St. Mary's Law Journal

Volume 29 | Number 1 Article 1

1-1-1997

Writing in the Margins: Brennan, Marshall, and the Inherent Weaknesses of Liberal Judicial Decision-Making Essay.

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ESSAY

WRITING IN THE MARGINS: BRENNAN, MARSHALL, AND THE INHERENT WEAKNESSES OF LIBERAL JUDICIAL DECISION-MAKING

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It is my hope that the Court during my years of service has built a legacy of interpreting the Constitution and federal laws to make them responsive to the needs of the people whom they were intended to benefit and protect. This legacy can and will withstand the test of time.

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William J. Brennan, Jr.[1]

> [W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes.

Supreme Court Associate Justice Antonin Scalia.[2]

I. INTRODUCTION

Supreme Court Justice William Brennan, Jr.'s, death in July 1997 did not signal the end of the most liberal Supreme Court jurisprudence in the history of the court; that end had already come. The Warren Court era ended slowly but surely. An increasingly conservative population elected conservative presidents who, in turn, placed more conservative Justices on the Court; and by the early 1980s, the more liberal Justices found themselves in the minority. Brennan's retirement from the Court in 1990, followed by that of his compatriot, Thurgood Marshall, a year later, signaled the coming of age of a new, more conservative (although certainly no less activist) Court. Thus, William Brennan, Jr.'s, death gives reason for sober pause: Brennan, perhaps more than any other Justice of his era, represented the ideals and jurisprudence of the Warren Court era. His landmark decisions in areas ranging from voting rights to free speech are the decisions most likely to be recited in any list of Warren Court accomplishments.

Almost invariably joining in those decisions from the time he ascended to the bench was Thurgood Marshall, Brennan's friend and ally for over twenty years. From 1967, when Marshall took his seat as Supreme Court Justice, until 1990, when Brennan vacated his seat, the two Justices formed one of the most consistent liberal voting blocs in the history of the Court.[3] The bloc was so consis-

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1. Letter from William J. Brennan, Jr., to President George Bush (July 20, 1990) (announcing his retirement from the Supreme Court), *in* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 280 (1993).

2. Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

3. *See* Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841, 872 (1980) (indicating that Marshall and Brennan voted alike in 95% of cases over two year period); *e.g.*, Benton v. Maryland, 395 U.S. 784 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969);

tent, in fact, that Brennan's clerks often referred to Marshall as Justice Marshall-Brennan.[4] When Marshall came to the Court, his liberal vote provided a solid majority for Chief Justice Earl Warren and for Justice Brennan, who had been successfully pursuing an agenda of liberal judicial activism.[5] After Warren resigned his post and was replaced by Nixon appointee Earl Burger, Brennan and Marshall continued to advance much of their liberal agenda.[6] However, pursuing a liberal agenda became difficult for Brennan and Marshall because the Court pulled more and more to the right, and much of their earlier work was undone or interpreted narrowly.[7] By the time Brennan stepped down, pleading ill health, the two Justices were writing dissents in an overwhelming majority of

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Monroe v. Board of Comm's, 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968); Duncan v. Louisiana, 391 U.S. 145 (1968).

4. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 222 (1993) (commenting on reference to Marshall as Marshall-Brennan). This reference to Marshall as Marshall-Brennan may have been a slight to Marshall, who had an undeserved reputation on the Court as a "follower." *See* MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991, at 63 (1997) (relaying Powell's concerns that Marshall would occasionally defer to Brennan's vote especially if Marshall lacked understanding of case). When Marshall sat on the United States Court of Appeals for the Second Circuit, Justice Henry J. Friendly wrote to Associate Supreme Court Justice Felix Frankfurter, "TM seems easily led. I do not have the feeling that he realizes the difficulties of his job and is burning the midnight oil in an effort to conquer them. . . . All this makes life fairly easy for him, save when he is confronted with a difference of opinion, and then he tosses a coin." Letter from Hon. Henry J. Friendly to Associate Justice Felix Frankfurter (Jan. 1962), *in* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 679 (1983).

5. *See* MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 279–80 (1992) (providing examples of liberal voting bloc); *see also supra* note 4.

6. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking Texas law denying children of undocumented immigrants education); Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (discounting Georgia's death penalty law); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 32 (1970) (upholding order requiring school to end school segregation by busing).

7. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989) (overruling in part Procunier v. Martinez, 416 U.S. 396 (1974), regarding standard of review for determining validity of prison regulations governing sending of publication to inmates); Daniels v. Williams, 474 U.S. 327, 328 (1986) (overruling in part Parratt v. Taylor, 451 U.S. 527 (1981), considering whether negligent act of prison official which caused unintended loss to inmates implicated Due Process Clause); Illinois v. Gates, 462 U.S. 213, 238 (1983) (overruling Aguilar v. Texas, 378 U.S. 108 (1964), abandoning *Aguilar* test for determining whether tip from informant provides probable cause for issuance of warrant).

cases.[8] Nevertheless, Justice Brennan believed that the Warren and Burger Court precedent would withstand the test of time.[9] Justice Marshall, however, was able to predict a nearly wholesale reversal of this precedent in areas such as constitutional criminal procedure, First Amendment freedoms, affirmative action, and substantive due process rights.[10]

In 1991, on the eve of his retirement, Marshall issued a final, scathing dissent protesting such a reversal.[11] In *Payne*, the conservative majority overruled two recent decisions and held that evidence of a crime's impact on its victim could be introduced during the state's closing remarks at a sentencing hearing.[12] In his dissent, Marshall criticized the majority for its premature and baseless reversal of Supreme Court precedent so newly established.[13] Marshall warned that under the Court's rationale for reversal, other Warren Court and Burger Court precedent was endangered.[14]

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8. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 255 (1995) (describing frequency of Brennan's and Marshall's dissents throughout 1970s and 1980s); *e.g.*, Schiro v. Indiana, 493 U.S. 910, 914 (1989) (Marshall & Brennan, JJ., dissenting); Hallstrom v. Tillamook County, 493 U.S. 20, 22 (1989) (Marshall & Brennan, JJ., dissenting); Acara v. Cloud Books, Inc., 478 U.S. 697, 698 (1986); Brooks v. Estelle, 459 U.S. 1061, 1063 (1982) (Marshall & Brennan, JJ., dissenting); Illinois v. Gates, 459 U.S. 1028, 1028 (Marshall & Brennan, JJ., dissenting); Lego v. Twomey, 404 U.S. 477, 490 (1972) (Marshall & Brennan, JJ., dissenting); Richardson v. Belcher, 404 U.S. 78, 87 (1971) Marshall & Brennan, JJ., dissenting); United States v. Harris, 403 U.S. 573, 586 (1971) (Marshall & Brennan, JJ., dissenting); Palmer v. Thompson, 403 U.S. 217, 240 (1971) (Marshall & Brennan, JJ., dissenting); Ehlert v. United States, 402 U.S. 99, 118 (1971) (Marshall & Brennan, JJ., dissenting); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 185 (1971) (Marshall & Brennan, JJ., dissenting); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall & Brennan, JJ., dissenting).

9. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 282–83 (1995) (indicating that when Brennan stepped down, he claimed to be unconcerned about Court's conservative turn).

10. *See Payne*, 501 U.S. at 844–45 (Marshall, J., dissenting) (criticizing majority for sending "clear signal that scores of established constitutional liberties are now ripe for reconsideration").

11. *See id.* at 844 (Marshall, J., dissenting) (criticizing majority opinion for ignoring doctrine of stare decisis). *Payne* overturned two decisions, South Carolina v. Gathers, 490 U.S. 496 (1989), and Booth v. Maryland, 482 U.S. 496 (1987). *Payne*, 501 U.S. at 830.

12. *Id.* at 826.

13. *See id.* at 844 (Marshall, J., dissenting) (commenting, "Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this court did.").

14. *See id.* at 851–52 n.2 (Marshall, J., dissenting) (detailing previous cases decided by Court that, under standards announced by *Payne* majority, may be subject to being overruled). Of the cases Marshall listed, two have been overturned. Metro Broadcasting v.

Specifically, Marshall believed that the Court's rationale for overruling precedent—that a case was decided by one vote, over "vigorous dissent"—would easily allow the new conservative Court to overturn other similarly decided cases.[15]

While Marshall may have been correct that the Court's rationale in *Payne* was specious and neglected to adequately respect precedent,[16] he might also have noted that the threatened decisions, those patched together from careful compromise and concession, carried the seeds of their own destruction. In fact, Marshall was not afraid to comment on the instability and vulnerability of decisions that Brennan had participated in or authored.[17] Brennan's uncanny ability to find compromise and to craft decisions that could seemingly pull majorities from thin air[18] has not ensured reliable precedent.[19] If Marshall and Brennan differed during their tenure together on the Court, it was often because of Marshall's perception that the majority's decision did not carry authority, that its success at compromise would render the ruling impossible to apply or that in compromising, the majority was limiting a right

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FCC, 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1992). Another case mentioned by Marshall, Aguilar v. Felton, 473 U.S. 402 (1985), is of questionable precedential value. *See* Board of Education v. Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 717–18 (1994) (O'Connor, J., dissenting in part and concurring in part) (criticizing *Aguilar* decision). Each of the three decisions was authored by Brennan.

15. *See Payne*, 501 U.S. at 844 (Marshall, J., dissenting) (surmising that "scores of established constitutional liberties are now ripe for reconsideration").

16. Marshall has been accused of hypocrisy here. *See Payne,* 501 U.S. at 834 (Scalia, J., concurring) (stating, "It seems to me difficult for those who were in the majority in *Booth* (including Marshall) to hold themselves forth as ardent apostles of stare decisis. . . . It was, I suggest, *Booth*, and not today's decision that compromised the fundamental values underlying the doctrine of stare decisis."); MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 10 (1992) (noting apparent contradiction between *Payne* decision and Marshall's career as civil rights lawyer, when he attacked separate-but-equal precedent).

17. *See* Rosenbloom v. Metromedia, 403 U.S. 29, 79–81 (1970) (Marshall, J., dissenting) (discussing weaknesses in Brennan's plurality opinion).

18. *See infra* notes 185–204 and accompanying text.

19. *See* Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 239 (predicting, "With the departure of Justices Brennan and Marshall, the role of precedent and the doctrine of stare decisis are certain to assume central importance in coming years, as a significantly more conservative Court confronts the increasingly inconvenient holdings of its predecessors").

Marshall saw as absolute.[20] Generally, Marshall was more willing to stand on principle and dissent from the majority opinion than was Brennan, who could content himself with narrow victories achieved on even narrower rationale.[21]

By looking at the cases in which Marshall and Brennan differed,[22] this Essay will examine some of the philosophical, doctrinal, and personal differences between them. In addition, this Essay will argue that the differences in Brennan and Marshall's jurisprudence exemplifies what Mark Tushnet has called the "dilemmas of liberalism."[23] Inasmuch as liberal constitutionalists believe in the judiciary's power to amend or overrule legislative action, and because they are often willing to paint with an extremely broad brush, they can encounter two main problems. The first problem stems from the nature of politics. Presidents do not generally appoint and Congress is not likely to confirm Justices who proclaim their rights to sit as platonic guardians over legislatures and states.[24] Indeed, Brennan was appointed to the Court because President Eisenhower believed him to be conservative or at least moderate in his views.[25] Thus, the Court is rarely comprised of a majority of judicial activists as it was at the end of the Warren-Court era.

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20. *See infra* notes 205–37 and accompanying text.

21. This statement should not obscure the truth of Brennan's voting pattern. Known for his ability to conciliate and compromise during the Warren and Burger eras, Brennan could not usually play such a role on the Rehnquist Court and, like Marshall, often resorted to dissent. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 427 (1986) (distinguishing Brennan's first term on Court from his previous term). Thus, this Essay does not claim that any described differences between Brennan and Marshall challenge their reputations as liberal Justices.

22. That is, cases in which either Justice dissented to the other's written opinion or cases in which the Justices wrote separate concurring opinions or dissenting opinions that display substantively differing rationales.

23. *See* Mark V. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 413–14 (1981) (identifying problem with liberalism as necessitating system of checks and balances to avoid tyranny by one political branch thereby blurring lines between governing branches such that "willful judges . . . can do whatever they want.").

24. *See* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 147–48 (1994) (observing that confirmation process generally ensures that Justices with extreme political views will not sit on Court).

25. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 90–91 (1993) (noting that white house staff did not research Brennan's background thoroughly and stating that Eisenhower administration was unaware of Brennan's liberal opinions in criminal cases).

The second difficulty facing a judicial activist on the Court is a lack of authority. An originalist can look to the history of the Constitution, to eighteenth-century dictionaries and to social encyclopedias for judicial authority. A textualist can go to his or her pocket Constitution to discern the law. By contrast, activists, particularly liberal activists, must be more ingenious. They must rely on less certain tools, such as abstract principles, natural law theory, or community consensus. Brennan and Marshall, activists, rejected both originalist and textualist approaches to constitutional decision-making and argued instead for standards that evolved and were reinvented for and by each generation.[26]

As an activist with broad, liberal objectives, Brennan had another tool available to him—the ability to find middle ground.[27] Marshall did not share this gift, and his dissents, no matter how eloquent, could not make law.[28] Yet, Marshall's expressed fears about the weaknesses of Brennan's decisions have, in many cases, turned out to be well-founded. Neither Brennan's knack for compromise nor Marshall's strict adherence to principal could withstand the conservative wave that followed the Warren Court. In the end, the two Justices left a legacy of some of the most expansive and profound declarations of individual freedom.[29] Whether this legacy will be an enduring one is a matter of increasing uncertainty.[30]

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26. *See* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 16 (1988) (stating that, in interpreting the Constitution, Justices must draw on experiences as inhabitants of current age); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (positing that contemporary standards invoke concepts that are very different from those that Framers endeavored to construct two hundred years ago).

27. *See infra* notes 185–204 and accompanying text.

28. *See* Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2124 (1992) (observing that Marshall's talents did not include consensus building).

29. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 375 (1978) (addressing right to marry); Eisenstadt v. Baird, 405 U.S. 438, 446 (1972) (asserting unmarried persons' right to obtain birth control); Stanley v. Georgia, 394 U.S. 557, 559 (1969) (establishing right to possess obscene materials in home); Baker v. Carr, 369 U.S. 186, 187 (1962) (reviewing voting rights issue).

30. *See* PAUL A. FREUND, ON LAW AND JUSTICE 36–37 (1968) (contending that doctrinaire thinking is dangerous because it leads to decisions that are easily reversed and do not maintain popular respect). An activist need not be a liberal, but the focus of this Essay is on two strongly liberal Justices. In this Essay, a liberal Justice is one with a high regard and concern for the rights of individuals vis-á-vis the state, especially in such areas as privacy, personal autonomy, and law enforcement. In this Essay, activist refers to a Justice willing

II. Two Paths to the Supreme Court

In some ways, the backgrounds of Brennan and Marshall were not as different as one might expect. As young men, both worked.[31] Brennan's father, a stern adherent to the work ethic, was a labor organizer, and both of Marshall's parents worked.[32] In addition, both Justices could identify with discrimination and oppression. Brennan was acutely aware of his joint disabilities as an Irishman and a Catholic.[33] Marshall grew up in segregated Baltimore, and while his family was considered middle-class, he did not escape the discrimination that plagued African-Americans during his youth.[34]

These similarities, however, cannot disguise the differences between the two men. The difference of color, with its attendant cultural experiences, is of course vast and can account for immense differences in ideology and outlook. In addition, the future co-Justices followed different career paths. Marshall took the path of an ardent and committed advocate of goals in which he fervently believed, while Brennan took a somewhat less impassioned path of private practice and state-court judiciary.[35]

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to oppose the will of the people as expressed by legislative action, in order to further a desired goal or policy.

31. Hunter R. Clark, Justice Brennan: The Great Conciliator 16 (1995) (noting that by age eleven, Brennan worked every type of job possible); Michael D. Davis & Hunter R. Clark, Thurgood Marshall, Warrior at the Bar, Rebel on the Bench 40–41 (1992) (noting Marshall's early jobs delivering hats and as waiter).

32. *See* Randall E. Bland, Private Pressure on Public Law: The Legal Career of Justice Thurgood Marshall chs. 1–4 (1973) (discussing early life of Marshall and indicating that Marshall's father worked as Pullman-car waiter and amateur writer while Marshall's mother taught school), *reprinted in* Roger Goldman & David Gallen, Thurgood Marshall, Justice for All 22, 23 (1992); Kim Isaac Eisler, A Justice For All: William J. Brennan, Jr., and the Decisions That Transformed America 18–19 (1993) (discussing career of William J. Brennan, Sr.); Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961, at 8 (1994) (detailing early life of Thurgood Marshall).

33. *See* Kim Isaac Eisler, A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America 32 (1993) (noting Brennan's status as Irish Catholic made it difficult for him to find employment as young man).

34. *See* Michael D. Davis & Hunter R. Clark, Thurgood Marshall: Warrior at the Bar, Rebel on the Bench 41 (1992) (relating that, at times, Marshall could find no public restrooms for African-Americans).

35. *See* Kim Isaac Eisler, A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America 32–41, 68–85 (1993) (chronicling Brennan's uneventful career as young lawyer and his career as New Jersey judge); Juan Williams, *Marshall's Law*, Wash. Post, Jan. 7, 1990, at W1 (recalling Marshall's fervor in study of law

A. *William J. Brennan, Jr.: Ike's Second Mistake*[36]

Brennan grew up in Newark, New Jersey, the son of labor organizer William Brennan, Sr., and Agnes Brennan, both immigrants to this country from Ireland.[37] After an undistinguished childhood and youth, Brennan attended the University of Pennsylvania and eventually graduated from Harvard Law School.[38] While his law school career was marked with minor achievements, Brennan showed no signs that he would become one of the most influential Supreme Court Justices in the Court's history.[39] Later, upon Brennan's appointment to the Supreme Court, those colleagues who could remember him recalled that he was able, affable, and a "prodigious notetaker."[40]

When Brennan attended Harvard Law School, his future co-Justice on the Supreme Court, Felix Frankfurter, sat on the faculty.[41] Frankfurter, a political liberal by the standards of the day, was part of a large movement that argued for judicial restraint[42] in decision-making in the wake of *Lochner v. New York*.[43] This movement, like Oliver Wendell Holmes' dissent in *Lochner*, supported the notion that it was the judiciary's responsibility to simply apply the law to a given set of facts rather than to overturn legislative enact-

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and future legal victories that earned him name of "Mr. Civil Rights"), *in* ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL, JUSTICE FOR ALL 26–27 (1992).

36. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 158 (1993) (quoting tradition that President Eisenhower called his appointment of Brennan to Supreme Court his second mistake as president, with first being his appointment of Chief Justice Warren).

37. *See id.* at 18–20 (describing Brennan's early childhood).

38. *See id.* at 27–30 (noting that Brennan was influenced to attend University of Pennsylvania and Harvard Law School by his father).

39. *See id.* at 28 (stating that Brennan was of "remarkably average intelligence").

40. *See id.* (pronouncing Brennan to have been hard-working, friendly individual who studied intensively).

41. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 29 (1993) (revealing that Frankfurter was Brennan's public utilities instructor and noting that Brennan was not Frankfurter's "prize pupil.").

42. *See id.* at 11–12 (calling Frankfurter "the model of judicial restraint"); *see also* Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 95 (observing that Frankfurter was not social conservative, yet he failed to distinguish between protecting economic rights and protecting more vulnerable individual rights).

43. 198 U.S. 45 (1905).

ments.[44] On the Court, Brennan would find himself directly opposed to the idea of judicial restraint, especially as propounded by his former professor at Harvard, Felix Frankfurter.[45] Ironically, those who remember Brennan at Harvard note that he was not interested in legal theory or philosophy.[46] Rather, as Paul Freund noted in his complaint of Brennan's appointment to the Court, Brennan never took a constitutional law course at Harvard.[47]

After graduation, Brennan began working for a labor defense firm in Newark, defending the kinds of groups that his father had fought against as a labor organizer. In 1949, Brennan accepted a seat on the New Jersey Superior Court as a trial judge and only one year after that, in 1950, he was appointed to the New Jersey Court of Appeals.[48] Two years later, he was appointed to the New Jersey Supreme Court.[49]

Reviewing Brennan's early jurisprudence, one could not predict that he would become one of the most liberal United States Supreme Court Justices in the history of that body. For example, at the appellate level, Brennan took a narrow view of the right to privacy,[50] and on the New Jersey Supreme Court he refused to hold that the privilege against self-incrimination in criminal trials had to be protected by the states.[51] While he was on the state supreme court, however, shades of the later Brennan began to show. In

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44. *See* Lochner v. New York 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (stating that Constitution "is made for people . . . and the accident of our finding certain opinions familiar, or novel . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution"); *see also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940) (declaring that "to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties").

45. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 168–77 (1993) (describing differences between Frankfurter and Brennan).

46. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 23 (1995) (noting that although Harvard emphasized legal theory, Brennan sought practicality).

47. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 94 (1993) (referencing Freund's 1956 letter to Frankfurter stating that he had reviewed Brennan's coursework).

48. *Id.* at 69.

49. *Id.* at 78.

50. *See* Cortese v. Cortese, 76 A.2d 717, 721 (N.J. Super. Ct. App. Div. 1950) (holding that mother in paternity suit could not invoke right to privacy in order to avoid taking blood test or having blood drawn from her child).

51. *In re* Pillo, 93 A.2d 176, 180 (N.J. 1952).

State v. Tune,[52] he dissented from a holding that criminal defendants had no right to inspect confessions they had made to the police.[53] In *State v. Fary*,[54] Brennan held that New Jersey must protect a right against self-incrimination.[55] In spite of these early hints at his later jurisprudence, the young Brennan was hardly a maverick; rather, he largely applied precedent and rarely hinted at his personal convictions.[56] This approach is apparent in a 1953 death penalty case in which Brennan upheld the conviction and death sentence of a teen found guilty of murder. Without expressing any personal compunctions against the death penalty,[57] Brennan simply listed the points of appeal and one by one dismissed them, including an undenied allegation that the jury had been given a pamphlet that had been written and authorized by the sheriff's office with "instructions" for proper jury deliberations.[58] Upon dismissing a claim that the revised exculpatory testimony of a codefendant (who had received a life sentence) should be the basis for a new trial for the teen receiving the death penalty, Brennan uncharacteristically wrote, "His life not being forfeit, nor could it be, he plainly perjured himself, obviously from some twisted sense of loyalty to his companion in depravity."[59]

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52. 98 A.2d 881 (N.J. 1953).

53. *See Tune*, 98 A.2d. at 894 (Brennan, J., dissenting) (arguing that experience has *not* shown that criminal who is aware of whole case against him will procure perjured testimony).

54. 117 A.2d 499 (N.J. 1955).

55. *Fary*, 117 A.2d at 501; *see also* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that right against self-incrimination was one of fundamental rights incorporated in Fourteenth Amendment's Due Process Clause to be applied to state action).

56. *See infra* note 61 and accompanying text.

57. *Cf.* Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death As a Punishment*, 22 FLA. ST. U. L. REV. 591 *passim* (1995) (stating that Brennan and Marshall were notorious for persistent dissents in death penalty cases, refusing to acknowledge precedent that held death penalty was constitutional).

58. *See* New Jersey v. Vaszorich, 98 A.2d 299, 305 (N.J. 1953) (indicating that each panel member was issued pamphlet entitled "Primary Instructions to Jurors"). The pamphlet included a quote taken from Lycurgus on its back cover, which read: "On the head of the criminal lies the crime; but in a miscarriage of justice the jurors delinquent become participants of guilt." *Id.* One Justice on the state supreme court dissented to the holding, stating that "the comforting faith in the equality of the criminal law and its impartial administration may well totter under the impact of the attempted distinction here made." *Id.* at 318 (Wachenfeld, J., dissenting).

59. *Id.* at 316.

The future Justice who had not engaged in theoretical pursuits at Harvard showed no signs of having done so as a New Jersey state judge. Nonetheless, there was some suggestion of his liberal political views when Brennan spoke out against the efforts of the Committee on Un-American Activities during this period;[60] but as a judge, Brennan rarely strayed from the rule of statute and precedent.[61] As a Supreme Court Justice, Brennan would ultimately develop and attempt to describe a judicial philosophy; but in 1959, when President Eisenhower appointed him to the Court, no such philosophy was apparent.

Ironically, Brennan came to the attention of the Eisenhower administration after a speech he made in Washington calling for better and more efficient management of appellate court documents and expressing the view that the appellate courts heard too many cases.[62] Seeking to appoint a Catholic Justice, Eisenhower acted on the advice that Brennan, although a Democrat, believed in judicial restraint and would not make waves.[63]

Brennan's confirmation hearings were held largely without incident, although under baiting questioning by Senator Joseph McCarthy, Brennan exhibited a weakness—an unwillingness to firmly take a position when challenged—for which he would be criticized

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60. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 109–11 (1993) (relating transcript of Brennan's 1957 confirmation hearing in which McCarthy questioned him for speaking out against efforts of investigating committees to expose communism). Brennan spoke out against anti-communist investigations, calling them "reminiscent of Salem witch hunts." *Id.* at 81; *see also* WALTER GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 488–89 (1968) (referring to Brennan as one of Committee's "four doughty foes").

61. *See* New Jersey v. Benes, 108 A.2d 846, 849 (N.J. 1954) (indicating that under New Jersey statute, defendant is not entitled to hearing or to copy of any report from presentencing mental evaluation, nor to opportunity to examine hospital staff); White v. Parole Bd. of New Jersey, 86 A.2d 422, 425 (N.J. Sup. App. 1952) (instructing that while Parole Board "should" provide hearing to give inmate chance to challenge evidence against him or her in interest of fairness, such hearing is not required by statute or due process).

62. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 84–85 (1993) (relating that during conference on court congestion Brennan spoke convincingly about court reforms that would eliminate delays in litigation).

63. *See id.* at 85 (noting that Eisenhower's advisors were unfamiliar with Brennan's dissent in *Tune* and viewed his remarks as illustrative of one who would not "entertain technical arguments [but would] get to the heart of the issue").

as a Supreme Court Justice.[64] McCarthy discovered that Brennan had criticized the tactics of the Committee on Un-American Activities in a recent speech, which McCarthy used to question Brennan's loyalty to the country.[65] Brennan, who acknowledged making the speech and specifically criticizing the scare tactics used by some of the committee members, denied having any particular instances in mind when he made the allegations and maintained that he had been using "artistic license."[66]

B. *Thurgood Marshall: The Right Man at the Right Time*[67]

Like Brennan, Thurgood Marshall did little to distinguish himself as a young man. In fact, Marshall was expelled twice from college for fraternity pranks, and he did not exhibit an early passion for civil rights issues.[68]

Marshall's father, perhaps seeing his son's flare for argument, pushed him to attend law school. Marshall first applied to the University of Maryland, which was located in Baltimore; however, the University of Maryland Law School did not admit African-Americans.[69] Undaunted, Marshall applied to Howard University where Charles Hamilton Houston, Harvard's top African-American graduate, was designing and implementing a course of study that would prepare young African-American lawyers to wage a battle against discrimination.[70] Houston, who like Brennan had studied under

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64. *See infra* notes 200–04 and accompanying text.

65. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 106–08 (1995) (recounting questioning of Brennan by McCarthy during confirmation hearings).

66. *See id.* at 106–08 (stating that Brennan made general, not specific, comments when he made allegations about committee on Un-American Activities). When confronted by McCarthy about his reference to "epithets hurled at hapless and helpless witnesses," Brennan said he was speaking of a "general impression" that he had of how witnesses before the committee had been treated. *Id.*

67. *See* MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 266 (1992) (quoting President Johnson upon his appointment of Marshall to Supreme Court as saying: "I believe it is the right thing to do, the right time to do it, the right man and the right place").

68. *See* Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990, at W12 (describing Marshall's college years), *reprinted in* ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 143–44 (1992).

69. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 9 (1994) (affirming that Maryland's segregation laws prevented Marshall from attending state university in Baltimore; thus, he entered Howard Law School in 1930).

70. *Id.* at 29.

Felix Frankfurter, shared the Legal Realists' belief that the law was a tool that could be used for social engineering.[71] Houston also believed in drawing on resources from outside of the law to support legal arguments, such as sociology, history, and psychology.[72] These ideas would become central to Marshall's efforts to end discrimination as an attorney for the National Association for the Advancement of Colored People ("NAACP").

Marshall went to work for the Baltimore branch of the NAACP shortly after graduating from Howard, and it may be for his work as a civil rights attorney for the NAACP that he will be most remembered. From the early 1930s, the NAACP attacked the nation's discriminatory practices, carefully choosing[73] and winning cases that chipped away at the separate-but-equal doctrine of *Plessy v. Ferguson*.[74] Together with Charles Hamilton Houston and a staff of talented lawyers, Marshall convinced court after court that the challenged educational programs were not "equal" to their white counterparts and, therefore, could not survive under the test articulated in *Plessy*. Finally, in *Brown v. Board of Education*,[75] the NAACP lawyers relied upon a vast array of social science data as well as precedent (which they had largely been responsible for creating) to argue that separate is inherently unequal.[76]

In 1961, several years after Marshall's success in *Brown*, President Kennedy appointed him to serve on the United States Court of Appeals for the Second Circuit.[77] Marshall's tenure there, like

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71. *See id.* at 6 (expounding on Houston's philosophy for educating young lawyers to attack discrimination).

72. *See id.* (providing that Houston drew upon sources from outside law to enable lawyers to explain to lawmakers how rules actually function in society).

73. *See* MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 77 (1992) (revealing that Marshall purposefully selected University of Maryland's law school for NAACP's first case challenging application of *Plessy's* separate-but-equal doctrine). Marshall successfully convinced the Maryland Supreme Court that the university's practice of assisting African-American law school applicants to attend out-of-state law schools did not satisfy the "equal" prong of separate-but-equal doctrine. *Id.*

74. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

75. 347 U.S. 483 (1954).

76. *Id.* at 495.

77. *See* MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 236 (1992) (recounting Marshall's 1961 nomination to Second Circuit). The politics of this appointment demonstrate that, in spite of the

Brennan's in the New Jersey state courts, was unremarkable. While he demonstrated somewhat liberal leanings—holding, for example, that New York's law requiring state university faculty members to sign loyalty oaths was unconstitutional[78]—he was not the fiery dissenter he would later become. In fact, in four years on the court, he wrote only twelve dissents.[79]

In 1965, President Johnson appointed Marshall to the position of Solicitor General.[80] In that role, Marshall was in a position to advocate strict enforcement of the new civil rights acts of 1957, 1960 and 1964, which were being tested in the south.[81] His first case before the Supreme Court was *United States v. Price*[82] in which the government argued that acts of racial terrorism should be made

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wealth of liberal self-congratulation that marked the sixties, the situation of African-Americans had not much improved. When Marshall approached Attorney General Robert Kennedy about a judicial appointment, Kennedy told him flatly that he could not have a seat on the appellate bench but offered him a district court judgeship. *Id.* at 223. When Marshall insisted on having a seat on the appellate court, the Kennedys knew there would be resistance to the appointment of an African-American judge to such a high seat because only one other African-American had ever sat on the appellate bench. *Id.* A deal was negotiated with Mississippi Senator James O. Eastland, who was vehemently opposed to the civil rights movement. *Id.* at 235–36. President Kennedy agreed to appoint Eastland's college roommate, Harold Cox, to a district judgeship in the South in return for Eastland's cooperation by allowing Marshall's appointment to go to a full committee vote. *Id.* at 236. Eastland is reported to have sent a message to President Kennedy through Robert Kennedy: "Tell your brother that if he will give me Harold Cox, I will give him the nigger." *Id.* *But see* Richard L. Revesz, *Thurgood Marshall's Struggle*, 68 N.Y.U. L. REV. 237, 259 n.136 (1993) (questioning accuracy of this account).

78. *See* Keyishian v. Board of Regents, 345 F.2d 236, 239 (2d Cir. 1965) (concluding that constitutional protections against discriminatory or arbitrary laws extend to pubic employees). Marshall's ruling was later upheld by the Supreme Court, with Justice Brennan authoring the opinion in Keyishian v. Board of Regents, 385 U.S. 589 (1967).

79. *See* MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 240 (1992) (indicating that Marshall wrote 98 majority opinions, 8 concurrences, and 12 dissents while he sat on Second Circuit Court).

80. *See id.* at 244–55 (discussing nomination and appointment of Marshall in 1965 to replace Archibald Cox as Solicitor General).

81. *See id.* at 245–47 (describing role of Solicitor General in arguing government's cases and noting that civil rights acts "were only as strong as the government's will to enforce them"). As Solicitor General, Marshall argued several cases on behalf of the government that eventually went before the Supreme Court. *See* Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (affirming validity of Title II of Civil Rights Act of 1964 under commerce power); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (finding Title II of Civil Rights Act of 1964 to be valid exercise of Congress's power under Commerce Clause).

82. 383 U.S. 787 (1966).

federal crimes.[83] Marshall served less than two years as Solicitor General before Johnson appointed him to the Supreme Court to replace Associate Justice Tom Clark.[84] The much-anticipated choice was met with general approval.[85] Nonetheless, the last leg of Marshall's path to the Court—his confirmation—was difficult.

At the hearings before the Senate Judiciary Committee, Marshall was remarkably frank. For example, he refused to agree with Senator Sam Ervin that the role of the Supreme Court was simply to give effect to the intentions of the Constitution's Framers.[86] Instead, Marshall stated his unwavering belief that the Constitution is a living document.[87] Furthermore, Marshall disagreed that both his and the Supreme Court's recent expansive reading of personal liberties amounted to injecting personal views into constitutional interpretation.[88] Additionally, in the area of criminal procedure,

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83. *See Price*, 383 U.S. at 788–89 (arguing that civil rights statutes made act of racial terrorism criminal conduct); *see also* Reitman v. Mulkey, 387 U.S. 369, 380–81 (1967) (striking California law authorizing housing discrimination); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (upholding congressional authority to ban literacy tests that had significant impact on minorities); United States v. Guest, 383 U.S. 745, 760 (1966) (upholding federal law criminalizing discrimination); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (concluding that voting district lines may not be drawn in discriminatory fashion); Evans v. Newton, 382 U.S. 296, 302 (1966) (finding that cities, like states, cannot enforce private discrimination).

84. *See* MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 263–76 (1992) (discussing nomination and appointment of Marshall to Supreme Court).

85. *See id.* at 264 (writing that Marshall's appointment was praised by Earl Warren, Tom C. Clark, and Ramsey Clark). A notable exception was the reaction of Representative John Rarick who said, "[T]he poor, persecuted, occupied southland, the heel of the judicial compulsion and forced to destroy their school systems this Fall is now compounded by the additional insult of having the agent who was used to foment the trouble now publicly lauded for his race-mixing." Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 HARV. BLACKLETTER J. 27, 31 (1989).

86. *See* Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 HARV. BLACKLETTER J. 27, 34 (1989) (agreeing generally with Ervin's assertion but insisting that Court's role required more because Constitution is living document).

87. *See id.* at 34 (responding that Constitution was "meant to be a living document").

88. *See id.* at 36 (confirming Marshall's sharp disagreement with Ervin's accusation). Marshall stated, "It is . . . understood that [Supreme Court Justices] shall not use their personal views, and indeed, they take an oath not to." *Id.* at n.91. Of course, the debate about whether a Justice injects his or her personal views into constitutional interpretation is an old one, and allegations that a given Justice has done so are launched from both sides of the political fence. The more relevant question is why that Justice injects one set of views and why a different Justice injects another. This question suggests the presence of cultural, psychological and economic forces that inevitably shape any jurist's reading of the

which occupied much of the hearings, Marshall disagreed that the nation's security was at that time endangered by crime[89] and refused to concede that the Fifth Amendment's proscription against the use of involuntary confessions applied only to impelled confessions.[90] Despite his refusal to make concessions in this area and in

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law. Such forces render meaningless the question of whether jurists "should" inject personal views into the Constitution. For example, during Senator Ervin's questioning of Marshall, the men discussed the Second Circuit case of Stovall v. Denno, 355 F.2d 731 (2d Cir. 1965), in which Marshall had participated. *Id.* at 36. Although vacated by an *en banc* court, Marshall's initial view in *Stovall* had been that a criminal suspect was entitled to have an attorney present for an in-custody eyewitness identification. *Id.* Ervin accused Marshall and the Supreme Court of finding a right in the Sixth Amendment that had not existed before. *See* Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 HARV. BLACKLETTER J. 27, 36 (1989) (criticizing decisions granting right to counsel during eyewitness identification that were later overturned); *see also* Gilbert v. California, 388 U.S. 263, 272 (1967) (declaring that in-court identifications may not be tainted by illegal lineup procedures); United States v. Wade, 388 U.S. 218, 237 (1967) (stating that post-indictment lineup is "critical stage" of prosecution, at which presence of attorney is required). Marshall responded, "We did not write anything into the Sixth Amendment. We applied the law of the land . . . that when a man reached . . . arraignment, he was entitled to a lawyer. He reached the stage, he did not have a lawyer. So any identification question . . . should be withheld until he gets a lawyer." Linda S. Greene, *The Confirmation of Thurgood Marshall to the United State's Supreme Court*, 6 HARV. BLACKLETTER J. 27, 36–37 (1989). The difference between Marshall and Ervin was not merely what they believed about the rights of criminal defendants but how they individually read the Constitution. It is customary but wrong to assume that because Ervin is relying on the specific words of the provision, his position is more correct and that Marshall is simply interjecting his own beliefs. Marshall's tendency to read the Constitution for broad, libertarian principles is formally equivalent to Ervin's tendency to read it for narrow, specific rules of law. If Marshall's belief is that the Constitution protects the individual from rampant governmental power, Ervin's position is that it protects innocent citizens from guilty citizens. In other words, the emotional thrust of Ervin's argument is not that the Constitution has been misinterpreted, but that criminals are being set free. *See id.* at 37 n.106 (recounting decisions of Court criticized by Ervin as examples of constitutional misinterpretation that allowed criminal to go free); *see also* Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters*, 61 U. CIN. L. REV. 29, 35 (1992) (arguing that insistence on separating what law "is" from what it ought to be is not self-evident but simply theory of interpreting law).

89. *See Nomination of Thurgood Marshall: Hearings Before the Committee on the Judiciary, United States Senate*, 90th Cong., 1st Sess. 8 (1967) (statement of Thurgood Marshall, nominee for Associate Justice of the Supreme Court of United States) (stating that even when security and welfare of all citizens is endangered, citizens cannot be required to sacrifice constitutional rights), *reprinted in* 7 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATION OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1972 (1975).

90. *See* Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 HARV. BLACKLETTER J. 27, 34–35 (1989) (presenting Marshall's argument that Fifth Amendment did not prohibit use of unrepresented defendants' voluntary statements and problem was determining whether statements are voluntary).

others, and in spite of considerable contention over the legitimacy of civil rights legislation,[91] Marshall's nomination was approved by an 11-5 vote.[92] After spirited debate, the Senate confirmed Marshall by a 69–11 vote.[93] Shortly thereafter, Marshall took his seat on the Court as the first African-American in the history of the country to assume so high a post and, in addition, solidified an already powerful liberal voting bloc.[94]

III. A THEORY BY ANY OTHER NAME, OR A WORD ABOUT PHILOSOPHY

Labeling in judicial philosophy is problematic because those who engage in this act so often conceal presumed standards. In spite of this difficulty, labeling is inescapable because one must label in order to engage in current intellectual discourse about the Court. However, labels must be useful and must tell us something about the Justice under consideration in order to understand that Justice. In this regard, a label like "results oriented,"[95] so often applied to Justices Brennan and Marshall, is of little use because the desire for strict adherence to the law or for deference to the legislative

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91. *See id.* at 37–39 (discussing dialogue between Marshall and Strom Thurmond concerning constitutional amendments serving as foundation for civil rights legislation). This lively debate was initiated by Senator Strom Thurmond, whose questioning of Marshall on the precepts and history of the post-Civil War amendments sounded something like a Jim Crow poll test. *See id.* at 48 (indicating that Thurmond's intent for questions to have that effect became apparent at full Senate debate on Marshall's nomination when he offered Marshall's inability to answer many questions as grounds for voting against appointment).

92. *See* MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991, at 27 (1997) (discussing Marshall's nomination and appointment to Supreme Court and noting that all negative votes were cast by Southern Democrats).

93. *Id.*

94. *See id.* at 28 (stating, "With Marshall, the Court had a solid bloc of five liberal justices" including Brennan, Warren, Douglas, and Fortas); *see also* Russell W. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962–1969)*, 20 SANTA CLARA L. REV. 773 *passim* (1980) (providing extensive overview of Supreme Court's voting patterns between 1961 and 1968, "a period in which liberal activists exercised almost complete control over the Court's decisions."); *e.g.* Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Green v. County Sch. Bd. 391 U.S. 430 (1968); Katz v. United States, 389 U.S. 347 (1967).

95. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 163 (1993) (describing criticism of Brennan's decisions as "results oriented").

enactment being reviewed is a desire for results.[96] A discussion about what results any Justice desires and why he or she desires it will be fruitful, as will a discussion about how that Justice works toward a desired end, whether it be an egalitarian society or strict adherence to the rule of law. However, an argument that a given Justice works toward desired ends while another merely applies the law with no regard to the outcome is absurd.

Instead, this Essay will focus on two questions that are basic to a determination and understanding of judicial theory and decision-making.[97] The first question asks what a Justice believes is the constitutionally approved role of the judiciary. This question requires an examination of the Justices' beliefs about the relationship between a legislature chosen by a majority of voters and an unelected judiciary. The second question asks where a Justice looks to find "the law." These distinct questions can be confused[98] and blur the vision, making two Justices, Marshall and Brennan, appear to be one. Upon separate examinations of these questions, it is apparent that Brennan and Marshall shared the same view with regard to the role of the judiciary, but sometimes diverged as to the source of the law.

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96. *See* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 66–67 (1978) (arguing that jurisprudence more concerned with legitimacy of system emphasizes procedural fairness over substantive rights). *But see* Texas v. Johnson, 491 U.S. 397, 412–14 (1989) (including opinion by Justice Kennedy that despite reverence for American flag, burning it is not unconstitutional). One might argue that because Justice Kennedy obviously reached a conclusion that was personally repugnant to him, his decision and others like it are not "results oriented." It is more likely that Justice Kennedy's conclusions in *Johnson* led to the only result that he could live with given his notions about the Constitution and the law. Thus, he was able to say, "The hard fact is that sometimes we must make decisions that we do not *like*. We make them because they are *right*, right in the sense that the law and the Constitution, *as we see them*, compel the result." *Id.* at 420–21 (emphasis added). Clearly, Kennedy sometimes had to choose between competing desired results, yet this did not make his thinking less "results oriented."

97. One might inquire as to what policies or values are reflected in a judge's decisions. This inquiry is expressed somewhat inadequately in politics and is answered with the attachment of phrases such as "liberal," "conservative," "leftist," or "rightist." This question need not be discussed at length because Marshall and Brennan were clearly left of center on virtually every issue.

98. *See* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 214–17 (1994) (generalizing that instrumentalist judges view judiciary as co-equal branch and rely primarily on text of Constitution as source of law and referring to Brennan and Marshall as instrumentalists).

A. *Role of the Judiciary*

Throughout the history of the Court, Justices have taken different positions regarding the proper role of the judiciary in the constitutional scheme. The fundamental question is whether judges may declare legislative acts void for failing to measure up to their reading of the Constitution or other extra-textual standards.

We need not linger on this question for the purposes of this Essay because Brennan and Marshall labored in the activist tradition.[99] Brennan and Marshall read the rule of *Marbury v. Madison*[100] expansively and believed that it was the judiciary's job to overturn invalid legislative acts.[101] In fact, both had a significant role in *Cooper v. Aaron*,[102] a decision that resoundingly affirmed *Marbury*. As NAACP counsel, Marshall argued the case, insisting that the Supreme Court had the authority to compel Arkansas to comply with the mandate of *Brown v. Board of Education*.[103]

B. *Sources of the Law*

Marshall and Brennan's activist jurisprudence unmistakably reflected the ideas of Legal Realism, the jurisprudential model that was predominant when they both attended law school. Roscoe Pound, the dean of the Harvard Law School for twenty years, is credited with the early development of this school of legal thought.[104] Legal Realism grew out of great social unrest which was pervasive in the early part of the twentieth century—unrest over labor conditions, rampant and irresponsible capitalism, and

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99. *See* Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71 *passim* (offering Justice Felix Frankfurter as paradigmatic example of judicial activism's antithesis, judicial restraint).

100. 5 U.S. (1 Cranch) 137 (1803).

101. *See* MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991, at 94–95 (1997) (discussing Supreme Court's responses to state statutes which violated equal protection clause and noting that "[a] vigorous jurisprudence of equal protection threatened the ability of legislatures to legislate at all.").

102. 358 U.S. 1 (1958).

103. *Cooper*, 358 U.S. at 3–4.

104. *See* N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302, 1307 (crediting Pound as being originator of Legal Realism).

government corruption.[105] In a 1906 speech before the American Bar Association, Pound criticized America's lawyers and justices for allowing society to flounder and for not responding to the public opinion fueling the unrest.[106] Pound argued that instead of adhering to a set of abstract rules and principles, the law should be adapted to social needs.[107] He proposed a pragmatic approach to the law by advocating the adjustment of principles to the human condition.[108]

For Marshall and Brennan, then, both constitutional and statutory law reflected broad goals and principles that should be fully enacted. Neither Justice was content to stop with an examination of the text of the Constitution or of a particular statute. Instead, Brennan explicitly rejected the positivist tradition in American law stating:

> The shift must be away from finespun technicalities and abstract rules. The vogue for positivism in jurisprudence—the obsession with what the law is . . . had to be replaced by a jurisprudence that recognizes human beings as the most distinctive and important feature of the universe which confronts our senses, and the function of law as the historic means of guaranteeing that pre-eminence.[109]

A positivist can rely on "positive law" or law found in the legal text to decide "hard cases."[110] A positivist may be an originalist,

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105. *See id.* at 1307 (elaborating on origins of legal philosophy of Pound that sought "judicial decisionmaking sensitive to currents of public opinion" and challenged methods of writing opinions and making decisions).

106. *See id.* (stating that Pound's discussion "laid the woes of the law" before legislators and judges)

107. *See id.* at 1308 (emphasizing sociological nature of Pound's position).

108. *See id.* at 1309–10 (outlining five characteristics of this new study of law: (1) it looked more to how law actually works than to abstract principles; (2) it viewed law as institution that could be improved; (3) it stressed purpose of law over its ability to sanction; (4) it viewed precepts more as guides than inflexible mandates; and (5) it reflected diversity of philosophical ideas).

109. William J. Brennan, Jr., Address at the Annual Survey of American Law at New York University Law School (Apr. 15, 1982), *in* Honorable Daniel J. O'Hern, *Some Reflections on the Roots of the Differing Judicial Philosophies of William J. Brennan, Jr. and Joseph Weintraub*, 46 RUTGERS L. REV. 1049, 1058 (1994); *see also* Francis P. McQuade & Alexander T. Kardos, *Mr. Justice Brennan and His Legal Philosophy*, 33 NOTRE DAME L. REV. 321, 348 (1952) (quoting Brennan as saying: "The law is not an end to itself, nor does it provide ends; it is pre-eminently a means to serve what we think is right").

110. *See* John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 7 (1990) (defining "hard cases" as those that have not been settled by precedent or applicable social rule and equating positivism with classical view of natural law).

who looks to the intent of the Framers to determine the law, or a textualist, who looks only to the plain text and history of the Constitution.[111] In contrast, Brennan and Marshall went beyond these texts to consider their purposes for the present as well as to determine their place in the past. As Legal Realist Karl Llewellyn wrote, speaking of statutory interpretation:

> If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense. . . . [I]ncreasingly as a statute gains in age its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here, the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be put into it, but rather for the sense which can be quarried out of it in the light of the new situation.[112]

To contend that both Brennan and Marshall recognized the interpretation and application of the law as purposeful exercises, however, is not to suggest that they did not differ in their approach to the task. Subtle, yet important distinctions can be made between the jurisprudence of the two Justices but to understand these distinctions, one must consider the raw materials Marshall and Brennan brought to their interpretations of the law and the sources they used to decide "hard cases." In other words, one must examine Brennan's confessed interest in what he called "natural law" theory as well as Marshall's training and work as a "social engineer."

IV. BRENNAN AND MARSHALL READING THE LAW

A. *Brennan and the Natural Law*

Natural law is one of the most written about and least carefully defined terms in legal scholarship. In its purest form, it originated in the writings of Aristotle, was adopted up by St. Thomas Aquinas, and emerged in the writings of such thinkers as Locke,[113] Hob-

111. *See* Bowers v. Hardwick, 478 U.S. 186, 189–91 (1986) (finding no right to homosexual conduct in text or history of Constitution); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (finding no right to education in text or history of Constitution).

112. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

113. JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE (Robert Horwitz et al., eds., 1990).

bes,[114] and Rousseau.[115] In addition, natural law undoubtedly influenced the construction of the United States Declaration of Independence.[116] Natural law has two aspects: a moral prescription for the way one lives his or her life and a set of rights to which each person is entitled by virtue of being a human.[117] The latter aspect inspired the Declaration of Independence and is implicated in Justice Brennan's jurisprudence.[118]

There are competing ideas about how far natural rights jurisprudence is, or should be, from positivism, and about what rights natural rights theory will recognize.[119] For example, some theorists argue that any consideration of natural rights must be limited to those contemplated and adopted by the Framers. This argument proposes that in contracting with the government, "the people" ex-

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114. THOMAS HOBBES, LEVIATHAN (C.B. Macpherson ed., 1968) (1651).

115. JEAN-JACQUES ROUSSEAU, LE CONTRACT SOCIAL (1792), *translated in* ROUSSEAU, POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU (F. Watkins ed. & trans., 1962).

116. *See* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 24–79 (1942) (expounding on influence of natural law/natural rights theory on Declaration of Independence, including influence of historic thinkers such as Locke, Rousseau, and Aquinas).

117. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS *passim* (1980) (discussing natural law versus natural rights theory); JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE 98–101 (Robert Horwitz et al., eds., 1990) (distinguishing between natural law in which individuals discover on their own what law of nature is, and natural rights, or "the fact that we have free use of something"); *see also* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 108 (1995) (highlighting distinctions between natural law and natural rights theory). Barnett correctly notes that natural law and natural rights are two separate studies, but because "natural law" is so often used as a catchphrase for one or both, it appears that natural rights is a subset or "aspect" of natural law theory. *Id.*; *See* R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1065–66 (1995) (tracing natural law/natural rights split to diverging lines of natural law theory: liberal line traced through Enlightenment philosophy emphasizing libertarian principles, and conservative line traced through "classic" or Christian ideology emphasizing more conservative values). Another scholar includes the natural rights strand as a precept of Aristotelian theory. *See* Alan Gerwith, *The Ontological Basis of Natural Law: A Critique and an Alternative*, 29 AM. J. JURIS. 95, 95–96 (1984) (identifying three features of Aristotelian-Thomist theory: belief that natural law is universal because it sets justifiable prescriptions for human conduct, that it requires protection of human goods or interests that are based on nature of human beings, that natural law is based on reason).

118. *See supra* note 116.

119. In the nineteenth century, for example, a list of natural rights would surely have included the right to contract. *See* Richard E. Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 390–91 (1995) (stating that *Lochner*-era law assumed property and contract rights were supported by natural law).

plicitly contracted for the government to protect specific rights.[120] Under this scheme, the judiciary has little or no business deciding what those rights are or whether "new" rights exist because the judiciary is not part of the contract. Advocates of this version of natural law are current Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter.[121]

However, any definition consistent with the origins of natural law ideology—an ideology that recognizes rights that existed independent from and *prior* to government—must acknowledge a resort to law that is "extra-governmental."[122] Thus, a more

120. *See* Raoul Berger, *Natural Law and Judicial Review: Reflections of an Earthbound Lawyer*, 61 U. CIN. L. REV. 5, 25 (1992) (offering that Fifth Amendment specifically recognizes rights to life, liberty, and property); *see also* R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1067 (1995) (pointing to specific rights named in First Amendment, Equal Protection Clause, and Due Process Clause); Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters*, 61 U. CIN. L. REV. 29, 29 (1992) (noting that under natural law theory, relevant moral principles should be derived from critical interpretations of Constitution and tradition).

121. *See* R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1080 (1995) (claiming that Justices O'Connor, Kennedy, and Souter employ natural law approach).

122. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA (describing human law as proceeding from natural law), *excerpted in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS 46 (Paul E. Sigmund ed. & trans. W.W. Norton & Co. 1988) (1273); *see also* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 108 n.42 (1995) (positing that natural rights are pregovernmental). For example, whereas Kelso believes O'Connor derives natural law principles only from the Constitution, I believe that like Brennan, O'Connor is willing to venture beyond that document to some "higher law" when the Constitution does not define its terms. Kelso's quote from O'Connor illustrates this assertion:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Id. (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852 (1992)). That other Justices have developed decidedly different definitions of liberty suggests that Justice O'Connor has resorted to some other source for her definition. Interestingly, O'Connor's definition is not unlike Brennan's, which included "freedom from bodily restraint or inspection; freedom of choice in basic decisions of life; and autonomous control over the development and expression of one's intellect and personality." Memo from William J. Brennan, Jr., to Justice Douglas (Dec. 30, 1971), *in* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 224 (1993).

appropriate definition of natural rights is provided by Professor Randy Barnett:

> Natural rights are the set of concepts that define the moral space within which persons must be free to make their own decisions and live their own lives; they entail enforceable claims on other persons; they are natural because their necessity depends upon the nature of persons and the social and physical world in which persons reside.[123]

According to Barnett, natural rights theory directs us to the question of what moral space or jurisdiction individuals need in order to pursue the "good life."[124]

To critics, perhaps the most disturbing aspect of natural law/natural rights theory is the notion that an immoral law, a law in violation of natural law, is no law at all.[125] The possibility that natural-law Justices might ignore the positive law on the basis of their perceptions that the positive law is unjust arouses criticism from natural-law opponents. These opponents argue that a determination of what comports with natural law rests on judgments that are hopelessly subjective.[126]

Justice Brennan admitted that some subjectivity in the interpretation of the law was unavoidable and necessary.[127] Indeed, Bren-

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123. Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 106 (1995); *see also* Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 421–25 (1991) (arguing that Framers contemplated unenumerated natural rights not limited to Constitution).

124. Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 108 (1995) (explaining that natural law assesses propriety of individual conduct).

125. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA (concluding that law which differs from natural law is corruption of law), *excerpted in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS 53 (Paul E. Sigmund ed. & trans., W.W. Norton & Co. 1988) (1273). This idea was taken up by Martin Luther King, Jr., as the rally cry of the passive resistance movement against racial discrimination. *See* Martin Luther King, Jr., *Letter from Birmingham Jail* (insisting that "one has a moral responsibility to disobey unjust laws"), *reprinted in* 26 U.C. DAVIS L. REV. 835, 840 (1993). King defined an unjust law as "any law that degrades human personality." *Id.*; *cf.* Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring) (contending that death penalty is unconstitutional because it is degrading to human dignity).

126. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959) (advocating importance of maintaining defined, objective standards).

127. *See infra* notes 133–49 and accompanying text.

nan's approach, along with his willingness to resort to notions of a "higher" societal good, reflects an adherence to natural law principles. Brennan once said that when the community's interpretation of a constitutional provision departs from the provision's "essential meaning," a Justice is bound by a "larger duty" to the community to point out the discrepancy.[128] Brennan's response to a higher calling and a more transcendent good was reflected in his jurisprudence. For example, in *Furman v. Georgia*,[129] both Brennan and Marshall argued that national consensus was (or, in Marshall's view, would be if the public were adequately informed) against the death penalty.[130] When confronted with evidence to the contrary, Brennan asserted in *Gregg v. Georgia*[131] that he would continue to oppose the death penalty on the principle that the punishment degraded human dignity, a proposition which was largely derived from natural rights theory.[132]

Brennan understood that natural law was not mere reliance on a given Justice's personal view and thus supported the widely accepted position that a judge cannot solely rely on his or her personal views when making judicial decisions.[133] Unlike Marshall, who showed little sign of utilizing any version of natural law interpretation or reliance on transcendent values,[134] Brennan explicitly and approvingly discussed natural law in his opinions.[135] In addi-

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128. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986). This idea presumes that the judicial branch is somehow superior to the people in arriving at a correct understanding of the Constitution.

129. 408 U.S. 238 (1972).

130. *See Furman*, 408 U.S. at 295 (Brennan, J., concurring) (asserting that death penalty has been almost totally rejected by society). Marshall shared Brennan's view of social consensus against the death penalty. *See id* at 360–61 (Marshall, J., concurring) (deeming death penalty unacceptable to United States citizens, and arguing that punishment is cruel and unusual if *informed* people find it shocking, unjust, and unacceptable).

131. 428 U.S. 153 (1976).

132. *See Gregg*, 428 U.S. at 230–31 (opposing death penalty as violative of human dignity).

133. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433, 434–35 (1986) (commenting that Justices are not selected to make law based on their personal beliefs).

134. Of course, we know Marshall believed in the natural rights upheld by the Constitution and Declaration of Independence. Here, I am merely suggesting that Marshall did not stray from an admittedly expansive reading of the Constitution, supported by his notion of national consensus, in upholding those rights.

135. *See* Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death As a Punishment*, 22 FLA. ST. U. L. REV. 591, 663 (1995)

tion to reading St. Thomas Aquinas's *Summa Theologica* in preparation for his now famous concurring opinion in *School District of Abington Township v. Schempp*,[136] Brennan spoke about principles derived from the natural law tradition.[137] Brennan set forth his views on judicial interpretation in a revealing speech made near the end of his career in which he advocated combining "reason" and "passion" to arrive at correct decisions.[138] Brennan defined "passion" as "reasoned reflection" on the humanity present in a given fact situation, and he stated that "[o]nly by remaining open to the entreaties of reason and passion, of logic and of experience, can a judge come to understand the complex human meaning of a rich term such as 'liberty,' and only with such understanding can courts fulfill their constitutional responsibility to protect that value."[139] This method of deliberation mirrors that described by writers, such as Aquinas and Locke, of an individual arriving at a determination of "the law."[140] Brennan also argued that courts do not, contrary to the view of positivists, "declare" law; rather, they derive it from "legal principles."[141] For Brennan, perhaps more

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(stating Brennan's death penalty jurisprudence was "openly aspirational," while Marshall worked more in instrumentalist tradition); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 395–96 (1985) (suggesting that Marshall's death penalty jurisprudence saw moral rights as created by convention rather than as natural, "real" rights).

136. 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

137. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN AND THE DECISIONS THAT TRANSFORMED AMERICA 184 (1993) (referencing Brennan's deference to theory of Aquinas and to view that Constitution was "a living, breathing document").

138. *See id.* (proposing, "As Aquinas had written that knowledge arises from reason, it was reason and fairness, not precedent and law, that would dictate Brennan's jurisprudence").

139. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 11 (1988).

140. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA (describing process of determining law through "practical reason"), *excerpted in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS 48–49 (Paul E. Sigmund ed. & trans., W.W. Norton & Co. 1988) (1273); JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE 199 (Robert Horwitz et al., eds., 1990) (contending that individuals must deduce law of nature from natural principles because law of nature cannot be derived by consensus); *see also* Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death As a Punishment*, 22 FLA. ST. U. L. REV. 591, 662 (1995) (stating, "The human faculty of reason plays a central role in natural law philosophy").

141. *See* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 15 (1988) (observing that legal principles were placed in form of written Constitution to ensure they were heeded).

consciously than for Marshall, those principles embodied a kind of morality.[142] Like natural law theorists, Brennan failed to see a sharp distinction between positive law and morality.[143] Moreover, Brennan was willing to move beyond the standard list of natural rights provided in the Declaration of Independence in order to define a principle by which such rights can be identified.[144] Brennan's decisions, as one biographer has noted, "ranged through the ages and the centuries in search of truth."[145]

In addition, Brennan explicitly embraced St. Thomas Aquinas's ideology, as he understood it. In a 1985 speech, Brennan noted a jurisprudential "return to the philosophy of St. Thomas Aquinas."[146] In Aquinas, Brennan saw a mandate to see "things whole" and to look at the entire human situation when determining the law.[147] This is somewhat of an extrapolation from Aquinas, who theorized about making determinations of the law on an individual, reflective basis.[148] Nonetheless, Brennan's speech implicitly acknowledges his opinion that a judge must consider the good of humanity in interpreting the law.[149] This concern with the common good in interpreting the law reflects Brennan's consideration of natural rights principles.

Although Marshall shared Brennan's liberal goals for society, he did not agree with the notion that such goals could be achieved

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142. *See* Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death As a Punishment*, 22 FLA. ST. U. L. REV. 591, 652 (1995) (stating that in death penalty cases Brennan believed prohibition against cruel and unusual punishment embodied moral standard but that intrinsic morality of Amendments controlled rather than strict percepts of conventional morality theory).

143. *See* Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2394 (1992) (proposing that moral theory is natural law theory and that moral principles are objectively valid and discoverable by reason).

144. *See Furman*, 408 U.S. at 305 (Brennan, J., concurring) (viewing death penalty as being unconstitutional because it degrades human dignity).

145. KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 184 (1993).

146. William J. Brennan, Jr., *How Goes the Supreme Court?*, 36 MERCER L. REV. 781, 787–88 (1985).

147. *Id.* at 788–89.

148. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA (relating determination of human law to individual reason applied to natural law principles), *excerpted in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS 55 (Paul E. Sigmund ed. & trans., W.W. Norton & Co. 1988) (1273).

149. *See id.* (describing unjust law as one that is contrary to human good or one that is contrary to divine will).

through an appeal to what is morally or absolutely right. Marshall emphatically denied going beyond the legal text to make law.[150] Indeed, if one accepts the argument that there is no "standard" reading of the Constitution, Marshall can be taken at his word. The jurisprudence of Thurgood Marshall reflects a remarkable confidence that the Constitution is broad enough to cure the country's ills if it were to be fully enacted by the Supreme Court.[151] Marshall's view that the Constitution was "defective from the start" does not contradict this notion.[152] Marshall saw the Constitution as evolving, having been improved by amendment, a civil war, and social change.[153] To Marshall, the Constitution was a document which, if kept to its word, could bring about further change.[154]

While Marshall never explicitly discussed natural law theory, he appeared to dismiss its implications on at least three occasions, in each case writing apart from Brennan.[155] By separating himself from natural law theory, Marshall exhibited a distrust of morality-based decision-making, whether utilized to arrive at conservative or liberal results. For example, writing a separate concurrence

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150. *See* Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 HARV. BLACKLETTER J. 27, 34 (1989) (responding to Senator Ervin during nomination hearings that he would consult "the law, precedents and facts to decide the case."). Marshall apparently did not conceive of any "human rights" beyond those explicit or implicit in the Constitution. He said, "The goal of a true democracy . . . is that any baby born in these United States . . . is, merely by being born and drawing his first breath *in this democracy*, endowed with the exact same rights as a child born to a Rockefeller." Thurgood Marshall, Address at the Annual Circuit Judicial Conference (Sept. 5, 1986), *in* 115 F.R.D. 349, 354 (1987) (emphasis added).

151. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 5 (1994) (relating contents of speech by Marshall demonstrating his faith in ability of Constitution to evoke change, stating that "[y]ou'll never find another Constitution like this one.").

152. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (relaying Marshall's view that Constitution was being cited for propositions not intended by Framers). In one case Marshall sternly speaks of the Constitution "as interpreted by this Court" as permitting two hundred years of discrimination against African-Americans. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part).

153. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (relating Marshall's opinion that Constitution's meaning is not 'fixed').

154. *See* James O. Freedman, *Thurgood Marshall: Man of Character*, 72 WASH. U. L.Q. 1487, 1489 (1994) (stating Marshall was idealist who believed in promise of Declaration of Independence, in rule of law, and in inability of government to improve social conditions).

155. *See infra* notes 156–67 and accompanying text.

from Brennan that Georgia's death penalty laws were unconstitutional, Marshall argued in *Furman v. Georgia*[156] that "at times a cry is heard that morality requires vengeance to evidence a society's abhorrence of [a criminal] act. But the Eighth Amendment *is our insulation from our baser selves.*"[157] Clearly, Marshall saw the danger of relying on one version or another of "morality" or "truth" to decide the law.[158] Similarly, in *Colgrove v. Battin*,[159] Marshall rejected the majority's holding, in a decision written by Brennan, that the demands of the Seventh Amendment's right to a jury trial are met when a federal-court jury in a civil proceeding is comprised of only six members.[160] Marshall argued strenuously that this decision was based on "nothing more solid than the intuitive, unexplained sense of five Justices that a certain line is 'right' or 'just.'"[161] When constitutional rights are based on such "intuition," he asserted, those rights are certain to erode.[162] The insistence that rules must be made and kept and that fact-specific distinctions would only dilute principles designed to protect criminal defendants is a recurring theme in Marshall's jurisprudence.[163]

Marshall launched a similar attack against the majority's reasoning in *City of Cleburne v. Cleburne Living Center*[164] in which he challenged the majority's assertion that the mentally retarded were

156. 408 U.S. 238 (1973).

157. *Furman*, 408 U.S. at 344–45 (Marshall, J., concurring).

158. *Id.* Interestingly, Marshall also argued in *Furman* that social consensus supports the end of the death penalty. *Id.* This is not as contradictory as it may seem considering that Marshall spoke of an adequately informed consensus. *See infra* notes 168–82 and accompanying text.

159. 413 U.S. 149 (1973).

160. *Colgrove*, 413 U.S. at 159–60.

161. *Id.* at 181.

162. *Id.* Marshall allied himself with the absolutist jurisprudence of Hugo Black, arguing that constitutional rights that are subject to "pressures of the moment" are not really protected at all. *Id.* at 181–82. As with Marshall, Brennan occasionally clashed with Black over Brennan's willingness to balance and negotiate rights which Black deemed to be absolute. *See* Thomas C. Marks, Jr., *Three Ring Circus Six Years Later*, 25 STETSON L. REV. 81, 122 n.5 (1995) (discussing Brennan's opposition to Black's absolutism with respect to First Amendment protections).

163. *See* Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369 *passim* (1994) (discussing Marshall's recurring preference for clear-cut rules to override effects of fallible fact-finding process).

164. 473 U.S. 432 (1985).

not a suspect classification.[165] Marshall denied the implication behind the Court's rigid three-tiered classification system for equal protection jurisprudence that absolute rights and wrongs could be fixed at one point in history for all generations. In fact, Marshall argued that the Court should heed society's evolving standards of right and wrong rather than rely on moral absolutes.[166]

In this opinion, Marshall demonstrates not only a distrust of morality-based judgments, but he rejects a major implication of natural law theory that the justness of a law is to be determined by an individual upon reasoned reflection.[167] Instead, Marshall believed that an evolving Constitution could be properly interpreted by a well-informed consensus. That view stemmed from his training in and lifelong adherence to the social engineering jurisprudence of Charles Hamilton Houston.

B. *Marshall and Legal Realism/Social Engineering*

The term most frequently associated with Thurgood Marshall's career as a lawyer and as a judge is "social engineering."[168] Alone, this term does not tell us how Marshall derived his view of the law. However, the "social engineering" philosophy that Marshall was schooled in as a law student is a version of Legal Realism, which identifies emerging social consensus as a source of new constitutional interpretation and, therefore, new law.[169]

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165. *Cleburne*, 473 U.S. at 461–64 (Marshall, J., concurring in part and dissenting in part).

166. *See id.* at 466 (arguing that constitutional principles evolve over time regardless of moral debates about absolute wrongs); *see also* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 14 (1994) (quoting Marshall as arguing during early segregation case: "What's at stake here is more than the rights of my clients; it's the moral commitment *stated in our country's creed*") (emphasis added).

167. *See* JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE 125 (Robert Horwitz et al., eds., 1990) (considering natural law notion that "[m]an, should he make use of his reason and native faculties with which he is provided by nature, can arrive at knowledge of this law without a teacher to instruct him; without a tutor to teach him his duty").

168. *See* James O. Freedman, *Thurgood Marshall: Man of Character*, 72 WASH. U. L.Q. 1487, 1491 (1994) (crediting Charles Hamilton Howard with teaching Marshall that lawyers are social engineers); Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2119 (1992) (recognizing Houston's influence in Marshall's idea of law as means of social engineering).

169. *But see* Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 751–52 (1992) (noting that Marshall was unconcerned with questions

Legal realism supplied the theoretical underpinnings for the jurisprudence of Charles Hamilton Houston, vice-dean of Howard Law School and Thurgood Marshall's teacher and mentor. Houston believed his mission at Howard was to teach young African-Americans to use the law to battle discrimination.[170] To accomplish this goal, Houston proposed to teach his students: (1) to anticipate and guide group advancement; (2) to recognize that a written Constitution provides ample material for social experimentation; (3) to use the law as a tool for minorities; and (4) to win cases and influence public opinion on broad principles.[171]

Marshall learned these lessons well. Perhaps more than Brennan, Marshall embodied Pound's idea that the goal of law was justice and that one should look to the results of a law to see if justice had been done.[172] As Mark Tushnet indicated, having combined his experience as a trial lawyer with his adherence to legal realism, Marshall believed that once you found a solution to a problem you

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of constitutional theory). Nonetheless, Marshall responded to some theoretical stances of his associate Justices. *See supra* notes 155–67 and accompanying text.

170. *See* Genna Rae McNeil, *Charles Hamilton Houston: 1895–1950*, 32 How. L.J. 469, 472 (1989) (articulating that Houston taught students to use law as instrument for minorities "to adopt direct action to achieve [their] place in the community and nation").

171. *See id.* (discussing Houston's view of lawyers as social engineers). Houston articulated a set of principles that appear to have been derived from natural law: (1) the law is only supreme insofar as it covers the most forgotten individuals; (2) human beings are equally entitled to the guarantees of the Declaration of Independence; and (3) a good system of government guarantees freedom and Justice for all its citizens while guaranteeing more and better opportunities for future generations. *See id.* at 475 (discussing moral jurisprudential principles).

172. *See* Roger Goldman & David Gallen, Thurgood Marshall: Justice For All 71 (1992) (discussing Marshall's predisposition to doctrine of Pound which emphasized "law-making and also the interpretation of legal rules, to take more account . . . of the social facts upon which the law must proceed and to which it is to be applied"); Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 613–15 (1908) (criticizing development of law because "legislation has not expressed social standards adequately," and giving examples of "the failure of our case law to rise to social and legal emergencies"). *But see* Roscoe Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 17–32 (1943) (illustrating Pound's willingness to consider competing interest groups and make adjustments in contrast to Marshall). In comparison to Marshall, Brennan shared Pound's pragmatism. *See* Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 La. L. Rev. 623, 629 (1991) (stating that Brennan advocated pragmatic source of analysis that evolved from jurisprudence of Pound).

had also found the law.[173] Like Houston, Marshall stressed the importance of community and public opinion as sources for legal change. For instance, in *City of Cleburne v. Cleburne Living Center*,[174] Marshall argued eloquently that the Supreme Court must be responsive to the people's new demands for justice as reflected in legislation passed by their elected representatives, stating:

> Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. . . . When that occurs, courts should look to such change as the source of guidance on evolving principles of equality.[175]

Merely observing that Marshall looked to consensus in interpreting the law states the matter too simply. As Marshall would argue in his separate concurrence in *Furman v. Georgia*[176] and in his dissent in *Gregg v. Georgia*,[177] social engineering requires an educated and informed consensus.[178] Thus, part of the work of an attorney or Supreme Court Justice, trained as a social engineer, was to educate the citizenry.[179] That education would include propounding a Constitution that supports broad social changes.

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173. *See* Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2119 (1992) (discussing influence of Marshall's experience as trial lawyer on his later jurisprudence).

174. 473 U.S. 432 (1985).

175. *City of Cleburne*, 473 U.S. at 466 (Marshall, J., concurring in part and dissenting in part).

176. 408 U.S. 238 (1972).

177. 428 U.S. 153 (1976).

178. *See Gregg*, 428 U.S. at 232 (reiterating view from concurring opinion in *Furman* that well-educated public would reject death penalty so it is unconstitutional); *Furman*, 408 U.S. at 360 (emphasizing value of consensus among informed people).

179. Like Marshall, Brennan recognized that judges should invoke community interpretations of the law. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986) (propounding that judges should look to community's interpretation when construing text of Constitution). As Marshall's and Brennan's comments regarding public sentiment towards the death penalty indicate, however, Marshall was more committed to the notion that the electorate should be actively informed. *Compare Gregg*, 428 U.S. at 231 (Brennan, J., dissenting) (denouncing death penalty as degrading to human dignity and, therefore, unconstitutional notwithstanding public sentiment in favor of it), *with id.* at 232 (Marshall, J., dissenting) (asserting that public opinion will differ greatly depending on public awareness of effects and consequences of death penalty).

Educating the public would require focusing on the humanity underlying the law and setting out in articulate and sometimes impassioned language the context and consequences of a judicial decision. More than any other Supreme Court Justice, Marshall understood this dialectic—the simultaneous turning to the consensus of society to find the law and educating society so that it reaches an informed consensus. He relied on many tools to negotiate this dialectic; perhaps the most famous is his use of scientific or sociological data.[180] Equally important and magnificent were the personal, human details he included in his decisions and dissents.[181] Marshall's stories, said Brennan, caused his fellow Justices to "confront walks of life we had never known."[182]

C. *From Theory to Practice: Judicial Pragmatism v. Standing on Principle*

The search for a Justice's jurisprudential philosophy is complicated by the unavoidable facts of high-court decision making. Opinions do not and *cannot* spring solely from the mind of their author. Rather, they are collaborative efforts that attempt to reflect a consensus and to avoid matters on which there is no consensus. The extent to which a Justice is able to work within this system has traditionally been some measure of his or her success on the Court. The best way to describe how Brennan and Marshall individually fared in this process is to look at what each had to say about the other. Hinting at Brennan's ability to establish a consensus, Marshall once noted that no one could persuade as well as

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180. *See City of Cleburne*, 473 U.S. at 461–63 (Marshall, J., concurring in part and dissenting in part) (relying on social data to demonstrate historical discrimination against mentally retarded); *Furman*, 408 U.S. at 360 *passim* (drawing on vast array of sociological study to argue death penalty is unconstitutional).

181. *See* Flagg Bros., Inc. v. Lefkowitz, 436 U.S. 149, 166 (1978) (Marshall, J., dissenting); Sampson v. Murray, 415 U.S. 61, 101 (1974) (Marshall, J., dissenting) (rejecting majority's notion that temporary loss of income is never irreparable injury considering difficulties of average persons in providing themselves "with the essentials of life"); United States v. Kras, 409 U.S. 434, 460 (1973) (chastising Court for averring that $2 per week was not great deal of money to poor family).

182. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 31 (1991), *reprinted in* ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 20 (1992).

Brennan.[183] Perhaps thinking of Marshall's refusal to join a majority which he did not absolutely agree with, Brennan said of Marshall, "He was a stickler for the honest truth."[184]

Brennan mastered consensus-building. Having learned early on the consequences of taking extreme positions in his decisions[185] and failing to take into consideration the views of his more conservative brethren,[186] Brennan developed a skill that was to characterize his jurisprudence until the Rehnquist Court: the skill of mediating. As Eisler notes, Brennan's career on the Court was not to be "a profile in courage," nor would he be known as a great dissenter.[187] Instead, Brennan was an accommodationist.[188] In his first years on the Court, this ability would put Brennan in the position of having to accommodate two groups: the absolutists and the conservativists. Justices Black and Douglas were absolutists who believed that the rights enumerated in the Bill of Rights must be absolutely guaranteed with no weighing of interests.[189] Standing in opposition were the more conservative Justices, Tom Clark and Potter Stewart. In many of Brennan's most famous decisions, he found ways to accommodate these competing interests.[190] For this reason, Brennan has been called a judicial pragmatist by some ob-

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183. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 237 (1995) (referring to Brennan's persuasive ability and remarking that Brennan could sit down and talk through issues to gather consensus).

184. *Id.* at 278.

185. *See* Jencks v. United States, 353 U.S. 657, 668 (1957) (holding that in federal criminal proceeding government must turn over relevant documents to *accused* prior to review by judge for determination of admissibility). Not only did Brennan's decision in *Jencks* create great public furor, resulting in the passage of the Jencks Act to overturn the decision, but it also alienated the most conservative members of the Court from Brennan. KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 132–38 (1993).

186. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 137 (1993) (revealing Brennan's regret over failure to address concerns of other Justices in *Jencks*).

187. *See id.* at 13 (positing that Brennan's secret to success on Court was that he was "accommodationist").

188. *Id.*

189. *See id.* at 120–21 (stating that Black and Douglas believed in absolute guarantee of constitutional rights).

190. *See infra* notes 191–99 and accompanying text. *But see* Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841, 849–50 (1980) (noting that when Court had solid liberal voting bloc, Brennan was not as inclined to compromise).

servers.[191] For example, in the voting apportionment case of *Baker v. Carr*,[192] Brennan wrote a decision giving state citizens access to federal courts to complain of unfair apportionment, rather than establishing the one-man-one-vote rule, in order to meet Justice Stewart's objections.[193] As Eisler points out, Brennan was able to build on that success and eventually pronounce the rule in *Baker*.[194] Similarly, in *New York Times v. Sullivan*,[195] Brennan was able to find a free-speech formula in the form of the "actual malice test" for libel cases that was palatable to a majority of the Justices.[196] Furthermore, in order to appease Justice Stewart, Brennan dropped a portion of his opinion in *Irvin v. Dowd*[197] that would have allowed federal courts to release state prisoners held in violation of their federal rights regardless of whether those prisoners had exhausted state-court remedies, and simply held that the petitioner had actually exhausted all available remedies.[198] While this decision did not eliminate the exhaustion rule as Brennan had wanted, it resolved the case in favor of the petitioner without strengthening the rule.[199]

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191. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 118 (1995) (observing that as pragmatist Brennan knew importance of winning five votes).

192. 369 U.S. 186 (1962).

193. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 175 (1995) (detailing that Black wanted to write *Baker* decision, but Chief Justice Warren assigned opinion to Brennan believing newer Justice would write decision that would win majority, while absolutist Black would not). Brennan, though, was not always averse to Black's position. In Grunewald v. United States, 353 U.S. 391 (1957), a case "that bolstered Fifth Amendment protection against self-incrimination," Justice Harlan insisted on writing the opinion so as to limit the decision to the facts before the Court. *Id.* Brennan concurred only in the holding, agreeing with Black that the decision should be expanded. *Id.* at 123–24.

194. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 175 (1993) (indicating that Brennan "announced the dramatic decision of the Court" that forever changed nature of politics in America). *But see* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5–6 (1992) (overruling deliberate by-pass standard pronounced in Fay v. Noia, 372 U.S. 391 (1963)).

195. 376 U.S. 254 (1964).

196. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 230–31 (1995) (explaining "actual malice test" articulated by Brennan which drew "unanimous decision in favor of the *Times*," but which drew some criticism from Justices Black, Douglas, and Goldberg).

197. 359 U.S. 394 (1959).

198. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 159–60 (1995) (discussing formation of Brennan's opinion in *Dowd*).

199. *See id.* at 161 (noting that exhaustion rule was not strongly affirmed by Court's decision).

Scholars have not always looked favorably on Brennan's gift for conciliation. One commentator has suggested that when the Court "seemed hopelessly split" on an issue, Brennan wrote opinions based on "narrow, sometimes technical grounds" in order to secure a majority vote.[200] Brennan has also been accused of being reluctant to take a stand on the issue of liberty under the Due Process Clause.[201] Additionally, liberal critics have charged that Brennan's tendency to balance interests rather than adopt Justice Black's absolutist views has allowed both abuses and curtailment of First Amendment freedoms.[202] Furthermore, because of Brennan's ability to see all sides of an issue, some have complained that his decisions are unclear.[203] "He made mistakes," wrote biographer Hunter R. Clark, "and in his haste to conciliate, forge consensus, and keep from burning bridges he may have minimized unpleasant realities."[204]

Marshall sometimes criticized Brennan's failure to squarely decide the law. Marshall did not possess Brennan's skills at conciliation. Although he became the fourth member of one of the strongest liberal voting blocs in the Court's history[205] and allied himself early and firmly with Brennan, he never developed—or appeared to want to develop—a flair for compromise.[206] If Brennan's first term on the Court taught him the danger of going too far in propounding extremist views, Marshall's first years taught him the danger of compromise. In Marshall's early years on the Court,

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200. Stephen J. Friedman, *William Brennan, Jr., in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1978, at 2849, 2852 (Leon Friedman & Frank L. Israel eds., 1980).

201. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 221–23 (1995) (revealing that Brennan urged co-Justices not to directly address certain issues of liberty under Due Process Clause because such issues would be imminently addressed by Civil Rights Act of 1964, which would soon be passed).

202. *See id.* at 280 (complaining that Brennan's rejection of Black's absolutism allowed First Amendment freedoms to be restricted and abused).

203. *See* Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841, 883 (1980) (finding that Brennan's ability to envision both parties' arguments sometimes led to his developing obscure guidelines).

204. HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 282 (1995).

205. *See* Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841, 872 (1980) (discussing liberal voting bloc of Warren Court). The other members of this bloc were Justices Fortas, Warren, and Brennan. *Id.*

206. *Cf.* A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55, 65 (1991) (praising Justice Marshall for consistently challenging seemingly immutable injustices in society).

he participated in some of the cases that set limits on the Fourth Amendment's mandate against warrantless searches.[207] In the 1972 case of *Adams v. Williams*,[208] Marshall expressed regret for joining those decisions and revealed some of the rationale behind his subsequent absolutist jurisprudence in the Fourth Amendment arena:

> While I took the position then [in *Terry v. Ohio*] that we were not watering down rights, but were hesitantly and cautiously striking a necessary balance between the rights of American citizens to be free from government intrusion into their privacy and their government's urgent need for a narrow exception to the warrant requirement of the Fourth Amendment. . . . It seems that the delicate balance . . . was simply too delicate, too susceptible to the "hydraulic pressures" of the day. As a result of today's decision, the balance struck in *Terry* is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and police action involved herein, is dealt a serious blow. Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.[209]

According to one biographer, Marshall lost faith in the Court's ability to balance private and government needs after *Adams* and dissented in decisions that made exceptions to the warrant and probable cause requirements.[210] Such steadfast adherence to the rule of law as he viewed it was a hallmark of Marshall's jurisprudence.[211] According to Tushnet, Marshall's views on matters about which he most cared were so firm that he saw little point in trying

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207. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (allowing brief warrantless searches in interest of police safety).

208. 407 U.S. 143 (1972).

209. *Adams*, 407 U.S. at 161–62 (Marshall, J., dissenting).

210. *See* ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 242–43 (1992) (recognizing Marshall's subsequent refusal to permit exceptions to warrant and probable cause requirements once he decided he could not balance citizens' privacy against government needs).

211. *See* William W. Fisher, III, *The Jurisprudence of Justice Marshall*, 6 HARV. BLACKLETTER J. 131, 131 (1989) (distinguishing characteristics of Marshall's jurisprudence: pursuit of a substantive conception of justice; Legal Realist view on abstraction; generalization and doctrine; and devotion to rule of law).

to influence the other Justices's opinions.[212] This was an approach that Brennan had little patience for. According to Hunter R. Clark, Brennan had become disillusioned with Marshall near the end of their joint tenure, and he felt that Marshall had not tried hard enough to compromise while on the Supreme Court.[213]

Marshall often avoided compromise when he felt the Court had refused to adopt acceptably clear standards. Marshall's experience as a trial lawyer taught him the importance of a need for clear standards.[214] First, clear standards made it relatively easy for lower court judges to arrive at their decisions.[215] Second, they provided predictability and consistency, both essential when litigating civil rights cases in a country where you never knew the racial politics of the judge before whom you were arguing.[216] Third, as noted previously, the respect given to the current set of standards would also have to be given to any set of standards a good lawyer was able to replace them with. Finally, standards kept lower court judges from rampant and dangerous exercises of judicial discretion.

Brennan, by contrast, particularly in his years on the Court prior to its radical shift to the right, was inclined to balance interests, to negotiate holdings with his fellow Justices and to arrive at less-than-certain and often fact-specific results. When disagreeing with

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212. *See* Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2129 (1992) (finding that Marshall's views were so liberal and definitive that his attempts to influence other Justices was pointless).

213. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 274 (1995) (commenting that Brennan viewed Marshall as highly intelligent but uninterested in debating many matters before Court).

214. *See* Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure,* 26 ARIZ. ST. L.J. 369, 401 (1994) (writing that Marshall believed "the rights the Supreme Court so carefully described would remain meaningless in the absence of clearly enunciated procedures to ensure that rights were known and enforceable"). Marshall's recommended standards were not always better defined than those of the majority. *See* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 293 (1984) (Marshall, J., concurring) (arguing that constitutional right of government employer to decide whether to make decisions in public arena varies with "the nature of the decision at issue and the institutional environment in which it must be made").

215. *See* John Doe Agency v. John Doe Corp., 493 U.S. 146, 164 (1989) (Marshall, J., dissenting) (criticizing majority opinion for ambiguous interpretation of requirements of Freedom of Information Act because lower courts would have to guess how to proceed).

216. *See* Stricklnad v. Washington, 466 U.S. 668, 707–08 (1984) (Marshall, J., dissenting) (condemning majority's application of "standard of reasonableness" in questions involving effective assistance of counsel for telling attorneys "almost nothing" and calling for "more detailed standards").

Brennan, Marshall willingly pointed out this tendency. One example is Marshall's dissent to Brennan's opinion in *Rosenbloom v. Metromedia, Inc.*,[217] a plurality decision with five separate opinions, written just three years after Marshall came to the Court. In *Rosenbloom*, Brennan wrote that when a private individual sues a media outlet for libel for conveying a story involving an event of public or general interest, the plaintiff must prove actual malice even if the defendant is not a public figure.[218] Dissenting, Marshall argued that Brennan's standard was so inexact that it could potentially damage the interests of both private individuals and the press.[219] In response to the Court's failure to provide lower courts with guidelines by which to determine whether or not a subject is of public concern, Marshall noted that any topic could qualify, including one as intimate as the use of contraceptives.[220] Furthermore, the Court's decision required lower court judges to engage in ad hoc balancing of the interests of private individuals and the media. Such balancing, Marshall believed, "is achieved at a substantial cost in predictability and certainty."[221] Brennan, who had compromised his way to the decision in the underlying case of *New York Times v. Sullivan*,[222] responded to these concerns with characteristic optimism about the ability of the lower court to apply the law by stating that "[w]e do not . . . share the doubts of our Brothers Harlan and Marshall that courts would be unable to identify interests in privacy and dignity. The task may be difficult but not more so than other tasks in this field."[223]

Marshall also argued, in a separate concurrence, that the Court's opinion in *Batson v. Kentucky*[224] would fail because it did not es-

217. 403 U.S. 29, 78 (1970) (Marshall, J., dissenting).

218. *Rosenbloom*, 403 U.S. at 52; *see also* New York Times v. Sullivan, 376 U.S. 254, 255 (1964) (delineating actual malice standard).

219. *See Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting) (criticizing nebulous standard proposed by Brennan).

220. *See id.* (asserting that potential danger exists for intimate matters of private individuals to be exposed publicly because Court failed to provide guidelines for lower courts to determine scope of public concern).

221. *Id.* at 81.

222. 376 U.S. 254 (1964).

223. *Rosenbloom*, 403 U.S. at 49 n.17.

224. 476 U.S. 79 (1986).

tablish a bright-line rule for lower courts to follow.[225] In *Batson*, the Court held that peremptory juror challenges made solely on the basis of race were unconstitutional.[226] Marshall argued in conference that determining whether a peremptory challenge had, in fact, been made on the basis of race would be nearly impossible and advocated the wholesale abolishment of preemptories.[227] In a memo to Brennan, Marshall wrote, "I continue to believe the majority's approach will by its nature be ineffective in ending racial discrimination in the use of preemptories. I see no reason to be gentle in pointing that out, and I doubt that pulling my punches now would make the situation any better."[228]

In Marshall's rare differences with Brennan, Marshall occasionally argued for a more "conservative" result. These differences often occurred over procedural matters.[229] For example, the Justices differed throughout their joint tenure over the meaning and scope of the Eleventh Amendment and the doctrine of sovereign immunity. Marshall believed that both the Eleventh Amendment, and, by implication, Article III of the Constitution prevented state citizens from suing their resident states in federal court absent con-

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225. *See Batson*, 476 U.S. at 108 (Marshall, J., concurring) (arguing that Court's failure to entirely ban preemptories created potential for ongoing discrimination in jury selection).

226. *Id.* at 86.

227. *See* BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM 338 (1990) (requesting complete ban of preemptories for both parties because of difficulty detecting racially motivated juror strikes).

228. *Id.* Brennan replied: "I am not yet ready to decide that peremptory challenges must be eliminated in order to cure the discriminatory use of those challenges and and [sic] for that reason do not join you." *Id.* Marshall expressed a similar dissent in Texas v. McCullough, 475 U.S. 134 (1986), a decision in which Brennan concurred. In that decision, Marshall protested the Court's holding that the imposition of a stricter sentence after a new trial than that given after the first trial was not presumptively vindictive where the trial judge had personally granted the new trial. *See McCullough*, 475 U.S. at 150 (Marshall, J., dissenting) (urging a bright-line rule of presumptive vindictiveness whenever greater sentence was imposed, even if new trial had been ordered by judge); *see also* Strickland v. Washington, 466 U.S. 668, 706 (1984) (Marshall, J., dissenting) (objecting to ambiguity of majority's standard for determining ineffective assistance of counsel to which Brennan concurred).

229. *See* American Export Lines, Inc. v. Alvez, 446 U.S. 274, 277–79 (1980) (holding that case satisfied finality requirement and thus Supreme Court had jurisdiction to hear it). Marshall disagreed with Brennan's holding in this case. *See id.* at 286 (Marshall, J., dissenting) (arguing decision below was not final and Court thus lacked jurisdiction).

sent or congressional override.[230] Brennan, on the other hand, consistently dissented from the Court's Eleventh Amendment jurisprudence, arguing strenuously that the amendment precluded from federal court suits brought against states by citizens of *other* states.[231] Again, this difference can be explained. Brennan clearly had the textual argument won; the Eleventh Amendment actually says what Brennan said it does. However, Marshall characteristically accepted the Court's traditional interpretation of the provision as well as the long history of that principle.[232]

Interestingly, while Marshall's dissents from Brennan's decisions or concurrences were often based on Marshall's perception that the majority was establishing a weak standard, Brennan most often dissented from Marshall's decisions because of a disagreement with how a standard should have been *applied* to a given set of facts. In *Beckwith v. United States*,[233] Marshall concurred with a majority holding that statements made by an individual during questioning by an IRS agent for criminal tax fraud could be admitted even though the individual had not received the warnings required by *Miranda v. Arizona*.[234] Marshall concurred only because the IRS agent *had* in fact given the individual a Miranda-like warning before questioning him.[235] Brennan dissented, however, arguing that *Miranda* required strict compliance.[236] This result may not be the anomaly it appears to be. Marshall tended to join majority opinions only when they did not endanger a rule of law in which he believed.[237] With the standard intact, he was free to interpret the facts as he saw them, as was Brennan. Brennan was more likely than Marshall to compromise on legal standards, although decreas-

230. *See* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 291 (1973) (Marshall, J., concurring) (concluding that state citizens have no constitutional rights to sue state without consent of state or action by Congress).

231. *See id.* at 310 (Brennan, J., dissenting) (interpreting Eleventh Amendment as absolute bar to any suit against one state by citizen of another state).

232. *See id.* at 288 (Marshall, J., concurring) (discussing history of sovereign immunity doctrine).

233. 425 U.S. 341, 348 (1975) (Marshall, J., concurring).

234. 384 U.S. 436 (1966).

235. *Beckwith*, 425 U.S. at 348 (Marshall, J., concurring).

236. *Id.* at 349–50 (Brennan, J., dissenting).

237. *See supra* notes 207–16 and accompanying text.

ingly so in his later years, such that Marshall's disagreements with him were likely doctrinal.

V. Distinctions Without Differences? Implications

From this discussion, we can identify the jurisprudential styles of Justices Brennan and Marshall and assess their philosophical differences. Both Justices were judicial activists who labored in the tradition of Legal Realism. Both men believed their jobs as part of the judiciary were to give effect to the purposes of our framing document and to our statutes in the light of changing needs and values. Marshall, skeptical of the view that the Constitution is a "sacred text," rarely went beyond his interpretation of that document to find the law.[238] Nevertheless, Marshall appealed to social consensus—either explicitly, stating that his views were supported by society, or implicitly by "educating" the public through human facts and details in his decisions and dissents. An informed public, he believed, would demand more from its framing document.[239]

Brennan strayed further from the text of the Constitution than Marshall did. Brennan explicitly and implicitly embraced the natural rights strand of natural law theory and believed that judges, by applying reason, could arrive at decisions that furthered the good of society and upheld human dignity.[240]

These descriptions of Marshall's and Brennan's decision-making styles present a paradox. On the rare occasions when Brennan and Marshall differed, they did so because Marshall advocated a hard-and-fast rule or adherence to an already established rule, while Brennan was willing to "give" a little to reach a consensus. The paradox lies here: why should Brennan, an avowed believer in finding the "right" law, be more likely to yield, and why should Marshall, who generally avoided natural law considerations, appear so inflexible?

As this discussion has revealed, this situation is not as paradoxical as it may seem. Marshall's training in the Legal Realist tradition and his career as a "social engineer" did not prepare him to negotiate away precedent he believed to be victories. As Tushnet

238. *See supra* notes 150–67 and accompanying text.
239. *See supra* notes 168–82 and accompanying text.
240. *See supra* notes 127–49 and accompanying text.

points out, a social engineer needs solid precedent.[241] Moreover, as Marshall stated on several occasions, litigators need a degree of certainty and predictability. Marshall understood that the paradox of social engineering was that the law must remain stable long enough to be attacked, and most of the precedent he strove to protect represented what he perceived to be legal victories. Thus, arguments for stability by way of rules that lower courts could apply made sense.

Similarly, Brennan's natural law ideology would not necessarily lead to an inflexible jurisprudence. The belief that the Constitution reflects broad, unenumerated goals but that it does not specifically enumerate all the "natural" rights encompassed by those goals can in some sense liberate a Justice from a need for hard-and-fast rules. Such rules are, of course, required by a textualist or originalist approach to interpretation and perhaps even by a Justice who accepts the moral rigidity of classical natural law ideology. A natural rights theorist who either implicitly or explicitly accepts that the Constitution is not the final word on a litigant's rights, sees his or her foremost duty as protecting those rights for the good of humanity.[242] The Justice can then view himself or herself as part of an interpretative process rather than as a declarer of the law. Thus, a flexible, progressive approach that achieves the goal of upholding basic human rights would be acceptable to natural rights theorists.

To the extent that a comparison of these Justices' philosophies with their jurisprudence *does* present a genuine paradox, this paradox is complex. In part, its solution lies in the personal and professional histories of the Justices. Marshall, one suspects, never lost his taste for resounding victories in the fight against injustice. As a civil rights lawyer, he was enormously successful and saw far-reaching results nearly overnight.[243] Things did not happen as quickly on the Supreme Court. Moreover, Marshall's decisions and dissents often evince a deep distrust of lower court judges, of the system, and sometimes of the Supreme Court. His dissent in *Adams*

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241. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 314–15 (1994) (explaining that Marshall believed by end of his tenure that precedent was necessary to change rule of law).

242. *See* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 118 (1995) (stating that Brennan compromised on decisions in effort to meet needs of litigants).

243. *See supra* notes 73–83 and accompanying text.

v. Williams,[244] in which he admits that his attempts to allow reasonable exceptions to Fourth Amendment jurisprudence had resulted in a watering down of that amendment, demonstrates the depth of this distrust.[245] Tushnet notes that Marshall's extreme political views isolated him on the Supreme Court from the start.[246] Because Marshall could always be expected to take a liberal stance, Tushnet argues, no Justice on the Court felt he needed to be "courted."[247] This phenomenon must surely explain Brennan's increased resort to dissent in his later years on the Court, when compromise and negotiation became increasingly impossible.

Brennan by all accounts took immediately and intuitively to the role of judge, and his personality lent itself remarkably to the traditional give-and-take of a multi-membered court. In some sense, this was both his failing and his gift. Perhaps a slight weakness in character, as some have charged, led to weak and difficult-to-apply decisions. On the other hand, Brennan's "weakness" helped create some of the greatest changes in the law this century.[248] Furthermore, even as he left the Court to an overwhelmingly conservative majority, Brennan expressed faith in the system's ability to correct itself and in the precedent he had helped to establish.

In some respects, this faith was misguided. Brennan's gift of compromise, a gift nearly essential to effective jurisprudence from an extremist judge, inevitably produced vulnerable precedent. In this respect, Marshall's occasional criticism of Brennan's decisions was well-founded. Decisions reached by a majority of five, based

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244. 407 U.S. 143 (1972).

245. *Adams*, 407 U.S. at 143; *see also* Paris Adult Theatre I, 413 U.S. 49, 114 (1973) (Brennan, J., dissenting) (reflecting Brennan's similar change of heart by renouncing his earlier attempts to balance interests in First Amendment protections of pornography and concluding that such attempts resulted in muddled standards).

246. *See* Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2129 (1992) (revealing that soon after his appointment Marshall so consistently dissented that he exerted little influence on other Justices).

247. *Id.* at 2129.

248. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 399 (1986) (extending protection of First Amendment to flag burning); Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding state could not deny education to undocumented immigrants); Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1977) (finding tort cause of action to be constitutional against cities and state subdivisions); Craig v. Boren, 429 U.S. 190, 197 (1976) (heightening scrutiny for classifications based on gender); Stephen Wermeil, Comments Made at Conference, *Members of the Warren Court in Judicial Biography*, 70 N.Y.U. L. REV. 791, 793 (1995) (arguing Brennan's jurisprudence reshaped "doctrinal landscape").

on arguably vague ideas of rightness and establishing arguably vague or fact-specific standards, are inherently vulnerable. The early Rehnquist Court did not disguise its intent to take advantage of that vulnerability.[249]

Marshall's Legal Realist/social engineer attempts to sway the public and the Court and to educate them as to the rightness of a particular position did not stop the conservative backlash[250] nor did his repeated call for standards "with teeth" and for firm adherence to Warren-Court precedent. Marshall knew this when he stepped down. His dissent in *Payne* makes it clear that he knew. But this awareness could not stop the conservative backlash. One suspects that the Constitution had "evolved" all it was going to before the pendulum swung back.

As Tushnet concludes, the liberal dilemma manifested by the choice between dissent on principle or judicial compromise may be inevitable. It may be that in a democracy it will nearly always be the moderate voice, the centrist view, or the majority's interests that carry the most weight. Brennan and Marshall knew well that what is moderate, centrist, or in the best interest of the majority changes, and a society comes to demand different protections from its government and its founding document. When society once again catches up, the jurisprudence of Brennan and Marshall will be there, waiting.

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249. *See* DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST: THE EARLY YEARS 49–50, 120–21 (1987) (discussing Rehnquist's outspoken opposition to liberalism and "excess in terms of constitutional adjudication" of Warren Court decisions).

250. See Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 425 (1981) (stating that in liberal societies, no court can create binding precedent and that successive courts must decide to be bound).