



1-1-2003

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Recommended Citation

Clay Calvert and Robert D. Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 Loy. L.A. Ent. L. Rev. 259 (2003).

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ARTICLES

DEFENDING THE FIRST IN THE NINTH:

JUDGE ALEX KOZINSKI AND

THE FREEDOMS OF SPEECH AND PRESS

*Clay Calvert**

*Robert D. Richards***

I. INTRODUCTION

One might expect, from a sampling of his opinions and scholarly writings, that Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit would fancy himself a champion of free speech. Consider, for instance, the following:

He has written opinions—first a majority,¹ then a dissent²—protecting the First Amendment³ speech rights of anti-abortion activists, both to create

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1. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *rev'd en banc*, 290 F.3d 1058 (9th Cir. 2002), *petition for cert. filed*, _ U.S. L.W. _ (U.S. Oct. 8, 2002) (No. 02-563).

2. *Planned Parenthood of Columbia/Williamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1089 (9th Cir. 2002) (Kozinski, J. dissenting). Judge Kozinski slightly amended his own dissent in July 2002. 2002 U.S. App. LEXIS 13829 (9th Cir. 2002).

3. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the

and to disseminate posters—one, graphically called *The Deadly Dozen*, offered a \$5000 reward “for information leading to arrest, conviction and revocation of license to practice medicine” of specific abortion doctors whose names and addresses were listed⁴—and to operate a Web site known as the *Nuremberg Files*⁵ that, as one columnist wrote, “denounces abortion doctors as murderers bound for hell”⁶ while providing detailed information about their identities and whereabouts.⁷ Physicians killed had their names crossed off a list on the website, while those who were wounded but survived attacks found their names grayed.⁸

To Judge Kozinski, the speech did not constitute unprotected expression as either a true threat of violence⁹ or an incitement to violence,¹⁰ but was instead “clearly an expression of a political point of view”¹¹ safeguarded by the First Amendment. He warned that the majority opinion of the Ninth Circuit in May 2002, which held otherwise, “will haunt

Fourteenth Amendment’s Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

4. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1064–65 (9th Cir. 2002).

5. *Id.* at 1065.

6. John Leo, *Difficult First Amendment Questions*, SAN DIEGO UNION-TRIB., June 3, 2002, at B6.

7. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1080 (9th Cir. 2002).

8. See Henry Weinstein, *Abortion Foes Are Ruled a Threat*, L.A. TIMES, May 17, 2002, at B1 (writing that “[t]he Web site [sic] featured the murdered doctors on a list of people guilty of crimes against humanity. The names of doctors who had been murdered were shown crossed off the list. The names of those who had been shot and wounded were grayed.”); *U.S. Court, in Reversal, Rebuffs Abortion Foes*, NEWSDAY (Long Island), May 17, 2002, at A45 (stating that “[t]he name of Dr. Barnett Slepian was crossed off the list on the Web site after he was killed by a sniper’s bullet at his home near Buffalo in 1998”).

9. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (describing how “true threats” against the President of the United States are not entitled to constitutional protection, whereas “political hyperbole” is); see also *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995), *aff’d sub nom.*, *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997) (setting forth a test for determining a “true threat”). See generally Ashley Packard, *Threats or Theater: Does Planned Parenthood v. American Coalition of Life Activists Signify That Tests for “True Threats” Needs to Change?*, 5 COMM. L. & POL’Y 235 (2000) (discussing the true threats doctrine and reviewing several threats statutes).

10. The United States Supreme Court has stated that:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

11. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1093 (9th Cir. 2002) (Kozinski, J., dissenting).

dissidents of all political stripes for many years to come.”¹²

Or, consider his opinions—first a dissent,¹³ followed by another dissent¹⁴—and scholarly writings¹⁵ championing the First Amendment interests in protecting popular culture¹⁶—in particular, “[t]he right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time”¹⁷—against the sprawl of the right of publicity tort.¹⁸ For Judge Kozinski, the Ninth Circuit has “let the right of publicity snuff out creativity.”¹⁹

More recently, in July 2002, he protected the ability of a Danish band, Aqua, to poke fun in the form of song at an inanimate cultural icon²⁰—the Barbie doll—when he rejected Mattel’s claims of trademark violation and unfair competition in *Mattel v. MCA Records, Inc.*²¹ Judge Kozinski wrote that the song “lampoons the Barbie image and comments humorously on the cultural values Aqua claims she represents.”²²

12. *Id.* at 1101.

13. *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1512 (9th Cir. 1993) (Kozinski, J., dissenting), *cert. denied*, 508 U.S. 951 (1993).

14. *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1285 (9th Cir. 1999) (Kozinski, J., dissenting).

15. See Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 975 (1993) (writing on trademark law and contending that “any doctrine that gives people property rights in words, symbols, and images that have worked their way into our popular culture must carefully consider the communicative functions those marks serve”).

16. Culture may be defined in several ways. See REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 2 (Stuart Hall ed., 1997) (noting that “[c]ulture” is one of the most difficult concepts in the human and social sciences and there are many different ways of defining it”).

The element, however, of meaning—something directly tied to freedom of expression and, thereby, to the First Amendment—is a common thread in many definitions of culture. For instance, culture may be defined as “the site where *meaning* is generated and experienced.” GRAEME TURNER, *BRITISH CULTURAL STUDIES: AN INTRODUCTION* 15 (1990) (emphasis added). Alternatively, it may be defined as “a process that delivers the values of a society through products or other *meaning-making forms*” and that allows societies and individuals “to make sense of daily life and to articulate their values.” RICHARD CAMPBELL, *MEDIA AND CULTURE: AN INTRODUCTION TO MASS COMMUNICATION* 5 (2d ed. 2000) (emphasis added). In addition, James Carey of Columbia University observes that culture can be defined as “the *meaning* and significance particular people discover in their experience through art, religion and so forth.” JAMES CAREY, *COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY* 44 (1988) (emphasis added).

17. *White*, 989 F.2d at 1521 (Kozinski, J., dissenting).

18. See *Wendt*, 197 F.3d at 1286 (Kozinski, J., dissenting) (contending that the Ninth Circuit’s opinion in *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), “exploded the right of publicity to include anything that brings the celebrity to mind”).

19. *Wendt*, 197 F.3d at 1289 (Kozinski, J., dissenting).

20. See *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 898 (9th Cir. 2002) (writing that “[w]ith Barbie, Mattel created not just a toy but a cultural icon”).

21. *Id.* at 894.

22. *Id.* at 907.

Furthermore, a review of his law journal articles²³ reveals a strong belief, at least at one time, that so-called commercial speech²⁴ may merit full First Amendment protection rather than the intermediate level it currently receives.²⁵

Add to all of this an opinion protecting the right of an attorney to caustically criticize a sitting judge²⁶ and, surely, one would think that Judge Kozinski privileges speech above all other rights. But as this article reveals, the Ronald Reagan-appointed judge with a penchant for panache and sprinkling his opinions with references from popular culture²⁷

23. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652 (1990) (arguing that "in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature"). This law review article, although now more than a decade old, was cited favorably in 2001 by the United States Supreme Court when Justice Clarence Thomas questioned "whether it is even possible to draw a coherent distinction between commercial and noncommercial speech" in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring). It also was cited by the Supreme Court in *Greater New Orleans Broad. Assoc., Inc. v. United States*, 527 U.S. 173 (1999), for the proposition that "certain judges... have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech. *Id.* at 184; see also Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756 (1993) (questioning the commercial speech/non-commercial speech distinction).

24. Commercial speech has been defined by the United States Supreme Court as expression that does "no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). This definition, however, does not provide clear guidance in all cases. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (observing that "the boundary between commercial and noncommercial speech has yet to be clearly delineated").

25. See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 62 (2000) (observing that "there are categories of less-protected speech where the government has more latitude to regulate than usual under the First Amendment. For instance, government generally can regulate commercial speech if intermediate scrutiny is met").

26. *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (protecting, as statements of opinion, the assertions of civil rights attorney Stephen Yagman that a federal judge was anti-Semitic and had a "penchant for sanctioning Jewish lawyers").

27. See *Wendt*, 197 F.3d at 1285 nn.1-3 (dropping multiple footnote references to famous lines uttered by the barfly characters Norm and Cliff on the television show *Cheers*); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1250 (9th Cir. 1997) (beginning his opinion about a case involving a tabloid publication, the *National Enquirer*, by riffing off that publication's one-time advertising campaign slogan and stating "[e]nquiring judges want to know"); see also *Mattel, Inc.*, 296 F.3d at 898, 908 (beginning the opinion with the line, "[i]f this were a sci-fi melodrama, it might be called Speech-Zilla meets Trademark Kong" and closing it with "[t]he parties are advised to chill"); Judge Kozinski's closing line in the *Mattel* case advising the parties "to chill" caught the attention of a Manchester, England-based publication, *The Guardian*, which proclaimed that the line "must rate a footnote for super-coolness in judicial history." *Court of Cool: Judge Advises Barbie Litigants to 'Go Chill,'* GUARDIAN, July 26, 2002, at 2.

considers himself “a champion of all rights.”²⁸

This Article, based on an over ninety-minute interview with Judge Kozinski in his Pasadena, California offices in August 2002, provides a first-hand look at his thoughts on a range of both First Amendment issues and cases such as *New York Times v. Sullivan*²⁹ and *Hustler Magazine v. Falwell*.³⁰ In the process, he describes what he believes may be the most important free speech issue soon facing the federal courts—the extent to which recently-enacted anti-terrorism statutes may abridge freedom of speech and, therefore, the Fourth Amendment—as well as his belief that freedom of speech serves as an essential bulwark against totalitarianism. In addition, Judge Kozinski discusses topics including the role of legal scholarship in both judicial decision-making and in the United States Supreme Court nomination process, the perception that the Ninth Circuit is a liberal appellate court,³¹ and whether judges, when it comes to questions of free speech, should even be classified as liberals and conservatives.³²

Part II of this Article describes the setting and logistics for the interview that gave rise to this Article. Next, Part III sets forth portions of the interview, including four separate sections, each united by its own theme. Finally, Part IV provides both an analysis and a synopsis of Judge Kozinski’s remarks.

II. THE SETTING AND CONTEXT

The setting for this interview—Judge Kozinski’s office—is in a building that is, at least historically and architecturally, about as far away as possible from what one would likely expect for a federal government structure. The Southern California home of the United States Court of

28. *Infra* Part III.A.

29. 376 U.S. 254 (1964). In *Sullivan*, the United States Supreme Court held that public officials seeking to recover damages in defamation actions for falsehoods regarding their official conduct must prove actual malice. *Id.* at 279–80.

30. 485 U.S. 46 (1988). The Court in *Hustler* borrowed the actual malice standard from defamation law and *Sullivan* to require public figures and public officials to prove actual malice in order to recover damages for emotional anguish allegedly caused by publications under the theory of intentional infliction of emotional distress. *Id.* at 56.

31. See Gail Diane Cox, *Largest Circuit Is Still the Maverick*, NAT’L L. J., Feb. 26, 2001, at B9 (writing that, in addition to being the largest and busiest of the regional federal appellate courts, the Ninth Circuit “is also arguably the most left-leaning”).

32. This last issue is particularly relevant today. As Professor Erwin Chemerinsky recently wrote in a review of the United States Supreme Court’s October 2001 term, “[o]ne area that now defies ideological prediction is freedom of speech. The reality is that conservatives on the court are as likely, or even more likely, to rule in favor of speech claims and against the government than the more moderate and liberal justices.” Erwin Chemerinsky, *Supreme Court Decided Crucial Issues*, CAL. BAR J., Aug. 2002, at 1, 22.

Appeals for the Ninth Circuit, in fact, is found in a renovated historic hotel on South Grand Avenue, near Colorado Boulevard, in the city of Pasadena. The building housed the Hotel Vista del Arroyo from 1931 until 1943, when the government converted it into the McCormick Army Hospital.³³ After World War II ended, the Army shut down the hospital, but the building itself continued to serve various federal agencies until its closure in 1974—at which point the vacant building became surplus government property.³⁴ The building remains on the National Register of Historic Places.

In 1978, Chief Judge Richard H. Chambers began a campaign to secure the site for the appellate court.³⁵ Notwithstanding eight years of political wrangling and a devastating fire in 1982, the building reopened officially as the Ninth Circuit's new Los Angeles-area home on February 4, 1986, less than four months after the United States Senate confirmed Judge Kozinski's appointment to the appellate court.³⁶ Named in honor of Judge Chambers in February 1993,³⁷ the building, constructed in a Spanish architectural style, with its pink exterior and red-tile roof, is surrounded by well-tended gardens and manicured lawns, and overlooks the Arroyo Seco.

Just inside the building, on the main floor, an engraved plaque containing the text of the Bill of Rights is mounted on a wall above a glass display case that holds artifacts of the courthouse's history. Also on that floor, attorneys can gather in a lounge and conference area adjacent to a functional appellate courtroom that looks out on one of the property's garden areas. A glass-enclosed law library fills up the other side of the hallway.

Judge Kozinski's chambers are located on the second floor. The Judge, whose 1985 appointment to the Ninth Circuit came just ten years after graduating from law school at the University of California, Los Angeles, works in modest quarters and can be found behind a horseshoe-shaped desk, with disheveled stacks of papers placed about the long expanse of the tabletop. To his left during the interview sits an electric typewriter, a piece of equipment that might look anachronistic in other settings but seems curiously at home in this locale. In fact, during the course of the interview, Judge Kozinski refers to the practice of licensing

33. *From Hotel to Courthouse*, W. LEGAL ROUNDUP (Ninth Judicial Circuit Historical Society, Pasadena, Cal.), Mar. 1993, at 1.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Pasadena Courthouse Renamed*, W. LEGAL ROUNDUP (Ninth Judicial Circuit Historical Society, Pasadena, Cal.), Mar. 1993, at 1.

typewriters in some totalitarian states as an example of government suppression of the press.³⁸

Easily within reach behind his chair is the Judge's computer, complete with Internet hookups and the ability to stream audio and video. The windows behind his desk allow in the afternoon sun and provide a vista of the Interstate 210 bridge that facilitates access to and from Pasadena.

The walls of Judge Kozinski's chambers are covered with personal memorabilia, including scores of family photographs on the wall in front of him and off to his left. The Judge, who turned fifty-two less than a month before the interview, seemed particularly proud of the snapshots of his bungee-jumping adventure about five years ago in Big Bear, California, with a streaming audio/video account of the entire jump readily accessible on his office computer. To his right, the wall contains autographed photographs from legal and political luminaries, past and present—including one from the man who appointed him, which is inscribed: "To Alex Kozinski, Very Best Wishes, Ronald Reagan." Signed photographs from Justice Sandra Day O'Connor and the late Supreme Court jurists William J. Brennan³⁹ and Warren E. Burger—Judge Kozinski clerked for Chief Justice Burger in 1976–77, after working the previous year for then-Ninth Circuit Judge and now Supreme Court Justice Anthony M. Kennedy—hang on the wall above a well-worn couch. A publicity photo of all nine Supreme Court justices is also provided in the space.

The authors interviewed Judge Kozinski in his chambers on the afternoon of August 5, 2002. The interview lasted approximately one hour and forty-five minutes and was recorded on audiotape. The tape was then transcribed verbatim by a professional secretary.⁴⁰ The authors made minor editorial changes to the transcript, mostly to correct syntax. Some of the questions and responses were rearranged to reflect the themes and sections in this part of the Article, and other portions of the interview were deleted as extraneous or redundant. A copy of the revised transcript was then forwarded to Judge Kozinski in late August 2002. He returned the transcript with minor revisions to the authors in September 2002 along with a signed statement verifying that the transcript, with the revisions, accurately reflected his remarks, and the authors then entered those

38. *Infra* Part III.A.

39. In the course of this interview, Judge Kozinski would praise a Brennan-authored opinion—*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)—as one of the most important victories for freedom of expression. *Infra* Part III.A.

40. All original notes and interview tapes are on record with the authors.

changes.⁴¹ Judge Kozinski, however, exercised no editorial control over either the conduct of the interview or the content of this Article. Furthermore, neither author had previously met the judge, appeared before him in any case, or otherwise had any affiliation with him that might jeopardize objectivity.

III. THE INTERVIEW

This portion of the article is divided into four sections, each of which includes a brief introduction to the section's theme followed by a question-and-response format. The first section—the longest in the Article—provides Judge Kozinski's responses to a wide-ranging series of questions relating to the First Amendment and, in particular, to the freedoms of speech and press. The second section then shifts focus to the more narrow topic of culture and, more specifically, to the relationship between culture and freedom of expression, including the ability to mock cultural icons. The third section is devoted to Judge Kozinski's views on the role of legal scholarship, both in general terms and, more specifically, as it relates to the confirmation process of judicial nominees. Finally, the fourth section—the Article's shortest—focuses on the Ninth Circuit Court of Appeals and the perception of some that it is a liberal court.

A. The First Amendment and the Freedoms of Speech and Press

After winding up in the minority in the Ninth Circuit's recent *en banc* decision to deny protection to anti-abortion activists' speech⁴² and having his initial opinion protecting that speech reversed,⁴³ Judge Kozinski, one might think, would be displeased by the current state of free speech jurisprudence. But, as this section reveals, he seems genuinely satisfied by the amount of protection that speech is given by the one judicial body to which the Ninth Circuit must answer—the United States Supreme Court.

Judge Kozinski also discusses in this section the use of speech as a defense against totalitarian governments. His comments bring to mind the late Justice Hugo Black's dissent in *Feiner v. New York*,⁴⁴ in which the free

41. A copy is on file with the law journal.

42. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1089 (9th Cir. 2002) (Kozinski, J., dissenting).

43. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *rev'd en banc*, 290 F.3d 1058 (9th Cir. 2002), *petition for cert. filed*, ___ U.S. L.W. ___ (U.S. Oct. 8, 2002) (No. 02-563).

44. 340 U.S. 315 (1951).

speech absolutist⁴⁵ wrote that the majority's affirmance of a conviction of a man for making derogatory remarks about public officials was tantamount to "a long step toward totalitarian authority."⁴⁶

Judge Kozinski also describes his concerns in this section with anti-terrorism measures adopted subsequent to the attacks on the Pentagon and the World Trade Center on September 11, 2001. Readers will find that he is not alone in his fears about the chilling effect on the First Amendment that this legislation may cause.⁴⁷

In addition, Judge Kozinski addresses in this section the use of metaphors in the law generally and, more specifically, the use of the marketplace of ideas metaphor in First Amendment jurisprudence.⁴⁸ He finds the marketplace metaphor "useful" in some instances but not in others.

Finally, when it comes to a distinction between the Free Speech Clause and the Free Press Clause, Judge Kozinski's comments suggest that he believes the differences between speech and press are rapidly blurring. To this extent, it probably is not surprising that he calls for a "principle of consistency" when interpreting the two clauses.

With this as background, the Article now turns directly to the interview, with all questions and comments from the authors indicated by the heading "QUESTION," and all of Judge Kozinski's answers and remarks designated by the heading "RESPONSE."

QUESTION: You wrote in the *Harvard Law Review* that

45. See JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* 170 (2d ed. 1996) (identifying Justice Hugo Black with First Amendment absolutism and a literal reading of the text of that amendment); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 792-93 (2d ed. 1988) (discussing absolutism as a manner of interpreting the meaning of the First Amendment).

46. *Feiner*, 340 U.S. at 323 (Black, J., dissenting).

47. See John Podesta, *USA Patriot Act*, HUM. RTS., Winter 2002, at 3 (discussing, among other issues, how the USA PATRIOT Act may affect the First Amendment protection of free speech); Nat Hentoff, *Eyeing What You Read*, VILLAGE VOICE, Feb. 26, 2002, at 25 (discussing the implications for the First Amendment of the USA PATRIOT Act passed after the attacks of September 11, 2001).

48. The marketplace of ideas "is perhaps the most powerful metaphor in the free speech tradition." RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992). It "consistently dominates the Supreme Court's discussions of freedom of speech." C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7 (1989). The metaphor is used frequently today, more than seventy-five years after it first became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes, Jr.'s often-quoted admonition that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 *JOURNALISM & MASS COMM.* Q. 40 (1996) (providing a relatively recent review of the Court's use of the marketplace metaphor).

“[c]onstitutional law is meaningful only to the extent it forces government officials—including judges—to do things they would otherwise rather not: protect unpopular speakers, uphold the rights of criminals, and the like.”⁴⁹ Is the current state of constitutional law—in particular, First Amendment jurisprudence—meaningful today in terms of doing enough to protect unpopular speakers?

RESPONSE: I think so. The Supreme Court has been quite vigilant in protecting First Amendment rights. This is one area where the conservatives actually have been more vigilant than the liberals. It’s hard to say how much protection is enough, but certainly, of all the kinds of claims that come through the Supreme Court that are likely to get a hearing, First Amendment claims, particularly freedom of speech claims, are among the most likely to get the Court’s attention.

QUESTION: Are there any particular cases, in your mind, that stand out in which the Court has demonstrated that vigilance?

RESPONSE: Well, we had a case just last term involving virtual child pornography.⁵⁰ I think that decision easily could have gone either way. I think there were legitimate questions raised by the government, such as what effect this would have on the trade of actual child pornography. The difficulty with prosecuting these cases arises because one can’t always tell whether it’s a real person or not.⁵¹ The Supreme Court just brushed this argument aside.⁵²

A few years ago, it also had no trouble striking down in short order the Communications Decency Act.⁵³ So I think the Court really has been quite vigilant, and we’re now at a high point in our constitutional history in terms of protection for speech.

49. Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1644–45 (1993).

50. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

51. As Judge Kozinski’s comments suggest, the government argued to the United States Supreme Court that:

[T]he possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images.

Id. at 254–55.

52. Justice Kennedy wrote for the majority on this point that “[t]he argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.” *Id.* at 255.

53. *See Reno v. ACLU*, 521 U.S. 844 (1997) (affirming a federal district court’s three-judge decision that the Communications Decency Act violated the First Amendment protection of freedom of speech).

QUESTION: Based on your dissents in *Planned Parenthood v. American Coalition of Life Activists*,⁵⁴ *White v. Samsung Electronics*,⁵⁵ *Wendt v. Host International*,⁵⁶ as well as your majority opinion in *Standing Committee on Discipline v. Yagman*⁵⁷ and your writings on commercial speech deserving more First Amendment protection than it currently receives,⁵⁸ you could be viewed by some as a champion of free speech.

RESPONSE: I'd like to think that the Supreme Court follows some of my advice. That article you mentioned was written ten years ago. I think that things have changed a little bit since then. Anyway, you were saying?

QUESTION: Do you consider yourself a champion of free speech? How would you view yourself when it comes to free speech?

RESPONSE: I consider myself a champion of all rights. First Amendment. Second Amendment.⁵⁹ Third Amendment.⁶⁰ Fourth Amendment.⁶¹

QUESTION: Even the quartering of soldiers? You haven't had any of those cases recently, have you?

RESPONSE: It doesn't arise very often but, by God, if the government ever decides to quarter soldiers in people's homes in time of peace, then they're not going to get by me. Not to worry about that.

I really don't view myself as having favorite amendments or favorite rights. Speech is important, but I think other rights are important, too. In fact, one of the problems we've had with constitutional theory has been the way the Constitution, as applied, reflects less the words that are written

54. 290 F.3d 1058 (9th Cir. 2002) (Kozinski, J., dissenting), *as amended by* 2002 U.S. App. LEXIS 13829 (9th Cir. 2002).

55. 989 F.2d 1512, 1512 (9th Cir. 1993), (Kozinski, J., dissenting), *cert. denied*, 508 U.S. 951 (1993).

56. 197 F.3d 1284, 1285 (9th Cir. 1999).

57. 55 F.3d 1430 (9th Cir. 1995).

58. *Supra* note 23 and accompanying text.

59. The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

60. The Third Amendment provides that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law. U.S. CONST. amend. III.

61. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

down and more the attitudes judges have toward particular amendments. So the First Amendment, for the last sixty years or so, has been well loved by the judiciary—and rightly so. It’s an important amendment. It has speech. It has press. It has assembly. It has religion. It has establishment. These all are very important rights, and the judiciary has been quite vigilant in enforcing these rights. But there are other important rights, too, and I don’t think that some are more important than others. I think the rights pertaining to people—how people are tried, how they’re brought to justice, and protection of their homes—are just as important.

One of the odd things about the way we’re interpreting the Constitution is that some of [the] neighboring provisions that have highly analogous language are loved, like the right not [to] incriminate yourself that blossomed in *Miranda*⁶² and a whole body of case law, while others, like the Takings Clause, which also is in the Fifth Amendment,⁶³ have shriveled up.

So I don’t consider myself a particular fan of the First Amendment. I consider myself a fan of all rights. We are here to protect the people from intrusive government in all of the things that people do in all their lives.

QUESTION: What, in your mind, is or are the primary reasons to protect speech in the United States, and how has your view about the scope of the First Amendment’s protection of speech changed, if at all, over time?

RESPONSE: One of the things—not the only thing, but one of the important things—that distinguishes us from a totalitarian government is that people are able to speak and criticize and to raise ideas and persuade other people. I think you lose other freedoms when the government can do things and the people can’t criticize them. That’s what happened in Nazi Germany. People were afraid to speak. I’d like to believe that if they had a stronger protection for speech, things would have been different. People would have been willing to speak out if they had protection for it, and then the people would have slowly regained their sanity. They would have said, “What are we doing?” Sometimes bad ideas get moved forward in societies because nobody is willing to debate them.

62. *Miranda v. Arizona*, 384 U.S. 436 (1966).

63. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend V.

So the conventional wisdom, or what seems to be the conventional wisdom, is that everybody must agree because nobody is objecting to the bad ideas. Well, if everybody thinks that way, then nobody will object and you start doing some very bad things. In many ways, the first step towards enslaving society is to cut off freedom of speech. We've seen this again and again.

There's no totalitarian regime that has survived with free speech. In fact, what I think brought down the Eastern Bloc countries more than anything else was the inability to keep out the avalanche of images, pictures, news broadcasts, newspapers, Internet connections, and all those things that brought information to their people. You can have a totalitarian government as long as people don't know how they compare to people elsewhere and they can't discuss ideas or receive information. Once you receive information, however, you begin to see the disparities. It becomes much more difficult for a Communist government, for example, to maintain control. I think China will go very quickly.

QUESTION: Really?

RESPONSE: Sure. It's a big nation—it's huge. They need a lot of computers. Once a country opens up that gateway, I just don't see how it can close it off.⁶⁴ I think the way Cuba and Korea are maintaining it is by controlling information. In Cuba, the last I heard, they were still registering typewriters.

QUESTION: Registering them in order to keep some control?

RESPONSE: Oh, it used to be very common. This was in the days before computers. If you were in a Communist country, you had to register your typewriter because typewriters can be used to make documents that can be copied and distributed. If you register the typewriter, you can trace where a document comes from, so registration basically prevents people from using typewriters to create underground newspapers. This is a very common technique. Obviously, with laser printers, it's no longer effective, but it was very effective for many years when Communist countries kept people from having mini-presses.

QUESTION: You were critical in a law journal article about what you called "a jurisprudence of metaphor."⁶⁵ First Amendment jurisprudence

64. There is great concern, in fact, in China, as well as Vietnam, about the influence of the Internet on their political systems. According to at least one report, those countries "are cracking down on the proliferation of 'cybercafes.' Recent regulations in these countries require cafe owners to police what web sites their customers are visiting and who they are e-mailing—or face arrest and incarceration." Michael D. Scott, *From the Editor: Whose Beautiful Mind?*, E-COM. L. REP., July 2002, at 2.

65. Kozinski & Volokh, *supra* note 49, at 1653.

often seems to pivot on a metaphor of its own—the marketplace of ideas.⁶⁶ Is the marketplace metaphor a problematic or flawed one? Is it antiquated and outdated?

RESPONSE: I should be clear if I wasn't in the article—I don't think that it's wrong to use metaphors. I think metaphors can be very useful if they are correctly constructed. Metaphors can be real aides in analyzing a problem because they let people visualize it in ways that help explain an abstract concept. The problem with metaphors is that they often are analogies. That means they have many things in common but they also have many differences. The thing you're using as a metaphor is different from the thing you're trying to represent. It's always very important to keep in mind what the differences are, because the differences in any one instance can be greater than the core metaphor.

As far as the First Amendment and the marketplace of ideas are concerned, I think it's a fairly useful metaphor, especially in the sense that a marketplace is some place where you exchange things. It is not probably as useful a metaphor in the sense that people talk about the marketplace being a place where you trade something for money. There certainly are aspects of speech where people trade speech for money, but it is only a part. And there certainly are places where people will simply speak just to be heard and don't get anything in exchange other than the pleasure of speaking. For instance, a scientist reaps the benefit of publishing and gets some bragging rights for being the first or whatever. Thus, one has to be a little careful at the edges, but I think, by and large, it's a useful metaphor if you think of it as an exchange by people who offer ideas and by people who swap ideas back and forth among themselves.

QUESTION: You and a colleague have written that, in determining what the First Amendment means, “a myopic originalist view of freedom of speech does not get us very far.”⁶⁷ What mode or modes of constitutional interpretation do, in your view, get us far on what the First Amendment freedom of speech should mean?

RESPONSE: When it comes to the First Amendment, if you think about speech in a narrow sense and about press in a narrow sense as meaning when you press something with ink on paper, then you wind up excluding a lot of technologies—a lot of ways of communicating—that the Framers didn't have in mind. It's one of those situations when you have to decide whether to be bound by the literal words or whether to expand the meaning of “press” to include the same function performed under very

66. See *supra* note 48 and accompanying text.

67. Kozinski & Banner, *supra* note 23 at 633.

different technological conditions. In other words, do you limit it to the narrow meaning or do you apply it to the broader concept?

In common parlance, we now apply the word “press” to things that don’t involve ink and paper. What the Framers had in mind was an actual press used in printing newspapers. It worked like a wine press. And today, we do apply this sort of “wine press” word to things that look nothing like wine presses. We apply it to wire services. We apply it to television. We apply it to the Internet. So I feel very comfortable in saying that, since the concept of press has expanded in common parlance, the Constitution should follow. We really are dealing with the same concept, but just with a change in the technology.

I think you’d be on much less safe ground, however, if you were to apply the concept to something that doesn’t lend itself to that kind of analogy. For example, if somebody said, “Well, you know, the Framers meant to protect press and speech and we now think that something that wasn’t contemplated, such as criminal conduct, is sort of analogous because it’s a symbolic way of speaking.” I would have some trouble with that. It really does not fit within the category of things that the Framers had in mind. There often are not clear-cut answers to these things. You have to exercise judgment.

QUESTION: You once wrote in a law journal article that “[e]very proposed constitutional doctrine must be, to borrow a phrase, strictly scrutinized.”⁶⁸ If you could propose or create one constitutional doctrine affecting freedom of speech and/or freedom of the press, what would it be?

RESPONSE: I think it would be the principle of consistency. I think that you have to treat freedom of speech, freedom of the press, and freedom of assembly consistently. We have, in fact, done so. It would be inconsistent if we, for example, gave the professional press certain privileges, but then didn’t with respect to the speech of individuals. In other words, it would be inconsistent if we read individual rights more narrowly because we believed that the Framers were particularly concerned with protecting newspapers. Those are not the words they used. They said, “speech, press, assembly.” They listed them. The fact that one came before the other doesn’t count for very much because you always have to have something come first. Thus, unless there’s something in the way they’ve structured the words in separate phrases or separate clauses apart from other things, they ought to be treated equivalently. And I think the courts have done so. To answer the question, I would not create a doctrine that would lead us in a different direction than what we have.

68. Kozinski & Volokh, *supra* note 49, at 1657.

QUESTION: So, in other words, the press would not receive special protection above and beyond what any other citizens would receive?

RESPONSE: Right. Or, I might put it a different way, and just say that individual citizens would not receive less protection than the press.

QUESTION: Okay. We would not carve out exemptions for the press from generally applicable laws?

RESPONSE: Right. Well, of course, we have two provisions. We have the provision for protecting speech and we have the provision protecting the press. They're next to each other. They are in the same clause in the Constitution. They serve similar purposes. If we said, "Oh well, you know, we would give extra protection to the press, but when it comes to speech, we'll treat that much more narrowly," that would be an inconsistency.

We have to treat speech and press as equivalent. They are next to each other. There is no suggestion that the Framers meant to have one be more important than the other. If we're going to give one protection, as we have, then we need to give the other one protection as well, which we have.

QUESTION: You actually said something earlier that ties to this, but I'll ask the question. You and Judge Reinhardt are sometimes considered polar political opposites on the Ninth Circuit Court of Appeals.⁶⁹ Yet, on the *Nuremberg Files Case*,⁷⁰ you joined in dissent, as you did in *LaVine v. Blaine School District*.⁷¹ Is First Amendment jurisprudence one of those areas in which labels like "conservative" and "liberal" have no meaning?

RESPONSE: I'm not sure they have no meaning, but I think they mean less than they do in other areas. If you look at the last Supreme Court term's free speech cases—for example, the case involving judges' elections—the conservatives are the ones who struck down the law and, therefore, arguably were more protective of the First Amendment.⁷² They said that the values of the First Amendment trump concerns about administration of justice. I thought it was a close call myself—there were

69. See David G. Savage, *Getting the High Court's Attention*, A.B.A. J., Nov. 1997, at 46, 47 (quoting Professor Arthur Hellman of the University of Pittsburgh for the proposition that "[n]o other circuit has the equivalent of *Kozinski and Reinhardt doing battle regularly* and writing such interesting opinions") (emphasis added).

70. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

71. 279 F.3d 719, 720 (9th Cir. 2002) (Kleinfeld, J., dissenting, joined by Kozinski, J., and Reinhardt, J.).

72. *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2542 (2002). The five-person majority opinion in *White* was written by Justice Scalia and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas, each of whom was appointed by a Republican president. *Id.* at 2531.

good arguments on both sides. It could've gone either way.

I thought the reasoning of the dissenters about why one might want to limit what one says in judicial elections was very strong and would be the kind of reasoning to apply if you ever were to trump speech.⁷³ For instance, in the past, in the case of *Gentile v. State Bar of Nevada*,⁷⁴ involving an order restricting a lawyer's speech, the Supreme Court said, "Mostly you cannot restrict speech, but when it affects the actual fairness of the trial and independence of jurors and the like, we will allow restrictions on speech."⁷⁵ Where fairness of the judicial process is at stake, the Court has been the most willing to allow restrictions of speech—and yet it didn't last term.

Here in the Ninth Circuit, if you look at the *Planned Parenthood* case, it is an odd lineup of the eleven judges. We have in both the majority and dissent appointees of both Republican and Democratic presidents. It doesn't seem to line up along party lines.

QUESTION: Let me follow up with some questions on this topic. First, a general one. What is the most important free speech question, in your opinion, facing the federal courts today? Drawing the line between protected expression and unprotected threats? Striking the balance between property rights protected by the right of publicity and the speech rights protected by First Amendment? Something else?

RESPONSE: I think it probably will wind up having to do with the very difficult problem of trying to gather intelligence on terrorists and other criminal organizations—the whole question of the flood of information that passes through tiny gateways. It's not strictly a First Amendment problem—but there is a First and Fourth Amendment component. In fact, they are layered into one. If you monitor speech or monitor computers or tap wires, you are implicating search and seizure issues and also suppressing speech. If people know they're being listened to, they're just not going to speak freely.

QUESTION: By creating a chilling effect?⁷⁶

RESPONSE: A chilling effect, yes. So I think that, on the whole, we've done pretty well since September 11. I don't think we have gone overboard, but we've passed some laws that we have yet to interpret.

QUESTION: So that will be the next big area where?

73. See *id.* at 2550. Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented in *White*.

74. 501 U.S. 1030 (1991).

75. See *id.* at 1074–76.

76. See generally *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (using the term "chilling effect" in the context of the exercise of First Amendment free expression rights).

RESPONSE: I think that will be the next big area. I think the Fourth Amendment will matter and I think the First Amendment will matter quite a bit as well.

QUESTION: You have written that “the notion that the press—or the media as they are now called—must serve as the National Nanny because the public is sort of trusting and sort of stupid and has to be fed goods ideas or else they’ll choke on bad ones is quaint and insulting today. The media provide a commodity like any other.”⁷⁷ What is the role or are the roles of the press today, as an entity singled out in the First Amendment for protection more than two hundred ten years ago?

RESPONSE: I think the division between press and ordinary speech has all but disappeared. In some pragmatic sense, you can look at *The New York Times* and say it definitely is the press. And you can see some guy shouting on a street corner and say that’s definitely speech. But what is it when somebody has a blog? I don’t know the answer to that question. It depends, I presume, on how many hits one gets on the blog. After all, people can set up a mailing list overnight. I even have a mailing list on which I send out jokes. That’s my way of expressing myself—of course, only to consenting adults, but this is how I communicate.

People communicate in a variety of other ways. You can communicate now with everything from fax newsletters to email listserves to blogs to websites. For instance, look at Matt Drudge. He sits in his little apartment with a computer and trawls the Internet and overnight becomes a reputable news source—at least a to-be-feared news source. I think the distinction is completely disappearing so that even talking about the role of the press is somewhat of a quaint concept.

QUESTION: Is the press like any other business then essentially today?

RESPONSE: To a large extent it is. When we think of a professional press, we envision an organization that has resources to send people in the field and actually go out and dig up information. They can send people with cameras and microphones and they have a function to perform. These functions are very business-like.

QUESTION: In terms of making a profit?

RESPONSE: Well, it’s not just making a profit. I mean, you have to have a business. If I decided to do a newswire, I wouldn’t have the resources to send somebody to the Middle East to do an investigation on the scene. To do that, you would have to have a business. You need to

77. Alex Kozinski, *How I Stopped Worrying and Learned to Love the Press*, 3 COMM. L. & POL’Y 163, 174 (1998).

generate enough revenue for you to pay the guy to do that type of reporting. You're not going to do this unless you make a profit. So profit is needed to set up the enterprise. But as for the self-expressive aspects of running a newspaper, that pretty much has been diffused so that anybody can do it. You can get an audience of 10,000 overnight—much more than a lot of small-town newspapers.

And you can get them all over the world. Everybody now speaks English. Basically, I think all other languages will disappear within a hundred years. It's too bad.

QUESTION: You wrote in a 1998 article about the pomposity of the so-called Hutchins Commission Report that “freedom of the press today is stronger than ever.”⁷⁸ Is that the case now—that in 2002 freedom of the press is stronger than ever? How do you measure or evaluate the strength of press freedom?

RESPONSE: You have to start by defining what you're talking about. I'm not sure the press, as a business or as an enterprise, is as healthy as it was thirty or forty years ago. I think that's partly because they used to have such a monopoly on the distribution of information. To some extent, they've lost power because they've lost control of the channels of distribution. There are so many people out there giving it away for nothing.

I don't think a lot of these newspapers would be so eager to allow free access of their Web pages—you don't have to buy the *New York Times*, you read it online—except to affect the competition. That's what they have to do if they hope to pull you in. So, in that respect, I'm not sure that the press—the professional press—is as strong. I think, to some extent, they may be in transition. Twenty years from now there will be a somewhat different alignment or arrangement. So I think that's where the great danger comes from—the new alignment—but it doesn't come from government.

We clearly have not had any serious effort at suppression of the press since the 1960s and 1970s. The *Pentagon Papers Case* was pretty much it.⁷⁹ After all, if the Supreme Court says you can publish war secrets—Pentagon secrets right in the middle of war when we have men dying in the field—then what's left? I can only think off the top of my head of just a few times that the courts have allowed an injunction against the media. There was, for instance, the case where the guy wanted to publish an article

78. *Id.* at 171.

79. *New York Times v. United States*, 403 U.S. 713, 714 (1971) (discussing publication of “the contents of a classified study”).

about how to make a nuclear bomb.

QUESTION: The *Progressive* case?⁸⁰

RESPONSE: Yes, that's the one. I mean, just sitting here, we can probably come up with every single case where courts have actually enjoined publication. I'm sure we couldn't possibly exhaust the number of cases where they've refused to do so. So you've got that as an indicator. You also have as a pretty good indicator the blossoming of *New York Times Co. v. Sullivan*.⁸¹ In that case, you've got the Court limiting the liability the press suffers from the mistakes it makes.⁸² And I have forgotten the year of the Hutchins Commission Report, but *Sullivan* was 1964.

QUESTION: The Hutchins Commission did its work in the 1940s.

RESPONSE: So after the Hutchins Commission, the next big thing that happens is that the Supreme Court basically put the lid on damages. In essence, you can't sue newspapers. I mean, you can sue them, but in all likelihood, you're just not going to win. *Sullivan* provided the press with freedom from the tyranny of the local governments and local juries so there's that layer of protection. And once again, I don't think we can come up with all of the libel cases that the press has lost, but there are very few. So I think that's another measure.

Basically, nobody tries to stop the press. To some extent the freedom from sanction has made people now realize that, even if they wanted to suppress the press, they just can't do it. Today, there are too many outlets.

QUESTION: Are you saying that there's no sense in trying to restrict one particular media outlet when there are so many others available to disseminate the information?

RESPONSE: Right. How are you going to suppress the guy who sits there and pushes a button and emails something to 10,000 or 20,000 or 30,000 people? Today, you can buy yourself a mailing list. If you really want to get something out, for \$300 you can buy yourself a mailing list, and half a million people will get it in their mailbox within seconds. So, to some extent, while we have the legal protections in place, from a practical standpoint, why bother litigating and try to suppress a newspaper when you've got 10,000 other outlets available.

QUESTION: This is a follow up on what you were talking about. Is *New York Times Co. v. Sullivan* the most important decision in the past fifty years in terms of protecting freedom of speech or the ability to

80. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

81. 376 U.S. 254 (1964).

82. *Id.* at 283 (limiting liability "for libel in actions brought by public officials against critics of their official conduct" absent "actual malice").

criticize individuals?

RESPONSE: As a practical matter, it has been. I think governmental suppression of speech is not likely to be terribly effective. Your secrets get out. Ultimately, it would be futile to try to suppress the media. With the protections in *Sullivan*, there is less fear of damages from local juries. I recently watched Billy Wilder's movie called *The Fortune Cookie*—a comedy where the guy fakes a slip-and-fall. He calls the press and says, "I'm suing for a million dollars." In those days, a million dollars was a lot of money. Well, today it would be sort of a gimme case. Verdicts are so much larger. So in that sense, *Sullivan* is important. After all, libel is an intentional tort, so you could get punitive damages and there is potential for really destructive damages. Organizations like the New York Times or Associated Press could be wiped out in a single case—it's not out of the question. So again, in a practical sense, this has been probably the most important decision in history.

B. Popular Culture and Freedom of Speech

In this section, the judge, with the propensity for mixing pop cultural references and legal analysis, explores the tension between private property rights, including those vested under federal copyright laws, and the public domain fostered by freedom of expression. He also discusses the ability within that public domain to mock cultural icons, lauding in the process the United States Supreme Court's decision in *Hustler Magazine, Inc. v. Falwell*⁸³ to protect the ability of Larry Flynt to mock the Reverend Jerry Falwell.⁸⁴ In addition, Judge Kozinski addresses the impact of certain pop-cultural products—specifically, television shows about lawyers and the legal system—on society.

QUESTION: Okay, let's move into the area of pop culture. You wrote in a law journal article that when you came to the United States at age twelve, you "spent the next several years glued to a television set."⁸⁵ Is that when your apparent affinity for pop culture first developed?

RESPONSE: I guess that's when it happened. I absorbed it by being plugged into it.

QUESTION: Based upon your dissents in the *White*⁸⁶ and *Wendt*⁸⁷

83. 485 U.S. 46 (1988).

84. See generally Clay Calvert & Robert D. Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPICUUS 159, 162–64 (2001) (providing Larry Flynt's own views about the case).

85. Kozinski, *supra* note 77, at 173.

86. *White*, 989 F.2d at 1512.

cases, as well as your essay *Trademarks Unplugged*,⁸⁸ it seems you are very concerned about private property rights trumping not only First Amendment rights of free speech, but also, and perhaps more importantly, the evolution of culture. Is that an accurate summary of your views?

RESPONSE: I'm actually a big believer in property. If you're in a forest, you can say you own this tree or that tree, and who's going to dispute it? When you are in a society, however, ownership of property is only meaningful as far as it relates to how you and others deal with the property—that is, the mutual rights vis-à-vis each other. In other words, if you have a piece of land, I have a piece of land, and somebody else has a piece of land, and the land is contiguous and there are no roads between the parcels of land, it just doesn't do you any good. The land is worth more if you have public thoroughfares that allow people to travel from one to another. Why? Because it's not like being the first on the scene and you just live on your land. You want to get the benefit of living in society. The way you get better at living in the society is by enabling people to bring stuff to your land and to travel. So what you need to have is a balance between private property and the public domain.

It's not always best to say, "Well, you'd be better off if your land extended to the middle of the street. And your neighbor's land extended to the middle of the street." Granted, you would each have a little more land, but you'd have more land that is less useful. I think about intellectual property and copyright in the same way. I think that copyright owners often tend to be a little myopic. They want to extend their rights to the point where ultimately they're going to have less and society is going to have less. And the classic case of this was the *Sony* case in the Supreme Court when videotapes first came out.⁸⁹

QUESTION: Betamax.

RESPONSE: Betamax, exactly. The movie companies were apoplectic. They said, "Oh my God, people are going to use them to copy movies off the television. They're going to duplicate tapes. Nobody will ever pay to see a movie again." They really believed this and were convinced that this was going to be the death of the movie industry. They didn't just say it. It wasn't a death wish. They truly felt that this would be the end of the movie business. Well, they lost the case, and it became the best thing that ever happened to the movie industry. More people are going to see movies. They have a whole new release-to-tape market.

87. *Wendt*, 197 F.3d at 1285.

88. Kozinski, *supra* note 15.

89. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

I remember when I saw *Twelve Angry Men* on TV and then had to wait ten years for it to come back on television. The people at the networks felt the audience had to build up the desire for it and they couldn't show it too often. So on Easter you'd see *The Robe* or on Christmas, I forget the movie.

QUESTION: *It's a Wonderful Life?*

RESPONSE: *It's a Wonderful Life*, exactly. *Miracle on 34th Street* is another one. So you would be able to watch those movies at that particular time, and that was it. This is how they thought the industry worked best. Experience shows that many more people are going to movies not just in total numbers but percentage-wise as well. People are spending more money going to movies. I think having that availability of films—having tapes and DVDs—stimulates interest in movies. People don't bother to copy them—who wants to have a copied tape? So this fear was unfounded. Not only was the industry not hurt by the videotape market, it has revolutionized the movie industry and brought only benefits. New profit centers. They now have movies that never have been released in the theaters. They were trying to kill the goose that was about to lay the golden egg for them.

QUESTION: Straight-to-video, as they call it.

RESPONSE: Yes, they go straight to video. I just saw an ad for a new Tarzan movie, and it must have gone straight to video. It wasn't out in the theaters. I guess they must market to people with children in that age group. But I happened to see a billboard.

The point is that just having a property right does not make you wise about when you should or should not limit that right. They're too eager to find an infringement. They generally want to say, "Someone stole my rights." They want compensation for this infringement, but I think often they wind up really not doing themselves any good. And they wind up sapping the public domain.

When you introduce something into popular culture—people start to think of it, recognize a face, or hum a tune—to some extent, you do give up some rights. You have the copyright, but I think you consent to having people make reference to it or poke fun at it. That's part of what living in society is about. If you want to just show a movie in the forest to a select number of your friends, I suppose, you can do that. But if you bring these things to the public, you're going to have to allow for the fact that people, if they like it, will absorb it. It will become part of them. It becomes a way for them to express themselves. It becomes a way for them to reference each other.

Homer Simpson, for example, has become a common reference in our

society. You can't stop it. Ultimately, these things are good for the authors and for the copyright. It helps make them more famous. It helps people become aware of them. Ultimately, everybody would be better off if they were a little less crabby.

QUESTION: When you were talking about poking fun, that leads to another question. In your dissent in *White v. Samsung Electronics*,⁹⁰ you write that "the vibrancy of our culture" depends in part on "the right to mock, for profit as well as fun, the cultural icons of our time."⁹¹ To that extent, then, we'd assume that you would agree with the United States Supreme Court's unanimous opinion in *Hustler Magazine v. Falwell*.⁹² Do you agree with that opinion?

RESPONSE: Oh, sure. It must not have been very pleasant for Jerry Falwell. It must have been as embarrassing as hell and quite unpleasant, but one would hope that none of his friends really reads that magazine.

QUESTION: Ironic, isn't it?

RESPONSE: Yes. I managed to miss that ad—until he brought the lawsuit and now everybody knows about it.

The other point is that Jerry Falwell did not become a public figure through accident. I mean he's somebody that you can make a joke about. Obviously, people can still make a joke about some local stiff neck, but nobody will get it. The only reason it's worthwhile to make a joke about Falwell is that somehow he has insinuated himself into the public consciousness. People are aware of him. If you want people to know who you are, you're going to have to put up with the fact that sometimes they are going to say things about you that your mother would not like to hear. That's just the way it is. If you don't like it, that's fine. Go live in the forest. Be a hermit. You know, it's your life.

QUESTION: So to follow up on that, when it comes to the right to mock, are there any people who you feel are off limits for mockery?

RESPONSE: I am.

QUESTION: But, of course! Would you make a distinction between public figures and private figures, or is anybody fair game?

RESPONSE: If you are a volitional public figure, I think you have no claim at all. In other words, if you are a public official or run for public office, or are just somebody who has become famous by being on television, you don't have a legitimate cause for complaint. If, on the other hand, you are a completely private person, I think the state cannot usurp

90. *White*, 989 F.2d at 1512.

91. *Id.* at 1521.

92. 485 U.S. 46 (1988).

your privacy interests. If you do nothing to thrust yourself into the public eye, you should have more protection for your individuality and for your feelings of privacy.

The people I worry most about are the people like the family in *Time, Inc. v. Hill*⁹³—the family that became big news because they were the subject of a crime. People often get thrust into the public eye through no fault or action of their own—truly against their will. I think there is a balancing that should take place, but ultimately it is one of the things that happens by living in society. Just as you risk being run over by a car or crashing in an airplane, you risk becoming a public figure against your will.

QUESTION: So as the Court mentioned in *Gertz v. Robert Welch, Inc.*,⁹⁴ there may be, in “exceedingly rare”⁹⁵ cases, an involuntary public figure?

RESPONSE: They’re not that “exceedingly rare.” Victims of crime, victims of disaster, or somebody who does something heroic at the scene of an accident are not looking for publicity or acclaim. Someone who does something heroic but, it turns out, is on his way from having an affair doesn’t want any publicity. He would rather not have been there at all. But it’s just one of those things. I think it happens more often than we think that people are thrust into the public eye.

There are, however, a lot of people who are very happy to get their face on television—and other body parts as well. Did you see that clip with Katie Couric on *The Today Show* where this woman opened up her coat to show bare breasts on TV?⁹⁶ There are people like that. If that’s your thing, I guess that’s fine. A lot of people are very happy to be anonymous, and I do think that we ought to protect them. You can’t say, though, “Look, I’m going to be anonymous to criticism, but otherwise I want to be famous.” You have to take the good with the bad. But when people do nothing to step forward into the limelight, I think we ought to cut them a little more slack.

QUESTION: In privacy areas as well as in defamation law?

RESPONSE: Well, they go hand in hand. Defamation gives us false statements⁹⁷ and invasion of privacy deals with true statements.⁹⁸

93. 385 U.S. 374 (1967).

94. 418 U.S. 323 (1974).

95. *Id.* at 345.

96. See generally Frank Ahrens, *How to Get a Show to Take Off*, WASH. POST, Aug. 8, 2000, at C2 (describing the flashing incident to which Judge Kozinski refers here).

97. See JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 111 (3d ed. 2001) (writing that statements “must be false in order to support a libel suit”).

QUESTION: I have a question to wrap up the pop culture area. You've placed some of the blame for our litigious society on popular culture—particularly television and motion picture portrayals of lawyers and judges. How does reality TV, such as *Court TV* and a newly-launched show about prosecutors and defense attorneys, contribute to America's desire to sue?

RESPONSE: Well, you know, I don't watch much television anymore. I gave it up some years back. Probably because I just don't have the time. But my wife watches these shows, so I see a little bit here and there. They actually play a pretty useful role. The ones I've seen tend to present interesting legal issues and, by and large, resolve them reasonably. To the extent that these shows provide an accurate description of the legal process, they probably are a good thing. They make people aware of their rights. I think they also make people aware of the very difficult process of recovering—being successful in court—and that it's not something to be undertaken for sport.

Of course, there are shows and movies out there in which the process gets glorified, and one might get the idea that for even a small injury—or something that's not even an injury—you can recover a fortune. Over time, though, people have become more realistic about the process.

C. Legal Scholarship and the Art of Writing Opinions

The value of legal scholarship continues to be a controversial point among lawyers, judges, and academics.⁹⁹ At its best, it can be seen as “an expeditious vehicle by which to receive a comprehensive introduction to an unfamiliar field of law written by scholars who have studied and taught in the field or by experienced practitioners”¹⁰⁰ working on a particular issue. At its worst, legal scholarship is viewed with “considerable wariness”¹⁰¹

98. The privacy tort known as public disclosure of private facts relates to “highly personal but *true information* that no one has a right to publicize about us.” PAUL SIEGEL, *COMMUNICATION LAW IN AMERICA* 159 (2002) (emphasis added).

99. See Seth P. Waxman, *Rebuilding Bridges: The Bar, the Bench, and the Academy*, 150 U. PA. L. REV. 1905, 1910 (2002) (observing that “[t]he law schools’ tilt toward pure scholarship, and especially theoretical scholarship, has often come at the expense of other things they can and should do”).

100. Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMP. L. REV. 7, 7 (2002) (praising law reviews as a source of information for judges and practitioners, as well as an invaluable exercise for law students).

101. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1327 (2002) (describing how so much legal scholarship goes without ever being cited in other sources).

and, from some of its harsher critics, is looked upon as a “wasteland.”¹⁰²

While the debate over the utility of legal scholarship rages on, critics acknowledge that the writing has not remained completely stagnant¹⁰³ since law reviews first gained recognition in the nineteenth century.¹⁰⁴ University of Chicago law professor Richard A. Epstein has observed that “the character and tone of much modern legal scholarship would have been unrecognizable to distinguished legal scholars before 1960.”¹⁰⁵ Epstein is quick to point out, however, that such a transformation has taken place in other disciplines as well.¹⁰⁶ Even temporary shifts in legal philosophy throughout the last century—legal realism in the 1920s and 1930s, for instance—have influenced the course of legal scholarship, albeit for a short time.¹⁰⁷ Despite these changes over time, critics still argue that the value of legal scholarship continues to decline.¹⁰⁸

Perhaps the group that should be the primary audience for legal scholarship—“judges and the leaders of the bar and the other movers and shakers of the legal community”¹⁰⁹—too often is put off by the length and style of the article.¹¹⁰ The law review format, which is quite the opposite of the easily digestible trade journal style, “discourages reading by busy judges, practitioners, and policymakers with influence over solutions.”¹¹¹ As a result, so much of legal scholarship today boils down to this: “law professors are writing largely for each other”¹¹²—ostensibly people with the time and inclination to engage in verbose and protracted exchanges.¹¹³

102. *Id.* at 1329.

103. Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1314 (2002).

104. See Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 662–63 (1998) (describing the early history of law reviews, including the first student-edited journal—the *Albany Law School Journal*—published for one academic year in 1875).

105. Richard A. Epstein, *Let “The Fundamental Things Apply”: Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1289 (2002).

106. *Id.* at 1289–90 (describing how other fields have changed over the past forty years, such as economics, with a more pronounced mathematical orientation, and “equally profound internal transformations . . . in anthropology, sociology, literature, and feminist theory”).

107. Posner, *supra* note 103, at 1315.

108. See Waxman, *supra* note 99, at 1909 (suggesting that “[t]he ties between the law reviews and practicing lawyers and judges are much weaker than they once were”).

109. Posner, *supra* note 103, at 1315.

110. Rhode, *supra* note 101, at 1336.

111. *Id.*

112. *Id.*; see also Richard S. Harnsberger, *Reflections About Law Reviews and American Legal Scholarship*, 76 NEB. L. REV. 681, 691 (1997) (suggesting that the change in law review content today is reflective of changes in legal education).

113. *But see* David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 993–95 (1991) (arguing that “many tenured faculty members simply do not engage in scholarship

This notion of folly is not solely a product of modern-day scholarship. A humorous, yet poignant critique of legal scholarship, published in 1936 by Fred Rodell, a figure in the Legal Realism movement, suggested that “[t]he best way to get a laugh out of a law review is to take a couple of drinks and then read an article, any article, aloud. That can be really funny.”¹¹⁴ Rodell preferred to publish in the popular press where he thought his efforts would serve a greater cause.¹¹⁵

On a more serious note, courts are looking less to law reviews for guidance on the finer points of law.¹¹⁶ One indicator of the trend away from the usefulness of law journals can be measured by the decline of citations by judges in their opinions. One study revealed a “47.35% decline in the use of legal scholarship by courts over the past two decades, the most notable decline occurring in the past ten years.”¹¹⁷ Coupled with the cacophony of “pleas of judges and practitioners for more ‘practical’ articles,”¹¹⁸ this statistic helps to make a solid case that legal scholarship as a vehicle for judicial influence is in trouble.

Despite the unsettled prognosis for legal scholarship, Judge Kozinski continues to be both an active publisher and consumer of law review articles. In this section, he discusses why he considers the law review to be an important outlet for his own work. While case opinions confine jurists to the facts, scholarly legal publications provide the chance for them to become advocates—partisan authorities—on a particular topic.

Judge Kozinski’s comments begin on a different matter related to legal scholarship—the relatively recent tendency to rely on prospective judges’ outside writings, in addition to case opinions, in judicial confirmation proceedings.

QUESTION: You make reference in a law journal article of your own to “the now-infamous *Indiana Law Journal* article”¹¹⁹ by Judge Robert Bork that was used in the confirmation proceedings after President Ronald Reagan nominated him to the United States Supreme Court. Should the scholarly writings of nominees to the Supreme Court—or, for that matter, any judicial post—be considered in the confirmation process or is there a

after tenure” and “nontenured faculty scholarship is hardly amok”).

114. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 40 (1936).

115. G. Beth Packert, Note, *The Relentless Realist: Fred Rodell’s Life and Writings*, 1984 U. ILL. L. REV. 823, 825 (1984) (discussing Rodell’s penchant for writing in a readable and humorous style that made use of narrative and focused on personalities in the law).

116. See McClintock, *supra* note 104, at 659.

117. *Id.* at 660.

118. *Id.*

119. Kozinski & Banner, *supra* note 23, at 633.

danger of self-censorship created by their consideration that is detrimental to the public discussion of ideas?

RESPONSE: There is that danger, but I don't know how you can avoid it. Senators can rely on anything they wish in casting their votes, and certainly it's legitimate to consider a candidate's prior writings.

I don't, however, think it's wise. We would be better off if the Senate didn't go digging through all the writings. For one thing, people may change their opinions once they are appointed to the bench. Second, I'm not sure how good of an indicator a person's writing is in any event. Writing opinions in real cases is different from writing law review articles dealing with hypothetical legal issues. Nevertheless, there is nothing we can do about it. We cannot tell the senators not to look at this material.

QUESTION: In a lecture at the Houston Law Center, you humorously described how you once wrote an opinion on contract law for the purpose, at least in part, of getting it published in a law school casebook.¹²⁰ Your dissent in the *Vanna White* case has made it into at least once such casebook on media law.¹²¹ When you wrote that dissent—one packed with so many pop cultural references that it is a favorite with our students—did you do so with a view to its possible inclusion in a casebook? Have you written any First Amendment opinions with that aim in mind?

RESPONSE: Probably the *Vanna White* case was as close as I got to it. I figured law professors couldn't resist all those pop cultural references.

QUESTION: It's just too good. You have stated that "judges generally like the security of treading on a beaten path."¹²² Would you put yourself into that category as one not prone to break with precedent? How important to you is the role of precedent in legal decision-making?

RESPONSE: It's quite significant. If you have controlling authority, you can just stop right there. You've got a case that controls directly, so you don't have to work very hard. And, of course, those are always the easiest cases. Unfortunately, that's not the way human nature is. People often do things that have never been done before, so you have to figure out how close that behavior comes to something else that came before.

Sometimes conduct falls right between established precedent on both sides of an issue. As a judge, you might lean toward one side or the other. Or you might fall somewhere in between. But even in those types of cases,

120. Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 298 (2000).

121. See PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, PROBLEMS 212–20 (1997) (including portions of Judge Kozinski's dissent in *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993)).

122. Kozinski, *supra* note 120, at 303.

you cannot go for something that is completely outside the range—in other words, go off and totally reject precedent. For one thing, you wouldn't be doing the parties, or society for that matter, any favors. People must be able to count on limiting the possible results. So I'm always very happy to follow precedent, if it's on point.

QUESTION: In a 1993 law review essay, you called fellow federal appellate court judge Richard Posner “an authority on everything.”¹²³ Do you admire Judge Posner, or how much of that comment was, say, rhetorical hyperbole?

RESPONSE: Oh, it wasn't hyperbole. I admire Richard Posner. I think he's the leading light in the federal judiciary. Frankly, he's just much smarter than any of us and much more accomplished. He's written much more. I think the guy's just amazing. He's definitely the leading jurist of the latter half of the twentieth century.

QUESTION: Are there other judges whom you particularly admire, either for their legal intellect, writing ability, or some combination of these?

RESPONSE: I wouldn't want to insult somebody by not including them, so I better not try to create a list. I do think quite a bit of Judge Reinhardt, my colleague on the Ninth Circuit. He is very smart. We disagree quite a bit, but he's a very good lawyer and he's very persuasive.

QUESTION: You mentioned a moment ago that sometimes there isn't precedent out there. When you are first approaching an issue that's raised in a case, do you instruct your law clerks to search out law journals as well as applicable precedent?

RESPONSE: I don't really need to instruct them to do so. They have recently come from law school, and they know these things. Occasionally, I'll tell them to look for a law review article on one point or another. Sometimes the briefs will cite a law journal article. And sometimes the law review article speaks more directly to the issue than the cases do because it anticipates the next problem. With three new law clerks each year who just have come off law reviews, there's not much of a danger that we're going to fail to take into account legal scholarship.

QUESTION: Do you think your views on the utility of legal scholarship are shared by other judges?

RESPONSE: I suspect not by all of them—maybe not even a majority. A lot of judges are skeptical of legal scholarship, but many do understand its importance.

123. Kozinski, *supra* note 15, at 960.

QUESTIONS: In terms of actual numbers, it seems that not many judges take the time to write law journal articles. Why do you feel it's important to write these articles when others might say, "Well, I'm too busy, and I don't have the time to write law journal articles."

RESPONSE: It's simply a different kind of writing. You can do things in law review articles that you can't do in opinions. Opinions are very confining—you're confined to the facts in a case and you can't go too far afield when deciding it. Sure, you can add a few rhetorical flourishes, like in the *Vanna White* case, but ultimately you are limited to the issues and the facts of that case.

Maybe there are other things you think are relevant or interesting, but you really can't put them in an opinion. And, truthfully, you shouldn't put them in an opinion. I'm very careful about what I write. If you put too much in, it starts to undercut the important stuff. It may look like you have two grounds for a decision, not just one. The danger in that case is that both will become dicta. If you craft opinions correctly, they have certain self-confining qualities.

Law review articles, on the other hand, let you be as partisan—as non-objective as you want to be. But you can't do that when writing an opinion. I have a piece coming out in the *Michigan Law Review* book review section in which I review Bjorn Lomborg's book, *The Skeptical Environmentalist*. I say some very unkind things about environmentalists—basically I call them liars and cheats. But I put these views aside when I decide cases.

QUESTION: In terms of your own writing style, you've been described as a "showy writer" and you drop in pop cultural references.¹²⁴ Do you do that for your own amusement, or for the readability of the opinion—to keep the reader interested—or is it just your natural style to write like that, instead of being dense and dull?

RESPONSE: It's all of those things. Some of it is to keep me entertained and interested. But mostly it's because I want people to read my work, and I think people are more likely to read it if it is interesting. They find little nuggets in there that make them laugh. People have told me that they've come to expect that in my writing, so they tend to read my stuff looking for those things. It's like a scavenger hunt if you salt the writing with enough of these.

QUESTION: You build up the expectation of your audience.

RESPONSE: Right. That's so they look for the line. I just did that in

124. Reynolds Holding, *A Judicial Choice of Words*, S.F. CHRON., June 21, 1998, at Zone3/3 (describing Kozinski as a "showy writer").

the opinion about Barbie. I got my news clippings from the WestFax service, and the most quoted line is when I wrote, "The parties are advised to chill."¹²⁵ It was a libel case wrapped inside of a trademark case.

QUESTION: You tracked the citations from that case?

RESPONSE: Yes. I track all my cites. Whenever my name pops up, I get a weekly WestFax report.

D. The Ninth Circuit Court of Appeals

It has been described as "a den of outlaw judicial activists that the Supreme Court must regularly smack into submission"¹²⁶ and a "maverick"¹²⁷ court whose "23 active judges and 20 senior status judges defy consensus."¹²⁸ The judges themselves have been called "renegades"¹²⁹ and "[r]ebels in [b]lack [r]obes."¹³⁰ These musings make one point perfectly clear: While most federal courts operate with little or no attention paid to their undertakings, the Ninth Circuit Court of Appeals¹³¹ has earned a reputation as the federal judiciary's "bad boy"—a tribunal that frequently is reversed and whose opinions sometimes fail to pick up even one vote from the nine justices of the United States Supreme Court.¹³²

In June 2002, the appellate court furthered its troubled reputation by ruling that the words "under God" should be removed from the Pledge of Allegiance because they violated the First Amendment's proscription against governmental establishment of religion.¹³³ The three-judge panel found that the reference to a single "God" was tantamount to endorsing monotheism as the national religious preference and thus was in violation

125. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 908 (9th Cir. 2002).

126. Michele Landis Dauber, *The 9th Circuit Follows: Court's Reversals Stem from Being Too Law-Abiding, Not Too Liberal*, LEGAL TIMES, Aug. 19, 2002, at 36.

127. Marisa Taylor, *Influential 9th Circuit Assembles in S.D.*, SAN DIEGO UNION-TRIB., July 15, 2002, at A1.

128. *Id.*

129. *Net Angst Picks Up in Federal Courts*, BROWARD DAILY BUS. REV., Sept. 10, 2001, at A12.

130. Jason Hoppin, *Ninth's Net Resistance Gains Steam*, RECORDER, Sept. 5, 2001, at 1.

131. The Ninth Circuit is comprised of the federal districts of Alaska, Arizona, Central, Eastern, Northern, and Southern California, Hawaii, Idaho, Montana, Nevada, Oregon, Eastern and Western Washington, Guam, and the Northern Mariana Islands.

132. See Jason Hoppin, *Ninth Circuit Was Reversed in 12 out of 17 Cases*, RECORDER, June 25, 2002, at 1 (observing that, in seven cases, the Ninth Circuit was reversed unanimously by the Supreme Court); see also Adam Liptak, *Court That Ruled on Pledge Often Runs Afoul of Justices*, N.Y. TIMES, June 30, 2002, at 1 (suggesting that "the Ninth Circuit has developed a reputation for being wrong more often than any other federal appeals court").

133. See *Newdow v. United States Cong.*, 292 F.3d 597, 597 (9th Cir. 2002).

of the Constitution.¹³⁴ The ruling set off a barrage of political fireworks across the country, resulting in a collective condemnation of the ruling by congressional Democrats and Republicans alike,¹³⁵ and a similar rebuke by the President.¹³⁶ The judge who authored the opinion shortly thereafter issued a stay of the order.¹³⁷

While the words “under God” concerned the judges from a constitutional standpoint, the term “indivisible” has troubled them on another front—specifically, attempts by some members of Congress to break up the Ninth Circuit into smaller circuits.¹³⁸ As it stands, the Ninth happens to be “the largest and the busiest of the 13 regional circuits.”¹³⁹ In fact, it “is “more than twice the size of the next largest appeals court.”¹⁴⁰ For some critics, size matters—and they attribute the errant rulings of the court to its unwieldy nature.¹⁴¹ Idaho Attorney General Alan G. Lance told a congressional subcommittee in July 2002 that “[t]he Ninth Circuit is simply too big, too slow, and too unreliable.”¹⁴² But the court’s chief judge, Mary M. Schroeder, told the same panel that it would be a mistake to reorganize the Ninth Circuit “because of particular judicial decisions or particular judges.”¹⁴³

Judge Richard A. Posner, a federal appeals judge from the Seventh Circuit—the nation’s second largest—whom Judge Kozinski described earlier in this Article, as the “leading jurist of the latter half of the twentieth century”¹⁴⁴ conducted an empirical study to determine if the size of Ninth Circuit predisposed it to judicial irresponsibility.¹⁴⁵ He concluded that,

134. *See id.* at 607.

135. *See* Stuart Taylor, Jr., *Holding Courts in Contempt*, NEWSWEEK, July 8, 2002, at 38.

136. Maura Dolan & James Gerstanzang, *9th Circuit Puts Its Ruling Against Pledge on Hold*, L.A. TIMES, June 28, 2002, at A20.

137. *Id.*

138. *See* Carolyn Lochhead, *Congress Moves to Divide Controversial Ninth Circuit Court*, S.F. CHRON., July 24, 2002, at A6.

139. Gail Diane Cox, *Largest Circuit Is Still the Maverick*, NAT’L L.J., Feb. 26, 2001, at B9 (describing how the reputation of the court as “left-leaning” persists despite some movement toward the center).

140. *See* Lochhead, *supra* note 138, at A6.

141. *See* Dauber, *supra* note 126, at 36.

142. *Breakup of 9th U.S. Circuit Court: Hearing on H.R. 1203 Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. (2002) (statement of Alan G. Lance, Attorney Gen., State of Idaho).

143. Michelle Munn, *Don’t Split 9th Circuit, House Panel Is Told*, L.A. TIMES, July 24, 2002, at B8.

144. *Supra* Part III.B.

145. Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000). Judge Posner examined the rates of unanimous reversals—avoiding any ideological bias—and summary reversals where the Supreme Court

when compared to the other circuits over a twelve-year period, the Ninth Circuit's reversal rate was "probably not a statistical fluke,"¹⁴⁶ and, furthermore, "may not be a product simply of that circuit's large number of judges."¹⁴⁷

Senator Orrin G. Hatch, a ranking member of the Senate Judiciary Committee, believes the Ninth Circuit's problems stem more from its "lack of balance" than its size.¹⁴⁸ Arguing for an expedited confirmation of President Bush's judicial nominees, Hatch has pointed out that seventeen of the Ninth Circuit's twenty-three active judges were appointed by Democratic presidents,¹⁴⁹ creating a liberal tilt with "activist judges who threaten religious rights as well as our constitutional government."¹⁵⁰

In this section, Judge Kozinski comments on the Ninth Circuit's liberal reputation, offers an explanation for the perceived imbalance, and speculates on its future.

QUESTION: The Ninth Circuit Court of Appeals is known for its so-called "liberal reputation"¹⁵¹ and is portrayed in the media as frequently having its opinions reviewed and reversed by the United States Supreme Court. Is that moniker—"liberal"—an accurate description of the Ninth Circuit? And, if so, what does it mean in today's legal world to be a "liberal" court?

RESPONSE: I think it's still a fairly accurate description. We had an infusion of some very liberal judges during the Carter era, and some of them are still active. Some are quite liberal without any embarrassment about it. These are the kind of judges that no longer get confirmed. They get knocked out of the process.

QUESTION: Why would that be?

RESPONSE: At the time that Carter was president, when a person was nominated to the lower federal courts, he was confirmed—as long as he didn't have a criminal record, a morals charge, not enough years of practice, or was clearly unqualified. Unless it was one of those very narrow kind of things which would usually surface during an FBI check, they would just get confirmed. It was highly unusual to have any kind of

reverses the case without briefing and oral argument, a process which he writes "can fairly be described as a rebuke to the lower court." *Id.* at 713.

146. *Id.* at 719.

147. *Id.*

148. Orrin G. Hatch, *A Circuitous Court: Pledge Decision Is Judicial Activism*, WASH. TIMES, July 2, 2002, at A17.

149. *Id.* (noting also that five seats on the Ninth Circuit currently are vacant).

150. *Id.*

151. Savage, *supra* note 69, at 46.

confirmation fight or any kind of opposition to people based on their judicial philosophy.

That's the way it worked. Now it has changed quite a bit. During the Clinton administration, we had twelve or thirteen judges appointed to the Ninth Circuit—very good, solid judges—but most of them definitely not ultra-liberal. Most of them accept the limited role of the judiciary. Even though some of them are a little more liberal than others, they basically are a quite solid middle-of-the-road crowd. Once the influence of the Carter judges diminishes, we probably will be just like any other circuit.

You have to keep in mind that Carter appointed eleven or twelve people to this court—more than half of the court at the time. They were not just liberal. They were really powerful intellects. People like Steve Reinhardt, Betty Fletcher, Bill Canby, Harry Pregerson, just to mention a few. Some of the judges were so committed and able that they would be very persuasive—pulling along other judges. So if you look at the record of the last fifteen years, and subtracted out some of the influence of the Carter judges, you would find that we are just like other circuits.

QUESTION: Once the Carter judges drop off?

RESPONSE: Yes. But some of them have many years left. I wouldn't be surprised if all these people will be around twenty years later still pumping out the opinions.

QUESTION: We all hear about the shortage of federal judges reaching almost crisis proportions. In the same breath, we hear that any president—Democrat or Republican—faces an uphill battle in getting his nominee confirmed. Yet, on your circuit, former President Clinton was successful in getting so many judges confirmed during his presidency—more than any other President in recent memory. How do you account for that?

RESPONSE: What happened with President Clinton is that he came to realize, fairly early on in the process, that he wasn't going to be able to appoint judges that reflected the most liberal elements in his administration. Carter, who I think was more liberal than Clinton, had no controversy in the confirmation process to worry about so he gave free rein to his legal people. And they clearly sought out judges based on ideology. Clinton, on the other hand, decided very early on that it's just not worth it. He picked some very good judges. I'm very happy with them.

QUESTION: So the limited role of the judiciary is the tie that binds?

RESPONSE: Absolutely. It may be, in fact, that Clinton truly believed in the limited role of the judiciary. He was in a little different era from Carter. All but the old timers believe, in fact, that judges have a limited role. I think Clinton believed that, and once a president comes to accept that fact, it's much easier to get candidates past the Senate.

QUESTION: Has President Bush accepted that fact?

RESPONSE: I believe so, but I have no inside information.

QUESTION: Here's a humorous one to end on. You write in the essay *Trademarks Unplugged* that "[i]f you want to refer to someone as a nebbish, you call him a Woody Allen."¹⁵² That said, take a stab at filling in the following blank: "If you want to call someone a _____, you call him an Alex Kozinski."

RESPONSE: Stud.

IV. ANALYSIS AND CONCLUSION

At the outset, and before analyzing the substance of the interview, it is interesting to note an important, although perhaps not surprising, dichotomy between the Judge Kozinski that one reads in case reporters and law journals and the Judge Kozinski that one first meets and interviews for purposes of writing a scholarly article. Reading the judge's opinions, described by one journalist as "among the most quotable in the West,"¹⁵³ and often peppered with pop cultural references¹⁵⁴ and sometimes written in a manner described as "showy"¹⁵⁵ and characterized by "wit and style,"¹⁵⁶ one might expect him to speak in snappy soundbites and be somewhat glib or sarcastic. This, however, was anything but the case. Judge Kozinski was personable, offered lengthy and thoughtful answers to the questions posed, and, as one *would* expect from a judge, he was both thoroughly intellectual and professional. He even managed to conclude the interview with the type of humor one expects from his legal writing.

Turning to the substance of the interview, Judge Kozinski's extensive remarks about free speech serving as a check on totalitarian governments should come as no surprise.¹⁵⁷ He was born to a mother who survived the Holocaust and a father who managed a weaving plant, in an Eastern Bloc

152. Kozinski, *supra* note 15, at 975.

153. Jason Hoppin, *A Judge of Many Opinions: About Books, Movies. . .*, RECORDER, July 25, 2000, at 4.

154. *See supra* note 27.

155. Holding, *supra* note 124.

156. *Recent Cases*, 20 ENT. L. REP. 9, 9, Oct. 1998. "Dreamwerks Production Group, a sponsor of science fiction conventions, is entitled to trial on its trademark infringement claim against DreamWorks SKG, because likelihood of confusion is an issue of material fact, federal appellate court rules." *Id.* at 8.

157. Totalitarianism "is a term which implies extreme or radical authoritarianism." JOHN CALHOUN MERRILL, *THE IMPERATIVE OF FREEDOM: A PHILOSOPHY OF JOURNALISTIC AUTONOMY* 11 n.17 (1974). *See generally* FRED. S. SIEBERT ET AL., *FOUR THEORIES OF THE PRESS* 9-37 (1963) (for a discussion of an authoritarian model and theory of press control).

communist community—Romania¹⁵⁸—and lived there until leaving for Vienna, Austria at age eleven and then coming to the United States—more specifically, to Baltimore, Maryland—at age twelve.¹⁵⁹ As he once told a reporter for the *New York Times* about his native land, “I know what it’s like to always be on your guard. Everything you say or do will be judged or reported, and you’ll have to explain yourself for things that are really innocent.”¹⁶⁰

And Judge Kozinski’s concerns about surveillance-based anti-terrorism legislation affecting freedom of expression, as well as privacy, by causing a chilling effect via the monitoring of communications also should not come as a surprise. Computer surveillance, it seems, is an acute concern of Judge Kozinski. Just one week before the attacks on the World Trade Centers and the Pentagon that ultimately gave rise to that legislation, he wrote an article published in the *Wall Street Journal* that attacked a then-pending proposal before the United States Judicial Conference to monitor the computer use of the 30,000 employees of the federal judiciary.¹⁶¹ Analogizing the policy’s treatment of federal judges like prisoners who also surrender privacy rights, Judge Kozinski blasted the surveillance policy as “draconian” and noted that the policy would jeopardize “a bedrock principle of our judicial system,” namely confidential case deliberations.¹⁶² When the twenty-seven judge panel of the Judicial Conference convened less than three weeks later, it heeded Judge Kozinski’s position and struck the language from the Internet-use policy giving no right of privacy in email and Web use to court employees.¹⁶³

Judge Kozinski’s privileging of *New York Times Co. v. Sullivan*¹⁶⁴ as a crucial decision protecting speech critical of public officials is consonant with the views of others. For instance, Harry Kalven, Jr., famously declared in a law journal article shortly after the opinion was handed down that the *Sullivan* decision “may prove to be the best and most important it

158. See generally Jane Leftwich Curry, *Media Control in Eastern Europe: Holding the Tide on Opposition*, in *PRESS CONTROL AROUND THE WORLD* 104–27 (Jane Leftwich Curry & Joan R. Dassin eds., 1982) (discussing control of the press in Eastern European nations, including Romania, from the 1950s through the 1970s).

159. Matt Richtel, *To One Judge, Cybermonitors Bring Uneasy Memories*, *N.Y. TIMES*, Aug. 18, 2001, at A8.

160. *Id.*

161. Alex Kozinski, *Privacy on Trial*, *WALL ST. J.*, Sept. 4, 2001, at A22.

162. *Id.*

163. *Judges Ease Surveillance of Web Use*, *N.Y. TIMES*, Sept. 20, 2001, at A15.

164. 376 U.S. 254 (1964).

has ever produced in the realm of freedom of speech.”¹⁶⁵ Likewise, Pulitzer Prize-winning journalist Anthony Lewis, in his book *Make No Law*, called the opinion “a transforming judgment,”¹⁶⁶ contending that “[i]t made clearer than ever that ours is an open society, whose citizens may say what they wish about those who temporarily govern them.”¹⁶⁷ And Cass Sunstein of the University of Chicago has called *Sullivan* “one of the defining cases of modern free speech law.”¹⁶⁸

On the matter of First Amendment interpretation, Judge Kozinski’s comments reveal that he is not bound to either a literal reading of the text of the document or to the original intent of the Framers of the Bill of Rights, at least when it comes to the meaning of the word “press.” Rather than focusing on a technological-specific definition of “press” as a device that puts ink to paper, he focuses on what might be described as a more *functional* definition. In particular, Judge Kozinski has no problem with an expanded definition of “press” that includes, as he put, “the same function performed under very different technological conditions.”¹⁶⁹ As such, the term press can sweep up and include, under this view, devices and technologies like the Internet that the Framers never envisioned.

New technologies, of course, are an area with which Judge Kozinski seems readily versed and familiar. His examples of blogs—online journals comprised of brief entries, often displayed in chronological order and usually written in a conversational tone and packed with links¹⁷⁰—like Matt Drudge¹⁷¹—provide excellent current illustrations of the difficulties today in defining “press” and the need to adopt the consistency principle between the Free Speech and Free Press Clauses that Judge Kozinski calls for. As technologies evolve and lines blur, the term “freedom of expression” will perhaps better serve as the catch-all term for both freedom of speech and freedom of press.

Acknowledging a legal dichotomy between public and private figures, Judge Kozinski believes that freedom of expression to voice opinions about

165. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 194 (1964).

166. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 7 (1991).

167. *Id.* at 7–8.

168. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 205 (1993).

169. *Supra* Part III.A.

170. Barb Palser, *Journalistic Blogging*, AM. JOURNALISM REV., July–Aug. 2002, at 58.

171. See generally Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 411–12 (1999) (raising the question of whether Matt Drudge is a member of the press and describing Drudge’s online publication, *Drudge Report*).

public figures like Jerry Falwell is a right that deserves protection. Public figures essentially assume a certain risk of verbal harm. As he aptly put it, “If you want people to know who you are, you’re going to have to put up with the fact that sometimes they are going to say things about you that your mother would not like to hear.”¹⁷² Indeed, Jerry Falwell’s mother probably would not like to hear about a fictitious sexual encounter with her own son—the subject of the ad parody in *Hustler* that generated the lawsuit in *Hustler Magazine v. Falwell*.¹⁷³ And the Judge’s comments also suggest a certain quid pro quo—in particular, a trade of fame gained for privacy lost, in which one gains public attention and loses the ability to remain free from criticism. As Judge Kozinski puts it, “[y]ou have to take the good with the bad.”¹⁷⁴

While not troubled by protecting caustic comments regarding the likes of Falwell, Judge Kozinski said that he does worry about people who “get thrust into the public eye through no fault or action of their own—truly against their will.” This comment brings to mind the category of involuntary public figures in libel law—a controversial area on which there is substantial disagreement about its continued validity.¹⁷⁵ Would Steven J. Hatfill—the man placed involuntarily in the white-hot media spotlight in August 2002 by the FBI as a “person of interest” in the investigation of Anthrax-laced letters—fall into this category?¹⁷⁶ Would Richard Jewell of the 1996 Centennial Olympic Park bombing notoriety similarly fit this niche?¹⁷⁷ Perhaps, as Judge Kozinski stated, “[j]ust as you risk being run over by a car or crashing in an airplane, you risk becoming a public figure against your will.”¹⁷⁸

On the topic of copyright protection, Judge Kozinski’s comments about the *Sony Beta Max Case* suggest that he believes copyright holders often have a certain misguided sense of “the sky is falling” when it comes to infringement on their rights. Indeed, Judge Kozinski suggests there are

172. *Supra* Part III.B.

173. 485 U.S. 46 (1988).

174. *Supra* Part III.B.

175. See generally Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard Jewell Is a Public Figure Is Wrong and Harms Journalism*, 22 LOY. L.A. ENT. L. REV. 293, 310–13 (2002) (discussing the state of the involuntary public figure doctrine in defamation law in the context of whether Richard Jewell should be held to be an involuntary public figure for purposes of his defamation action against the Atlanta Journal Constitution).

176. See generally Ted Gup, *Goicha; You May or May Not Be a Suspect, But You Will Be All over the News*, WASH. POST, Aug. 18, 2002, at B1 (describing the media spotlight cast on Hatfill).

177. See Calvert & Richards, *supra* note 175, at 319.

178. *Supra* Part III.B.

benefits—not only to society at large, but to the individual asserting that property right—that come with the use of one’s work and being discussed. As he stated about authors and copyright holders, “everybody would be better off if they were a little less crabby.”¹⁷⁹

As an author himself of legal scholarship, Judge Kozinski recognizes first hand the benefits and problems that accompany the wide circulation of one’s writings. He is a prolific writer whose combined use of language, humor, and thought-provoking analyses make him stand out among his judicial peers. His writing is anything but routine. He admits in the interview—somewhat unabashedly—that his references to pop culture are designed to make people take notice because he wants them to read his work. On occasion, these “rhetorical flourishes”¹⁸⁰ are designed to attract the attention of law school casebook authors—and it has worked.¹⁸¹ At the very least, this signature of his writing style is something readers have come to expect. And he does not disappoint his audience.

Although case opinions provide an outlet for his thoughts, he obviously is confined to the facts of the case at bar. Law journals enable him not only to showcase his writing talents but also to express his viewpoints on a variety of subjects. As Judge Kozinski pointed out during the interview, however, being prolific—and opinionated—comes with a price. Judicial nominees can expect that their writings will be pored over by legislative staff members, and they will be held accountable for their ideas that have made it to print. While Judge Kozinski does not believe this is a good way to proceed with the confirmation process, he recognizes that it has become a way of life in politics.

And the political machinations associated with the judicial selection process are readily apparent to anyone who examines the composition of the United States Court of Appeals for the Ninth Circuit. In his comments on the appellate court, Judge Kozinski candidly assessed the substantial role and influence of President Jimmy Carter’s appointees more than twenty years ago on its reputation today as the most liberal circuit in the country. While President Bill Clinton’s influence in securing, in two presidential terms, more than a dozen seats on the Ninth Circuit cannot be dismissed, Judge Kozinski—an appointee of Republican President Ronald Reagan—felt the Clinton appointees are less ideologically strident, although not less talented, than the judges who took office in the late 1970s. The Carter judges’ powerful intellects allowed them, at least in

179. *Supra* Part III.B.

180. *Supra* Part III.C.

181. *See, e.g.*, WEILER *supra* note 121, at 212–20.

part, to persuade other judges to their way of thinking.¹⁸²

Judge Kozinski suggested that the evolution of the confirmation battles in the Senate Judiciary Committee would preclude the appointment of such jurists today. He recalled that, in the 1970s, as long as a nominee successfully passed the FBI screening, confirmation was all but guaranteed. More recently, presidents have faced a much harsher political terrain—one in which ideologues on either side of the aisle are rooted out of the process long before they come to a vote. Or, more practically, they are not nominated in the first place. Judge Kozinski attributed President Clinton's relative success in the appointment process, at least to some extent, to his nomination of judges who believe in a limited role for the judiciary.¹⁸³

Despite this moderating influence, Judge Kozinski recognizes that Carter appointees are still active in the Ninth Circuit and may continue to be for several years to come. In short, the court's reputation as a liberal maverick is not likely to change any time soon.

In summary, this Article has provided a first-hand account of the views of one of the most influential appellate court jurists in the country. Judge Kozinski's candid and thoughtful comments on topics¹⁸⁴ ranging from the First Amendment to the Ninth Circuit to legal scholarship provide a unique glimpse into his thinking and beliefs about a number of important and contested issues. The authors of this Article hope these comments, in turn, will provide a vein from which other scholars studying these issues may draw primary insight beyond that contained in the multiple opinions and law journal articles Judge Kozinski has authored over more than fifteen years as an appellate court judge.

182. *Supra* Part III.D.

183. *Id.*

184. There was one particular topic on which Judge Kozinski could not be candid. In particular, the authors prepared in advance of the interview several questions for Judge Kozinski related to *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1089 (9th Cir. 2002). He understandably did not want to discuss the case because it was still in the court system with a very real possibility for a petition for certiorari to the United States Supreme Court. In fact, a petition was filed with the Court in October 2002. *U.S.L.W.* (U.S. Oct. 8, 2002) (No. 02-563). The authors thus had to abandon this line of questioning.

