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BRENNAN'S APPROACH TO READING AND INTERPRETING THE CONSTITUTION

JEFFREY ROSEN

I am delighted to introduce our first panelists, Professor Burt Neuborne of New York University Law School, and Roger Pilon of the Cato Institute, who will discuss Justice Brennan's substantive approach to the Constitution. Professor Neuborne.

BURT NEUBORNE

Thank you, Jeffrey, and a special thanks to the *Harvard Civil Rights-Civil Liberties Law Review* for co-sponsoring this debate with the Brennan Center. This debate is a wonderful way to begin the process of seriously considering the Brennan legacy because it allows for a long and interesting series of discussions.

I believe that *HCR-CL* celebrates Brennan in a much more profound way. *HCR-CL* celebrates Brennan in the way Brennan should be celebrated—through the systemic discussion of issues that he cared deeply about. The discussion of how these issues effect our lives is the best way to celebrate Justice Brennan's legacy.

The splendid piece by Jessica Roth on the Legal Services cutbacks¹ and the provocative piece by Ed Baker on election regulation,² are excellent examples of how to celebrate the Brennan legacy. Accordingly, I salute the staff.

I am obligated to mention the Brennan Center, since we are co-sponsoring this event. As many of you know, the Brennan Center is a partnership between the law school at NYU and Justice Brennan's clerks, who were searching for a special way to honor him. They wanted to do something that was different than just a bricks and mortar approach. With Josh's remarkable leadership, they proceeded to create an institution that would continue to think about and grapple with the kinds of issues that Brennan cared about, in the way the Justice would have if he were still sitting on the bench.

1. See Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107 (1998).

2. See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998).

Justice Brennan extracted a promise from us before we went forward with the Center that it not become the Brennan Defense Fund. He believed the Center should not just defend his ideas. Instead, it should provoke thought concerning issues of American life in the same way that the Justice would try to think about them. In addition, the Center should not give any particular prominence to his decision or avoid questioning whether he was correct in his reasoning.

Therefore, I think it is profoundly correct that one of the first things the Brennan Center did was to disagree with the Justice and argue that *Buckley v. Valeo*³ is wrong and should be overturned. By acknowledging that the Justice had a lot to do with the per curiam, we acknowledge that *Buckley v. Valeo* is largely a Brennan opinion. However, it is an incorrect Brennan opinion. That can happen.

As originally structured, I planned to introduce today's debate as the First Annual William J. Brennan Tag Team Mud Wrestling Match featuring "Nuke" Neuborne, "Rattlesnake" Reinhardt, "Man Mountain" McConnell, and Roger "the Steel" Pilon.

However, my sense is that today will not turn into a mud wrestling match. Instead, I foresee a good, vigorous exchange of views. I will begin with an observation of something that is becoming a worldwide phenomenon—the emergence of a new democratic hero. This new democratic hero is the constitutional judge whose job it is to guard the liberties that are necessary for a true democracy. We've come to recognize that democracy is not necessarily the same thing as majoritarianism.

The rule of "one person-one vote" would not be worth very much unless we maintained the corpus of liberties that are necessary for the operation of a true democracy. If not, what we have is a form of government that is different from authoritarianism, but not much better. As such, the constitutional judge functions as the device by which individual liberties can be inserted into the fabric of majoritarian governments.

The constitutional judge can be added to the existing stock of democratic archetypes. We have "founding fathers," "tribunes of the people," "national leaders," "statesmen," and now we have "constitutional judges" as archetypal figures for the functioning of a democracy.

Because our system has been working with constitutional judges for so long, it is only natural that we look to our history for how these constitutional judges are supposed to perform. In some sense the story is a

3. 424 U.S. 1 (1976).

relatively easy one to relay. It is the story that Mort and Larry Tribe tell.

First, we look to Justice John Marshall as the person who invented the “constitutional judge.” Then, we look to Holmes and Brandeis as the people who explained the complexity of trying to mesh a necessary deference to the majority with the important commitment to individual liberties, since it is necessary to look for archetypes of how that balance can be struck. Brennan is one such archetype. Brennan’s philosophy can be characterized as a non-positivist approach to achieving that balance.

At the risk of being controversial, we have not yet seen an archetype of a positivist judge. There are, however, a couple of candidates. One candidate could be Frankfurter. Another could be Harlan during his first ten years. Scalia could be one if he fulfills the promise that is evident in his early work. But as yet, we do not have a clear archetype of the positivist judge. Brennan is, however, the clear archetype of the non-positivist judge.

To explain, there are four different philosophies that a constitutional judge can follow in fulfilling his or her responsibilities. First, one can read the text literally. “I am a literalist judge.” Black characterized his work that way, as does Scalia. In addition, Frank Easterbrook agrees with the literalist or textual approach.

Second, one can be an “original intentionalist” judge that tries to enrich the literal text by looking back into history.

Third, one can be a “constructive intentionalist” judge. The best way to understand constructive intentionalism is to imagine that you have transported a founder forward 200 years in time and the founder is sitting next to you. Then you ask the founder, what would you want me to do as a judge?

Fourth, one can take the approach of Justice Brennan. I will characterize his approach as something called “constitutional functionalism.” “Constitutional functionalism” attempts to read the Constitutional text, but not literally. Literalism would be wonderful if only it worked. If a literal reading of the text would give us answers, true answers, in some intellectually satisfying way, we could all go home. There would only be one way for a constitutional judge to act. Everybody agrees that if the literal text provided the answer, then it is the starting and ending point. There is a lot of false debate about literalism because when people depart from literalism, including Brennan, it is generally because they believe the literal text has more than one possible meaning. When this is so, literalism is not very helpful as a philosophy of interpretation.

In regard to the second philosophy, original intentionalism, many in the audience have written about it with far greater eloquence than I. These writings show that a single right answer is not derived in an enormous number of cases. Often, people in the past were just as divided as we are over difficult issues. If you look with the true eye of an impartial historian, and not the jaundiced eye of a legal historian using history as a set of bricks to throw at an opponent, you rarely get a single right answer in the difficult constitutional cases.

Therefore, literalist or original intentionalist approaches very rarely offer the comfort that a single right answer has been divined. In fact, some of the funniest decisions in recent years in the Supreme Court have been from originalists like Justices Scalia and Thomas, learnedly disputing about what history requires them to do in constitutional cases.

Scalia and Thomas are two extremely talented men armed with extremely talented clerks, and they have virtually limitless historical resources for their reference. However, if they cannot agree in a substantial number of settings, it is almost impossible to think that a literalist or original intentionalist approach to divining the meaning from history will yield single right answers.

That leaves the third and fourth philosophies. The third, "constructive originalism," is a fantasy. Conceptually, one transports a fictive founder 200 years forward in time. Then, sitting next to him, one asks how he would decide the case. Unsurprisingly, he gives the same answer that you would give. To suggest that this is a setting in which you are forming independent conclusions, concurred with by an objective presence from 200 years ago, may fool the public for a period of time, but it will not fool the legal profession for a moment. That type of constructive positivism is false positivism; it is subjectivism masquerading as positivism.

That leaves Brennan's approach, the fourth philosophy, which he arrives at out of desperation, not commitment, because literalism fails, originalism fails, and constructive intentionalism is a fantasy.

Brennan's philosophy considers the constitutional text and asks: Why is it there? What is the purpose? Literalism and originalism help to answer these questions, as does public values. However, the greatest help comes from placing the constitutional provision being interpreted, within the context of the time. Asking why the founders wrote the text the way they did and discussing the values contained within the Constitution and how they have evolved forces one into a relentlessly functionalist approach to the Constitution.

It is in some sense fitting that we are talking about Brennan in this courtroom. In this Ames Courtroom. I remember that thirty-four years ago, Henry Hart delivered the 1964 Holmes Lectures in this courtroom. Henry Hart, in his day, was the dominant force in the theory of statutory interpretation. The purposive theory of statutory interpretation that the Hart and Sacks legal process materials evolved is the key to Brennan's constitutional theory.⁴

What he does over and over again, in area after area, is live with the Constitution for awhile and then come to some sort of personal understanding. I concede that this approach is personal, not objective. As such, a conception of the clause is necessary to understand the role it is supposed to play in a democracy. Then, one must relentlessly advance the purpose of the clause in case after case until a body of judicial precedent is built that reinforces the purposive intention for the clause.

I can offer three brief, substantive examples to put some theoretical flesh on the hypothetical bone and discuss whether this is a coherent philosophy. The first example is free speech. As Mort mentioned this morning, it is not a coincidence that Brennan's free speech decisions start out tentatively. Let us begin with an examination of Brennan's opinion in *Roth v. United States*.⁵ It was in *Roth* that he was still trying to understand in his own mind the structural underpinnings of the First Amendment. *Roth*, in some sense, is an effort to use language, literalism, definition, and some form of non-functional approach to decide the case. This is why we find it so unsatisfying over the years; this notion of a definitional exception to the speech clause. It is a tentative and false start, which is common in many of Brennan's decisions. These tentative beginnings become more confident as the depth of his understanding of the function of the clause becomes deeper and he becomes more certain.

And so, *Roth* ripened into *New York Times v. Sullivan*⁶ and *Texas v. Johnson*⁷—the two great First Amendment cases of our time in which Brennan explained why there is a First Amendment and why we care about freedom of speech. One cannot extract that from a literalist approach to the text. One cannot extract that by going back 200 years in time and pretending to ask the founders what they thought in the eight-

4. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

5. 354 U.S. 476, 479 (1957).

6. 376 U.S. 254, 256 (1964).

7. 491 U.S. 397, 399 (1989).

eenth century. You get it from the only place you can get it—if you are a great judge like Brennan—and that is from your commitment to understanding the ethos of the text, and your insistence that you decide cases in a way that drive the law toward respect for those textual values.

*New York Times v. Sullivan*⁸ and *Texas v. Johnson*⁹ have become great cases, not just because they are rightly decided, but because the rationale of those cases resonates with an understanding of the constitutional clause. They provide a blueprint—a roadmap—of where we are supposed to go.

The second example is democracy. If you take a look at Brennan's democracy cases, *Baker v. Carr*,¹⁰ *Elrod v. Burns*,¹¹ *Katzenbach v. Morgan*,¹² and *Thornburg v. Gingles*,¹³ you will notice these cases are rooted in a deep conception of what the normative theory of democratic government means.

When Brennan and Frankfurter squared off in *Baker v. Carr*, the debate was over whether it was appropriate for a judge to insist that there is a normative theory of democracy as part of the enforcement of the Constitution, and if so, could a judge use his or her power to enforce that normative theory.¹⁴

Frankfurter said there are too many normative theories, and we should simply allow the majority to choose the one it wants. Brennan said there is a right normative theory. That is a very difficult question on which we can have a good deal of debate. Brennan was not afraid to commit to a conception of democracy that he believed was best and to enforce it.

The third example is procedure. In *Goldberg v. Kelly*,¹⁵ Brennan had a conception of what fair procedure meant and had a deep appreciation for what it meant to want fair procedure in the modern bureaucratic state. In addition, he realized the role of the Due Process Clause was in the modern bureaucratic state that created and enhanced those fair proce-

8. 376 U.S. 254, 256 (1964).

9. 491 U.S. 397, 399 (1989).

10. 369 U.S. 186, 187 (1962).

11. 427 U.S. 347, 349 (1976).

12. 384 U.S. 641, 643 (1966).

13. 478 U.S. 30 (1986).

14. See *Baker*, 369 U.S. at 270.

15. 397 U.S. 254, 255 (1970).

dures.

Reasonable people can differ over the meaning of a constitutional provision based on objective conception. Obtaining the concurrence of one's peers based on such an approach is one way to become a great constitutional judge, but there are other models and archetypes.

I would not want a Court of nine Brennans; five would do. One of the reasons we are so sure Brennan is a hero is that for so many of us, he has become the archetype of the constitutional judge. He will continue to be that archetype for generations to come.

On a personal level, Brennan freed me from a tenet of my youth. I was not born a Catholic, but a Marxist. When I was younger and attended law school, I was sure that Marx was right. I was sure that law was simply a club that the most powerful wielded to beat the weak into submission. I believed that the law was merely the recognition of powerful forces in society that would continue to replicate themselves in defense of the status quo. The great triumph of Brennan on the world stage was his ability to persuade people that Marx was wrong about law.

Law allows a community to come together and ask itself the fundamental question of why it exists. In that sense, law is heroic. Thank you.

JEFFREY ROSEN

Thanks so much, Professor Neuborne. Roger Pilon.

ROGER PILON

Thank you, Jeffrey. And thank you Burt for setting the issues up so nicely. Although Burt and I have done battle over the years on these issues, we did not coordinate things today. Nevertheless, it turns out that what I want to say on the subject of Justice Brennan's approach to reading and interpreting the Constitution should play well against the issues Burt has raised.

I should probably say at the outset, however, that it is with no little trepidation that I come before this audience to introduce the first discordant note of the morning—following six wonderful songs about the life and jurisprudence of Justice Brennan. Let me say simply that I was invited to play the role of the critic, and I do not want to disappoint my hosts.

But my task is made the more difficult by the fact that I agree with much of Brennan's substantive jurisprudence—the subject assigned to Burt and me—even if the methods by which he reached his conclu-

sions—the subject assigned to the next two speakers—leave much to be desired. In the areas of speech, due process, and federal oversight of state actions under the Fourteenth Amendment, for example, much of what Brennan helped to accomplish was, in my judgment, long overdue.

My principal criticism, then, may be surprising: it is that Brennan did not go far enough. And he did not, I believe, because his substantive view of the Constitution prevented it. As Burt's remarks only adumbrated, Brennan's was the modern, post-New Deal view: he sought to carve out bastions of liberty from what he took to be an essentially democratic document—or, as Burt put it, he "inserted" liberties into the fabric of majoritarian governments. And his constitutional vision colored in turn his methodology—a subject I will have to broach, as Burt did, even as the speakers who follow us will no doubt have to touch upon substantive issues.

My critique, therefore, will amount to arguing that Brennan's conception of the Constitution, which limits him, is fundamentally mistaken. He is a modern democrat; I am a modern libertarian, with roots in the classical liberal tradition.¹⁶ As a corollary, I find Brennan's substantive concern with dignity—which I share—to be misplaced as a *constitutional* matter. The Founders were no less concerned with dignity, I dare say, but they took it to be a function of liberty, not a substantive matter to be sought and brought into being through law.

In the few minutes that I have this morning I can only outline that argument, of course. Nevertheless, I hope at least to plant a few skeptical doubts about the modern liberal—and Brennan's—approach to constitutional interpretation, and to leave you as well with a few thoughts about how the best of Brennan's agenda might reach fruition—along with the promise of America that so animated his work on the Court.

Let me begin, however, with a case that Burt mentioned also, *Texas v. Johnson*,¹⁷ in which Brennan, writing for the majority, found a Texas statute criminalizing the desecration of the American flag to be impermissible under the First Amendment. The thing that struck me about that opinion when I revisited it recently was the way Brennan began his

16. For a fuller discussion of the issues that follow, see, e.g., Roger Pilon, *On the First Principles of Constitutionalism: Liberty, Then Democracy*, 8 AM. U. J. INT'L L. & POL'Y 531 (1992/93); Roger Pilon, *Freedom, Responsibility and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507 (1993); and Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999 (1996).

17. 491 U.S. 397 (1989).

analysis. "Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words,"¹⁸ he wrote. "This fact somewhat complicates our consideration of his conviction under the First Amendment."¹⁹

Now why would that fact "somewhat complicate" the Court's consideration of the conviction? The answer, of course, has to do with the plain language of the First Amendment: as applied against the states through the Fourteenth Amendment, "[t]he First Amendment literally forbids the abridgment only of 'speech,'"²⁰ Brennan writes. The amendment says nothing about flag-burning: thus, just as it does not prohibit states from criminalizing murder, manslaughter, and much else, so too it does not, at least on its face, prohibit states from criminalizing flag desecration.

Right from the start, then, Brennan is something of a legal positivist. Now I know it may seem odd to think of him that way, especially after what Burt has said, but plainly he is taking seriously the problem posed by the fact that the amendment speaks here only of speech, not of the many other things that states might be prohibited from criminalizing, many of which we would want them to be able to criminalize. And so the question Brennan next asks is whether defendant Johnson's act of flag-burning constituted "expressive conduct,"²¹ which would permit it to be called "speech" and thus enable its protection. As we all know, it is through "expression" that the category of protected speech has expanded in recent years to include everything from the wearing of obscenities on jackets²² to cross-burning.²³

Now again, I agree with that result and that trend, if not with the methodology; but it does not go far enough. Yet, in *Johnson* Brennan notes, with seeming approval, that the Court has "rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."²⁴ Few would disagree with that rejection, of course, but one wants

18. *Id.* at 402.

19. *Id.* at 402-03.

20. *Id.* at 404.

21. *Id.* at 403.

22. *See* *Cohen v. California*, 403 U.S. 15 (1971).

23. *See* *R.A.V. v. City of St. Paul*, 504 U.S. 377 (1992).

24. *Johnson*, 491 U.S. at 404 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

to know why it is that *speech* drives the analysis. In particular, why are we not concerned with protecting conduct or action, more generally, of which speech is but one kind? Is it the text of the First Amendment, and legal positivism, that limits us? Why was the case not decided more straightforwardly under the Fourteenth Amendment's Privileges or Immunities Clause, for example, which was meant to ensure the constitutionality of the Civil Rights Act of 1866, which arguably did protect conduct?²⁵ (The Act was passed immediately after the amendment was ratified.) To put the question simply: Was the Constitution written to protect liberty, or just certain kinds of liberty, which judges must twist out of shape, as here, if they want to expand the scope of constitutional protection?

Let me suggest, again, that Brennan's constitutional vision prevents him from moving very far down the line—from speech toward ever-broader kinds of action. To help illustrate my point, it may be useful to invoke the adage that is often attributed to Voltaire, "I may disagree with what you say but I will defend to the death your right to say it." However much that may capture the intuition behind our modern free-speech jurisprudence, it does not capture our larger constitutional vision, I submit, at least as originally understood. To do that, we have to move beyond speech to action and say: "I may disagree with what you *do*, but as long as you respect the rights of others I will defend to the death your right to do it." That, not the narrower vision of today, is what this nation is all about.

Carried to its logical conclusion, however, that fuller, libertarian vision will preclude the modern redistributive and regulatory state. And that, precisely, is the dilemma that any modern liberal, including Brennan, will face if he tries to expand the scope of liberty very far. For the democratic principle that was elevated by the New Deal Court, which led to the modern state, is at war with the libertarian principle. The more government pursues all manner of economic, social, and political ends,

25. See 14 Stat. 27, ch. 31, § 1. One reason *Johnson* was not decided under the Privileges or Immunities Clause, of course, is because the clause has been a dead letter since the Court eviscerated it in 1873 in the notorious *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). Yet the clause was meant to be the principal source of substantive rights under the amendment. For a fuller discussion, see Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. OF LAW & POL. 1 (1998); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

the more it intrudes upon individual liberty. And Brennan, of course, was not unaware of that, as we will see shortly. The more specific question I want to pose, then, is whether Brennan handled the dilemma in conformity with the Constitution—or with the “libertarian dignity” he spoke of in his now-famous Georgetown lecture of 1985,²⁶ where his thoughts on his work were so nicely drawn together.

Let me address that question by first outlining the classical liberal conception, as set forth in our founding documents, starting with the Declaration of Independence, where the Founders sketched the philosophy of government that eleven years later would appear in the Constitution. That philosophy is grounded expressly in the natural law tradition, in the “self-evident” truths of reason, as the seminal passage in the Declaration makes clear.²⁷ It begins with a premise of moral equality, then defines that equality by invoking our unalienable rights to life, liberty, and the pursuit of happiness. Only then, after outlining those moral principles, does the Declaration turn to government, which is instituted not to provide us with goods and services, nor even to give us rights, but to secure the rights we already have. To be just or legitimate, however, government’s powers must be grounded in consent. Thus, government is twice limited—by its ends and by its means.²⁸

That is a starkly libertarian picture. We each have a right to pursue happiness, however we wish, provided only that we respect the equal rights of others to do the same. And government’s purpose is simply to secure that freedom.

Those principles were incorporated in the Constitution, of course, which was written not simply to authorize but to limit government as well. I will not dwell upon the many checks on power with which we are all familiar, save for the one check that today is all but forgotten—the doctrine of enumerated powers. Stated simply, that doctrine says that if you want to limit power, don’t give it in the first place. Grounded in the idea that all power comes from the people, as the Declaration argues, the

26. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Address at Georgetown University, Text & Teaching Symposium (Oct. 12, 1985), reprinted in 26 S. TEX. L. REV. 433 (1986).

27. See generally EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955).

28. I discuss those issues more fully in: Roger Pilon, *The Purpose and Limits of Government*, in *LIMITING LEVIATHAN* (Don Racheter and Richard Wagner eds., forthcoming 1999).

doctrine appears at the very outset of the Constitution, in the Preamble, which states that "We the people . . . do ordain and establish this Constitution." It begins Article I: "All legislative Powers herein granted shall be vested in a Congress"; by implication, not all powers were "herein granted," as Section 8 of Article I shows. And it is stated, as if for emphasis, in the Tenth Amendment, the final member of the Bill of Rights: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution, in short, is a document of delegated, enumerated, and thus limited powers.

As the *Federalist Papers* make clear throughout, the doctrine of enumerated powers is the very foundation of the Constitution. Indeed, we went for two years without a bill of rights because many of the Founders thought one unnecessary. "Why declare that things shall not be done which there is no power to do?" asked Alexander Hamilton,²⁹ echoing James Wilson's observation that "every thing which is not given is reserved."³⁰ And when it did become necessary to add a bill of rights, to ensure ratification, the Founders solved the problem that then arose—namely, that the enumeration of only some rights might be construed legally as disparaging others not so enumerated—by writing the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."³¹

It is not too much to say, in fact, that the Ninth and Tenth Amendments, the final documentary writings of the founding period, are as fine a summary of the founding philosophy as one could hope to find: Individuals have both enumerated and unenumerated rights; government, by contrast, has strictly enumerated powers.³² The best way to guard against overweening government, it was thought, was to give only certain powers from the start. In America, we established a government of *limited* powers, which we enumerated in our basic law. That left individuals free—to pursue happiness, to chart their own courses, to live lives of

29. THE FEDERALIST NO. 84, at 559 (Alexander Hamilton) (Modern Library ed., 1937).

30. James Wilson, Address to a Meeting of the Citizens of Philadelphia (1787), in B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, vol. 1, at 529 (1971).

31. U.S. CONST. amend. IX. See generally THE RIGHTS RETAINED BY THE PEOPLE (Randy E. Barnett ed., 1989).

32. See Roger Pilon, *The Forgotten Ninth and Tenth Amendments*, 13 CATO POL'Y REP. 1 (1991).

dignity as free men and women.

Now to return to the modern view. Justice Brennan, too, begins with our founding document when he says “the Declaration of Independence, the Constitution, and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority.”³³ But in his Georgetown lecture he says nothing at all thereafter about the Declaration, much less about its philosophy of government. He does discuss the Constitution, of course, yet even there one searches for a sound theory of the matter. Thus, he writes that “[o]ur Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.”³⁴ Perhaps “sufficiently” saves him. But the better view, I suggest, is that the colonists, in the Declaration, were not really calling for a new society or new principles; rather, they were complaining about the loss of their rights as Englishmen, which the Constitution they later drafted was intended to better secure.³⁵

The Constitution itself, before it was amended, was in large measure “a blueprint for government,”³⁶ Brennan continues. It “does not speak primarily of the rights of man,” he says, “but of the abilities and disabilities of government.”³⁷ Fair enough. But one wants more about the point and the strategy of the blueprint—and about the doctrine of enumerated powers, in particular. What one gets instead is a general encomium:

On reflecting upon the text’s preoccupation with the scope of government as well as its shape, . . . one comes to understand that what this text is about is the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy. When one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitu-

33. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *supra* note 26, at 433.

34. *Id.* at 438.

35. See, e.g., CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE* ch. 3 (1922).

36. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *supra* note 26, at 438.

37. *Id.* at 439.

tion.³⁸

That is thin gruel, to be sure, although it might do—except for what follows, where all pretense to truly limited government is abandoned.

When Brennan turns to the Bill of Rights and the Civil War Amendments, he comes alive, of course. The “sparkling vision of the supremacy of the human dignity of every individual,” he writes, “manifests itself most dramatically in the specific prohibitions of the Bill of Rights, a term which I henceforth will apply to describe not only the original first eight amendments, but the Civil War Amendments as well.”³⁹ Indeed, the Civil War Amendments must be included in any such vision; for they brought an end—at least in law, and for the moment—to the tragedy that was sanctioned by the original Constitution’s oblique recognition of slavery. But what has become of the Ninth and Tenth Amendments in Brennan’s vision? Are they, and the majestic outline of limited government they depict, to be forgotten?

Apparently so, for Brennan moves next to lay the foundation for expansive government—and the intrusions on liberty that necessarily follow. Having now settled on “human dignity” as his principal touchstone, rather than the liberty that infuses all of the documents, he notes that the “sparkling vision” has guided us throughout our history, “although the precise rules by which we have protected fundamental human dignity have been transformed over time in response to both transformations of social condition and evolution of our concepts of human dignity.”⁴⁰ Thus, whereas dignity “found meaningful protection in the institution of real property” until the end of the 19th century,

. . . the days when common law property relationships dominated litigation and legal practice are past. To a growing extent, economic existence now depends on less certain relationships with government—licenses, employment, contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. Government participation in the economic existence of individuals is pervasive and deep We turn to government and to the law for *controls* which would never have been expected or tolerated before this

38. *Id.*

39. *Id.* at 18-19.

40. *Id.* at 19.

century⁴¹

Indeed, the protection of dignity today, Brennan continues, “requires a much modified view of the proper relationship of individual and state.”⁴² Problems surrounding that relationship have multiplied, he says, and “the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands”—an expansion that is foreordained, for “[t]he modern activist state is a concomitant of the complexity of modern society; it is inevitably with us.”⁴³ In the end, Brennan is reduced to pleading for good governors: “those who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power.”⁴⁴ And that, he says, will require “a personal confrontation with the well-springs of our society.”⁴⁵

Thus Brennan’s view on the inevitability of government growth, notwithstanding evidence to the contrary from around the world. And thus, more immediately, Brennan’s view of the Constitution. What began as a blueprint for limited government stands now as authority for “the modern activist state,” producing “collisions” at every turn between government and individual rights. Yet, in the name of a vague “dignity,” Brennan approves of that vast expansion of state power. Unable any longer to invoke the limitations on power that are inherent in the doctrine of enumerated powers, which would check such expansion, he is left with little choice but to implore those who govern to have a “personal confrontation” with the well-springs of our society, to “recognize” human dignity, to “accept” limitations on their power. Whatever happened to the *institutional* restraints on power, which were meant to take rulers as they are, not as they might be?

Well, we all know what happened to those restraints. During the New Deal, the social engineering themes that had been building since the Progressive Era finally were institutionalized when the Court lost its nerve following Roosevelt’s notorious Court-packing scheme.⁴⁶ In 1937

41. *Id.* (emphasis added).

42. *Id.* at 440.

43. *Id.* Cf. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

44. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *supra* note 26, at 440.

45. *Id.*

46. See MERLO J. PUSSEY, *THE SUPREME COURT CRISIS* (1937).

the General Welfare and Commerce Clauses, meant as shields against overweening power, were turned into swords.⁴⁷ With the doctrine of enumerated powers effectively eviscerated, and the floodgates opened, the modern redistributive and regulatory state poured forth. Then a year later, in the notorious *Carolene Products* case,⁴⁸ the Bill of Rights was effectively bifurcated: "fundamental" rights such as speech and voting would thereafter get "strict" judicial protection whereas "nonfundamental" rights such as those involved in "ordinary commercial relations" would get "minimal" protection.⁴⁹ Thus was an essentially libertarian constitution democratized. The illegitimacy of what had happened was captured best, perhaps, by Rexford Tugwell, one of the principal architects of the New Deal: "To the extent that [our New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them."⁵⁰

And so to return to the question I posed earlier, whether the way Brennan handles the conflict between expansive government and individual liberty is consistent with the Constitution or with libertarian dignity, the answer on both counts must be no. The Constitution was plainly written to establish a government whose powers were "few and defined," as James Madison put it famously in *Federalist* 45. And the Ninth and Tenth Amendments, together with the Privileges or Immunities Clause of the Fourteenth Amendment, far from being written to be ignored, were meant to restrain the ways that governments at all levels could exercise the powers they did have. The proper way for a judge to handle the modern conflict, then, is to recognize those restraints and enforce them. Thus, to recur to *Johnson*, the proper question is not whether "speech" can be stretched to include flag-burning but whether the state of

47. For the demise of the General Welfare Clause, see *United States v. Butler*, 297 U.S. 1 (1936); *Helvering v. Davis*, 301 U.S. 619 (1937); cf. LEONARD R. SORENSON, *MADISON ON THE "GENERAL WELFARE" OF AMERICA* (1995). For the Commerce Clause, see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); cf. Glenn H. Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?*, CATO INST. POL'Y ANALYSIS NO. 216 (1994); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996).

48. *United States v. Carolene Prods.*, 304 U.S. 144 (1938). See also Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

49. See Roger Pilon, *On the Foundations of Economic Liberty*, 38 THE FREEMAN 338 (1988); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTIONAL* (1980).

50. Rexford G. Tugwell, *A Center Report: Rewriting the Constitution*, CENTER MAG., Mar. 1968, at 20. Cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

Texas has any ground for interfering with Mr. Johnson, whose conduct violated the rights of no one, whose freedom and personal integrity are among the privileges or immunities enjoyed by citizens of the United States. Plainly, in a free society, states have no such authority.

But neither is there authority for the many powers that today governments exercise in pursuit of "human dignity," especially when such powers compromise dignity. It is one thing to protect dignity by requiring governments to provide due process, for example, or by prohibiting them from inflicting cruel and unusual punishments, for both such efforts secure rights. It is quite another to take from some and give to others in the name of dignity, or to prohibit some from enjoying their rights so that others might enjoy the benefits that follow. Those acts are not in service of dignity. They fly in the face of dignity. Where is the dignity in living by the labor of another, or in enjoying the fruits that flow from restricting the rights of another?

Justice Brennan was right to invoke libertarian dignity, for it is the only dignity worthy of the name. In our constitutional life as a nation, however, we took a wrong turn earlier in the century, a turn that has brought us neither liberty nor dignity. What it brought instead was ubiquitous government that stifles us all—benefactor and beneficiary alike—compromising the dignity we enjoy as free men and women responsible for our own lives and our own dignity. The time has come to build on the best of Brennan and move beyond the legacy he left us, toward a society of true libertarian dignity. Thank you.

JEFFREY ROSEN

Thank you so much, Roger. Judge Reinhardt has passed me a note asking for a copy of the Constitution. We will next hear from Michael McConnell.

MICHAEL MCCONNELL

Well, you may be wondering whether I am some kind of a traitor or an ingrate. After all, I was a law clerk in the 1980 term. I have first-hand knowledge of Justice William Brennan's character. I saw his warmth and generosity. I know he was fair-minded. In fact, if I had a conflict that was deeply important to me or my family, and I were required to submit it to the judgement of some recent member of the court system, I cannot imagine anyone I would be more likely to trust than Justice Brennan.

Furthermore, I declare that on a variety of issues, free speech among them, I am a wholehearted fan of Justice Brennan's jurisprudence. Brennan, at his best, was a master of persuasive argument based on constitutional text, history, and tradition.

Roger's characterization of Justice Brennan as something of a positivist is true when looking at many of his decisions. An opinion like *Abington School District v. Shemp*,⁵¹ the second school prayer case, exemplifies these elements of positive constitutional law. Therefore, I praise Justice Brennan's jurisprudence. However, I criticize the non-positive aspect of his jurisprudence, which looms all too large in the discussion of the Brennan legacy and is a double-edged sword about which we should be very cautious.

As a member of the Brennan family, I am troubled by my critical role. However, I do take some comfort in my belief that Justice Brennan would have liked for me to be here and would have wanted me to say what I believe because he was not averse to honest criticism.

When I clerked for Justice Brennan, he and I often disagreed, although actually far less than you might expect. He made me feel that our disagreements made me that much more valuable a part of his team and his chambers. When I first entered academia, my first article on accommodation of religion was in large part a criticism of Justice Brennan's Establishment Clause jurisprudence. I sent him a copy with a letter filled with post-clerkly trepidation, and I am told by those who clerked for him at the time that he was beaming as he read my letter aloud to them all. He acted just as proud of my critique as he did with articles written by his other clerks that praised and agreed with him.

With that memory, I trust that I can speak frankly and without too much fear that if he were present today, he would be doing anything but smiling at what I have to say. My conscious awareness of Justice Brennan's loving and gentle spirit is not irrelevant to my criticism of his method. The central problem with his jurisprudence is that he cast aside all of the traditional constraints on constitutional decision making. This approach placed into the hands of judges the power to turn their own views of good social policy into law without any credible basis in constitutional text, history, precedent, constitutional tradition, or contemporary democratic warrant.

That is an awesome power. In the hands of most judges, such power

51. 374 U.S. 203, 230 (1963).

would be recognized as dangerous. Because of the trust that we and the legal academic world have for this wonderful man, we have failed to see the danger in some of what he had to say about the judicial role. We members of the legal academy are all too inclined to cheer at this centralization of power, because we tend to agree with the results. We trust the warm, generous, fair-minded man who wielded this power in the name of liberty and equality.

It is important whenever thinking about power not to imagine the power being exercised by the people whom we love and trust, but to have before us a slightly different example. Thus, I invite you to consider Justice Brennan's jurisprudence not in the hands of Justice Brennan, but in the hands of your worst judicial nightmare.

I do not know who that is. Is it Justice Rehnquist or Scalia or Thomas? Or will it be whatever appointments Newt Gingrich may make if elected to the presidency? Imagine these judges with this awesome power to turn their own views of good social policy into law. The most fundamental rule of all is that what is sauce for the goose is sauce for the gander.

With these unpleasant examples before your eyes, do you still believe that a five Justice majority should be able to decide important questions of social policy, affirmative action, or property rights? Should social policy be determined by personal judicial notions of the dignity of the human individual without the constraints of constitutional text, history, precedent, constitutional tradition, or contemporary democratic opinion?

I operate on the assumption that the most fundamental of all of our constitutional principles, more fundamental even than free speech or equality or the Bill of Rights, is the idea that power must be divided. Every exercise of governmental power must be subject to checks and balances and ultimately, must be rooted in the will of the people.

For all of Justice Brennan's many personal virtues, and for all of the results that I like and applaud, Justice Brennan's approach to constitutional decision making was deficient in this most important respect: he lacked institutional restraint.

I suppose that there are two possible responses to this. Either it is not true, or it is not a bad thing. First, let us consider whether it is true. There are certain authorities on which judges may draw in constitutional cases, beyond the judge's own view of the best outcome. One authority is constitutional text, including structure. A second is the historical

background of the text, by which I would emphatically include what Burt Neuborne describes as functional. This interpretation must reflect the actual historical purpose and function of the constitutional text and not an imagined function imposed on the text by subjective philosophies or ideology.

Another authority is precedent. There is the constitutional tradition, meaning the way in which the institutions of our society view the limits of the courts, legislatures, presidents, Congresses, and writers of Law Review articles.

Finally there is contemporary democracy, as expressed in actual legislative enactments. These sources of authority operate as constraints. According to traditional constitutional methods, a judge must defer to democratic judgment unless it is contradicted by some combination of text, precedent, and constitutional tradition.

I am not, like many other critics of freeform jurisprudence, insisting upon some particular rigid methodology. A mechanical jurisprudence does not exist. No single answer can be found in text or history or any of these other places.

Furthermore, different schools of thought emphasize different elements of this legal calculus, and inevitably there is room for judgment. I do not claim that Justice Brennan always disregarded text, history, precedent, constitutional tradition, or contemporary democratic opinion. He invoked these authorities when they supported his position. However, he was not constrained by them when they did not support his opinion. The distinctive feature of Justice Brennan's jurisprudence is that he defended this lack of constraint as a matter of principle.

I use as my basic text his famous speech before the Georgetown Law School in 1985, later published under the title *The Constitution of the United States: Contemporary Ratification*.⁵² In this speech, Brennan set forth his approach and explained how it works by applying it to capital punishment.⁵³ The question Brennan posed is whether capital punishment is unconstitutional in all cases.

An analysis of this question begins with the text of the Due Process Clause of the Fourteenth Amendment, through which the Eighth Amendment applies. The text states that "no State shall deprive any per-

52. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *supra* note 26.

53. See *id.*

son of life or liberty of which the liberty against cruel and unusual punishments is one, without due process of law."⁵⁴ However, an examination of the text shows that it has a negative side—that life, liberty, and property *can* be deprived *with* due process of law. Therefore, the Due Process Clause presupposes that life, liberty, and property may, in fact, be taken away if the deprivation is accompanied by appropriate process. Consider, as well, the text of the Eighth Amendment, which prohibits punishments that are “cruel and unusual.”⁵⁵ What could be meant by “unusual”? Surely it must be a reference to common opinion or consensus. A punishment is “unusual” if it is rejected throughout most of our nation.

How does capital punishment fare under these texts? Capital punishment is not provided without due process, and it is not unusual. I am not going to argue that the text forbids the results that Justice Brennan reaches. Nevertheless, it is very difficult to say that the text provides any affirmative support for this position. Much the same can be said for the historical background.

Justice Brennan’s main point in his speech was to explain why the historical background as an authority is of little importance as an authority.⁵⁶ But he also rejects the authority of precedent, constitutional tradition, and contemporary democratic opinions.

In his speech, Justice Brennan acknowledges that his view that capital punishment is in all cases unconstitutional, is contrary to “a majority of my fellow countrymen”⁵⁷ as well as to *stare decisis*. But he insists that the judge is bound “by a larger Constitutional duty” to enforce what he calls the “essential meaning” of the text, predicated on nothing more than his own vision of human dignity.⁵⁸

One could argue that this disregard of constitutional restraints only applies to capital punishment. But the same can be said of Justice Brennan’s position with respect to other issues: the abortion cases;⁵⁹ *United Steelworkers v. Weber*;⁶⁰ the parochial school decisions;⁶¹ *Miranda v.*

54. U.S. CONST. amend. XIV, § 1.

55. U.S. CONST. amend. VIII.

56. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *supra* note 26, at 435.

57. *Id.* at 444.

58. *Id.*

59. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

60. 443 U.S. 193, 195 (1979).

Arizona;⁶² some of the educational funding cases;⁶³ and mandatory school busing.⁶⁴ In none of these important cases did text, history, constitutional tradition, democratic enactments, or precedent play any serious role.

Nor can it even be said that Justice Brennan reserved this non-positivist judging for cases when other institutions failed. Even in cases of relatively minor importance, such as *Michael H. v. Gerald D.*,⁶⁵ Justice Brennan was willing to apply this non-positivist jurisprudence.

The jurisprudence at issue routinizes and legitimates our courts overturning the decisions of democratically elected legislatures without constraint from text, history, tradition, or precedent.

Therefore, the next question is whether this is a problem. That would depend on one's view of government. This jurisprudence is certainly contrary to our nation's posture as a democracy. These constraints, with the possible exception of precedent, firmly attach our courts' decision making to the expressions of the will of the people.

Judges, however, are hardly a representative segment of our society. Judges all did well in law school and became very successful lawyers. Therefore, legal audiences find unrestrained rules by judges attractive, because it amounts to rule by people like us. The question, though, is why the rest of the country is willing to put up with us.

In addition to the undemocratic character of this type of rule, there is the problem of imposing nationwide straitjacket rules rather than a system of decentralized norms and experimentation. It is very difficult to change mistakes once they are made through the process of constitutional judicial review. There is a tendency to abstract and carry principles to their logical end, and sometimes extreme conclusions.

I would suggest that some would be resentful if Justice Thomas ruled against affirmative action on the basis of a color blindness principle not seen in the Constitution. Or if Justice Scalia insisted on compensation when property is merely regulated in the public interest and taken. These

61. See, e.g., *Nebraska State Bd. of Educ. v. School Dist. of Hartington*, 409 U.S. 921, 924-26 (1972) (Brennan, J., dissenting).

62. 384 U.S. 436 (1966).

63. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982).

64. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

65. 491 U.S. 110, 136-57 (1989) (Brennan, J., dissenting).

scenarios would lead some to an analysis of the text of the Constitution. One would want to invoke history and to appeal to precedent and constitutional traditions that demand due regard, by the courts, to the decisions of voters and legislators.

JEFFREY ROSEN

Thank you so much, Professor McConnell. Judge Reinhardt.

STEPHEN REINHARDT

Professor McConnell points out how terrible we might think it was if Justices like Justice Rehnquist, Scalia, and Thomas had the unfettered authority to impose their own views. That's what a "liberal" approach to constitutional construction could lead to, he implies. What does Professor McConnell think is happening now? Just look at how those justices and others have treated the subject of affirmative action. There is a polite way to explain it, of course.

As Justice Brennan said, they just see a different Constitution than we do. For instance, the *Michael H.*⁶⁶ case that Professor McConnell mentioned, involves the most basic and fundamental right of an individual, a father, to see his own child. Justice Scalia said this right was unimportant.⁶⁷ Justice Scalia thought it was contrary to the particular moralistic, puritanical view of our society that he wanted to impose on every American. Only births blessed by marriage are fully recognized in his moral world, and the Constitution that he construes.⁶⁸

Justice Brennan tells us that the Constitution that the *Michael H.*⁶⁹ plurality said it was construing was unfamiliar to him. Justice Brennan went on to say:

It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretative method that

66. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

67. *See id.* at 113.

68. *See id.* at 123.

69. *Id.* 136-57 (1989) (Brennan, J., dissenting).

does such violence to the charter that I am bound by oath to uphold.⁷⁰

Today, as Justice Brennan might have predicted, we have a Court that seems to see the Fourteenth Amendment as a shield that serves to protect the rights of the white male against encroaching black and female minorities. I guess today's Supreme Court majority really does just see a different Constitution. Those who say that we cannot even notify minorities about the existence of contracts anymore or that we cannot take steps to try to bring equality to this nation must surely do so.

To pretend that Justice Brennan's jurisprudential opponents are simply interpreting the Constitution in a restrained, historical manner, while Justice Brennan substituted his own views, is to play a cynical game with constitutional interpretation. In fact, what may have helped Justice Brennan become great was that he was not on the *Harvard Law Review*. It may be that he was even wise enough not to take Constitutional Law from the then current Harvard Law School professors.

The professional debate about the various forms of interpretation is very interesting to professors and provides very good Law Review reading. However, I am not sure it has a lot to do with what the Constitution is really about or what a judge really does when deciding how to interpret the Constitution.

The fundamental question, which Justice Brennan answered quite properly, is what kind of a constitution do we have? What is the purpose of the Constitution? There are times in reviewing current Supreme Court decisions, when I, (and undoubtedly Justice Brennan, were he still with us) simply cannot imagine that the authors possess any understanding of the reason we have the Constitution. Are they even aware that the Preamble, for example, begins: "We the People of the United States, in Order to form a more perfect Union, establish Justice . . ."⁷¹ When is the last time you heard anyone on the Court mention justice? Read opinions. Listen to Court discussion. Justice is a word you almost never hear. Law, yes; rules, yes; standards, yes; waiver, yes; default, yes; justice, no.

To establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty are the reasons we have this Constitution. It is not a document

70. *Id.* at 141.

71. U.S. CONST. preamble.

simply designed to transfer all of the powers to the states. The Civil War settled that. We fought to establish a federal government—a fact that this Court sometimes fails to recognize.

We fought and won that battle long ago, we thought. We no longer live in an agrarian society where the states can solve all of our problems. We had a war, we had a New Deal, and we had a judicial awakening—a change in the rigid, unreasoning way courts had looked at constitutional doctrine. To understand the Constitution, we must, as Justice Brennan told us, look at the entire history of its development and implementation. We must look at how it has been interpreted, as this society has changed and grown. Some of our Justices today would like to pretend that nothing legitimate has occurred in the area of constitutional understanding since the date the document was adopted. They believe they can find all the answers in originalist debates. That is simply not the case—even if it were possible to determine, from some of those cryptic exchanges, the founders' intent regarding problems of which they could never have conceived.

Justice Brennan knew what he was doing in *Buckley v. Valeo*,⁷² incidentally. He would still believe in the First Amendment. He might agree that Burt Neuborne and the Brennan Institute have every right to challenge his views, and he would undoubtedly not be displeased to see the debate continue. However, he would probably recognize something familiar about it. All of us, even those who think we are most dedicated to the First Amendment, tend to see reasons to find it inapplicable when our own ox is gored, or our own primary interests are at stake.

The First Amendment should not be applied only to the types of matters that we personally believe need protection, and discarded wherever we think that the underlying problem is more important. We have seen that occur time after time: morality; religion; children; national security; and now electoral purity. Transitory concerns regarding particular hot topics do not transcend First Amendment principles. I do not believe that Justice Brennan would change his view regarding *Buckley*, because I believe that he was fundamentally right about the First Amendment. We must give it life, not just when we think its opponents' cause is undeserving or unimportant, but even when the price we pay for our commitment to constitutional principles is painful to true First Amendment believers—even when our ability to resolve problems we recognize

72. 424 U.S. 1 (1976).

as important is made far more difficult by our commitment to one of our most basic freedoms.

Those who do not agree with court decisions always argue that the judges who reach those decisions, who find those rights, and who protect those particular liberties are neither applying doctrine properly nor following precedent. Interestingly, these arguments are made by both sides of the philosophical spectrum. If you believe it is liberal judges who do not follow precedent, or if you would like to see a seething and accurate attack on "conservative" justices who reach "policy oriented" decisions, just read Justice Marshall's dissent in *Payne v. Tennessee*⁷³ and its discussion of the conservative majority that has become even more conservative since that day.⁷⁴ Justice Marshall's swan song has an air of authenticity. He seems to have got it right.

Today's decision charts an unmistakable course. If the majority's radical reconstruction of the rules for overturning this Court's decision is to be taken at face value, and the majority offers us no reason why it should not, then the overruling of *Booth* and *Gathers* is but a preview of an even broader and more far reaching assault upon the Court's precedents.⁷⁵

Justice Thurgood Marshall continued, "Cast aside today are those condemned to face society's ultimate penalty."⁷⁶ Prophetically, Marshall said "Tomorrow's victims may be minorities, women or the indigent. Inevitably, this campaign to resurrect today's spirited dissents will squander the authority and the legitimacy of this Court as a protector of the powerless."⁷⁷

Justice Marshall listed a number of opinions he predicted might be overruled by those who do not have great regard for precedent. Some already have been.

The basic disagreement, however, is not about methods of constitutional interpretation. It is about something far more significant. The dis-

73. 501 U.S. 808 (1991).

74. *See id.* at 844.

75. *Id.* at 856.

76. *Id.*

77. *Id.*

agreement between Justice Brennan and those represented by today's Supreme Court majority is over what the Constitution is really about: the nature of the fundamental rights granted to individuals; what they are; whether the Constitution protects the rights to certain types of freedom in this country.

What kind of nation was this Constitution designed to ensure? What kind of lives were individuals guaranteed? Justice Brennan's view suggests that, as times change and develop, we must examine the nature of human life and the nature of human liberty and recognize that society evolves and changes. Some concepts that we thought were perfectly acceptable several hundred years ago are no longer acceptable. The prejudices, discriminations, and structural superiorities we once accepted are no longer acceptable in a democratic society. The Constitution is intended to protect and preserve the rights of individuals to govern their own lives, deaths, and futures.

Society must apply those concepts to new issues and questions as our scientific and genetic experiences develop. We are going to have to apply those concepts to issues wholly unknown and unimaginable when the Constitution was adopted.

Another view of the Constitution is that its almost exclusive purpose was to limit the powers of the federal government. Judges inclined to this view, however, do not hold a similar belief that the purpose was to limit the powers of the State government. It seems difficult to believe that our citizens would have fought so hard to obtain fundamental liberties that would render them free from government control—but only where the federal government is concerned—and that the Constitution would permit the State government to tell those same citizens how they must live their private lives, how their family and sexual relations are to be determined, and how and when they may live and die.

That states' rights view is, oddly, one that appeals to those who oppose the kind of Constitution that Justice Brennan saw. Their view that the Constitution allocates powers among governmental entities is certainly not wholly without merit. A purpose of our Constitution was to have a charter that distributed power among the people, the state, and the federal government.

But surely there is more to it than that. One would think that even those in opposition to Justice Brennan's views would tend to believe there is more. A strict corollary of their position would be to allow the states unfettered authority over our existences. That is certainly not how Justice Brennan would interpret the Constitution. But, more important, it

should not be the way that his philosophical opponents do either. Yet, to varying degrees, that appears to be the unspoken premise of some of their constitutional analyses.

It is not only the preamble to the Constitution that today's judges all too frequently ignore. The Ninth Amendment does mean something. It reserved rights to the people to live their lives as they pleased without interference by the state or by the federal government. I would like to see a revival of the Ninth Amendment to protect the liberty of the individual.

These conflicting views of the Constitution lead us to the divisions we find prevalent today. Is the Constitution a document designed to ensure the opportunity for a noble and dignified way of life in this country? To ensure that this is a nation devoted to freedom, equality, and fairness? Is that what the purpose of the Constitution is? And are we supposed to read it in light of implementing that purpose? Are we to consider our evolving experience and understanding?

If so, we take the risk that Justices Scalia, Thomas, Rehnquist, and others will interpret what is fair and decent in a rather odd way, which of course is what they are doing anyway, under their own approach to constitutional interpretation.

It is in the end often irrelevant which particular school of constitutional analysis, which interpretive method most judges purport to follow as a general rule—to the extent that they even purport to follow a particular approach. Judges often consider a whole variety of factors when they make decisions. They read the language of the Constitution. They consider the debates that occurred. They read the cases that have been issued since that time. They frequently understand quite well the nature and dynamics of the practical issue before them. They know how Congress works. And to make a decision, they often must weigh and balance a variety of facts and circumstances—legal, practical, and otherwise. In the end, they use their best judgment, which often means they apply all the experience they have gained in their lifetimes, influenced heavily by their own judicial philosophy and approach to the law and by the understanding of the nature of the Constitution at which they have arrived. The one thing that is clear to me is that the role of a judge is not the same as that of a computer operator; nor is it one of simply applying a particular interpretive method objectively and then finding at the end of that intellectual process—lo and behold—the result.

Justices are appointed because they have a particular philosophy, a particular view of the Constitution, and a particular view of how to make

decisions. This view will always affect their decisions. They start with a different view of the Constitution itself. The conservative Justices who do not share Justice Brennan's view of the Constitution also do not share his view of the social compact of the nature of life in this country—of the rights of individuals, of what equality means, of whether we have really reached the point where we do not need civil rights laws anymore. They have a different view of their right to impose their own morality or way of life on others. Those Justices who apply a different scheme of analysis from Justice Brennan's almost always seem to reach the conclusion that the rights of the individual really do not exist under the Constitution. Whether that is because they use a different form of interpretive analysis or because that is what their personal views of the Constitution are is a fair matter for debate. I think, however, that law professors tend to over-emphasize the importance of methodology. They might do better to look to the Justice's underlying philosophical and Constitutional views.

I was not a Brennan clerk. I did not know Justice Brennan, but I believe he was a hell of a Justice, perhaps the best. Thank you.

JEFFREY ROSEN

I have been asked to begin our debate by posing a question to each of the panelists. I will try to do that now. Burt Neuborne, I suppose I was surprised to hear you say that constructive intentionalism or positivism is a lie and that this is the age of the heroic functionalist. I would have thought that it was precisely the opposite. Your colleague, Ronald Dworkin, tells us in his response to Justice Scalia's Tanner lectures that we are all originalists now, and when we think about the current Supreme Court, it is surely significant that not a single Justice takes the Brennan/Marshall position about the death penalty.

When we think about the Academy, scholars from the left and the right—from Jed Rubenfeld and Akhil Amar to Michael McConnell—were all interested in the translation exercise that you suggest is unworkable.

The cases that you discussed—flag burning,⁷⁸ abortion,⁷⁹ and mandatory school segregation⁸⁰—are not the best cases for heroic functionalism because many of them can be reconceived in more traditional positivistic terms. What do you think, for example, about the criminal procedure cases?

In *Warden v. Hayden*,⁸¹ inattention to text and history, abandonment of the ancient mere evidence rule, and the exaltation of warrants and probable cause over reasonableness, led to the holding that personal business papers and private diaries are not protected.⁸² In that case, Justice Brennan suddenly finds himself in dissent.

Roger Pilon, you came to criticize Justice Brennan, not to praise him. But, even in your criticism, it seems that you are actually the most faithful Brennanite of all of our panelists. You may disagree with some of Brennan's decisions, but it seems that you really only disagreed with his application of a natural law methodology you both share.

Aren't you sympathetic to Brennan's idea of a non-positivistic, morally based evolving vision of liberty that is less concerned about constraints on legislatures and the traditional rule of law constraints—the constraints that Mike McConnell was talking about?

Professor McConnell, maybe you are a more faithful Brennan clerk than you think. If we set aside abortion⁸³ and the death penalty,⁸⁴ the most controversial cases, and we think about the cases that really define the core of Justice Brennan's legacy—apportionment,⁸⁵ sex discrimination,⁸⁶ and affirmative action⁸⁷—can't many of these cases be reconceived in more traditional textual and historical terms? Doesn't this ap-

78. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

79. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

80. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

81. 387 U.S. 294 (1967).

82. See *id.* at 302, 309.

83. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

84. See, e.g., *South Carolina v. Gathers*, 490 U.S. 805 (1989) (Brennan, J.).

85. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986) (Brennan, J.).

86. See, e.g., *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987) (Brennan, J.).

87. See, e.g., *Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421 (1986) (Brennan, J.).

proach work for the apportionment cases in terms of the Guarantee clause or the sex discrimination cases in terms of the Privileges and Immunities Clause, as you yourself have argued in the school cases? Can't originalism justify Brennan's position in the affirmative action cases?

Judge Reinhardt, you spoke eloquently and said that you agreed with almost every word that Justice Brennan wrote. But I wonder in light of some of the rule of law and legitimacy concerns that the other panelists have raised whether you can think of a single Brennan decision that might have gone too far for institutional reasons. Can you think of a Brennan decision that you disagree with?

BURT NEUBORNE

The fact that there are a number of us in the audience, a number of extraordinarily bright and inventive people who will reconstruct the Brennan fabric and explain that it was always there in the more traditional ways—meaning there is a traditional textual support or traditional historical support—shows that it was unnecessary for him to move to a more adventurous form of judging. That is a wonderful example of the normative value of the actual.

The normative value of the actual means that whatever the issue, we will try to justify it. Therefore it was unnecessary for the heroic path to be taken. My sense is none of the new paths that people are telling us to take are worth traveling. They are paths that would have been as intellectually dishonest for Justice Brennan to take as the traditional intellectually dishonest path—which is, of course, the constructive or positivist approach.

Brennan was intellectually honest. Brennan laid on the table what he was doing. He did not operate through outside constraints. He exhausted those constraints. If those constraints forced him to act, he would do it. He felt that he took an oath and if those outside constraints forced him to decide a case in a particular way, he would do it. But in so many difficult cases, especially cases at the Supreme Court, the outside constraints reach a tie. The question is how do you break that tie?

Brennan taught us to break a tie. One must first ask what is the function of the Constitutional provision in question. On this point, Professor McConnell and I differ. Our fundamental difference is on the question of function.

Professor McConnell says we should look at the historical function historically. He suggests that the function given to the clause 200 years

ago should be the function used today. In contrast, I suggest that Brennan looked to the present for the best function for the clause.

There is a huge difference between these arguments. His provision attempts to be an external guide on the judge. He limits a judge's power, but the price is enormous. The price is that we are locked into a vision of the world 200 years old. Brennan asks what should be the present function of that clause.

There is a risk that we will get it wrong. There is also a risk that judges someday will have a vision that is terrible. Regardless of these risks, it is probably the only way to go forward with a living constitution. In this, I find Brennan's argument genius.

ROGER PILON

Jeff, you've suggested that I may be the most faithful Brennanite on the panel because I praised much of what Brennan did even if I have reservations about his methodology. And that's right. My concern about his methodology is both that it draws from considerations not found in the Constitution and that in the wrong hands it can produce results that none of us would want—a point Mike made earlier.

To put the point somewhat differently, to do constitutional adjudication well, you have to have a theory of the matter, and Brennan didn't have much of a theory beyond "libertarian dignity." Now the libertarian part I agree with, of course, because it derives from the document—although you still have to work out the underlying theory of property, broadly understood,⁸⁸ to have a serious theory of liberty. But the dignity part can be a way of "sneaking in the back door," so to speak, things that are not there and, indeed, things that were meant to be not there.

Thus, I think Brennan got the procedural issues right in a case like *Goldberg v. Kelly*;⁸⁹ for once the government does set up some redistributive scheme the due process and equal protection principles kick in as a defense against arbitrary power. But that still leaves open the question of whether there is a power to set up such a scheme to begin with, whether government can transfer title from *A* to *B* in the first place. That's the deeper concern I have and that's why I went after the question

88. That theory was outlined by John Locke, *Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1965) (1690); see, e.g., *id.* para. 123 ("Lives, Liberties and Estates, which I call by the general Name, *Property*.").

89. 397 U.S. 254 (1970).

of what powers there are under the Constitution and what, if anything, Brennan had to say about that.

But to continue for a moment on this issue of government power and property rights, which you raised, we know that Brennan wrote the dissent in *Nollan*.⁹⁰ Perhaps we can assume that he would also have dissented in the several regulatory takings cases the Court has subsequently decided.⁹¹ If so, one sees here the modern view writ large, for his dissent focuses on, among other things, the standard of review: following *Carolene Products*,⁹² this being a case about “mere” property rights, minimal judicial scrutiny will do. And so Brennan defers to the government, which was engaged in what Justice Scalia called “an out-and-out plan of extortion”⁹³ in its effort to extract an easement from the Nollans. One wonders where the “libertarian dignity” is in that.

And on this business, finally, of giving clauses a functional reading, which Burt argued was the mark of Brennan’s being a “constitutional judge,” one wonders how Brennan would have come out in the seminal *Lopez* case,⁹⁴ finding the Gun-Free School Zones Act unconstitutional, or on the *Brzonkala* case⁹⁵ just decided en banc by the Fourth Circuit, which found the Violence Against Women Act unconstitutional. In both cases, the courts said, in a promising departure from their post-New Deal jurisprudence, that Congress does not have power under the Commerce Clause to regulate anything and everything for any reason—which truly would be arbitrary power.

As we all know, the central function of the Commerce Clause was to ensure the free flow of goods and services among the states by empowering Congress to regulate—or make regular—such commerce. Now Burt urges a functional account of clauses, but he qualifies that to mean not what a clause’s function was when it was written but what its function is today. The only problem with that argument is that it is circular: unless Burt has in mind some independent function of the clause, we can

90. *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

91. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

92. *United States v. Carolene Prods.*, 304 U.S. 144 (1937).

93. *Nollan*, 483 U.S. at 837 (citing *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

94. *United States v. Lopez*, 514 U.S. 549 (1995).

95. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 1999 WL 111891 (4th Cir. Mar. 5, 1999).

make the function whatever we want it to be. That is the very definition of arbitrary power.

I am all for functional accounts—especially in the case of the Commerce Clause, which is all but boundless if read otherwise. But such accounts, by definition, are rooted in some sense of original understanding—failing which they themselves are boundless. Moreover, the functions of clauses must be consistent with the functions of the documents in which they rest. It would be anomalous, at least, if the Commerce Clause, which rests in a document written to limit government, were read as permitting Congress to regulate anything for any reason. Yet that, until very recently, is what our Commerce Clause jurisprudence has amounted to.

And so in the end we come back to the question that Mike has raised about what it is that binds the judge to the law. I am for allowing judges to invoke moral theory, as you suggested, Jeff, but not any moral theory. In fact, judges may rightly invoke only the moral theory that is part of the law they are sworn to apply. We are fortunate that the theory of natural rights stands behind our Constitution—a theory that was reflected in substantial measure by the classic common law.⁹⁶ Far from being able to ignore that theory, judges must invoke it from time to time. But that theory is not boundless. It constitutes a sound theory of justice. But it also binds the judge.

MICHAEL MCCONNELL

I am tempted to address Burt Neuborne's comment on our differences, which I hope we will have time to do. However, I feel honor bound to answer the question put to me.

I have no problem agreeing with Professor Rosen. I am not quite like Robert Bork. When I read *The Tempting of America*,⁹⁷ it looks as though the Supreme Court has never been right. Throughout the history of the Court, there seems to be just one disaster after another. That assessment does not seem accurate to me. I think the Supreme Court decided correctly a vast majority of the time. There has been a tremendous amount of good, responsible, positivistic application of our Constitutional principles based on the circumstances of today.

96. "Indeed, the notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law." CORWIN, *supra* note 27, at 26.

97. ROBERT BORK, *THE TEMPTING OF AMERICA* (1990).

STEPHEN REINHARDT

Professor Rosen, I am more used to reading your articles in the *New Yorker*, not the *New Republic*. But your question demonstrates what has happened to this country.

We have come to the point where two Republicans are the liberal/moderate wing of the Court. I suppose we can thank President Clinton for that. The Clinton Justice Department wants to overrule cases that protect individual rights; they want to overrule the Fourth Amendment. They have stripped the courts of much of their jurisdiction over prisoner litigation, immigrant litigation, and habeas corpus.

That is why these conferences are necessary to keep the liberal spirit and the liberal philosophy alive, because it will not be done by way of presidential appointments—not in this administration.

Justices Marshall and Brennan were right. However, the spectrum has moved to such an extent that Justice Stevens, who was in the middle, is now on the extreme left all by himself. This is a tragedy that I hope we can correct some day.

I do not think it is methodology that primarily brings different results. I do not think the Justices who vote against affirmative action do so because of a difference in methodology. It happens to be very convenient that their methodology leads them to the conclusion that blacks do not have equal rights anymore. That is a wonderfully convenient use of methodology. But I believe it represents a more fundamental attitude regarding the social compact.

Justice Brennan's opinions are not arrogant—he does not do whatever he wants. He tried to be reasonable. It was the putsch by the newly emerging conservative majority that caused Justice Marshall to say “power, not reason, is the currency of this Court's decision making.”⁹⁸

Whichever side one's on, it is easy to say that the opposition is not following the right methodological system. Yet both sides try to justify their decisions, methodologically, albeit often not very persuasively.

The members of the Court have somewhat different views, but they each take into account a number of factors. They do not simply substitute their own judgment for the Constitution or for history. Nevertheless, it would be nice if the Court used compassion as one of its factors occasionally. Still, judicial philosophy is the most important thing in a judge

98. *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

these days. Judges consider their own history, their own views of life, and their own philosophy of the law. Regardless, I do not know of a decision by Justice Brennan or Justice Scalia where they do not look at the Constitution, the history, the precedents, or what they think are the appropriate standards and guidelines. Yet, following their assiduous examinations, they tend to arrive at where their fundamental philosophical and constitutional beliefs put them in the first place, rather than where any particular methodology might lead them. To the extent that belief and methodology frequently coincide, there are good and valid explanations for the results. But as to which predominates when they diverge, I have little doubt.

AUDIENCE MEMBER ONE

Judge Reinhardt, is there a difference between the judge's fundamental view of the Constitution and the judge's fundamental view of good social policy?

STEPHEN REINHARDT

Yes, usually. But sometimes there is less of a difference than one might imagine.

There are some social policies that involve fundamental rights. Homosexuality, for instance. Does it matter whether the majority agrees with the judge's view that the individual has a right to engage in private sexual conduct? Or is it enough that the judge concludes that homosexuality is a basic social right? Not every social view can be transformed into a constitutional right or into law. Some social views, however, clearly fit that category.

JEFFREY ROSEN

I think we have time for one or two more questions.

AUDIENCE MEMBER TWO

How do Justices Scalia and Brennan differ in their decisional methodologies?

MICHAEL MCCONNELL

That is an extremely easy question. Scalia was exactly in the school

of Powell and Harlan. Let us just take the one example of *Poe v. Ullman*.⁹⁹ Harlan says, in his dissent, that the case was not resolved on the merits.¹⁰⁰ He continues by saying that if you look at the actual law and the individual states with respect to contraception, no state in the union, except Connecticut, made the use of contraceptives by married couples illegal.¹⁰¹ Accordingly, he says that that is the dispositive thing for him.

Harlan looks at tradition. He considers how the various states responded to this question of rights, and he imposes upon Connecticut the consensus that has been reached by the nation.

Then there is *Michael H.*¹⁰² That is the case about whether the natural father of a child born to a married couple can assert his parental rights. Scalia considers the laws that have been on the books by many jurisdictions.¹⁰³ These jurisdictions have prevented the natural father from being able to assert parental rights in similar circumstances. These are not anachronistic laws. They have been recently enacted. Regardless of what you think of the morality of this judgement, it is the judgment of our nation. Therefore, we have no basis for asserting that California got it wrong. This is Harlan's method.

Justice Brennan's method was to look instead at Supreme Court decisions that discussed paternal rights but did not address this particular wrinkle. Brennan believed those Supreme Court decisions ought to be analogized or broadened to include this particular case.

Harlan, Powell, and Scalia looked to the Constitutional tradition of the nation, not to the Court's. In addition, they looked at specific decisions to assist them in answering this moral question. In contrast, Brennan looked at more abstract principles and then tried to apply them to a particular case.

99. 367 U.S. 397 (1961).

100. *Id.* at 534.

101. *Id.* at 554.

102. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

103. *See id.* at 125.

As such, whether it is right or wrong, I see Scalia as being squarely in the shoes of Harlan and Powell.