Herndon continues with a description of the trial, specifically Lincoln's address to the jury. 'For,' said [Lincoln], 'I am going to skin Wright, and get that money back.'" Evidently, Lincoln became quite incensed during the trial proceedings, and he

recounted the causes leading to the outbreak of the Revolutionary struggle, and then drew a vivid picture of the hardships of Valley Forge, describing with minuteness the men, barefooted and with bleeding feet, creeping over the ice....There was no rule of court to restrain him in his argument, and I never, either on the stump or on other occasions in court, saw him so wrought up....The speech made the desired impression on the jury. Half of them were in tears, while the defendant sat in the court room, drawn up and writhing under the fire of Lincoln's fiery invective.<sup>21</sup>

While Herndon perhaps may have exaggerated Lincoln's passionate court performance, his description of Lincoln's infuriation at the injustice toward the widow is exemplary of Lincoln's abilities to effectively convince and emotionally stir the feelings of a jury. This pension case illustrates very well Lincoln's powerful presence, not only as a lawyer, but also as an orator, and demonstrates what Lincoln describes as the "leading rule for the lawyer...*diligence*. Leave nothing for to-morrow which can be done to-day."<sup>22</sup> This diligence, detestation of moral injustice, and talent for persuasion undoubtedly revealed itself again during his presidency, and these defining characteristics of his political career could not have emerged without the skills he established during his legal career.

A combination of his adherence to the Whig values of order and tradition, dedication to the Union, and diligence to justice can be seen in perhaps his most well known case, *Hurd v. Rock Island Bridge Company* in 1857. The development of the railroad in 1850's America not only spurred economic expansion, settlement, and new labor markets, but also prompted an increase in railroad law. In this case, a railroad bridge in Rock Island, Illinois, was the first to span the Mississippi River, a significant development in opening the West for market development and national transportation. The owners of the bridge were the Rock Island Bridge Company and its parent company, the Chicago and Rock Island Railroad. John S. Hurd, the owner of a shipping vessel, the *Effie Afton*, sued the bridge owners after his vessel was damaged when it collided with the bridge. In this case, Lincoln defended the bridge owners,

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stressing “the importance of the railroad in the development of the West” and the “utility of the railroad bridge.”<sup>23</sup> Though the jury was unable to reach a verdict, this case was significant “to the river towns as well as to those centers of population whose future prosperity was dependent upon the development of railroad transportation.”<sup>24</sup> Perhaps his argument was seemingly exaggerated, but it seems conceivable that Lincoln may have viewed this case and the bridge itself as just one more way of uniting the ever-expanding country by finding a common thread that could tie the North and South together. Much of his later law career involved legal disputes such as *Hurd v. Rock Island Bridge Company*, which caused Lincoln to be often known as a “railroad lawyer.” Just like in his early career, he both represented and sued railroad companies, working diligently for both sides, reaffirming his Whig sensibilities of being willing to defend any client to resolve legal difficulties, all the while honing his negotiation and communication skills.

Allen Spiegel aptly argues that “for Lincoln, law and politics were complementary, interdependent, and virtually inseparable...there is no doubt that Lincoln used his political and legal careers almost interchangeably...political connections nourished his law practice and his legal work nourished his political ambitions.”<sup>25</sup> From his political beginnings with the Whig party, Lincoln became attracted to the Whig ideals of maintenance of order, reconciliation of community disputes, and impartiality toward clientele, traits he exhibited throughout his legal career and even into his presidency. Towards the 1850’s, however, the rise of market capitalism, railroad development, and territorial expansion changed the pace of American society and views toward the law, Lincoln “never fully adjusted to the new regimen” of the demands of an emerging market economy.<sup>26</sup> Whig law began to become outmoded later in his career, yet Lincoln still clung to the “Whiggish” ideology of his earlier practice. Lincoln’s career as an attorney allowed him to grasp the issue of preservation of the Union, notably exhibited in the *Ashmore v. Bryant* slave case of 1846, which essentially defined his vision as president. Lincoln spent 40% of his life as an attorney, which introduced him to an extensive variety of individuals and circumstances in American society, arguably more so than during his political career.<sup>27</sup> While history may not remember his quiet and rather ordinary legal career, the knowledge and experience he gained as an attorney no doubt made him a great president.

## Endnotes

<sup>1</sup> Allen D. Spiegel, *A. Lincoln, Esquire* (Macon, GA: Mercer University Press, 2002). p. 1.

<sup>2</sup> Mark E. Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln* (Dekalb, IL: Northern Illinois University Press, 2006). p. 26.

<sup>3</sup> Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln*. p. 29.

<sup>4</sup> Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln*. p. 53.

<sup>5</sup> Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln*. p. 27.

<sup>6</sup> Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln*. p. 27.

<sup>7</sup> Spiegel, *A. Lincoln, Esquire*. p. 2.

<sup>8</sup> Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln*. p. 56.

<sup>9</sup> Abraham Lincoln, “The Political Religion of the Nation,” *Lincoln on Democracy*, ed. Mario Cuomo and Harold Holzer (New York: A Cornelia and Michael Bessie Book, 1990). p. 19

<sup>10</sup> Lincoln, “The Political Religion of the Nation.” p. 20.

<sup>11</sup> Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln*, Spiegel, *A. Lincoln, Esquire*. p. 136, ix.

<sup>12</sup> Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln*. p. 136.

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- <sup>13</sup> Steiner, An Honest Calling: The Law Practice of Abraham Lincoln, p. 103.
- <sup>14</sup> Abraham Lincoln and Dan Stone, "'Injustice and Bad Policy'," Lincoln on Democracy, ed. Mario Cuomo and Harold Holzer (New York: A Cornelia and Michael Bessie Book, 1990). p. 14.
- <sup>15</sup> Steiner, An Honest Calling: The Law Practice of Abraham Lincoln, p. 128.
- <sup>16</sup> Steiner, An Honest Calling: The Law Practice of Abraham Lincoln, p. 125.
- <sup>17</sup> Steiner, An Honest Calling: The Law Practice of Abraham Lincoln.
- <sup>18</sup> Abraham Lincoln, "My Paramount Object in this Struggle," Lincoln on Democracy, p. 253-4.
- <sup>19</sup> Brian Dirck, Lincoln the Lawyer (Chicago: University of Illinois Press, 2007). p. 103.
- <sup>20</sup> Abraham Lincoln, The Words of Abraham Lincoln, ed. Isaac Thomas (Chicago: Western Publishing House, 1898). p. 64.
- <sup>21</sup> Lincoln, The Words of Abraham Lincoln, p. 64-5.
- <sup>22</sup> Abraham Lincoln, "'Resolve to Be Honest': Notes for a Law Lecture," Lincoln on Democracy, ed. Mario M. Cuomo and Harold Holzer (New York: A Cornelia and Michael Bessie Book, 1990). p. 45.
- <sup>23</sup> Steiner, An Honest Calling: The Law Practice of Abraham Lincoln, p. 69.
- <sup>24</sup> John T. Richards, Abraham Lincoln: The Lawyer-Statesman (New York: Houghton Mifflin Company, 1916). p. 31.
- <sup>25</sup> Spiegel, A. Lincoln, Esquire, p. 1.
- <sup>26</sup> Steiner, An Honest Calling: The Law Practice of Abraham Lincoln, p. 160.
- <sup>27</sup> Dirck, Lincoln the Lawyer, p. xi.
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# ***Brown v. Board of Education: Impact, Symbolism and Significance***

*Rachel L. Mark*

## **Abstract**

*Brown v. Board of Education of Topeka, Kansas* has been looked at as a major turning point in American racial and social history since it was decided in 1954. Its contemporaneous and current commentators and critics attach to it extraordinary power. Yet, a majority of school districts in the South actually became more segregated after the decision. Since the decision did not actually desegregate public education, one must look to other means for defining the success and explaining the myth that *Brown* has become. *Brown v. Board of Education: Impact, Symbolism, and Significance*, aims to discover why *Brown*, despite its inability to affect real results, is reasonably considered a turning point in our nation's history. This article argues that the impact of *Brown* can be seen in its effects on racism as an ideology, and very significantly in the way the Supreme Court is perceived. Some argue that because the Court is based on a system of precedent, it is forever stuck in the past. But *Brown*, a unanimous decision, showed that the Supreme Court was not a backwards institution out of touch with the times, but rather a progressive and forward thinking branch of government.

In 1951, thirteen parents filed a class action suit on behalf of their twenty children against the Board of Education of the City of Topeka, Kansas. The case, "*Oliver Brown et al v. The Board of Education of Topeka, Kansas*" would eventually reach the Supreme Court of the United States and become an inspiration to the growing Civil Rights movement. Historians and contemporary writers attributed to it great cultural significance. The decision was regarded as a drastic change by both the Northern and Southern states. However, over fifty years later, it still does not have absolute power, and is invoked more as a noteworthy aspiration than as a plausible reality. Perhaps W.E.B. DuBois said it best when he predicted "Great as is this victory, many and long steps along Freedom Road lie ahead."<sup>1</sup> Contrary to popular belief, the *Brown* decision did not have much more than a symbolic impact on American society.

In 2004, *Brown* received much press coverage as it celebrated its fiftieth anniversary. At a rally commemorating the historic decision in May 2004, Reverend Jesse Jackson said, "It's so fundamental it's set to change the world. America's base has been redefined by that decision ... So today, our model for a nonracist society, whether in South Africa or anywhere in the world, is driven by that decision"<sup>2</sup> The decision is viewed as a paradigm for democracy and desegregation around the world. The case is also used to show what a disappointment the "progress" has been. African Americans still lag tremendously in the world of education, which contributes to diminished success in professional life. Many articles written at this anniversary framed contemporary problems with the statement "Fifty years after *Brown v. Board of Education*, yet...". Frank Brown, a Distinguished Professor of Education at the University of North Carolina Chapel Hill writes in one such article, published in *The Journal of Negro Education* that "...today most would give *Brown* a passing grade for the elimination of apartheid or legal racial segregation in public education, higher education, housing,

voting rights, and public facilities throughout the country”.<sup>3</sup> Brown notes that the *Brown* decision has at best been disappointing in terms of its actual impact. Significant changes have not been made. Less than a third of minority students attend schools with sizable White communities. In 2004, 58% of minority college students attended universities created to serve minority interests. Most startlingly, Brown notes that:

In reality, school segregation increased in Topeka, Kansas. Immediately after *Brown*, the school district adopted a neighborhood school policy that produced more segregation in three, all Black elementary schools in a district with a less than 10% Black population. In 1979, *Brown* was reopened, and in 1992 the 10<sup>th</sup> Circuit Court of Appeals concluded that the Topeka, Kansas school district was still racially segregated.<sup>4</sup>

The case clearly resulted in very little desegregation, and one has to look for a deeper, less tangible significance to find the positive effects of *Brown*. It is important to consider this remarkable moment historically to make sense of why *Brown* has produced so few substantial physical effects and is yet considered a landmark decision.

In 1951, Oliver Brown, an African American, was concerned with the “separate but equal” doctrine that was in place in Topeka’s public lower schools as a result of the *Plessy v. Ferguson* decision established by the Supreme Court some five decades earlier. He lived in an integrated neighborhood and his daughter Linda walked 21 blocks to her bus stop to take the bus to school over a mile further. She lived seven blocks away from a White school, and her father and other local African American parents tried to enroll their children there. They were not permitted to do so, and with the assistance of the National Association for the Advancement of Colored People (NAACP), the group filed a lawsuit against the Topeka Board of Education. The district court agreed that segregation was injurious to African American students, but nevertheless upheld the *Plessy v. Ferguson* precedent because they deemed the African American and White schools to be equal in terms of transportation, building, curriculum, and educational qualification of teachers. Brown decided to take his case to a higher authority. When it was argued in the Supreme Court in 1954, *Brown v. Board of Education* was an amalgamation of five separate cases from Kansas, South Carolina, Virginia, Washington D.C., and Delaware. Thurgood Marshall, the President of the NAACP who was later appointed to the U.S. Supreme Court, argued the case. In a unanimous decision, the court decided: “in the field of public education the doctrine of ‘separate but equal’ has no place”.

The statement and its assumed consequences were radical at the time and the public reacted accordingly. Southern newspapers predicted the end of their world. The *Jackson Daily News* wrote: “White and Negro children in the same schools will lead to miscegenation. Miscegenation leads to mixed marriages and mixed marriages lead to mongrelization of the human race”. They feared that this decision would bring not just segregation but society as whole to an end. Northern newspapers, on the other hand, eagerly anticipated this change. The *Chicago Defender* compared the decision to the results of the not yet ten years old second World War:

Neither the atom bomb nor the hydrogen bomb will ever be as meaningful to our democracy as the unanimous

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decision of the Supreme Court of the United States that racial segregation violates the spirit and letter of our Constitution. This means the beginning of the end of the dual society in American life and the...segregation which supported it.

The *Defender* article was overly optimistic at best. In the years following the decision, its supporters would struggle to implement it time and again. Revolutionary as it was, this decision would soon prove to be inadequate.

Despite the hopes and fears of the North and South, the effectiveness of the *Brown* decision was inhibited by several factors. Southern resistance was found elsewhere than just the newspapers. Several Southern senators, including South Carolina senator Strom Thurmond who eventually ran for president on a segregationist platform, wrote the *Southern Manifesto* in response to the *Brown* decision. The document accused the Supreme Court of abusing judicial power and vowed to bring about the repeal of this decision. It stated: "We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation". Many states followed through on this promise. Senator Harry Byrd of Virginia organized the closing of schools rather than succumbing to orders to desegregate. Governor Orval Faubus of Arkansas ordered the Arkansas National Guard to physically guard Little Rock High School to prevent African American students from entering. President Eisenhower responded to the resistance by sending members of the Air Force and nationalizing Arkansas' National Guard, and Governor Faubus promptly closed the Little Rock schools for the year. Many similar anti-desegregation incidents occurred throughout the South. Additionally, many Whites threatened African Americans which discouraged many from arguing their cases before a court. African Americans who did file lawsuits were kicked out of their community thus unable to file a lawsuit against a school district they did not belong to, or their lives threatened by the White community. Finally, lawsuits could only be filed with the help of a lawyer, whom many African Americans were too poor to afford. The combination of these factors significantly hindered the effective implementation of the *Brown* decision.

To some extent, the weakness of *Brown* was remedied by later legislation, specifically *Brown II* and the 1964 Civil Rights Act. In 1955, *Brown II* ordered district courts to carry out desegregation "with all deliberate speed". Frank Brown discusses the problem with implementing *Brown* on a legal level: "the 'all due deliberate speed' outlined in *Brown II* in 1955 suggested to the federal district courts that it was okay to go slow with school desegregation or to do nothing".<sup>5</sup> As the *Atlanta Constitution* assuaged its readers:

...The court decision does not mean that Negro and white children will go to school together this fall. The court itself provides for a "cooling off" period. Not until next autumn will it even begin to hear arguments from the attorneys general of the 17 states involved on how to implement the ruling.

The Atlanta newspaper immediately saw the weakness in the decision and accurately predicted the outcome. However, *Brown* has gains legal significance if it is seen as a

stepping-stone on the way to the Civil Rights Act of 1964. This act granted the U.S. Attorney General the power to bring lawsuits on behalf of African Americans in racially segregated school districts. It also gave the Secretary of Education the power to collect information on the implementation of *Brown* and to grant money to school districts looking to desegregate. In the ten years following the passage of this act, cases were brought against about 500 districts by the U.S. Justice Department. However, the impact predicted by the newspapers did not compare to the amount of cases brought forth. Even the 1964 Civil Rights Act was less effective than it could have been, as evidenced by the passage of another, stronger act in 1991, less than thirty years later.

If *Brown*'s significance cannot be found in its legal history, one must dig deeper into this country's history. There have been many Supreme Court decisions that have implemented change and altered the course of this country's history, yet none is as romanticized as *Brown*. *Brown* has been placed on a pedestal that no other legal decision can encroach. It represents the triumph of the minority at a time when the minority had been fighting for their rights for almost one hundred years. But more importantly, it shows the way that the Supreme Court, a seemingly stagnant institution with impermeable "marble walls" can change its mind and reinvent itself as an institution.<sup>6</sup> And if the Supreme Court can reinvent itself in the eyes of the American public, then perhaps the American public can alter its racist biases.

America's history has long been tainted by racial battles and strife. In an article entitled "Slavery, Race and Ideology in the United States of America", Columbia University history professor Barbara Fields chronicles a genealogy of racism in America. She writes: "race is not an idea but an ideology".<sup>7</sup> That is, a system of ideas and ideals that forms the basis of political or economic theory. According to Fields, "ideology is best understood as the descriptive vocabulary of day to day existence, through which people make rough sense of the social reality that they live...".<sup>8</sup> If racism is an ideology, then racism is one way that people understand the social construct of their daily lives. Louis H. Pollak, a United States District Judge, supports this idea. Quoting Solicitor General Robert Bork he says: "race has been *the* issue in this nation since it was founded".<sup>9</sup> Fields, however unknowingly, provides some hope of ending this vicious cycle: "An ideology must be constantly created and verified in social life; if it is not, it dies, even though it may seem to be safely embodied in a form that can be handed down".<sup>10</sup> In a uniquely optimistic moment in her work, Fields implies that if an ideology is *not* recreated and verified, it can die. Unfortunately, it is hard to completely remove oneself from society's conventions and norms. As Fields also argues, "...ideology is impossible for anyone to analyze rationally who remains trapped on its terrain. That is why race still proves so hard for historians to deal with historically".<sup>11</sup> Fields is correct in saying that living in a racist society, one that has arguably been such since its inception, Americans find it difficult to deal with racism. Similarly, the Supreme Court has often been depicted as being stagnant and immutable as Fields' ideology. Referencing a 1987 case in which the Supreme Court concluded that Jews and Arabs were not protected under civil rights law, Fields comments

In fact, the Supreme Court had little choice, bound as it is by American precedent and history...by its participation in those rituals that daily create and re – create race in its characteristic American form. The Supreme Court acts...within the assumptions...that constitute racial ideology in the United States<sup>12</sup>

She argues that because of its basis on precedent, the Supreme Court can not and does not make decisions that are contrary to its conservative, possibly racist past. This is, in fact, how the some Southern newspapers viewed the Supreme Court in their reactions the day after the decision. The *Jackson Daily News* wrote: "...Human blood may stain Southern soil in many places because of this decision but the dark red stains of that blood will be on the marble steps of the United States Supreme Court building...". Referencing the "marble steps" of the Constitution, the *Jackson* newspaper envisions the institution as solid and unchanging.

But, if this were the case, the *Brown* decision would not have been possible. In fact, when making the *Brown* decision, the Court reflected on its history and actively decided to alter the course it was taking, which is what makes *Brown* so momentous. Discussing the events of the summer of 1953, when *Brown* was being debated, Pollak writes "I do not recall any instance before or since when the court expressly directed the parties to conduct a prescribed exploration of history".<sup>13</sup> Contrary to Fields, Pollak describes the Supreme Court as investigative and inquisitive. Pollak goes as far as to assert that generally, "In its proper decisions about race...the Court appears to have been aware of its relevant history, has neither departed from nor embellished it, and has, on occasion, made it a building block in those decisions".<sup>14</sup> A brief history of the Supreme Court on race reveals that in *Dred Scott v. Sanford* in 1857, the Supreme Court declared that slaves were property and even free African Americans could never be citizens. In 1883, the Supreme Court invalidated the 1875 Civil Rights Act and declared that it was never intended that Whites and Blacks would "lodge and eat" together.<sup>15</sup> In 1896's *Plessy v. Ferguson*, the Court ruled that segregation in railway cars is legal, that "separate but equal" upholds the Equal Protection clause of the 14<sup>th</sup> Amendment. While these two decisions seem to be in line with Fields' pessimism, a deeper investigation reveals that neither of these decisions was unanimous. The public often does not realize that the Supreme Court is comprised of nine individuals, each with his or her own opinion. In both *Dred Scott* and *Plessy*, dissenting minority opinions sided with the African American minority. Because of its inability to defy precedent, the Supreme Court had to make the *Brown* decision based on a technicality from statements made in the *Plessy* decision. In *Brown*, a unanimous decision, the Supreme Court acknowledged and examined its past, and then made a conscious decision about the direction of its future.

The *Boston Herald* said it best on May 18, 1954, when it asserted: "The Supreme Court's history-making decision against racial segregation in the public schools proves more than anything else that the Constitution is still a live and growing document." Above all else, the decision proved that the Supreme Court, a seemingly inflexible institution, could change its mind and redefine itself as an institution. It did so as a protector of minority rights and as a progressive institution when a great majority of Americans were not ready for progress. The Court proved to the public that it was not the backwards, conservative institution conjured by the imagery of the marble walls and steps, but rather a liberal, forward thinking branch of a democratic government.

## Endnotes

<sup>1</sup> UCLA Institute for Democracy, Education and Access, *Brown v. Board of Education* (Los Angeles, CA: UCLA, 2004), 1.

<sup>2</sup> "Landmark Decision Remembered" (CNN, May 15, 2004), <http://www.cnn.com> (accessed March 8, 2008)



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<sup>3</sup> Frank Brown. "The First Serious Implementation of Brown: The 1964 Civil Rights Act and Beyond" *The Journal of Negro Education Special Issue: Brown v. Board of Education at 50* (Summer 2004): 189

<sup>4</sup> *Ibid*, 187

<sup>5</sup> *Ibid*, 182

<sup>6</sup> Louis H. Pollak. "Race, Law & History: The Supreme Court from 'Dred Scott' to 'Grutter v. Bollinger,'" *Dedalus* 38. (Winter 2005)

<sup>7</sup> Barbara Jeanne Fields. "Slavery, Race and Ideology in the United States of America," *New Left Review*, 110. (May-June 1990)

<sup>8</sup> *Ibid*, 110

<sup>9</sup> Pollak, 29

<sup>10</sup> Fields, 112

<sup>11</sup> *Ibid*, 100

<sup>12</sup> *Ibid*, 97

<sup>13</sup> Pollak, 38

<sup>14</sup> *Ibid*, 30

<sup>15</sup> *Ibid*, 34

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# The Fourteenth Amendment in American Election Processes: Where Are We Going, Where Have We Been?

*James Dawson*

“...our consideration is limited to the present circumstances,  
for the problem of equal protection in election  
processes generally presents many complexities...”  
*Bush v. Gore*, 531 U.S. 98 (2000)

## Abstract

When the Constitution of the United States was being drafted, James Madison wrote that its separation of powers scheme plainly rendered the possibility of the judiciary influencing the selection of presidential electors to be absolutely “out of the question.” His call for proper judicial restraint was heeded for more than two centuries, until the Supreme Court of the United States granted certiorari in *Bush v. Gore*, 531 U.S. 98 (2000). In this remarkable case, the legal team of George W. Bush—appealing the Florida Supreme Court’s interpretation of Florida state law while a statewide recount was underway—argued that the absence of uniform substandards for evaluating voters’ intent on manually recounted ballots in Florida violated the Equal Protection Clause of the Fourteenth Amendment. After a rushed oral argument, five justices agreed that the lack of an explicit substandard was constitutionally repugnant, and ordered a stay of the recount that functionally handed the presidency to Governor Bush. But a close reading of the per curiam opinion in the case shows that the Rehnquist Court readily discarded standing equal protection doctrine, declined to apply applicable precedents, ignored their own previous jurisprudence, and betrayed the original intent of the Fourteenth Amendment. The election law that emerged from *Bush v. Gore* therefore stands as a striking outlier along the arc of equal protection jurisprudence, and raises important questions about the future of the Fourteenth Amendment in election processes.

On Thursday, November 9<sup>th</sup>, 2000, the State of Florida conducted an automatic machine recount of all six million votes that had been cast in the presidential election two days before. It showed Governor George W. Bush of Texas leading Vice-President Al Gore by 327 votes, a margin of about .005 percent.<sup>1</sup> What followed was a thirty-six day legal battle to decide the Presidency of the United States, eventually culminating before the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000). The decision in that case—alternately heralded as sound jurisprudence and “crudely partisan”<sup>2</sup>—was premised on a theory advanced by Bush’s attorney and future Solicitor General Theodore Olson, who suggested that the absence of uniform substandards for evaluating voters’ intent on ballots that were manually recounted amounted to a denial of “the equal protection of the laws,” and so violated the Fourteenth Amendment to the United States Constitution.<sup>3</sup> When the litigation finally reached the Supreme Court, seven Justices concurred with Olson, finding that “the absence of specific standards to ensure [the] equal application”<sup>4</sup> of Florida’s statewide “intent of the voter”<sup>5</sup> standard was constitutionally repugnant; five of those seven Justices then agreed that no constitutionally-permissible recount could occur before 3 U.S.C. §5’s “safe harbor” deadline for permanently locking a state’s Electoral College votes.<sup>6</sup> As a result, the

Florida Supreme Court's order to manually recount all undervotes<sup>7</sup> across the state was reversed, functionally awarding the Presidency to George W. Bush. But a closer examination of the *per curiam*<sup>8</sup> opinion in the case reveals that the majority readily discarded the principles of *stare decisis*<sup>9</sup> and instead wrote new equal protection doctrine that not only abandoned standing interpretations and the original intent of the Fourteenth Amendment, but also struck through applicable precedents such as *Reynolds v. Sims*, *Victor v. Nebraska*, *Bain Peanut Company of Texas v. Pinson*, *Moore v. Ogilvie*, *United States v. Butler*, and even *Marbury v. Madison*. Especially considering that "the doctrine of equal protection [had] fallen into relative disuse in the Rehnquist Court,"<sup>10</sup> the majority's willingness to apply this clause to a mold it did not fit renders *Bush v. Gore* a striking outlier along the arc of equal protection jurisprudence.

During oral argument before the Supreme Court, Bush's counsel advanced two equal protection arguments: first, that the lack of uniform substandards for evaluating manually recounted ballots amounted to unequal and arbitrary treatment of voters; and, second, that the inclusion in the certified vote total of recounts in three counties that included overvotes<sup>11</sup> in addition to undervotes amounted to unequal treatment of voters in counties where *only* undervotes were recounted. However, by far the most troubling equal protection claim was presented in the first of these two arguments, especially considering that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."<sup>12</sup> David Boies, arguing the case for Vice-President Gore, explained in oral argument that Florida—like thirty-three other states at the time—*did* have a uniform standard: "the standard [was satisfied] whether or not the intent of the voter [was] reflected by the ballot. That [was] the uniform standard throughout the State of Florida."<sup>13</sup> But for the majority, the problem came when county canvassing boards attempted to apply this standard. The record before the Court indicated that "in some cases a piece of the card -- a chad -- [was] hanging, say by two corners. In other cases there is no separation at all, just an indentation."<sup>14</sup> The various canvassing boards responded to these situations differently, such that a citizen who had merely indented the chad rather than punctured it might have their vote counted in one county but rejected in another. The majority found that this disparity rendered the "the recount mechanisms implemented in response to the decisions of the Florida Supreme Court" unconstitutional, as they failed to "satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right [to fairness]."<sup>15</sup>

The absence of explicit precedent dealing with equal protections in election processes meant that the Justices' evaluations of these two claims were largely driven by "their personal backgrounds, experiences, values and institutional assumptions."<sup>16</sup> That framework was to be expected, and it suggested that the best barometer for evaluating the Justices' responses to the two claims would be earlier equal protection cases decided by the Rehnquist Court. Nevertheless, when the opinion was handed down, it quickly became apparent that *Bush v. Gore* was a prominent outlier in the conservative bloc's "own well-developed and oft-invoked approach to the Equal Protection Clause."<sup>17</sup> Indeed, Professor Geoffrey R. Stone of the University of Chicago Law School notes:

In the decade leading up to *Bush v. Gore*, Justices Rehnquist, Scalia and Thomas cast approximately 65 votes in non-unanimous Supreme Court decisions interpreting the Equal Protection Clause. Of the 46 votes that these Justices cast in cases that did not involve affirmative action, Justices Rehnquist, Scalia and Thomas

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collectively cast only two votes to uphold a claimed violation of the Equal Protection Clause. Thus, these three Justices found a violation of Equal Protection in only 4 percent of these cases. For the sake of comparison, over this same period, and in these very same cases, the colleagues of Justices Rehnquist, Scalia and Thomas collectively voted 74 percent of the time to uphold the Equal Protection Clause claim. 74 percent versus 4 percent. Against this background, one must wonder why Justices Rehnquist, Scalia and Thomas suddenly discovered power and beauty in the Equal Protection Clause in *Bush v. Gore*. Indeed, as a group they cast more votes (three, to be exact) to uphold the Equal Protection Clause claim in *Bush v. Gore* than they had previously cast in all of the non-affirmative action Equal Protection Clause cases that they had considered in the previous decade.<sup>18</sup>

Professor Stone presents a troubling inconsistency; for an objective viewer, the conservative bloc's previous hesitance to invoke the Equal Protection Clause is hard to reconcile with their casual willingness to apply it in *Bush v. Gore*. Stone's analysis does not consider the possibility that *Bush v. Gore* was less a statistical outlier than an organic evolution of equal protection, extending its provisions into a new arena never before considered by the Court. This possibility, however, is rendered virtually impossible by Harvard Law School Professor Cass Sunstein's conclusion that the decision was not a harmless evolution of equal protection doctrine but rather an activist stroke of the pen that "lacked all support in precedent and history. . .and clearly ignored a host of problems as serious as those it addressed."<sup>19</sup> Not the least of these problems was the fact that the most intuitive interpretation of the Equal Protection Clause fell into the camp of the respondents; indeed, their brief noted that "it is the exclusion of [ballots that had not registered on machines], not their inclusion, that would raise questions of unequal treatment. The [recount] order does nothing more than. . .[treat all voters] equally: ballots that reflect their intent are counted."<sup>20</sup> And so, even if the majority is afforded every benefit of the doubt (as they should be), it remains clear that *Bush v. Gore* was inconsistent not only with established precedent, but also with the majority's own previous interpretations of the Equal Protection Clause.

The *per curiam* opinion was written to suggest that this new doctrine was an appropriate application of the equal protection precedent established by *Reynolds v. Sims*, 377 U.S. 533 (1964), which invalidated malapportioned Congressional districts by ruling that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."<sup>21</sup> But in fact, the majority distorted the *Reynolds* decision, cherry-picking its language in an attempt to drive home the fragile link between equal protection and the franchise. In his dissent, Justice John Paul Stevens argued that the *per curiam* opinion misapplied *Reynolds* because the Court in that case had only found an equal protection violation

When individual votes within the same State were weighted unequally<sup>22</sup> . . . but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the fact-finders, specifically the various canvassing

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boards, by the "intent of the voter" standard is any less sufficient -- or will lead to results any less uniform -- than, for example, the "beyond a reasonable doubt" standard employed everyday by ordinary citizens in courtrooms across this country.<sup>23</sup>

Because there was no equal protection precedent involving substantive standards for evaluating ballots during manual recounts, Stevens looked to a situation roughly analogous to Florida's decision to define a "legal vote": Nebraska's decision to define "reasonable doubt." His reasoning invoked the Court's 1994 decision in *Victor v. Nebraska*, 511 U.S. 1, in which it was held that "the beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so."<sup>24</sup> If Nebraska's decision to define "reasonable doubt" without substandards to guarantee equal protections for trial defendants was consistent with the Fourteenth Amendment, then it follows that Florida's decision to define "legal vote" as one that reflects "the intent of the voter" with no further substandards for guaranteeing equal protection of voters is also constitutional. But the majority saw it differently. They crudely mapped the language of *Reynolds* onto the Florida recounts, concluding that nonuniform standards were "[diluting] the weight" of rejected votes. Such a conclusion does not appear entirely unreasonable, unless we consider the reality that the majority "who eagerly embraced this argument in *Bush v. Gore* [had] steadfastly rejected" this link between equal protection and vote dilution "for the better part of three decades."<sup>25</sup>

Although Justice Stevens' discussion of the "reasonable doubt" standard does seem to suggest that the Court was radically reversing its own equal protection jurisprudence in *Bush v. Gore*, his dissenting opinion goes on to present an even more devastating argument to the petitioners' Fourteenth Amendment claim. Indeed, Justice Stevens seems to render the entire equal protection argument moot when he notes that the concerns over "the use of differing substandards for determining voter intent in different counties employing similar voting systems...are alleviated -- if not eliminated -- by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process."<sup>26</sup> The statutory procedure for contesting statewide election results in Florida called for the election contest to be heard in Leon County Circuit Court (Florida's capital County Court, in Tallahassee). If petitioners could demonstrate that there were sufficient "illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election,"<sup>27</sup> the County Court Judge would then supervise the recounts necessary to correct the error. The County Court Judge, of course, was one person. This person would have one mind, and one consistent set of substandards for evaluating similarly-situated ballots. David Boies clarified this procedure in oral argument, explaining that those who objected to one recounter's particular substandards for evaluating ballots would "get a right to object to" those standards by submitting "written objections" that would be reviewed by the Leon County Circuit Court Judge.<sup>28</sup> Justices Ginsburg and Stevens thought that the long-standing precedent to respect and leave undisturbed those institutions with statutory procedures for internal judicial review was itself grounds to dismiss the entire equal protection argument. Indeed, Stevens believed that this "procedure for ultimate review by an impartial judge," together with the precedent of *Marbury v. Madison*,<sup>29</sup> meant that Bush's equal protection argument "did not even raise a colorable federal question."<sup>30</sup>

Harvard Law School Professor Laurence Tribe<sup>31</sup> thought that the general "intent of the voter" standard used statewide in Florida—one which "[let] each county

make its own best effort, using fallible human counters, to get each voter's intent right"—was “as American as key lime pie.”<sup>32</sup> Justice Stevens agreed, but his approach to showing the standard’s consistency with standing equal protection doctrine was slightly less anecdotal than Tribe’s; he defended the constitutionality of the general standard with a lengthy and technical discussion of *Bain Peanut Company of Texas v. Pinson*, 282 U.S. 499. In particular, Stevens emphasized that case’s determination that “[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.”<sup>33</sup> Indeed, Stevens seems to be correct in suggesting that varying substandards in manual recounts were constitutionally permissible as indicative of “a little play in [the] joints [of the machinery of government].” Tribe offers a similar phrase, suggesting that the recounts exposed not the “joints of government” but the “the raw edges of democracy”<sup>34</sup>; in fact, he argues that equal protection doctrine up until *Bush v. Gore* would have

celebrated [the recounts] as depicting a vibrant and well-functioning democracy going about the oh-so-normal but ever-so-imperfect business of translating millions of disconnected voices into the will of a collective people. Yet in [the election for president in 2000], the Court saw the imperfections of our democratic machinery not as an opportunity, but. . . as a violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>35</sup>

Although Tribe never explicitly mentions *Bain*, equal protection doctrine is certainly included among the “constitutional principles” to which that case refers. Stevens agreed that, “if it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ...might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.”<sup>36</sup> And it was not as if the majority were unaware of this precedent; Boies hinted strongly at this case during oral argument when he suggested that varying substandards—even if objective—would not violate the Equal Protection Clause, because “there are a lot of times in the law in which there can be those variations from jury to jury, from public official to public official.”<sup>37</sup> But, instead of referring to *Bain*’s precedent, the Court instead called for a uniform standard that would eliminate just the sort of variations *Bain* allowed, even though “the notion that a state must develop and apply ‘specific standards’ for construing the marks and indentations on machine-rejected ballots to guarantee ‘nonarbitrary treatment of voters’ and ‘to secure the fundamental right’ to equal treatment comes from nowhere and overlooks several critical dimensions of the situation.”<sup>38</sup>

Justice Ginsburg went one step further with this line of reasoning, arguing that varying substandards were not only constitutional, but were also necessary responses to the variation in voting mechanisms across the state. The transcript from oral argument provides a valuable window into Ginsburg’s thinking, showing the back-and-forth between Olson and the Justice:

MR. THEODORE OLSON: ...There is no question, based upon this record, that there are different standards from county to county.

JUSTICE GINSBURG: And there are different ballots from county to county too, Mr. Olson, and that's part of the argument that I don't understand. There are machines, there's the optical scanning, and then there are a whole variety of ballots. There is the butterfly ballot that we've heard about and other kinds of postcard ballots. How can you have one standard when there are so many varieties of ballots?

MR. THEODORE OLSON: Certainly the standard should be that similarly situated voters and similarly situated ballots ought to be evaluated by comparable standards.

JUSTICE GINSBURG: Then you would have to have several standards, county by county?

MR. THEODORE OLSON: You're certainly going to have to look at a ballot that you mark in one way different than these punch card ballots...<sup>39</sup>

Later in oral argument, Justice Stevens pressed Mr. Olson on why Katherine Harris—who was simultaneously the Florida Secretary of State, the State's Chief Elections Officer, and the Bush Campaign's Florida Chairwoman<sup>40</sup>—had failed to specify a uniform statewide substandard for the “intent of the voter” general standard. “Can we possibly infer from the failure of the Secretary of State to promulgate a statewide standard,” he asked, “that she might have inferred that the intent of the voter is an adequate standard?” Certainly, Justice Stevens' question was a fair one. It was plain to see that the differences between voting methods created “underlying inequalities [that] dwarfed whatever inequalities might have existed among counties with respect to methods of recounting ballots. Yet the Court refused to see beyond the surface inequalities in the recount and insisted that a clear set of objective rules, uniform across the state, was needed to solve the alleged constitutional problems.”<sup>41</sup> But this reasoning ignored the very basis of the Fourteenth Amendment, extending equal protections to similarly-situated ballots but not to similarly-situated people—each of whom, regardless of politics, wanted his or her ballot to count in the race for President. And the further the majority went with their equal protection tangent, the further they got from the reality that “voters in a statewide election are unlikely to be concerned with being treated the same way as others who have the same intent they do; they are likely to care about being treated in a way that accurately and fairly translates their intent into a vote for the candidate of their choice.”<sup>42</sup>

Even Florida's Secretary of State seemed to agree with Justice Ginsburg that the sheer variety in voting systems rendered a single statewide substandard impossible. Even if these standards were feasible, they would have been violated in every single American election that ever included write-in votes or absentee ballots, which “vary in innumerable ways, making it a virtual certainty that look-alike ballots in those categories would be interpreted at least somewhat differently depending on which county they happened to come from.”<sup>43</sup> The fact that so many systems of voting exist—from optical scan to punch-card to absentee to butterfly ballot—seemed to validate the wisdom of the Justices in the majority of *Bain*. They foresaw situations in which “[t]he interpretation of constitutional principles must not be too literal.” They foresaw that, in some situations,

overly literal interpretations of provisions like the Equal Protection Clause would grind the very machinery of government to a standstill, preventing it from performing its basic functions in the best way it knew how. Certainly, the Florida canvassing boards—which had actually used the time between the stay and oral argument to prepare a recount of the remaining ballots as quickly as possible<sup>44</sup>—were doing the best they could. Certainly, everyone—from the Courts to the recounters themselves—“were ready to do their best to get [the statewide manual recount] done.”<sup>45</sup> In light of these realities, and in respect to plainly applicable judicial precedent, it seems the Court should have deferred to *Bain* and allowed the recounts to continue.

But beyond the argument to be made about the equal application of the “intent of the voter” standard, Bush’s legal team presented a second equal protection claim: that the inclusion in the certified vote total of recounts in three counties that included overvotes in addition to undervotes amounted to unequal treatment of voters in counties where *only* undervotes were recounted. The *per curiam* decision articulated this concern:

The recounts in these three counties [Miami-Dade, Palm Beach, and Broward] were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes...As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.<sup>46</sup>

This argument is rather easily disposed of, without needing to consider judicial precedent. Justice Breyer noted in his dissent that “as far as the [overvote] issue is concerned, petitioners presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes.”<sup>47</sup> While it is true that the *per curiam* opinion provides no evidence for this claim, the larger problem is that an internal inconsistency colors much of the majority’s overvote analysis. As Laurence Tribe explains,

the *per curiam* [opinion] did not even notice the reflection of the overvote issue in the mirror of its own narrow holding. The Court saw an equal protection violation because overvotes were treated differently from undervotes. But, taking the Court on its own terms, a recount standard that uniformly excludes overvotes should be perfectly constitutional—each overvote is treated the same as every other [they are not recounted]. Instead, the Court seemed to suggest that overvotes have some positive right to be counted—that, because some “dimpled chads”



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are considered under positive law, dimpled chads on overvotes must receive that same consideration. But this line of argument leads to an absurd conclusion: voting jurisprudence would no longer be "one person, one vote," or even "one ballot, one vote," but "one dimple, one vote."<sup>48</sup>

But even if it were true that the overvotes presented an equal protection problem, the respondents were not responsible for their inclusion in the provisional vote totals. As David Boies noted in oral argument, this second equal protection claim is destroyed entirely by the reality that "nobody asked for a contest of the overvotes, and the contest statute begins with a party saying that there is either a rejection of legal votes or an acceptance of illegal votes."<sup>49</sup>

Nonetheless, the single most important argument in Gore's entire equal protection calculus was the fact that the manual recount was itself offering a corrective for disparate treatments of voters. As Justice Stevens noted in his dissent, "the percentage of nonvotes in [the 2000 Presidential Election] in counties using a punch-card system was 3.92%; in contrast, the rate of error under the more modern optical-scan systems was only 1.43%.<sup>50</sup> Put in other terms, for every 10,000 votes cast, punchcard systems result in 250 more nonvotes than optical-scan systems."<sup>51</sup> Justice Breyer took this argument one step further than Justice Stevens, who had relegated it to footnote. Breyer instead centralized it, arguing that contemporary equal protection doctrine would in fact support the Florida Supreme Court's recount order, considering that "the manual recount would itself redress a problem of unequal treatment of ballots."<sup>52</sup> Although the argument seemed like an oxymoron to the conservative bloc, the statistics indicate that Justice Breyer may have been correct; indeed,

the ballots of voters in counties that use punch-card systems are more likely to be disqualified than those in counties using optical-scanning systems... Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.<sup>53</sup>

Even though the majority sought to guarantee that each voter had an equal chance to have their votes counted, they reversed a Florida Supreme Court order that was resolving the disparity in voting system error via manual recounts. To justify this ruling, the *per curiam* opinion returns again and again to *Moore v. Ogilvie*, 394 U.S. 814 (1969), an early case linking equal protection and voting. That case held that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."<sup>54</sup> But in reality, statistics available to the entire Court showed that "greater voting strength" was being afforded to those citizens who used optical-scanning, rather than punch-card, voting systems. This undisputed fact is the basis for Stanford Law School Professor Pamela S. Karlan's observation that "a court that believes that the real problem in Florida was the disparities in the manual recount standards, rather than the disparities in a voter's overall chance of

casting a ballot that is actually counted, has strained at a gnat only to ignore an elephant.”<sup>55</sup> Boies attempted to hash out this line of reasoning during oral argument, when he told the Chief Justice that “[the] distinction between how [the counties] interpret the intent of the voter standard is going to have a lot less effect on how votes are treated than the mere difference in the types of machines that are used.”<sup>56</sup> If *Moore* had been respected, Breyer’s equal protection argument would have been sufficient reason to affirm to the Florida Supreme Court. Nonetheless, like so many other established tenets of equal protection, the majority ignored *Moore*.

This is not to say that there is no equal protection precedent for federal interference in state recount procedures; even the brief of the respondents concedes that, if the petitioners were able to demonstrate that the “Florida Supreme Court’s order is discriminatory in any invidious manner,” then such intervention might be warranted.<sup>57</sup> But, instead of following this established procedure for bringing an equal protection grievance, the petitioners instead made “none of these claims, which in certain circumstances<sup>58</sup> have provided the basis for federal intervention in state election procedures and/or findings of invalidity of such procedures.”<sup>59</sup> In short, *Bush v. Gore* was in fact quite different from the voting rights and “one person, one vote” cases of the 1960’s, even though the opinion in the case purports to be based on them. If *Bush v. Gore* were actually predicated on equal protection precedent from these cases, then “the majority should have identified the purported targets of [a] constitutional violation [of the Equal Protection Clause]—blacks? women? the poor? Of course, the Court could point to no such class of victims, because there weren’t any.”<sup>60</sup> However, maybe the problem wasn’t that there weren’t any victims, but that the Court and the media were looking for them in the wrong place.

Especially considering that “counting variances” resulting from different voting systems “tend to correlate closely with race and class,”<sup>61</sup> there may actually be an equal protection argument in favor of manual recounts; indeed, “many states have been able to reduce perceived and actual inequity by manually recounting ballots in particularly close elections.”<sup>62</sup> The original intent of the Fourteenth Amendment was, of course, to protect the civil and political liberties of newly-freed African slaves. This was clear as early as April of 1873, when Justice Samuel Freeman Miller delivered the opinion of the Court in the *Slaughter-House Cases*, 83 U.S. 36, which was one of the Court’s first interpretations of the then newly-ratified Fourteenth Amendment. Miller framed the adoption of the Fourteenth Amendment within the context of the Civil War—an event he said was “almost too recent to be called history”<sup>63</sup>—and made clear that “on the most casual examination of the language of” the Thirteenth, Fourteenth, and Fifteenth Amendments

no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth. We do not say that no one else but the negro can share in this

protection...But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.<sup>64</sup>

Thus, the Florida manual recount procedures were in fact fully consistent with the original intent of the Fourteenth Amendment, which was designed to “address” and “remedy” the “grievances of [African-Americans].” Poor black voters in Florida were denied equal protections by being given voting machines that were substantially more likely than those in richer counties to malfunction and produce “nonvotes.” The manual recounts, however, were a means of “addressing” and “[remedying]” this “grievance” against African-Americans; in short, they were the only chance for poor black voters to have their votes counted. It follows that the manual recounts were just the sort of procedure that the Fourteenth Amendment’s authors were imagining when they drafted the Equal Protection Clause, which was intended to shield minority voters from the sorts of prejudices propagated against them in the 2000 presidential election.

It is galling that *Bush v. Gore* claims to extend the Equal Protection Clause to the obscure theater of uniform substandards for evaluating voter intent on punch-card ballots while at the same time disenfranchising the same minority voters that the Fourteenth Amendment was intended to protect. This formalist reading of the Fourteenth Amendment is nearly identical to the nineteenth-century view that operated without considering power disparities resulting from socioeconomic differences among racial groups. But the century that separated that reading from the Rehnquist Court had rendered this view painfully obsolete and totally anachronistic. The *per curiam* opinion ignored those hundred years, casually throwing them out the window along with standing equal protection doctrine and their own jurisprudence.

The majority attempted to avoid these race-based questions by instead focusing on abstract questions that concerned the machines involved in the election, and not the people. Although the Fourteenth Amendment’s framers never could have imagined the questions posed by the aftermath of the Florida 2000 presidential election, the majority nonetheless wrote new doctrine and ruled that the Equal Protection Clause mandated uniform standards for each individual machine. After all, it said, “the factfinder [*i.e.*: recounter] confront[ed] a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.”<sup>65</sup> But in reality, those who were actually on the ground performing the recounts often found that “the search for intent” transcended questions that could be answered by any uniform substandard. In these situations, the standing doctrine of equal protection as a “constitutional [principle]” from *Bain* would suggest that the Supreme Court should have deferred to the decisions of the factfinder in order to “[allow] a little play in [the government’s] joints.” David Boies pointed to two such situations during oral argument:

MR. DAVID BOIES: ...Some states, like Texas, have given a statutory definition [for a uniform standard], although even in Texas, there is a catch-all that says anything else that clearly specifies the intent of the voter.<sup>66</sup> So, even where states have approached this in an attempt to give specificity, they have ended up with a catch-all

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provision that says look at the intent of the voter. . . The Palm Beach chairman of the canvassing board actually was a witness, Judge Burton. He came and testified, and he testified that they used a clear intent of the voter standard. . . and found hundreds of ballots that they could discern the clear intent of the voter from that were not machine read [*sic*]. Now, in doing so, they were applying Florida law, and like the law of many states, it has a general standard, not a specific standard.

JUSTICE O’CONNOR: Were those dimpled or hanging chads, so to speak?

MR. DAVID BOIES: Well, what he testified is that you looked at the entire ballot, that if you found something that was punched through all the way in many races, but just indented in one race, you didn’t count that indentation, because you saw that the voter could punch it through when the voter wanted to. On the other hand, if you found a ballot that was indented all the way through, you counted that as the intent of the voter.

JUSTICE O’CONNOR: With no holes punched?

MR. DAVID BOIES: With no holes punched, but, but where it was indented in every way. . . Another, another thing that they counted was he said they discerned what voters sometimes did was instead of properly putting the ballot in where it was supposed to be, they laid it on top, and then what you would do is you would find the punches went not through the so-called chad, but through the number.<sup>67</sup>

Here we have two situations—one in which the voter had indented a number of chads intending to vote for a number of candidates, and another where a voter had punched through a candidate’s number instead of his or her chad. Both votes would fail strict, uniform substandards like the ones Olson advocated during oral argument. But both clearly show the “intent of the voter.” Although a machine would never know that the voter had made the same mistake over and over again, the great advantage of a manual recount that broadly searches for “the intent of the voter” is that the individual recounter can pick up on these trends. They can see that hole after hole has been indented, in some coherent pattern, and that the voter clearly intended to vote for a certain slate of candidates but failed to follow instructions. Laurence Tribe took interest in Justice O’Connor’s impatience during the section of oral argument reproduced above, wherein she seemed hesitant to consider the rights of a “voter who did not properly follow the explicit and objective instructions” to have their ballot counted. He notes that O’Connor’s concurring opinion in *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), seems to make the opposite argument; indeed, it suggested that

[s]tates which decline to consider any evidence other than. . . explicit oral or written instructions regarding [individuals’] intent to refuse medical treatment should they become incompetent. . . may frequently fail to honor a patient’s intent [and

thus violate] a duty [that] may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment.<sup>68</sup>

According to both Florida law and Justice O'Connor's equal protection jurisprudence in *Cruzan*, the two ballots described above are both legal; nonetheless, the majority's strikethrough of plain equal protection precedent calling for the state to "[allow] a little play in its joints" meant that the person who cast that ballot with a pattern of indentations was disenfranchised. This person's vote was never counted in a race that was decided by 537 votes. It seems clear that Justice O'Connor—not unlike the other Justices in the majority—readily discarded her own equal protection philosophy as articulated in *Cruzan* in order to join the outlier position of the majority in *Bush v. Gore*.

At the end of the day, *Bush v. Gore* has yielded little useful precedent for future equal protection cases. Professor Karlan, however, has interpreted the case as creating a new equal protection doctrine: that of "structural" equal protections that "regulate the institutional arrangements within which politics is conducted."<sup>69</sup> Tribe explains that "this new structural model, though supposedly drawing upon the Equal Protection Clause to defend individuals' voting rights, in fact permits the Court to use the Fourteenth Amendment to extend its power to adjudicate political controversies at the same time as it undercuts the authority of legislatures."<sup>70</sup> This model adopts the somewhat pessimistic—but apparently realistic—view that "individual voters' rights are simply a cover for the Court's structural ambitions."<sup>71</sup> But even if this doctrine of equal protection were to hold water, it is still unlikely that *Bush v. Gore* will ever be seriously regarded as applicable judicial precedent—and that's all because of one, small sentence lurking at the tail end of the majority's opinion. Although Jeffrey Toobin's acute partisanship is visible in the following selection, he nonetheless speaks for a wide swath of legal historians that wonder how the "present circumstances" clause ever worked its way into the *per curiam* opinion:

[I]f it was difficult to identify [the equal protection violation], it was simple to find the single beneficiary of this new rule of constitutional law: George W. Bush. Late in the process on Tuesday, [Justice Sandra Day] O'Connor and [Justice Anthony] Kennedy made this point explicit in a sentence that quickly became the most notorious in their opinion: "our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." The basic obligation of a court devoted to precedent is to create rules of general application. Here, however, the Supreme Court was announcing in advance that the case of *Bush v. Gore* existed to serve only the Republican candidate for president in 2000. For those who would see cynical motives in the work of the majority—who thought they were acting more from political than principled motives—this sentence looked like a confession. O'Connor, Kennedy, and the others, it appeared, limited themselves to "the present circumstances" because that was what was necessary to assure their candidate's victory.<sup>72</sup>

Justice Breyer's dissenting opinion translated Toobin's partisan anger into grounded legal parlance. He simply stated that the majority's decision did "not adequately [attend]

to that necessary ‘check upon our own exercise of power,’ ‘our own sense of self-restraint.’ *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting).<sup>73</sup> Justice Stone’s position in *Butler* was not unlike Justice Breyer’s position in *Bush v. Gore*: both Justices were writing at a time when conservative majorities had been on the ascendancy for several decades, and both Justices were dissenting from a majority that they felt was engaged in deeply imprudent jurisprudence. Moreover, both Justices were working within an intensely polarized Court (Stone’s dominated by the Four Horseman<sup>74</sup> and Breyer’s dominated by seven Republican-appointed Justices<sup>75</sup>), and both felt that this environment enabled conservative majorities to ignore a proper “sense of self-restraint” and instead map their own politics onto hugely important Supreme Court cases. The common links between *Butler* and *Bush* thus demonstrate the recipe for outlier Supreme Court decisions: they occur when the Court is so deeply divided that even basic jurisprudential questions are up for grabs. This condition allows strange things to occur: *Butler*, for example, was the last case in which the High Court invalidated an Act of Congress as extending beyond the authority granted to that body in the Spending Clause.<sup>76</sup> And *Bush v. Gore*, of course, was no normal case in the history of equal protection.

It goes without saying that these outliers have done damage to the reputations and effectiveness of the Courts that created them; indeed, as soon as it is forgotten that “the basic obligation of a court devoted to precedent is to create rules of general application,”<sup>77</sup> then lower court judges begin scratching their heads, wondering how to interpret decisions that are palpably political and unapologetically inapplicable. Such is the case with *Bush v. Gore*. The “present considerations” clause, in tandem with a complete disregard for Justice Stone’s warnings about judicial restraint in *Butler*, has

effectively precluded *Bush v. Gore* from having any precedential value. Elections that fall within the margin of error calling for vote recounts are extremely rare, and advances in vote-counting technology, spurred in large part by [the election for president in 2000], will hopefully [mean that an] ex post statewide recount under similar circumstances may never again arise. . . the effect of *Bush v. Gore* on legal doctrine could prove to be a nullity, despite the best efforts of voting rights advocates to leverage it into a brave new world of voter equality.<sup>78</sup>

And so, for roughly eight years after *Bush v. Gore*, the line of precedent stemming from the case turned “out not to be a line at all, but a mirage.”<sup>79</sup> But then, in November 2008, there was another uncommonly close election for federal office. As the dust settled on Election Night, figures released by the Minnesota Secretary of State’s office suggested that incumbent Senator Norm Coleman (R-MN) had won reelection over challenger Al Franken (DFL-MN) by a margin of 215 votes. When the subsequent manual recount showed Mr. Franken ahead by 225, Senator Coleman knew where to go. By the beginning of his recount trial, he had acquired as counsel Ben Ginsberg—a prominent architect of George W. Bush’s legal strategy in 2000. Ginsberg wasted no time invoking the precedent he had worked so hard to create. In a Minnesota courtroom, almost eight years to the day after *Bush v. Gore* was decided, Ginsberg argued:

as part of this [Minnesota recount] process, we have seen that different counties treated the same ballots differently so that voters

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whose votes counted in one county were rejected in another county. . . In order to achieve equal protection under the law and enfranchise as many people as possible, we need to count all similarly situated ballots [as that would be] the only way to avoid the *Bush v. Gore* problem.<sup>80</sup>

But, when the District Court for the Second Judicial District of Minnesota released their opinion in the election contest trial on the afternoon of April 14, 2009, they found that the “present considerations” clause precluded the application of *Bush v. Gore* to *Coleman v. Franken*. In a unanimous 3-0 decision, they ruled:

Contestants [Coleman et. al.] rely exclusively on *Bush v. Gore*, 531 U.S. 98 (2000), in support of their equal protection argument. The United States Supreme Court expressly limited the potential precedential reach of its opinion in *Bush*. See *Bush* 531 at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”) See also *Austin v. Wilkinson*, 502 F.Supp.2d 660, 671 n.6 (N.D. Ohio 2006) (characterizing *Bush* as a “notable exception” to the general rule that “when the Supreme Court rules, it intends that its words will guide the future actions of those before and not before the court. That is, it will create precedent[.]”); *Spears v. Stewart*, 283 F.3d 992, 997 (9th Cir. 2002) (comparing majority opinion to the *Bush* decision thusly: “good for this case and this case only[.]”).<sup>81</sup>

*Coleman v. Franken* thus appears to be just one more in a long string of cases wherein lower court judges have declined to apply the murky precedent of *Bush v. Gore*. Indeed, the case now seems to be “disappearing down the legal world’s version of the memory hole, the slot where, in George Orwell’s ‘1984,’ government workers disposed of politically inconvenient records.”<sup>82</sup>

Nonetheless, critics of the Court’s equal protection jurisprudence in *Bush v. Gore* should remember that the most important part of that ruling—the decision to permanently suspend the Florida recounts—was based on Article II and 3 U.S.C. §5, not on the Equal Protection Clause. It is easy to conflate the two decisions and conclude that a less-than-stellar equal protection argument prevailed because of the identities of the parties involved. Jeffrey Toobin ends his book *Too Close to Call* by igniting the rhetorical fireworks in support of this claim:

In the cynical calculus of contemporary politics, it is easy to dismiss Gore’s putative victory. But if more people intended to vote for Gore than for Bush in Florida—as they surely did—then it is a crime against democracy that he did not win the state and thus the presidency. It isn’t that the Republicans “stole” the election or that Bush is an “illegitimate” president. But the fact remains: The wrong man was inaugurated on January 20, 2001, and this is no small thing in our nation’s history. The bell of this election can never be unrung, and the sound will haunt us for some time.<sup>83</sup>

While this rhetoric may offer some solace to disillusioned Gore voters, we can never know for sure what the seven Justices in the *Bush v. Gore* majority were thinking—whether their motives were sinister and political or genuinely judicious. In the end, the only recourse for those who disagree with the decision is to watch and wait for equal protection doctrine to shift once more under the feet of our judges. Indeed, modern legal scholars have no idea where *Bush v. Gore* will lead us, just as many have no idea where it came from. While this reality has mired the lower Courts in a constant struggle to apply *Bush v. Gore*, the Supreme Court itself treats the case like it never happened; for all the attention it has commanded, they have “not cited it once since it was decided.”<sup>84</sup> In some ways, it is almost as if “the Supreme Court [wrote] an opinion, and then, in a bow to René Magritte, put as its last sentence: ‘This is not an opinion.’ What is a lower court to do?”<sup>85</sup> And when Associate Justice Antonin Scalia—a staunch proponent of *stare decisis* and a member of the majority in *Bush v. Gore*—was recently asked at a forum to clarify some confusion about the case, “he snapped: ‘Come on, get over it.’”<sup>86</sup>

## Endnotes

<sup>1</sup> Jeffrey Toobin, *Too Close Too Call: The Thirty-Six Day Battle to Decide the 2000 Presidential Election* (New York: Random House Trade Paperbacks, 2002): xv.

<sup>2</sup> Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007): 177.

<sup>3</sup> Constitution of the United States of America, Amendment XIV, Section 1: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” [Emphasis mine.]

<sup>4</sup> *Bush v. Gore*, 531 U.S. 98 (2000), at 105-06.

<sup>5</sup> See *Gore v. Harris*, 772 S2d 1243, slip op., at 39.

<sup>6</sup> *Bush v. Gore*, 531 U.S. 98 (2000), at 110: “The Supreme Court of Florida has said that the legislature intended the State’s electors to “participat[e] fully in the federal electoral process,” as provided in 3 U.S.C. §5. 772 So. 2d, at 1289; see also *Palm Beach Canvassing Bd. v. Harris*, 2000 WL 1725434, \*13 (Fla. 2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12 [the “safe harbor” date in 2000, six days before the constitutionally-designated date for the meeting of the Electoral College]. That date is upon us, and there is no recount procedure in place under the State Supreme Court’s order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.”

<sup>7</sup> Undervotes are ballots for which voting machines detect no vote for President.

<sup>8</sup> A *per curiam* opinion is literally an opinion “by the Court as a whole.” *Per curiam* decisions are issued by multi-member appellate courts acting anonymously as a whole unit; as such, they do not list the author of the opinion (although it is understood that the *per curiam* decision *Bush v. Gore* was co-written by Justices Sandra Day O’Connor and Anthony Kennedy [see Toobin, *Too Close to Call*, at 265]).

<sup>9</sup> *Stare decisis* is the policy of the Court to stand by its precedents; the phrase is an abbreviation of *stare decisis et quia non movere*—“to stand by and adhere to decisions and not disturb what is settled”—and was articulated in *IRS v. Osborne (In re Osborne)*, 76 F.3d 306, 96-1 U.S. Tax Cas. (CCH) paragraph 50,185 (9th Circuit 1996).

<sup>10</sup> Jeffrey Toobin, *Too Close Too Call: The Thirty-Six Day Battle to Decide the 2000 Presidential Election* (New York: Random House Trade Paperbacks, 2002): 259.

<sup>11</sup> Overvotes are ballots for which voting machines detect votes for two or more Presidential candidates.

<sup>12</sup> *Bush v. Gore*, 531 U.S. 98 (2000), at 106.

<sup>13</sup> Supreme Court transcript of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>14</sup> *Bush v. Gore*, 531 U.S. 98 (2000), at 105.

<sup>15</sup> *Bush v. Gore*, 531 U.S. 98 (2000), at 105.



<sup>16</sup> Geoffrey R. Stone, Equal Protection? The Supreme Court's Decision in *Bush v. Gore*, University of Chicago Library Digital Collection, <http://fathom.lib.uchicago.edu/1/777777122240/>, <posted 5/23/01> (accessed 4/02/09).

<sup>17</sup> Stone.

<sup>18</sup> Stone.

<sup>19</sup> Stone, quoting Cass Sunstein.

<sup>20</sup> Laurence H. Tribe, David Boies, Andrew J. Pincus, Thomas C. Goldstein, Jonathan S. Massey, Kendall Coffey, and Peter J. Rubin. *Bush v. Gore*, 531 U.S. 98 (2000): Brief of Respondents Gore et. al, at 38.

<sup>21</sup> *Reynolds v. Sims*, 377 U. S. 533, 555 (1964), at 555.

<sup>22</sup> Stevens cites *Reynolds v. Sims*, 377 U. S. 533 (1964), at 568.

<sup>23</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Stevens, J., dissenting), at 124-25. Emphasis mine.

<sup>24</sup> *Victor v. Nebraska*, 511 U. S. 1 (1994), at 5.

<sup>25</sup> Stone.

<sup>26</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Stevens, J., dissenting), at 126.

<sup>27</sup> Florida Statute Ann. Section 102.168(3)(c).

<sup>28</sup> Supreme Court transcript of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>29</sup> *Marbury v. Madison*, 1 Cranch 137 (1803), at 177: "It is emphatically the province and duty of the judicial department to say what the law is."

<sup>30</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Stevens, J., dissenting), at 128.

<sup>31</sup> In the interest of impartiality, it is fair to note that Laurence Tribe authored the brief for respondents in *Bush v. Gore*, after arguing the case for the Vice-President in the lower courts.

<sup>32</sup> Tribe, at 220.

<sup>33</sup> *Bain Peanut Company of Texas v. Pinson*, 282 U. S. 499 (1931) (Holmes, J.), at 501.

<sup>34</sup> Tribe, at 219.

<sup>35</sup> Tribe, at 219. Emphasis mine.

<sup>36</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Stevens, J., dissenting), at 126.

<sup>37</sup> Supreme Court transcript of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>38</sup> Tribe, at 222. Emphasis mine.

<sup>39</sup> Supreme Court transcript of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000). Emphasis mine.

<sup>40</sup> Jeffrey Toobin, *Too Close Too Call: The Thirty-Six Day Battle to Decide the 2000 Presidential Election* (New York: Random House Trade Paperbacks, 2002): 61-62.

<sup>41</sup> Tribe, at 177.

<sup>42</sup> Tribe, at 220.

<sup>43</sup> Tribe, at 218-19.

<sup>44</sup> Supreme Court transcript of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000), wherein David Boies indicated: "There is about another day or so, except for, except for four or five counties, all of the counties would be completed in about another day. And maybe even those counties could be now because as I understand it some of them have taken advantage of the time to get the procedures ready to count."

<sup>45</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Ginsburg, J.J., dissenting), at 135.

<sup>46</sup> *Bush v. Gore*, 531 U.S. 98 (2000), at 107-08.

<sup>47</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Breyer, J., dissenting), at 145.

<sup>48</sup> Tribe, at 236. Emphasis mine.

<sup>49</sup> Supreme Court transcript of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>50</sup> *Siegel v. LePore*, No. 00-15981, 2000 WL 1781946, \*31, \*32, \*43 (charts C and F) (CA11, Dec. 6, 2000), as removed from: *Bush v. Gore*, 531 U.S. 98 (2000) (Stevens, J., dissenting), at n4.

<sup>51</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Stevens, J., dissenting), at n4.

<sup>52</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Breyer, J., dissenting), at 147.

<sup>53</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Breyer, J., dissenting), at 147. Emphasis mine.

<sup>54</sup> *Moore v. Ogilvie*, 394 U. S. 814 (1969), at 819.

<sup>55</sup> Stone.

<sup>56</sup> Supreme Court transcript of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>57</sup> Laurence H. Tribe, David Boies, Andrew J. Pincus, Thomas C. Goldstein, Jonathan S. Massey, Kendall Coffey, and Peter J. Rubin. *Bush v. Gore*, 531 U.S. 98 (2000): Brief of Respondents Gore et. al, at 41.

<sup>58</sup> Stone provides two examples of the "certain circumstances" that have called for legitimate federal intervention in State election procedures: "*Harper [v. Virginia Board of Elections]*, 383 U.S. 663] and

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*Reynolds* [v. *Sims*, 377 U.S. 533], which involved laws that clearly discriminated against readily identifiable groups of voters.”

<sup>59</sup> Laurence H. Tribe, David Boies, Andrew J. Pincus, Thomas C. Goldstein, Jonathan S. Massey, Kendall Coffey, and Peter J. Rubin. *Bush v. Gore*, 531 U.S. 98 (2000): Brief of Respondents Gore et. al, at 41.

<sup>60</sup> Jeffrey Toobin, *Too Close Too Call: The Thirty-Six Day Battle to Decide the 2000 Presidential Election* (New York: Random House Trade Paperbacks, 2002): 265.

<sup>61</sup> Tribe, at 218.

<sup>62</sup> Tribe, at 218.

<sup>63</sup> *Slaughter-House Cases*, 83 U.S. 36, at 71.

<sup>64</sup> *Slaughter-House Cases*, 83 U.S. 36, at 71-72. Emphasis mine.

<sup>65</sup> *Bush v. Gore*, 531 U.S. 98 (2000), at 106.

<sup>66</sup> Texas Election Code §127.130(d): a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless: (1) at least two corners of the chad are detached; (2) light is visible through the hole; (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote; or (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote. (e) *Subsection (d) does not supersede any clearly ascertainable intent of the voter.* [Emphasis mine.]

<sup>67</sup> Supreme Court transcript of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>68</sup> Tribe, at 244; quoting Justice O’Connor’s concurring opinion in *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), at 290.

<sup>69</sup> Pamela S. Karlan, “The Newest Equal Protection: Regressive Doctrine on a Changeable Court,” in *The Vote: Bush, Gore, and the Supreme Court*, ed. Cass R. Sunstein and Richard A. Epstein (Chicago, IL: University of Chicago Press, 2001): 77, 78.

<sup>70</sup> Tribe, at 227-228.

<sup>71</sup> Tribe, at 228.

<sup>72</sup> Jeffrey Toobin, *Too Close Too Call: The Thirty-Six Day Battle to Decide the 2000 Presidential Election* (New York: Random House Trade Paperbacks, 2002): 265. Emphasis mine.

<sup>73</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (Breyer, J., dissenting), at 158.

<sup>74</sup> The term “Four Horsemen” refers to the four conservative Justices who opposed the New Deal politics of Franklin Roosevelt during the 1930’s: James Clark McReynolds, George Sutherland, Willis van Devanter, and Pierce Butler.

<sup>75</sup> Indeed, when *Bush v. Gore* was heard in 2000, the only Justices appointed by Democratic presidents were Stephen Breyer and Ruth Bader Ginsburg.

<sup>76</sup> Article 1, Section 8, Clause 1 of the United States Constitution: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States”

<sup>77</sup> Jeffrey Toobin, *Too Close Too Call: The Thirty-Six Day Battle to Decide the 2000 Presidential Election* (New York: Random House Trade Paperbacks, 2002): 265. Emphasis mine.

<sup>78</sup> Tribe, at 270-71.

<sup>79</sup> Tribe, at 270.

<sup>80</sup> “Funny Business in Minnesota,” *The Wall Street Journal*, sec. A, January 5, 2009. Quoting Ginsberg.

<sup>81</sup> *Cullen Sheehan and Norm Coleman, contestants, v. Al Franken, contestee*, No. 62-CV-09-56, in the matter of the Contest of the General Election held on November 4, 2008, for the purpose of electing a United States Senator from the State of Minnesota, in the District Court for the Second Judicial District, State of Minnesota, County of Ramsey (April 14, 2009): 44. <available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNfinalorder.pdf>>.

<sup>82</sup> Adam Cohen, “Has Bush v. Gore Become the Case That Must Not Be Named?,” *The New York Times*, Editorial Section, August 15, 2006.

<sup>83</sup> Jeffrey Toobin, *Too Close Too Call: The Thirty-Six Day Battle to Decide the 2000 Presidential Election* (New York: Random House Trade Paperbacks, 2002): 282.

<sup>84</sup> Cohen.

<sup>85</sup> Chad Flanders, Please Don’t Cite This Case!: The Precedential Value of *Bush v. Gore*, 116 *Yale Law Journal Pocket Part* 141 (2006), <http://thepocketpart.org/2006/11/07/flanders.html>, <posted 7/11/06> (accessed 4/02/09).

<sup>86</sup> Cohen.

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# *Washington v. Glucksberg: The Right to Be or Not to Be*

*Robyn Gordon*

## **Abstract**

In the United States Supreme Court case *Washington v. Glucksberg* (1997), four Washington state physicians and their three terminally ill patients challenged Washington state's ban against physician-assisted suicide, claiming that the Due Process Clause of the 14th Amendment protected a citizen's "right to die." The Supreme Court unanimously decided that the Due Process Clause does not safeguard the "right to die" because this right is not a fundamental liberty interest "deeply rooted in this Nation's history." This piece explores why the Court chose to act as it did even while many Justices acknowledged an apparent liberty interest in granting terminally ill, mentally competent patients the right to determine the circumstances of their own deaths. The answer involves a combination of various factors: the history of federal jurisprudence relating to inherent rights and liberties as protected by the 14th Amendment; the *zeitgeist*, or public opinion of American society in the second half of the 20th century; previous court cases of physician-assisted suicide; and the decisions of the preceding Burger and Warren Courts respecting individual liberties. As this paper demonstrates, the Supreme Court was reluctant to overturn the Washington state law since the practice of physician-assisted suicide had yet to assimilate comfortably in the collective consciousness of the American public.

James Poe is a 69-year-old retired sales representative who suffers from emphysema, which causes him a constant sensation of suffocating. He is connected to an oxygen tank at all times, and takes morphine regularly to calm the panic reaction associated with his feeling of suffocation. Mr. Poe also suffers from heart failure related to his pulmonary disease, which obstructs the flow of blood to his extremities and causes severe leg pain. There are no cures for his pulmonary and cardiac conditions, and he is in the terminal phase of his illness. Mr. Poe is mentally competent and wishes to commit suicide by taking physician-prescribed drugs.<sup>1</sup>

## **Introduction: The Facts of *Washington v. Glucksberg*, 521 US 702 (1997)**

Dr. Harold Glucksberg, Dr. Abigail Halperin, Dr. Thomas A Preston, and Dr. Peter Shalit were physicians who practiced medicine in the State of Washington. Each doctor declared that he or she had periodically treated terminally ill, mentally competent adults who wished to hasten their deaths with help from their physicians.<sup>2</sup> However, in 1994, promoting a suicide attempt in the State of Washington was a felony punishable by up to five years' imprisonment and up to a \$10,000 fine. RCW 9A.36.060(2) and 9A.20.020(1)(c).<sup>3</sup> According to Wash. Rev.Code 9A.36.060 (1) (1994), "a person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."<sup>4</sup> Were it not for Washington's assisted-suicide ban, the four doctors

said, they would have provided help in ending the lives of their suffering patients.

On January 29, 1994, these four physicians, along with three “gravely ill, pseudonymous plaintiffs who have since died” (including Mr. James Poe), and the non-profit organization Compassion in Dying, which counseled individuals considering physician-assisted suicide, filed suit in the United States District Court of Washington, seeking a declaration that Wash. Rev. Code 9A.36.060(1)(1994) violated the Due Process Clause of the 14th Amendment.<sup>5</sup> The plaintiffs argued that Washington’s state laws infringed upon “the existence of a liberty interest protected by the 14th Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide.”<sup>6</sup> While the District Court and the Ninth Circuit Court of Appeals ruled in favor of Glucksberg, the case was brought before the Supreme Court of the United States on January 8, 1997. The plaintiffs once again questioned whether “Washington’s prohibition against ‘caus[ing]’ or ‘aid[ing]’ a suicide offend[ed] the 14th Amendment of the United States Constitution,”<sup>7</sup> and the Supreme Court unanimously found that it did not. It is to this ultimate finding that I will now turn.

As Carl E. Schneider opens his exploration of physician-assisted suicide in *Law at the End of Life: The Supreme Court and Assisted Suicide*, he quotes Alexis de Tocqueville: “‘Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.’”<sup>8</sup> Since the early 1980s, the puzzle of physician-assisted suicide and its impact on the legislative and judicial processes effectively demonstrates de Tocqueville’s keen observation and reflection. For essentially all of English and United States history, the common-law tradition—ranging from Henry de Bracton’s legal-treatises of the 13th century to William Blackstone’s *Commentaries on the Laws of England*—as well as United States state laws have punished or otherwise denounced both suicide and assisting suicide. As stated in *Glucksberg*’s United States Supreme Court record, “in almost every State—indeed, in almost every western democracy, it is a crime to assist a suicide.”<sup>9</sup> The decision of the Ninth Circuit Court of Appeals that terminally ill, mentally competent individuals have a constitutional right to “die with dignity” took “the power of decision away from political institutions by finding in the constitutional right of privacy an entitlement to the help of a physician in committing suicide.”<sup>10</sup>

The nine United States Supreme Court Justices’ decision in the 1997 case *Washington v. Glucksberg* reversed the lower court’s ruling, holding that Washington’s ban on assisted suicide did not violate the Due Process Clause of the 14th Amendment. Currently, physician aid in dying is legal in only three American states—Oregon, Washington, and Montana. Though *Glucksberg* was decided by a unanimous court, the opinions of such Justices as O’Connor, Stevens, Souter, and, to some extent, Rehnquist, revealed an underlying sympathy for terminally ill patients who wish to end their lives, going even so far as to recognize the apparent human right to freedom of choice in determining the circumstances of one’s death in particular cases. The Justices seemed to acknowledge that “if a truly competent patient who is genuinely about to die and who is in unrelievable pain irrevocably wishes to refuse ‘heroic’ medical care, who are we to say he [or she] is wrong?”<sup>11</sup> On the other hand, there does seem to be a compelling state interest in protecting against the dangers of mistaken, coerced, involuntary, or impulsive decisions, and against the abuses of end-of-life practices. Ultimately, even if the Justices indeed identified a right to freedom of choice in assisted suicide, then why did they unanimously rule against legalizing the practice?

To respond to this central question, we must examine the history of federal

jurisprudence. Essentially, by the 1960s and 1970s, the Court “had stated basic democratic values that could not be attacked by politicians” or the American public, specifically related to civil and reproductive rights.<sup>12</sup> Few, if any, cases relating to physician-assisted suicide, however, surfaced in the American legal landscape until the late 1970s. By the late 1980s and early 1990s, when physician-assisted suicide and right-to-die cases were receiving moderate publicity (through a series of cases in the late ’80s and early ’90s and through the exposure and prosecution of right-to-die advocate Dr. Jack Kevorkian), the American public simply had not yet become comfortable with the complex notion of doctors assisting their patients in hastening death. The values of the American society influenced the case’s outcome. In the ’60s and ’70s, American society’s acceptance of legislative and judicial protection of privacy and other due process rights bolstered Supreme Court decisions favoring those rights; by the mid 1990s, when *Washington v. Glucksberg* was decided, the idea of physician-assisted suicide had not yet become a widely held and inchoate value of the American people. As a result, the Court was not yet ready to profoundly change social norms by rendering physician-assisted suicide constitutional and potentially making drastic changes to the American legal landscape.

### **The Problem: What exactly constitutes physician-assisted suicide?**

Before we can delve into the Supreme Court’s reasoning in *Washington v. Glucksberg*, it is important to have a clear understanding of the characterization and ramifications of physician-assisted suicide. Though the Supreme Court’s ruling was unanimous, many of the Justices, including the concurring Justices O’Connor and Stevens, indicated that “distinguishing among various end-of-life practices is a messy, case-by-case job,” and that it is difficult, nigh impossible, to differentiate between physician-assisted suicide, withdrawal of life support, terminal sedation, palliative care, voluntary euthanasia, and other death-hastening procedures.<sup>13</sup> So before we can even explore the Justices’ evaluation of whether physician-assisted suicide is protected by the United States Constitution, the following question must be solved: how is physician-assisted suicide defined?

The first state to legalize “physician-assisted suicide” was Oregon, after the passage of the Oregon Death with Dignity Act on November 8, 1994.<sup>14</sup> The definition of physician-assisted suicide in Death with Dignity Act should be made clear by the following excerpt:

An adult who is capable...and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner.<sup>15</sup>

The act limits the scope of the definition, disallowing cases that may fall under alternative definitions of physician-assisted suicide. However, according to the Washington statute banning physician-assisted suicide, “withholding or withdrawal of life-sustaining treatment at a patient’s direction shall not, for any purpose, constitute a suicide.”<sup>16</sup> Confusingly, even though both practices—physician-assisted suicide with medicine and withdrawal of life support—ultimately result in the hastening of a patient’s

death, only the former is outlawed. Justice O'Connor, in dicta of her concurring opinion, also explained that "a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication from qualified physicians to alleviate that suffering, even to the point of causing unconsciousness and hastening death."<sup>17</sup> This is often referred to as "palliative care," treatment that reduces the severity of disease symptoms and pain, even if that treatment "may have the foreseen but unintended 'double effect' of hastening the patient's death."<sup>18</sup>

This struggle between causation and intent as highlighted in O'Connor's remarks troubled most of the Justices, particularly Justice Rehnquist. In *Vacco v. Quill*, another "right-to-die" case decided in 1997, the Court similarly held that a New York State ban on physician-assisted suicide was constitutional (physician-assisted suicide here was defined in the same way as it was in Oregon: the prescription of lethal medication for mentally competent, terminally ill patients who are suffering great pain and desire a doctor's help in taking their own lives).<sup>19</sup> Rehnquist, who delivered the majority opinion, cited the fundamental legal principles behind causation and intent. He noted in *Quill* the reasonable difference between removing life-sustaining treatment and administering enough pain medication with the intent of ending the patient's life:

When a patient refuses life sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication....The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or maybe, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead."<sup>20</sup>

Rehnquist applied this reasoning to *Glucksberg* when concluding that the three distinct concepts—physician-assisted suicide, removal of life-sustaining treatment, and aggressive palliative care—"furnish a clear enough line to support the states' decisions to deny terminally ill patients legally protected access to physician-assisted suicide."<sup>21</sup>

Blurring the lines even further between permissible and prohibited end-of-life practices, Justice Stevens, in his concurring opinion in *Glucksberg*, calls attention to the procedure of terminal sedation:

The American Medical Association unequivocally endorses the practice of terminal sedation—the administration of sufficient dosages of pain killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced. The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes, and the actual cause of death is the administration of heavy doses of lethal sedatives. This same intent and causation may exist when a doctor complies with a patient's request for lethal medication to hasten her death.<sup>22</sup>

Stevens implies here that physician-assisted suicide should be permitted when performed with the same intent as the practice of terminal sedation. However, does this practice really differ from active voluntary euthanasia, “where a person other than the patient commits the death-causing act”?<sup>23</sup> But the practice of the specific term “euthanasia” was outlawed in all 50 states, and to this day the Justices unanimously shudder when considering the legalization of euthanasia, even if the circumstances are such that a patient requests euthanasia. Apparently, the practice of euthanasia (which I will delve into later in relation to Dr. Kevorkian) is so ostensibly distinguishable from that of physician-assisted suicide that the latter is allowed while the former is anathema.

“Despite the gray areas, most of the Justices found the causation and intent analyses strong enough to justify maintaining a line between physician-assisted suicide and the practices they deemed constitutionally protected,” such as terminal sedation, palliative care, and withdrawal of life-sustaining treatment.<sup>24</sup> The Justices ultimately lamented the absence of clearer demarcations to distinguish between permissible and impermissible end-of-life conduct.

### Pre-*Glucksberg* Cases on Physician-Assisted Suicide

By the mid-1990s, with cases like *Cruzan v. Director, Missouri Department of Health*, *Vacco v. Quill*, and even earlier with the 1976 New Jersey case of Karen Ann Quinlan (in which a hospital refused to grant a couple’s request to have their daughter’s respirator removed when she was in a vegetative state, provoking widespread media coverage), physician-assisted suicide had entered the psyche of American legal and judicial landscape and the minds of Americans as a well-known topic. Kevorkian’s actions “further aroused interest in and provoked discussion of assisted suicide among the general public.” In *The Right to Die Debate*<sup>25</sup> Marjorie Zucker explains, “By December 1998, 37 states had statutes that explicitly criminalized assisting in a suicide.<sup>26</sup> An article written in the November 13, 1993 issue of *The Economist* titled “Death’s Dissident” emphasized that “the idea of dying on purpose, with the help of the very profession traditionally relied upon to keep death away, confront[ed] Americans with their last great taboo.”<sup>27</sup> In a poll taken by the Gallup Organization in 1997 about spiritual beliefs and the dying process, only 33 percent of those polled would support making physician-assisted suicide legal “under a wide variety of specific circumstances”; 32 percent would support making it legal “in a few cases” but “oppose it in most circumstances”; and 31 percent would oppose making it legal “for any reason.”<sup>28</sup> Similarly, in a poll of 1103 adults conducted by the *Washington Post* in March of 1996, 40 percent of those polled were against the legalization of physician-assisted suicide.<sup>29</sup>

As Schneider argues, with developing medical technology and doctors facing particularly desperate cases and patients, physicians “faced genuinely confounding choices about whether to use medicine’s whole armory,” and it soon became more acceptable in the medical community—though not without reservation—to respect patients’ wishes to issue orders against reviving or prolonging the lives of pain-ridden, terminally ill patients.<sup>30</sup> These statistics were undoubtedly in the minds of the Justices while they were making their decision regarding *Glucksberg*.

In deciding *Glucksberg*, the Court also relied on the opinions and reasoning of previous right-to-die cases, specifically *Cruzan v. Director, Missouri Department of Health*, decided in 1990, and *Vacco v. Quill*, decided in 1997. *Cruzan* involved Nancy Beth Cruzan, who in January 11, 1983 was driving in Jasper County, Missouri when her



car went off the road (and crashed), causing Nancy to slip into a “permanent vegetative state.”<sup>31</sup> Her parents were told that “Nancy was not legally dead, since some parts of her brain still worked. Nor was she terminally ill. Indeed, she might live another thirty years. But she would never regain consciousness.”<sup>32</sup> Consequently, Nancy’s parents wished to remove her feeding tube so that she would die, but the hospital refused to obey without a court order. While the Missouri trial court issued the order, the Missouri Supreme Court refused that order, and seven years later the case reached the United States Supreme Court.

Why would the Supreme Court agree to take this case? After all, “federal law is not responsible for defining homicide or regulating medical care.”<sup>33</sup> The Supreme Court could only deliberate on this case if the Justices believed that Nancy Cruzan’s federal rights under the Constitution may have been violated by the state of Missouri. As Schneider asserts, “the claim in Cruzan, [then], was not that good social policy justified withdrawing food and water from Nancy, but that she had a constitutional right to compel the hospital to stop feeding her. The claim, in short, was that she had a ‘right to die.’”<sup>34</sup> By a vote of five to four, the Court held that the state of Missouri could refuse to withdraw Nancy’s feeding tube based on the evidence that “Nancy had never chosen to refuse treatment and now was physically incapable of making any kind of choice at all.”<sup>35</sup> In Justice Brennan’s dissent, however, he insisted that “Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State.”<sup>36</sup> Stevens, in his dissenting opinion, recognized an “interest in dignity” and “an interest in the kind of memories that will survive after death.”<sup>37</sup> Moreover, the very fact that *Cruzan* was a 5-4 decision indicates that there was much disagreement as to what was in Nancy Cruzan’s best interest. So even though the Court ruled against the Cruzans, the Court seemed to recognize that some kind of constitutional right to die did indeed exist, thus opening the door “to the prospect of a series of cases limiting the ability of the states to regulate law at the end of life.”<sup>38</sup>

A second case that the Court relied upon in making its decision is *Vacco v. Quill*. In this case, New York physicians Dr. Timothy Quill, Dr. Samuel C. Klagsbrun, and Dr. Howard A. Grossman sued the State’s Attorney General in the U.S. District Court, arguing that New York’s physician-assisted suicide ban violated the Equal Protection Clause of the 14th Amendment. The three physicians contended that “because New York permits a competent person to refuse life-sustaining medical treatment, and because the refusal of such treatment is ‘essentially the same thing’ as physician-assisted suicide, New York’s assisted suicide ban violates the Equal Protection Clause.”<sup>39</sup> While the New York District Court ruled in favor of the statute, the Court of Appeals for the Second Circuit reversed that ruling on the grounds that New York did not give equal treatment to all terminally ill, competent individuals who wished to hasten their deaths. New York allowed those patients on life support to hasten their deaths by being removed from life support but forbid patients from hastening their deaths through physician-assisted suicide.<sup>40</sup> Ultimately, the case reached the Supreme Court in June of 1997, after *Glucksberg* had already been argued. Again, the Justices unanimously decided that the New York state law “neither infringe[s] fundamental rights nor involve[s] suspect classification,” and that there was a medical and rational distinction between withdrawing life support and turning to physician-assisted suicide.<sup>41</sup> The New York statute did not, therefore, violate due process.

But as in *Glucksberg*, the Justices expressed ambivalence and hesitation in

their decision in *Vacco* to uphold the New York ban on physician-assisted suicide. In her concurring opinion Justice O'Connor wrote:

There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure.<sup>42</sup>

Furthermore, O'Connor essentially went so far as to endorse the medically-accepted "double effect" principle: "the parties and amici agree that a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication from qualified physicians to alleviate that suffering, even to the point of causing unconsciousness and hastening death."<sup>43</sup> And so the question remains: why, if the Justices could identify a cognizable interest in a suffering patient's right to die, did they unanimously rule in favor of a physician-assisted suicide ban?

We have already answered this question in part by investigating the history of physician-assisted suicide in federal jurisprudence. To fully understand the Justices' decision in *Glucksberg*, we must now turn our attention to the *zeitgeist*—the temperature of the American public in the era of the case—, and the application of the 14th Amendment to previous cases of questioned "fundamental" rights and liberties.

### The Warren and Burger Courts: An Emphasis on Public Opinion

In making their decision in *Glucksberg*, the Justices unquestionably looked back upon the history of the Court's decisions involving the existence (or lack thereof) of fundamental rights protected by the 14th Amendment, which range in topic from privacy to school prayer to rights of criminal defendants. As Lawrence Friedman explains in Martin Belsky's *The Rehnquist Court: A Retrospective*, "rights consciousness—and particularly the sense that there are fundamental, inborn, inherent, basic rights, which legislatures should not touch—is a strong social aspect of twentieth-century opinion in Western countries."<sup>44</sup> He continues, "one consequence of this fact is an inevitable increase in the role of Courts, which are after all the guardians and interpreters of these fundamental rights."<sup>45</sup>

During the 1950s and 1960s, the Warren Court, led by Chief Justice Earl Warren from 1953 to 1969, was seen as a champion of "moral responsibility," demonstrating a "desire for justice," a "commitment to equality," and an "overriding concern with the rights of the individual."<sup>46</sup> Under Warren's leadership, the Court was commonly known as "a *Carolene Products* Court," addressing whether "the Supreme Court should be called upon to decide whether a particular law...prevents the pluralist political system from being open to all," and fervently advocating for the protection of discrete and insular minorities.<sup>47</sup> The Warren Court ended *de jure* segregation in public schools with *Brown v. Board of Education*, outlawed anti-miscegenation laws through *Loving v. Virginia* (1967), ruled that the Due Process Clause protects an individual's right to privacy with *Griswold v. Connecticut* (1965), and expanded the rights of criminal defendants with *Miranda v. Arizona* (1966) and *Escobedo v. Illinois* (1964).

Following the retirement of liberal Earl Warren, Warren Burger, a contrastingly strict constitutionalist, became the court's Chief Justice. While the Warren Court "consistently resolved an overwhelming majority of non-unanimous civil liberties

cases in favor of the civil liberties claimant, the Burger Court majorities have just as consistently rejected more than half of civil liberties claims.”<sup>48</sup> Somewhat ironically, the Burger Court is perhaps most renowned for its landmark decision of *Roe v. Wade* (1973), in which the Court asserted that a woman’s right to an abortion falls within the right to privacy. What accounts, then, for the Court’s decisionmaking during the 1960s and 70s, with two essentially contrary Chief Justices defending similar “fundamental” rights substantively guaranteed by the U.S. Constitution?

In essence, while the Court took into account previous cases on physician-assisted suicide, its response was primarily influenced by its practices during the ’60s and ’70s, when the Court turned to the “zeitgeist,” or the collective consciousness of the times. Abortion law provides an example; by 1973, when *Roe* was decided, Colorado, California, Oregon, North Carolina, New York, Alaska, Hawaii, Washington, and other states had already legalized abortion in cases of rape, incest, and/or disability to the mother.<sup>49</sup> Additionally, “birth control services were in fact widely available to the middle classes” in the mid ’60s and early ’70s; from a poll conducted by the National Opinion Research Center’s General Society Survey in 1972 of 673 males and 675 females, 89 percent of both men and women polled approved of legalizing abortion for reasons of health, and at least 80 percent of those polled approved legalization for reasons of rape or birth defects in the potential child. 51 percent of both men and women supported legalizing abortion in situations of poverty.<sup>50</sup> Similarly, the Warren Court decided a series of criminal procedure cases based on precedent, going back to the 1930s. With the case of *Powell v. Alabama* (1931), the Court declared that the right to counsel was implied in the Bill of Rights. Later, in 1963, in *Gideon v. Wainwright*, the Court invoked the Sixth Amendment in unanimously declaring that state courts must guarantee criminal defendants counsel if they are unable to afford their own attorneys.<sup>51</sup> This was followed by the above-mentioned *Escobedo v. Illinois* and *Miranda v. Arizona*, which also reinforced the rights of criminal defendants.<sup>52</sup> As these cases demonstrate, precedent for rights of criminal defendants existed for decades and aided the Court in making its decisions in the late 1960s.

The Warren and Burger Courts responded to inchoate, national moral values held by the American people in making landmark and controversial decisions like *Roe*. In effect, the Rehnquist Court took the same approach in its *Glucksberg* decision. Unlike in cases relating to reproductive rights or criminal procedure, few statutes or pieces of law supported the practice of physician-assisted suicide during the second half of the 20th century, and so there was little in the way of legislative material to aid the Justices in their ruling. Recalling a principle applied by his predecessors, Rehnquist, in writing his majority opinion for *Glucksberg*, stresses that the practice of physician-assisted suicide was not “deeply rooted in this Nation’s history and tradition.”<sup>53</sup> He further explains that while the “respondents contend...that the liberty interest they assert is consistent with this Court’s substantive due process line of cases, if not with this Nation’s history and practice,” the fact that many of the “rights and liberties protected by the Due Process Clause [like the right to privacy, abortion, and counsel] sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected....”<sup>54</sup>

The Court listed five legitimate government interests in prohibiting the physician-assisted suicide in *Glucksberg*: 1) a “symbolic and aspirational as well as practical” interest in preserving, rather than ending human life; 2) an interest in preventing suicide, including involving the assistance of physicians; 3) an interest in “protecting the integrity and ethics of the medical profession” and preserving

physicians' roles as healers; 4) an "interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes" in addition to coercion; and 5) an interest in avoiding the path to "voluntary and perhaps even involuntary euthanasia."<sup>55</sup> While these arguments are perfectly sound, the Court's decision remains nevertheless puzzling since many of the Justices in effect identified a liberty interest in the practice, and physician-assisted suicide seemed to simply be another extension of substantive due process to a potential fundamental right.

The Court undoubtedly also took into consideration when making its decision that a majority of states directly outlawed physician-assisted suicide and that a significant majority of Americans were uncomfortable with the idea of legalizing physician-assisted suicide. As Schneider asserts, "the Court sensed, as it always must, the far-reaching sociological, political, and moral implications of its decision."<sup>56</sup> With such a delicate and touchy subject as terminally ill patients and appropriate responses at the end of life, "the Justices were surely hesitant to establish moral authority for acts as irreversible and ethically complex as ending life," especially when Americans (and most Western democracies) did not have strong support for the practice.<sup>57</sup> Additionally, in his majority opinion, Rehnquist explains that the Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open ended."<sup>58</sup>

Unlike previous substantive due process cases, such as *Roe, Griswold, Carolene Products* (1938), even as far back as *Lochner* (1905) and the *Slaughterhouse* (1873) cases, few state statutes, court precedents, and legislation relating to physician-assisted existed to guide the Justices in supporting the practice. If anything, most, if not all, previous physician-assisted suicide legislation in the U.S. and around the world opposed physician-assisted suicide. The Justices, therefore, simply responded as their predecessors had; just as the Warren Court responded to changes in national moral values, the Rehnquist Court similarly ruled based on the beliefs and principles of the American people, who did not yet believe that the time for federally-legalized physician-assisted had come.

## Conclusion

While the nine Supreme Court Justices unanimously ruled that the right to assistance in committing suicide was not protected by the Due Process Clause in the 1997 case *Washington v. Glucksberg*, underlying sympathy for terminally ill, suffering, mentally competent patients indicated that the Justices recognized a fundamental liberty in allowing such patients to determine the circumstances of their own deaths. Why, then, did they rule against legalizing physician-assisted suicide? America and the world were simply not ready for it.

When we examine the history of the Supreme Court, specifically in the mid-20th century, however, we see that the Rehnquist Court was acting very similarly to the previous Courts. By the time of decisions like *Roe* and *Griswold*, the idea of the right to privacy and the practice of abortion had already become ingrained in the collective consciousness of the American people and in state legislatures. In contrast, when the *Glucksberg* decision came on scene 1997, only one state had already legalized the practice of physician-assisted suicide, and many states and countries blatantly denounced suicide and assisting suicide. The Supreme Court responded accordingly. Even today, only three states have legalized the practice, indicating that, while attitudes toward suicide itself may be changing, laws still consistently condemn and continue to

prohibit assisting suicide. This issue remains controversial in America's legal landscape, with recent notable cases such as those of Terry Schiavo, Piergiorgio Welby, and Jana Van Voorhis, and will undoubtedly continue to be a thorn in the Court's side in the years to come.

## Endnotes

<sup>1</sup> *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1995).

<sup>2</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> Carl E. Schneider, ed., *Law at the End of Life: The Supreme Court and Assisted Suicide* (Ann Arbor: The University of Michigan Press, 2000), p. 1.

<sup>9</sup> *Washington v. Glucksberg*.

<sup>10</sup> Schneider, ed. p. 1.

<sup>11</sup> *Ibid.* p. 18.

<sup>12</sup> *Ibid.* p. 14.

<sup>13</sup> Schneider, ed. p. 46.

<sup>14</sup> "Oregon Death with Dignity Act," in *ORS 127.800-995* (United States: 1994).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Washington v. Glucksberg*.

<sup>17</sup> *Ibid.*

<sup>18</sup> Schneider, ed. p. 45.

<sup>19</sup> *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>20</sup> *Ibid.*

<sup>21</sup> Schneider, ed. p. 46.

<sup>22</sup> *Washington v. Glucksberg*.

<sup>23</sup> Schneider, ed. p. 58.

<sup>24</sup> *Ibid.* p. 47.

<sup>25</sup> *The Right to Die Debate: A Documentary History* p. 234.

<sup>26</sup> *Ibid.* p. 234.

<sup>27</sup> *Ibid.* p. 236.

<sup>28</sup> *Ibid.* p. 16.

<sup>29</sup> *Ibid.* p. 260.

<sup>30</sup> Schneider, ed. p. 12.

<sup>31</sup> *Ibid.* p. 11.

<sup>32</sup> *Ibid.* p. 11.

<sup>33</sup> *Ibid.* p. 12.

<sup>34</sup> *Ibid.* p. 12.

<sup>35</sup> *Ibid.* p. 12.

<sup>36</sup> *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

<sup>37</sup> *Cruzan v. Director, Missouri Department of Health*.

<sup>38</sup> Schneider, ed.

<sup>39</sup> *Vacco v. Quill*.

<sup>40</sup> Schneider, ed. p. 28.

<sup>41</sup> *Vacco V. Quill*.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *The Rehnquist Court: A Retrospective*, ed. Martin H. Belsky (New York: Oxford University Press, 2002), p. 147.

<sup>45</sup> *Ibid.* p. 147.

<sup>46</sup> Kahn. p. 20, "The Legacy of the Warren Court," *TIME*. July 4, 1969.

<sup>47</sup> Kahn. p. 38.

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<sup>48</sup> Edward V. Heck, "Civil Liberties Voting Patterns in the Burger Court 1975-1978," *The Western Political Quarterly* 34, no. 2 (June 1981). p. 193.

<sup>49</sup> Kahn. p. 12.

<sup>50</sup> Lucky M. Tedrow and E.R. Mahoney, "Trends in Attitudes toward Abortion 1972-1976," *The Public Opinion Quarterly* 43, no. 2 (Summer 1979). p. 183.

<sup>51</sup> "The Legacy of the Warren Court."

<sup>52</sup> *Ibid.*

<sup>53</sup> *Washington v. Glucksberg.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Schneider, ed. p. 47.

<sup>57</sup> *Ibid.* p. 47.

<sup>58</sup> *Washington v. Glucksberg.*

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