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Mapping Supreme Court Doctrine: Civil Pleading

Scott Dodson* and Colin Starger**

ABSTRACT

This essay, adapted from the video presentation available at http://vimeo.com/89845875, graphically depicts the genealogy and evolution of federal civil pleading standards in U.S. Supreme Court opinions over time. We show that the standard narrative—of a decline in pleading liberality from Conley to Twombly to Iqbal—is complicated by both progenitors and progeny. We therefore offer a fuller picture of the doctrine of Rule 8 pleading that ought to be of use to judges and practitioners in federal court. We also hope to introduce a new visual format for academic scholarship that capitalizes on the virtues of narration, graphics, mapping, online accessibility, and electronic dissemination.

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I. INTRODUCTION

It is now familiar that the landmark decisions of *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2] have tightened federal civil pleading standards. Courts and commentators reiterate a standard narrative of relatively lax liberality from *Conley v. Gibson*[3] for fifty years, suddenly tightening with *Twombly* and *Iqbal*.[4]

We do not dispute the general trend of tightened pleading standards. But we believe the simplified picture of the standard narrative is incomplete. Other cases, often overlooked, complicate the picture considerably.

We aim to bring those cases and complications to light by graphically depicting the genealogy and evolution of civil pleading standards in U.S. Supreme Court opinions over time. This essay, written for the print edition, is adapted from our unique audio/visual presentation of the topic,[5] which capitalizes on the virtues of narration, graphics, mapping, online accessibility, and electronic dissemination. We urge readers to view and share the video presentation.

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1. 550 U.S. 544 (2007).
2. 556 U.S. 662 (2009).
3. 355 U.S. 41 (1957).
4. *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections of the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331-35 (2013); Randall v. Scott, 610 F.3d 701, 705-10 (11th Cir. 2010). Although we are mindful that lower courts have not always followed the liberality of *Conley*, *see* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 449-50, 492 (1986), we focus here exclusively on the standard as articulated by the Supreme Court.
5. Scott Dodson & Colin Starger, *Mapping Supreme Court Doctrine: Civil Pleading*, VIMEO.COM (Jan. 28, 2014), https://vimeo.com/84355403.

II. THE MAPPING SCHEMA

For this print version, we incorporate a graphical "doctrinal map" to chart pleading doctrine.[6] The map plots relationships between Supreme Court opinions on an x-y axis. The opinions themselves are represented as triangles: Upward-pointing triangles represent cases where pleadings were found sufficient (motions to dismiss under Rule 12(b)(6) were unsuccessful) and downward-pointing triangles represent cases where the pleadings were found insufficient (motions to dismiss under Rule 12(b)(6) were successful). The x-axis plots the date of an opinion, while the y-axis plots the relative liberality of the opinion's pleading standard: the higher on the y-axis, the more liberal the pleading standard in that opinion. The map also shows—via arrows—the citations of one decision to another, with a green arrow representing a favorable citation and a yellow arrow representing a critical citation. Figure 1 shows the axes and legend:

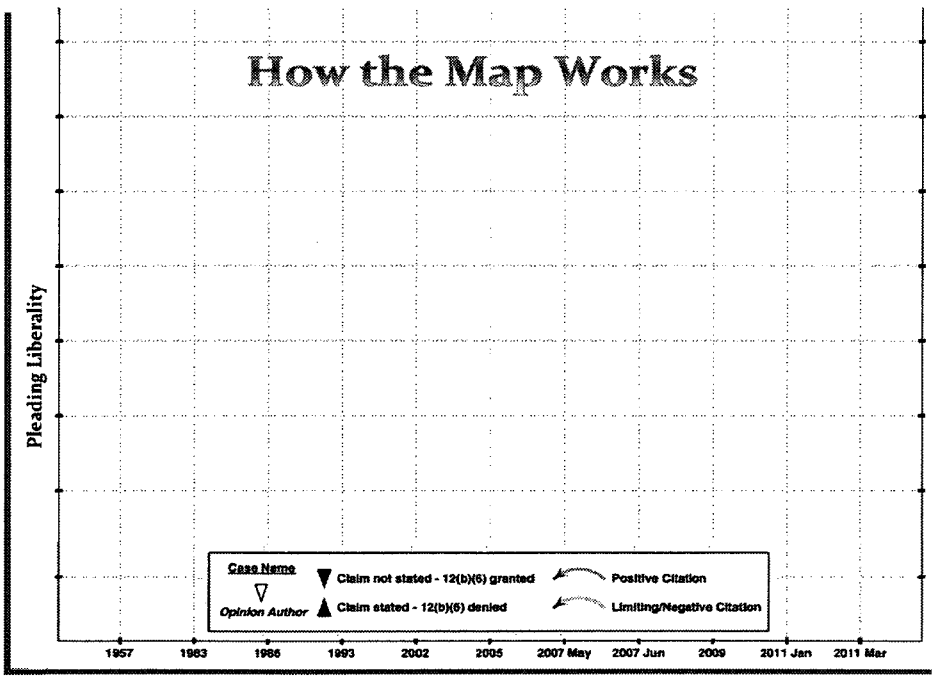

FIGURE 1

6. Our use of "doctrinal maps" grows out of earlier work by one of us in this field. *See, e.g.*, Colin Starger, *Exile on Main Street: Competing Traditions and Due Process Dissent*, 95 MARQ. L. REV. 1253 (2012); Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77 (2012); Colin Starger, *A Visual Guide to* United States v. Windsor*: Doctrinal Origins of Justice Kennedy's Majority Opinion*, 108 NW. U. L. REV. COLLOQUY 130 (2013).

III. THE SIMPLE PLEADING NARRATIVE

In this Part, we map the pleading narrative that dominates court opinions and commentary. As we hope to show in a later Part, this narrative is overly simplistic.

Before plotting the decisions themselves, we must lay out the backdrop of federal civil pleading. Rule 8 of the Federal Rules of Civil Procedure states that a plaintiff's complaint need only set out "a short and plain statement showing that the pleader is entitled to relief."[7]

The seminal case on Rule 8 is *Conley v. Gibson*, which interpreted Rule 8 merely to require a complaint to give the defendant "fair notice" of the plaintiff's claim "and the grounds upon which it rests."[8] *Conley* famously stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[9]

Conley thus set a very liberal standard for pleading a civil claim.[10] As long as the claimant pleads a legally recognizable claim and includes enough facts to provide notice to the defendant, the claim should satisfy Rule 8.[11]

The Court decided two important cases after *Conley*—*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*[12] and *Swierkiewicz v. Sorema N.A.*[13] Each case unanimously reaffirmed and restated the liberal *Conley* standard and disapproved of lower courts attempting to set a stricter pleading standard for certain kinds of cases.[14]

In 2007, however the Court decided *Bell Atlantic Corp. v. Twombly*,[15] which abrogated *Conley*'s "no set of facts" standard and held that the plaintiff must go beyond mere notice to state a claim for relief that is "plausible."[16] Two years later, in *Ashcroft v. Iqbal*,[17] the Court confirmed

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7. FED. R. CIV. P. 8(a)(2). Other rules and statutes can require different pleading standards for specific kinds of claims. *See, e.g.*, FED. R. CIV. P. 9(b) (fraud), but because we focus on the general pleading standard of Rule 8, we do not address unique pleading standards here.

8. 355 U.S. at 47.

9. *Id.* at 45-46.

10. *Id.*

11. *See* SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY 26-30 (2013). Many have criticized the liberality of *Conley*. *See, e.g.*, Geoffrey C. Hazard, Jr., *From Whom No Secrets are Hid*, 76 TEX. L. REV. 1665, 1685 (1998).

12. 507 U.S. 163 (1993).

13. 534 U.S. 506 (2002).

14. *See* DODSON, *supra* note 11, at 35-37.

15. 550 U.S. 544 (2007).

16. *Id.* at 556-57, 562-63.

17. 556 U.S. 662 (2009).

Twombly's plausibility standard and further tightened pleadings by directing courts to disregard conclusory allegations.[18] Figure 2 below plots these cases.

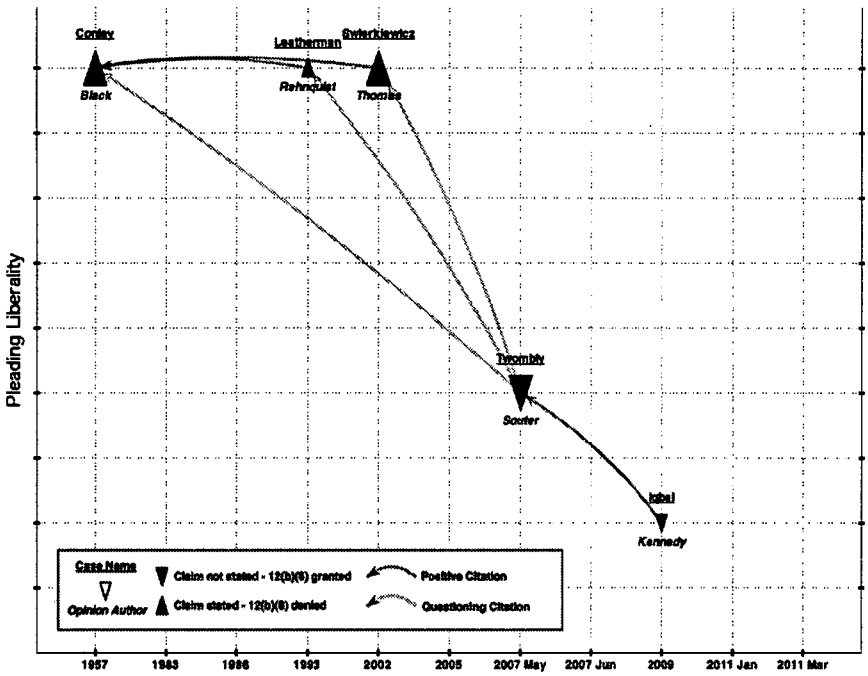

FIGURE 2

Figure 2 depicts the conventional narrative of pleadings standards at the Supreme Court level. The chart shows an unadulterated liberality from *Conley* to *Swierkiewicz* with all upward-pointing triangles at the high end of the liberality axis, suddenly sliding down to a stricter pleading standard imposed by the downward-pointing triangles of *Twombly* and *Iqbal*. *Twombly*, by instituting a new "plausibility" hurdle, is plotted significantly lower on the y-axis liberality scale. *Iqbal*, with its rigid, transsubstantive application of plausibility, plus its insistence that conclusory allegations be disregarded, is plotted even lower.[19]

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18. *Id.* at 678-80.

19. We understand that "liberality" is both relative and subjective. However, we believe the basic slide in liberality depicted here is widely accepted. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 872-73 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010); Miller, *supra* note 4, at 331-38; A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353-

Note that, although *Twombly* cited to *Leatherman* and *Swierkiewicz*, it also called them into question because both of those cases relied heavily and largely on *Conley*.[20] Accordingly, we have colored those arrows yellow. Interestingly, as the map shows, *Iqbal* did not even cite directly to *Conley*, *Leatherman*, or *Swierkiewicz*.

The most visually arresting takeaway from the map, however, is the standard narrative: a consistent adherence to the liberal *Conley* pleading standard, marked by a fairly dramatic slide to *Twombly* and *Iqbal*, with neither case following other prior precedent.

IV. COMPLICATING THE MAP

We hope to complicate this picture a bit by attending to *Twombly*'s progenitors and progeny. We do not dispute the general trend: pleading standards have, at least at the Supreme Court level of doctrine, tightened. But there is more to this story than just *Conley*, *Twombly*, and *Iqbal*.

To begin with, *Twombly* did not create stricter pleading out of whole cloth. *Twombly* relied on three other pleadings decisions for support.

In the first, *Associated General Contractors, Inc. v. California State Council of Carpenters*,[21] although the Court found the conduct alleged may have been unlawful—the claim was "insufficient as a matter of law"[22]—the Court opined that if the conduct had been unlawful, then a district court could "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[23]

In the second, *Papasan v. Allain*,[24] a case challenging wealth disparities in public education, the plaintiffs alleged that the disparities deprived schoolchildren of a minimally adequate education.[25] The Court disregarded this allegation because, the Court said, such an allegation with "no actual

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54, 359 (2010); Fowler v. UPMC Shadywide, 578 F.3d 203, 210 (3d Cir. 2009) ("[P]leading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading . . . ."). *But see* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1344-45 (2010) (making the case that *Twombly* and *Iqbal* are consistent with *Conley* and its progeny).

20. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) ("A court may dismiss a complaint only if it is clear that no relief could be granted under *any set of facts* that could be proved consistent with the allegations." (emphasis added)); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167-68 (1993) (rejecting the need for factual specificity under Rule 8 beyond mere notice); *cf. Fowler*, 578 F.3d at 211 ("[B]ecause *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.").

21. 459 U.S. 519 (1983).

22. *Id.* at 545.

23. *Id.* at 527 n.17.

24. 478 U.S. 265 (1986).

25. *Id.* at 273-74.

facts" alleged in support was merely "a legal conclusion couched as a factual allegation."[26]

In the third, *Dura Pharmaceuticals, Inc. v. Broudo*,[27] the Court held that a plaintiff pleading federal securities fraud must allege some factual description of the economic loss and its causal connection.[28] Otherwise, the Court predicted, "a plaintiff with a largely groundless claim" could force an unjust settlement without "a reasonably founded hope that the discovery process will reveal relevant evidence."[29]

Instead of *Leatherman* or *Swierkiewicz*, *Twombly* relied on each of these three cases to justify its doctrinal conclusion. *Twombly* cited *Papasan* to disregard the allegation of a conspiracy as merely a legal conclusion.[30] And, citing *Associated General* and *Broudo*, *Twombly* emphasized the need for additional facts before allowing a claim without a reasonably founded hope of evidentiary support to impose discovery costs or force an unjust settlement.[31] Figure 3 below shows the complications of the progenitors of *Twombly*.

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26. *Id.* at 286.

27. 544 U.S. 336 (2005).

28. *See id.* at 346.

29. *Id.* at 347 (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975)). Although federal statutory law sets a specific pleading standard for certain elements of securities fraud, the Court analyzed the pleading issue in *Broudo* under Rule 8(a)(2).

30. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citing Papasan v. Allain, 478 U. S. 265, 286 (1986)).

31. *Id.* at 557-62.

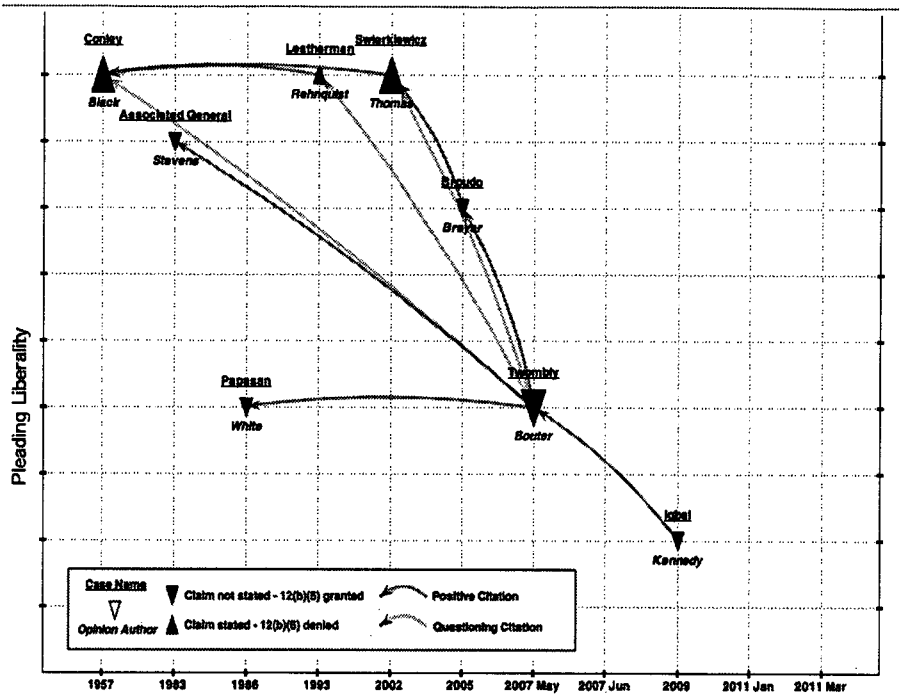

FIGURE 3

In addition to these oft-overlooked early cases, there is a blip in the middle. *Erickson v. Pardus*,[32] decided just after *Twombly*, seemed to apply a more lenient pleading standard to a pro se prisoner suit,[33] which is why Figure 4 below plots it higher up on the y-axis. But, in that case, the allegations easily satisfied even *Twombly*'s plausibility standard. And pro se plaintiffs are historically given some leniency in pleading.[34] Further, *Iqbal*, the case right after *Erickson*, continued the downward trend in pleading liberality, and it relied heavily on *Twombly* without even mentioning *Erickson*. In fact, *Erickson* has not been cited by any other opinion in our map. As Figure 4 shows, *Erickson* is just a red herring.

32. 551 U.S. 89 (2007).
33. *Id.* at 93-94.
34. *See* DODSON, *supra* note 11, at 61-62.

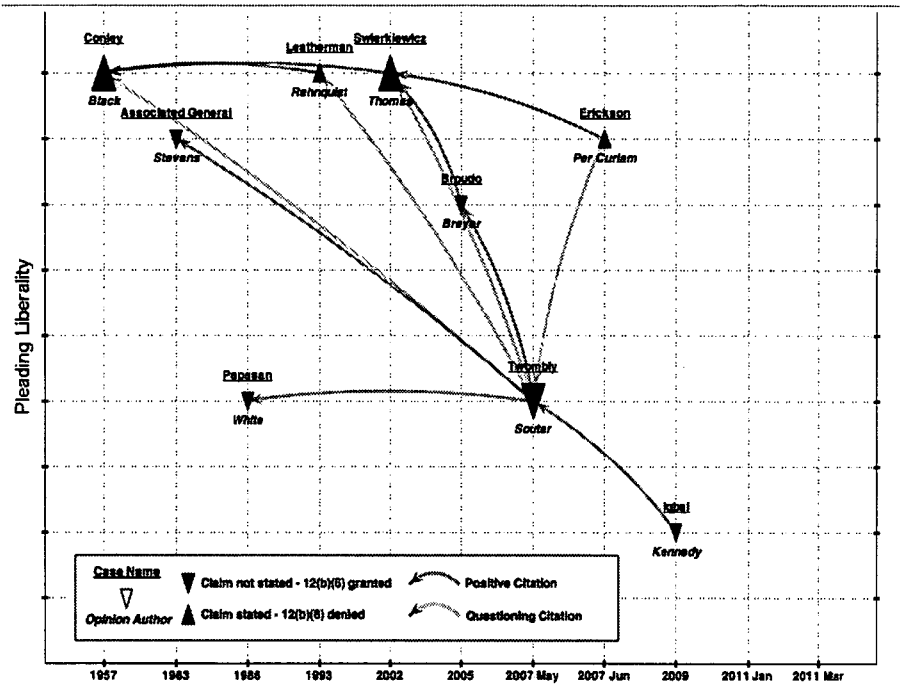

FIGURE 4

The final complication that we introduce to the map comprises the post-*Iqbal* cases, which seem to show a bit of genuine uptick in pleading liberality.

In *Matrixx Initiatives, Inc. v. Siracusano,*[35] a unanimous Court reaffirmed the plausibility-pleading standard of *Twombly* and *Iqbal* but nevertheless held that the relatively bare allegations satisfied that standard.[36] And, in *Skinner v. Switzer,*[37] the Court favorably cited *Swierkiewicz* (and did not cite *Twombly* or *Iqbal*) in upholding the complaint.[38] Figure 5—the final map—adds these cases.

35. 131 S. Ct. 1309 (2011).
36. *Id.* at 1322-23.
37. 131 S. Ct. 1289 (2011).
38. *Id.* at 1296.

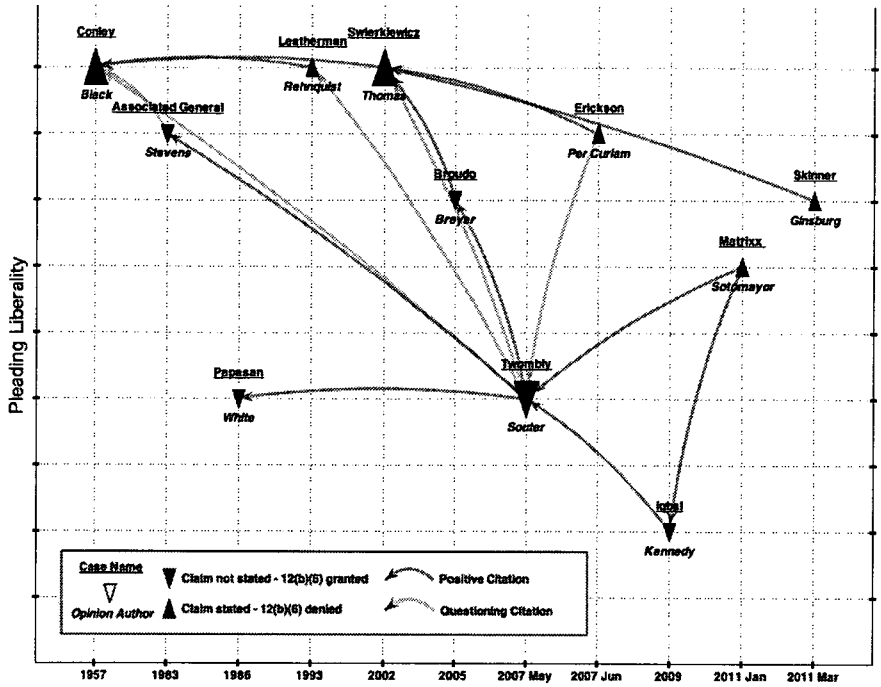

FIGURE 5

These cases do not retract the *Twiqbal* standard—to the contrary, their language tends to entrench it—but they do offer data points that could be seen as less strict. All told, then, our map shows a more complicated—and perhaps quite unfinished—picture of civil pleading standards as set out by the Supreme Court.

V. CONCLUSION

In this very brief essay, we have graphically mapped civil pleading standards as articulated by the Supreme Court. We hope readers will view, and share, the more accessible video presentation from which this written essay is adapted. In the meantime, we look forward to the Court's next pronouncement.