

April 2008

Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal

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Recommended Citation

Travis A. Knobbe, *Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal*, 110 W. Va. L. Rev. (2008).

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BRENNAN v. SCALIA, JUSTICE OR JURISPRUDENCE? A MODERATE PROPOSAL

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I. INTRODUCTION

Throughout America's legal history, the members of the federal judiciary have attempted to faithfully uphold the laws of our nation, as established by the Constitution and the federal legislature. Since Justice Marshall's famous opinion in *Marbury v. Madison*, it has been recognized that it is the Supreme Court's responsibility to interpret the Constitution and that the Supreme Court's interpretation of the Constitution stands as the law of the land.¹ This principle was unanimously reaffirmed by the Court in *Cooper v. Aaron* over 150 years later.² Though this principle is well-established and is, in fact, one of the longest-standing precedents in our nation's entire legal corpus, the problem arising from this principle has been the *manner* of interpretation. This Note proposes a solution to this problem by looking at two very divergent judicial styles, those of Justices William J. Brennan and Antonin Scalia.³

As the body of this Note will discuss, Justice Brennan followed an unabashedly liberal mode of interpretation, one which often valued the result over the method, while Justice Scalia follows a strict mode of construction, preferring

¹ 5 U.S. 137, 177 (1803).

² 358 U.S. 1, 18 (1958).

³ This Note often refers to both Justices by their last names only. This has been done to enhance readability and not out of disrespect to either Justice.

the narrowest possible interpretation and placing more value in the mode of interpretation than the particular result reached. This Note will attempt to view the styles of both Justices with equal candor and respect while contemplating the potential flaws in both styles with the ultimate goal of proposing a more preferable method of interpretation that takes into account the goals of both Justices and incorporates the central purposes of the Supreme Court as an institutional whole.

While Justices Brennan and Scalia find themselves on opposite ends of the jurisprudential spectrum, both Justices' styles have been subjected to equal amounts of criticism.⁴ The most pointed criticism of Brennan's preference for liberal decision-making and judicial activism has come in the form of proposed legislation.⁵ Even judges have entered into the criticism. Alabama Supreme Court Justice Tom Parker has recently asserted that "the liberals on the U.S. Supreme Court . . . look down on the pro-family policies, Southern heritage, evangelical Christianity, and other blessings of our great state," in an attempt to convince state judges to refuse to follow Supreme Court opinion "simply because they are 'precedents.'"⁶ In a *Wall Street Journal* article, retired Justice Sandra Day O'Connor notes that "the ubiquitous 'activist judges' who 'legislate from the bench' have become central villains on today's domestic political landscape."⁷ The criticisms have led to dangerous territory, proposed legislation that threatens judicial independence.⁸ This, of course, is undesirable, because the Framers created the judiciary as an *independent* branch of government.⁹

While Justice Scalia's restrictive method of construction is certainly more preferable in light of the criticism pointed at more liberal jurists, his style also is open to serious criticism.¹⁰ His view is to base judicial decisions only on

⁴ See *infra*, Part II.C and Part III.C.

⁵ For example, South Dakota has recently proposed a state constitutional amendment that would eliminate judicial immunity. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A-18. This proposed legislation seems aimed at trying to chill "judicial activism." *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The United States Supreme Court has outlined the policies behind judicial immunity on a few occasions. See *Stump v. Sparkman*, 435 U.S. 349, 356-364 (1978); see also *Bradley v. Fisher*, 80 U.S. 335 (1872).

⁹ See, e.g., U.S. CONST. art. III.

¹⁰ At least one potential criticism is that, while Justice Scalia asserts that a judge should not decide cases based on his individual preferences, he does, in fact, decide cases in this manner. Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000); see also, andré douglas pond cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action, and the Treachery of Originalism: "The Sun Don't Shine Here in This Part of Town,"* 21 HARV. BLACKLETTER L.J. 1, 62-63 (2005) (noting that Justices Thomas and Scalia both abandon their originalist philosophies for their individual passions in the area of affirmative action). Moreover, those attacking the Justices on the left for being too "activist" have overlooked Scalia's own brand of activism. From the years of 1994-2000, Justice Scalia has voted to overturn precedent 19 times, second only to Justice Thomas, who voted to overturn precedent 23 times.

the text of the Constitution and the most relevant historical practice at the time of its ratification.¹¹ However, his method has been viewed by many as overly restrictive,¹² and his method does not allow for a decision which takes into account modern realities and sensibilities. The problem that such a narrow method of construction presents is that it often reaches overly conservative results and sometimes places too much emphasis on majoritarian views. This ignores the Lockean principle that government is created for the purpose, *inter alia*, of preventing tyranny of the majority.¹³

This Note does not overlook the fact that the Supreme Court has gone through its cycles of restraint and activism, just as the other branches have gone through similar cycles. In fact, it embraces the fact. This Note, however, does propose that neither being overly active from the bench nor being overly conservative in interpretation is the most preferable method of construction. Finally, it concludes that both styles contain inherent flaws subject to criticism and that a more moderate approach to jurisprudential decision-making is preferable. Part II deals with Justice Brennan, and Part III concerns Justice Scalia. Within each part, Section A will outline that Justice's personal history, Section B will outline that Justice in his own words, and Section C will focus on case law and criticism to illustrate that Justice's style, highlighting the notable flaws and proposing more moderate jurisprudential techniques that may resolve the flaws. Part IV will then pull together these suggestions in an attempt to establish a more preferable mode of interpretation.

II. JUSTICE BRENNAN

A. *Biography*

Justice William J. Brennan was born in 1906 in New Jersey as the second of eight children born to Irish immigrants.¹⁴ He got his law degree from Harvard and entered into private practice in New Jersey.¹⁵ As a man of deeply-felt commitment to family, Brennan sought a position as a trial judge in New Jersey when he felt like his practice interfered with his family life.¹⁶ He ascended to that state's highest court by 1952, and he was appointed to the United

Lori Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENTARY 43, 65, tbl. 9 (2007). Justice Souter only voted in this manner 7 times. *Id.*

¹¹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

¹² See *infra* Part III.C.

¹³ This becomes especially problematic in Scalia's interpretation of the Establishment and Free Exercise Clauses. See *e.g.*, Chemerinsky, *supra* note 10.

¹⁴ Oyez.com, William J. Brennan, Jr. Biography, http://www.oyez.org/justices/william_j_brennan_jr/ (last visited April 21, 2008).

¹⁵ *Id.*

¹⁶ *Id.*

States Supreme Court by President Dwight D. Eisenhower in 1956.¹⁷ Eisenhower later admitted publicly that the appointment of Brennan was a mistake, presumably because Brennan turned out to be so liberal and so influential.¹⁸

B. Brennan in His Own Words

Based on Brennan's speeches and scholarly writings, one should expect a liberal approach to the bench that focuses more on the result than the particular method of analysis employed. This, of course, is not to say that Justice Brennan's legal reasoning is not sound and that he does not base his decisions on the Constitution and precedent. However, one should expect him to read the Constitution broadly in order to protect individual liberties. In fact, Brennan says that "our Constitution is a charter of human rights and human dignity,"¹⁹ and he notes that the highest accomplishments of the Court during his tenure "were [the numerous] opinions protecting and promoting individual rights and human dignity."²⁰

At a statement given at the University of Pittsburgh in 1986, Brennan said just that: "[t]he primary mission of us all has been and at the present moment is to preserve individual freedom—freedom of thought and action—to the fullest extent possible."²¹ The preservation of the individual rights to freedom, he says, "[is] the central problem of our law today."²² Though Brennan seems to pay particular attention to results, he does not ignore the importance of sound legal reasoning. In fact, he notes that "[t]he integrity of the process through which a rule is forged and fashioned is as important as the result itself; if it were not, the legitimacy of [that] rule would be doubtful."²³ The question, then, necessarily arises as to whether such a result-oriented approach might actually follow a consistent methodology.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ E. JOSHUA ROSENKRANZ AND BERNARD SCHWARTZ, REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 18 (1997) [hereinafter, INFLUENCE].

²⁰ *Id.* Considering the frequency with which Justice Brennan mentions human dignity and individual rights, it appears that his chief concern would be the preservation of those concepts. See William J. Brennan, Jr., *In Defense of Dissents*, 50 HASTINGS L.J. 671, 680 (1999) [hereinafter *Dissents*]; William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1989) [hereinafter *Reason*]; William J. Brennan, Jr., *Are Citizens Justified in Being Suspicious of the Law and the Legal System*, 43 U. MIAMI L. REV. 981, 982 (1989) [hereinafter *Citizens*]; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 536 (1986) [hereinafter *States*]; see also William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961).

²¹ William J. Brennan, Jr., *What's Ahead for the New Lawyer?*, 47 U. PITT. L. REV. 705, 710 (1986) [hereinafter, *New Lawyer*].

²² *Id.*

²³ *Dissents*, *supra* note 20, at 679.

With respect to that question, Brennan's approach to Constitutional interpretation may be too elusive to pin down. In his confirmation hearings, Brennan hinted at how he *might* approach the bench. He noted that there is a "great deal of precedent that deals with every amendment as well as with every provision [of the Constitution]."²⁴ When asked whether the Constitution should be interpreted in accordance with its provisions and precedents interpreting those provisions, Brennan said he did believe in that approach.²⁵ However, he also said that "it is part of the judicial process to consult a lot of things which may bear upon the particular case that is before you for decision."²⁶ Despite his apparent statement of fidelity to the Constitution and its prior interpretations, Brennan also notes that "due process require[s] fidelity to a more basic and more subtle principle: the essential dignity and worth of each individual."²⁷ Thus, it appears that one might expect Brennan to use the most solid reasoning available within the traditional judicial "toolkit" to reach what seems to be the appropriate result in each case.

Brennan, in fact, expressly rejects the historical tradition approach favored by the more "conservative" justices. Brennan notes that "the view that the Constitution could be definitively interpreted by reference to the 'intention of the Framers' [is] nothing more than 'arrogance cloaked as humility.'"²⁸ Instead, he says the each generation must seek to establish its own balance of power and individual freedoms "with which the Constitution is concerned."²⁹ In fact, he notes that "[t]he genius of the Constitution rests not in any static meaning it may have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and needs."³⁰ He cautions that we must "work hard at making . . . arguments that are based on reason and experience"³¹ because our experience will cause "the rules that we have inherited . . . to give way."³² In essence, he believes that rather than taking the historical analysis approach we must instead restudy the Constitution in terms of our changing realities.³³

²⁴ Roy M. Mersky and J. Myron Jacobstein, 6 THE SUPREME COURT OF THE UNITED STATES NOMINATIONS, BRENNAN 37 [hereinafter, Brennan Confirmation Hearings].

²⁵ *Id.*

²⁶ *Id.* at 38. This is one of the qualities that really separates Justice Brennan from Justice Scalia and the strict constructionalists. See *infra* Part III.B.

²⁷ *Reason*, *supra* note 20, at 15.

²⁸ William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 325 (1986) [hereinafter, *Adjudication*].

²⁹ *Reason*, *supra* note 20, at 22.

³⁰ INFLUENCE, *supra* note 19, at 18.

³¹ *Adjudication*, *supra* note 28, at 331.

³² *Id.* at 320. Certainly, this statement reflects Brennan's preference for a more common-law-oriented approach to interpretation.

³³ *New Lawyer*, *supra* note 21, at 710.

In defense of his preference to view the Constitution as a “living” document, Brennan notes that times have changed drastically since that of the framers; in fact, “[i]t is only within recent years that we have had occasion to think of freedom outside the context of peace.”³⁴ Aside from this basic view, Brennan notes that it is “inescapable . . . that the choice by the Framers to employ general and relativistic [terms] was a deliberate one.”³⁵ Because of this, the Court’s views “must be subject to revision over time, or the Constitution falls captive to the anachronistic views of long-gone generations.”³⁶ Brennan also employs a pragmatic defense of his views noting that “if it were possible to find answers to all constitutional questions by reference to historical practices, we would not need judges.”³⁷ According to Brennan, judges have a duty “to bring their individual intellects” informed by modern realities “to bear on the issues that come before the Court.”³⁸ Moreover, judges are “not there simply to decide cases, but to decide them as *they* think they should be decided.”³⁹

One might reasonably ask what principles or methods are in place to limit the discretion of judges deciding cases solely on their personal views, especially in light of Brennan’s statement that “the range of emotional and intuitive responses [which he calls ‘passion’] to a given set of facts . . . speed into our consciousness far ahead of . . . reason.”⁴⁰ Brennan himself recognizes that due process requires that “judicial determinations concerning life [and] liberty must be based on pre-existing standards of law and cannot be left to the unlimited discretion of a judge.”⁴¹ The judicial process which limits judicial discretion is “principled and meaningful and . . . goes well beyond what the cynics describe as the imposition of the judge’s personal views of morality [and] policy.”⁴² He notes that two important checks on judicial discretion are the recording of precedent and the requirement of a public and reasoned explanation of the judicial result.⁴³ Thus, judges are controlled by the responsibility they have to “proceed and to persuade by reasoned argument in a public context.”⁴⁴

³⁴ *Id.*

³⁵ *Adjudication, supra* note 28, at 325.

³⁶ *Dissents, supra* note 20, at 681.

³⁷ *Adjudication, supra* note 28, at 326.

³⁸ *Dissents, supra* note 20, at 678.

³⁹ *Id.* (emphasis added). This refers to Justice Brennan’s distaste for the more mechanical method of interpretation used by many jurists prior to Justice Cardozo’s accession to the bench. See, e.g., *Reason, supra* note 20.

⁴⁰ *Reason, supra* note 20, at 9.

⁴¹ *Adjudication, supra* note 28, at 317.

⁴² *Id.* at 329.

⁴³ *Reason, supra* note 20, at 8.

⁴⁴ *Adjudication, supra* note 28, at 329.

However, Brennan also warns that “formal reason severed from the insights of passion” is “the greatest threat to due process principles.”⁴⁵ Brennan appears to think that such reason is inappropriate because lawyers “must bring real morality into the legal consciousness.”⁴⁶ He notes that government has “an affirmative role, a positive duty to provide those things which give real substance to our cherished values of liberty, equality and human dignity.”⁴⁷ Brennan’s deeper concern seems to be that mechanically-produced, passionless legal decisions will not satisfactorily protect individual liberties. This is unacceptable because “all legal decisions should advance, not degrade, human dignity.”⁴⁸

In fact, Brennan notes that judging cannot be “characterized as simply the application of pure reason to legal problems, nor . . . as the application of the personal will or passion of the judge.”⁴⁹ Rather, it is the combination of “reason and passion . . . [that] is central to [judicial] vitality.”⁵⁰ It is these elements, Brennan says, that a judge must consider when choosing between “basic principles” so that the decisions judges make will reflect their status as “flesh-and-blood human beings.”⁵¹ In fact, the danger in perpetuating “the prevailing myth that a judge’s personal values were irrelevant to the decision process” in favor of a purely reason-based process⁵² is that by “ignoring [passion], the judiciary [will] deprive[] itself of the nourishment essential to a healthy and vital rationality.”⁵³

One would do well to recall that the central accomplishments of the Court according to Brennan include the preservation of human liberties and dignity. It is in this light that Brennan’s approach—to mix passion and reason—makes the most sense. He says,

[o]nly by remaining open to the entreaties of reason and passion, of logic and experience, can a judge come to understand the complex human meaning of a rich term such as ‘liberty,’ and only with such an understanding can courts fulfill their constitutional responsibility to protect that value.⁵⁴

⁴⁵ *Reason*, *supra* note 20, at 17.

⁴⁶ *Citizens*, *supra* note 20, at 986.

⁴⁷ *Id.* at 982. In essence, he seems to believe that the individuals in the three branches of the government must breathe life into the Constitution to ensure its human elements are preserved.

⁴⁸ *Dissents*, *supra* note 20, at 680.

⁴⁹ *Reason*, *supra* note 20, at 3.

⁵⁰ *Id.*

⁵¹ *Id.* at 5.

⁵² *Id.* at 4.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 11. A healthy rationality, of course, is an important element of the judicial integrity for which Brennan advocates. See *supra* note 30 and accompanying text.

He argues that the judges must ensure that “official judgment always remain *human* judgment”⁵⁵ so that the “broadly phrased guarantees of our freedoms” will not become “anachronism[s].”⁵⁶ It is only by recognizing that our “framers bequeathed to us a vision . . . of . . . common humanity”⁵⁷ that judges can make decisions that “realize the true potential of our Constitution and its Bill of Rights.”⁵⁸

Justice Brennan has also spoken on what he views as the appropriate role of state and federal power, but he also casts this discussion in terms of individual rights. He notes that the decisions of the Court binding the states to the Bill of Rights were highly “significant for the preservation and furtherance of the ideals we have fashioned for our society.”⁵⁹ He recognizes that the Fourteenth Amendment has “served as the legal instrument . . . protecting each of us from the employment of governmental authority in a manner contravening our national conceptions of human dignity and liberty.”⁶⁰ This Amendment, he continues, has been interpreted “to nationalize civil rights, making the great guarantees of life, liberty, and property binding on all [state] governments throughout the nation.”⁶¹

However, Brennan notes with some regret that the Court has been increasingly likely to “insure control rather than to nurture individuality.”⁶² In essence, he fears that the Court has already and will continue to pull back the reins on individual liberty. For example, he notes that the “venerable remedy of habeas corpus has been sharply limited in the name of federalism” and that the “Equal Protection Clause has been denied its full reach.”⁶³ He counters the Court’s trend with the assertion that “[a] *healthy* federalism is not promoted” by allowing state officers and state courts to bypass constitutional guarantees.⁶⁴ However, Brennan does agree that where state “experiments provide *more* rather than *less* protection for civil liberties and individual rights” than does the Constitution, this experimentation should not be limited.⁶⁵

⁵⁵ *Id.* at 15 (emphasis in original).

⁵⁶ *Id.* at 12.

⁵⁷ *Id.* at 22.

⁵⁸ INFLUENCE, *supra* note 19, at 21.

⁵⁹ *States, supra* note 20, at 536. Of course, these decisions are facing the most directed attack by those who agree with Alabama Supreme Court Justice Tom Parker. *See supra* note 6 and accompanying text.

⁶⁰ *Id.*

⁶¹ *Id.* at 540.

⁶² *Id.* at 546. In the battle of state power versus personal freedoms, Brennan comes down on the side of the individual.

⁶³ *Id.* at 547.

⁶⁴ *Id.* at 541 (emphasis in original).

⁶⁵ *Id.* at 551 (emphasis added).

Brennan cautions, however, that the “revitalization of state constitutional law is no excuse for the weakening of federal protections and prohibitions.”⁶⁶ He says that this would weaken our federal system.⁶⁷ He notes that while states should be permitted to secure liberties *above* the floor set by the Constitution, the federal court system serves as a “double source of protection” when states infringe upon those liberties.⁶⁸ As an example, Brennan notes that he has always defended the collateral remedy of habeas corpus because it guarantees individual rights and because “it provide[s] *double* protection for constitutional rights.”⁶⁹

Justice Brennan seems to find the constitutional protections of equality and liberty so important because the public has been pointing out “what they regard as indefensible inequities” in our legal systems “with rising vehemence.”⁷⁰ More troubling is the fact that the “[l]aw is regarded as an obstacle to, rather than an instrument of, the creation of a just and generous society.”⁷¹ He adds,

[s]ociety’s overriding concern today is with providing freedom and equality of rights and opportunities, *in a realistic and not merely formal sense*, to all the people of this nation. Society is concerned with securing justice, equal and practical, to the poor, to the members of minority groups, to the criminally accused, to the displaced persons of the technological revolution . . . to all, in short, who do not yet partake of the abundance of American life.⁷²

He believes that, on top of that concern, “Americans expect fair play on the part of their courts”⁷³ and that failing to protect individual liberties against governmental intrusions by the states runs contrary to this notion. While he admits that the Court has done much “to close the gap between the promise” of the Fourteenth Amendment “and the social and political realit[ies]” of the times,⁷⁴ he essentially argues that using federalism to limit individual remedies for violations of constitutional rights by the states will threaten the integrity of the Court.

⁶⁶ *Id.* at 552; see also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁶⁷ *States*, *supra* note 20, at 552.

⁶⁸ *Id.* at 550, 552.

⁶⁹ William J. Brennan, Jr., Preface, *Nineteenth Annual Review of Criminal Procedure*, 19 Ann. Rev. Crim. Pro. xiii (1990).

⁷⁰ *Citizens*, *supra* note 20, at 981.

⁷¹ *Id.* at 982.

⁷² *Id.* at 983 (emphasis added).

⁷³ Brennan Confirmation Hearings, *supra* note 24, at 23.

⁷⁴ *States*, *supra* note 20, at 546.

This belief seems to inform Brennan's view that "the Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal *floor* of protection" that should be used to determine whether states have violated constitutional rights.⁷⁵ In fact, he notes that "state courts . . . [had] handed down over 250 published opinions [between 1970 and 1984] holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law."⁷⁶ Thus, he seems to argue that, even though state courts agree that the rights under the Constitution provide the bare minimum protections of liberty and equality, the federal courts must still intervene when states do not meet these minimums. He seems to view this role as the *duty* of the federal courts, and he seems to find that this duty is vital to the integrity of the court system because, after all, "[t]he mechanism by which society makes choices and accommodates conflicting social interests has always been preeminently the law."⁷⁷ The United States Supreme Court, then, must step in and pull knowledge from all disciplines to "investigate and report on the functioning and nature of society"⁷⁸ to ensure that, when society does codify its collective policy choices into the law, individual liberties and equality are accommodated.

In summary, one should expect Brennan's opinions to utilize the most logical form of reasoning he can in order to arrive at his preferred result. That result will likely best promote the protection of individual liberty, equality, and human dignity. He will likely use strongly passionate discourse and stylized language to ensure that the "Constitution intervene[s] to provide [a] cloak of dignity"⁷⁹ for the individual whose constitutional rights have been violated. One should expect Brennan to utilize a case-by-case approach which provides the necessary "flexibility with respect to the call of *stare decisis*"⁸⁰ to ensure that individual rights are protected. One should also expect more forward-looking opinions—that is, arguments based on the future effects of one outcome versus another—filled with a "certain idealism . . . of what the law can and must be."⁸¹ One should not expect to find a discernible *method* of reasoning that Brennan continuously employs because it is likely that he will use the most solid legal analysis possible to reach the result that does the most to protect individual rights—a result Brennan would seemingly have in mind *before* he begins to reason through the facts and law. The following section will show that, for the

⁷⁵ *Id.* at 550 (emphasis added).

⁷⁶ *Id.* at 548.

⁷⁷ *Citizens*, *supra* note 20, at 985.

⁷⁸ *New Lawyer*, *supra* note 21, at 709.

⁷⁹ INFLUENCE, *supra* note 19, at 19.

⁸⁰ *Dissents*, *supra* note 20, at 681.

⁸¹ *Adjudication*, *supra* note 28, at 318-19.

most part, Justice Brennan does appear to be mostly result-oriented⁸² and that he does seem to interpret individual rights in the broadest manner reasonable given the text and history of the Constitution.

C. Case Law and Criticism

Justice Brennan's opinions display that his legal reasoning was sound—at least when each case is viewed in isolation. However, by looking at his collective body of Supreme Court opinions, one can conclude that Brennan had no discernibly consistent jurisprudence. His contradictions are too numerous. While the results achieved during Justice Brennan's tenure are at least remarkable and at best admirable, his lack of consistency is somewhat problematic with respect to how solid a precedential value his decisions might have over the next few decades. This section will analyze those inconsistencies—as well as other criticisms of Justice Brennan's opinions—to the extent necessary to show that a more moderate jurisprudence might have been preferable in comparison.

In a panel discussion conducted at New York School of Law to address the question of whether the Brennan legacy would endure, all four panelists—Akhil Reed Amar, Robert Nagel, Mark Tushnet and Richard Fallon—agreed on at least one point; they noted that Brennan's contributions to American jurisprudence must be analyzed with an appropriate understanding that Brennan's tenure on the court began at a time when the social programs instituted during President Franklin D. Roosevelt's "New Deal" were beginning to take hold.⁸³ Amar stated that, before Brennan, the picture of constitutional law was much different.⁸⁴ Prior to Brennan's tenure, the first ten Amendments were rarely invoked (and never were they referred to collectively as the "Bill of Rights").⁸⁵ Because of Brennan, Amar asserts, "we can consider the Bill of Rights our palfadium of liberty, our Parthenon."⁸⁶ The thrust of Amar's argument appears to be that Brennan's greatest legacy is twofold: first, that he elevated the Court to the position it now occupies as the arbiter between governmental power and individual rights; second, that he greatly expanded what rights the Court protects against governmental authority.⁸⁷ Richard Fallon clarifies this argument

⁸² This is not to say that Justice Brennan will not utilize solid legal reasoning in his opinions. He does, after all, stress the importance of such reasoning as a limit of judicial discretion. This is merely to say that it does appear in many cases that Justice Brennan appears to work backwards from the result. That is, he appears to employ various methods of legal reasoning to fit his desired result. See *infra* Part II.C.

⁸³ See generally, Panel Discussion, *Will the Brennan Legacy Endure?*, 43 N.Y. L. SCH. L. REV. 177 (1999) [hereinafter, *Legacy Panel*].

⁸⁴ *Id.* at 178.

⁸⁵ *Id.* at 178-79. This Note assumes, *arguendo*, that Amar's assertion is factually sound.

⁸⁶ *Id.* at 179.

⁸⁷ *Id.* at 177-81. Certainly, this is a defensible position, especially with respect to the latter contribution. However, as this Section shows, many argue that Justice Brennan stretched those

by noting that “[a]s power gathered at the center [during the New Deal], Justice Brennan wanted to make sure that individuals’ rights were protected.”⁸⁸ Even Nagel, an admitted critic of Justice Brennan,⁸⁹ seems to think that Justice Brennan’s influence on the Supreme Court’s role was positive.

All of this, at first blush, seems to provide reason to praise, not criticize, Brennan’s jurisprudence. From this, it may be argued that the “liberal activism”⁹⁰ Brennan brought to the Court was exactly what the Nation needed during his tenure. However, Tushnet raises the opposite view. He notes that “[t]o the extent that . . . Brennan’s vision . . . depended on the New Deal order, the disappearance of that order would *have* to be fatal.”⁹¹ He notes further that this vision, and the gains made during his tenure as a result of that vision, have not been adequately protected for the future.⁹² Tushnet and Nagel both note that “judicial retrenchment” on the progressive doctrines established during Brennan’s tenure has taken place during the Rehnquist era.⁹³ Nagel, in fact, argues that much of what Brennan had accomplished would have already been chipped away had the Rehnquist court developed the same “intellectual confidence” that Brennan possessed.⁹⁴ In light of Brennan’s own assertion that public confidence in the judiciary is one of the primary purposes of elevating human dignity, liberty, and equality to such a high plateau, such retrenchment would seem especially problematic.⁹⁵

To that point, many of the criticisms of Justice Brennan’s jurisprudence are especially noteworthy. In another panel discussion at the New York School of Law, Michael McConnell and Stephen Reinhardt both question whether Brennan’s apparently “unfettered authority” to impose his own views might inspire Justices Thomas or Scalia to do the same and impose their own, more conservative views upon the Nation.⁹⁶ In fact, Justice Kennedy expresses this

rights *too* far. In other words, he did not strike the appropriate balance between the individual and the government.

⁸⁸ *Id.* at 189.

⁸⁹ *Id.* at 186.

⁹⁰ This Note does not use the terms “liberal” or “activist” in the manner which seems to dominate the legal scholarship in this area. It does not attach the negative connotations that often accompany these terms, nor does it view liberal activism unfavorably. For a thoroughly nuanced analysis of the contours of judicial activism, see Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567 (2007).

⁹¹ *Id.* at 188 (emphasis added).

⁹² *Legacy Panel*, *supra* note 83, at 188 (emphasis added).

⁹³ *Id.* at 185-89. This retrenchment is likely to continue—and perhaps even accelerate—during the Roberts era.

⁹⁴ *Id.* at 183-84. Justice Scalia, in fact, may provide just the sort of confidence about which Nagel was speaking.

⁹⁵ See *supra* notes 70-74 and accompanying text.

⁹⁶ Panel Discussion, *Brennan’s Approach to Reading and Interpreting the Constitution*, 43 N.Y. L. SCH. L. REV. 41, 63 (1999) [hereinafter *Approach Panel*]. In fact, one could argue that Justices Thomas and Scalia already *do* impose their own views upon the Nation. Cummings,

very concern in *Chauffers v. Terry* when he says, “If we abandon the plain language of the Constitution to expand the jury right, we may expect Courts with opposing views to curtail it in the future.”⁹⁷ This statement was made in response to Brennan’s concurring view that the court should abandon the historical analysis that had been a constant part of the Court’s Seventh Amendment jurisprudence.⁹⁸ Kennedy’s statement, therefore, can be supported by the plain language of that Amendment.⁹⁹

The obvious concern is that if Brennan could successfully abandon the text of the Constitution to broaden the scope of recognized rights, then more conservative jurists could do the same in the future. Much of the scholarship written about Justice Brennan focuses on the assertion that perhaps Brennan’s view of which rights are constitutionally protected was too subjective. For example, Donna Coltharp notes that Brennan’s view in this regard is informed largely by “natural rights” theory.¹⁰⁰ She notes that natural law, a phrase found nowhere in the Constitution, is “hopelessly subjective.”¹⁰¹ Moreover, according to Coltharp, “Brennan’s gift of compromise, a gift nearly essential to effective jurisprudence from an extremist judge, inevitably produced vulnerable precedent.”¹⁰²

In addition, Coltharp argues that Brennan’s use of natural rights theory, along with his gift of compromise, has led to unclear decisions—especially with regard to his First Amendment jurisprudence.¹⁰³ Kevin Driscoll illustrates this criticism by focusing on Brennan’s decision in *Jencks v. United States*.¹⁰⁴ In *Jencks*, the court was faced with a defendant who was charged with perjury for lying about his affiliation with the Communist party.¹⁰⁵ The court held that “the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce . . . relevant statements

supra note 10, at 61-63 (noting specifically that Justice Thomas’ decisions are influenced, in part, by his own background and preferences).

⁹⁷ 494 U.S. 558, 593 (1990). This is, in fact, a real danger considering the fact that Justice Scalia, who had been writing as a dissenter during most of the early portion of his career, may now “emerge as a leader of the new conservative majority.” See David G. Savage, *Supreme Court’s New Tilt Could Put Scalia on a Roll*, L.A. TIMES, Feb. 20, 2007, at A1.

⁹⁸ 494 U.S. at 574.

⁹⁹ The Seventh Amendment reads, in pertinent part, “In Suits at common law...the right of trial by jury shall be *preserved*[.]” U.S. Const. amend. VII (emphasis added).

¹⁰⁰ Donna F. Coltharp, *Writing in the Margins: Brennan, Marshall, and the Inherent Weaknesses of Liberal Judicial Decision-Making*, 29 ST. MARY’S L.J. 1, 23 (1997).

¹⁰¹ *Id.* at 25

¹⁰² *Id.* at 45. This aggravates the concern that, though Justice Brennan made positive gains while on the court, the stability of his legacy may be in jeopardy because of the manner in which he made those gains.

¹⁰³ *Id.* at 37.

¹⁰⁴ 353 U.S. 657 (1957).

¹⁰⁵ *Id.* at 658-59.

or reports in its possession.”¹⁰⁶ Driscoll notes that the opinion is subject to criticism because Brennan’s “language was so broad and generalized that the lower courts at once began to interpret it in various ways.”¹⁰⁷ The fact that Brennan’s opinions can sometimes present interpretive difficulties presents problems with his goal of integrity.¹⁰⁸ If troubling language is used in the identification of a right that is supposedly protected by the Constitution or by federal law, then it becomes that much more difficult to protect that right. Certainly, this cannot be what Brennan had in mind when he noted that the Court’s role is to protect individual liberties and human dignity.¹⁰⁹

Scholars have also criticized Brennan’s jurisprudence on two related grounds: first, that the holdings are often “less-than certain” and the results are often “fact-specific”¹¹⁰ and, second, that Brennan consistently twisted the facts in order to reach his desired result.¹¹¹ As an example of the latter, Driscoll points to *Irvin v. Dowd*.¹¹² In that case, the defendant was tried for committing six murders.¹¹³ His constitutional claim was that due process would be violated because of the publicity surrounding his trial.¹¹⁴ The Indiana Supreme Court denied the defendant’s motion for a new trial in part because he had escaped from prison in the interim.¹¹⁵ Essentially, the court had to decide whether it had jurisdiction over the federal habeas action.¹¹⁶ The issue was complicated. If the Court found that the state denied the motion for a new trial solely on the state-law grounds that the prisoner had escaped, then it had no jurisdiction for federal habeas review; if, however, the Court found that the decision was really based on the constitutional due process issue, then jurisdiction was proper.¹¹⁷ The Court ultimately found that the Indiana Supreme Court had rested its decision on the constitutional issues, and, therefore, the Court had jurisdiction over the habeas petition.¹¹⁸ However, the Indiana Supreme Court clearly rested on the fact that an escaped prisoner “is not entitled during the period he is a fugitive to any standing in court or to file any plea or ask any consideration from such

¹⁰⁶ *Id.* at 672.

¹⁰⁷ Kevin O’D. Driscoll, *The Origins of a Judicial Icon: Justice Brennan’s Warren Court Years*, 54 STAN. L. REV. 1005, 1012 (2002) (citations omitted).

¹⁰⁸ *See supra* note 77 and accompanying text.

¹⁰⁹ *See supra* note 48 and accompanying text.

¹¹⁰ Coltharp, *supra* note 100, at 39.

¹¹¹ Driscoll, *supra* note 107, at 1016.

¹¹² 359 U.S. 394 (1959).

¹¹³ *Id.* at 396.

¹¹⁴ *Id.* at 397-98.

¹¹⁵ *Id.* at 402.

¹¹⁶ Driscoll, *supra* note 107, at 1015.

¹¹⁷ *Id.* at 1015.

¹¹⁸ *Irvin v. Dowd*, 359 U.S. 394, 404 (1959).

court.”¹¹⁹ Any mention of the constitutional claims by that court became dicta at that point. Thus, the criticism that Brennan “twists facts and words at [his] pleasure in order to reach the results [he] wants”¹²⁰ seems well-grounded, especially given Brennan’s position on federal habeas relief.¹²¹

At least one scholar points out two criticisms of Brennan’s jurisprudence related to his vision of human dignity. Stephen Wermiel notes that some find Brennan’s “vision of human dignity . . . self-serving.”¹²² Wermiel gives two examples of such criticism: first, pro-life scholars criticize Brennan for overlooking the human dignity of the unborn fetus when upholding a woman’s right to an abortion procedure; second, other scholars criticize Brennan for using the First Amendment to protect against unwanted and hateful speech, claiming that this does not advance human dignity in the sense of the community.¹²³ Wermiel also notes that some criticize Brennan by asking just where “one finds the standards of human dignity to apply” when deciding which rights to protect under the Constitution.¹²⁴ Both of these criticisms, if valid, diminish the integrity of Brennan’s decision-making process because they show that he will bend his reasoning in order to reach a particular result, and this reflects and solidifies the position taken by Justice Kennedy in *Chauffers v. Terry*.¹²⁵

These criticisms only scratch the surface. The contradictions noted below will show that Brennan’s approach does, in fact, seem self-serving. Coltharp points out one of these inconsistencies in Brennan’s death penalty jurisprudence.¹²⁶ Coltharp notes that in *Furman v. Georgia*, Brennan argues that “national consensus was against the death penalty,” and, therefore, it should be considered unconstitutional under the Eighth Amendment.¹²⁷ In *Gregg v. Georgia*, however, “when confronted with evidence to the contrary . . . Brennan asserted . . . that he would continue to oppose the death penalty on the principle that the punishment degraded human dignity, a proposition which was largely

¹¹⁹ *Irvin v. State*, 139 N.E.2d 898, 901 (1957).

¹²⁰ Driscoll, *supra* note 107, at 1016 (citing Henry M. Hart, Jr., *Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 110 (1959)).

¹²¹ See *supra* note 69 and accompanying text; see also Mark Tushnet, *Justice Brennan, Equality, and Majority Rule*, 139 U. PA. L. REV. 1357, 1357-60 (1991) (examining how Justice Brennan similarly twists facts to reach his desired result in *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)).

¹²² Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL OF RTS. J. 223, 236-37 (1998).

¹²³ *Id.*

¹²⁴ *Id.* at 237. This criticism, of course, is really just a restatement of those criticisms that attack Justice Brennan for his reliance on natural law theory to articulate the scope of rights that are constitutionally protected. See *supra* notes 100-02 and accompanying text.

¹²⁵ See *supra* note 97 and accompanying text.

¹²⁶ Coltharp, *supra* note 100, at 26.

¹²⁷ *Id.*

derived from natural rights theory.”¹²⁸ These cases, read together, show that Brennan is willing to rest on different grounds in order to arrive at the result he feels is appropriate—a result grounded in natural rights theory, which, as mentioned above, is criticized for being too subjective.¹²⁹ This does seem to show that Brennan employs legal reasoning to advance his own views.

In addition, Coltharp notes that Brennan’s “explicit[] and implicit[] embrace[] [of] the natural rights strand of natural law theory” is not grounded anywhere in the text of the Constitution.¹³⁰ Thus, his decisions resting on natural rights theory cannot stand on solid ground when they are not supported by the text.

However, Brennan has no problem strictly adhering to the text when it yields the result he would prefer. For example, Coltharp also notes that Brennan “consistently dissented” from the Court’s decisions in Eleventh Amendment cases and that he “clearly had the textual argument won.”¹³¹ Again, to the extent that he is attempting to reach what he considers the appropriate result, Brennan’s jurisprudence appears self-serving.

A comparison of *City of Newport v. Fact Concerts*¹³² and *Teague v. Lane*¹³³ provides another example of Brennan’s inconsistent jurisprudence. In *Fact Concerts*, the Court faced the question of whether “a municipality may be held liable for punitive damages under [42 U.S.C. § 1983].”¹³⁴ However, the respondent argued that, because the City of Newport did not object to the giving of jury instruction allowing for punitive damages to be awarded against the city before the jury retired to consider its verdict, Federal Rule of Civil Procedure 51 barred appeal of the punitive damages issue.¹³⁵ The majority, however, overlooked Rule 51’s requirements and reached the merits of the issue,¹³⁶ deciding that punitive damages may not be awarded against a municipality.¹³⁷ Justice Brennan, however, dissented on the ground that Rule 51 clearly bars consideration of the issue.¹³⁸ Here, Brennan takes what this Note considers the moderate

¹²⁸ *Id.*; see also *Gregg v. Georgia*, 428 U.S. 153, 230-31 (1976) (Brennan, J., dissenting).

¹²⁹ See *supra* note 101 and accompanying text.

¹³⁰ Coltharp, *supra* note 100, at 43.

¹³¹ *Id.* at 42. For a more thorough discussion of Eleventh Amendment jurisprudence, see *infra* notes 244-54 and accompanying text.

¹³² 453 U.S. 247 (1981).

¹³³ 489 U.S. 288 (1989).

¹³⁴ 453 U.S. at 249.

¹³⁵ *Id.* at 255-56. In this case, the court cited a relevant portion of the then-existing rule: “No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.” *Id.* at 255 n.9.

¹³⁶ *Id.* at 256.

¹³⁷ *Id.* at 271.

¹³⁸ *Id.* at 274 (Brennan, J., dissenting).

approach, deciding the case on the narrowest grounds available. However, one could at least speculate that, given Brennan's views on the Court's role of protecting individual rights against governmental intrusion,¹³⁹ he did not want to reach the merits because he did not agree that punitive damages could not be awarded against municipalities.

However, in *Teague*, Justice Brennan would have it the opposite way; here, he would give the Court broad discretion to decide a substantive issue where the Court might have dismissed the action without so deciding. In *Teague*, the Court was presented with the issue of whether its prior rule that the Sixth Amendment requires a jury venire to represent a fair cross section of the community should be extended to the petit jury.¹⁴⁰ This question was brought before the Court on appeal from the denial of petitioner's writ of habeas corpus.¹⁴¹ The Court held that it could not reach the merits of the constitutional question because "the rule urged by petitioner should not be applied retroactively to cases on collateral review."¹⁴² The *Teague* majority followed the same approach Brennan took in his *Fact Concerts* dissent; the majority avoids deciding the substantive issue on procedural grounds. Brennan, however, dissents from this approach in *Teague*, saying that the Court should reach the merits of petitioner's constitutional claim.¹⁴³ Here, one could easily assume—given Brennan's position concerning the remedy of habeas corpus—that he advocates this approach based on his own personal views.¹⁴⁴ Thus, the inconsistency between his reasoning in *Fact Concerts* and *Teague* illustrates how Brennan's jurisprudence can be seen as self-serving.

It appears, then, that Justice Brennan's approach is undesirable with respect to his own goal of integrity. The inconsistencies in his jurisprudence—when viewed as a cohesive whole—show that he is willing to twist facts or change his methodology to reach his desired result. This leads to the problem that it might open the gates for a Justice with more conservative views to also use transparent, subjective methodologies to reach the opposite results. According to Brennan's own view, this is undesirable because the liberties he protected in order to advance the integrity and legitimacy of the Court are found within precedents that do not stand on solid ground.¹⁴⁵ A more moderate approach would seek to do the opposite. A Justice using this approach would take the long-view and seek to protect his results into the future, so opposing voices cannot overcome these decisions so easily.

¹³⁹ See *supra* Part II.B.

¹⁴⁰ *Teague v. Lane*, 489 U.S. 288, 292 (1989).

¹⁴¹ *Id.* at 293.

¹⁴² *Id.* at 299.

¹⁴³ *Id.* at 329 (Brennan, J., dissenting).

¹⁴⁴ See Brennan, *supra* note 69 and accompanying text.

¹⁴⁵ See *supra* note 77 and accompanying text.

III. JUSTICE SCALIA

A. *Biography*

Justice Antonin Scalia was born in Trenton, New Jersey, in 1936 as an only child.¹⁴⁶ He was a second-generation American with an Italian upbringing, and he has a strong dedication to Catholicism.¹⁴⁷ He received his law degree from Harvard Law School and entered into government service shortly thereafter.¹⁴⁸ In 1982, he was appointed by President Ronald Reagan to the D.C. Court of Appeals, where he gained a reputation for judicial restraint and limited interpretation.¹⁴⁹ This reputation followed him when he was appointed to the United States Supreme Court in 1986 by President Ronald Reagan to fill the void created when Justice William Rehnquist was appointed Chief Justice.¹⁵⁰

B. *Scalia in His Own Words*

According to Scalia's confirmation hearings and his own scholarly writings, one would expect him to take a conservative approach to the bench. Clearly, Scalia established early in his career that he is a proponent of 'originalism,' which means that he prefers to adhere to the original meaning of the Constitution.¹⁵¹ In one essay, Scalia cites to Chief Justice Taft's opinion in *Myers v. United States*¹⁵² as a "prime example of . . . the 'originalist' approach to constitutional interpretation."¹⁵³ Scalia notes that this approach is preferable because the judge should seek to establish the meaning of the Constitution in 1789 by looking to the text of the Constitution, its overall structure, and the "contemporaneous understanding" of the framers.¹⁵⁴ Scalia, however, distinguishes his approach from that of a strict constructionist. He explains that a text "should

¹⁴⁶ Oyez.com, Antonin Scalia Biography, http://www.oyez.org/justices/antonin_scalia (last visited Feb. 22, 2008).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* It is arguable whether his brand of judicial interpretation is really a practice in restraint. See *infra* Part III.C.

¹⁵⁰ See *infra* Part III.C.

¹⁵¹ See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter *Originalism*]; see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter *Rule of Law*]; Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1997) [hereinafter *Interpretation*]; Roy M. Mersky and J. Myron Jacobstein, 13 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1982 142 (1989) [hereinafter *Scalia Confirmation Hearings*].

¹⁵² 272 U.S. 52 (1926).

¹⁵³ *Originalism*, *supra* note 151, at 851-52.

¹⁵⁴ *Id.* at 852.

not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”¹⁵⁵ Scalia also distinguishes original meaning from original intent.¹⁵⁶ Scalia explains that the distinction minimizes the importance of legislative history as an interpretive device because it is the meaning of the Constitution or of a statute that is important, not the intent of the drafters.¹⁵⁷ In fact, he notes that “if somebody should discover that the secret intent of the framers was quite different from what the words seem to connote, it would not make any difference.”¹⁵⁸

Scalia frequently juxtaposes his preference for originalism with the more liberal approach he calls “nonoriginalism.”¹⁵⁹ This approach is favored by those who advocate “The Living Constitution.”¹⁶⁰ The fundamental flaw of nonoriginalism, he says, is that it is incompatible “with the very principle that legitimizes judicial review of constitutionality.”¹⁶¹ Nonoriginalists, he continues, read the Constitution as merely a “novel invitation to apply current social values”; however, he questions whether such an invitation would be aimed at the courts rather than the legislature.¹⁶² Scalia also questions the sources from which judges should draw these fundamental values that replace original meaning: “the philosophy of Plato, or of Locke, or Mills, or Rawls, or perhaps from the latest Gallup poll.”¹⁶³ In sum, Scalia views the primary problem with nonoriginalism to be the impossibility of “achieving any consensus on what, precisely, is to replace the original meaning, once that is abandoned.”¹⁶⁴

In fact, Scalia has viewed nonoriginalism skeptically since before his confirmation. During his confirmation hearings, for example, Scalia notes that he worries that by following the approach of the nonoriginalists, that he is not reflecting the fundamental beliefs of society but rather the “most deeply felt beliefs of Scalia, which is not what I want to impose on the society.”¹⁶⁵ Scalia continues

I am deeply mistrustful of my ability, without any guidance other than my own intuition, to say what are the deepest and most profound beliefs of our society. And that’s what it means

¹⁵⁵ *Interpretation*, *supra* note 151, at 23.

¹⁵⁶ Scalia Confirmation Hearings, *supra* note 151, at 142.

¹⁵⁷ *Interpretation*, *supra* note 151, at 29-30. *But see* Scalia Confirmation Hearings, *supra* note 151, at 159 (Scalia says that legislative history is “a significant factor in interpreting a statute”).

¹⁵⁸ Scalia Confirmation Hearings, *supra* note 151, at 202.

¹⁵⁹ *Originalism*, *supra* note 151, at 862.

¹⁶⁰ *Interpretation*, *supra* note 151, at 47.

¹⁶¹ *Originalism*, *supra* note 151, at 854.

¹⁶² *Id.*

¹⁶³ *Id.* at 855.

¹⁶⁴ *Id.* at 862-63.

¹⁶⁵ Scalia Confirmation Hearings, *supra* note 151, at 183.

to say that something is constitutionally required. It is in accordance with the deepest and most profound beliefs of our society. I find it difficult to come to the conclusion that something qualifies for that description when neither at the time the constitutional provision in question was enacted, was it in fact the practice of the society, as demonstrated by the laws the society enacted, nor at the present time is it that way.¹⁶⁶

Scalia constantly ponders the problem “that the judges will mistake their own predilections for the law”¹⁶⁷ throughout his writings.

Another facet of the problem with nonoriginalism to Scalia is that this approach does not comport with his view of the separation of powers doctrine. In fact, he attacks the common-law case-by-case approach, saying that this would be “an unqualified good, were it not for a trend in our government . . . called democracy.”¹⁶⁸ He explains that the problem with a nonoriginalist view is that general rules under this approach do not have “a solid textual anchor,” and, as a result, such rules appear “uncomfortably like legislation.”¹⁶⁹ Scalia was so concerned that judicial interpretation would replace the legislative process that he advised Congress during his confirmation hearings that “the more specific Congress can be, the more democratic the judgment is, because if Congress is not specific, the judgment is made by the courts, and the courts are not democratic institutions.”¹⁷⁰

This criticism and advice stems from Scalia’s theoretical view of the function of the Constitution. He says, “[t]o a large degree, [the Constitution] is intended to be an insulation against the current times, against the passions of the moment that may cause individual liberties to be disregarded, and it has served that function valuably very often.”¹⁷¹ In fact, Scalia notes that a democratic society does not “need constitutional guarantees to insure that its laws will reflect ‘current values.’”¹⁷² Instead, Scalia believes that the Constitution’s purpose is to protect against such changes in values that the society “adopting the Constitution [thought] fundamentally undesirable.”¹⁷³ This concern is best reflected when Scalia says

[The nonoriginalist approach], of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it

¹⁶⁶ *Id.* at 195.

¹⁶⁷ *Originalism*, *supra* note 151, at 863.

¹⁶⁸ *Interpretation*, *supra* note 151, at 9.

¹⁶⁹ *Rule of Law*, *supra* note 151, at 1185.

¹⁷⁰ Scalia Confirmation Hearings, *supra* note 151, at 135.

¹⁷¹ *Id.* at 142-43.

¹⁷² *Originalism*, *supra* note 151, at 862.

¹⁷³ *Id.*

was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.¹⁷⁴

A related concern, according to Scalia, is that, just as nonoriginalists have used this method of interpretation to expand on freedoms in the past, nonoriginalists can use the same method of interpretation to contract these freedoms in the future.¹⁷⁵ Moreover, because Justice Scalia views the Constitution in this manner, he takes the need for “theoretical legitimacy” very seriously.¹⁷⁶

Scalia has also written and spoken on the specific methods of interpretation he prefers. To Scalia, the specific method of legal reasoning that a judge sets out seems to be the most important facet of his job. In fact, Scalia says, “the rule of law is *about* form,”¹⁷⁷ and “whether the right party won is really secondary.”¹⁷⁸ For him, the first step is to discover the original meaning of the Constitution or of a statute during the time of the drafters.¹⁷⁹ Scalia pledges to “adhere closely to the plain meaning of the text.”¹⁸⁰ He will attempt to find the original meaning of the text by establishing an “historical criterion” separate from his own preferences.¹⁸¹ When attempting to interpret the text, he claims to construe the words to have a meaning fairly within the “limited range of meaning” that those words have.¹⁸² Further, Scalia will only use the writings of Hamilton and Madison in *The Federalist Papers* to the extent that these writings help show how the “text of the Constitution was originally understood.”¹⁸³

Of course, Scalia will not go through this analysis in each case. Where a particular issue has already been decided—in whole or in part—by the court, he will adhere to the doctrine of *stare decisis*.¹⁸⁴ This comes with a caveat, however, because he also notes that a persuasive argument might convince him to overrule a prior decision of the court.¹⁸⁵ Moreover, Scalia will not necessarily stick to a plain meaning analysis in all cases. Where a circumstance arises that was not within the contemplation of the framers, he will attempt to resolve the issue in the way which would “most comport with the application of that clause

¹⁷⁴ *Interpretation*, *supra* note 151, at 47.

¹⁷⁵ *Originalism*, *supra* note 151, at 855.

¹⁷⁶ *Id.* at 862.

¹⁷⁷ *Interpretation*, *supra* note 151, at 25 (emphasis in original).

¹⁷⁸ *Id.* at 6.

¹⁷⁹ Scalia Confirmation Hearings, *supra* note 151, at 202.

¹⁸⁰ *Rule of Law*, *supra* note 151, at 1184.

¹⁸¹ *Originalism*, *supra* note 151, at 864.

¹⁸² *Interpretation*, *supra* note 151, at 24.

¹⁸³ *Id.* at 38.

¹⁸⁴ Scalia Confirmation Hearings, *supra* note 151, at 126.

¹⁸⁵ *See, e.g., id.* at 132.

to the circumstances that *did* exist at the time.”¹⁸⁶ It is in this area that Scalia will look not only to text, but also to legislative history and policy considerations.¹⁸⁷

This method of interpretation, according to Justice Scalia, is designed to help ensure the development of general rules, which he feels are important due to the nature of a legal system “in which the Supreme Court can review only an insignificant proportion of the decided cases.”¹⁸⁸ It is important to Scalia that the Supreme Court fosters predictable results in the lower federal courts.¹⁸⁹

To summarize Scalia’s apt description of his interpretive method, it seems one should expect him to decide a Constitutional issue in the following manner. He will first look to the text of the Constitution and attempt to glean from it the original meaning of the particular clause governing the case. Then, he will look to prior Supreme Court decisions to determine whether the issue has been decided in whole or in part. If the prior decisions cannot be reconciled with the text, then he will overrule the prior case to the extent necessary. Finally, if the Constitution does not specifically speak to the issue, then he will attempt to determine from the Constitution as a whole and from the framers’ contemporaneous understanding of the Constitution what the most appropriate result should be.

C. *Case Law and Criticism*

While Justice Scalia seems to adhere closely to his “original meaning” method of interpretation, his tenure on the bench has not come without contradiction. This Section highlights those contradictions to show that a more moderate approach to Constitutional interpretation might be not only more preferable than Scalia’s approach, but also more realistic than Scalia’s justifications for using that approach.

Erwin Chemerinsky argues that the fundamental flaw in Justice Scalia’s jurisprudence is that, while “pretend[ing] that [his] decisions are a result of a neutral judicial methodology,”¹⁹⁰ Scalia actually makes the same value choices he has argued that a Supreme Court Justice should not be making.¹⁹¹ The fundamental problem in such an approach is that, “as a result[,] his value choices are not defended”;¹⁹² instead they are hidden behind a conservative approach that explicitly disclaims the making of such choices.

¹⁸⁶ *Id.* at 203 (emphasis added).

¹⁸⁷ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (1989).

¹⁸⁸ *Rule of Law*, *supra* note 151, at 1178-79.

¹⁸⁹ *Id.*

¹⁹⁰ Chemerinsky, *supra* note 10, at 385.

¹⁹¹ *See supra* notes 178-79 and accompanying text. *See also*, cummings, *supra* note 10, at 65.

¹⁹² Chemerinsky, *supra* note 10, at 385.

Chemerinsky questions Scalia's assertion that he is not engaging in value judgments by pointing out several areas in which Scalia's jurisprudence leads to results remarkably consistent with his own conservative personal ideology in areas such as affirmative action, abortion rights, school prayer, state sovereign immunity, and in condemning unwed mothers and fathers.¹⁹³ In fact, Scalia's jurisprudence "leads one to believe that the original meaning of the Constitution and the Republican platform are remarkably similar."¹⁹⁴ Indeed, as shown below, most of Scalia's critics have gone to great lengths to point out the inconsistencies not only in Scalia's jurisprudence as a whole, but also between his method of originalism and some of the results he has reached during his tenure.

David Schultz points out that, although Scalia's approach tends to support the theory that the Court should generally defer to the political process, Scalia's record, in fact, "demonstrates that he has selectively used judicial power to support those interests and groups which he favors at the expense of those he does not."¹⁹⁵ Schultz goes on to cite a number of examples in which Scalia exhibits deference to state and federal legislatures.¹⁹⁶ Then, he makes the argument that Scalia sometimes contends that courts *can* second-guess the political process, especially when "policy decisions [can be viewed] as nothing more than pressure politics."¹⁹⁷

The best support for the argument that Scalia, despite his assertions to the contrary, defers to legislatures in a preferential manner lies in his decisions on affirmative action. In *Johnson v. Transportation Agency*¹⁹⁸ (where Scalia dissented on the grounds that he would hold the affirmative action program dealt with in the case unconstitutional), he "describes the origin of preferential treatment programs as residing in pressure politics."¹⁹⁹ Scalia has, in fact, "condemned affirmative action."²⁰⁰ David Boling points out that Scalia's views on

¹⁹³ *Id.* at 391-92.

¹⁹⁴ *Id.* at 392. Lest it be forgotten, one should recall that Scalia was appointed by President Ronald Reagan, a staunch Republican. See *supra* text accompanying note 150.

¹⁹⁵ David Schultz, *Scalia on Democratic Decision Making and Long Standing Traditions: How Rights Always Lose*, 31 SUFFOLK U. L. REV. 319, 331-32 (1997). In fact, Scalia has voted to invalidate federal statutes thirty times between 1994 and 2004, making him the third most-frequent Supreme Court Justice to do so within that period. Ringhand, *supra* note 10, at 49.

¹⁹⁶ Schultz, *supra* note 195, at 332-37. See generally *Romer v. Evans*, 517 U.S. 620 (1996); *United States v. Virginia*, 518 U.S. 515 (1996); *Norman v. Reed*, 502 U.S. 279 (1992); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

¹⁹⁷ Schultz, *supra* note 195, at 337.

¹⁹⁸ 480 U.S. 616 (1987) (dealing with the question of whether affirmative action programs are valid under the Constitution).

¹⁹⁹ Schultz, *supra* note 195, at 337; see also *Johnson*, 480 U.S. at 677.

²⁰⁰ James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913, 914 (1986). Justice Scalia has also written in the area of affirmative action in *City of Richmond v. J.A. Croson Co.*,

affirmative action are deeply personal in that they were informed by Scalia's own heritage as an Italian immigrant.²⁰¹ Chemerinsky also notes this contradiction and adds that Scalia cannot even justify his disapproval of affirmative action based on original meaning because "there is overwhelming historical evidence that affirmative action was widespread around the time that the Fourteenth Amendment was adopted."²⁰² Scalia joined in the majority opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁰³ in which the Court effectively held that employing racial classifications in school enrollment can rarely, if ever, survive strict scrutiny under the Fourteenth Amendment.²⁰⁴

One point that the critics have consistently attacked concerns Scalia's use of long-standing tradition. Schultz notes that "[i]n every instance which Scalia has appealed to historical tradition, he has ruled against the recognition of a right or has supported the majoritarian political process against a claim of discrimination."²⁰⁵ Interestingly, David Zlotnick even notes that despite Scalia's preference for "textual fidelity," he cannot draw this conservative approach from anywhere in the Constitution.²⁰⁶ In fact, Zlotnick seems to suggest that the relevant historical tradition would run contrary to Scalia's jurisprudence because the common law, case-by-case approach was unquestioned at the time of the Constitution's ratification.²⁰⁷

Some of the scholars that have attacked Scalia's jurisprudence on this front have said that Scalia sometimes either severely misinterprets or completely abandons historical practices.²⁰⁸ One scholar has said that Scalia's use of historical practices is not even a part of his originalism; rather, the scholar suggests, Scalia uses this method merely as "damage control" to limit the court's

488 U.S. 469, 520-28 (1989) (Scalia, J., concurring). Here, he concurred because he refused to accept the majority's proposition that "state and local governments may in some circumstances discriminate on the basis of race in order . . . 'to ameliorate the effects of past discrimination.'" *Id.* at 520.

²⁰¹ David Boling, *The Jurisprudential Approach of Justice Antonin Scalia: Methodology over Result?*, 44 ARK. L. REV. 1143, 1150-53 (1991). Boling takes this personal view from an early article written by Scalia before he joined the Supreme Court. See Antonin Scalia, *The Disease as Cure: "In order to get beyond racism, we must first take account of race,"* 1979 WASH. U. L.Q. 147 (1979). This point assumes *arguendo* that Scalia's judicial opinions on affirmative action are informed by his personal views and not his readings of the Constitution.

²⁰² Chemerinsky, *supra* note 10, at 392; see also, Cummings, *supra* note 10, at 46-47.

²⁰³ ___ U.S. ___, 127 S. Ct. 2738 (2007).

²⁰⁴ *Id.*

²⁰⁵ Schultz, *supra* note 195, at 343.

²⁰⁶ David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1382 (1999).

²⁰⁷ *Id.* at 1398-99.

²⁰⁸ *Id.* at 1413-17.

previous substantive due process cases.²⁰⁹ Further, while Scalia claims that his approach is preferable because it constrains a judge to the text of the Constitution and, therefore, restrains a judge from forcing his own judgment upon the people,²¹⁰ some scholars have noted that Scalia's use of historical tradition actually provides little, if any, "constraint on his decision-making."²¹¹

While these scholars have argued that Scalia, in fact, does incorporate his own value judgments into his decision-making process, they have also addressed a potential weakness in that argument. Both Chemerinsky and Zlotnick address the result reached in *Texas v. Johnson*,²¹² in which Scalia voted to hold that the flag-burning statute questioned in the case was unconstitutional.²¹³ Zlotnick, however, argues that some of Scalia's "opinions are self-consciously drafted to make clear that they contradict his personal politics."²¹⁴ In addition, Chemerinsky notes that he cannot "think of a single instance since the early 1990s in which Justice Scalia seemed to follow his interpretive methodology in a constitutional case where it would lead to [anything] other than the conservative result."²¹⁵

On the other hand, Scalia supporters seem to focus on his opinions "defending a criminal defendant's rights against the power of the state."²¹⁶ Barkow, for example, cites to Scalia's opinions in four primary areas—the Fifth Amendment's guarantee of the right to a jury trial, the Sixth Amendment's right to confrontation, the interpretative preference that ambiguous criminal statutes be construed in favor of a criminal defendant, and the procedural guarantees granted to criminal defendants even in times of war and terror.²¹⁷ However, the picture of Scalia's jurisprudence in the area of criminal law and procedure has not been as bright as Barkow may like to think.

²⁰⁹ David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia over Unenumerated Fundamental Rights*, 61 *FORDHAM L. REV.* 895, 906-07 (1993).

²¹⁰ See *supra* notes 165-167 and accompanying text.

²¹¹ Chemerinsky, *supra* note 10, at 399; see also Schultz, *supra* note 195, at 345.

²¹² 491 U.S. 397 (1989) (holding that a Texas statute criminalizing the burning of the American flag was unconstitutional under the First Amendment).

²¹³ Zlotnick, *supra* note 206, at 1423; Chemerinsky, *supra* note 10, at 394-95.

²¹⁴ Zlotnick, *supra* note 206, at 1424. This Note does *not* endorse this particular argument because it implies bad faith on the part of Justice Scalia. Moreover, it looks into his inner thoughts, a place into which no scholar can claim to have enough insight to confidently make such a statement. This Note also recognizes that Zlotnick does not specifically adopt this position either. Rather, he argues that since Scalia has a known agenda to promote his *methodology*, then no study of Scalia should overlook the fact that it *might be* the case that Scalia would intentionally sign on to more "liberal" opinions. *Id.*

²¹⁵ Chemerinsky, *supra* note 10, at 395.

²¹⁶ Rachel E. Barkow, *Tribute to Justice Antonin Scalia*, 62 *N.Y.U. ANN. SURV. AM. L.* 15, 16 (2006). Barkow was a law clerk to Justice Scalia in 1997-1998.

²¹⁷ *Id.* at 16-20.

Barkow cites to *Hamdi v. Rumsfeld*²¹⁸ to support the fact that Justice Scalia finds that criminal defendants have all of their procedural guarantees during times of war and terror.²¹⁹ However, Justice Scalia has spoken on the topic covered by the court in *Hamdan v. Rumsfeld*²²⁰ saying that “detainees [do not] have rights under the U.S. Constitution because ‘[w]ar is war, and it has never been the case that when you captured a combatant you have to give them a jury trial in your civil courts.’”²²¹ In addition, Scalia has consistently voted that the Eighth Amendment does not prohibit the use of the death penalty against either the mentally retarded or criminal defendants under the age of eighteen.²²² It is in these cases that some of Justice Scalia’s contradictions start to come to light.

A brief comparison of *Stanford v. Kentucky*²²³ and *Atkins v. Virginia*²²⁴ will highlight the fact that Scalia sometimes picks and chooses between what methods he finds important to an outcome and what methods he finds unimportant. In *Stanford*, Scalia addressed the argument that the enactment of a federal statute providing for capital punishment for some drug-related crimes by offenders at least 18 years old helps show that the national consensus was that no person should be executed if under the age of 18.²²⁵ Scalia says that

even if it were true that no federal statute permitted the execution of persons under 18, that would not remotely establish—in the face of a substantial number of state statutes to the contrary—a national consensus that such punishment is inhumane,

²¹⁸ 542 U.S. 507, 554-79 (2004) (Scalia, J., dissenting).

²¹⁹ Barkow, *supra* note 216, at 19.

²²⁰ 126 S. Ct. 2749 (2006)

²²¹ Michael Isikoff, *Supreme Court: Detainees’ Rights—Scalia Speaks His Mind*, NEWSWEEK, April 3, 2006, at 6. Bear in mind that this extra-judicial comment was made on March 8—twenty days before oral arguments on the case were made. Scalia dissented in *Hamdan*, saying that the court had no jurisdiction to hear the case under Detainee Treatment Act. *Hamdan*, 126 S. Ct. at 2810-23 (Scalia, J., dissenting). The distinction between *Hamdi* and *Hamdan*, of course, is the distinction between a citizen and an “enemy combatant.” This Note views the distinction as unimportant to this point because some procedure should still be in place to make the *initial determination* of an individual’s status as an enemy combatant.

²²² See *Roper v. Simmons*, 543 U.S. 551, 607-630 (2005) (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 337-54 (2002) (Scalia, J., dissenting); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (abrogated by *Roper*, 543 U.S. 551).

²²³ 492 U.S. 361 (1989) (dealing with the question of whether the Eighth Amendment prohibited execution of criminals who were convicted of crimes committed before the defendant reached the age of eighteen).

²²⁴ 536 U.S. 304 (2002) (dealing with the question of whether the Eighth Amendment prohibited execution of mentally retarded criminals).

²²⁵ *Stanford*, 492 U.S. at 372-73.

any more than the absence of a federal lottery establishes a national consensus that lotteries are socially harmful.²²⁶

What is telling is that, in *Atkins*, the court was presented with the argument that Congress, when enacting legislation to reinstate the federal death penalty, specifically provided that no execution “shall . . . be carried out upon a person who is mentally retarded.”²²⁷ In this case, where the federal statute could not possibly help Scalia in his dissent, he completely ignores it.²²⁸

Of course, this brand of “picking and choosing” is what Scalia criticizes the majority for doing in *Roper v. Simmons*.²²⁹ More disturbing to a cohesive view of Scalia’s jurisprudence as a whole is that Scalia criticizes the majority for overturning a decision just fifteen years old.²³⁰ However, Justice Scalia proposes to do just that in his line of opinions dealing with the abortion cases. In his concurring opinion in *Webster v. Reproductive Health Services*,²³¹ Scalia flatly states, “I share Justice Blackmun’s view [that a portion of the majority’s opinion] effectively would overrule *Roe v. Wade*” and continues, “I think that should be done, but [I] would do it more explicitly.”²³² Just sixteen years had passed since the initial opinion in *Roe* that held that the right to privacy prevented state bans on abortion.²³³ Continuing down the line of subsequent abortion cases, Scalia affirms this position in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²³⁴ and then calls for the overruling of *Casey* (just eight years after it was decided) in *Stenberg v. Carhart*.²³⁵ Yet, Scalia would contend that he does not make value judgments as a judge—that he is not, in fact, picking and choosing when to follow *stare decisis* and when to discard it based on his preferred outcome.²³⁶ This contradiction is even more explicit in *Lawrence*

²²⁶ *Id.*

²²⁷ 536 U.S. 304 at 314.

²²⁸ *Id.* at 337-54 (Scalia, J., dissenting).

²²⁹ 543 U.S. 551, 616-17 (2005) (Scalia, J., dissenting). This case also dealt with the question of whether the Eighth Amendment prohibited execution of criminals who were convicted of crimes committed prior to the age of 18; the court overruled *Stanford* and held that the Eighth Amendment did prohibit such executions. *Id.* (majority opinion).

²³⁰ *Id.* at 607-08.

²³¹ 492 U.S. 490 (1989).

²³² 492 U.S. at 532 (Scalia, J., concurring) (internal citations omitted) (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

²³³ *Roe*, 410 U.S. 113.

²³⁴ 505 U.S. 833, 982 (1992) (Scalia, J., dissenting in part).

²³⁵ 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

²³⁶ This becomes even more clear when one considers that Scalia has made public, extrajudicial statements to the fact that he believes *Roe v. Wade* should be overturned. See *Scalia Debates Friend Who Heads ACLU*, ST. LOUIS POST-DISPATCH, Oct. 16, 2006, at A4. Moreover, Scalia contradicts himself by making these statements as he explicitly declines to address the question of whether he would vote to overrule *Roe* during his confirmation hearings based on the fact that he

v. Texas.²³⁷ Simply put, where *stare decisis* serves Scalia's personal preferences, he adheres to it; where it does not, he will not hesitate to overturn precedent.²³⁸ The problem lies in the fact that Scalia specifically disclaims the use of value judgments by judges.²³⁹

As noted in the preceding subsection, Scalia believes that rules formulated by the court should have a "solid textual anchor"²⁴⁰ and that Constitutional interpretation should be limited to all that its words fairly mean.²⁴¹ In other words, if an issue was not contemplated by the framers of the Constitution, then the resolution of such issue should be left to the legislative processes of the states. Scalia follows these principles strictly when it comes to the substantive due process cases.²⁴² However, one can ask why Scalia's strict adherence to the plain meaning of the Constitution is not followed in the state sovereign immunity cases.²⁴³

In fact, in this area of law, Justice Scalia himself admits that a state's right to be free from suit by its own citizens is not supported by the Constitution. He says, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,²⁴⁴ though the "precise terms [of the Eleventh Amendment] bar only federal jurisdiction brought against one State by citizens of another State or foreign state, we have long recognized that [it] accomplished much more."²⁴⁵ The Court had adhered to extra-textual interpretation of the Eleventh Amendment since its landmark decision in *Hans v. Louisiana*, in which the Court found that the Eleventh Amendment barred suits against a state by its own citizens.²⁴⁶ Scalia does not question that court's reasoning; nor does he attempt to justify his reliance on *Hans* by anything other than a respect for

thinks it inappropriate that he would be viewed as having a less-than impartial view on the matter. Scalia Confirmation Hearings, *supra* note 151, at 131.

²³⁷ 539 U.S. 558 (2003) (Scalia, J., dissenting) (dealing with the constitutionality of a Texas statute that made it criminal for homosexuals to engage in sexual conduct). Here, Scalia says, "'Liberty finds no refuge in a jurisprudence of doubt.' That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade*. The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick* is very different.'" *Id.* at 586 (Scalia, J., dissenting) (citations omitted).

²³⁸ Recall that Justice Scalia has voted to overturn precedent more times than all but one of his Rehnquist Court colleagues. See Ringhand, *supra* note 10, at 64-65.

²³⁹ See *supra* notes 166-168 and accompanying text.

²⁴⁰ See *supra* note 169 and accompanying text.

²⁴¹ See *supra* note 155 and accompanying text.

²⁴² See generally *Lawrence v. Texas*, 539 U.S. 558, 586-605 (2003) (Scalia, J., dissenting); *Stenberg v. Carhart*, 530 U.S. 914, 953-56 (2000) (Scalia, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979-1002 (1992) (Scalia, J., dissenting in part); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532-37 (1989) (Scalia J., concurring).

²⁴³ *Chemerinsky*, *supra* note 10, at 392-94.

²⁴⁴ 527 U.S. 666 (1999).

²⁴⁵ *Id.* at 669.

²⁴⁶ 134 U.S. 1 (1890).

stare decisis. However, in the abortion line of cases, Scalia criticized the majority's tendency to ignore whether a decision was "wrong . . . on its face" when determining whether stare decisis should be disregarded.²⁴⁷ Yet, according to Scalia's own jurisprudence, *Hans* was wrong when it was decided. As Chemerinsky notes, "he obviously cannot base [his reliance on *Hans*] on the text of the Constitution."²⁴⁸ Yet, Scalia consistently joins the majority in reaffirming *Hans*,²⁴⁹ even though the text of the Eleventh Amendment *only* applies to suits against states by citizens of other states or foreign states.²⁵⁰ The result with which Scalia concurs cannot be reached by the text alone; instead, the Justices must resort to materials beyond the text to reach the holding announced in *Hans*.

Scalia's jurisprudence in this area of the law is contradictory because it seems to violate his strict adherence to original meaning and because it seems to counter his strong belief in clear separation of powers.²⁵¹ In *Hans*, the Court was clearly concerned with the fact that *Chisholm v. Georgia*²⁵² yielded such a quick response by Congress and the states in passing the Eleventh Amendment.²⁵³ The notion that Congress and the states might have had a similar response had the Court allowed the suit to proceed seems, in large part, to have driven the result. However, the Court could, among other things, be criticized for overstepping its role in that it played the part of Congress by reading the amendment to bar this suit. Yet, Justice Scalia never mentions or addresses this argument in any of his opinions in the area of state sovereign immunity. Where is his faithfulness to the plain, original meaning of the Constitution, and where is his belief in a strict separation-of-powers doctrine?

All of the contradictions in Justice Scalia's jurisprudence noted above point to the fact that perhaps Chemerinsky is correct to argue that Scalia does, in fact, base his decisions on his own value judgments.²⁵⁴ The most fundamental

²⁴⁷ *Planned Parenthood*, 505 U.S. at 982-83 (Scalia, J., dissenting in part).

²⁴⁸ Chemerinsky, *supra* note 10, at 392.

²⁴⁹ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank*, 527 U.S. 666; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (overruled by *Seminole Tribe*, 517 U.S. 44).

²⁵⁰ U.S. CONST. amend. XI. "The judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another State[.]" *Id.* (emphasis added).

²⁵¹ For an example of Justice Scalia's view of separation of powers, see *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting). Here, Scalia says that "[t]he Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* at 697.

²⁵² 2 U.S. 419 (1793) (holding that federal courts had jurisdiction to hear diversity cases against the states) (superseded by statute, U.S. CONST. amend. XI).

²⁵³ *Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890). The Eleventh Amendment was passed just during the first meeting of Congress after *Chisolm* was decided. *Id.* at 11.

²⁵⁴ Chemerinsky, *supra* note 10, at 385. The author of this Note adopts the position of Chemerinsky that he is "not criticizing Justice Scalia for making value choices in deciding cases." *Id.* at

problem, however, is that such prominent contradictions bring into question the theoretical legitimacy of Scalia's methodology. This, of course, points to the most severe contradiction of all—that Scalia himself takes the need for such legitimacy very seriously.²⁵⁵ Perhaps what makes Scalia's jurisprudence so conservative is the very fact that he denies making value choices. Even if he were still to reach the same conservative results, a more moderate jurisprudence would clarify and defend such results by resorting to pragmatic considerations.

Some of the problems inherent in Scalia's methodology can be seen on the surface of what Scalia purports to do. He says that he neither construes text strictly nor liberally; rather, he construes a text to contain all that it reasonably means.²⁵⁶ Moreover, when text is ambiguous, he refers to long-standing tradition and the historical practices in place at the time the Constitution was adopted.²⁵⁷ Both of these methods, however, ignore the fact that two judges could use precisely the same method and reach very divergent results.²⁵⁸ What, then, leads to the difference between the judges' results? The answer lies outside the text and in the personal preferences of the judges.

Kamp argues that Scalia's method is flawed mostly because it does not have a place for judicial creativity.²⁵⁹ He argues that Scalia's opinion in *Burnham v. Superior Court*²⁶⁰ suffers as a result of lack of creativity and a misapplication of tradition in the realm of personal jurisdiction.²⁶¹ Chemerinsky argues that Scalia's conservative methodology would have led to the opposite result the court ultimately reached in *Brown v. Board of Education*.²⁶² He notes that the same Congress that passed the Fourteenth Amendment also passed statutes allowing for segregation in the D.C. school districts.²⁶³ While no one can say with certainty that Scalia would have dissented in *Brown*, it does seem highly plausible, given his conservative methodology.

However conservative his methodology might be, it must be noted that Scalia's jurisprudence has, at least, approached moderation at times. In addition, he has used his jurisprudence in a few instances to reach what his more liberal observers would consider the appropriate result. For example, Scalia

395. The problem does not lie in the making of value choices but rather the disclaimer that he does not make such choices when he, in fact, does.

²⁵⁵ See *supra* note 176 and accompanying text.

²⁵⁶ See *supra* note 155 and accompanying text.

²⁵⁷ See *supra* note 187 and accompanying text.

²⁵⁸ Chemerinsky, *supra* note 10, at 399.

²⁵⁹ Allen R. Kamp, *The Counter-Revolutionary Nature of Justice Scalia's "Traditionalism,"* 27 PAC. L.J. 99, 111 (1995).

²⁶⁰ 495 U.S. 604 (1990).

²⁶¹ Kamp, *supra* note 259, at 101-02.

²⁶² Chemerinsky, *supra* note 10, at 398; see *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954).

²⁶³ Chemerinsky, *supra* note 10, at 398.

wrote for the majority in *Kyllo v. United States*,²⁶⁴ in which the court held that the Fourth Amendment prevented police officers from using a thermal imager without a warrant to detect the amount of heat produced in a home.²⁶⁵ Here, Scalia explicitly holds that the Fourth Amendment protects the rights of individuals to be free from unreasonable searches in their homes. While the court debated over whether or not this was a search, Scalia held that any method police officers used to gain intimate details of the home that could not be ascertained without sense-enhancing technology constituted a search.²⁶⁶ The only aspect of the opinion that keeps it from being moderate is that he admits the court must adopt a rule that “take[s] account of more sophisticated systems that are already in use or in development.”²⁶⁷ This approach sounds remarkably familiar to an argument one might expect Justice Brennan to make—that a rule will or will not lead to potentially disastrous results in the future.²⁶⁸

In *Thornton v. United States*,²⁶⁹ Scalia concurred in the judgment that the Fourth Amendment does not protect an individual from a warrantless search of his car subsequent to an arrest even when that individual is first approached by the police when he is outside of the car, but he strongly rebukes the court’s reasoning.²⁷⁰ While the majority’s rationale was based on the fact that an officer should be given reasonable discretion to protect his safety,²⁷¹ Scalia says that this rationale does not apply with the same force where the apprehended individual is handcuffed in the back of the squad car.²⁷² Scalia, instead, chooses to rest his judgment on the more moderate and more realistic proposition that it is the officer’s interest in the acquisition of further evidence of the crime for which the suspect was apprehended.²⁷³ The only thing keeping Scalia’s approach from being characterized as moderate is the fact that this argument was not raised in the lower courts nor was it addressed by the parties during oral argument—a fact that O’Connor cites in her concurrence.²⁷⁴

²⁶⁴ 533 U.S. 27 (2001).

²⁶⁵ *Id.* at 40.

²⁶⁶ *Id.* at 34.

²⁶⁷ *Id.* at 36.

²⁶⁸ The dissent squarely addresses this point and criticizes Justice Scalia for adopting a rule that is, in part, based on future applications of the Fourth Amendment to advancing technology. *Id.* at 42 (Stevens, J., dissenting).

²⁶⁹ 541 U.S. 615 (2004).

²⁷⁰ *Id.* at 625-32 (Scalia, J., concurring).

²⁷¹ *Id.* at 623.

²⁷² *Id.* at 625.

²⁷³ *Id.* at 629.

²⁷⁴ *Id.* at 624-25 (O’Connor, J., concurring).

IV. JUSTICE OR JURISPRUDENCE? A MODERATE PROPOSAL

Thus far, this Note has attempted to show that both Justices' approaches to the bench are subject to criticisms from opposite ends of the spectrum. Ultimately, this Note proposes that a more moderate approach is preferable to both the overly-conservative and the outwardly-liberal approaches examined above. In general, Brennan's jurisprudence is flawed because it focuses too much on result, and Scalia's jurisprudence is flawed because it focuses too much on methodology.²⁷⁵ In essence, the perfect, moderate judge would endeavor to find the appropriate result within well-established modes of interpretation and jurisprudence.

A. *What Does it Mean to be "Moderate"?*

In order to properly advocate for a moderate jurisprudential philosophy, the term moderate, as this Note applies it, must be properly defined. Of course, such a broad term can be elusive of general definition. As Coltharp recognizes, "what is moderate [or] centrist . . . changes, and a society comes to demand different protections from its government and its founding document."²⁷⁶ This statement, however, assumes that the terms "moderate" and "centrist" focus on the results reached by a judge. This Note does not make this assumption; instead, this Note advocates for moderate *jurisprudence*—which, in itself, takes into account the result. The result reached, in other words, is only of marginal import to this definition.²⁷⁷ Moderation, in short, is the *balanced* application of text, case law, pragmatism, and policy to the facts of a particular case in order to reach a result that makes sense when applied to real scenarios.

What exactly, then, does a moderate judge look like? A moderate judge should focus, of course, on the facts of the case before him. He should then look to the entire body of law that applies to the case and view that body of law as a continuing tradition of which he is only a part. A moderate judge should interpret the text of the Constitution and the Court's precedents in a reasonable manner—that is, neither too broadly nor too narrowly. Account should be taken of all the objective understandings allowed by the text, and the moderate judge should look to determine whether precedent has squarely addressed how the text might or should apply to the case at hand. If precedent cannot satisfactorily determine the approach that should be taken, then the judge should adopt the understanding of the text that takes the middle ground between the most broad

²⁷⁵ See *supra* Parts II.B and III.C. This Note recognizes that this characterization of Justices Brennan and Scalia is somewhat limited in scope. However, the approaches are so characterized solely for the purpose of illustrating what a more moderate approach might look like.

²⁷⁶ Coltharp, *supra* note 100, at 46.

²⁷⁷ In other words, the definition of moderation advocated by this Note should be viewed differently than a more "numerative" definition of moderation. Moderation in jurisprudence should appear the same no matter what the era and no matter what the result.

and most liberal interpretations. However, such an approach should not be overly formalistic. An approach should also take into account the facts of the case and determine which result would best comport with the overall spirit of the Constitution and its protections and dictates.²⁷⁸ Here, the judge should also take into account any pragmatic factors which may cut in favor of a particular result.

A moderate judge should pay equal attention to the past traditions of the law, the present case before the judge, and the future implications of his decision. He should seek to rest his holdings on the firmest grounds available so that his decision is not quickly overturned by a subsequent decision. The judge's decisions should neither be framed in an overly-broad nor in an overly-narrow manner. Equal attention should also be paid to the following aims of the Court as a whole: legitimacy, predictability, and longevity.²⁷⁹ Finally, a moderate judge should only seek to overturn precedent on one of the following occasions: first, when the prior case the judge seeks to overrule was wrongly-decided,²⁸⁰ or, second, when the prior case lays down a rule that has become completely unworkable.²⁸¹ Moreover, when overturning precedent, a moderate judge should seek to overturn that decision only to the extent necessary to properly decide the case before him.

While the above definition does not address all aspects of a judge's jurisprudence, it, at least, provides a useful starting point through which a moderate approach can be examined. The following section illustrates this approach by analyzing some of the cases explored in the preceding sections in this light. Moreover, it will look more closely at the criticisms of Justices Brennan and Scalia, and it will show how this approach proposed above allays some of these concerns.

B. *A Moderate (and Modest) Illustration*

It seems that there are at least two common threads running through the discussions above. First, both Brennan and Scalia view reasoning as important.²⁸² Second, both Justices seem to pick and choose between the methods that

²⁷⁸ This approach should take place *after* the judge first decides whether the questions presented by a particular case are aptly resolved by the text and precedent. It should be utilized only if such sources do not yield a clear answer—which, admittedly, is most often the case.

²⁷⁹ Longevity, in this context, refers to the desire a moderate judge should have that his decision stands as precedent for as long as can be reasonably expected.

²⁸⁰ When overturning precedent on this ground, it must be *clear* that the prior case was wrongly-decided.

²⁸¹ Again, when overturning precedent on this ground, it should be *clear* that this is the case. It is preferable that the rule or method laid down by the prior case has been given ample time to work itself out. That is, a moderate judge would not overturn precedent on this ground when its rule has only been given a few years to work. This determination, after all, should be made according to *real* experience.

²⁸² See *supra* Part II and Part III.

best suits their desired results.²⁸³ However, there are some useful distinctions to be made to help illustrate why both Justices' approaches are undesirable compared to a more moderate jurisprudence. While both Brennan and Scalia do view the reasoning as an important part of the decision-making process, and while it appears that both Justices seem to share the view that reasoning is important because it furthers the goal of legitimacy, the two depart on their views of what legitimacy entails.²⁸⁴

Justice Brennan seems to view legitimacy as being closely intertwined with the integrity of the Court—and the integrity of the Court is closely related to the public's view of how well the Court protects individual liberties.²⁸⁵ Justice Scalia, on the other hand, seems to view legitimacy more in the abstract, and he finds legitimacy to be linked closely with predictability.²⁸⁶ However, both Justices' views seem to be at odds with what a more moderate approach might look like.

A more moderate Justice would have the concerns of legitimacy, integrity, and predictability in mind. However, as shown above, both Justices Brennan and Scalia seem to pick and choose between methodologies in their reasoning in order to achieve their desired results.²⁸⁷ With respect to this problem, Brennan's approach seems preferable because he at least admits that he places value on human dignity and liberty and, therefore, does value the results.²⁸⁸ However, Brennan's approach, to the extent that it relies on subjective natural law principles, does nothing to foster predictability. Moreover, as argued above, this approach runs counter to the concern for longevity.²⁸⁹ In addition, the fact that his legacy has been questioned based on the fact that his decisions do not stand on solid ground²⁹⁰ militates against long-term predictability because vulnerable precedent leads to the potential result that this precedent will be overturned.

On the other hand, Justice Scalia's resolution of these concerns does no better in terms of moderation. While he does not seem to rest any of his decisions on wholly subjective grounds such as natural rights theory, his methodology has been so inconsistent that it raises serious questions as to whether Scalia really does ignore the result, as he claims.²⁹¹ This raises the concern with legitimacy as Brennan has framed it because, as Chemerinsky argues, Scalia's results and subjective views, while being imposed in the name of originalism,

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ See *supra* notes 75-78 and accompanying text.

²⁸⁶ See *supra* notes 188-189 and accompanying text.

²⁸⁷ See *supra* Part II.C and Part III.C.

²⁸⁸ See *supra* notes 60-61 and accompanying text.

²⁸⁹ See *supra* notes 109-110 and accompanying text.

²⁹⁰ See *supra* notes 100-102 and accompanying text.

²⁹¹ See *supra* notes 177-183 and accompanying text.

never get defended.²⁹² It even raises concerns with legitimacy as Scalia views it because his method is still subject to the personal views of the decision-maker.

As noted above, the moderate approach would seek to resolve these problems by using a formulaic and practical methodology.²⁹³ For example, moderate jurisprudence would not rely on such subjective theories as natural law theory. Moreover, a moderate judge would view the potential results in a case and squarely address both the positive and negative repercussions of each. He would then advocate for the result which is most reasonable considering not only applicable text and precedent but also pragmatic considerations. By doing this, a moderate judge would foster all three goals—legitimacy, predictability and longevity—much better than do the individual approaches of Justices Brennan and Scalia.

In order to further illustrate what a moderate approach might look like, it would be useful to look at some cases already on the books. Take, for example, *Lawrence v. Texas*.²⁹⁴ In that case, the majority struck down a Texas statute which made it illegal for two persons of the same sex to engage in sexual conduct.²⁹⁵ The majority held that this violated the Due Process Clause of the Fourteenth Amendment,²⁹⁶ sparking a vehement dissent by Justice Scalia.²⁹⁷ However, in order to hold that the statute was unconstitutional under the Due Process Clause of the Fourteenth Amendment, it had to hold broadly that this violated substantive due process.²⁹⁸ This entailed the Court's having to address and overturn its prior decision in *Bowers v. Hardwick* that homosexuals do not have a fundamental right to engage in sodomy.²⁹⁹

However, as Justice O'Connor notes in her concurrence, it would have been more preferable to rest this decision on the Equal Protection Clause of the Fourteenth Amendment.³⁰⁰ This would have accomplished several things. First, it wouldn't have required the Court to overrule *Bowers*. Second, it would have allowed the decision to rest on more solid ground.³⁰¹ Under established Equal Protection Clause jurisprudence, a statute that makes a distinction between two classes of people similarly situated is constitutionally suspect.³⁰² While the

²⁹² Chemerinsky, *supra* note 10, at 385.

²⁹³ See *supra* Part IV.A.

²⁹⁴ 539 U.S. 558 (2003).

²⁹⁵ *Id.* at 563.

²⁹⁶ *Id.* at 578-79.

²⁹⁷ *Id.* at 586 (Scalia, J., dissenting).

²⁹⁸ *Id.* at 564.

²⁹⁹ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (overruled by *Lawrence*, 539 U.S. 558).

³⁰⁰ *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

³⁰¹ As it stands now on substantive due process grounds, the majority is really hanging by a thread. This makes the precedent set by the case vulnerable, leading to the same problems discussed above with respect to Brennan's jurisprudence. See *supra* Part II.C.

³⁰² See generally *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (overruled on other grounds).

Court has never directly held that homosexuals are a suspect class, it is not a far jump from a strand of jurisprudence running through the Equal Protection decisions—that which makes classifications based on *immutable characteristics* constitutionally suspect.³⁰³ Under this approach classifications based on immutable characteristics—“those determined solely by the accident of birth”³⁰⁴—must be “assessed under the most stringent level of review.”³⁰⁵ In other words, unless there is a highly persuasive reason for the state to make this distinction, then such statutes “always violate the Constitution.”³⁰⁶ The Court could then have instructed the parties to focus arguments on whether homosexuality is really an immutable characteristic.

A decision based on these grounds has much more support by prior precedent that did the majority’s opinion in *Lawrence*. It also would have been decided on much more narrow grounds than under the Due Process Clause of the Fourteenth Amendment. Certainly, an immutable characteristics analysis is much less subjective than the natural law theory packed within the *Lawrence* majority’s analysis. Finally, it would have been much less of an intellectual leap to decide the case on these grounds. A decision on these grounds would have furthered all three goals with which a moderate Justice should be concerned—legitimacy, predictability, and longevity. It would have advanced legitimacy because it would have been well-grounded in prior case law; such a decision would have fostered predictability because it would have given future litigants a distinct framework within which to work; and it would have fostered longevity because it would have made sense on a pragmatic level.

V. CONCLUSION

Perhaps moderation is only the ideal and not the reality. However, it is more likely that an opinion written in a more moderate tone which takes into account the proper result for the case at hand and reaches that result based on sound legal reasoning grounded in the text of the Constitution, prior Supreme Court decisions, and pragmatic concerns will create more solid precedent than one that either focuses completely on the result or one that absolutely ignores it. While there is no doubt that the Court, as a whole, goes through cycles of “liberalism” (i.e., the Warren Court) and “conservatism” (the Rehnquist Court), an individual judge should consider that the opinion he issues, whether it commands a majority of the Court or not, will be read for years to come. Therefore, the moderate judge should take seriously the duty to ground opinions as firmly as he can in constitutional text. The moderate judge should also ensure that his

³⁰³ See *Michael M. v. Superior Court*, 450 U.S. 464, 477 (1981) (Stewart, J., concurring); *Fullilove*, 448 U.S. at 496 (Powell, J., concurring); *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, J., concurring); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

³⁰⁴ *Frontiero*, 411 U.S. at 686.

³⁰⁵ *Fullilove*, 448 U.S. at 496 (Powell, J., concurring).

³⁰⁶ *Michael M.*, 450 U.S. at 478 (Stewart, J., concurring).

conclusion is the most sound resolution possible. This is, in fact, the true nature of moderation—unabashedly taking into account both result and reason, and giving each its equal due.

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