A Behind the Scenes Look at *Bilski v. Kappos*

J. Michael Jakes
Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P
Washington, D.C.

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BACKGROUND

Claim at Issue

1. A method for managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price comprising the steps of:

a) initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumer;

(b) identifying market participants for said commodity having a counter-risk position to said consumers; and

(c) initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions.

In re Bilski, 545 F.3d 943 (Fed. Cir. 2008) (*en banc*)

A process is patentable under 35 U.S.C. § 101 only if:

(1) it is tied to a particular machine or apparatus, or

(2) it transforms a particular article into a different state or thing.

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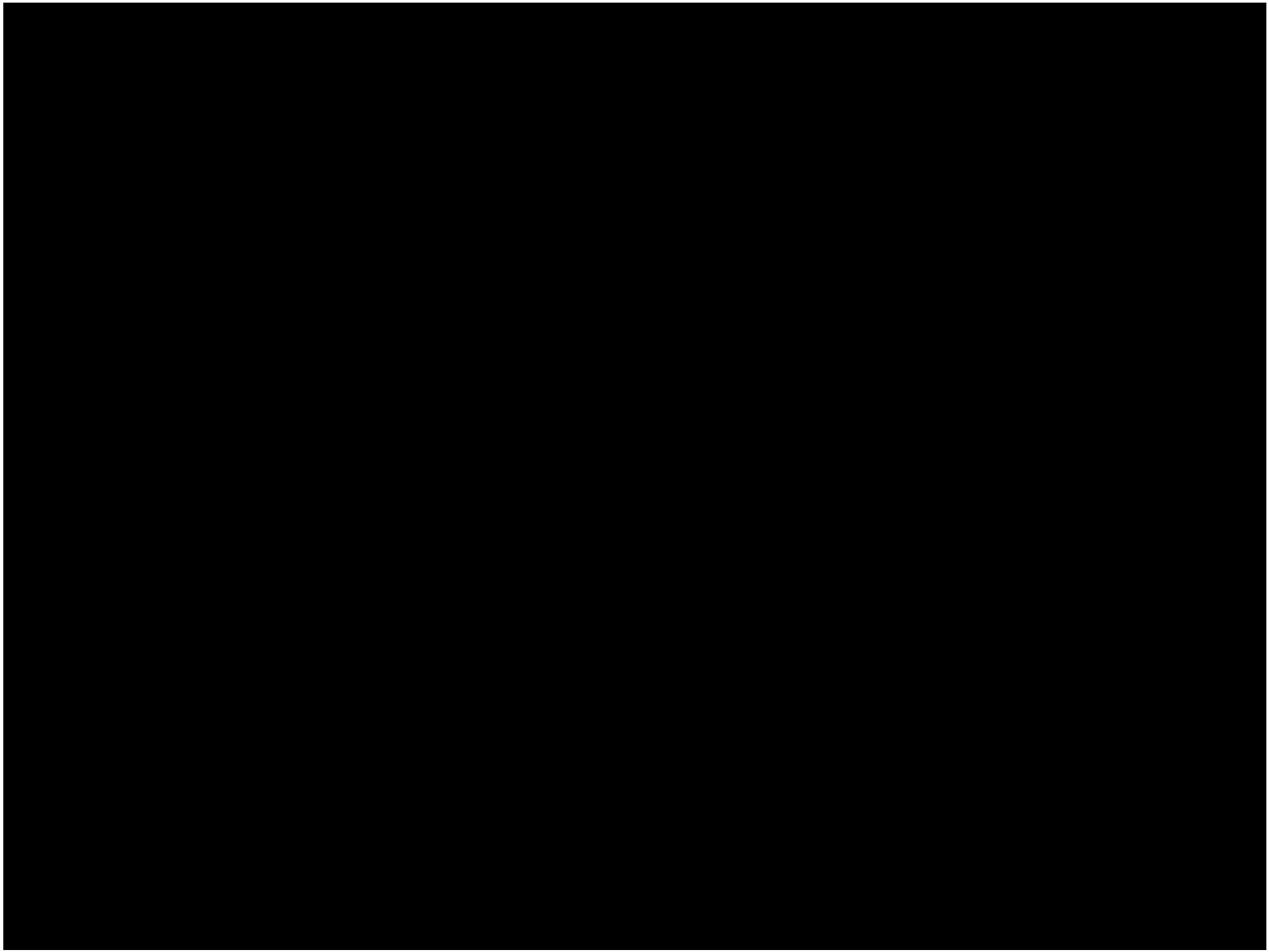
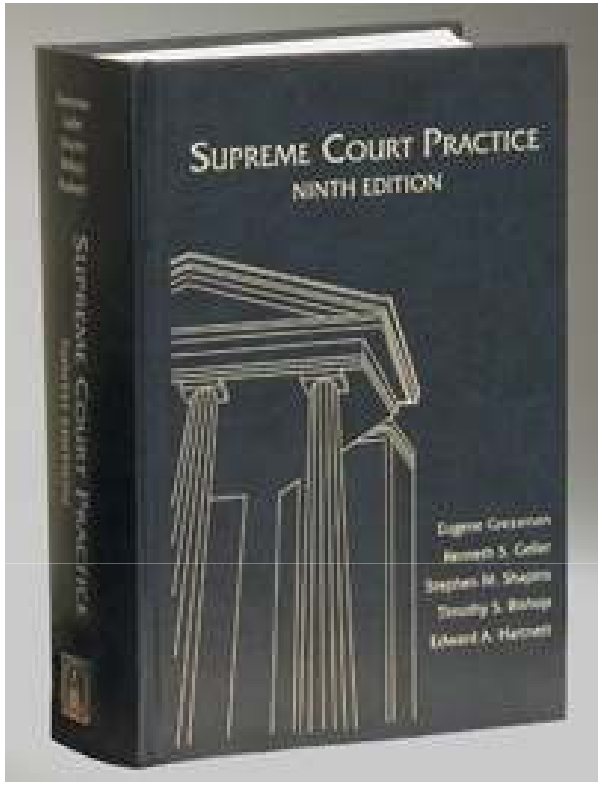
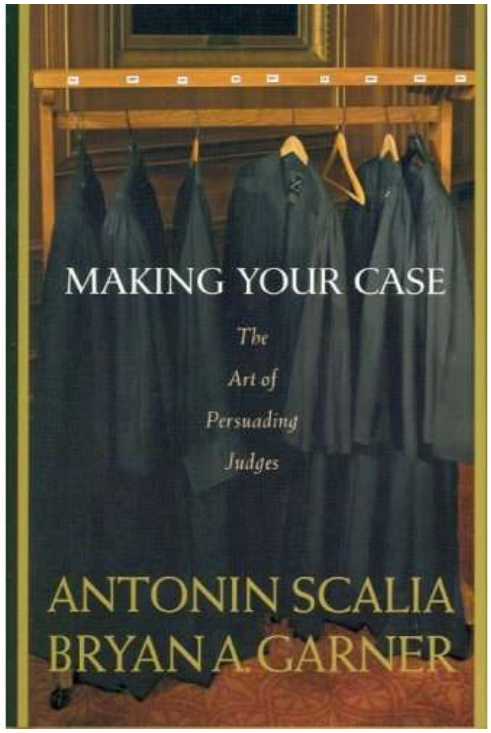


CERT. PETITION



Supreme Court Practice
Ninth Edition

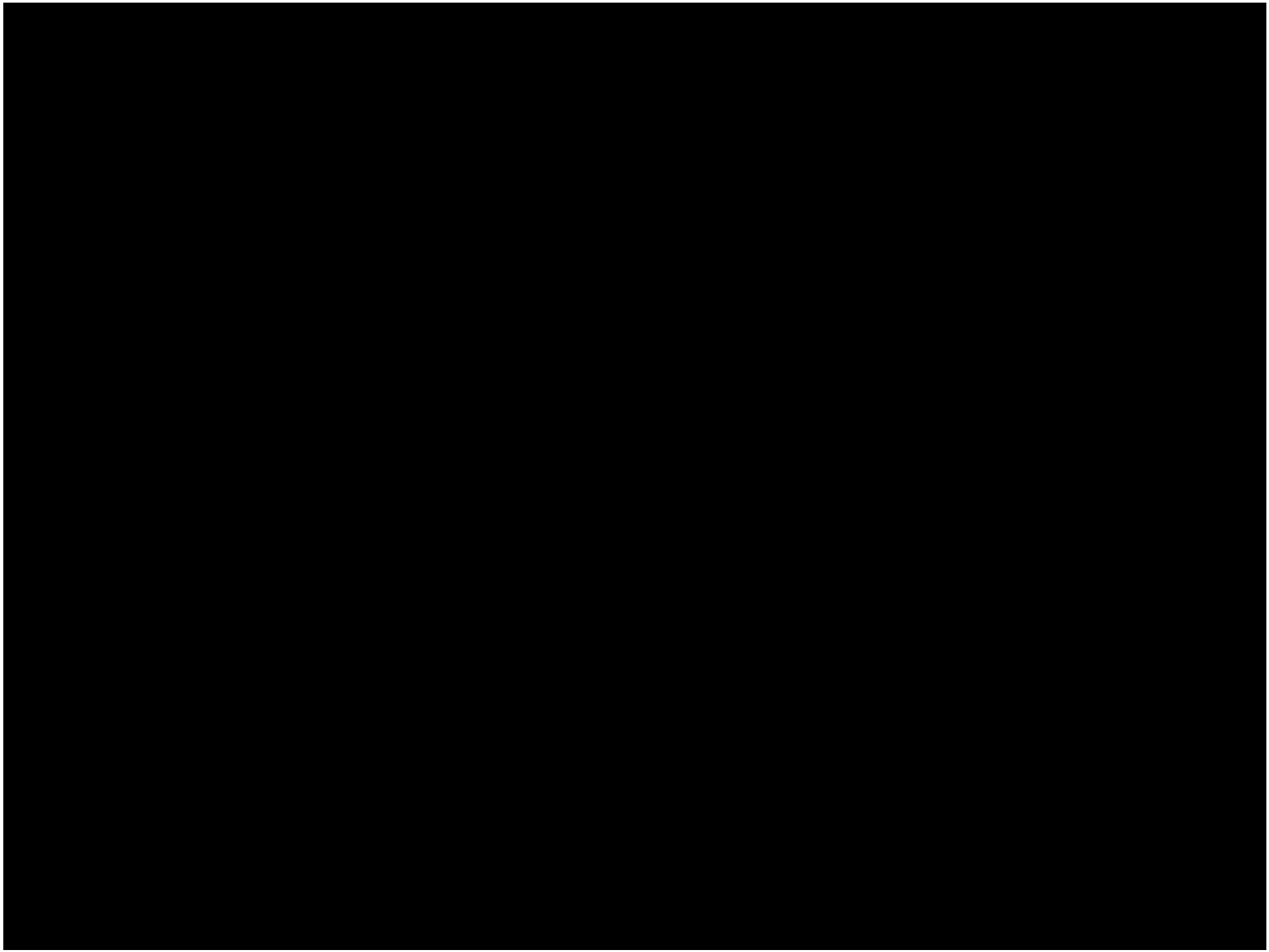
Making Your Case: The Art of Persuading Judges



Questions Presented

1. Whether the Federal Circuit erred by holding that a "process" must be tied to a particular machine or apparatus, or transform a particular article into a different state or thing ("machine-or-transformation" test), to be eligible for patenting under 35 U.S.C. § 101, despite this Court's precedent declining to limit the broad statutory grant of patent eligibility for "any" new and useful process beyond excluding patents for "laws of nature, physical phenomena, and abstract ideas.

2. Whether the "machine-or-transformation" test for patent eligibility adopted by the Federal Circuit, effectively foreclosing meaningful patent protection to a business method involving a series of transactions among a commodity provider, consumers, and market participants, contradicts the clear Congressional intent that patents protect "method[s] of doing or conducting business." 35 U.S.C. § 273.



MERITS BRIEFS

Petitioners' Brief

Machine-or-transformation test conflicts with Supreme Court precedent holding that patentable subject matter is broad and flexible

Machine-or-transformation test conflicts with Patent Act's definition of business method patents in 35 U.S.C. 273

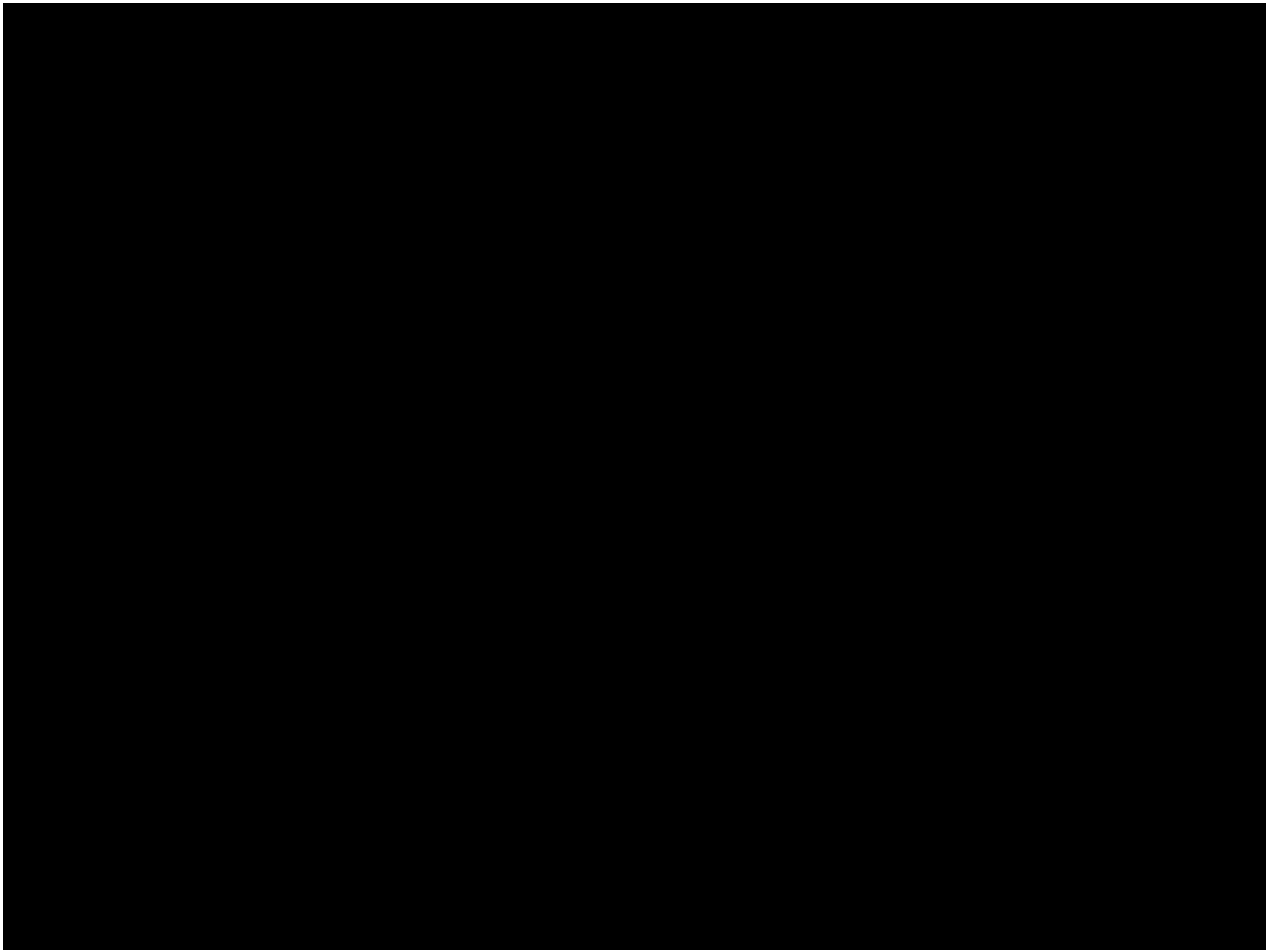
A claim involving a fundamental principle is patent-eligible if it recites a practical application of the fundamental principle

Practical application: applied to a useful result; applied in an apparatus or product; applied in an art or process

The Bilski claims are patent-eligible under section 101

Patent Office's Brief

- Section 101 protects only industrial and technological processes
  - Machine-or-transformation test is "framework"
- Machine-or-transformation test has been the Supreme Court's definitive definition of process for over a century
- Petitioners' practical application test has no limiting standard to prevent bad patents
- Case only involves non-technological business methods
  - Software, biotechnology not affected
  - Only bad patents will be disrupted



AMICUS BRIEFS

17 *Amicus* Briefs Supporting Petitioners

Accenture and Pitney Bowes
AwakenIP LLC
Borland Software
Boston Patent Law Association
Caris Diagnostics, Inc.
Double Rock Corporation et al.
Dr. Ananda Chakrabarty
Eagle Forum & Legal Defense Fund
Entrepreneurial Software Companies

Franklin Pierce Law School
Georgia Biomedical Partnership
Houston IP Law Association
John P. Sutton, Esq.
Novartis
Timothy F. McDonough, PhD
University of South Florida
Washington State Patent Law Association

27 *Amicus* Briefs Supporting Neither Party

20 Law and Business Professors
AIPLA
AIPPI and AIPPI-US
Austin IP Law Assoc.
BIO, Advanced Medical Technology Association, Wisconsin Alumni Research Foundation and Regents of the University of California
Business Software Alliance
Conejo Valley Bar Association
Dolby Laboratories
Federal Circuit Bar Association
FICPI
IBM
Intellectual Property Law Assoc. of Chicago
IPO

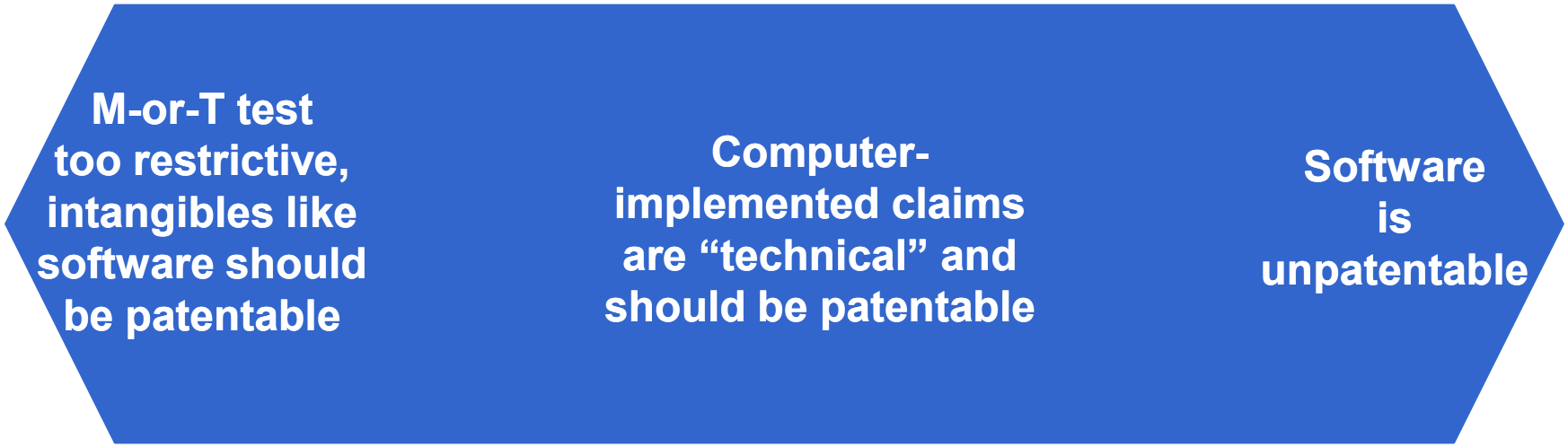
Legal On Ramp
Medtronic Inc.
Monogram Biosciences Inc. and Genomic Health
On Time Systems
PhRMA
Prof. Kevin Emerson Collins
Prometheus Labs
Raymond C. Meiers
Regulatory DataCorp, American Express, Palm, Rockwell Automation, and SAP
Robert R. Sachs and Daniel R. Brownstone
San Diego IP Law Association
Telecommunication Systems, Inc.
Teles AG
Yahoo! Inc.

23 *Amicus* Briefs Supporting Patent Office

11 Law Professors and AARP
Adamas Pharmaceuticals and Tethys Biosciences
American Bar Association
American Insurance Association, The Hartford, Jackson National Life Insurance, Pacific Life Insurance, Sun Life Assurance, Transamerica Life Insurance
American Medical Assoc., American College of Medical Genetics, American Society of Human Genetics, Mayo Clinic
Bank of America, Barclays Capital, The Clearing House Association, Financial Services Roundtable, Google, MetLife, Morgan Stanley
Bloomberg L.P.
CASRIP of Univ. of Washington School of Law
Computer and Communications Industry Assoc.
Entrepreneurial and Consumer Advocates

Foundation for a Free Information Infrastructure
Prof. Lee Hollar and IEEE-USA
IEEE-US and Prof. Hollar
Internet Retailers (LL Bean, Overstock.com, J.C. Penney, Crutchfield, Newegg, Hasbro, Talbots)
IP Section of Nevada State Bar
Knowledge Ecology International
Mark Landesmann
Profs. Menell and Meurer
Microsoft, Philips and Symantec
Red Hat
Software & Information Industry Association
Software Freedom Law Center
William Mitchell College of Law IP Institute

Software and Computer Industry



Borland Software

Business Software Alliance

Computer & Communications Industry Association

Dolby Labs.

Entrepreneurial Software Companies

IBM

IEEE-USA

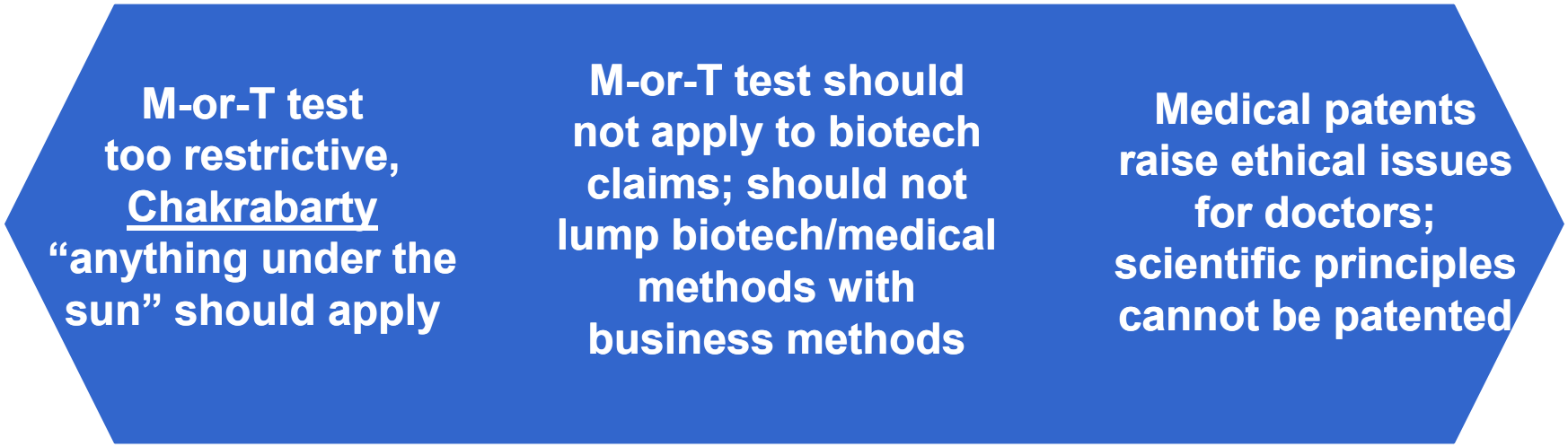
Microsoft, Philips, Symantec

Red Hat

Software & Information Industry Association

Software Freedom Law Center

Biotechnology and Medical Technology



Caris Diagnostics,

Dr. Chakrabarty

Novartis

Univ. of South Florida

Monogram Biosciences

Biotechnology Industry Org.

Medtronic

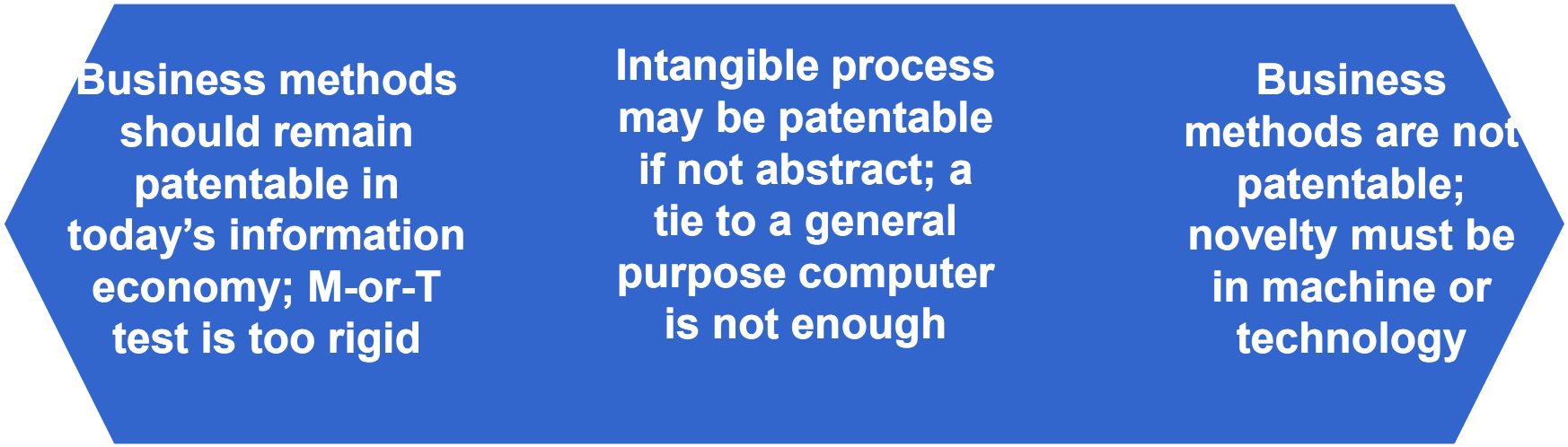
PhRMA

Prometheus Labs.

Adamas Pharmaceuticals

American Medical Association,
Society of Human Genetics,
Mayo Clinic

Services and E-Commerce Industries



Accenture & Pitney Bowes

Double Rock Corp.

Regulatory Data Corp., American Express, SAP, Palm Inc.

On Time Systems

Yahoo!

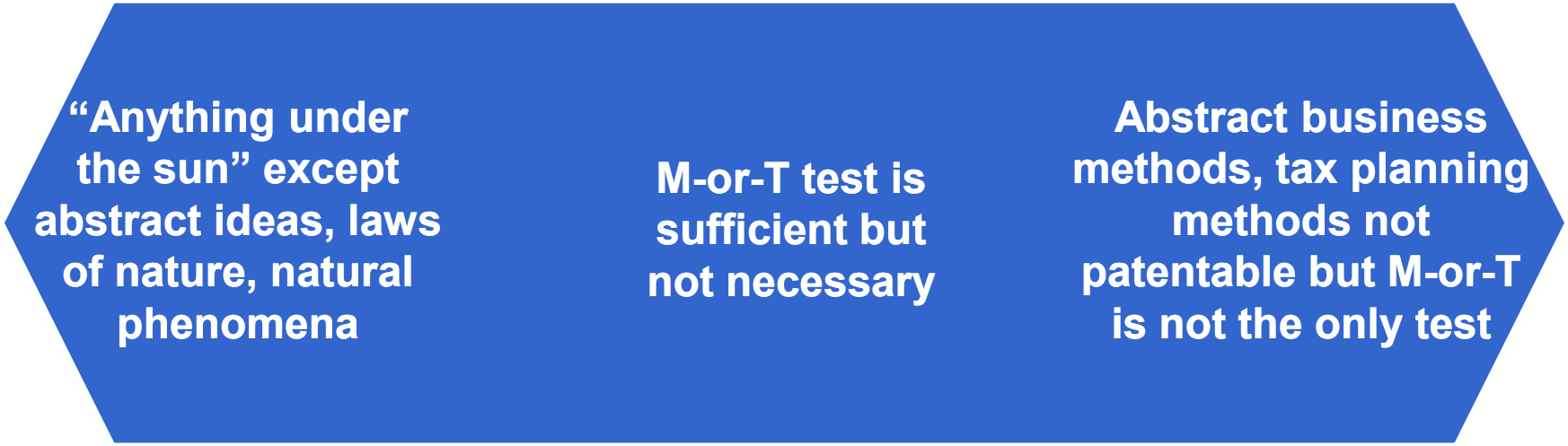
American Insurance Assoc., The Hartford, Pacific Life

Bank of America, Google, MetLife, Morgan Stanley

Bloomberg

L.L. Beam, Overstock.com, J.C. Penney's, Crutchfield

Bar Associations



Houston IP Law Assoc.

Wash. State Patent Law Assoc.

AIPLA

Austin IP Law Assoc.

Conejo Valley Bar Assoc.

IP Law Assoc. of Chicago

Nevada State Bar IP Section

Boston Patent Law Assoc.

IPO

San Diego IP Law Assoc.

Federal Circuit Bar Assoc.

ABA

Academia

M-or-T test will harm innovation, application of an abstract idea may be patented

20 Law and Business Professors (Prof. Mark Lemley)

Prof. Kevin Emerson Collins

Franklin Pierce Law Center

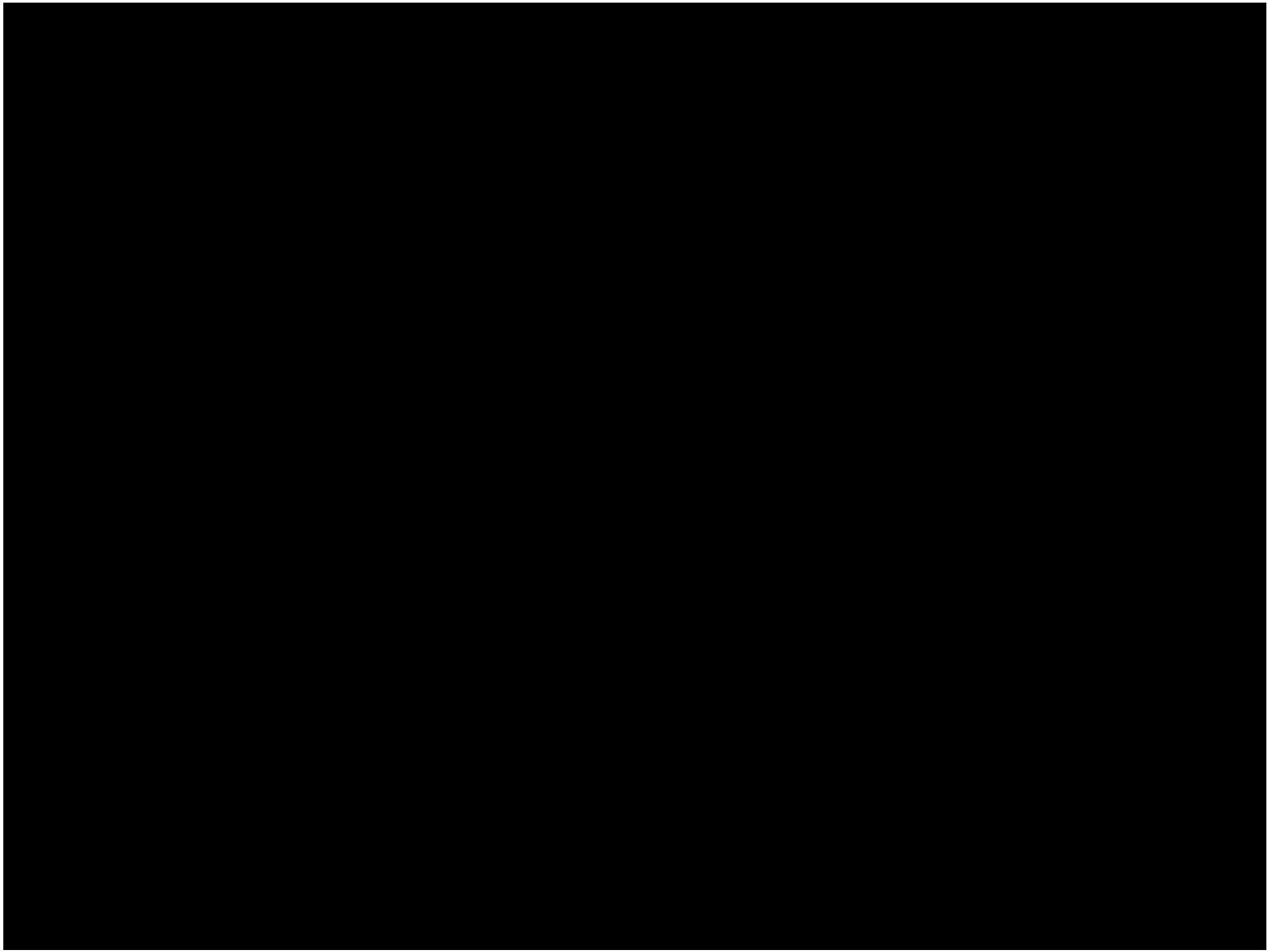
Constitutional "useful arts" excludes business methods; must show invention in the application/machine

Univ. of Washington Law School (CASRIP)

11 Law Professors and AARP (Prof. Joshua Sarnoff)

Profs. Menell and Meurer

Wm. Mitchell College of Law



ORAL ARGUMENT

The Georgetown Supreme Court Institute

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Approximately the same number of questions for each party

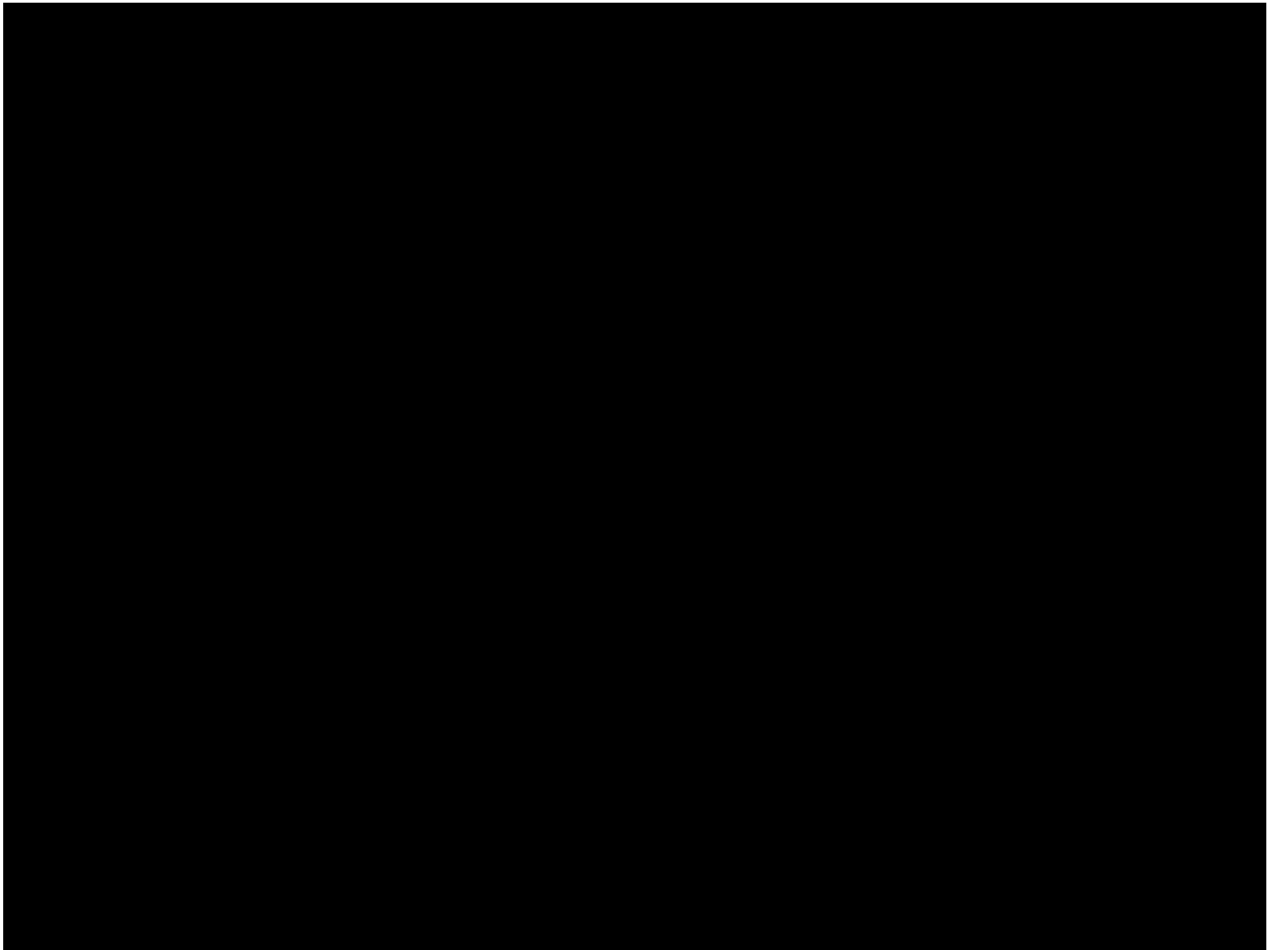
Justice	Number of Questions
Sotomayor	21
Breyer	13
Roberts	13
Kennedy	11
Stevens	8
Ginsburg	7
Scalia	6
Alito	1
Thomas	0

Justice	Number of Questions
Petitioner	**43**
Sotomayor	16
Breyer	7
Roberts	6
Scalia	5
Kennedy	4
Ginsburg	3
Stevens	2
Respondent	**37**
Roberts	7
Kennedy	7
Stevens	6
Breyer	6
Sotomayor	5
Ginsburg	4
Alito	1
Scalia	1

General Topic by Party (Top five)	Number of Questions
Petitioner	
Patent Eligibility Hypothetical	18
Policy	13
Precedent	8
Statutory Construction	7
Bilski Claim	4
Respondent	
Machine or Transformation Test	27
Precedent	16
Is Bilski the right 101 case?	5
Machine or Transformation Test Alternative	5
Procedural Fact	2

Hypotheticals

- Alphabet
- Electronic Signals
- Estate plans
- Tax avoidance
- Choosing a Jury
- Winning friends and influencing people
- Teaching Antitrust Law
- Phone calls
- Insurance risk management with differential calculus
- Speed dating
- Training Horses



PRESS COVERAGE

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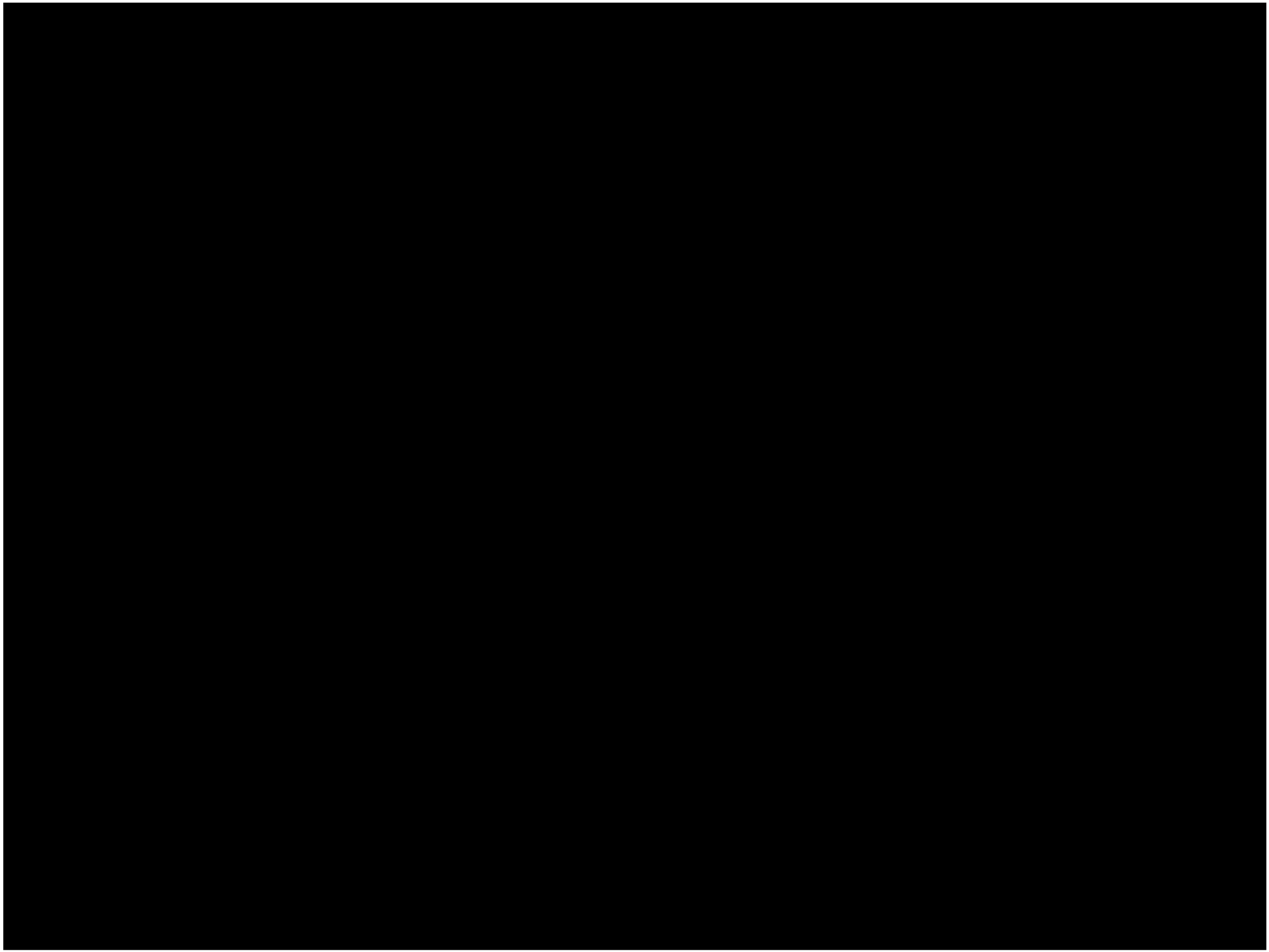
Bilski Supreme Court Preview: Finnegan Lawyer Challenging 'Machine or Transformation' Patent Test Says He's Ready

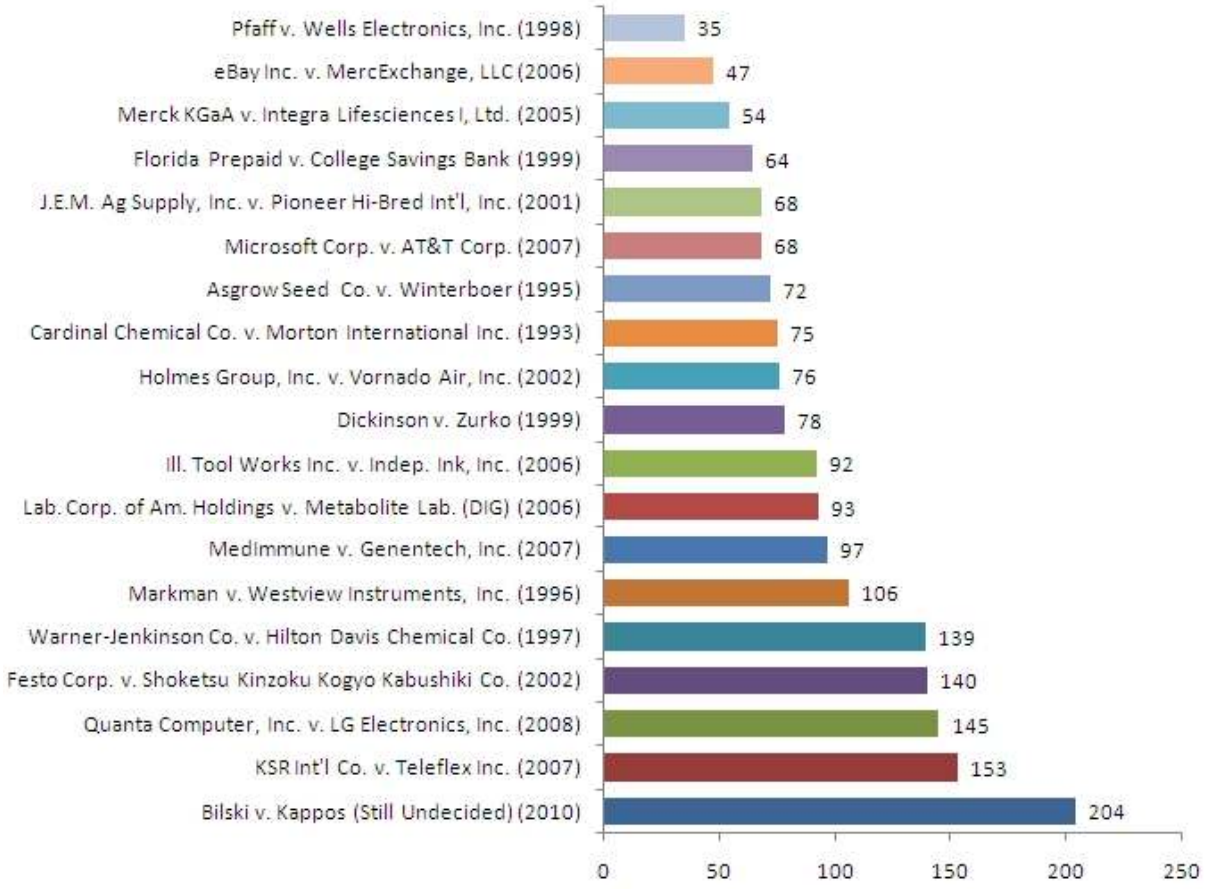
Ben Hallman
11-06-2009

If the Litigation Daily were prepping for our first Supreme Court argument--no snickering, please--in a case that's considered one of the critical business controversies of the Court's term, we would be a damn sight more nervous than J. Michael Jakes of Finnegan, Henderson, Farabow, Garrett & Dunner. On Monday, Jakes is arguing Bilski v. Kappos, a closely-watched IP case that will help decide whether business methods are patentable. But on Thursday afternoon, when we called him, Jakes was at his desk, sounding decidedly nonplussed about his first U.S. Supreme Court argument.



WAITING

Bilski Watch: Days Elapsed from Argument to Decision in Supreme Court Patent Cases



Prof. Joseph Miller
Lewis & Clark Law School
Patently-O, June 1, 2010

Bilski, Kenny Rogers and Supreme Court Rule 46

You got to know when to hold 'em, know when to fold 'em
Know when to walk away, know when to run

-- Kenny Rogers in *The Gambler*

Kenny Rogers' hit song *The Gambler* provides some wise strategic advice, valid not only in cards and but also in law and perhaps in life generally: If "fold 'em" is an option, sometimes it is the best one. Supreme Court Rule 46 on "Dismissing Cases" provides petitioners in Supreme Court cases the opportunity to "fold 'em," and in the days remaining before the Supreme Court delivers an opinion in its *Bilski v. Kappos* case, the most puzzling question in the case has become this: Why won't the petititoners in *Bilski* fold?

Prof. John F. Duffy
George Washington University Law School
Patently-O, June 25, 2010

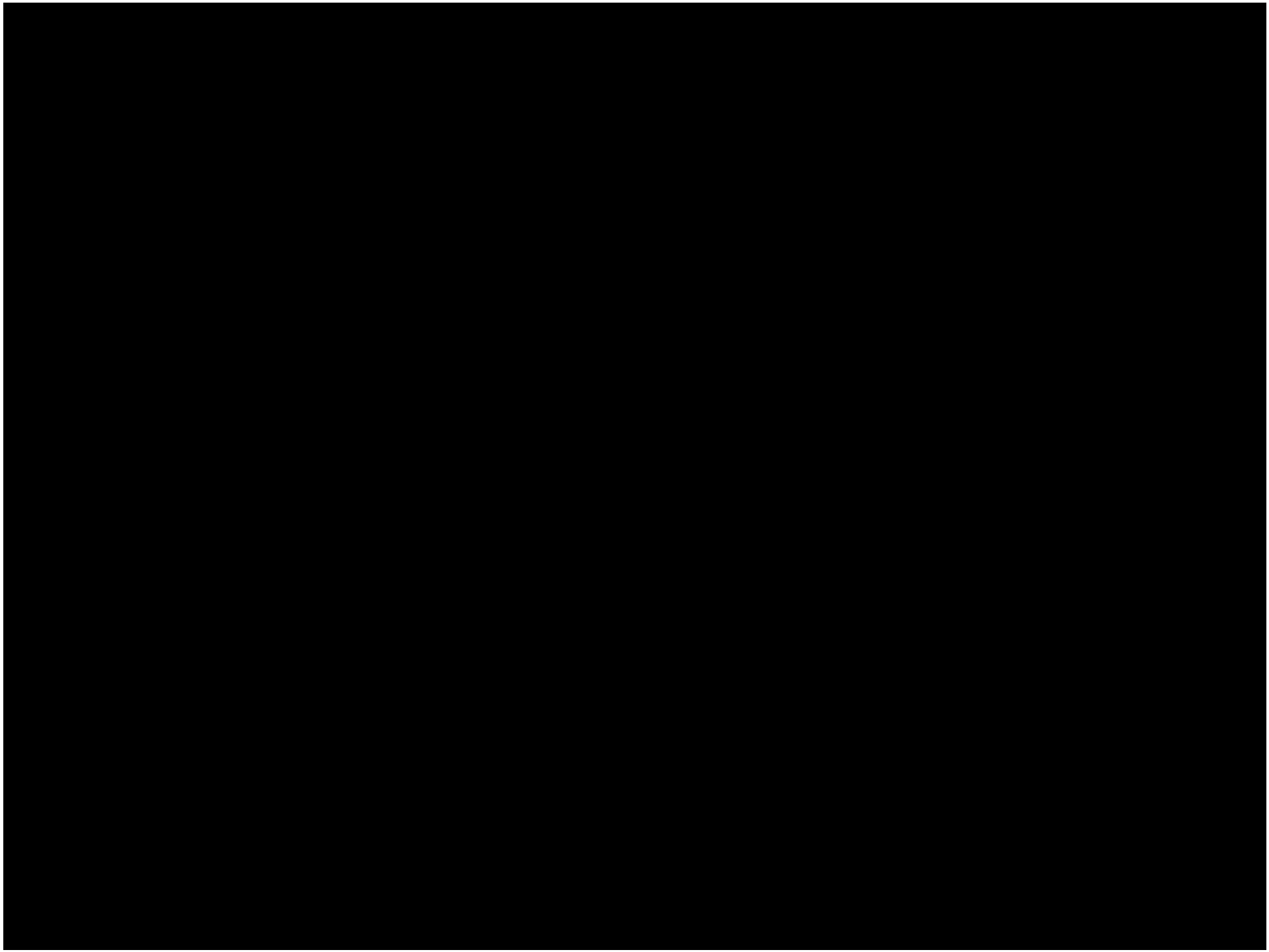
Bilski v. Kappos, a Patent Law Flutie Tomorrow (Monday) Morning?

Less than 24 hours from now the Supreme Court in its final session for the 2009 Term is expected to affirm the holding of the Federal Circuit in Bilski v. Kappos. Tom Goldstein and Professor John Fitzgerald Duffy point to an affirmance. The main point at issue is the manner in which the Court decides the case, whether it fashions a new test or follows the test laid out by the en banc Federal Circuit below.

Did Bilski Deliberately Lose the Appeal? Tom goes into detail as to why Justice Stevens may be the author of the opinion and explains his view that the Court will rule against petitioner. Former Scalia Clerk Duffy lays out a case why Bilski must lose, while painting a disturbing picture that Bilski's assignee – the real party in interest – is deliberately seeking a loss in this case to destroy patent-eligibility in its field of commerce.

Adding support to Prof. Duffy's argument is the reaction of counsel to the Court's engagement in an exercise of reductio ad absurdum: Bilski's counsel answered in the affirmative each time when queried whether methods are patent-eligible if they relate to a nineteenth century horse whisperer's training techniques (Scalia, J.), "buy low and sell high" (Chief Justice), speed dating (Justice Sotomayor) and law school teaching methods (Justices Breyer and Ginsburg).

Harold C. Wegner
Foley & Lardner
June 26, 2010



DECISION

Bilski v. Kappos (Finally)

Decision Issued June 28, 2010

The Holdings:

- The machine-or-transformation test is not the sole test for patentability of processes
- Business methods cannot be categorically excluded from patentability
- The Bilski claims recite an unpatentable abstract idea

The *Bilski* Opinions

Majority written by Justice Kennedy

- Joined in full by Justices Roberts, Thomas, Alito
- Joined in part by Justice Scalia

Concurring opinion written by Justice Stevens

- Joined by Ginsburg, Breyer, Sotomayor

Concurring opinion written by Justice Breyer

- Joined in part by Justice Scalia

Majority Opinion

Basic Principles

- The four categories of § 101 are independent and broad, though not unlimited
- § 101 is a threshold analysis, with §§ 102, 103, and 112 remaining important

Machine-or-Transformation Test

- "Ordinary, contemporary, common meaning" of "process" and statutory definition of "process" do not support machine-or-transformation test as sole test
- Machine-or-transformation test remains a "useful and important clue" for process patentability

Majority Opinion (cont'd)

Business Methods Cannot be Categorically Excluded

- Common meanings of "process" or "method" do not exclude business methods
- Prior user defense of § 273 "acknowledges that there may be business method patents"

9-0 Decision on Particular Claims

- Following *Benson*, *Flook*, and *Diehr*, Bilski's claims are directed to an abstract idea

Petitioners' Brief

Machine-or-transformation test conflicts with Supreme Court precedent holding that patentable subject matter is broad and flexible

Machine-or-transformation test conflicts with Patent Act's definition of business method patents in 35 U.S.C. 273

A claim involving a fundamental principle is patent-eligible if it recites a practical application of the fundamental principle

Practical application: applied to a useful result; applied in an apparatus or product; applied in an art or process

The Bilski claims are patent-eligible under section 101

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  Practical application: applied to a useful result; applied in an apparatus or product; applied in an art or process

The Bilski claims are patent-eligible under section 101

Majority Opinion (cont'd)

Justice Scalia Declined to Join Two Sections

"Times Change" Section

- § 101 is a "dynamic provision"
- "Machine-or-transformation" test suited for Industrial Age, but not Information Age

Broader Business Methods Section

- Should not exclude business methods from patenting based on history alone
- At least some Information Age business processes are patentable under § 101

Stevens Concurrence

Joined by Ginsburg, Breyer, Sotomayor

Business Methods are Unpatentable

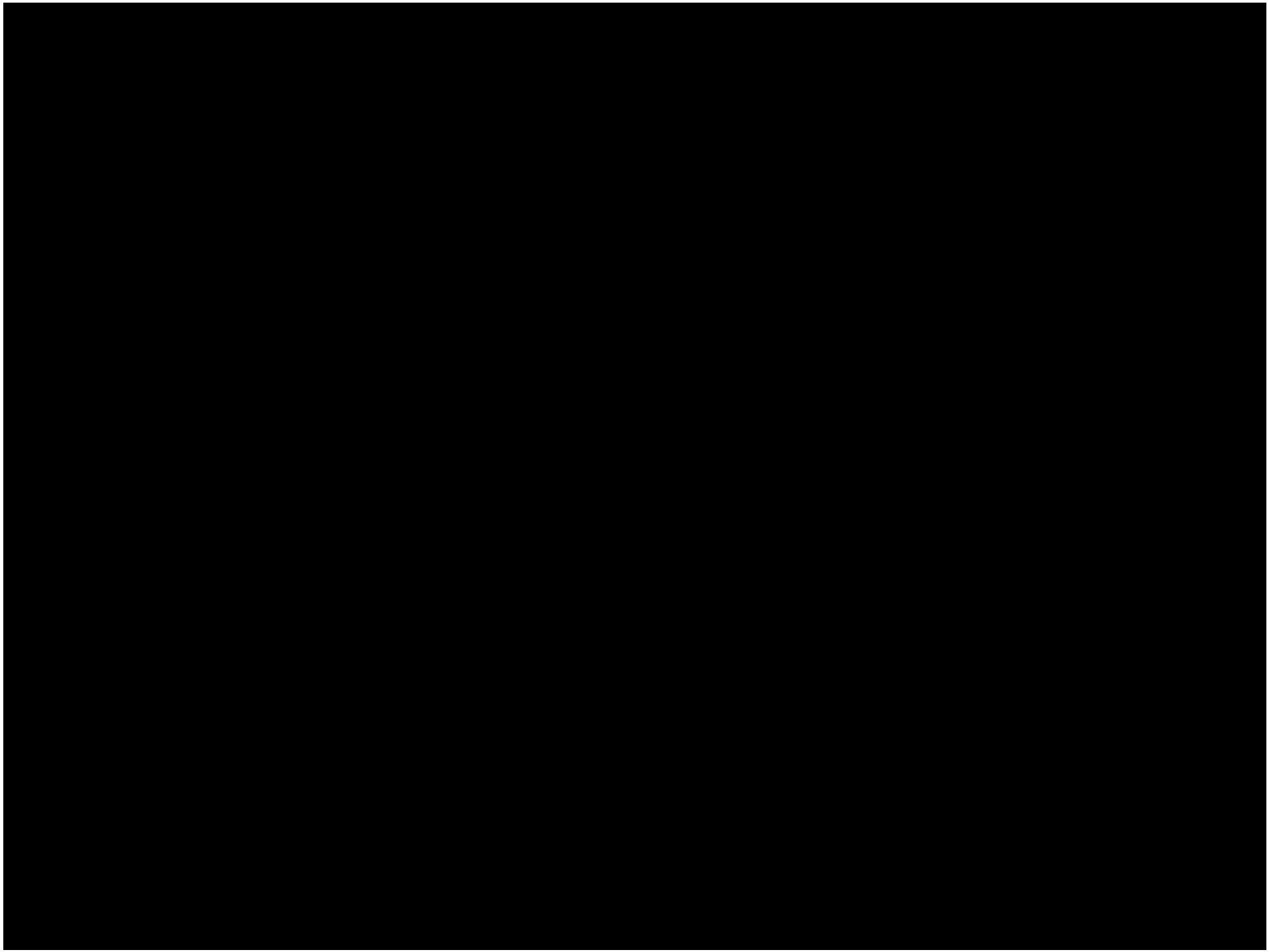
- Statutory definition of "process" in § 100(b) is not helpful
- Other categories of § 101 imply "process" is not entirely open-ended
- § 273 does not endorse the patentability of business methods
- All historical evidence points to business methods being unpatentable
- Business method patents "more likely stifl[e] progress than promote it"

Breyer Concurrence

Business Methods Are Not Patentable Based on Text, History, Purposes

All Agree That (joined by Justice Scalia):

- The text of § 101 is not without limit
- The Court has long viewed the "machine-or-transformation" test as a helpful tool
- The "machine-or-transformation" test has never been exclusive
- The "useful, concrete, tangible result" test of *State Street* is not the Court's test



WHAT'S NEXT?

In re Ferguson

1. A method of marketing a product, comprising:

developing a shared marketing force, said shared marketing force including at least marketing channels, which enable marketing of a number of related products;

using said shared marketing force to market a plurality of different products that are made by a plurality of different autonomous producing company [sic], so that different autonomous companies, having different ownerships, respectively produce said related products;

obtaining a share of total profits from each of said plurality of different autonomous producing companies in return for said using; and

obtaining an exclusive right to market each of said plurality of products in return for said using.

In re Ferguson - Cert. Denied

1. A method of marketing a product, comprising:

developing a shared marketing force, said shared marketing force including at least marketing channels, which enable marketing of a number of related products;

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obtaining a share of total profits from each of said plurality of different autonomous producing companies in return for said using; and

obtaining an exclusive right to market each of said plurality of products in return for said using.

Classen Immunotherapies v. Biogen

1. A method of determining whether an immunization schedule affects the incidence or severity of a chronic immune-mediated disorder in a treatment group of mammals, relative to a control group of mammals, which comprises:

immunizing mammals in the treatment group of mammals with one or more doses of one or more immunogens, according to said immunization schedule, and

comparing the incidence, prevalence, frequency or severity of said chronic immune-mediated disorder or the level of a marker of such a disorder, in the treatment group, with that in the control group.

Classen Immunotherapies v. Biogen

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comparing the incidence, prevalence, frequency or severity of said chronic immune-mediated disorder or the level of a marker of such a disorder, in the treatment group, with that in the control group.

Remanded

Prometheus Labs. v. Mayo Collaborative Servs.

1. A method of optimizing therapeutic efficacy for treatment of an immune-mediated gastrointestinal disorder, comprising:

   (a) administering a drug providing 6-thioguanine to a subject having said immune-mediated gastrointestinal disorder; and

   (b) determining the level of 6-thioguanine in said subject having said immune-mediated gastrointestinal disorder,

   wherein the level of 6-thioguanine less than about 230 pmol per $8x10^8$ red blood cells indicates a need to increase the amount of said drug subsequently administered to said subject and

   wherein the level of 6-thioguanine greater than about 400 pmol per $8x10^8$ red blood cells indicates a need to decrease the amount of said drug subsequently administered to said subject.

Prometheus Labs. v. Mayo Collaborative Servs.

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wherein the level of 6-thioguanine greater than about 400 pmol per $8x10^8$ red blood cells indicates a need to decrease the amount of said drug subsequently administered to said subject.

Remanded

Cases Stayed at Federal Circuit

1. *Fort Properties v. American Master Lease*
   - Method of creating real estate investment instruments
2. *CyberSource v. Retail Decisions*
   - "Computer readable medium" claim and method performed over the Internet
3. *Every Penny Counts v. Bank of America*
   - System claim including a network and computing means
4. *DealerTrack v. Huber*
   - Computer-aided method using display device and terminal device
5. *FuzzySharp Technologies v. 3D Labs*
   - Method of reducing computations in 3-D computer graphics including computing step and computer storage

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5. *FuzzySharp Technologies v. 3D Labs Inc.*
   - Method of reducing computations in 3-D computer graphics including computing step and computer storage

Stayed pending Bilski

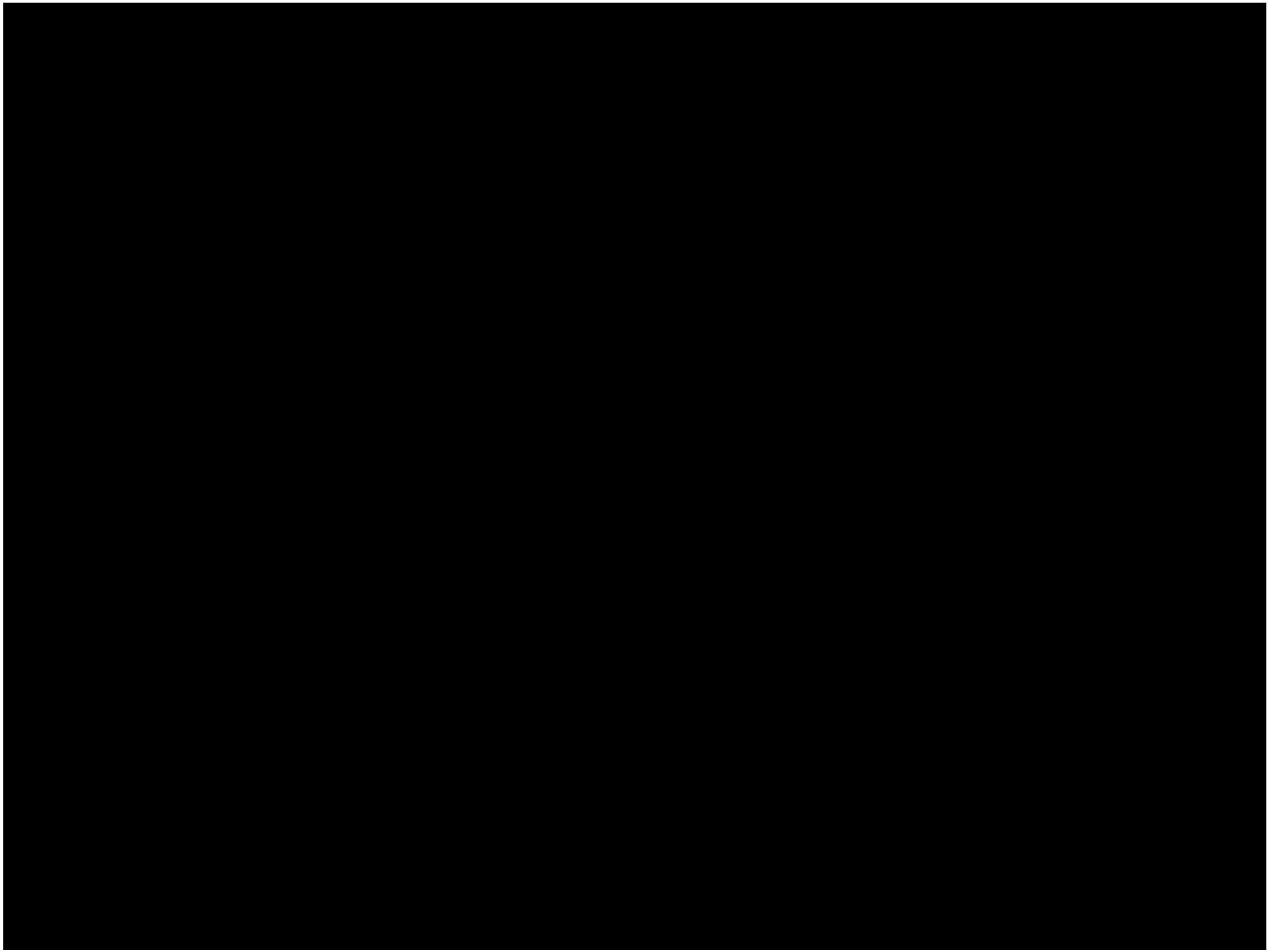
Pending at Federal Circuit

Fort Research Corp. Technologies v. Microsoft
(D. Ariz. July 28, 2009)

- Method for halftoning gray scale images by utilizing a pixel-by-pixel comparison of the image against a blue noise mask
- Argued June 9, 2010

District Court Cases After *Bilski*

1. *Ultramercial v. Hulu* (C.D. Cal. Aug. 13, 2010)
   - Method for allowing Internet users to view copyrighted material free of charge in exchange for watching certain advertisements
   - District court applied machine-or-transformation test to conclude that claims were invalid as covering an abstract idea
2. *Graff/Ross Holdings v. Federal Home Lone Mortgage Corp.* (D.D.C. Aug. 27, 2010)
   - Method for computing a price for a fixed income asset and generating a financial analysis output using a general purpose computer
   - Magistrate judge found claims invalid as reciting an abstract idea on a general purpose computer



PTO GUIDELINES

USPTO Interim *Bilski* Guidance

Interim Guidance Issued July 27, 2010

Public Comments due September 27, 2010

Three Questions:

- Examples of claims that fail machine-or-transformation test but are not abstract idea?
- Examples of claims that pass machine-or-transformation test but are nonetheless abstract idea?
- More narrow category or class of applications that "instruct how business should be conducted" that are unpatentably abstract?

USPTO Interim *Bilski* Guidance

Sections 102, 103, 112 Provide Tools for Managing Abstract Claims

Examiners Should Avoid Relying Solely on Section 101 Except in the "Most Extreme Cases"

For Section 101 Rejections:

- Examiner must provide clear rationale for abstract idea finding
- Must specifically point out factors relied upon
- Applicant can explain why claim is not abstract idea

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Factors to Determine Patent-Eligibility of Method Claims

- Machine or apparatus
- Transformation of an article
- Application of law of nature
- Involves “general concept”

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Machine or Apparatus:

- Particularity or specificity of machine
- Implements method steps
- Field-of-use or extrasolution activity

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Machine or Apparatus - Possible Arguments in Favor of Patentability

- Machine can be specifically identified
- Machine is integral to performance of the method
- Machine imposes meaningful limitations on claim scope
- Machine is not merely object on which the method operates
- Machine is not just used for data gathering

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Transformation of an Article:

- Particularity of transformation
- Particularity of article
- Extent of transformation
- Nature of object transformed
- Field-of-use or extrasolution activity

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Transformation of an Article - Possible Arguments in Favor of Patentability

- Article to be transformed can be specifically identified
- Object or substance is transformed, as opposed to just a concept, like a contractual obligation or mental judgment
- Transformation results in state or thing having different function or use
- Not merely moving article to new location
- Transformation imposes meaningful limitations on claim scope

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Application of Law of Nature:

- Particularity of application
- Not mere subjective determinations (e.g., thinking about a law of nature)
- Field-of-use or extrasolution activity

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Application of Law of Nature - Possible Arguments in Favor of Patentability

- Claim would not monopolize a natural force or scientific fact
- Claim does not have broad applicability across many fields of endeavor
- Claim is not merely subject determination (e.g., thinking about applying law of nature)
- Application imposes meaningful limitations on claim scope

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General Concepts:

- Preemption of concept in other fields
- Claims known and unknown uses of concept
- Claims all possible solutions of problem
- Disembodied concept vs well-instantiated
- Mechanisms that perform steps

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Examples of General Concepts:

- Basic economic theories or practices
- Mathematical concepts
- Mental activity
- Interpersonal interactions or relationships
- Teaching concepts
- Human behavior
- Instructing how business should be conducted

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General Concepts - Possible Arguments in Favor of Patentability

- Claim would not preempt use of concept in other fields
- Claim is not a statement of a problem, but a description of a particular solution to a problem
- Concept is implemented in tangible way
- Steps of process are observable and verifiable
- Steps of process are not imperceptible or subjective