The
DIGEST
National Italian American Bar Association Law Journal

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THE DIGEST

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The Legacy Continues: From Columbus and Cabot to Sirica and Scalia

ANGELA MARIE GURRERA, CHRISTOPHER BORWHAT, AND
MATTHEW LAVALLE†

I. INTRODUCTION

"In 1492, Columbus sailed the oceans blue . . . ." This elementary school mnemonic which children have memorized in order to recall the anniversary of Christopher Columbus' discovery of America ideally should include the dates of 1497 and 1498 as well. Five hundred years ago, John Cabot (Giovanni Caboto) discovered North America when he spied Canada.[1] In the same year, 1497, Amerigo Vespucci became the first explorer to realize that the American continent was not Asia when he landed in the Chesapeake Bay.[2] Italian explorers shaped the development of the American continent by claiming the lands they found for the various nations they were sailing for—Great Britain and Spain, rather than their homeland. On this five hundredth anniversary of Cabot's and Vespucci's voyages to the New World, it is important to recognize the role that Italian Americans have played in shaping our nation from its earliest beginnings.

Giovanni Caboto has, in many ways, slipped into anonymity; however, it is important to note the effect that both he and Vespucci had on the settlement of the Americas. Cabot's claim of the northern portion of the Americas for Great Britain predicated the British domination of the continent and helped give rise to the nation we know today.[3] Since all these men were exploring for other nations and are known by their anglicized names, it is possible to forget that they were Italians. Similarly, many Italian Americans today do not have 'recognizably Italian' names, but this does not negate the strong influence Italian American culture has had on both the personal and political elements of their lives.

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† The authors are student members of the NIABA chapter at Syracuse University College of Law. This year they served as Columbus Fellows to THE DIGEST at the request of the Editor-in-Chief. The Fellows undertook the preparation of this essay celebrating the 500th anniversary of Giovanni Caboto's discovery of North America. The essay is offered as a celebration of our shared heritage as Italian Americans. It would be impossible to acknowledge all of the people and organizations contributing to our cultural importance in America. With this in mind, we attempted to highlight a few key people in hopes of being able to honor and celebrate the multitude of Italian Americans who have made this country great.

1. *See* REVEREND ANTHONY LOGATTO, THE ITALIANS IN AMERICA: 1492-1972, 1 (1972).

2. *See id.*

3. *See* JERRE MANGIONE & BEN MORREALE, LA STORIA: FIVE CENTURIES OF THE ITALIAN AMERICAN EXPERIENCE 4 (1992).

II. INFLUENCES IN THE FOUNDING ERA

Italians did not have a large presence in colonial America, however, the few men who were in the colonies had a substantial impact on the nascent nation. William Paca was an Italian immigrant who became a delegate to the Continental Congress from Maryland and along with another man of Italian descent, Caesar Rodney of Delaware, signed the Declaration of Independence.[4] Prior to his service in the Continental Congress, Paca served in the Maryland legislature and after the war was elected Governor of the State, a position he held from 1782 until 1785.[5] In 1789, he was rewarded for his service to the nation by President George Washington with an appointment as Judge of the Federal District Court.[6] Paca was the first person of Italian descent to become governor of an American state. The next Italian American to become governor would not win election until Andrew Longino was elected Governor of Mississippi in 1900.[7]

The first Italian to become an American citizen was Francesco Vigo of Sardinia, who arrived in New Orleans in 1774 to seek his fortune.[8] Vigo's pursuit of wealth led him into the fur trade and across the Northwest Territory, which he explored with Lewis and Clark. Vigo not only explored his new nation, but participated in its fight for independence.[9] Although Francesco Vigo is not generally remembered as one of the heroes of the American Revolution and the Northwest Conquest, he has been honored posthumously for his service to his adopted nation.[10]

Two Italians strongly influenced the creation and development of the American legal system, although they are relatively unknown and rarely credited for their contributions. One man who had a monumental impact on the development of the American criminal justice system, yet never visited the country, was a young idealist pondering the fate of people overall. Cesare Beccaria was an eighteenth century philosopher and political theorist who published pamphlets on the state of criminal law and punishment of criminals, and especially condemned practices in place all over Europe at the time.[11] Beccaria's *Dei delitti e delle pene [On Crimes and Punishments]* was first published in Italy in 1764,

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4. *See* LoGATTO, *supra* note 1, at 5; *see also* National Italian American Foundation, *Fact Sheets* (visited March 17, 1998) <http://www.niaf.org/research1.html>.

5. *See* LoGATTO, *supra* note 1, at 5.

6. *See id.*

7. *See id* at 12.

8. *See* MANGIONE AND MORREALE, *supra* note 3, at 11.

9. *See* GIOVANNI SCHIAVO, ITALIANS IN AMERICA BEFORE THE CIVIL WAR 199 (1934) [hereinafter CIVIL WAR].

10. *See id* at 199-202.

11. *See* ADOLPH CASO, AMERICA'S FOUNDING FATHERS 34 (1975); see also Dominic R. Massaro, *Cesare Beccaria—The Father of Criminal Justice: His Impact on Anglo-American Jurisprudence,* 1 THE DIGEST 1 (1991).

and translated editions quickly spread throughout Europe.[12] The first known English translation of *On Crimes and Punishments* appeared in London in 1767 and by 1773 was supposedly being published in America.[13] However, no copies of this first publication have been found: the first edition known to exist was published in 1776.[14]

Beccaria's influence on the founding fathers is often documented by their own words and actions. Thomas Jefferson, in his diaries, wrote: "The principle of Beccaria is sound. Let the legislators be merciful, but the executors of the law inexorable."[15] It is also thought that some of the ideals espoused in the Declaration of Independence can be traced to Beccaria, such as the idea that the "universal principle of dissolution [of government] which we see . . . cannot be avoided except by motives that have a direct impact on the senses . . . opposed to the general good."[16] John Adams, the second U.S. president, possessed one of the earliest translations, and in fact penned his own comments on Beccaria's notions in the margins of his copy.[17] Adams thought so highly of Beccaria's musings that upon his death he bequeathed his copy to one of his sons.[18]

Filippo Mazzei was born near Florence, Italy on Christmas Day 1730.[19] He had originally pursued a medical career; however, he soon tired of it and instead became involved in commercial trade.[20] It was through his business ventures that he encountered Thomas Jefferson and Benjamin Franklin in London, who encouraged Mazzei to export and introduce Italian agricultural products into Virginia.[21] Upon his arrival in Virginia, Mazzei purchased acreage adjoining Thomas Jefferson's estate, Monticello.[22] It was through their common interests in agriculture that Mazzei and Jefferson became acquainted, and quickly became close friends. Eventually their discussions turned from plantings to politics, and "Furioso" was born.[23] "Furioso" was Mazzei's pseudonym for a series of patriotic articles published in the *Virginia Gazette* during the pre-Revolutionary period.[24]

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12. *See* CASO, *supra* note 12, at 41.
13. *See id.* at 29.
14. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 42 (David Young trans., Hackett Publishing 1986).
15. CASO, *supra* note 12, at 31.
16. BECCARIA, *supra* note 15, at 7.
17. *See id.* at 237.
18. *See id.* at 17.
19. *See* MARGHERITA MARCHIONE, PHILIP MAZZEI: JEFFERSON'S "ZEALOUS WHIG" 15 (1975).
20. *See id.*
21. *See* MANGIONE AND MORREALE, *supra* note 3, at 12.
22. *See* RICHARD CECIL GARLICK, JR., PHILIP MAZZEI: FRIEND OF JEFFERSON 41 (1933) [hereinafter FRIEND OF JEFFERSON].
23. *See* MANGIONE AND MORREALE, *supra* note 3, at 12.
24. *See* MARCHIONE, *supra* note 20, at 18.

Thomas Jefferson, John Adams and James Madison have all been regarded as the great thinkers behind the Revolution; however, there were additional minds at work. Mazzei, in his journal, explained his relationship with Thomas Jefferson and how he came to become intricately involved in the movement for American independence. For a time, Mazzei would pen his thoughts in Italian and Jefferson would translate them into English in order for them to be published in pamphlets for distribution throughout the colonies.[25] Mazzei recalled in his journal: "'[Jefferson] said: You have a manner of expressing yourself in your language which I cannot translate without weakening your writing.' I then wrote in English and after he had corrected the first page it looked like a spoiled puzzle."[26] Although his lack of eloquence in English originally disheartened Mazzei, he continued to draft articles urging American independence from Great Britain. Eventually, Mazzei mastered English and penned a statement which would become the basis of the Bill of Rights issued by Virginia.[27] Mazzei's ideas were the model for both the Declaration of Independence and the United States Bill of Rights, although Thomas Jefferson ultimately changed the language when authoring the Declaration of Independence in 1776.[28] Mazzei's original words were: "All men are by nature equally free and independent. Such equality is necessary in order to create a free government . . . . [A] true Republican government cannot exist unless all men from the richest to the poorest are perfectly equal in their natural rights . . . ."[29] President John F. Kennedy acknowledged the great influence that Mazzei had on the development of the American nation when he wrote that Jefferson's "great doctrine that 'All men are created equal' was paraphrased from the writings of Philip Mazzei."[30]

III. THE TWENTIETH CENTURY

Italian Americans have made many contributions to American political culture, although it was not until the 1930's when Fiorello La Guardia was elected as Mayor of New York City that Italian Americans began to obtain leadership positions in large numbers. In 1934, Fiorello La Guardia defied the political odds to become one of the few Republican mayors to ever be elected in the traditionally Democratic city of New York. In addition to becoming the city's first Italian American mayor,[31] he was the first Mayor in New York's 275 year history to be elected Mayor for three consecutive terms.[32]

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25. *See* FRIEND OF JEFFERSON, *supra* note 23, at 42, n.6.
26. CIVIL WAR, *supra* note 10, at 169.
27. *See id.*
28. *See* MANGIONE AND MORREALE, *supra* note 3, at 12.
29. CIVIL WAR, *supra* note 10, at 165.
30. *See* JOHN FITZGERALD KENNEDY, A NATION OF IMMIGRANTS (Robert F. Kennedy ed., 1964).
31. *See* Lawrence Elliot, Little Flower, The Life and Times of Fiorello La Guardia 12 (1983).
32. *See id.* at 16.

Although it took almost sixty years for NYC to elect another Italian American mayor, and another Republican at that, Mayor Rudolph Giuliani has become another potent force in New York's political arena. On November 3, 1993, Rudolph William Giuliani was elected the 107th Mayor of New York City. Rudolph Giuliani is only the second Italian American in New York City's history to be elected mayor. Like his predecessor La Guardia, Mayor Giuliani was elected on a Republican ticket, even though in New York City Democrats outnumbered Republicans five to one.[33]

Another notable Italian American politician was Ella Grasso. In January of 1974 she was elected Governor of Connecticut, becoming the first woman in United States' history to serve as governor.[34] Ella Grasso's leadership would inspire many Italian American women to serve their nation in public office.

Ella Grasso won her first election as a representative in Connecticut's state house in 1952. After serving in the state house, she then served as Connecticut's Secretary of State and as a Congressional Representative from 1971 to 1975.[35]

Geraldine Ferraro, another Italian American woman, began her political career as the assistant District Attorney for Queens County, New York in 1974. As an Assistant District Attorney, Ferraro demonstrated such aptitude at her job that she was given a special position within the office, head of the Special Victims Bureau.[36] In 1979, Geraldine Ferraro won the ninth-district congressional race.[37] She would serve in Congress until 1985.[38] While serving in Congress, Mrs. Ferraro tackled a myriad of issues. However, Geraldine Ferraro's career reached its pinnacle in 1984, when she became the first woman in American history to be selected as a Vice Presidential candidate of a major political party. Although the Mondale-Ferraro ticket did not win the election, she realized the contribution her candidacy made for the role of women in American politics. Recently, Geraldine Ferraro has re-entered the political arena by challenging Senator D'Amato, another Italian American politician, for his U.S. Senate seat in New York.

The accomplishments of Ella Grasso and Geraldine Ferraro are not unique occurrences, but are rather prototypical of the innumerable contributions generations of Italian American women have made to American society. Italian American women have served this nation with excellence in virtually ever ca-

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33. *See* Rudolph W. Giuliani, *Biography* (visited Dec. 20, 1997) <http://www.ci.nyc.ny.us/html/om/home.html>.

34. *See* University of Maryland, *Ella Grasso* (visited Dec. 19, 1997) <http://www.glue.umd.edu/~cliswp/Politicians/State/Ct.html>.

35. *See id.*

36. *See* University of Maryland, *Geraldine Ferraro* (visited April 27, 1998) <http://www.glue.umd.edu/~cliswp/Bios/gfbio.html>.

37. *See id.*

38. *See id.*

pacity, whether from serving in the local state houses throughout the country, as federal representatives, or as civic leaders. It has been their active and enthusiastic civic involvement which has been a tremendous source of national strength and leadership.

Grasso is not the only notable Italian American to serve as a State Governor. James Florio was elected the governor of New Jersey in 1989. Governor Florio believed strongly in protecting the civil rights of all Americans.[39] New Yorkers elected Mario Cuomo as the state's 52nd governor in 1982.[40] Mario Cuomo would be reelected three times as the Governor of New York.[41]

In 1980, New Yorkers elected an Italian American as one of their senators, Alfonse D'Amato. Another Italian American U.S. Senator who has distinguished himself is Patrick Leahy of Vermont. Senator Leahy was first elected to the U.S. Senate in 1974, and continues to serve the people of that state today.[42] When dealing with the budgetary problems of the United States, Senator Pete Vichi Domenici of New Mexico is one of this nation's premier experts on fiscal matters. Much of the progress the federal government has made towards balancing the budget is attributable to Senator Domenici.[43]

The most recent Italian American senator to be elected to office, is Robert Torricelli of New Jersey, who was elected in 1996. Previously, Senator Torricelli worked in the Carter administration and was a Representative for New Jersey in the 98th Congress. Senator Torricelli has demonstrated a life commitment to serving people, and it is no surprise that Senator Torricelli measures the value of a person by what they do for others.[44]

Numerous Italian Americans have served their nation in the House of Representatives; numbers too large to include here. The geographic diversity in their representation reflects the widespread numbers of Italian Americans throughout the nation. Although primarily from the Northeast, Italian American Congresspersons come to Washington, D.C. from across the country. For example, Congressmen Vic Fazio of California, John Baldacci of Maine, Frank Pallone of New Jersey all share a common heritage with former Congresswoman Susan Molinari of New York, Congresswomen Connie Morella of Maryland and Nancy Pelosi of California, regardless of their political affiliations or home

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39. *See* Ed Martone, *Five's a Charm* (visited Jan. 4, 1998) <http://pwl.netcom.com/~alexdn/njaclu.html>.

40. *See* LAWRENCE DISTASI, DREAM STREETS 213 (1989).

41. *See* MARIO CUOMO, REASON TO BELIEVE 100 (1995).

42. *See* Saint Michael's College, *Senator Leahy to Report on Landmines in Major Address at Saint Michael's*, November 18, 1997, Press Release (visited Jan. 4, 1998) <http://www.smcvt.edu/publicrel/pressrelease/leahy.html>.

43. *See* Pete Domenici, *Accomplishments* (last modified Aug. 26, 1996) <http://www.senate.gov.member/nm/domenici/general/personal.html>.

44. *See* Robert Torricelli, *Biography* (visited April 27, 1998) <http://www.senate.gov/~torricelli/bio.html>.

state.[45] Since the dawn of the twentieth century, Italians have been one of the largest immigrant group in the U.S. and today are the fifth largest, numbering approximately 23 million persons.[46]

One issue which seems to unite all Italian Americans regardless of age, gender, or political ideology, is their commitment to serve the nation. When the United States has faced difficult times, Italian Americans were there to help lead the nation to a brighter future. Italian Americans have a long historical pedigree of commitment to service. From this nation's earliest beginnings, Italian Americans were there leaving their footprints in the sands once trod upon by Columbus and Cabot.

Italian Americans have played an integral role in the shaping of our country's jurisprudence through positions on the bench. Many Italian Americans have served as local, state, and federal judges—their numbers and contributions are far to great to catalogue in this short essay. A few jurists however have reached national prominence and serve as examples of Italian Americans far reaching contributions to the American judicial system. John J. Sirica is one such example. Judge Sirica was the U.S. District Judge who presided over the Watergate investigation, which inevitably led to President Richard Nixon's resignation.[47]

In his book regarding the Watergate cases, *To Set the Record Straight*, Sirica stated that: "A lifetime of dealing with criminal law . . . had not hardened me enough to hear with equanimity the low political scheming that was being played back to me from the White House offices."[48] For his efforts during the Watergate affair, Sirica was named "TIME MAGAZINE Man of the Year" for 1973.[49] Following Watergate, he sat as a senior judge at the U.S. District Court until his retirement in 1986.[50]

Another notable Italian American jurist is Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit who was born in Milan, Italy in 1932.[51] As a child he immigrated to the United States with his family. Judge Calabresi went on to attend Yale University and Oxford University before attending Yale Law School, from which he graduated first in the class of 1958. Other than summer clerkships, Judge Calabresi has always devoted himself to academia or government service. Judge Calabresi served for one year as a law clerk to Jus-

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45. *See* Robin H. Carle, *Official List of the House of Representatives* (modified April 10, 1998) <http://clerkweb.house.gov>.

46. *See* Wartime Violation of Italian American Civil Liberties Act, H.R. 2090, 105th Congress §2 (1997).

47. *See* MANGIONE AND MORREALE, *supra* note 3, at 404.

48. *Id.*

49. *See id.*

50. *See id.*

51. WESTLAW and LEXIS both provide thorough compilations of biographical information for Judge Calabresi. This information in WESTLAW can be found in WLD-JUDGE and AFJ (Almanac of the Federal Judiciary)(Feb. 25, 1998).

tice Hugo Black of the U.S. Supreme Court. Immediately following his tenure as a Supreme Court Clerk, Judge Calabresi returned to Yale as an Assistant Professor of Law. Yale has always played a prominent role in Judge Calabresi's career, for he spent his entire academic career there, other than brief stints elsewhere as a visiting professor. Beginning with his appointment as one of the youngest full professors in Yale's history, and culminating with his service as Dean of the Law School from 1985-1994, Judge Calabresi devoted his academic career to Yale's ivy walls. In 1994, Judge Calabresi returned to working in the judicial system when he was appointed to the Second Circuit Court of Appeals by President Clinton.[52]

Judge Calabresi has never forgotten his Italian roots. In addition to the numerous honors Judge Calabresi has received from Italian universities, he has occasionally taught in Italy. As a recognition of his stellar achievements in the law, Judge Calabresi was named an Honorary Knight Commander of the Republic of Italy in 1994. A number of Italian organizations have admitted Judge Calabresi as a foreign member, such as the Academia Nazionale dei Lincei. In America, Judge Calabresi has acknowledged his heritage by his positions as a Council Member of the National Italian American Foundation and the Italian American Historical Society of New Haven.[53]

Perhaps the most renowned jurist of Italian descent is Antonin Scalia. Scalia became the first Italian American justice on the U.S. Supreme Court when he took the oath of office on August 17, 1982.[54] A Reagan appointee, he was confirmed by a vote of the U.S. Senate on September 17, 1986.[55] Scalia was born in Trenton, N.J. on March 11, 1936, and was raised in Queens, N.Y.[56] He earned an A.B. degree from Georgetown University in 1957 and his law degree from Harvard University in 1960.[57] After graduating law school, he became a Sheldon fellow at Harvard prior to accepting a position in the private sector with Jones, Day, Cockley, and Reavis in Cleveland. In 1967 he re-entered the academic world as a law professor at the University of Virginia until 1971, when he began his career of government service by serving as the general counsel in the White House Office of Telecommunications policy.[58]

Scalia was the chair of the Administrative Conference of the United States, an administrative law advisory group utilized by the government, from 1972-74.[59] Scalia then took the position as head of the Justice Department's Office of Legal Counsel from 1974-77, prior to becoming a professor once again at the

52. *See id.*
53. *See id.*
54. *See id.*
55. *See* Justice Antonin Scalia, <http://www.law.upenn.edu>.
56. *See id.*
57. *See id.*
58. *See id.*
59. *See* Justice Antonin Scalia, <http://www.law.upenn.edu>.

University of Chicago.[60] Scalia's final stop before being appointed to the Supreme Court was his sitting as a judge in the U.S. Court of Appeals for the D.C. Circuit from 1982 to 1986.[61]

Justice Scalia, regarded by many as the greatest jurist of our time, is considered the leading conservative justice on the Supreme Court. As a textualist, Scalia holds fast to the belief that the plain language of the Constitution is what should be utilized for purposes of statutory and constitutional interpretation. At the same time, he rejects allegiance to the notion of original intent:

> It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws they enact which bind us.[62]

Justice Scalia's opinions have become known as much for their boldness as they are for their frequency. Not easily swayed by the other Justices on the Court, Scalia often plays the role of dissenter. The insistent character of his opinions reflect the manner in which he passionately stands firm to his beliefs. Scalia' opinions have done a great deal to shape the current legal framework within which our society functions. He has often stated his ill feelings toward affirmative action and abortion. At the same time he has become known as a bulwark for defending deregulation, as well as privacy and property rights.

Some of Scalia's more famous opinions which echo these beliefs are found in such landmark cases as *RAV v. St. Paul, Romer v. Evans, Lucas v. S.C. Coastal Council, and Planned Parenthood v. Casey*, where he played the role of dissenter.[63] Consistent throughout his opinions however is the importance he places on interpreting the Constitution by its plain language. Regarding the Constitution, Scalia states:

> If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end to the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against; the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.[64]

Antonin Scalia's beliefs, intellect, and opinions have left their indelible mark on the American legal system for future generations.

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60. *See id.*

61. *See id.*

62. *See id.*; *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997).

63. R.A.V. v. City of Saint Paul, 505 U.S. 377 (1992); Romer v. Evans, 517 U.S. 620 (1996); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833 (1992).

64. *Id.*; *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 47 (1997).

IV. CONCLUSION

As explorers, political theorists, political leaders, and jurists, Italian Americans have made tremendous strides and achievements. The contributions of Italian Americans to this nation cannot be overstated, from the signing of the Declaration of Independence, to the changing of the judiciary and establishment of legal precedent, to leading our nation through difficult situations to better times. Italian Americans have served their nation in virtually every capacity, from local and community leaders (founding such organizations as the National Italian American Bar Association, the National Italian American Foundation, The Order of the Sons of Italy, and the American Italian Heritage Association, among others), to leaders throughout the state houses of the country, to distinguished Congressional representatives.

Initial Public Offerings by Italian Companies in United States Capital Markets: Will Infirmities in the Formation of Italian Capital Markets Lead Italy's Growth Firms to a "Corsa Alla Borsa" in America?

MICHAEL AVRAMOVICH†

I. INTRODUCTION

Modern capitalism first arose in what is today the northern half of Italy.[1] By the thirteenth century, northern Italian merchants conducted their business through agents, developing the use of credit instruments and paper transactions,[2] and had expanded their business affairs from cloth finishing to international banking, developing new forms of partnership, financial instruments, insurance, business information services, and techniques of management and administration.[3] During the Renaissance, an Italian mathematician developed a system of financial record keeping, now known as the double-entry method of accounting, to meet the needs of the new breed of international entrepreneur and capitalist.[4] The rich Italian entrepreneurial tradition of the successful family-owned business operating internationally continues to this day. However, Europe as a whole has not fared uniformly well during the late twentieth century.

The average economic performance of many European businesses has been dismal, particularly when compared to capitalism's more vigorous offshoots in the United States and Japan.[5] In a recent survey on European business, *The Economist* observed:

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† Member of Matuszewich, Thomas, Kaminski, Zou & Avramovich in Chicago, Illinois, and Adjunct Professor of International Business and Trade Law, The John Marshall Law School. B.A. North Park College; Master of Management, Kellogg Graduate School of Management, Northwestern University; J.D., The John Marshall Law School; C.P.A., LL.M. Georgetown University Law Center. The author wishes to dedicate this article to his wife, Susan, for her love, dedication, encouragement and support.

1. Since the Crusades, raw wool from England, woven and pulled in Flanders, was sold to Italian merchants from the northern Italian city-states of Asti and Genoa. At first, the Italian businessmen journeyed to the fairs in the Flemish cloth towns. Subsequently, the Italian businessmen conducted their business through agents. *See* Joseph Gies & Frances Gies, Merchants and Moneymen: The Commercial Revolution, 1000-1500, 300 (1972).

2. *See id.*

3. *See id.*

4. *See* Jerry J. Weygandt et al., Accounting Principles 5 (4th ed. 1996).

5. Herbert A. Henzler, The New Era of Eurocapitalism, HARV. BUS. REV., July-Aug. 1992, at 57, *available in* LEXIS, News Library, Magazine Stories Combined File.

> Europe's history has been its biggest burden. In the second half of the 1980s, when America went through the most wrenching structural changes in 50 years, Europe tried to get away with doing nothing. Firms were holding on to old management hierarchies, ancient diversifications and outdated working practices, stuck in national markets and hemmed in by pervasive regulation. Europe seemed to be a fortress, designed not so much to keep out the Japanese and the Americans but to keep out change. But as product life-cycles shortened, currencies (and costs) seesawed, competition from Asia intensified and electronics invaded whole industries, Europe, which since the second world war had been growing faster than America, began to fall behind. Productivity growth stagnated. Unemployment started to climb.[6]

Not all Italian firms have been immune to such business myopia, ossification of management hierarchies and obsolete working practices. However, there are many small and medium-sized companies in Italy for which history has not proved a burden. On the contrary, it is the Italian entrepreneurial heritage that renders those companies among the most competitive and productive in the world.

Dynamic small and medium-sized Italian companies increasingly need to examine carefully whether to raise capital through the issuance of equity in order to remain competitive in today's global economy. However, fundamental problems remain for small and medium-sized company capital formation in Italy. In recent years, a number of laws have provided incentives for the entrepreneurial Italian firm to consider the issuance of equity on the Milan Stock Exchange ("MSE"), Italy's largest exchange. However, the MSE is relatively small and illiquid. Also, the MSE continues to be dominated by a handful of large corporations.

The privatization of large Italian state-owned enterprises in multi-billion dollar transactions has occurred in the United States during 1996.[7] In addition, smaller, prestigious Italian consumer goods manufacturing companies, such as *Gucci*, the leather goods manufacturer, *Luxottica*, the upscale eyewear manufacturer, and *Fila*, the sportswear manufacturer, have also successfully completed stock offerings in the United States.[8] Thus, both large and well-known firms have led the way by whetting the appetite of international investors. Other Italian firms that are studying the possibility of raising capital through the issuance of stock should seriously consider bypassing the Italian capital markets alto-

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6. Edward Carr, *A Fortress Against Change*, THE ECONOMIST, Nov. 23, 1996, at 3.

7. *OECD Economic Survey - Italy*, ORG. FOR ECON. COOPERATION AND DEV., Apr. 1997, *available in* LEXIS, News Library, Curnws File.

8. Jennifer Steinhauer, *Glitter Fades As Sales in Asia Slow*, INT'L HERALD TRIB., Sept. 27, 1997, *available in* LEXIS, News Library, Curnws File; Jeffrey Daniels, *Italian Eyewear Maker Hopes Foreign-Stock Boom Will Help It*, INVESTORS DAILY, Jan. 11, 1990, *available in* LEXIS, News Library, Curnws File; Timothy J. Mullaney, *Fila Offering Does Better Than Planned*, BALTIMORE SUN, Oct. 18, 1995, *available in* LEXIS, News Library, Newspaper Stories, Combined Papers File.

gether and, instead, undertake an initial public offering ("IPO") in the United States.

This article will discuss why dynamic small and medium-sized firms in Italy will require additional sources of capital in the highly competitive international economic environment. Furthermore, this article will consider why the current structure of the Italian equity markets may likely prove unable to provide the funds needed to sustain the growth and expansion of the Italian entrepreneurial firms. This article will then examine some of the practical and procedural ways in which the equity issuance by a foreign private issuer differs from U.S. domestic issuance of equity. Finally, this article briefly discusses the role of venture capital in equity issuance and how the Italian government can create a hospitable atmosphere for venture capital investment.

II. GLOBAL COMPETITION COMPELS DYNAMIC SMALL AND MEDIUM-SIZED ITALIAN FIRMS TO EXPLOIT THEIR COMPETITIVE ADVANTAGES.

The Italian economy is undergoing a seismic shift. Since June 1993, total proceeds from privatization in Italy have amounted to over Lit. 15 trillion (about US $9.4 billion),[9] of which the stock market has effectively financed about Lit. 11 trillion.[10] Additional privatization of approximately Lit. 30 trillion were expected during 1998.[11]

The Italian business sector is made up of two dissimilar types of entities. On one hand, there are large business groups with extensive intergroup shareholdings.[12] Those large groups comprise many disparate types of businesses, employ hundreds of thousands of persons and often suffer losses equivalent to hundreds of millions of dollars each year.[13] A prime example is *Instituto per la*

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9. The exchange rate used in this paper is based upon an average of 1,600 Italian lira per 1.00 U.S. dollar. The term "Lit." is the plural form of Italian lira.

10. *See* Mahmood Pradhan, *Privatization and the Development of Financial Markets in Italy*, FINANCE AND DEVELOPMENT INT'L MONETARY FUND, Dec. 1995, *available in* LEXIS, News Library, Curnws File.

11. *See id.*

12. *See id.* Large business groups in Italy are typically characterized by extensive cross-holdings of equity stakes, both within and outside the group. The hierarchical nature of business groups distinguishes the Italian system of cross-holdings from those of other countries where cross-holdings are also extensive, such as France, Germany, and Japan. In Italy, "parent" companies–those at the top of a pyramidal structure–have stakes in smaller firms lower down the hierarchy, but these subsidiaries rarely hold equity in parent firms. Such business group interests are extensive in the manufacturing sector, where they account for 75 percent of total employment. For parent firms, control of firms lower down the hierarchy can often be exercised with a minority holding. The controlling group can gain at the expense of other shareholders through transactions among subsidiaries that are designed to transfer profits to subsidiaries in which the controlling group has a larger share. This makes the protection of minority investors a particularly important issue in Italy: without adequate protection, there is little incentive for investors to hold noncontrolling stakes. *Id.*

13. *Hypercompetition Closes In*, FINANCIAL TIMES, Feb. 6, 1997, *available in* LEXIS, News Library, Newspaper Stories, Combined Papers File.

Riconstruzione Industriale ("*IRI*"). *IRI* was created by Benito Mussolini, the Italian fascist dictator, to aid a weak banking system and to be a vehicle for promoting economic development.[14] *IRI*'s influence spread after World War II as it was used by successive Italian governments to acquire ailing industries.[15] By the 1980s, *IRI* companies accounted for approximately five percent of the entire Italian gross domestic product, but the group's indebtedness exceeded that of Argentina.[16]

Another example of the large business group characterized by extensive intergroup shareholdings is the *Ente Nazionale Idrocarburi* ("*ENI*"), the Italian national oil company. In a recent profile of the changes at *ENI*, one commentator observed:

> A bloated behemoth, [*ENI* once] represented some of the worst tendencies in Italian business. *ENI*'s state owner saddled the company with hundreds of subsidiaries that did everything from grow flowers to publish a newspaper. Droves of employees owed their jobs to connections, not skills, and violently opposed any talk of privatization. In 1992, the company posted a net loss of 946 billion lire ($559 million). . . . These days, *ENI* looks more like a profit-spewing giant. . . . This month the company reported that net income rose 2.8% to 4.45 trillion lire ($2.63 billion) in 1996, rising for the fourth straight year, and analysts expect steady gains to continue. By many industry measures, *ENI* – now the world's fifth-largest oil company – is beginning to compete successfully with some of the best-run international oil companies, including Exxon Corp. Credit Suisse First Boston calls *ENI*, which is gradually being privatized, a "world-class bargain." What made the difference? The combination of Mr. Bernabe, a 49-year-old apolitical chief executive and Italy's "clean hands" crackdown on bribes, kickbacks and other corruption . . . . Since taking control of *ENI*, Mr. Bernabe has slashed the payroll by nearly 50,000, or 40% of the domestic work force, with hardly a squeak from unions. The purge rid *ENI* of 180 unwanted textile, metals and other businesses that had been loaded on the company for political reasons. The divestment program brought in $6 billion and cleared the path for *ENI*'s privatization, which began in late 1995. Mr. Bernabe continues to auction off noncore assets.[17]

On the other hand, there are myriad small and medium-sized companies that are strong and productive. These highly entrepreneurial, family-owned businesses typically are in the light engineering, food, fashion and other luxury

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14. *See* Robert Graham, *The End of IRI's Dominant Role in Sight*, FINANCIAL TIMES, Nov. 13, 1996, *available in* LEXIS, News Library, Newspaper Stories, Combined Papers File.

15. *See id.*

16. *See id.* (in 1993, the European Commission insisted that *IRI* reduce its debt to "[l]evels acceptable to a private investor operating in a market economy." As a result of the European Commission's demand, since 1993, *IRI* has sold more than 300 companies resulting in divestitures in excess of Lit. 18,000 billion (approximately US $12 billion).

17. Bhushan Bahree, *ENI is Leaner, Cleaner-and Profitable*, WALL ST. J., Mar. 27, 1997, at A18.

goods sectors. Some of the brand names are valued by consumers all over the globe. *Gucci, Fila, Luxottica, Bennetton, Bruno Magli, Bulgari, Ferrari,* and *Masarati*, for example, are all highly regarded Italian consumer products companies with broad international appeal. Though the firms tend to be small in size, they have a strong export orientation. On average, almost seventy percent of their sales are outside of Italy.[18] With such an export focus, those companies have been able to enhance their international image and are able to attract foreign investors for their IPOs. Such small and medium-sized Italian enterprises offer foreign investors good or excellent growth prospects, a solid competitive position, and an excellent reputation for high quality products. One commentator described the prosperity created by such enterprises:

> Growing 3.1% [in 1995], the Italian economy outperformed every major industrialized economy, except that of the U.S., and these official numbers for Italy are probably seriously understated because they don't allow for the Italians' artistry at getting around a slovenly and broken-down government. Per capita income, even by reported figures, is $18,520. In the prosperous north it is even higher. Per capita GDP in the province of Brescia is $33,000, far above the average in Switzerland, Germany or the U.S. But even the average Italian lives better than the average Briton or Swede. What makes these numbers especially impressive is that they have been achieved in spite of a heavy drag from the relatively nonindustrial south, where per capita income is half that of the industrialized north. Northern Italy has already achieved a Swiss-level living standard. What's Italy's secret? In just two words: artisan and entrepreneur. Visit Lumezzane, a narrow valley, population 24,000, just north of Brescia. Lumezzane contains 1,980 registered businesses—one for every 12 inhabitants. The winding road between the mountains is crowded with workshops and factories, mostly metalworking enterprises making faucets, taps, valves, silverware and auto parts. The local supermarket displays not breakfast cereals but milling machines and lathes. Lumezzane is not a cosmopolitan place. Tourists seldom come here, and the people speak Italian in a heavy provincial accent. But this little valley sends its products all over the world.[19]

Traditionally, such family businesses have not been keen on the stock market. The preponderance of family-owned companies has kept the stock market small.[20] The dynamics of the global economy, however, are forcing such companies to focus their businesses and to reallocate assets. Moreover, the increasing emphasis on maximizing shareholder value and the need to raise new capital

18. *The 1996 Guide to Italy Supplement,* EUROMONEY, Sept. 1996, *available in* LEXIS, News Library, Newspaper Stories, Combined Papers File.

19. Paul Klebnikov & Richard C. Morais, *Italy Second Risorgimento*, FORBES, Apr. 22, 1996, at 182.

20. *See* Steven Irvine, *Selling the Family Silver*, EUROMONEY, Jan. 1996, at 57.

are leading such companies to consider other kinds of activities such as spin-offs and IPOs.[21]

A. ITALIAN CORPORATIONS SEEK TO FOCUS THEIR BUSINESSES AND TO REALLOCATE ASSETS.

One of the most state-directed and state-owned economies in Western Europe, Italy is gradually opening to market and competitive forces. Privatization, the Italian government's need to contain the ballooning national deficit, and the government's need to position the Italian lira to join a single European currency on January 1, 1999, are all factors behind the shift.[22]

Moreover, some Italian companies, such as exporters that have benefited from the devaluation of the Italian lira since 1993, face the challenge of consolidation.[23] Some critics of the government's devalued lira strategy have argued that the family-owned businesses operating in niche markets from the so-called "miracle" growth area of northeast Italy have prospered exclusively "on the back of a cheap lira."[24] To the extent that is true, such firms must either find ways to finance their growth or else consider selling out to possible competitors.

Nonetheless, many smaller and medium-sized Italian companies have flourished over the years on the strengths of their products rather than the value of the lira. They have proved adept at developing global business capability because their own domestic markets are too small. However, they increasingly find that they are competing with other international firms that are financing operations through equity raised on the equity markets. In addition, with Italian exports of goods and services running at more than 9.1 percent during the fourth quarter of 1997, there is an increasing need for fresh capital.[25]

Family firms that are going public represent market leaders in specialized market niches. Each is willing to expand and to diversify, and many expect to make acquisitions in the process. *Industria Macchine Automatiche*, for example, is a Bologna-based packaging-machinery manufacturer that went public in May 1995 by selling forty-four percent of the company in a Lit. 6200 per share offering.[26] At that time, the company had seventy percent of the world market

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21. Gail Edmondson, *A Sudden Shower of Seed Money*, BUS. WEEK INTERNATIONAL, May 18, 1998, *available in* LEXIS, News Library, Magazine Stories, Combined Papers File.

22. Paul Betts, *Privatization*, FINANCIAL TIMES, July 21, 1997, *available in* LEXIS, News Library, Magazine Stories, Combined Papers File.

23. *See* Robert Graham, *Unique Cycle is Over*, FINANCIAL TIMES, Nov. 26, 1996, at 2. For the fourth successive year, Italy prepared for a record trade surplus. As a consequence, Italy's re-entry into the ERM signaled an end to the Italian government's strategy of competitive devaluation.

24. *See id.*

25. *Italy*, QUEST ECONOMICS DATABASE, Apr. 1998, *available in* LEXIS, News Library, Magazine Stories, Combined Papers File.

26. *See* John Glover, *Beyond Family Capitalism*, INST. INV., July 1995, at 63.

for tea-bag-making machinery and planned to diversify into medical-packaging machinery.[27] During that year, *SAME*, an Italian tractor manufacturer, expected to complete the purchase of a German tractor maker.[28] Finally, *Bulgari* was "studying the luxury goods sector to decide on an acquisition," according to the firm's managing director, Francisco Trapani, who is also a family member.[29] Each of these firms earned more than one half of their revenues outside of Italy in 1995.[30]

During 1996, *Bulgari's* sales rose seventeen percent, with most of its increased product demand arising in East Asia and the United States.[31] CEO Trapani attributed the operating results to the implementation of *Bulgari's* new growth strategy and the launch of new products in major international markets.[32] The company opened ten stores internationally during 1996, including stores in Paris, Chicago, San Francisco, Frankfurt, Tokyo and Honolulu, in addition to its forty-four existing stores.[33] *Luxottica*, the Italian eyewear manufacturer, reported that its 1996 net earnings rose 27.2 percent over the prior year.[34] *Luxottica* is also the parent company of LensCrafters, the largest U.S. eyewear retailer, which it acquired when it purchased U.S. Shoe in May 1995.[35] Subsequent to the acquisition of U.S. Shoe, *Luxottica* disposed of U.S. Shoe's footwear business.[36] *Luxottica* sells its shares in the United States through American Depository Receipts.[37]

Another example of a medium-sized company expanding and reallocating assets is *ERG*. *ERG*, an acronym for *Raffinerie Edoardo Garrone*, is owned by the Garrone family of Genoa. The company owns and operates oil refineries and over 2,200 gasoline stations throughout Italy.[38] As of 1996, the company had assets of Lit. 2,000 billion (U.S. $1.3 billion) and 1,650 employees.[39] ERG accounted for approximately six percent of Mediterranean refining capacity.[40] *ERG* planned to double its assets within five years.[41] A cornerstone of that strategy was the company's decision to enter the power-generation business. In a joint venture with a U.S. company, *ERG* planned to build and operate a Lit.

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27. *See id.*
28. *See id.*
29. *See id.*
30. *See* Glover, *supra* note 26.
31. *See Bulgari Sales Grow 17 Percent in 1996*, WOMEN'S WEAR DAILY, Jan. 27, 1997.
32. *See id.*
33. *See id.*
34. *See* Paul Betts, *Luxottica up 27% in 1996*, FINANCIAL TIMES, Jan. 29, 1997, at 19, *available in* LEXIS, News Library, Individual Journal File.
35. *See id.*
36. *See id.*
37. *See id.*
38. *See* Irvine, *supra* note 20, at 58.
39. *See id.*, at 57.
40. *See id.*
41. *See id.*, at 58.

1,800 billion, 512 megawatt thermal power station.[42] Pietro Nebuloni, *ERG*'s Managing Director, stated in an interview,

> We are merging all operating companies into a single company . . . [A more difficult task is deciding what to do with the companies set up when *ERG* closed its Genoa oil refinery in 1988. These range from data management to chemical research, and were created largely to provide work for 400 unemployed families]. We are going to take all these out, and become just an oil company. Some [of these extraneous businesses] will be sold outside and some will be bought by the family as private concerns.[43]

There are numerous other small and medium-sized Italian companies that also have prospered on the strengths of their products. Those companies have proved capable of effectively competing against companies and products from around the world by providing innovative, quality products of superior design at highly competitive prices. However, in order to maintain and improve their international position, those Italian companies must find additional sources of funds to compete with large non-Italian firms that finance their operations through capital raised on the global equity markets.

B. THE GROWTH OF INCREASINGLY SOPHISTICATED INSTITUTIONAL INVESTORS IN ITALY.

The reallocation of assets by *ERG*[44] "represents the arrival of a new kind of listed company with clear, straightforward accounts and without labyrinthine subsidiaries and holding companies."[45] The pressure for such reforms is coming from investors, a far more international and demanding group than they used to be. The corruption in business that has been exposed in countries such as Italy and France makes international investors all the more wary of companies with opaque accounts and empire-building bosses.[46]

Italian investors, too, are increasingly finding their voices. In September 1995, *Gemina* and *Ferruzzi Finanziaria*, two of Italy's largest holding companies, sought to merge.[47] The merger was engineered by *Mediobanca*, the Milan investment bank.[48] The transaction would have put *Mediobanca* in charge of Italy's second-largest industrial group without paying minority shareholders a

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42. *See id.*

43. *See id.*

44. *See supra* part II.A.

45. Edward Carr, *Investor Power*, THE ECONOMIST, Nov. 23, 1996, 11, *available in* LEXIS, News Library, Magazine Stories Combined File.

46. *See id.*

47. *Cuccia's Last Hurrah*, INSTITUTIONAL INVESTOR, Dec. 1995, *available in* LEXIS, News Library, Archived News Files.

48. *See id. (Mediobanca* has been depicted as the *eminence grise* of Italian capitalism, criticized for its secretive deal-making capability, and has been called "conspiratorial"). *See supra,* note 6.

premium for control of *Ferruzzi Finanziaria*.[49] However, as described by *The Economist*:

> [S]omething went wrong. Unexpected losses at RCS, a Gemina subsidiary, triggered an investigation by the regulatory authorities. Small shareholders and a hostile press kicked up a fuss and the bid was dropped. No longer Mediobanca's triumph, Gemina became remarkable for something entirely different: for the first time, Italian investors had said no. . . . Gemina brought something to an end in Italy, but a new order has yet to take its place.[50]

Moreover, wealthy institutional investors will emerge in Italy as a result of legislation enacted in August 1994. The new laws require Italian companies to set up pension funds for their employees rather than providing life insurance policies as was previously required.[51] That may well bring about a revolution in corporate governance. Estimates are that the accumulated assets of the pension funds will grow to approximately Lit. 600 trillion (U.S. $375 billion) within fifteen years.[52] It is likely that only the largest companies will elect to manage their own pension investments; others are expected to turn to major financial institutions to act as their asset managers.[53]

The Italian government's struggle to stave off the collapse of the public pension system in Italy is also having a positive impact on the capital markets.[54] Private pension funds have begun to emerge, promising both increased demand for equity and, in theory, more discerning investors than the bank-controlled mutual funds. As noted above, shareholders are already less passive than they used to be.[55]

Moreover, there is no shortage of demand for investment advice for Italy's retail investors. Italian households are expected to save 12.6 percent of their pre-tax incomes during 1997.[56] However, Italian investors have traditionally

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49. *Cuccia's Last Hurrah*, *supra* note 47.

50. *See id.*

51. *See* Laura Colvill, *A Test of Nerves*, EUROMONEY, Oct. 1995, at 59.

52. *See id.*, at 60.

53. *See id.*, at 61.

54. The regulations that allow mutual fund companies to manage pension funds, Law Decree 124/1993, Italy's first on private pension plans, were issued in 1993. However, implementation of the regulations did not begin until early 1997. The Decree provides that only defined contribution plans will be allowed for employees, along with a tax break for corporations providing pension plans. *See*, *Italian Law Means Boon for Fund Companies*, INSTITUTIONAL INVESTOR, Oct. 7, 1996.

55. *See* Glover, *supra* note 26. When the privatized *Banca Commerciale Italiana* announced in 1994 a surprise cash call after earlier promising not to do so, and without explaining what the cash was to be used for, a mutual fund manager "had the nerve to abstain." *See* Glover, *supra* note 26.

56. *See Table of Thrift*, THE ECONOMIST, Mar. 29, 1997, at 115. Although Italian households saved more of their income, 18.3 percent, than anyone else in Europe in 1987, their current savings rates places them in third place for 1997, behind Belgian households at 16.5 percent, Spanish households at 12.9 percent, and French and Italian households at 12.6 percent.

looked upon the MSE as an exclusive club hostile to outsiders.[57] Most Italians have preferred to invest in Italian government bonds or fixed-income securities from several of the top issuers, such as the European Investment Bank, but decreases in interest rates over the past year have induced Italian investors to look for profitable alternatives.[58]

For years, the unequal treatment of minority shareholders was practically institutionalized by a system described as "Chinese boxes" or "kangaroo companies."[59] Under that system, a company listed on the MSE owned another, which, in turn, through shareholder agreements, owned other companies.[60] Some of the listed companies existed only to own others.[61] Through such a web of complex corporate and financial structures, the dominant shareholders (usually members of a family) continued to maintain and exercise control over a business.[62] An example of the pervasiveness of the system is illustrated by the 1995 shareholdings of the nonfinancial corporate sector accounted for almost eighty percent of the capitalization of firms listed on stock markets, with most of the remainder held by financial institutions.[63] The practice is currently prohibited by the MSE.[64]

Some have argued that because the Italian stock market is less transparent than other European equity markets, suffers from a lack of disclosure, and favors the interests of the family shareholders to the detriment of minority shareholders, the equity values are less than those of comparable companies in Europe.[65] In a speech in November 1996, Antonio Fazio, governor of the Bank of Italy, strongly criticized the families that dominate the ownership of listed companies for "mistreating" minority shareholders.[66] However, he also attacked other entrepreneurs for not daring to issue securities for their family businesses because "they were afraid of losing control over their companies or of having to meet new demands for transparency."[67] Of course, the main rea-

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57. Andrew Hurst, *Italy Stock Revival Ups Chances for Privatiations*, REUTERS FINANCIAL SERVICE, Jan. 12, 1997.

58. *See* Colvill, *supra* note 51; *see also* Hurst, *supra* note 57.

59. *See The Italian Governance Deficit*, GLOBAL INVESTOR, Nov. 1996.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See* Pradhan, *supra* note 10. By comparison, in the United Kingdom, less than four percent of market capitalization is held by the nonfinancial corporate sector, and of the largest 200 companies, more than two thirds have no single shareholder with more than ten percent of the equity.

64. *See id.*

65. *The Italian Governance Deficit, supra* note 59. In this article, Alessandro Valeri, Managing Director and co-founder of the Italian brokerage firm, *Intermobiliare,* stated, "[I]taly has been downrated by investors for a number of reasons including the lack of proper disclosure. An Italian publishing company, Mondadori for example, trades at a 30% discount to its European peers." *Id.*

66. *Time to Solve Problems, Survey on Italian Finance, Industry and Exports*, THE FIN. TIMES, Nov. 26, 1996, *available in* LEXIS, News Library, News Stories, Combined Papers File.

67. *See id.*

son why large Italian companies should care about minority shareholders' complaints is that without a ready pool of institutional and retail investors, the cost of capital will tend to remain prohibitively high for Italian companies that need to compete internationally.[68]

Yet, for many long-term foreign investors, the current weaknesses in the Italian stock market offer great opportunities. In a survey of the Italian stock market published in September 1996, *Euromoney* concluded:

> The Italian stock market's recent [price levels] thus appear to have been prompted by [mainly political variables], rather than by [stock price] overvaluation. . . . [A fundamental price analysis] approach only ends up reaffirming the significant upside potential for prices. The shares of leading industrial [companies] as well as financial institutions (mainly insurers) have been trading at depressed levels. . . . [A]fter the announcement of the 1997 budget . . . the [MSE] . . . will . . . recover . . . 25 percent over the current level. Considering current prices, [international] investors opting to put their money into the Italian stock market can already count on attractive returns, especially if they concentrate on quality issues such as the recently [issued] growth stocks or the interest rate sensitive companies in the telecommunications, energy or utility sectors.[69]

Part of the increased appetite for Italian shares among foreign investors arises from the juxtaposition of (a) the tax incentives offered to induce smaller firms to list on the MSE with (b) the large number of such firms in Italy that traditionally have been reluctant to list.[70] There are few newly-listed firms. Consequently, many of the newly-listed Italian companies have seen their share prices double in just a few months. Also, many of the smaller, entrepreneurially oriented companies were listed on the basis of annual sales growth rates of twenty to thirty percent, which they have managed to sustain. Therefore, these companies have generated an enormous appetite among both retail investors and foreign institutions alike.[71] In fact, the MSE has seen large inflows of funds as Italian investors have begun to switch out of lower-yielding Italian government debt into shares. Some investment firms forecast that the Italian stock market could rise an additional twenty percent in coming months.[72]

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68. *See* Andrew Hill, *A Rattle Grows Louder at Italy's Boardroom Doors: Shareholders are Demanding Greater Democracy*, THE FINANCIAL TIMES, June 24, 1996, *available in* LEXIS, News Library, News Stories, Combined Papers File.

69. *The 1996 Guide to Italy Supplement*, EUROMONEY, Sept. 1996.

70. Sam King, *Borsa Offers Tax For Stock*, THE EUROPEAN.

71. *See* Peter Lee, *Developing a Taste for Equity*, EUROMONEY, July 1996, *available in* LEXIS, News Library, News, Txtnws File.

72. *See* Malcolm Whittaker, *Italian Markets Drive On After Rate Cut*, REUTERS FIN. SERVICE, Jan. 22, 1997, *available in* LEXIS, News Library, News Stories, Combined Papers File.

C. THE GREATER WILLINGNESS OF SMALL AND MEDIUM-SIZED ITALIAN COMPANIES TO UNDERTAKE A PUBLIC LISTING.

Italian entrepreneurial companies now see the stock market as an attractive vehicle that provides a more competitive source of funds. This is because family owners are attracted by the opportunity to float a small portion of their company's shares and yet retain control while establishing a market valuation for their remaining shareholding, the greater part of the family wealth.[73]

Notwithstanding, the desire to stay in control and a reluctance to disclose financial information are strong disincentives. Italian companies have a long and rich tradition of seeking to avoid opening their books and financial records to public scrutiny.[74] Historically, the Italian tax system has impeded the development of Italian equity markets because Italian companies were reticent about disclosure of the true profitability, fearing tax authorities.[75] In addition, the Italian tax system favored the use of debt and hindered the development of equity markets because interest payments on a company's debt were tax-deductible, whereas dividend payments were paid on an after-tax basis.[76]

Italian family-owned companies considering IPOs are beginning to look beyond the MSE. They now have the luxury of greater choices: EASDAQ[77] and Euro NM.[78] These two new trans-European securities exchanges have arrived, joining the long-established U.S. automated trading system, the National Asso-

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73. *See* Lee, *supra* note 71.

74. *See* Klebnikov & Morais, *supra* note 13. One commentator has observed:

> Everybody knows that Italy is great not because of the politicians but in spite of them. With this contempt goes a relaxed way of confronting tax obligations. We visited a small factory that solders eyeglass parts and found an inconspicuous chalet with a cheap Fiat Punto parked in the drive. Inside, the place looked run-down, with cheap pillows taped over the backs of wooden chairs. But there were also a half-dozen well-oiled machines for soldering stem parts together. The whole operation was clearly intended not to draw the eye of the tax collector to this flourishing little enterprise. The government is using heavy-handed tactics to crack down on tax avoidance. We saw members of the *Guardia di Finanza* (Financial Police) setting up a roadblock and randomly searching 1934 Actrching cars and trucks to see that any industrial parts being transported matched the goods listed on the invoices. The cops simply assumed that any unreported deliveries were skirting the value-added tax, which can reach 19%. The cops are probably right. However, they cannot put all of the country's entrepreneurs in jail. The economy would grind to a halt. *See id.*

75. *See* Lee, *supra* note 71.

76. *See id.*

77. *Friends of the Family*, EUROMONEY, Dec. 1996, *available in* LEXIS, News Library Curnws File. European Association of Securities Dealers Automated Quotation. EASDAQ is a "screen-based trading platform using multiple market-making." *See id.* EASDAQ opened on September 26, 1996, and investors are able to buy EASDAQ-listed stock from broker-dealer members in fifteen European countries and the United States. *Id.*

78. *See id.* Euro NM is a joint venture between the French Nouveau Marche, the Germany Neuer Markt, and the Belgian Nouveau Marche. In addition, the Dutch second market, the New Market Amsterdam, set up in September 1996, also applied for access to Euro NM. "Euro NM have developed joint marketing and common regulations and will move toward joint front-end technology for members." *See id.*

ciation of Securities Dealers Automated Quotation ("NASDAQ").[79] Each of those three securities markets is actively promoting itself to small and middle level capitalization growth companies, precisely the type of firms represented by many of the family-owned businesses.[80] The establishment of EASDAQ and Euro NM is expected to encourage the flow of funds to entrepreneurs seeking capital to start and build new businesses in Europe in recent years.[81] In addition, the flow of capital has rekindled interest in European high-technology start-up companies among private investors, venture capitalists and investment bankers in both Europe and the United States.[82] For example, in 1995, a total of ECU 653 million (U.S. $740 million) of seed and start-up capital flowed to emerging information and other high-technology companies in Europe, compared with about $8 billion in the United States alone.[83] Nonetheless, the Commission of the European Union, in a June 1995 survey, found that investors were attracted to the EASDAQ because it was pan-European and highly regulated.[84] Therefore, the emergence of markets such as the EASDAQ provide an important new exit route alternative for both long-established Italian firms and for those entrepreneurs building start-up companies.

In the final analysis, the selection of where to raise capital must be determined by where the money is located. What is most appropriate for an Italian manufacturer or retailer of high-quality consumer goods is that it reach the largest number of both investors and investment managers. However, that may not be suitable for an Italian high-technology industrial machinery company with a narrow product focus in a highly competitive international and specialized industry. In such a case, the broadest number of investors may be within a national market.

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79. *See id.* As of the end of 1996, NASDAQ listed more than ninety European companies, of which fifteen joined in the first eight months of 1996. NASDAQ's aggressive promotion makes it a serious challenge to the ambitions of the EASDAQ (of which NASDAQ holds a share) and Euro NM. *See id.*

80. *See id.*

81. *See* Paul Taylor, *Survey - Venture and Development Capital*, FINANCIAL TIMES, Sept. 20, 1996, *available in* LEXIS 1996 WL 10614366.

82. *See id.*

83. *See id.* It is interesting to note that, when compared with the venture capital process in the United States, much of the seed and start-up capital invested in European enterprises comes in the form of grants and loans either from national or state governments.

84. Communication from the Commission Reporting on the Feasibility of the Creation of a European Capital Market for Smaller Entrepreneurially Managed Growing Companies, COM(95) 498 Final at 27 (Oct. 1995) [hereinafter "Communication"]. A total of 292 questionnaires were sent to investors in France, the Netherlands, Spain, the United Kingdom, Germany and Italy, asking for details of institutional or private client funds invested or managed, and for an estimate of the percentage of those funds that might be invested in stocks listed through EASDAQ." See *id.* The European Parliament "welcomed" the Communication. 1996 O.J. (C 211) 40.

III. THE ITALIAN STOCK MARKET IS SMALL AND ILLIQUID.

The Milan Stock Exchange ("MSE") is the largest of the ten Italian stock exchanges, accounting for more than ninety percent of all equity trading.[85] However, the MSE is smaller than its counterparts in Europe, with trading concentrated in blue chip issues.[86] Only 215 firms are presently listed on the MSE.[87] The MSE is dominated by a small number of industrial blue chip companies, such as *Fiat, Societa' Finanziaria Telefonica* and *Pirelli*, the insurer *Le Generali*, and large Italian utilities, such as the *Ente Nazionale per l'Energia Elettrica ("ENEL")*, and the national petrochemicals company, *Ente Nazionale Idrocarburi ("ENI")*.[88] It was estimated that as of July 1996, the total capitalization of the Italian stock market was approximately thirty percent of the country's Gross Domestic Product ("GDP"), as compared with 120 percent of the GDP in the United Kingdom.[89]

A number of major Italian banks, insurance companies and public utilities were privatized from 1992 through 1994.[90] The privatization program has attracted trading capital, even though Italian banks, heavily weighted in the MSE, are part of the most backward and inefficient banking system in the developed world.[91] As a consequence, trading volumes on the MSE are beginning to ap-

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85. *See* Pradhan, *supra* note 10.

86. *See id.* When measured by capitalization, the MSE ranks sixth in Europe. The thirty largest capitalization stocks included in the MIB-30 index accounted for over 75 percent of the trading of the MIB during 1996, while their market value represents nearly 71 percent of the total capitalization. *See id.*

87. *See* Hurst, *supra* note 57.

88. *See id.*

89. *See* Lee, *supra* note 71. The average OECD stock market capitalization is approximately fifty percent of gross domestic product. *Id.*

90. *See 1996 Guide to Italy Supplement, supra* note 69.

91. For example, the *Istituto Bancario San Paolo di Torino*, Italy's largest bank, is owned by a medieval-period charitable foundation that places "greater emphasis on spending money than making it. Foundation board members, ranging from renowned author Umberto Eco to city-hall appointees, are chosen more for their prestige and skill at selecting cultural projects than for their banking acumen." Maureen Kline, *Italy's Banks, Mired in Middle Ages, Face Revolution: Profits Before Charity*, WALL ST. J., Mar. 24, 1997, at A14. Kline writes:

> [T]he Bank's Chairman, Gianni Zandano] wants to free San Paolo from its 434-year-old system of control under local authorities by fully privatizing the bank by this summer, after having sold off 20% to the public in 1992. 'The real problem of Italian banks is there's never been a shareholder holding a whip,' says Mr. Zandano. 'It was enough if you made a few charity donations, and had a little margin to reinvest.' Many Italian bankers are starting to realize that banks need bigger profit margins to survive. With European monetary union nearing, industry observers say Italy's banks must adapt their medieval ownership structures and become larger, more efficient and more profit-driven. Italy's banking sector is among the most fragmented and least profitable in Europe. San Paolo, the largest of Italy's nearly 1,000 banks, ranks only 25th in Europe. The Italian Banking Association estimates average return on equity at Italian banks between 1993 and 1995 was only 2%, compared with 8% for Germany banks and 18% for U.K. banks. Bank of Italy Governor Antonio Fazio recently said that Italian banks need to cut some 30,000 employees, or more than 10% of their staffs,

proach the levels of the Amsterdam, Frankfurt and Paris exchanges, with average daily volume in the $300 to $400 million range.[92] In fact, most weeks, the MSE will have at least one day with a trading volume of approximately one billion dollars.[93]

In addition, seventeen new companies made their entrance into the MSE between early 1995 and September 1996.[94] The rapid increase in new companies resulted from a number of tax incentives that have been granted to companies with equity of less than Lit. 500 billion (U.S. $313 million).[95] In the past, the Italian tax system hindered the development of the equity market.[96] The tax authorities have recently tried to make listing more attractive.[97] The "Tremonti law" of 1994 allowed companies going public in 1995 to deduct sixteen percentage points from their taxes for the next three years, lowering their corporate tax rate from thirty seven percent to twenty-one percent.[98] Companies quoting in 1996 were granted two years' relief.[99] Medium-sized companies that have increased their capital by fifteen percent through the sale of new shares have enjoyed a reduction in corporate tax of sixteen percent from 1994 through 1997.[100] It is hoped that advantage will be renewed. The MSE has also done its part by waiving listing fees for the first two years for newcomers to the stock market.[101]

Another drawback to the MSE is the heavy emphasis in interest rate sensitive issues. Traditionally, banks and insurance companies dominated the MSE. Even with the increase in new issuances, banks and insurance companies accounted for approximately twenty-eight percent of the total market capitaliza-

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in order to lower costs to European averages. 'If we go into European Monetary Union with 1,000 little banks . . . we'll get eaten alive,' says Corrado Passera, chief executive officer of Banco Ambrosiano Veneto Spa in Milan. *See id.*

92. *See* Lee, *supra* note 71.

93. *See* Lee, *supra* note 71. Equity trading volume on Friday, January 10, 1997 at the MSE totaled Lit. 2.2 trillion (US $1.46 billion). *See* Hurst, *supra* note 55. During 1997, the MSE's equity trading volume more than doubled from that of 1996 to 334,613 billion lire, with a daily trading average of 1,344 billion lire. *Privatized Milan Gets Fine Baptism*, FINANCIAL TIMES, Jan. 6, 1998, at 32, *available in* LEXIS, News Library, Curnws File. In addition, the market capitalization of companies on the MSE rose from 386,157 billion lire at the end of 1996 to 587,049 billion lire at the end of 1997. *Id* at 32. However, during 1998, the MSE has experienced even more dramatic growth. For the first four months of 1998, trading volume should rise to 339 trillion lire, exceeding the trading volume for all of 1997. *Milan Shares Close Sharply Higher*, EXTEL EXAMINER, Apr. 28, 1998, *available in* LEXIS, News Library, Combined News File.

94. *See 1996 Guide to Italy Supplement, supra* note 69.

95. *See id.*

96. *See* Lee, *supra* note 71.

97. *See id.*

98. *Italians Join the Great Equity Chase*, THE EVENING STANDARD (London), Nov. 10, 1995, at 35.

99. *See id.*

100. Elio Silva, *Benefici Per Tre Anni Dopo La Quotazione*, Il Sole 24 Ore, Sept. 13, 1997, at 18, *available in* LEXIS, New Library, Noneng File.

101. *See* Lee, *supra* note 71.

tion for the MSE last year.[102] In addition, the MSE also has a high percentage of industrial shares, fifty-seven percent of the index in 1996.[103]

Banks have not encouraged initial public offerings regarding the use of the equity markets as competitors because corporations that go public will often need to borrow less from banks. "[T]he financial sector here is a sort of emerging market in a very strong economy," MSE's Chief Executive Benito Boschetto stated.[104] He acknowledged, however, that an efficient stock market remains a pipe dream as long as prejudice about the stock market is rife.[105] Listing rules are administered by the state regulatory body, *Commissione Nazionale per la Societa' e la Borsa* ("CONSOB").[106] On February 7, 1997, the Italian stock market authorities announced that they had created a new company that would lead MSE to become a privately owned company with fifty-one percent of the share capital held by market participants.[107] The new company, *Borsa Italiana*, S.p.A., will manage the share, over-the-counter and derivatives markets as a first step before the Italian Treasury places the shares on the market.[108] The new exchange arrangement will allow the MSE to rewrite its listing rules. Although the privatization of the stock market itself is unlikely to induce companies to list on the MSE, it does signify a major transformation in the way that equity business will be done in Italy. In July 1996, MSE's Boschetto stated:

> Privatization is a pragmatic choice. We think that only as a private body can we develop an aggressive practical policy towards domestic markets and to international markets. We have many natural candidates for listing. A new aggressive leadership group at the stock exchange may be able to fertilize the financial culture in Italy, where the stock market has not been popular.[109]

There are currently several other factors that also will profoundly affect the Italian financial and capital markets and provide opportunities for Italian corporations. First, the Italian government must adopt legislation implementing the European Union's Investment Services Directive ("ISD"), which will likely lead to a major revision of Italian financial law. The ISD provides that financial intermediaries from any European Union country are given a "passport" to sell securities in any other member country.[110] Until September 1, 1996, Italian law

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102. *See 1996 Guide to Italy Supplement, supra* note 69.

103. *See id.*

104. Colvill, *supra* note 51.

105. *See id.*

106. *See* Lee *supra* note 71.

107. *See id.*

108. *Italian Bourse Creates Market Management Firm*, REUTER EUR. BUS. REP., Feb. 7, 1997, *available in* LEXIS, New Library, Curnws File.

109. *See* Lee, *supra* note 71.

110. Piero Salera, *Italian Futures Market Faces Privatization*, INT'L FIN. L. REV., Sept. 1997, at 26, *available in* LEXIS, News Library, Newspaper Stories, Combined Papers File.

establishes that only members of *societa' d'intermediazione mobiliare* ("SIMs"), which are brokers with a base in Italy, have the right to sell securities to Italian residents.[111] Implementation of the ISD will void the existing SIM law. Foreign equity brokers are not restricted in any way in their dealings in the Italian market so long as they have a base in Italy. Thus, investment firms from EU member states may set up branches in Italy and render services in Italy after giving prior notice to the Bank of Italy and CONSOB by the regulatory authority in the investment firm's home country.[112]

CONSOB issued new guidelines in December 1996 that pave the way for full implementation of the cross-border share trading directive in Italy.[113] However, CONSOB provided that the new regulations would remain in effect for one year, after which CONSOB reserved the right to make changes.[114] In the regulations, CONSOB sought to encourage a high degree of concentration on the MSE, but also permitted off-bourse trading in certain circumstances.[115]

Second, the European Commission brought a complaint against Italy before the European Court of Justice, claiming that the SIM law breached the original Treaty of Rome.[116] The treaty gave companies and individuals, from one European Union member-state, the fundamental right to establish themselves in another.[117] Thus, the European Commission's complaint against Italy, in addition

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111. *Italian Securities Laws*, EUROMONEY, Sept. 1996, at 14, *available in* LEXIS, News Library, Newspaper Stories, Combined Papers File.

112. *See id.*

113. *See Italy's CONSOB Outlines New Stock Market Rules*, REUTERS EUR. BUS. REP., Dec. 16, 1996, *available in* LEXIS, New Library, Newspaper Stories, Combined Papers File.

114. *See id.*

115. *See id.* CONSOB regulations permit off-bourse trading if (1) the parties desire to trade off-bourse; (2) the trading price is better than on the MSE; (3) if one of the parties is from outside of Italy; (4) the transaction consists of a block trade; or (5) the transaction is in state-guaranteed bonds. CONSOB, *supra* note 13.

116. The European Court of Justice, in its judgment rendered on June 6, 1996, held that:

> "by restricting the activity of dealing in transferable securities to companies or firms having their registered office in Italy, the Italian Republic had failed to comply with its obligation under articles 52 and 59 of the Treaty of Rome."

Italian Securities Laws, *supra* note 111.

117. Article 52 of the Treaty of Rome provides in pertinent part:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State."

Treaty Establishing the European Community, Feb. 7, 1992, 31 I.L.M. 247, [1992] 1 C.M.L.R 573 (1992).

Article 59 of the Treaty of Rome provides in pertinent part:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period

to the European Union's ISD, represents a second avenue of attack to pry open the Italian financial markets to companies and individuals from other European Union member-states.

A third factor was the enactment of the *Offerta Pubblica di Acquisto* law in 1992. The law formulated a fundamental break with the past. Under the Act, a public tender offer is mandated whenever control of a company changes hands.[118]

As a result of these factors, the MSE is likely to grow increasingly accessible to a larger number of small and medium-sized Italian entrepreneurial companies. However, the ultimate beneficiary of changes in the MSE may not be the MSE itself. Rather, it may be the foreign equity markets that will be capable of providing Italian companies the advantages of higher price multiples for the issuances along with greater liquidity of markets after the psychological comfort in public listing has been established for the Italian business owner.

IV. U.S. CAPITAL MARKETS OFFER DYNAMIC ITALIAN FIRMS A GREATER BOOST IN THE VALUE OF THEIR STOCK THAN IN THE ITALIAN DOMESTIC MARKET.

The financial markets in the United States have developed broadly and deeply to allow a large number of capital finance suppliers to compete with one another in many different financial markets.[119] Nineteen ninety-six was a record year in many ways on Wall Street. Eight hundred sixty-six foreign companies raised seventy-billion dollars during 1996.[120] More than one-fifth of that total was raised by ninety-eight international companies that issued shares in the United States for the first time, easily surpassing the record set in 1993 of sixty companies raising $6.6 billion dollars.[121] During 1996, thirty-eight European companies raised $6.1 billion in new capital by issuing shares to investors for the first time.[122] Although many of the new issuances on Wall Street reflected the high valuations placed on initial public offerings in the U.S. capital markets,

> in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

See id.

118. *I Mercati Dei Capitali al Cambio Di Regime*, Il Sole 24 Ore, Feb. 22, 1998, (quoting *Decreto Legislativo* (Italian Parliamentary Legislative Decrees, arts. 106-08)), *available in* LEXIS, News Library, Noneng File.

119. *See* Stephen D. Prowse, *Corporate Finance in International Perspective: Legal and Regulatory Influences on Financial System Development*, 237 ECON. REV. (Federal Reserve Bank of Dallas), 1, 2-15 (1996).

120. *See Wall Street Set Debt, Equity Records in '96*, ROCKY MTN. NEWS, Dec. 29, 1996, at 9B, *available in* LEXIS, New Library, Newspaper Stories, Combined Papers File.

121. *See* Lisa Bransten, *U.S. Equities Boost European Groups*, FINANCIALTIMES (London), Dec. 30, 1996, at 15.

122. *See id.*

there is an arbitrage effect from a New York Stock Exchange listing for an attractive Italian company. The arbitrage effect will boost the stock of the Italian company in its own market because the U.S. market is more efficient; therefore, it reflects more accurately the Italian company's stock price.

The United States Securities and Exchange Commission ("SEC") is attempting to make it easier for non-U.S. companies to list securities or raise capital in the United States. Moreover, the New York Stock Exchange's Chairman, Richard Grasso, within several weeks of beginning his job, began a global effort to promote the listing of foreign companies on the exchange.[123] Grasso observed that there were 2,300 foreign companies that were potential candidates that could meet the stringent financial criteria for a New York listing.[124] Of course, the main advantage for a foreign company seeking to list in the United States is the vast number of investors with an abundance of cash.[125] There are, however, disadvantages as well. Despite the SEC's attempts to facilitate listing in the United States, foreign companies must find their way through the labyrinth of U.S. accounting standards. In addition, foreign companies are required to conduct audits despite great differences in accounting and auditing standards between the United States and the home country. In addition, the SEC's financial reporting rules continue to be complex and are often deemed to be endless and intrusive. Nevertheless, a number of both large and small Italian companies have successfully listed their equity on the United States stock markets.

When a foreign entity offers to sell securities to the public in the United States, the securities, if not exempt, must be registered under the 1933 Securities Act ("1933 Act").[126] Registration under the 1933 Act also subjects the foreign issuer to the registration and periodic reporting requirements of the Securities Exchange Act of 1934 ("1934 Act").[127] In addition to registration under the 1933 Act and the 1934 Act, a separate application with the appropriate exchange must be made if a foreign issuer seeks to have its securities listed on a United States stock exchange or traded on NASDAQ (and is eligible for such a listing).[128] This section will examine briefly the registration requirements for foreign issuers under U.S. securities laws.

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123. *See NYSE Chairman Urges Foreign Companies to List on Market*, LOS ANGELES TIMES, June 15, 1995, at 6, *available in* LEXIS, News Library, Newspaper Stories, Combined Papers File.

124. *See id.*

125. *See id.*

126. Securities Act of 1933, 15 U.S.C. § 77a (1933).

127. Securities Exchange Act of 1934, 15 U.S.C. § 78a (1934).

128. *See generally* Allan B. Afterman, U.S. Securities Regulation of Foreign Issuers: Financial Reporting and Disclosure Manual § A9 (1998-1 Supp.).

A. REGISTRATION UNDER THE 1933 ACT.

Unless otherwise exempt, every public offering of securities must be registered under the 1933 Act.[129] The 1933 Act confers jurisdiction over international securities transactions whenever United States facilities of interstate commerce are used to effect a securities transaction.[130] The registration requirements of the 1933 Act are limited by a territorial presumption, whereby offerings taking place within the United States must comply with the provisions of the 1933 Act, regardless of the nationality of the issuer.[131] However, with the increasingly competitive nature of the global financial marketplace, the SEC sought to balance the needs of foreign equity issuers with the need for protection of U.S. investors. As a consequence, the SEC has adopted Forms F-1, F-2, F-3, and F-4 for foreign private issuers.[132]

In general, the specific disclosure requirements for Forms F-1, F-2 and F-3 are similar. The principal differences among the forms are the manner in which information may be incorporated by reference and the requirement for delivery to prospective security holders of the information so incorporated. Form F-1 is used to register securities when no other form is authorized or proscribed.[133]

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129. 15 U.S.C. § 77(e) provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, any such means or instruments or transportation, any such security for the purpose of sale or for delivery after sale. For a list of transactions that are exempt from registration under the 1993 Act. *See* 15 U.S.C. § 77(d) (1998).

130. Securities Act of 1933, 15 U.S.C. § 77(b)(a)(7) provides:

> The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or *between any foreign country and any State, Territory, or the District of Columbia*, or within the District of Columbia. (Emphasis added).

131. 15 U.S.C. § 77(e)(a) applies to "any person." The 1933 Act defines "person" to mean "an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof." 15 U.S.C. § 77(a)(2).

132. To use Form F-1, F-2, F-3, and F-4, a foreign issuer must meet the definition of a foreign private issuer pursuant to Rule 4-05 of the 1933 Act, which defines such an issuer as an entity meeting all of the following criteria:

> Not more than fifty percent of its outstanding voting securities are held of record either directly or through voting trust certificates or depository receipts by residents of the United States; the majority of its executive officers and directors are not United States citizens or residents; Not more than fifty percent of its assets are located in the United States; and its business is not principally conducted in the United States. 1933 Act, Rule 4-05; Rule 462 (b).

A foreign company that does not meet the definition of a foreign private issuer is considered to be a domestic registrant and must use U.S. domestic registration forms. Afterman, *supra* note 128, at § A3.

133. Afterman, *supra* note 128, at § A3[c]. Form F-1 operates as a "default" registration form for private foreign issuers. Financial statements included in Form F-1 must be reconciled to United States

Form F-2 is used to register securities when the foreign private issuer has registered a class of securities under the1934 Act.[134] Form F-3 is used to register securities offered for cash by a foreign private issuer whose voting stock has a worldwide market value equivalent to seventy-five million dollars.[135] Under present rules, eligibility to use Form F-2 or F-3 calls for the issuer to have, in certain circumstances, voting stock with a worldwide aggregate market value of the equivalent of seventy-five million U.S. dollars.

Form F-4 may be used by a foreign private issuer to register securities in connection with any of the follow transactions or a combination thereof: (1) an

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generally accepted accounting standards ("GAAP") unless the only securities being registered are "non-convertible, investment grade securities or the only securities being registered are to be offered:

> Upon the exercise of outstanding rights granted by the issuer pro rata to all existing security holders on the basis of their present holdings and there is no standby agreement (or similar arrangement) in the United States;
> Pursuant to a dividends or interest reinvestment plan; or
> Upon the conversion of outstanding convertible securities or upon the exercise outstanding transferable warrants of the issuer or of an affiliate."

134. Afterman, *supra* note 128, at § A3[d]. To be eligible to use Form F-2, a foreign private issuer must meet all of the following conditions:

> The foreign private issuer has a class of securities registered under the 1934 Act;
> The foreign private issuer has timely filed all required 1934 Act reports during the twelve month prior to the filing; or
> The foreign private issuer has been subject to the 1934 Act continuous reporting requirements for at least thirty-six months prior to the filing. Note, however, that this requirement is waived if (1) only non-convertible, investment grade securities are being registered, or the aggregate worldwide market value of the registrant's voting stock is the equivalent of at least seventy-five million dollars, and the registrant has filed at least one form 20-F that is the latest required to have been filed.
> Financial statements included in a Form F-2 filing should be reconciled to United States GAAP.

135. Afterman, *supra* note 128, at § A3[e]. In addition to the use of Form F-3 to register securities offered for cash by a private foreign issuer whose voting stock has a worldwide market value of seventy-five million dollars, Form F-3 is used to register securities for any of the following transactions:

> Nonconvertible, investment grade securities offered for cash;
> Securities offered in connection with (1) rights offerings (without a standby agreement or other similar arrangement in the United States), (2) dividend or interest reinvestment plans, or (3) conversion convertible securities or exercise of warrants; and Securities offered in a secondary offering, that is, for the account of a party other than the foreign issuer.
> To be eligible to use Form F-3, a foreign private issuer must meet all of the following conditions:
> The registrant has a class of securities registered under the 1934 Act;
> The registrant has been subject to the 1934 Act continuous reporting requirements for at least twelve months prior to the filing;
> The registrant has timely filed all required 1934 Act reports during the twelve months prior to the filing; and
> Neither the registrant nor any of its subsidiaries have, since the date of the latest fiscal year for which audited financial statements are included in a 1934 Act report:
> Failed to pay any dividend or sinking fund installments on preferred stock; or Defaulted on any material debt installment payments or lease payments.

acquisition or merger; (2) an exchange offer; and/or (3) a public reoffering or resale of securities acquired pursuant to the registration statement.[136] As for the registrant itself, the information required to be provided is the same as would be required by whichever form (i.e., Form F-1, F-2, or F-3) it could register a primary offering.[137]

The most difficult hurdle an Italian issuer must clear before conducting an offering in the United States is the requirement that its financial statements be reconciled to the United States' generally accepted accounting standards ("GAAP") and the SEC's Regulation S-X.[138] Foreign accounting practices often vary substantially from those prevalent in the United States, and reconciliation is a lengthy, time-consuming and often expensive task.

To reduce the burden on foreign issuers, the SEC acknowledges two forms of accounting reconciliation between the foreign accounting standards and those required under GAAP. First, "full" recognition requires that all data be reconciled to GAAP and Regulation S-X.[139] Although full reconciliation is not required for periodic reports under the 1934 Act, it is required for 1933 Act registration statements. Second, in those cases where full reconciliation is not required, the SEC accepts reconciliation of only measurement items.[140] Such cases reflect income statement and balance sheet data. Although it is considerably less burdensome than full reconciliation, it nevertheless entails significant expense and potential delays.

One technique that has long been used to avoid extensive regulation under the 1933 Act is the use of American Depository Receipts ("ADRs"). Under this approach, an American bank purchases (in exempt secondary-market transactions) shares of foreign issuers.[141] The shares are held in a trust or other custodial arrangement by the bank, which then issues receipts evidencing beneficial ownership of a stated number of shares.[142] In 1983, the SEC issued Form F-6, a registration form for ADRs.[143] If the foreign issuer arranges for the ADR in the United States, the issuer must sign the form. The bank will also sign the form in any case. In addition, the foreign issuer must comply with the periodic reporting requirements of the 1934 Act.[144] Existing ADR arrangements were grandfathered under the regulations, creating Form F-6, and those issuers do not

136. *See* Afterman, *supra* note 128, at § A3(e).

137. *See id.*

138. *See id.*

139. *See* Afterman, *supra* note 127, at § A3.

140. *See generally* Afterman, *supra* note 128 (for a discussion of the sources of requirements and applicable forms to reconcile to U.S. GAAP at § B3).

141. *See* DAVID K. EITEMAN & ARTHUR I. STONEHILL, MULTINATIONAL BUSINESS FINANCE 280-81 (5th ed. 1989).

142. *See id.*

143. *See* Afterman, *supra* note 128, at §A3[i].

144. *See id.*

have to file 1934 Act reports.[145] At present, some foreign issuers using ADRs must file 1934 Act reports, while others do not. Nonetheless, the ADRs are extremely popular with investors.

B. REGISTRATION UNDER THE 1934 ACT.

Like the 1933 Act, the 1934 Act defines interstate commerce to include commerce between any foreign country and the United States.[146] The registration requirements of the 1934 Act do not distinguish between foreign and domestic registrants. Therefore, the 1934 Act requires registration and periodic reporting if a foreign issuer has securities listed on a United States exchange.[147] In addition, the 1934 Act requires a foreign issuer that has at least 500 shareholders and more than five million dollars in assets to register with periodic reporting.[148]

However, under SEC Rule 12(g)3-2(b), a foreign issuer is exempt from registration if it files with the SEC all information that it makes public abroad (*e.g.*, stock exchange reports, filing required by the laws of its domicile, voluntary statements released to shareholders), and if its securities are neither traded on any United States exchange nor listed on NASDAQ.[149] Until 1983, it was possible for a foreign issuer to have securities traded on NASDAQ and still be exempt from the 1934 Act's registration and reporting requirements under SEC Rule 12g3-2(b). When the SEC modified the exemption to require NASDAQ-listed issuers to register and report, the SEC grandfathered foreign issuers listed on NASDAQ at the time the rule was changed.[150] Consequently, there are still a number of foreign issuers listed on NASDAQ who have not registered under the 1934 Act and who do not report on United States forms.

Foreign private issuers whose securities trade on an exchange or NASDAQ and who are not grandfathered under Rule 12g3-2(b) must file an annual Form 20-F.[151] The form is generally similar to a domestic Form 10-K.[152] However,

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145. *See id.*

146. *See* Securities Exchange Act of 1934, *supra* note 127, at 15 U.S.C.§ 78(c)(a)(17) provides:

> The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between *any foreign country and any State*, or between any State and any place of ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or any other interstate instrumentality. (Emphasis added).

147. *See id.* at § 12(b).

148. *See id.* at § 12(g).

149. *See id.* at § 12(g)3-2(b)(1)(i).

150. 15 U.S.C. § 78g(f)(3).

151. Afterman, *supra* note 128, at § A4[b]. Form 20-F may be used only by a foreign private issuer. The definition of a foreign private issuer is the same as that under Rule 405 of the 1933 Act. Rule 3b-4 of the 1934 Act defines a foreign private issuer as an entity which meets all of the following criteria:

> Not more than 50 percent of its outstanding voting securities are held of record either directly or through voting trust certificates or depository receipts by residents of the United States;

the form requires substantially less disclosure of self-dealing transactions and of management compensation than its United States counterpart. Financial statements filed with Form 20-F do not need to be reconciled to GAAP.[153] However, if the Form 20-F will be incorporated by reference into a 1933 Act registration statement, then the financial statements must be reconciled to GAAP.[154]

Foreign registrants are not required to file quarterly reports, because they are not common outside the United States.[155] When material information becomes public abroad, however, a foreign registrant must file a Form 6-K disclosing that information.[156]

Of particular relevance to Italian issuers, Section 13(b) of the 1934 Act was amended by the Foreign Corrupt Practices Act ("FCPA") of 1977. Section 13(b) of the 1934 Act requires every issuer with a class of securities registered pursuant to section 12 of the 1934 Act or that files reports with the SEC pursuant to section 15(d) of the 1934 Act to comply with certain internal control and accounting-related standards. Therefore, an Italian company that registers a

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The majority of its executive officers and directors are not U.S. citizens or residents;
Not more than 50 percent of its assets are located in the United States; and
Its business is not principally conducted in the United States. *See id.*

152. *See* Afterman, *supra* note 128, at § A4[b]. The following information is required in Form 20F:

Item	Description
1.	Description of Business
2.	Description of Property
3.	Legal Proceedings
4.	Control of Registrant
5.	Nature of Trading Market
6.	Exchange Controls and Other Limitations Affecting Security Holders
7.	Taxation
8.	Selected Financial Data
9.	Management's Discussion and Analysis of Financial Conditions and Results of Operations
10.	Directors and Officers of the Registrant
11.	Compensation of Directors and Officers
12.	Options to Purchase Securities from Registrant or Subsidiaries
13.	Interest of Management in Certain transactions
14.	Description of Securities to be Registered
15.	Default upon Senior Securities
16.	Changes in Securities and Changes in Security for Registered Securities
17 & 18.	Financial Statements (and Financial Statement Schedules)
19.	Exhibits.

In addition to information expressly required to be contained in a Form 20-F filing, any other disclosures considered necessary to make the document not misleading should be included.

153. *See* Afterman, *supra* note 128, at § B3[b].

154. *See id.* Afterman, at § A11[d].

155. *See id.* at § B2[b].

156. *See id.* at § A4[c].

class of securities under section 13(b)(2) of the 1934 Act is required to do the following:

> (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer, and
>
> (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
>
> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
>
> (iii) access to assets is permitted only in accordance with with management's general or specific authorization; and
>
> (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[157]

In addition, section 13(b)(5) prohibits any person from knowingly circumventing, or knowingly failing to implement a system of internal accounting controls, or knowingly falsifying an entity's books, records, or accounts.[158] Moreover, the FCPA amended the 1934 Act by adding section 30A. Section 30A(a) makes it unlawful for any foreign private issuer whose securities are registered under section 12 of the 1934 Act or that files reports pursuant to section 15(d) of the 1934 Act (or any officer, director, employee, agent or stockholder acting on behalf of the foreign issuer) to pay (either in money or in anything of value) or to authorize a payment to a foreign official,[159] a foreign political party,[160] or candidate for political office[161] if such payment is intended to influence the decision of the recipient acting in an official capacity.

Although there are numerous hurdles to overcome in registration of equity offerings by Italian companies in the United States, there are major issues that provide significant challenges for both company management and investors. These challenges grow out of differences in the legal systems as well as cultural and language differences. These differences involve far more than merely complying with the plethora of SEC regulations and forms, or reconciling the foreign company's financial statements to conform with GAAP. Finally, as discussed in the following section, small and medium-sized Italian companies

157. *See* Afterman, *supra* note 28, at §A4[c].

158. *See* Securities Exchange Act of 1934, *supra* note 127, at § 13(b)(5).

159. *See id.* at § 30A(a)(1).

160. *See id.* at § 30A(a)(2).

161. *See id.*

should explore venture capital opportunities to better position themselves for IPOs.

V. VENTURE CAPITAL EXIT MECHANISMS OFFER DYNAMIC ITALIAN FIRMS THE OPPORTUNITY FOR BETTER ACCESS TO SOURCES OF LONG-TERM EQUITY CAPITAL.

European venture capital funds began in the 1960s.[162] The funds did not attain staying power for some years; as of 1980, only a small number of institutions were active in venture capital outside of the United States.[163] However, additional funds began in the United Kingdom and some other European countries at that time.[164] By 1990, more than half of all the venture capital under management worldwide was outside the United States.[165] Although, in many ways, venture capital in other countries resembles the system present in the United States, there are important differences.[166] Perhaps the key distinction between the current United States form of venture capital and its non-U.S. counterpart is that, outside the United States, a large part of what is classified as venture capital is dedicated to leveraged management buy-outs;[167] that is, venture capital financing provided to purchase a firm or the operating division of a firm from its current owners.[168] In an article on venture capital, *The Economist* noted:

> Europe's venture-capital business has grown impressively in the past decade. At the end of 1995, the 500 or so venture-capital firms in Europe boasted 20,000 companies in their portfolios, with cumulative investments of $32.8 billion. This business has delivered capital to assist the restructuring that Europe needs. Yet it has failed to spur the kinds of dynamic start-ups that venture capitalists have created across the Atlantic. More than half the [European] region's venture-capital investment, for example, is used to fi-

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162. *See* Organization for Economic Co-operation and Development, Paris, France *Venture Capital in OECD Countries*, FINANCIAL MARKET TRENDS, Feb. 1, 1996 [hereinafter "OECD"].

163. *See id.*

164. *See id.*.

165. *See id.*

166. OECD, *supra* note 162.

167. MARY JACKLEY SJOQUIST & PHILIP G. FEIGEN, ED., LAYMAN'S GUIDE TO THE LEGAL ASPECTS OF VENTURE INVESTMENTS 384 (5th ed., 1996).

> Leveraged management buy-outs are defined as a "takeover of a company, using borrowed funds (which may be at any stage of development). Most often, the target company's assets serve as security for the loans taken out by the acquiring firm, which repays the loans out of cash flow of the acquired company. Management may use this technique to retain control by converting a company from public to private. A group of investors may also borrow from banks, using their own assets as collateral, to take over another firm. In almost all leveraged buyouts, public shareholders receive a premium over the current market value for their shares."

168. *See id.*

> nance changes in firms' ownership. Most of those deals are management buy-outs, in which the managers of a small company, or of a division of a bigger company, take control. . . . By allowing bigger companies to break up, such deals have contributed to Europe's industrial restructuring; and by allowing smaller ones to achieve smooth successions, they help to preserve many valuable firms. But such deals do not really create anything new. In fact, less than 6% of Europe's venture-capital investment goes towards starting up new firms.[169]

Thus, small and medium-sized entrepreneurial European and, in particular, Italian businesses, are handicapped by an absence of effective exiting mechanisms for realizing the value of their businesses. Although European venture capital funds show an aversion to risk as compared with their colleagues in the United States, venture capital funds provide better incentives for both investors and management to effectively use investment capital.

A. Venture Capital Exiting Process Provides Italian Corporations With Better Incentives to Compete More Effectively in a Highly Competitive International Marketplace.

The presence of effective and efficient exit mechanisms is vital for healthy venture capital, because both investors and entrepreneurs must be able to realize value from their investments. The most common exit routes from successful venture development include: (1) trade sales; (2) private placements; (3) IPOs on the securities markets; and (4) repurchases, such as leveraged management buy-outs.[170]

Trade sales are the primary exit route for European businesses.[171] In a trade sale, a venture-capital-backed company is sold either partially or completely to an industrial or service company.[172] In most cases, the motivation of the purchasers is principally financial.[173] Transactions may also occur to fill a gap in a product line or to gain access to a new technology.[174]

Private placement is the purchase of a venture capitalist's interest in a business by another investor also acting as a venture capitalist.[175] This exit vehicle is frequently associated with less successful investments, otherwise, the initial

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169. *Venture Capitalists: Europe's Tentative Ventures/Lagging in Europe*, THE ECONOMIST, Jan. 25, 1997, at 21.

170. *See* OECD, *supra* note 162; *see generally* Jack S. Levin, STRUCTURING VENTURE CAPITAL, PRIVATE EQUITY, AND ENTREPRENEURIAL TRANSACTIONS 183-98 (1994). Involuntary exits may also exist in the form of liquidations resulting from bankruptcy. Such involuntary exits are beyond the scope of this paper.

171. *See* OECD, *supra* note 162.

172. *See id.*

173. *See id.*

174. *See id.*

175. *See* OECD, *supra* note 162.

venture capital firm would typically retain its interest for further capital appreciation.[176]

Private companies can go public by selling their shares in an IPO on a stock exchange.[177] Venture capitalists may participate in such an offering, or subsequent public offerings, by selling some of their shares to the public, and thus achieve an exit from their investment.[178] One of the most important determinants of returns on venture capital investments is the health of the IPO market. In addition to their direct role as exit vehicles, IPOs serve as benchmarks for pricing other types of exit mechanisms, including trade sales and leveraged buyouts.[179] Therefore, IPOs play an important role in the functioning of all venture capital exits.[180] IPOs are considered the preferred exit route in the United States, and are considered the exit route of the most successful companies.[181]

The development in the United States of NASDAQ has provided smaller companies with access to long-term equity capital through the IPO process and subsequent listing. Estimates of the proportion of U.S. firms that were initially financed by venture capital funds and subsequently listed on NASDAQ, has ranged from eight-eight percent to ninety-five percent, a highly significant number in either case.[182] In total numbers, the difference is also startling: 628 companies were listed on NASDAQ for the first time in 1993, whereas only thirty-one European companies were listed for the first time in all of the second-tier European stock markets during 1993.[183]

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176. In the Netherlands, a formal market for private placements, known as the Dutch Participation Exchange ("Parex"), was created in December 1992. Parex holds auctions twice a year where investors in private companies wishing to sell blocks of shares are matched with buyers. Parex was established in partial response to the lack of a public stock exchange for smaller and medium enterprises.

177. *See* Levin, *supra* note 170, at 185-89.

178. *See id.; see also* OECD, *supra* note 161.

179. *See id.* In establishing the price for an acquisition, reference is made to the valuation of similar companies in recent IPOs.

180. *See id.*

181. *See* Levin, *supra* note 176. In the Report on NASDAQ, the European Commission Report stated:

> It has been developed as a market focusing specifically on meeting the needs of high growth companies seeking to raise equity capital in order to fund further expansion. It is now the primary market in the USA for companies wishing to raise finance by means of an initial public offering. Out of the "Forbes" magazine list of its 200 best small firms, 154 were listed on NASDAQ. . . . Of the securities listed at the end of 1994, 3,772 were on the National Market and 1,989 on the SmallCap Securities Market. It is now the largest stock market in the world measured by the number of companies listed, the second largest based on the dollar value of equities traded, and the third largest in terms of numbers of shares traded. A total of 445 initial public offerings were made during [1994] raising $12.24 billion. In addition, 667 companies already listed on NASDAQ made subsequent public offerings of shares, raising a total of $21.1 billion.

Communication from the Commission, *supra* note 84, Ann. A at 20.

182. *See id.* at 4.

183. *See id.* at 5.

The creation of EASDAQ was intended to fill a major gap in the ability of European entrepreneurially managed growth firms to obtain access to long-term equity capital through the IPO process. However, the creation of EASDAQ merely creates the mechanism to trade equities electronically, but does nothing to improve the conditions for the success of the new markets. *The Economist* observed, "Now, [Europe] has the Easdaq market, which many European venture capitalists hope will make the sale of their stakes easier, thereby encouraging more investors to wade in. But financial obstacles are only part of the explanation for Europe's problems."[184] The European Commission itself has recognized that the creation of EASDAQ alone is insufficient to guarantee its success. The European Commission has identified the limitations intrinsic to the creation of EASDAQ, noting that other factors must also be in place:

> The opinion of potential market participants appears to be that, in order to be successful, European level capital markets will need to be promoted, both to companies and investors, far more intensively than has been the norm for stock exchange services in Europe.
>
> . . . This also indicates the need for the continuing development of a stream of suitable candidate companies, particularly those involved in high technology areas showing particular promise of rapid expansion. For this to come about, measures to alleviate the financial factors retarding their development also need to be considered. . . . Another essential requirement is that the market should enjoy a high degree of liquidity, so that it is possible to easily buy and sell shares in a particular company, although obviously this will depend on the amount of shares in public issue and the number of shareholders. Without the ability to easily trade blocks of shares of a reasonable size, institutional investors will rapidly lose interest. This is one of the reasons for the relative lack of success of existing second-tier stock markets in Europe. . . . It is also important that all operations be cost-effective, enabling listing and membership fees to be kept at a realistic level. . . . If the objective of securing better [small and medium enterprise] access to external sources of equity capital is to be achieved to any significant extent, it will be necessary to ensure that the owners of suitable companies are encouraged to bring them to the market and the interest of a considerable number of potential investors is stimulated. This requires that both should have a high degree of confidence regarding the regulation of such stock markets and the probity of those operating within them.[185]

The absence of those factors is particularly acute in Italy. Moreover, the perception of the absence of those factors is pervasive throughout the Italian business community. In fact, the apparent shortage of venture capital invest-

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184. *Adventures With Capital: If Only Europe Could Learn From America's Success in Nurturing New Business/How Venture Capital Works*, THE ECONOMIST, Jan. 25, 1997, at 18.

185. Communication from the Commission, *supra* note 84, at 13-14.

ment in Italy has also made its way into the advice columns. In a "Dear Annie" column in *Fortune*, one reader sought advice for his business problem:

> . . . Eight years ago I founded a high-tech company in Italy, and partly thanks to a government grant, we have a great product and plenty of ideas, patents, and skilled personnel, but we need venture capital, which is nowhere to be found in Europe. Should we seek backers in the U.S., or do you have any other suggestions?[186]

In Annie's response, she observed, "startup companies raised a record $10.1 billion in venture capital in the U.S. in 1996. . . ."[187] She noted that there are "more than 500 sources of seed money on the Continent, and suggested that the reader contact "the venture capital arm of Olivetti . . . which exists solely to [invest in such] ventures."[188]

Other Italian companies, such as *STET-Societa Finanziaria Telefonica*, Italy's largest telecommunications company, are presently bypassing Italian and other European high-technology firms to invest in the United States.[189] *STET*, for example, has invested $35 million dollars in young companies in the United States.[190] *STET* officials admitted that although the telecommunications giant serves as the largest Internet service provider in Italy, "it knows little about what to do with people once they are on-line."[191] Nonetheless, *STET's* director general, Umberto de Julio, said that "*STET* is interested in 'reproducing some of the characteristics' of Silicon Valley in Italy, perhaps encouraging the start of a venture-capital community and the creation of an environment where technology entrepreneurs can work."[192] What will it take for the creation of an environment where technology entrepreneurs can work? How can an Italian venture capital fund, or a European regional venture fund, play a more significant role in the development of new services and technology in an increasingly technological age?

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186. Anne Fisher, *How Do I Woo Workers? . . . Got Any Startup Money? . . . And Other Queries*, FORTUNE, Mar. 17, 1997, *available in* LEXIS 1997 WL 3108168.

187. *See id.*

188. *See id.* Ironically, Annie's reliance on Olivetti as a source of venture capital may have been misplaced as Olivetti recently completed the disposal of several non-strategic businesses, including Venture Capital USA, its venture capital fund with interests in twenty-three U.S. high-technology companies, as part of its recovery plan. *See* Paul Betts, *Olivetti Completes Disposals*, FIN. TIMES, Jan. 22, 1997.

189. *See* Mark Boslet, *Stet Takes Its Wallet to Silicon Valley As Italians Keep Flocking to Internet*, WALL ST. J., Apr. 7, 1997, available in LEXIS 1997 WL-WSJ 2415829.

190. *See id.*

191. *See* Fisher, *supra* note 186.

192. *See id.*

B. Recommendations to Foster the Creation of Long-Term Equity Capital Through Venture Capital.

In light of the importance of improving access to equity capital for dynamic Italian small and medium enterprises, the Italian government plays a critical role in the enactment of statutes and through promulgation of financial, tax and legal regulations and decrees, that are venture-capital friendly. First, the privatization of pension plans in Italy will create an immense pool of readily available funds over the next fifteen years for firms and individuals who need capital.[193] The Italian government, through its regulatory authority over these private pension funds, can designate that a percentage of the total investment pool must be used for venture capital investments. Based upon the estimates of pension fund assets of $375 billion dollars within the next fifteen years discussed *supra*,[194] even a two percent allocation of pension fund balances would require in venture capital investments of $7.5 billion over the next fifteen years. Although the pension funds will likely be invested in assets throughout the world, a portion of these pension funds will also find their way to the equity offerings of dynamic small and medium Italian firms.

Second, the implementation of the Tremonti law induced a number of Italian companies to issue equity in the MSE.[195] However, rather than establish a three-year effective period with declining tax benefits over that period, the Tremonti law should be made permanent. Permanency would provide more time for entrepreneurs to become familiar with the law and how it has benefited other successful entrepreneurs. It would also enable entrepreneurs to begin the process of preparing their firms for IPOs, which can, in some cases, take several years. Further, the benefits of the Tremonti law should be available for Italian entrepreneurs, who list on a recognized stock exchange, regardless of its location. Thus, an Italian entrepreneur whose company issued equity on either the EASDAQ, NASDAQ, the New York Stock Exchange, or the MSE, would be subject to the same tax treatment.

VI. Conclusion

Italy boasts a large number of dynamic small and medium-sized companies that are among the most competitive in the world. As the pace of global economic integration grows, resulting in a shrinking economic world at the advent of the twenty-first century, many of these Italian small and medium-sized companies will find their historically high growth rates constrained by an inability to raise capital in a cost-efficient manner. This is because today fundamental

193. *See supra* Section II.B.

194. *See supra* notes 51-51 and accompanying text.

195. *See supra* Section II.

problems exist for the small and medium-sized company capital formation in Italy.

Yet, in recent years, the Italian economy has experienced a seismic shift. Large state-owned enterprises are being privatized and the Italian government is launching a series of monetary and fiscal measures to prepare Italy for entry into the European Monetary Union, including the creation of a private pension funds program to stave off the collapse of the public pension system. These represent examples of the magnitude of economic changes currently underway in Italy.

Moreover, a number of laws have provided incentives for the entrepreneurial Italian firm to consider the issuance of equity on Italy's largest exchange, the Milan Stock Exchange. These laws include a large reduction in corporate income tax for those corporations issuing equity on Italian exchanges. However, the Italian stock exchanges continue to be relatively small and illiquid.

The Milan Stock Exchange continues to be dominated by a handful of large corporations. Yet, we are beginning to see the emergence in Italy of a new kind of listed company with clear, straightforward accounts and without the traditional labyrinthine subsidiaries and holding companies; an impetus coming primarily from large institutional investors. As a result, some smaller and medium-sized Italian entrepreneurial companies are considering the stock market as an attractive vehicle to provide more competitively priced capital funds. Family owners are attracted by the opportunity to float a small portion of their company's shares and yet retain control while reestablishing a market valuation for their remaining shareholding, typically the greater part of the family wealth.

However, the entrepreneurs are not only attracted to the Italian stock exchanges, a market that they have viewed as being hostile to outsiders. Rather, Italian entrepreneurs increasingly have become aware of other choices available to them: alternatives such as EASDAQ, Euro NM, NASDAQ, and the New York and other stock exchanges. Moreover, the venture capital exiting process provides Italian corporations with better reward incentives to compete more effectively in a highly competitive international marketplace by enabling both investors and entrepreneurs to realize value from their investments.

However, despite the clear benefits to Italian entrepreneurs, such venture capital exiting mechanisms are rarely used in Italy today. Yet, through such mechanisms, small and medium-sized Italian companies should explore venture capital opportunities to better position themselves for IPOs. Nonetheless, in light of the tremendous increase in private pension funds in Italy during the coming decades, far-sighted Italian government policy can encourage private pension funds to earmark a portion of their investment in venture capital funds. Additionally, the Tremonti law provided a three-year period of tax incentives for small and medium-sized Italian entrepreneurs to seek a listing on the Milan

Stock Exchange.[196] Such a law should be made permanent by the Italian government whenever a smaller or medium-sized company elects to list on any recognized stock exchange or quotation system. The implementation of such a measure by the Italian government will enable Italian entrepreneurs to develop the coming decades as the new golden age of Italian capitalism.

196. *See supra* Section II.

Full Inclusion and the Individuals with Disabilities Education Act: A Clear and Convincing Standard for Cases Involving the Least Restrictive Environment Provision

Alessio David Evangelista†

Introduction

On most mornings, Mrs. Molly Scuderi arrives in her classroom at about eight o'clock.[1] On this particular morning it is very cold, about ten degrees. The snow makes that crisp crunching sound as people walk through the parking lot of Van Buren Elementary School.[2] Mrs. Scuderi is a special education teacher in a pilot inclusion program which she helped design.[3] Sharing the classroom with Mrs. Scuderi is Mrs. O'Connor, a regular education teacher. Mrs. Scuderi and Mrs. O'Connor team-teach a full inclusion third grade class.

The students start streaming into the room at about eight forty-five. There are a total of twenty-four children in the class. Eight of the students have been labeled by the school district as learning disabled, mentally retarded, or emotionally disturbed. These students would normally spend a majority of their day in a segregated, self-contained classroom were it not for the inclusion program. During the morning hours the class sings songs, listens to Mrs. Scuderi read a story, works on subtraction problems, and composes letters to pen pals in a Virginia third grade class. At noon, the class leaves for "specials" (physical education, art, library time, etc.). Surprisingly, only four of the eight labeled students showed signs of their disabilities during the morning activities.

Full inclusion is a new and controversial movement sweeping across the American educational landscape. Advocates of the movement argue that all children with disabilities have a right to be educated along side their non-dis-

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† Alessio David Evangelista, Esq. is a graduate of Syracuse University College of Law (J.D. 1995). He is currently an associate at Covington & Burling in Washington, D.C. The views expressed herein are soley those of the author.

1. I would like to thank Mrs. Molly Scuderi for allowing me to visit her class and to ask questions concerning special education. I would also like to thank Professor Robin Paul Malloy for his helpful and insightful comments.

2. Van Buren Elementary School is located in Baldwinsville, New York, which is a suburb in the Syracuse metropolitan area.

3. The Individuals with Disabilities Education Act defines special education as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including . . . instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and . . . instruction in physical education." 20 U.S.C. §1401 (16)(A)-(B) (1990) *amended by* Pub. L. No. 105-17, 111 Stat. 45 (1997).

abled peers in the schools they would have attended were they not disabled.[4] Full inclusion has a large and vocal following, and support for the movement is growing. According to the United States Department of Education, over 1.6 million children with a wide range of disabilities, from autism to speech impairments, now spend the entire day in regular classes, and that number is growing by over 100,000 students each year.[5] However, full inclusion also has powerful and articulate critics.[6]

In addition to the stir that full inclusion is causing in the nation's schools, the controversy has found its way into the courts.[7] Parents of children with disabilities are bringing actions under the Equal Protection Clause,[8] Section 504 of the Rehabilitation Act[9], and most often, the Individuals with Disabilities Education Act ("IDEA").[10] The issue in these cases is to what extent, if any, is full inclusion supported, mandated, or even prohibited by federal laws governing special education.[11]

The first part of this article will present the controversy over full inclusion. The second part of the article will look briefly at the history of special education law in the United States. The third section of the article will examine the IDEA, the most influential federal law governing special education, along with regulations and court decisions interpreting it. This section will focus on how courts are interpreting and implementing the Least Restrictive Environment ("LRE")[12] provision of the IDEA. Finally, the last section of this article proposes a new standard for deciding cases under the LRE provision.

I. THE FULL INCLUSION CONTROVERSY

One of the first issues parents, teachers, advocacy groups, scholars, school districts and courts must struggle with is how to define inclusion. Since the passage of the IDEA in 1975, most discussions concerning the placement of students with disabilities in regular education classrooms have used the term

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4. *See* NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION STUDY GROUP, WINNERS ALL: A CALL FOR INCLUSIVE SCHOOLS (1992) [hereinafter "*NASBE report*"]. The NASBE report is cited in Oberti v. Board of Educ., 995 F.2d 1204, 1217 (3d Cir. 1993).

5. *See* Mary Jordan, *Push to Mainstream Disabled Students Gets a Mixed Report Card,* WASH. POST, Dec. 25,1993, at A11.

6. *See infra* notes 8-10.

7. This development is not surprising considering the synergistic relationship which exists between education policy and special education law.

8. *See* U.S. CONST. amend. XIV §1.

9. *See* 29 U.S.C. §794 (Supp. 1993).

10. *See* Individuals with Disabilities Education Act, 20 U.S.C. §1400-*et.seq.* (1994) *amended by* Pub. L. No. 105-17, 111 Stat. 37 (1997).

11. *See infra* notes 20-31.

12. *See* 20 U.S.C. §1412(5)(B) (1993) *amended by* Pub. L. No. 105-17, 111 Stat. 61 (1997).

"mainstreaming."[13] The current system places an emphasis on the identification, classification, and placement of students with disabilities according to their individual needs.[14] Students identified as having special needs are often placed in special (segregated) classes and schools, and then integrated into regular classes when educators feel it is appropriate.[15] When disputes arise over the placement of children with disabilities, school districts and parents turn to the elaborate procedural mechanisms set forth in the IDEA.[16]

Many full inclusion advocates argue that the entire system is flawed and should be abolished in favor of placing all children in regular education classrooms.[17] One of the leading policy statement endorsing full inclusion is a report from the National Association of State Boards of Education ("NASBE") Study Group on Special Education released in October, 1992.[18] The report makes three recommendations for creating a new, inclusive education for all students:

> State boards of education must create a new belief system and vision for education in their state which includes ALL students. Once the vision is created, boards must provide leadership by clearly articulating goals for all students and then identifying the changes needed to meet those goals. (2) State boards should encourage and foster collaborative partnerships and joint training programs between general educators and special educators to encourage a greater capacity of both types of teachers to work with the diverse student population found in full inclusive schools. (3) State boards, with state departments of education, should sever the link between funding, placement, and handicapping label. Funding requirements should not drive programming and placement decisions for students. The NASBE report describes an "inclusive system of education that strives to produce better outcomes for all students."[19]

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13. The United States Court of Appeals for the Second Circuit defined mainstreaming as educating a handicapped child with non-handicapped. *See* Briggs v. Board of Educ., 882 F.2d 688, 691 (2d Cir. 1989). The most widely accepted definition of mainstreaming is contained in a model known as the "cascade" model. *See* Frederick J. Weintraub & Alan R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1039-41 (1972). The cascade model posits that mainstreaming involves a continuum of placements for students identified as needing special education services. *See id.* The placements range from most restrictive to least restrictive (from residential placements in distant facilities, to placements in a regular education classroom with supplementary aids and services). *See id.* This continuum of placements is codified and mandated in regulations implementing the LRE provision of the IDEA which are found in 34 C.F.R. §300.550-.556 (1993).

14. *See* 20 U.S.C. §1400-*et.seq.*

15. *See* 20 U.S.C. §1412(5)(B); *see also* 34 C.F.R. §300.550-.556 (1993).

16. *See* 20 U.S.C. §1415 (1994) *amended by* Pub. L. No. 105-17, 111 Stat. 87 (1997).

17. *See supra* notes 15-16.

18. *See supra* note 4.

19. *Id.*

The report states that:

> special education services in this inclusive system are provided as a support to students who need them in order to achieve the outcomes expected of all students, and general and special education services complement and support each other. Emphasis is placed on improved instruction rather than the process of classifying and labeling students. Parental involvement, individualization, due process and access are part of the system, but do not completely define the system.[20]

Other groups define full inclusion by contrasting it with the current system and argue that full inclusion implies the existence of only one unified educational system where there is no need for integration because there is no initial separation.[21] Yet another approach has been to state explicitly what inclusion is, and what it is not.[22]

The district court in *Board of Education v. Holland* was one of the first courts to expressly use the term "inclusion."[23] The *Holland* court stated that full inclusion means "that the . . . child is a full member of a regular education class."[24] Dr. Wayne Sailor, an expert in special education who testified in *Holland*, stated that "under full inclusion, the child need not be in the classroom 100% of the time."[25] He noted that "the child may be removed from that class to re-

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20. *Id.*

21. *See* 21 INCLUSION TIMES at 2, Sept. 1993.

22. For example, a 1993 pamphlet published by the Advocacy Board for the Center on Human Policy at Syracuse University states the following: inclusion means (1) Educating all children with disabilities in regular classrooms regardless of the nature of their disabling condition(s); (2) Providing all students enhanced opportunities to learn from each other's contributions; (3) Providing necessary services within the regular schools; (4) Supporting regular education teachers and administrators (e.g., by providing time, training, teamwork, resources, and strategies); (5) Having students with disabilities follow the same schedules as non-disabled students; (6) Involving students with disabilities in age-appropriate academic classes and extra-curricular activities, including art, music, gym, field trips, assemblies, and graduation exercises; (7) allowing students with disabilities to use the school cafeteria, library, playground and facilities along with non-disabled students; (8) Encouraging friendships between non-disabled and disabled students; (9) Providing students with disabilities receiving their education and job training in regular community environments when appropriate; (10) Teaching all children to understand and accept human differences; (11) Placing children with disabilities in the same schools they would have attended if they did not have disabilities; (12) Taking parents' concerns seriously; and (13) Providing an appropriate individualized educational program. Inclusion does not mean: (1) "Dumping" students with disabilities into regular programs without preparation or support; (2) Providing special education services in separate or isolated places; (3) Ignoring children's individual needs; (4) Jeopardizing students' safety or well-being; (5) Placing unreasonable demands on teachers and administrators; (6) Ignoring parents' concerns; (7) Isolating students with disabilities in regular schools; (8) Placing students with disabilities in schools or classes that are not age-appropriate; or (9) Requiring that students be "ready" and "earn" their way into regular classrooms based on cognitive or social skills.

23. Board of Educ. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd* 14 F.3d 1398 (9th Cir. 1994). *See also* Oberti v. Board of Educ., 995 F.2d at 1221.

24. *Id.*

25. *Id.*

ceive supplementary services such as physical or speech therapy when these services cannot be provided in the classroom."[26] Finally, Dr. Sailor stated that "[u]nder full-inclusion, the child's primary placement is in the regular education class, and the child has no additional assignment to any special class for handicapped children."[27]

Various private and governmental organizations have expressed their positions on full inclusion. In support of full inclusion, the Association for Supervision and Curriculum Development argued that "increasing empirical evidence demonstrates that this labeling [in the current system] stigmatizes children and tends to result in segregated services and lower expectations."[28] The Association for Retarded Citizens argues that:

> All schools should value all students and include them in all aspects of school life. Preparation for life in the community best occurs when all students of different backgrounds and abilities learn to socialize together in classrooms and other school settings where all have a chance to achieve and receive instruction designed to develop and enhance successful living within the community. *Each student with a disability belongs in an age-appropriate classroom with peers that are not disabled.* Each student has the right to receive individualized education which provides choices, meets the student's needs, and offers the necessary support.[29]

The Council for Exceptional Children ("CEC") takes a more moderate position, believing that youths and young adults with disabilities should be served in general education classrooms in inclusive schools and neighborhood settings whenever possible.[30] However, the CEC also argues that a continuum of services must remain available for all children, youth and young adults.[31]

One of the most vocal and influential opponents of full inclusion is the American Federation of Teachers ("AFT"). AFT argues that the education community is moving too quickly to embrace full inclusion without fully considering its consequences.[32] For example, on December 15, 1993, the president of the 800,000 member strong AFT, Albert Shanker, called for a moratorium on new inclusion programs, arguing that school districts were practicing budget-driven

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26. *Id.*

27. Board of Educ. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd* 14 F. 3d 1398 (9th Cir. 1994).

28. *Supra* note 21, at 3.

29. REPORT CARD TO THE NATION ON INCLUSION IN EDUCATION OF STUDENTS WITH MENTAL RETARDATION, Oct. 1992, (uses federal data and grades states in terms of how extensively they provide an inclusive program) (emphasis added).

30. *See* Statement adopted at the April 1993 convention after presentation of results from a three-year study conducted by the Panel on Reform and Integration.

31. *See id.*

32. *See* Richard Whitmire, *Teachers Group Says Inclusion Programs Become Budget Device*, GANNETT NEWS SERV., Dec. 15, 1993.

inclusion and that school districts were using a "figleaf of altruism."[33] At a press conference in Washington, D.C. on the same day, Mr. Shanker stated that "[w]e must put the brakes on the helter-skelter, even tumultuous rush toward full inclusion."[34] A union publication also argued that the current rush to full inclusion would lead to overwhelmed teachers, a doubling of the number of students with disabilities in the mainstream, and a majority of the students in these classes suffering academically.[35]

Another group which opposes full inclusion is the Learning Disabilities Association of America ("LDA").[36] The LDA "does not support full inclusion or any policies that mandate the same placement, instruction, or treatment for all students with learning disabilities."[37] The LDA argues that while some students may benefit from being served in the regular education classroom, "the regular education classroom is not the appropriate placement for a number of students with learning disabilities who may need alternative instructional environments, teaching strategies, and/or materials that cannot, or will not, be provided within the context of the regular education placements."[38] The LDA believes that full inclusion may actually be detrimental to the educational and social development of many children with disabilities.[39] As the debate rages on, courts across the nation are facing the difficult task of interpreting the IDEA and other federal statutes in an attempt to articulate clear standards to address this issue.

II. SPECIAL EDUCATION IN THE UNITED STATES

Before the 1960's, children with disabilities were either segregated into separate classrooms or simply not educated at all.[40] Programs for people with severe disabilities, if they existed at all, were often viewed as custodial rather than

33. *See id.*

34. *Id.*

35. *See* Jordan, *supra* note 5.

36. *See* Position paper on *Full Inclusion of All Students with Learning Disabilities in the Regular Education Classroom* (1993).

37. *Id.*

38. *Id.*

39. *See id.* The position paper supports keeping continuum of alternative placements and individualized decision making approaches in place and argues that "the placement of all children with disabilities in the regular education classroom is as great a violation of the IDEA as is the placement of all children in separate classrooms on the basis of their type of disability." *Id.*

40. *See* H. Rutherford Turnbull III, et al., *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 RUTGERS L.J. 489, 496 (1983); *see also* Weintraub, *supra* note 13, at 1045. In some states there were laws which considered the attendance of children with disabilities "inadvisable." *See supra* note 13, at 1045 (citing ALASKA STAT tit. 14, ch. 30 (1971); NEV. REV. STAT. §392.050 (1963)). Children with disabilities were also "privileged" with an exemption from compulsory education laws. *See* Darvin L. Miller & Marilee A. Miller, *The Handicapped Child's Rights as it Relates to the "Least Restrictive Education" and Appropriate Mainstreaming*, 54 IND. L.J. 1, 10 (1978). Of course, this was not really a privilege, rather, it was a money saving device for the school districts.

educational.[41] Many people believed that children with disabilities should not be educated with non-disabled children because they thought that children with disabilities simply could not learn, or that the effect on the learning of non-disabled children would be too great.[42] Others argued that the cost of educating the disabled community was too high, and that children with disabilities in the schools made other non-disabled students and staff uncomfortable.[43]

The popular notion of "Social Darwinism" was partly responsible for society's attitude toward these children.[44] As an extreme example, in the early years of the twentieth century, the American Breeders Association suggested that all "feebleminded" men and women should be segregated, sterilized, or euthanized.[45] In 1954, the Supreme Court of the United States in *Brown v. Board of Education* ruled that the segregation of Black students under the separate but equal doctrine violated the Equal Protection Clause of the United States Constitution.[46] Advocates for people with disabilities eventually seized the Equal Protection Clause reasoning in *Brown* and brought lawsuits of their own challenging both the validity of the laws and school district practices of segregating students with disabilities.

Two of the most significant cases were *Pennsylvania Assoc. of Retarded Children v. Pa.*[47] ("PARC") and *Mills v. Board of Educ.*[48] ("Mills"). PARC was a class action suit resulted in judicial approval of a lengthy consent agreement between the classes.[49] The plaintiff class in PARC argued that the exclusion of mentally retarded children from a free public education, through the application of various state statutes, violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[50] The consent agreement in PARC guaranteed children who were mentally retarded residing in the Commonwealth of Pennsylvania a substantive right to a free, appropriate, public education.[51] The agreement also guaranteed elaborate procedural due process rights to parents of children who were mentally retarded, including the right to

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41. *See supra* note 4.
42. *See* Weintraub & Abeson, *supra* note 13, at 1057-58.
43. *See id.*
44. *See* Turnbull, *supra* note 40, at 494. People believed that individuals with disabilities were genetically inferior and would contaminate the race. *See id.*
45. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 294 (E.D. Pa. 1972) (citing Buck v. Bell, 247 U.S. 200, 207 (1926)). In *Buck*, the United States Supreme Court upheld Virginia's compulsory sterilization law stating that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for a crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles is enough." *Buck*, 274 U.S. at 207.
46. Brown v. Board of Educ., 347 U.S. 483 (1954).
47. *Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 279.
48. Mills v. Board of Educ., 348 F. Supp. 866 (D.C. 1972).
49. *See Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 306.
50. *See id.* at 282-283.
51. *See id.* at 302-303.

notice and an opportunity to be heard on matters relating to the education of their children.[52] The court in *Mills* granted summary judgment to a class of plaintiffs in the District of Columbia comprised of children labeled as mentally retarded, as well as children who were said to have behavioral, emotional, or hyperactivity problems.[53]

Federal legislation granting direct federal subsidies for special education was first adopted in 1958.[54] In 1965, Congress passed the Elementary and Secondary Education Act, which provided modest funding for programs assisting children with disabilities.[55] That act was amended in 1966,[56] and then in 1968, Congress passed the Education of the Handicapped Act ("EHA").[57] The EHA was amended in 1970[58] and then again in 1974.[59] In 1973, Congress enacted section 504 of the Rehabilitation Act.[60] Finally, the Education of All Handicapped Children Act[61] was passed in 1975 and remains in force today under a new name, the Individuals with Disabilities Education Act.[62]

III. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The IDEA is both a funding and civil rights statute.[63] The stated purpose of the IDEA is:

> to assure that all children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children and their par-

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52. *See id.* at 297. In an interesting example of prediction, the court's discussion of the equal protection claim states that the plaintiffs were not challenging the separation or assignment of mentally retarded children to special, segregated classes. *See id.* Today, some full inclusion advocates filing claims under the Equal Protection Clause, Rehabilitation Act, and Individuals with Disabilities Education Act are challenging the segregation or assignment of special needs children into any special classes out of the mainstream.

53. *See Mills,* 348 F. Supp. at 868.

54. *See* National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958).

55. *See* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

56. *See* Elementary and Secondary Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191 (1966).

57. *See* Education of the Handicapped Act, Pub. L. No. 90-242, 81 Stat. 804 (1968).

58. *See* Education Amendments of 1970, Pub L. No. 91-230, 84 Stat. 121 (1970).

59. *See* Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974).

60. *See* Section 504 of the Rehabilitation Act, Pub. L. No. 93-112, §504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. §794 (1988)). The IDEA is often used in conjunction with Section 504 of the Rehabilitation Act. The Rehabilitation Act is a federal civil rights statute which prohibits discrimination against persons with disabilities by any program or activity receiving federal financial assistance. *See* 29 U.S.C. §794 (1985). Regulations implementing the Rehabilitation Act are found in 34 C.F.R. §104(1993).

61. *See* Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

62. *See* Individuals with Disabilities Education Act, 20 U.S.C. §1400 (1990) *amended by* Pub. L. No. 105-17, 111 Stat. 37 (1997).

63. *See id.* The IDEA is often used in conjunction with section 504 of the Rehabilitation Act. 29 U.S.C. §794 (1985). The Rehabilitation Act is a federal civil rights statute which prohibits discrimination against disabled persons by any program or activity receiving federal financial assistance. *See id.* The regulations implementing section 504 are found in 34 C.F.R. pt. 104 (1993).

> ents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.[64]

Under the IDEA, states submit plans to the Secretary of Education which guarantee a Free Appropriate Public Education ("FAPE") for every child with a disability, within the state.[65] States which comply with the IDEA receive federal funds to offset the cost of implementing their plans.[66] The principle mechanism by which the substantive right to a FAPE is advanced is the Individualized Educational Program ("IEP").[67] Under the IDEA, an IEP is:

> a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and wherever appropriate, such child . . . .[68]

The IDEA also contains elaborate procedural safeguards that parents of disabled children can evoke when disputes arise over the educational placement of a child with a disability.[69] The centerpiece of these procedural provisions is the right to appeal school district placement or identification decisions to an impartial hearing officer.[70] States can also create another level of appeal directly to the state education department.[71] Finally, parents, still aggrieved after the administrative review process, can bring suit in any federal district court or any state court of competent jurisdiction.[72] The IDEA provides that these courts

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64. 20 U.S.C. §1400(c) (1990) *amended by* Pub. L. No. 105-17, 111 Stat. 37 (1997).

65. *See* 20 U.S.C. §§1412, 1413 (1990) *amended by* Pub. L. No. 105-17, 111 Stat. 61 (1997). A FAPE is defined in the IDEA as: Special education services and related services that . . . have been provided at public expense, under public supervision, and without charge . . . meet the standards of the State educational agency. . . include appropriate preschool, elementary, or secondary school education in the state involved, and . . . are provided in conformity with the individualized education program required under section 1414(a)(5) of this title. 20 U.S.C. §1401 (18)(A)-(D) (1990).

66. *See* 20 U.S.C. §1420 (1990) *amended by* Pub. L. No. 105-17, 111 Stat. 37 (1997). Today, the federal government pays only seven percent of the costs associated with educating a disabled student. *See* Joseph P.Shapiro et al., *Separate and Unequal*, U.S. NEWS & WORLD REP., Dec. 13. 1993, at 56.

67. An IEP generally includes annual objectives designed to ameliorate the adverse impact of the child's impairment, and special education and related services necessary to achieve those objectives. *See* Bruce G. Sheffler, *Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN'S L. REV. 81, 97 (1981) (citing 20 U.S.C. §1401(19)(B); 34 C.F.R. §300.3

68. *See* David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166 (1991). The group of school district personnel is generally called the Committee on Special Education ("CSE"). *Id.* The meeting between the parents and the CSE is generally referred to as an IEP conference. *Id.*

69. *See* 20 U.S.C. §1415 (1990) *amended by* Pub. L. No. 105-17, 111 Stat. 87 (1997).

70. *See id.*

71. *See id.*

72. *See* 20 U.S.C. §1415(e)(2) (1990) *amended by* Pub. L. No. 105-17, 111 Stat. 87 (1997).

"shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."[73] The IDEA also contains a "stay put" provision which mandates that the child remain in his or her current placement during the pendency of the review process.[74]

Board of Educ. v. Rowley is the most influential court decision interpreting and applying the FAPE provision of the IDEA.[75] *Rowley* involved a young girl with minimal residual hearing who claimed that her school district was obligated under the IDEA to provide her with a sign-language interpreter.[76] The Supreme Court established a two-part test for determining whether a school district has provided a free appropriate, public education: "First, has the state complied with the procedures set out in the Act. And second, is the individualized educational program developed through the Act's *procedures reasonably calculated to enable the child to receive educational benefits*."[77] Citing to the Act's legislative history, the Court stated that this test should make "independent decision[s] based on a preponderance of the evidence."[78]

In *Rowley*, the Supreme Court relied heavily on the district court's finding that Amy Rowley was "receiving an adequate education, since she performs better than the average child in her class and is advancing easily from grade to grade."[79] Applying the first part of the test, the Court held that there was no evidence indicating that the Furnace Woods School District failed to comply with the procedural requirements of the IDEA.[80] Applying the second part of the test, the court held that Amy was not entitled to an interpreter because Amy was receiving "some educational benefit" from the personalized instruction and related services the school district was providing her.[81] The Supreme Court did not consider whether Amy's placement was in the least restrictive environment.

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73. *Id.*

74. *See* 20 U.S.C. §1415(e)(3) (1990).

75. Board of Educ. v. Rowley, 458 U.S. 176 (1982). Other Supreme Court decisions involving the IDEA include: Florence County Sch. Dist., et al. v. Carter, 510 U.S. 7 (1993); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Honig v. Doe, 484 U.S. 305 (1988); Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 358 (1985); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984) (holding that a school district must provide clean intermittent catheterization as a related service under the IDEA); Smith v. Robinson, 468 U.S. 992 (1984).

76. *See Rowley*, 458 U.S. at 176.

77. *Id.* at 206-207 (footnotes omitted) (emphasis added).

78. *Id.* at 205 (citing S. CONF. REP. No. 455, 94th Cong., 1st Sess. 50 (1975)).

79. *Id.* at 209-210 (citation omitted).

80. *See Rowley*, 458 U.S. at 209-10.

81. *Id.*

A. THE LEAST RESTRICTIVE ENVIRONMENT PROVISION

The IDEA guarantees children with disabilities a FAPE in the Least Restrictive Environment ("LRE").[82] Before a state can qualify for financial assistance under the IDEA, the state must demonstrate to the Secretary of Education that it has complied with the LRE provision by establishing:

> . . . that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[83]

Federal regulations implementing the LRE provision state a preference for placing children with disabilities in regular education classrooms with the necessary supplementary aids and services.[84] The regulations also endorse the notion of a continuum of alternative placements for children with disabilities.[85] Further, the regulations state that the placement of a child with a disability should be in the school which he or she would attend if he or she were not handicapped.[86]

Despite all of the language advising against a segregated placement, the IDEA regulation also state that "[t]he overriding rule . . . is that placement decisions must be made on an individual basis," and that each agency have

82. *See* 20 U.S.C. §1412(5)(B). This provision is often referred to as the "mainstreaming" requirement. *See* Briggs v. Board of Educ., 882 F.2d 688, 691 (1989).

83. 20 U.S.C. §1412(5)(B); *see also* 34 C.F.R. §104.34 (1993) (interpreting Section 504 of the Rehabilitation Act).

84. *See* 34 C.F.R. §300.550-.556 (1993). 34 C.F.R. §300.550 mirrors the language of the IDEA and states that "[e]ach educational agency shall ensure that public agency establishes and implements procedures which meet the requirements of 34 C.F.R §300.550-.556." Section 300.550 also states that "each public agency shall insure . . . that to the maximum extent appropriate, children with disabilities . . . are educated with children who are not handicapped." 34 C.F.R. §300.550 (1993).

85. *See* 34 C.F.R. §300.551-.553 (1993). Section 300.551 states: Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services . . . The continuum required under . . . this section must: (1) Include the alternative placements listed in the definition of special education under §300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and (2) Make provision for supplementary services (such as resource room services or itinerant instruction) to be provided in conjunction with regular class placement. *Id.*

86. *See* 34 C.F.R. §300.552 (1993) states: Each public agency shall ensure that: (a) The educational placement of each child with a disability: (1) Is determined at least annually; (2) Is based on his or her [individualized education program]; and (3) Is as close as possible to the child's home; (b) The various alternative placements included at 300.551 are available to the extent necessary to implement the [individualized education program] for each child with a disability; (c) Unless the individualized education program of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if not disabled; and (d) In selecting the [least restrictive environment], consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs; *see also* 34 C.F.R. § 104.34(a) (1993) ("Whenever a [school district] places a person in a setting other than the regular education environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.").

various alternative placements available in order to ensure that each child with a disability receives an education which is appropriate to his or her individual needs.[87] Regulations implementing Section 504 of the Rehabilitation Act contain very similar language.[88] Today, both advocates and opponents of full inclusion are turning to the courts for interpretive guidance regarding the LRE provision in light of the current full inclusion controversy.

B. Case Law Interpreting The LRE Provision

Courts are split concerning how to interpret and implement the LRE provision.[89] In *Roland M. v. Concord School Committee*, the issue before the United States Court of Appeals for the First Circuit was whether the placement of a child with multiple disabilities in a self-contained class in the public schools was preferable to the private school placement sought by the parents of the child.[90] At the outset, the court stated that the principle function of the district court was one of "oversight" and that the district court rulings should be based on a preponderance of the evidence.[91] The court also stated that the burden of persuasion rested with the party challenging the state education agency decision.[92] In holding that the self-contained classroom was the appropriate placement, the court stated that "an appropriate educational plan . . . requires a balancing of the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum."[93]

The Fourth, Sixth, and Eighth Circuits have applied what is known as the *Roncker* test.[94] *Roncker v. Walter* involved a nine year old boy with severe mental retardation.[95] He was labeled "trainable mentally retarded" and was recommended for placement by the school district at a county school exclusively

87. 34 C.F.R. §330.552 note (1993).

88. The regulations state: A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular education environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §104.34 (1993).

89. *See* 20 U.S.C. §1412(5)(B).

90. Roland M. v. Concord Sch. Comm'n, 910 F.2d 983, 988-989 (1st Cir. 1990) *cert. denied*, 449 U.S. 912 (1992). Interestingly, this case is set in Massachusetts where education law mandates that special education programs assure "the maximum possible development" of handicapped students. *Id.* at 991 (citing Mass. Gen. L. ch. 71B, §2 (1972)). This, of course, is a much higher standard than the "some educational benefit" standard announced in *Rowley*. *See Rowley*, 458 U.S. at 176.

91. *See Roland*, 910 F.2d at 989.

92. *See id.* at 991 (citing Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988)); Spielberg v. Henrico Pub. Sch., 853 F.2d 256, 258, n.2 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989)).

93. *Roland*, 910 F.2d at 993.

94. *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983); Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987), *cert. denied*, 484 U.S. 847 (1987).

95. *Roncker*, 700 F.2d at 1060.

for mentally retarded children.[96] The student's mother contended that the placement did not provide him with enough contact with his non-disabled peers.[97] The district court applied the deferential "abuse of discretion" standard of review and found in favor of the school district.[98]

Rejecting the abuse of discretion approach, the Court of Appeals in *Roncker* set out a test for determining compliance with the least restrictive environment provision of the IDEA.[99] The court stated that " . . . where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could feasibly be provided in a non-segregated setting.[100] If they can, the placement in the segregated school would be inappropriate under the Act."[101]

The *Roncker* court stated that district courts should: (1) compare the benefits the child would receive in special education with those the child would receive in regular education, (2) consider whether the child would be disruptive in the non-segregated setting, and (3) consider the cost of mainstreaming.[102] The court also stated that the district court should have given "due weight" to the administrative proceedings.[103] The court also rejected the second part of the *Rowley* test because *Rowley* " . . . involved a choice between two methods for educating a deaf student," while *Roncker* considered " . . . whether the school district satisfied the [IDEA's] requirement that handicapped children be educated alongside non-handicapped children to the maximum extent appropriate."[104] The *Roncker* court ultimately vacated the district court's decision and remanded the case for further proceedings consistent with its opinion.[105]

The court in *Devries v. Fairfax County School Board* applied the *Roncker* test and held that the placement of a seventeen year old student with autism in a county vocational center was appropriate under the IDEA.[106] The district court found that the school district's more restrictive placement was appropriate because: (1) there was no appropriate peer group academically, socially, or vocationally at the regular education school, (2) even with the help of an aid, the

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96. *See id.*

97. *See id.* at 1061. Both the impartial hearing officer and the State Board of Education found that Neill's placement was not in compliance with the mainstreaming requirement of the IDEA. *See id.*

98. *See id.*

99. *See Roncker*, 700 F.2d at 1063.

100. *Id.*

101. *Id.*

102. *Id.*

103. *See Roncker*, 700 F.2d at 1062 (citing *Rowley*, 458 U.S at 206).

104. *See* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 391 (1990) ("*Rowley* expounded the IDEA of a minimal duty to provide access to some educational benefit; *Roncker* established an open ended commitment to provide services in settings where they have never before been provided."). *Id.*

105. *See Roncker*, 700 F.2d at 1064.

106. Devries v. Fairfax County Sch. Bd., 882 F.2d 876 (4th Cir. 1989).

student would have simply monitored classes with non-handicapped students, (3) the disparity in cognitive levels would have made interaction with the non-disabled students difficult, (4) the student would glean little from the lectures, (5) the student's individual work would be at a much lower level than his classmates, and (6) the vocational school would provide a structured program with one-to-one instruction that the student required.[107] The district court placed a great deal of emphasis on the student's ability to "keep up" with his or her classmates. Full inclusion advocates would probably argue that this emphasis is misplaced.

The *Devries* court invoked the *Roncker* test when it considered the second part of the *Rowley* test, suggesting that the mainstreaming requirement does not exist independently of the FAPE provision as the court in *Roncker* seemed to believe.[108] In terms of the LRE provision, the *Devries* court stated that the provision ". . . obviously indicated a strong preference for mainstreaming," yet the court also stated that mainstreaming is not appropriate for every child.[109] The court ultimately affirmed the district court's conclusion that the student's placement enabled the student to receive a FAPE in the LRE.[110]

A.W. v. Northwest R-1 School District involved an elementary aged boy with Down's Syndrome.[111] The court stated that the second part of the two-part *Rowley* test assumes compliance with the other parts of the act, including the mainstreaming requirement.[112] The court held that the school district's decision not to place the student in the local elementary school did not violate the LRE provision.[113] The court focused on the issue of scarce resource allocation and stated that courts "should not tie the hands of local and state educational authorities who must balance the reality of limited funds against the exceptional needs of handicapped children."[114]

In *Briggs v. Board of Educ.*, the plaintiffs were the parents of a pre-school boy with moderate to severe hearing loss, and speech and language impairments.[115] The parents claimed that their child's placement in a segregated preschool program violated the LRE provision of the IDEA.[116] In reversing the decision of the district court, the Court of Appeals held that the segregated placement was appropriate under the IDEA because the IEP was "'reasonably

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107. *See id.* at 879.

108. *See id.* at 878 (citing *Rowley*, 458 U.S. at 176).

109. *Id.* at 878 (citing 20 U.S.C. §1415(5)(B)).

110. *See Devries*, 882 F.2d at 880.

111. *A.W. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (4th Cir. 1987). The parties stipulated before trial that the procedural requirements of the IDEA had been satisfied. *Id.*

112. *See id.* at 163, n.7.

113. *See id.* at 163.

114. *Id.* at 164.

115. Briggs v. Board of Educ., 882 F.2d 688, 689 (2nd Cir. 1989).

116. *See id.* at 690.

calculated to enable the child to receive educational benefits.'"[117] The court characterized the LRE provision as the "mainstreaming presumption" of the act, yet it eschewed the district court's use of the *Roncker* standard by warning that "courts must be careful to avoid imposing their view of preferable educational methods upon the States."[118]

The Third, Fifth, and Eleventh Circuits use the *Daniel R. R.* test.[119] *Daniel R.R. v. State Bd. of Educ.* involved a six year old boy who was mentally retarded and had speech impairments because of Down's Syndrome.[120] Daniel's placement was in a segregated special education class with some contact with non-handicapped students during recess.[121] Daniel was also allowed to eat lunch three days a week with non-handicapped students if his mother was present to supervise him.[122] His parents claimed that this was an inappropriate placement under the IDEA because it violated the mainstreaming provision.[123] The court first agreed with the Sixth and Eighth Circuits, holding that the *Rowley* test was inappropriate to use when evaluating compliance with the mainstreaming requirement of the IDEA.[124] The court stated that the *Rowley* test assumes that the state has met all the requirements of the Act, including the "mainstreaming" or LRE requirement.[125] The court then rejected the *Roncker* test, claiming that the test necessitated "too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials."[126]

Instead, the court established a two-part test for determining compliance with the mainstreaming requirement.[127] "First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child . . . If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate."[128] Some of the factors a court can consider when applying this test are: (1) Whether the state has taken steps to accommodate the child in regular education; (2) If steps are being taken, are they sufficient (*e.g.*, the state

117. *Id.* at 693 (quoting *Rowley*, 458 U.S. at 206-7).

118. *Id.*

119. *See* Daniel R. R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989); *see also* Oberti v. Board of Educ., 995 F.2d 1204, 1215 (3d Cir. 1993); Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025 (1992), *reinstated*, 967 F.2d 470 (1992).

120. *Daniel R.R.*, 874 F.2d at 1039.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See Daniel R.R.*, 874 F.2d at 1045 (citing *A.W.*, 813 F.2d at 163; *Roncker*, 700 F.2d at 1063).

125. *See id.*

126. *Id.* at 1046.

127. *See id.*

128. *Daniel R.R.*, 874 F.2d at 1048 (citing 20 U.S.C. §1412(5)(B)).

may not make mere token gestures, nor is it required to provide every conceivable supplementary aid or service); (3) Will the child receive an educational benefit from regular education considering the nature and severity of the handicap and the curriculum and goals of the regular education class; (4) What is the balance of benefits between regular and special education for each child; and (5) What effect does the handicapped child's presence have in the regular education classroom, including the disruption and time demands placed on the teacher.[129]

The court applied the two-part test, using the five factors aforementioned, and held that Daniel's placement mainstreamed him to the maximum extent appropriate.[130] The court reasoned that "[r]egular education not only offers Daniel little in the way of academic or other benefits, it also may be harming him . . . [b]alancing the benefits of a program that is only marginally beneficial and is somewhat detrimental against the benefits of a program that is clearly beneficial, we must agree that the beneficial program provides the more appropriate placement."[131]

Greer v. Rome City School District involved Christy, a ten year old girl with Down's Syndrome.[132] Her parents challenged the school district's decision to place her in a self-contained special education class.[133] The court found that the school district did not take steps to accommodate her during the development of her IEP.[134] In light of this finding, the court held that the school district did not comply with the mainstreaming mandate of the IDEA.[135] The court relied heavily on the *Daniel R.R* stating that it: "(1) made a comparison of the educational benefits the child with a disability will receive in a regular education classroom, supplemented by appropriate aids and services, with the benefits the student will receive in a self-contained special education environment, (2) considered the effect the presence of the child with a disability would have on the other children in the regular education classroom, and (3) considered the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the child with a disability in a regular classroom."[136]

In *Oberti v. Board of Educ.*, the parents of an eight year old child with Down's Syndrome challenged the school district's decision to remove the child from the regular classroom and place him in a segregated special education

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129. *See id.* at 1048-49 (notably, the court did not discuss the cost factor in its opinion).

130. *See id.* at 1051.

131. *Id.*

132. Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir.), *withdrawn*, 956 F.2d 1025 (1992), *reinstated*, 967 F.2d 470 (1992).

133. *See* Greer, 950 F.2d at 690.

134. *See id.* at 698.

135. *See id.*

136. *Id.* at 697.

classroom.[137] Whereas most courts have held that the burden of proof in the district court proceeding rests with the party challenging the state education agency decision, the *Oberti* court held that the burden of proving compliance with the IDEA's mainstreaming requirement falls on the school district.[138] This is significant because other courts have held that the burden of proof in the district court proceeding rests with the party challenging the state education agency decision.[139] The court also held that "due weight" is owed to the administrative proceedings, but the amount of deference to be afforded to the proceedings is an issue left to the discretion of the district court.[140]

The *Oberti* court applied the two-part *Daniel R.R.* test and held that the school district violated the mainstreaming requirement of the IDEA.[141] The court reasoned that: (1) the school district had made only negligible efforts to include Rafael in a regular classroom, (2) Rafael would benefit socially and academically from "inclusion"[142] in the regular education class, and that children without disability in the class would also benefit from his inclusion, and (3) the district improperly justified Rafael's exclusion from less restrictive placements based on past behavioral problems which ". . . were exacerbated and remained uncontained due to the inadequate level of services provided [in the developmental kindergarten class]."[143]

The Court of Appeals for the Ninth Circuit adopted a test which employs factors from both lines of cases.[144] In *Sacramento City Unified Sch. Dist. v. Rachel H.* the parents of an 11 year old girl with moderate mental retardation wanted her placed full-time in a regular education classroom.[145] The school district wanted to divide Rachel's time between a self-contained special education class for academic subjects and a regular class for non-academic subjects such as art, music, lunch and recess.[146] The Holland's decided to enroll Rachel

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137. Oberti v. Board of Educ., 995 F.2d 1204, 1206 (3rd Cir. 1993).

138. *See Oberti*, 995 F.2d at 1219.

139. *See id.*; *see also* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990), *cert. denied*, 449 U.S. 912 (1992); Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988).

140. *See id.* (citing Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853, 857 (11th Cir. 1988)).

141. *See id.* at 1223.

142. Not only does the court explicitly use the term "inclusion," the court cites: (1) the NASBE report, (2) the Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, which state that two-thirds of the state plans submitted to the Department of Education were not in compliance with the LRE provision, and (3) David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 187 (1991). *See id.*

143. *Oberti*, 995 F.2d at 1220-23.

144. *See* Sacramento City Unified Sch. Dist. v. Rachel H., No.92-15608, 1994 U.S. App. LEXIS 1124 (9th Cir. Jan. 24,1994).

145. *Id.* at 2.

146. *See id.*

in a regular kindergarten class at a private school and invoke their procedural rights under the IDEA.[147]

The Court of Appeals affirmed the district court's holding that ". . . the appropriate placement for Rachel was full-time in a regular second grade classroom with some supplemental services."[148] The Court of Appeals also affirmed the four-factor balancing test employed by the district court, which considers: (1) the educational benefits of placement full-time in a regular education class; (2) the non-academic benefits of such a placement; (3) the effect the student with a disability has on the teacher and children in the regular class, and (4) the cost of mainstreaming the student with a disability.[149]

The Appellate Court expressly affirmed the determinations of the district court that: (1) Rachel received substantial benefits in regular education and that all of her IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide, (2) Rachel's placement in the regular kindergarten class at the private school improved her self-confidence, and fostered new friendships and feelings of excitement about school and learning, (3) Rachel was not disruptive, distracting, or unruly, and she did not interfere with the teacher's ability to teach the other students in the class, and (4) the school district had inflated the cost estimates and failed to show that the cost of placing Rachel in a regular classroom would be prohibitive.[150]

In light of the various approaches taken by courts attempting to apply the LRE provision of the IDEA, Congress or the Supreme Court should set down one clear standard for deciding these cases.

V. A New Standard of Persuasion under the LRE Provision

As stated, the LRE provision of the IDEA creates a rebuttable presumption that children with disabilities should be educated in a regular education environment with appropriate supplemental aids and services.[151] Before a school district segregates a child with a disability, current law requires the district to rebut this presumption by demonstrating that a "preponderance of the evidence" indi-

147. *See id.* at 3; *see also* 20 U.S.C. §1415 (1990) *amended by* Pub. L. No. 105-17, 111 Stat. 85 (1997).

148. *Sacramento City Unified Sch. Dist., supra* note 144, at 10.

149. *Id.* at 16.

150. *See id.* at 5 - 10.

151. *See, e.g.,* Oberti v. Board of Educ., 995 F.2d at 1204, 1213; *see also* H. Rutherford Turnbull III, *Free Appropriate Public Education: The Law and Children with Disabilities* 161 (1990); Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103, 1122 (1979) (recommending that the party seeking removal of the disabled child from a regular education environment bear the burden of persuasion); Commet, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and Analysis,* 13 GONZ. L. REV. 717, 772-77 (1978).

cates that a regular education placement is inappropriate.[152] This presumption should be strengthened to require school districts to rebut it with "clear and convincing evidence" that a regular education placement is inappropriate.[153] The clear and convincing standard of proof will more effectively promote the purposes and values underlying the IDEA because more children with disabilities will be educated in fully integrated classrooms. This new standard of proof could be implemented through express Congressional amendment but it can also be gleaned from the IDEA using traditional tools of statutory interpretation.

A. CONGRESSIONAL AMENDMENT

Initially, so as to leave no doubt as to the matter, Congress could amend Section 20 U.S.C. 1415(e)(2) to read:

> Any party aggrieved by the findings and decision made under . . . this section . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section . . . . In actions brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. *However, in actions alleging violation of section 1412 subsection (5)(b), the state or local educational agency must produce clear and convincing evidence that the disabled child cannot be satisfactorily educated in a regular education environment with appropriate supplementary aids and services.*[154]

Because the IDEA does not define "satisfactory" education, impartial hearing officers, state educational agencies, and courts should apply the four factor balancing test employed by the United States Court of Appeals for the Ninth Circuit in *Holland v. Board of Educ.*[155] As discussed above, the *Holland* test, requires courts to balance (1) the educational benefits to the student with a disa-

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152. *See* 20 U.S.C. §1415(e)(2)(stating that courts reviewing educational placements must base their decisions on a "preponderance of the evidence"). *See id.*

153. Clear and convincing evidence is evidence that persuades a fact finder that the truth of the contention is "highly probable," whereas a preponderance of the evidence is generally defined as proof which makes "the existence of the contested fact more probable than its nonexistence." MCCORMICK ON EVID.,§§339, 340 (4th ed. 1992). Classes of cases that commonly apply the clear and convincing standard include: (1) charges of fraud and undue influence; (2) suits on oral contracts to make a will, and suits to establish the terms of a first will; (3) suits seeking specific performance of an oral contract; (4) proceedings to set aside, reform, or modify written transactions, or official acts on grounds of fraud, mistake or incompleteness; and (5) miscellaneous types of claims and defenses where there is thought to be special danger of deception, or where the court considers the particular type of claim should be disfavored on policy grounds." *See id.* at §340.

154. 20 U.S.C. §1415(e)(2) (emphasis added to proposed text); *see* Daniel R.R. v. State Bd. of Educ., 874 F.2d at 1036, 1048 (stating that the proper test in cases under the LRE provision is ". . .whether education in the regular education classroom, with the use of supplemental aids and services, can be achieved satisfactorily"). *Id.*

155. Holland v. Board of Educ., 768 F. Supp. at 1404.

bility from placement in a full-time regular education class, (2) the non-academic benefits to the student from such a placement, (3) the effect of that student's presence on the teacher and children in the regular education class, and (4) the cost of mainstreaming the student with a disability.[156] Thus, the clear and convincing standard of persuasion could be successfully implemented through express Congressional amendment.

B. STATUTORY INTERPRETATION

Absent Congressional amendment, however, the clear and convincing standard of persuasion can still be gleaned from the IDEA using traditional tools of statutory interpretation.[157]

1. *Plain Meaning*

As an initial matter, the "plain meaning" of 20 U.S.C. §1412(5)(B) implies that school districts must produce clear and convincing evidence to rebut the presumption of regular education placement. The IDEA explicitly states that children with disabilities must be included in regular education classes to the "maximum extent appropriate."[158] At the very least, "maximum extent appropriate" indicates a strong congressional preference for educating children with disabilities in regular education classes.[159]

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156. *See id.* at 1404; *see also* JoEllen Lane, Note, *The Use of the Least Restrictive Environment Principle in Placement Decisions affecting School-Age Students with Disabilities*, U. DET. L. REV. 291, 309-21 (1992). Ms. Lane groups the various factors employed by courts into three categories: (1) those which bear on the needs of the student with the handicap, (2) those which bear on the needs of the other students in the call or building, and (3) those which bear on efficiency and economy of program administration. *Id.* Although the cost factor is fraught with controversy, courts should always balance the cost of mainstreaming a disabled child when applying this test because limited funding requires school district administrators to compare the costs of a given program to the benefits it produces. *See* Leslie A. Collins & Perry A. Zirkel, *To What Extent, Any, May Cost Be a Factor in Special Education Cases?*, 71 WEST EDUC. L. REP. 11 (1992). Collins and Zirkel conclude that: (1)school districts should not base placement decisions solely on cost; (2) cost cannot be used to justify blanket exclusion of services to all handicapped students unless such exclusion is found in the [IDEA]; (3) cost cannot be used as a defense where a school district has failed to offer a continuum of programs as required under the [IDEA]; (4) the high cost of a handicapped child's program is material in its effect on the cost of programs for other handicapped students more than on that for non-handicapped students; and (5) courts are increasingly, although not consistently comparing the cost of a program or service to the benefit received by the child. *See id.* at 24-25.

157. Note, if courts adopt the clear and convincing standard of persuasion and Congress objects, Congress can simply amend the IDEA to overturn those decisions.

158. *See* 20 U.S.C. §1412(5)(B); *see also* Sutherland, STATUTORY CONSTRUCTION §46.01 (5th ed. 1993) ("There is no safer nor better settled cannon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses.") (quoting United States v. Article of Drug, 484 F.2d 748 (7th Cir. 1973)).

159. The plain meaning of 20 U.S.C. §1412(5)(B) also implies that something more is required than the minimal showing under the Supreme Court's test for determining whether a disabled child's individual educational program (IEP) complies with the IDEA. *See* Board of Educ. v. Rowley, 458 U.S. at 176. *Rowley* asks whether a disabled child's IEP is "reasonably calculated to achieve educational

The plain meaning of Section 504 of the Rehabilitation Act, which prevents entities that receive federal government funds from discriminating on the basis of disability, also supports the requirement of clear and convincing evidence before a school district segregates a disabled child from his or her non-disabled peers.[160] The plain meaning of the regulations implementing the LRE provision, and Section 504 of the Rehabilitation Act, also support the clear and convincing standard of persuasion.[161] The regulations under both statutes place the burden of persuasion on the school district by requiring it to prove that a regular education placement cannot be achieved satisfactorily. Thus, imposing the clear and convincing standard of persuasion strengthens the presumption of regular education placement by giving effect to the plain meaning of the statutes and regulations that secure a child with a disability the right to be educated in the least restrictive environment.

Finally, remedial statutes such as the IDEA should be "construed liberally to suppress the evil and advance the remedy."[162] The stated purpose of the IDEA is to protect the rights of disabled children with disabilities and their guardians.[163] Congress findings prefacing the IDEA indicate that Congress was motivated to enact the Act by: (1) the exclusion of children with disabilities from public education, and (2) the documented hardships faced by children with disabilities and their parents attempting to find services outside the public school system.[164]

Thus, the plain meaning and remedial nature of the LRE provision and implementing regulations require that school districts to rebut the presumption of regular education placement with clear and convincing evidence.

2. *Legislative History*

Although somewhat controversial, courts can also look to the IDEA's legislative history if the plain meaning of the text is "at variance with the policies underlying the statute, or if there is clearly expressed legislative intention con-

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benefits." *Id.* However, *Rowley* involved the "free appropriate public education" provision of the IDEA, not the LRE provision. *Id.* Thus, *Rowley* is not controlling in cases under the *LRE* provision.

160. *See* 29 U.S.C. §794 (1988).

161. *See* 34 C.F.R. §§300.550-556 (1993) (implementing the LRE provision of the IDEA) and 34 C.F.R. §104.34(a) (1993)(implementing section 504 of the Rehabilitation Act). For example, 34 C.F.R. §300.550 mirrors the language of the IDEA and states that "[e]ach educational agency shall ensure that public agency establishes and implements procedures which meet the requirements of 34 C.F.R. §§300.550-556." Section 300.550 also states that "each public agency shall insure . . . that to the maximum extent appropriate, children with disabilities . . . are educated with children who are not handicapped." 34 C.F.R. §300.550 (1993); *see also* 34C.F.R. §104.34(a) (1993) ("Whenever a [school district] places a person in a setting other than the regular education environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.") *Id.*

162. *Sutherland, supra,* note 158, §60.01 (citing Flores v. United Air Lines Inc., 757 P.2d 641 (Haw. 1988).

163. *See* 20 U.S.C. §1400(b).

164. *See* 20 U.S.C. §1401(3).

trary to the language of a statute."[165] The legislative history of the IDEA and the LRE provision support the adoption of the requirement of clear and convincing standard of proof. The legislative history of the IDEA focuses on the origins of the Act and describes relevant case law prior to the enactment of the IDEA.[166] Specifically, the Committee Reports refer to the PARC and *Mills* cases and to the vast numbers of children with disabilities excluded or inadequately served by the public school system.[167]

In recommending passage of the IDEA, the Senate Committee on Labor and Public Welfare stated:

> The Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the nation . . . . [O]ver the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution . . . . It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. . .[168]

The Senate Committee's statements and the legislative history of the IDEA illustrate Congress' strong preference that children be educated with their non-disabled peers. Thus, the clear and convincing standard of persuasion furthers the expressly stated legislative purpose of the LRE provision.

3. *Constitutional Values*

Finally, the Constitutional values underlying the IDEA also support the adoption of the more stringent requirement of clear and convincing standard of proof in LRE cases. The most obvious constitutional values underlying the IDEA are the notions of due process and equal protection. These values are served when school districts are forced to proffer clear and convincing evidence that a child cannot be appropriately educated in a regular education classroom before school districts treat children with disabilities differently than their non-disabled peers by educating the children them in a segregated environment.[169]

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165. *Sutherland*, *supra*, note 158, §46.01 (citing Escobar Ruiz v. Immigration & Naturalization Serv., 838 F.2d 1020 (9th Cir. 1988)).

166. *See* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 362 (1990).

167. *See* S. REP. No. 168, 6 (1975); *see also* H.R. REP. No. 332 (1975); *Pennsylvania Assoc. of Retarded Citizens v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Board of Educ., 348 F. Supp. 866 (D.C. 1972).

168. *See* S. REP. No. 1686 (1975).

169. A related equal protection justification for the LRE provision lies in the documented over-representation of blacks in segregated special education classes. For example, one study shows that

In addition, the clear and convincing standard of persuasion also promotes the right of children with disabilities to associate with non-disabled children, an important constitutional value rooted in the First Amendment.[170] The right of association is more than a constitutional imperative; it is also a positive force in broadening individual and cultural dimensions of the citizenry and in dispelling stigmatizing and discriminatory attitudes of non-handicapped people concerning disabled people.[171] Ultimately, "the critical analytical problem of discrimination in the handicapped context is less one of overcoming bigotry and invidious prejudice than one of redesigning social structures and institutions to make them more responsive to the needs of the disabled segment of the population."[172]

Thus, the plain meaning of the text and regulations implementing the LRE provision, the legislative history of the IDEA, and the constitutional values underlying the IDEA, all support the adoption of a requirement that school districts rebut the presumption of a regular education placement with clear and convincing evidence that a child with a disability cannot be appropriately educated in a regular education classroom.

VI. RESPONSE TO COMMENTATORS

Commentators approach special education law and the issue of inclusion from a variety of ideological viewpoints. One of these viewpoints is the Critical Legal Studies (CLS) movement. In general, the CLS movement posits that existing law and institutions are "socially constructed" and that social choices reflect a class struggle inherent in the historical evolution of our political and economic relations.[173] CLS scholars also argue that law and legal discourse are used to make these arrangements appear "natural" and that this "myth" is used to legitimize past and present class conflicts and exploitation.[174]

In the special education context, one commentator Professor Theresa Glennon appears to adopt the CLS perspective and argues that the current system mistreats children with emotional disabilities because it approaches problems

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twice as many blacks are classified as mentally retarded as compared to whites. *See* Joseph P. Shapiro et al., *Separate and Unequal*, U.S. NEWS & WORLD REP., Dec. 1993, at 54.

170. *See* H. Rutherford Turnbull III, *Free Appropriate Public Education: The Law and Childrenwith Disabilities* (1990). *See id.*

171. *See id.* at 164; *see also* H. Rutherford Turnbull III, *A Policy of "Least Restrictive" Education of Handicapped Children*, 14 RUTGERS L.J. 489, 502-04 (1983).

172. Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1436 (1986) (stating that the real issues are the degree of structural change society will tolerate and the cost society is willing to pay).

173. *See* Robin Paul Malloy, *Law And Economics: A Comparative Approach To Theory And Practice*, 65 TEMP L. REV. 187, 189 (1990) (discussing ideological bias and its influence on legal discourse).

174. *See id.*

using either a "medical" or "punitive" paradigm.[175] Professor Glennon argues that these two paradigms are socially constructed and permeate the way we view people in our society.[176] She also criticizes the power relationships set up by the current special education system because they place too much power in the hands of "experts" who intimidate parents at Individual Education Program (IEP) conferences.[177]

Professor Glennon rejects the medical and punitive paradigms and proposes a new "learning" paradigm where: (1) all children are treated as "learners," (2) behavioral, social, and emotional learning is made an important part of a child with an IEP disability, and (3) educators become "learners" and reflective practitioners who reflect on the school environment and modify the environment in "important" ways.[178] Ultimately, Professor Glennon believes that educators must assume more responsibility for the learning of a student with an emotional disability, rather than punishing the child or sending the child away for medical treatment.[179]

Professor Glennon's analysis is an insightful and thought provoking deconstruction of the way our society views children with emotional disabilities. However, whether socially constructed or not, the medical and punitive paradigms are significantly more helpful than Professor Glennon's "learning" paradigm. The medical paradigm is more helpful because it reflects the fact that therapists and other medical professionals can often help children understand and control their disruptive behavior. In fact, professional assistance often enables these children to participate more fully in our society - an overriding goal of the IDEA. The medical paradigm also reflects the widely accepted notion that not all disruptive children should be held morally or legally accountable for their behavior. The punitive paradigm is also significantly more helpful than Professor Glennon's learning paradigm because it reflects the traditional and tested view that voluntary disruptive behavior is unhealthy, undesirable, and should be controlled. In sum, Professor Glennon's learning paradigm is hopelessly vague and, unlike the adoption of the clear and convincing evidence standard of proof, does nothing to actively encourage school districts to educate more children with disabilities with their non-disabled peers when it can be done appropriately.

Another professor, David M. Engel, also appears to take a CLS approach to special education and focuses on the power relationships created by the current special education scheme. He argues that the current scheme is flawed because

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175. *See* Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students Emotional Disabilities*, 60 TENN. L. REV. 295, 314-15, 325 (1993).

176. *See id.*

177. *See id.*

178. *See id.* at 344.

179. *See* Glennon, *supra* note 175, at 344-5.

"professional" knowledge and opinions expressed at IEP conferences carry more weight than parental knowledge and opinions.[180] He believes this happens because: (1) parents are outnumbered and "surrounded" by professionals at the conferences, (2) school district officials are more reluctant to oppose one another than to oppose the "outsider" parents, (3) parents' IDEAs are viewed as inherently suspect because of their emotional attachment to the child, (4) parents are generally anxious and inarticulate because there is more at stake for them, and (5) parents are generally less educated than the school district officials and are generally less conversant in special education jargon and legalese.[181] Professor Engel concludes that parents have little power or authority in social and cultural terms even though their legal power is rather significant.[182] According to Professor Engel, this problem stems from the fact that parents are reluctant to exercise their legal power because

> parents correctly sense that it contains a hidden and highly destructive set of implications. Although it might liberate their children from isolated and inadequate educational programs, [exercising their legal power] can reinforce an already prevalent understanding that children with disabilities are separated from "normal" children by clear and unmistakable boundaries. The assertion of rights under the [IDEA] could thus reproduce, in the long run, the very distinctions it sets out to obliterate and could relegate children with disabilities to a life of "otherness" from which neither law nor culture could free them.[183]

While Professor Engel offers a valuable deconstruction and critique of the power relationships inherent in the IEP process, his solution to the problem is a vague "relationships" approach that emphasizes increased power sharing.[184] Professor Engel's solution is flawed it is based on the false premise that parents are choosing not to exercise "significant" legal power. In fact, what parents need is more legal power to force school districts to fully integrate children with disabilities into regular education classes where appropriate. Requiring school districts to produce clear and convincing evidence that a child with disabilities cannot be educated with his or her non-disabled peers will more effectively address the uneven distribution of power identified by Professors Engel.

CONCLUSION

Full inclusion, where appropriate, constitutes long overdue compensation for the years of suffering and unfair treatment endured by children with disabilities

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180. *See* David M. Engel., *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 194 (1991).

181. *See id.*

182. *See id.*

183. *Id.* at 205.

184. *See* Engel, *supra* note 180, at 205.

in our society. It is also consistent with the spirit of the IDEA and fulfills our responsibility to provide all children with an equal opportunity to participate and share in the fruits of our society to the greatest extent possible In order to achieve these ends, we must not segregate a child with a disability from his or her non-disabled peers unless there is clear and convincing evidence that it is necessary and appropriate.

Kansas v. Hendricks
117 S. Ct. 2072

CASE SURVEY

BRETT D. CARROLL†

NO. 95-1649. ARGUED DECEMBER 10, 1996 - DECIDED JUNE 23, 1997

Over the course of thirty years, Leroy Hendricks stalked and molested at least twelve young children.[1] These boys and girls were the innocent victims of an evil predator; a man, who, in his own words, stated that he "[could] not control the urge" to "molest children."[2] Mr. Hendricks had spent much of his life in and out of prison, but neither his convictions nor the knowledge of the harm that he had caused his victims stopped him.[3] In a recent court appearance, Hendricks readily agreed that he suffered from pedophilia, that he is not cured of the condition, and that "treatment [for the condition was] bullshit."[4] Mr. Hendricks is only one of the thousands of evil predators who continue to stalk children as their prey.

On June 23, 1997, the United States Supreme Court, in a five to four decision, upheld the decision by the state of Kansas to commit Leroy Hendricks to the Secretary of Social and Rehabilitation Services under the Sexually Violent Predator Act of 1994 [hereinafter the Act].[5] The Act establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence."[6] The Court held that the Act's definition of "mental abnormality" satisfied that substantive due process protections against arbitrary governmental action under the Constitution of the United States.[7] The Court also held that the Act did not violate an individual's Constitutional protection against double jeopardy nor was it ex post facto law making.[8]

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† J.D. expected May 1998, Syracuse University College of Law; B.A.(Great Distinction), McGill University.

1. Kansas v. Hendricks, 117 S. Ct. 2072, 2078-79 (1997).
2. *Hendricks*, 117 S. Ct. at 2079 (citing Brief for Petitioner at 172, Kansas v. Hendricks, 117 S. Ct. 2072 (No. 95-1649)(1997)).
3. *See* Petitioner's Brief at 153, *Hendricks* (No. 95-1649).
4. *See id.* at 153, 190.
5. *See Hendricks*, 117 S. Ct. at 2072.
6. KAN. STAT. ANN. §59-29a01 et. seq. (1994), §59-29a02(b).
7. *See Hendricks*, 117 S. Ct. at 2079; *see also* U.S. CONST. amend. XIV.
8. 117 S. Ct. at 2086; U.S. CONST. art. I, §10, cl. 1 (Ex Post Facto Clause), U.S. CONST. amend. V (Double Jeopardy Clause).

Shortly before Mr. Hendricks was slated for his release from prison,[9] Kansas invoked the Sexually Violent Predator Act in state court for the first time since its enactment, seeking the civil confinement for Mr. Hendricks.[10] On August 19, 1994, Mr. Hendricks challenged the commitment as a violation of various constitutional provisions.[11] The court did not decide on the constitutionality of the Act, but rather held that there was probable cause to support the state's finding that Mr. Hendricks was a sexually violent predator who should be evaluated at the state security hospital.[12] Hendricks then petitioned for a jury trial in order to determine whether he qualified as a sexually violent offender.[13] The jury unanimously found, beyond a reasonable doubt, that Hendricks was a sexually violent offender.[14] The trial court subsequently determined that pedophilia, as a matter of state law, qualified as a "mental abnormality" as defined by the Act and ordered Hendricks to be committed to the state's custody.[15] Mr. Hendricks appealed, claiming that the Act violated the Constitution's Due Process, Double Jeopardy, and Ex Post Facto Clauses.[16]

The Kansas Supreme Court accepted Hendrick's due process claim and held that in order to commit a person to an involuntary civil commitment proceeding, the State was required, under the substantive due process clause, to show that the person was not only mentally ill but also danger to himself and/or others.[17] The court held that the state failed to meet its burden of showing that "mental abnormality," as defined in the Act, was equivalent to a showing of mental illness as required by prior case law.[18] Thus, the court reversed the lower court's decision and held that the Act violated Hendricks' substantive due process rights.[19] Certiorari was granted by the Supreme Court, and Justice Thomas writing for the majority, held that the Act was not a constitutional violation of Mr. Hendrick's rights under the Due Process, Double Jeopardy, or Ex Post Facto Clauses.[20]

The Court, in rejecting Hendricks' due process claim of Hendricks, held that the Act's definition of "mental abnormality" met the substantive due process requirements as secured by the Constitution.[21] The Court had long held that

9. Hendricks was slated for release from prison from a 1984 conviction for taking "indecent liberties" with two 13 year-old boys. *See Hendricks*, 117 S. Ct. at 2078.

10. *See id.* at 2078.

11. *See id.* at 2079.

12. *See id.*

13. *See Hendricks,* 117 S. Ct. at 2079.

14. *See id.*

15. *See id.*

16. *See In re* Hendricks, 912 P.2d 129, 138 (Kan. 1996), *rev'd* 117 S. Ct. 2072 (1997).

17. *See id.* at 137.

18. *See id.*

19. *See id.*

20. *See Hendricks*, 117 S. Ct. at 2078.

21. *See id.* at 2079.

individuals do not have an absolute liberty interest, especially when restraints were necessary for the common good and public safety.[22] The Court had consistently upheld involuntary civil commitment statutes which provided for the confinement of individuals who posed a danger to public health and safety.[23]

The majority was also quick to dismiss Hendrick's Double Jeopardy and Ex Post Facto claims holding that the Act did not establish a criminal proceeding.[24] Hendricks contended that the newly enacted "punishment" was predicated upon past conduct, for which he has already served a prison sentence, thus violating the Constitution.[25] The majority held that the Court generally defered to the legislature's intent when determining the classification of a statute as either civil or criminal.[26] The Court found that Kansas intended to create a civil proceeding by its placement of the Act in the probate code rather than the criminal code, and by specifically stating that the Act created a civil commitment procedure.[27] Hendricks, the Court found, failed to satisfy the heavy burden of showing that, through the "clearest proof," the Act was so punitive in nature as to negate its civil classification.[28]

The dissent, however, led by Justice Breyer, found that the Act violated the Ex Post Facto Clause because it essentially inflicted a greater punishment than the law provided for at the time Hendricks committed his crime in 1984.[29] The dissent found numerous similarities between the Act and the classic criminal proceeding which, the dissent argued, demonstrated that the Legislature's actual intent was not civil in nature, but rather, a second criminal proceeding.[30] Specifically, the Act implicated the concepts of incapacitation and secured confinement, concepts traditionally associated with criminal proceedings.[31] Moreover, the Act, like criminal punishment, imposed its sanctions only upon an individual who had committed a past crime.[32] The Act also imposes that confinement through traditional means associated with criminal law including the use of

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22. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992)(holding that liberty interests are not absolute).

23. *Hendricks,* 117 S. Ct. at 2079 citing Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905). *See generally Foucha,* 504 U.S. at 80.

24. *See id.* at 2081-82.

25. *See id.* at 2081.

26. *See id.* at 2081-82. *See also* Allen v. Illinois, 478 U.S. 364, 368 (1986); *cf.* Jones v. U.S., 463 U.S. 354, 365 n.13 (1983).

27. *See* KAN. STAT. ANN. §59-29a01 ("Care and Treatment for Mentally Ill Persons").

28. *See Hendricks,* 117 S. Ct. at 2082 citing U.S. v. Ward, 448 U.S. 242, 248-49 (1980).

29. *See id.* at 2090 citing California Dept. of Corrections v. Morales, 514 U.S. 499, 505 (1995); *see also* U.S. CONST. art. I, §10, cl. 1.

30. *See id.* at 2090.

31. *See* KAN. STAT. ANN. §59-29(a)07(a).

32. *See* KAN. STAT. ANN. §§59-29(a)02(a), 59-29(a)03(a); *see also* Lipke v. Lederer, 259 U.S. 557, 561 (1922).

prosecutors, procedural guarantees (including trial by jury), and the standard of beyond a reasonable doubt.[33]

In stark contrast, the majority, found that the civil confinement under the Act, was not punitive in nature.[34] Like the dissent, the majority compared the major aspects of the Act to a traditional criminal proceeding, but unlike the dissent, found that none of the traditional norms associated with criminal law were implicated by the Act.[35]

The majority held that, when accompanied by the appropriate circumstances and proper procedures, incapacitation may be a legitimate end of the civil law, even though treatment may not be possible for an individual.[36] The Kansas court's determination that the Act's overriding concern was the continued "segregation of sexually violent offenders" was, according to the majority, consistent with its conclusion that the Act established civil proceedings, especially when that concern was "coupled with the States' ancillary goal of providing treatment to those offenders, if possible."[37] The Court also stated that it had never held that the Constitution prevented a State from civilly detaining those for whom no treatment was available but nevertheless posed a danger to others.[38]

Both the dissent and Hendricks finally argued that the Act was necessarily punitive because it failed to offer any legitimate treatment.[39] Without treatment, confinement under the Act would merely be "disguised punishment" and a violation of the Ex Post Facto Clause.[40] The dissent agreed with the Kansas Supreme Court decision that "treatment," under the Act was a matter that was "incidental at best."[41]

The majority's conclusion that the Act was non-punitive in nature removed the essential prerequisite for Hendrick's double jeopardy and ex post facto

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33. *See Hendricks*, 117 S. Ct. at 2091.

34. *See id.* at 2081.

35. *See id.* at 2081-83 citing U.S. v. Ursery, 518 U.S. 267 (1996)(holding the fact that an Act may be "tied to criminal activity" is "insufficient to render the statute punitive); *see also*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)(holding, in part, that scienter requirement is important in distinguishing criminal from civil statutes); U.S. v. Salerno, 481 U.S. 739, 747 (1987)(stating that the confinement of "mentally unstable individuals who present a danger to the public" as one classic example of non-punitive detention).

36. *See Allen*, 478 U.S. at 373.

37. *Hendricks*, 117 S. Ct. at 2084.

38. *See id.* at 2084 citing Accord Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380 (1902)(permitting the involuntary quarantine of persons suffering from communicable diseases).

39. *See id.* at 2092.

40. *Hendricks*, 117 S. Ct. at 2083.

41. *In re* Hendricks, 912 P.2d at 136. In contrast, the *Allen* Court wrote "'treatment, not punishment' [was] the aim of the statute." *Allen*, 478 U.S. at 367 quoting People v. Allen, 481 N.E.2d 690, 694-95.

claims.[42] The Double Jeopardy Clause provides that a State cannot punish an individual twice for the same crime committed.[43] The Court found that the Clause was not implicated by the Act because a civil commitment does not constitute a second prosecution.[44] As the Supreme Court found in *Baxstrom v. Herold* commitment, although following a prison term, did not constitute "punishment."[45] The state was under no obligation to release an individual, who had met the requirement for involuntary civil commitment, just because detention would follow a period of incapacitation.[46]

Similarly, the Ex Post Facto Clause "forbids the application of any new punitive measures to a crime already committed."[47] This Clause has been interpreted to exclusively apply to penal statutes.[48] The Act, the Court found, did not raise ex post facto concerns because it did not implicate criminal punishment.[49] Furthermore, the Court held that the Act did not criminalize any conduct that was legal before its enactment.[50]

Whether one agrees with the Supreme Court's decision is likely predicated on his/her belief that civil confinement after serving a criminal term is essentially a second punishment. This is a question of interpretation, one that is left to the determination of the courts. However, the courts seem to be receptive to the public sentiment that those who molest and abuse must be contained and prevented from hurting children ever again.

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42. *See id.* at 2085.

43. *See* U.S. CONST. amend. V. *See also* Witte v. United States, 515 U.S. 389, 396 (1995).

44. *See Hendricks*, 117 S. Ct. at 2085; *cf.* Jones v. United States., 463 U.S. 354 (1983)(permitting involuntary civil commitment after verdict of not guilty by reason of insanity).

45. *See Hendricks*, 117 S. Ct. at 2086 citing Baxstrom v. Herold, 383 U.S. 107, 86 (1966)(holding that civil commitment could follow the expiration of a prison term without offending double jeopardy principles).

46. *See id.* at 2086.

47. *Id.*

48. *See id* at 2086.

49. *See Hendricks*, 117 S. Ct. at 2086.

50. *See id.*

Washington v. Glucksberg
117 S. Ct. 2258

CASE SURVEY

ALEXANDER PERCHEKLY†

WASHINGTON STATES PROHIBITION OF PHYSICIAN-ASSISTED SUICIDE; A VIOLATION OF A FUNDAMENTAL RIGHT OR A GOVERNMENTAL INTEREST IN PROMOTING PUBLIC-HEALTH AND SAFETY?

Four doctors from the state of Washington, Harold Glucksberg, M.D., Abigail Halperin, M.D., Thomas A. Preston, M.D., and Peter Shalit, M.D., ("Respondents") are occasionally confronted with terminally ill patients suffering from painful and incurable diseases.[1] In such cases, these physicians, along with numerous other medical doctors, are faced with the ethical, moral and legal choice of what role they can take in alleviating the pain and suffering of these patients in light of state statutes prohibiting physician-assisted suicide. The difficulty in resolving this issue stems from the inherent conflict between a state's interest in promoting public-welfare and safety and an individual's right to privacy in choosing a humane and dignified death. This problem was recently addressed by the United States Supreme Court in *Washington v. Glucksberg*.[2] In *Glucksberg*, a claim was filed by the Respondents and their terminally-ill patients against the state of Washington and its Attorney General ("Petitioners") to challenge its prohibition against physician-assisted suicide.[3] The doctors in this case had to decide on either assisting their terminally ill patients in hastening their inevitable deaths or in abiding by the Washington State law prohibiting physicians from assisting their patients in committing suicide.[4]

In *Glucksberg*, there were three terminally ill patients involved, none of whom survived to the conclusion of this case.[5] The first patient was Jane Roe, a sixty-nine year old retired physician dying of breast cancer.[6] Although Ms. Roe

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† J.D. expected May 1998, Syracuse University College of Law.

1. *See* Brief for Respondent at 4, Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (No. 96-110).

2. *See Glucksberg*, 117 S. Ct. 2258.

3. *See id.* at 2261.

4. *See* Brief for Respondent at 4, Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (No. 96-110). Additionally, Washington state law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. Promoting a suicide attempt is a felony punishable by up to five years imprisonment and up to a $10,000 fine." *Glucksberg*, 117 S. Ct. at 2261. Most of these terminally-ill patients are mentally competent, and understand their condition and desire for physician-assisted suicide to prevent prolonged pain and suffering. *See id.*

5. *See id.* at 2.

6. *See id.*

underwent surgery, chemotherapy, and radiation therapy, she could not stop the cancer from spreading throughout her entire body.[7] The second patient was forty-four year old John Doe, who was terminally ill with AIDS.[8] As a result of the debilitating nature of AIDS, Mr. Doe was vulnerable to all manner of infection and was suffering from loss of vision, chronic skin infections, sinusitis and seizures.[9] Mr. Doe's health was rapidly diminishing along with his ability to care for himself.[10] The third patient, Mr. James Poe, was sixty-nine years old and dying of emphysema.[11] Mr. Poe struggled with every breath he was barely able to take.[12] His condition required an oxygen tube twenty-four hours a day to prevent him from suffocating while also suffering from associated heart failure.[13] In all of these cases the treating physicians had informed their patients that there was no hope of recovery.[14]

> In January 1994, the Respondents filed a lawsuit in the United States District Court for the Western District of Washington seeking to overturn the Washington state law prohibiting assisted suicide on the grounds that it was unconstitutional.[15]

The Respondents argued that the Fourteenth Amendment to the United States Constitution extended a liberty interest to enable a mentally competent, terminally ill adult to commit suicide and to receive physician's assistance while doing so.[16] After the District Court found for the Respondents[17] an appeal was filed by the Petitioners to the Ninth Circuit Court of Appeals which reversed the District Courts decision.[18] This set-back was reversed, however, when the Ninth Circuit Court of Appeals chose to rehear the case, *en banc*, and reversed the prior panel decision and affirmed the District Court's holding.[19] The Court of Appeals' rehearing panel based its holding on the United States Supreme Court decision in *Cruzan v. Dir. Miss. Dep't of Health*.[20] In *Cruzan*, the Court

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7. *See id.*
8. *See* Brief for Respondent at 2, Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (No. 96-110).
9. *See id.* at 3.
10. *See id.*
11. *See id.*
12. *See* Brief for Respondent at 3, Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (No. 96-110).
13. *See id.*
14. *See id.* at 2.
15. *See* Compassion in Dying v. Washington, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994).
16. *See Glucksberg*, 117 S. Ct. at 2261-62.
17. *See id.* at 2262. The United States District Court granted summary judgment in favor of the Respondents stating that: "Washington's assisted-suicide ban is unconstitutional because it places an undue burden on the exercise of [that] constitutionally protected liberty interest." *Glucksberg*, 117 S. Ct. at 2262.
18. *See id.* at 2262. The Court of Appeals stated: "In the two hundred and five years of our existence no constitutional right was to aid in killing oneself has ever been asserted and upheld by a Court of final jurisdiction." *Glucksberg*, 117 S. Ct. at 2262.
19. *See id.*
20. *See* Cruzan v. Dir., Miss. Dep't of Health, 497 U.S. 261 (1990).

held that the United States Constitution protected a person's right to refuse artificial means of lifesaving by administering nutrition and hydration.[21] The Court also based its decision on *Planned Parenthood of Southeastern Pa. v. Casey*.[22] In *Casey*, the United States Supreme Court held that a woman has a right to an abortion before her fetus becomes viable without undue interference from the State.[23] Following similar logic, the Court of Appeals agreed with Respondents' argument that at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[24] Therefore, a State should not involve itself in matters where an individual desires an action which is based on an attempt to preserve personal dignity and to alleviate suffering and pain. The case was then granted *certiorari* by the United States Supreme Court.

In this case the *Glucksberg* court framed the issue as: "Whether the Fourteenth Amendment to the United States Constitution is violated by Washington's prohibition against causing or aiding a suicide."[25] In the State of Washington assisting suicide has been illegal since 1854 when the State's first territorial legislature outlawed such assistance.[26] Consequently, a person convicted of violating this statute is guilty of manslaughter.[27] Currently, the State of Washington has a contemporary prohibition against assisted suicide in its penal code.[28] However, even though a State has a legitimate interest in protecting its citizens, this protection cannot be in violation of the United States Constitutional protections granted to people in the Fourteenth Amendment.[29]

In determining whether the right to physician assisted suicide should be encompassed as a Fourteenth Amendment liberty interest the Court applied an established substantive due process analysis. This due process analysis involves two primary factors. First, is this particular right deeply rooted in our nation's history, tradition and conscience as to be ranked as fundamental and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed?[30] Second, substantive due process cases

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21. *See id.* at 269.

22. *See* Planned Parenthood of Southeasten Pa. v. Casey, 505 U.S. 833 (1992).

23. *See id.* at 846. The United States Supreme Court stated in *Casey*: "Most liberty interests which are protected by the constitution involve the most intimate and personal choices a person may make in a life time, a choice central to personal dignity and autonomy." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

24. *See Glucksberg*, 117 S. Ct. at 2271.

25. *See id.* at 2261.

26. *See id.*

27. *See id.*

28. *See Glucksberg*, 117 S. Ct. at 2261.

29. *See id.*

30. *See id.* at 2268.

have required a careful description of the asserted fundamental liberty interest.[31]

The Court began its inquiry with the first question in establishing whether the claimed right has any place in our nation's tradition and history.[32] The Court concluded that there is almost a universal rejection of the asserted right to assist a person in committing suicide.[33] The Court stated that to accept the liberty interest today, it would have to reverse centuries of legal doctrine and practice, thus striking down the policy choice of almost every state.[34] The Respondents argued that the right to assisted suicide is consistent with the Court's line of substantive due process cases, as well as, with the nation's history and practice.[35] The Respondents main contentions were issues that *Cruzan* and *Casey* cases reflected: (1) a general tradition of self-sovereignty, and (2) that liberty protected by the Due Process clause includes basic and intimate exercises of personal autonomy.[36] Therefore, the Respondents asserted that competent, terminally ill adults should have the right to make end-of–life decisions free from government interference.[37] However, the *Glucksberg* Court responded to this question by pointing out the fact that the issue in this case not only involves a person's right to commit suicide but also that person's right to receive anothers' assistance.[38]

The *Glucksberg* Court then turned its attention to the *Cruzan* case which the Court of Appeals relied on in its affirmation of the District Court's decision.[39] The Respondents contended that since the Court acknowledged a person's right to have the power to remove life sustaining devices, the Court should also give a person the right to hasten their own death by committing suicide.[40] The *Glucksberg* Court responded by stating that within this nation's history and common law, forced medication was considered a battery and there has been a long legal tradition in protecting a person's right to refuse unwanted medical treatment.[41] The Court noted that the decision to commit suicide with the assistance of another may be just as personal as the decision to withdraw life-sustaining medical treatment, but suicide simply never received the same legal protection in our nation's history.[42] The flaw in this assertion is that this issue

31. *See id.*
32. *See Glucksberg*, 117 S. Ct. at 2269.
33. *See id.*
34. *See id.* (forty-four states and the District of Columbia and two territories prohibit assisted suicide).
35. *See id.* at 2269.
36. *See Glucksberg*, 117 S. Ct. at 2269.
37. *See id.* at 2269.
38. *See id.*
39. *See id.* at 2262.
40. *See Glucksberg*, 117 S. Ct. at 2270.
41. *See id.*
42. *See id.* at 2270.

is currently before the Court in a contemporary society which is being guided by the ideas and morals of our distant past. A strong argument can be made that an idea should not be dismissed simply because it was not accepted in history. After all, slavery was once an accepted and legally protected idea within the conscience of the United States. History illustrates that advocates argued that slavery is an accepted practice and should not be abolished. However, today, an assertion to reinstate slavery based on a historical prejudice would be contrary to society's morals and certainly would fail. Therefore, it is important to look at what is deeply rooted in the conscience of people today to examine what liberty interests are so fundamental to a contemporary society that neither justice nor liberty would exist if they were sacrificed. However, the *Glucksberg* Court fails to do that by simply basing its decision on a historical tradition of non-acceptance.

The Court then moved on to discuss the *Casey* case which the Ninth Circuit Court of Appeals also relied on in affirming the District Court's decision.[43] The Respondents' argument focused on the idea that the right to have an abortion is analogous to the choice of how and when to die.[44] Decisions of this nature are the most intimate and personal choices an individual may make in his lifetime involving one's personal dignity and autonomy.[45] However, the Court responded to this argument by stating that merely because the rights and liberties found to be protected by the Fourteenth Amendment involve personal autonomy, this does not warrant the assumption that *any* and *all* personal decisions are protected by the Constitution.[46] The Court has concluded that the Due Process Clause of the Fourteenth Amendment does not include the right to physician assisted suicide, and that it is not a fundamental liberty interest.[47] However, the Court fails to explain, aside from history, why this intimate personal choice, which involves one's dignity and autonomy, should not be protected by the Constitution.

However, for the Washington State law prohibiting physician assisted suicide to be constitutional, the law requires that a State have a legitimate government interest to prohibit the act.[48] The *Glucksberg* Court began by addressing a State's unqualified interest in preserving human life and promoting public-health and safety.[49] The Respondents conceded the fact that a State has a legitimate interest in preserving life, but argued that it should only extend to those who contribute to society and enjoy life.[50] The Court refused to accept a sliding

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43. *See id.* at 2262.
44. *See Glucksberg*, 117 S. Ct. at 2270.
45. *See id.*
46. *See id.* at 2271.
47. *See id.*
48. *See* Heller v. Doe, 509 U.S. 312, 319-20 (1993).
49. *See Glucksberg*, 117 S. Ct. at 2272.
50. *See id.*

scale approach to life and affirmed the State of Washington's general ban of physician-assisted suicide, regardless of the mental or physical condition of the patient.[51]

Additionally, the Court stated that the State of Washington has an interest in protecting the integrity and ethics of the medical profession.[52] The Court held that physician-assisted suicide is fundamentally incompatible with the physician's role as a healer and that the doctor-patient relationship may be injured by blurring the line between healing and harming.[53]

Finally, the Court discussed a State's interest in protecting the rights of vulnerable groups[54] which include the young, elderly, poor and disabled.[55] A State has a legitimate interest in protecting these groups from abuse and neglect.[56] The Court asserts that if physician-assisted suicide was permitted, individuals might resort to suicide to spare their families the financial burden of health care costs which can be exorbitant in today's society.[57] Additionally, the Court argued that a State's interest extends to protecting the disabled and terminally ill from prejudices, stereotypes and societal indifference.[58] A State must promote the policy that the life of a terminally ill person is worth just as much as anyone else's.[59]

In conclusion, the reasoning of the *Glucksberg* Court's decision revolves around the principal grounded in our nation's history. The Court emphasizes that the Anglo-American legal tradition has prohibited and punished assisted suicide for over 700 years.[60] This tradition has perpetuated through time and remains illegal in almost every State in this nation.[61] In light of that history, the *Glucksberg* Court concluded that assisted suicide is not a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Therefore, States, with a legitimate governmental interest, are free to regulate or prohibit physicians from assisting a patient in the commission of suicide.[62]

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51. *See id.*
52. *See id.* at 2273.
53. *See Glucksberg*, 117 S. Ct. at 2273.
54. *See id.*
55. *See id.* at 2272.
56. *See id.* at 2273.
57. *See Glucksberg*, 117 S. Ct. at 2273.
58. *See id.*
59. *See id.*
60. *See id.* at 2259.
61. *See Glucksberg*, 117 S. Ct. at 2259.
62. *See id.* at 2260.

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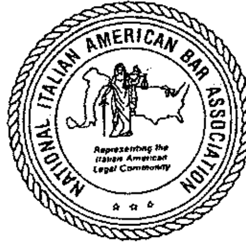

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