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Susan D. Carle

ARTICLES

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ABSTRACT

Observers commonly think of the Warren and Roberts Courts as polar opposites in their modes of constitutional interpretation. But how different are their approaches really? To be sure, the values that underlie the jurisprudence of the Warren and Roberts Courts are dramatically different, but their methodologies for constitutional adjudication are similar in a crucial respect: both Courts frequently employ a teleological approach. They look, in other words, to ends outside of the law to determine the direction in which constitutional law should be heading.

To prove this point, this Article examines the methods and values Justice William J. Brennan Jr. used in his constitutional interpretation. Widely recognized as an intellectual leader of the Warren Court, Justice Brennan was open and forthright about the ends toward which he believed constitutional law should be evolving. As

* Professor of Law, American University Washington College of Law (WCL). I am indebted to many people for assistance on this project. WCL students Catherine Blalock and Ethan McSweeny and Washington & Lee Law School student Lillian Spell provided excellent research assistance. My colleague Stephen Wermiel generously provided sources and expertise on Brennan as well as comments on a draft. WCL Library Director Adeen Postar and other members of the library staff provided invaluable research support. Widener University Delaware Law School and its Dignity Law Program Directors Professors James R. May and Erin Daly, along with its faculty and students, offered intellectual support and helpful feedback through their visiting scholars program. All mistakes remain my own.

he put it, the challenge Justices faced in interpreting the Constitution's meaning was to "foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure." His jurisprudence, in short, sought to promote the dignity rights of the individual. This Article traces the personal and historical influences that led Brennan to this jurisprudential commitment and the way in which it played out in many facets of work, including both his opinions and his extrajudicial writings. The Article further investigates the criticisms that Brennan's approach engendered and evaluates problems with his jurisprudence that have become clear with the benefit of historical hindsight.

Today, as a large and growing literature convincingly documents, the Roberts Court similarly uses a teleological approach in its constitutional adjudication. Unlike Justice Brennan, however, the members of the Roberts Court's conservative supermajority refuse to acknowledge that they bring teleological reasoning to their judging, instead hiding behind purportedly almost mechanistic interpretive techniques such as originalism. Those techniques leave vast areas of uncertainty and large spaces for discretion in constitutional adjudication, however, and for this reason the Roberts Court uses its own kind of teleological reasoning to come to conclusions in many of the cases it adjudicates, very much like Brennan did methodologically but with very different substantive ends in mind. The views of the conservative majority on the Roberts Court about the "good" toward which constitutional law should be moving are anchored in preserving tradition and promoting the political agenda of the right wing in United States politics. Those values, to be sure, differ greatly from Brennan's. But in its underlying methodology, the Roberts Court's conservative majority mirrors Brennan far more than it wants to admit.

If this argument holds, then a key question in constitutional law today is not so much based in assessing underlying differences in the methods of reasoning of the Warren versus Roberts Courts as it is in evaluating the views of these two Courts as to the ends, values, and conceptions of the "good" constitutional law should embrace. Those questions require acknowledging the teleological assumptions underlying the reasoning of Justices in the two eras. With those assumptions exposed, the job of evaluating the benefits and drawbacks of the alternative teleological conceptions that underlie

the jurisprudence of various Justices and eras of the Court can begin.

TABLE OF CONTENTS

INTRODUCTION

As the nation reels in the wake of the activism of the six-member conservative supermajority of the current Roberts Court, the time is ripe for a new assessment of Justice William J. Brennan Jr., widely recognized as an intellectual leader of the progressively activist Warren Court, which is the seeming antithesis of the Roberts Court's.[1] How and why did the interpretive methodology Brennan championed fall so out of favor? To what extent are the critiques of Brennan's jurisprudence justified? The Roberts Court's conservative supermajority claims to be engaged in an approach to jurisprudence that is diametrically opposed to Brennan's. Is this claim correct?

As a principal theorist and vote wrangler for the progressive wing of the Supreme Court of the United States over several decades, Brennan played a large role in many of the most far-reaching, and thus controversial, decisions in the Warren Court era and beyond. Brennan repeatedly stated that he approached constitutional interpretation with a specific goal in mind—namely, the advancement of human dignity.[2] Brennan based his theory of constitutional interpretation and his opinions on one fairly simple proposition. As he put it, "The challenge is . . . to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure."[3] Such reasoning based on the furtherance of ends or values outside law is often referred to as *teleological*.[4] Brennan was explicit about his teleology. This Article will examine its sources and evaluate its strengths and drawbacks.

Brennan's critics vehemently disagreed with his approach. Through a process of political organizing and substantive critique,

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1. *See, e.g.*, Richard H. Fallon, Akhil Reed Amar, Robert Nagel & Mark Tushnet, *Will the Brennan Legacy Endure?*, 43 N.Y.L. SCH. L. REV. 177, 182 (1999) (remarks of Professor Robert Nagel) ("Brennan did much more than win discrete constitutional arguments. He dominated legal thought and commentary on the Constitution."); Robert Post, *William J. Brennan and the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 123, 123 (Mark Tushnet, ed. 1993) (noting Brennan's "eminent, if not preeminent," position on the Warren Court).

2. *See infra* Section II.B.

3. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification,* 27 S. TEX. L. REV. 433, 440 (1986) [hereinafter, Brennan, *Contemporary Ratification*] (publishing a speech delivered at Georgetown University Law Center on Oct. 12, 1985).

4. For further discussion of teleological reasoning, see *infra* Section II.A.

those critics eventually bent the jurisprudential trajectory of the Court in a very different direction. Today's supermajority of extreme conservatives who generally dominate the Roberts Court profess themselves to be engaged in the very opposite approach to that of Brennan. They claim to be using textualism and "original public meaning" analysis to divest constitutional interpretation of reasoning based on ideas about the "good" or the proper ends of constitutional law. But the Roberts Court's conservative supermajority applies assumptions about the proper ends of constitutional law to reach decisions just as Brennan and other jurists did in earlier eras. Like Brennan, they think teleologically—though, to be sure, the values they espouse are different.

The conservative members of the Roberts Court, whom projections predict will dominate the Court for another half century or more,[5] should not hide behind claims of having disavowed teleological reasoning when they have not done so in reality. They should acknowledge the choices embedded in their teleological reasoning just as Brennan did. With these assumptions exposed, various views of the "good" toward which constitutional law should be evolving can be stacked next to each other for comparison and critique. The end result of such an assessment is beyond the scope of this Article; its purpose is to show that the teleology underlying various modes of constitutional interpretation can and should be identified and subject to evaluation.

To show this, this Article explores the teleological reasoning on which Brennan's constitutional interpretive methodology rests and identifies some of the assumptions embedded in it. Some of those assumptions no longer pertain and should be discarded, but that does not mean that Brennan's teleology does not remain one of the options on the table. Various possible teleological commitments should be evaluated on their respective merits. What conceptions of the "good" should guide constitutional law?

To advance this argument, this Article proceeds in four Parts. Part I sketches the broad outlines of Brennan's life and its historical context. Part II analyzes Brennan's commitment to the goal of advancing human dignity as the proper end of constitutional law. It also analyzes some of the assumptions embedded in this

5. *E.g.*, Ian Ayres & Kart Kandula, *How Long Is a Republican-Nominated Majority on the Supreme Court Likely to Persist?,* BALKINIZATION (July 3, 2022), https://balkin.blogspot.com/2022/07/how-long-is-republican-nominated.html [https://perma.cc/XP3Y-X8AK].

commitment, both showing their historical contingency and identifying flaws in Brennan's assumptions that history has exposed. Part III sketches the critiques leveled against the jurisprudence of Brennan and the Warren Court and provides a contemporary assessment of those critiques. Finally, Part IV shows how the Roberts Court's conservative supermajority likewise engages in teleological reasoning despite denying doing so. The Article concludes that the teleological aspects of constitutional reasoning should be acknowledged, their underlying assumptions identified, and their merits evaluated and debated based on their fit for particular historical circumstances.

I. BACKGROUND: BRENNAN'S CONTEXT

In light of the large volume of literature exploring both Brennan's contributions as a historical figure,[6] and the historical context in which he developed the interpretive commitments that would guide him throughout his long career on the Court, only a quick sketch is necessary to set the frame for considering Brennan as a jurist. Two basic influences are most relevant: first, the circumstances of his upbringing, and second, his historical context, which he often described as highly important in shaping his views about constitutional interpretation.[7]

A. *Brennan's Life*

William J. Brennan Jr. was born not long after the turn of the twentieth century (in 1906), into an Irish-American Catholic family in working-class Newark, New Jersey.[8] His parents had each migrated separately from Ireland and married in the United States.[9] His father, Bill Sr., started his life in the United States as a laborer and quickly became involved in the labor movement.[10] In the 1910s, Bill Sr. entered local politics and rose through the ranks of the New Jersey Democratic Party to become an elected city commissioner.[11] His political commitments were first to Teddy

6. *See, e.g.*, Post, *supra* note 1, at 123.
7. *See infra* Section II.C.1.
8. *See* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 6–7 (2010).
9. HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 13 (1995).
10. *Id.* at 13, 15.
11. *Id.* at 15–16.

Roosevelt's "square deal for all, special privileges to none" platform and later to New Deal liberalism.[12] Bill Sr. subscribed to the social justice teachings of progressive Catholic theologian John A. Ryan, an important intellectual influence on the New Deal and the development of American Catholics' support for it.[13] Ryan argued for the importance of social policy in supporting the development of "every individual's personality."[14] Bill Sr. passed on to his son, William Jr., these political perspectives based on government responsibility to assist those without power and refrain from imposing power that harms the individual.[15]

William Jr. derived not only his basic political world view but also his faith commitments from his family and upbringing. He attended parochial schools in his early years.[16] After that, he entered a prestigious public high school that was a "magnet" for "immigrant parents like Brennan's with big ambitions for their first-generation American offspring."[17] Brennan was, in other words, born lucky into a mid-twentieth century opportunity-enhancing educational and social structure that boosted him to success. Although he admired his father's political career and shared his father's political commitments to New Deal social policy, broadly conceived, by the age of sixteen he had seen enough of the hard toll that politics had taken on his father to conclude "[w]hat a filthy business the whole thing was" and that he "wanted no part of it."[18] Instead he was able to move up the socio-economic ladder into a professional career.

Brennan's excellent academic record at a top public high school in the suburbs of Newark led him to gain admission in 1924 to the University of Pennsylvania Wharton School of Business, where he majored in economics.[19] After graduating, on his father's urging,

12. STERN & WERMIEL, *supra* note 8, at 10–11.

13. *Id.* at 11, 166.

14. Harlan R. Beckley, *The Legacy of John A. Ryan's Theory of Justice,* 33 AM. J. JURIS. 61, 62 (1988). Ryan had a "teleology of the human person," *id.* at 63, much like the one Brennan would develop. He followed papal encyclicals that "determine 'all justice in social relations with reference to the dignity of the human person.'" *Id.* at 66 (citations omitted); s*ee also id.* at 68 (discussing how Ryan's "concept of dignity provides the basis for [his] conception of rights"); *id.* at 69 (discussing Ryan's condemnation of classical liberalism for protecting "the 'right' of the strong to violate the dignity of the weak").

15. *See* STERN & WERMIEL, *supra* note 8, at 21.

16. CLARK, *supra* note 9, at 20.

17. STERN & WERMIEL, *supra* note 8, at 13.

18. *Id.* at 16.

19. CLARK, *supra* note 9, at 20–21.

Brennan immediately gained admission to the Harvard Law School.[20] As his family fully appreciated, this degree offered William Jr. a guaranteed pathway into an elite professional career.[21]

At Harvard, Brennan was a good student but not one of the shining intellectual stars offered a place on the *Harvard Law Review* or a spot in then-Professor Felix Frankfurter's "intimate," invitation-only seminars.[22] Brennan had other, more pragmatic concerns in any event. By this time married, Brennan graduated with a focus on making a good living and settling into family life.[23] That goal meant accepting a job at Newark's top business law firm, where he was its first Catholic lawyer.[24] There, Brennan worked long hours to serve the firm's clients but also took part in local professional and political activities. He carried out court-appointed criminal defense assignments and became involved in court reform and other Democratic party-based, good government league activities.[25] Brennan fostered political connections he had through his father and developed more on his own.[26]

Brennan's high profile brought him an offer of appointment to the bench of a newly reformed New Jersey trial court system. After weighing the benefits and drawbacks of leaving his well-paid corporate law job, Brennan decided to accept this seat, becoming a New Jersey Superior Court judge in January 1949.[27] He quickly gained a reputation for being hardworking and fair, and he rose through the ranks to soon become an appellate division judge where, according to his biographers, he did not yet demonstrate the visionary attitude toward constitutional rights he would later express on the Supreme Court.[28] In 1951, Brennan won appointment to New Jersey's highest court.[29] His judicial clerks recall that his opinions showed no particularly striking "ideological bent,"

20. *Id.* at 20.

21. STERN & WERMIEL, *supra* note 8, at 18–19; *see* CLARK, *supra* note 9, at 21–23.

22. STERN & WERMIEL, *supra* note 8, at 20, 25, 27; CLARK, *supra* note 9, at 23 (noting that Brennan was practical rather than geared toward the kind of abstract theorizing that characterized the academic atmosphere of Harvard at the time).

23. CLARK, *supra* note 9, at 22, 25.

24. STERN & WERMIEL, *supra* note 8, at 23.

25. *Id.* at 26–28.

26. *Id.* at 28–29, 45; CLARK, *supra* note 9, at 45.

27. STERN & WERMIEL, *supra* note 8, at 45–48; CLARK, *supra* note 9, at 50.

28. STERN & WERMIEL, *supra* note 8, at 53; CLARK, *supra* note 9, at 53 (noting that Brennan proceeded slowly and conservatively).

29. *See* CLARK, *supra* note 9, at 54.

though some elements of his later jurisprudence on the rights of criminal defendants started to emerge.[30] His reputation as a workhorse rather than an ideologue benefitted him when, a mere five years later, Republican President Dwight E. Eisenhower nominated him for the Supreme Court.[31]

After a fairly smooth confirmation process ending with a nearly unanimous voice vote in his favor, Brennan formally assumed his seat on the nation's highest court in October 1956.[32] This was three years after Eisenhower's nomination of California governor Earl Warren as the Court's Chief Justice.[33] Warren was the author and political mastermind of the unanimous Court decision striking down government-sanctioned racial apartheid in public schools in *Brown v. Board of Education*.[34] Decided two years before Brennan joined the Court, *Brown* was the Court's first attempt at massive reform of an institution as central to citizens' lives as public schools. It could have remained a rare instance of such intervention by the Court based on the exceedingly important principle of racial nondiscrimination in education, as some commentators argued it should have.[35] To Brennan and other progressives on the Court, however, *Brown* showed the potential the Court had to engage in major institutional reform in many spheres. Brennan would soon become a leader and primary strategist behind that judicial philosophy.

Brennan's acclaimed biographers, journalist Seth Stern and law professor Stephen Wermiel,[36] trace the steps by which his judicial philosophy and leadership developed on the Court. Like former politician Warren, Brennan enjoyed the benefits of having a

30. STERN & WERMIEL, *supra* note 8, at 59–60; CLARK, *supra* note 9, at 55–56.

31. *See* STERN & WERMIEL, *supra* note 8, at 78–79; CLARK, *supra* note 9, at 77–79.

32. *See* STERN & WERMIEL, *supra* note 8, at 85–96.

33. CLARK, *supra* note 9, at 73.

34. 347 U.S. 483 (1954).

35. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Bobbs-Merrill Co., Inc., 2d ed. 1986) (1962) [hereinafter LEAST DANGEROUS BRANCH] (discussing judicial review and the role of the Supreme Court); ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT (1965) [hereinafter WARREN COURT] (discussing the Supreme Court's role in desegregation and the Civil Rights Era). For a further discussion of Bickel's views of the Warren Court, see *infra* Section III.A.

36. *See* STERN & WERMIEL, *supra* note 8; David J. Garrow, *Justice William Brennan, A Liberal Lion Who Wouldn't Hire Women*, WASH. POST (Oct. 17, 2020) (book review), https://www.washingtonpost.com/wp-dyn/content/article/2010/10/15/AR2010101502672.html?wprss=rss_print/bookworld [https://perma.cc/QY4X-YQZE] (calling this book "a supremely impressive work that will long be prized as perhaps the best judicial biography ever written").

gregarious personality, excellent social skills, and strong political horse sense. In this respect, Brennan was much like his father; he probably absorbed many of his skills from watching his father in action during his childhood. On top of this, Brennan had developed another set of skills through his years on the New Jersey bench, which Warren, who had no judicial experience before becoming Chief Justice, did not possess in the same abundance. Brennan was good at combining legal argumentation with political strategy in campaigning for his colleagues' votes. Even when Brennan did not author the decisions that advanced the Court's progressive agenda, he was usually in the background promoting its expansive approach to individual constitutional rights.[37]

B. *Historical Context*

Brennan frequently cited his historical context in explaining his jurisprudential commitments.[38] Not only had the Court's extraordinary opinion in *Brown* indicated new possibilities for the Court, but Congress soon followed by passing two landmark civil rights statutes: the Civil Rights Act of 1964[39] and the Voting Rights Act of 1965.[40] Both Acts passed Congress by fairly wide bipartisan margins, despite being strongly opposed to the end by members of a conservative, southern congressional voting bloc.[41] A considerable amount of the Court's jurisprudence in the subsequent decades

37. STERN & WERMIEL, *supra* note 8, at xii, 106, 279 (observing that Warren used the powerful tool he possessed as Chief Justice to assign key cases to Brennan when he was in the majority, even when Brennan was a junior Justice); *id.* at 157–58 (noting that even Justice Douglas, who was a "loner" on the Court, privately sent drafts of his opinions to Brennan for his eyes only and concluding, after examining the memos Brennan sent his liberal colleagues, that he "emerge[d] as the group's strategist, scouting out opportunities to advance their views and plotting out how a current loss could contribute to future victories"); *id.* at 183–84 (characterizing the evidence behind the Court's ruling in *Baker v. Carr*, which Warren saw as the most important of his tenure, as showing "Brennan at his best as a tactician and coalition builder," but also as revealing "his willingness to sacrifice the quality of an opinion's legal reasoning to get the outcome he wanted"); *see also* CLARK, *supra* note 9, at 114–15 (quoting former Brennan law clerk, Owen Fiss, explaining that "it was Brennan who by and large formulated the principle, analyzed the precedents, and chose the words that transformed the ideal into law"); *id.* at 117 (quoting other direct observers' reports of Brennan's special influence and leadership skills).

38. *See infra* Section II.C.1.

39. Civil Rights Act of 1964, Pub. L. No. 88-352, 75 Stat. 424.

40. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

41. JULIAN E. ZELIZER, THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY 102, 128, 217 (2015) (detailing the complex political maneuvering preceding passage of each Act).

would focus on developing doctrines to enforce the provisions of those pivotal statutes.

Achieving formal civil rights equality was not the only social justice priority Brennan watched Congress achieve. President Lyndon Johnson took office in 1963 determined to pursue a "Great Society" program aimed at building an improved social welfare state.[42] Johnson benefitted from large Democratic majorities in both houses of Congress at the start of his administration,[43] and he won reelection in 1964 with rare overwhelming voter support.[44] In a four-year period, Johnson and the Democratic Congress that won election with him passed an astonishing amount of social welfare legislation, including the Economic Opportunity Act of 1964,[45] which set up and funded community-based anti-poverty programs and spurred local community activism and leadership development;[46] the Elementary and Secondary Education Act of 1965,[47] which provided more federal assistance to low-income school children;[48] and the Higher Education Act of 1965,[49] which provided funding to develop an American workforce better equipped for the increasingly complex needs of a changing society.[50] In speeches, Brennan cited some of the research behind these initiatives: excellence in and a progressive orientation toward education, Brennan believed, were key to developing an enlightened electorate that would agree with the Court's progressive jurisprudential turn.[51]

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42. *Id.* at 1–3 (describing a participant's recounting of Johnson's first meeting with his top advisors while still in bed on the morning after President Kennedy's assassination, in which he laid out his already well-developed agenda).

43. *Id.* at 8–9; IRWIN UNGER, THE BEST OF INTENTIONS: THE TRIUMPHS AND FAILURES OF THE GREAT SOCIETY UNDER KENNEDY, JOHNSON, AND NIXON 102 (1996).

44. ZELIZER, *supra* note 41, at 159 (giving specific numbers reflecting Johnson's "Democratic triumph"); RANDALL B. WOODS, PRISONERS OF HOPE: LYNDON B. JOHNSON, THE GREAT SOCIETY, AND THE LIMITS OF LIBERALISM 130 (2016) (noting the two-to-one majorities Democrats enjoyed in both houses of Congress).

45. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508.

46. *Id.* § 202; WOODS, *supra* note 44, at 10 (describing "the government-sponsored initiatives designed to institutionalize grassroots involvement in decision making" and noting that one of the lasting achievements of the Great Society "was a vast network of local nonprofits that gave voice and opportunity to the nation's urban poor").

47. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

48. ZELIZER, *supra* note 41, at 182; WOODS, *supra* note 44, at 138.

49. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219.

50. WOODS, *supra* note 44, at 144–45; (stating that the Higher Education Act "helped make America's colleges and universities the envy of the world and its population the most educated in history"); *id.* at 135 (noting that the Russians' success in Sputnik "highlighted the importance of quality education to national security").

51. *See infra* Section II.C.3.

So too, the nation's highly popular Medicare system, which guaranteed high quality health care for older citizens, was the product of the Social Security Amendments of 1965.[52] More controversial provisions in that same legislation established the Medicaid program, which offers states federal funding to provide healthcare to low-income citizens.[53] Medicaid has proved a vulnerable initiative, probably because it addresses the needs of the most economically and, correspondingly, politically disenfranchised sectors of the United States population.[54] For the progressively inclined members of the Warren Court in the 1960s, however, these initiatives coming from their coordinate federal executive and legislative branches reinforced their assessment that they were on the right path in pushing to expand human political and economic rights.

As history tells, the Great Society period did not last long. By 1968, the "window for legislating had closed."[55] This shift occurred for many complex, interdependent reasons, including Johnson's descent into the funding and political quagmire of the Vietnam War, inflation pressures, and shifts in voter attitudes.[56] Very important was the highly successful organizing of conservatives, at first less visibly at the state level and then at the national level, leading to a strategically wily, highly potent movement that changed, among many aspects of national politics, the type of Justices appointed to the Court.[57] These conservatives were as adamantly against the

52. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.

53. WOODS, *supra* note 44, at 153-54, 235. Other new laws included water and air pollution statutes, and funding for the arts, housing, and urban renewal. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845; Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476; WOODS, *supra* note 44, at 232–33, 235–36.

54. *Cf.* Nat'l Fed'n. of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (striking down the provisions of the Patient Protection and Affordable Care Act of 2010 that required states to add more citizens to their rolls of Medicaid recipients as a condition for continuing to receive federal Medicaid subsidies).

55. ZELIZER, *supra* note 41, at 302.

56. *Id.*

57. For an account of the demise of the liberals' era on the Court, see STERN & WERMIEL, *supra* note 8, at 470–80, 503. The authors discuss the political ascendency of former President Ronald Reagan, the influence of his attorney general Edwin Meese on judicial nominations, the appointment of conservative Justices, and Brennan's difficulty adjusting to this new ideological terrain. Accidents of timing in Justices' retirements and deaths mattered too, as they have throughout the Court's history. *See* BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE MODERN LIBERAL ESTABLISHMENT *passim* (2022) (discussing deaths and retirements of Justices and their replacement with new appointees).

ideologies that supported the growth of the social welfare state as its adherents were enthusiastic in their support of them.[58]

The relatively well-funded Great Society programs did not succeed even on their own terms. Much remained not well in America; the nation's poorest citizens continued to feel despair about their prospects in American society. One manifestation of this despair was increasing urban unrest.[59] Crime also continued to be a problem, exacerbated by this continuing lack of economic opportunity. This situation made mostly white, middle America anxious.[60] These factors played into the hands of Richard Nixon, who made law and order the central organizing theme of his successful presidential campaign in 1968.[61] Running against the Warren Court and all it stood for, Nixon and his messages fell on receptive ears. Thus, after a brief period of unabashed progressive liberalism in the early and mid-1960s, national politics began trending rightward. With Nixon's election, along with the appointment of Warren E. Burger to head the Court from 1969 to 1986, followed by President Reagan's appointment of William H. Rehnquist as Chief Justice in 1986, the Court, too, began to track in a moderately conservative direction.[62] These Courts reversed or cut back on Warren Court precedents, though their conservatism would hold no candle to the juridical revolution the Roberts Court would aggressively pursue.[63]

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58. WOODS, *supra* note 44, at 379–80 (describing the Warren Court as the conservative movement's "bête noir").

59. UNGER, *supra* note 43, at 249; WOODS, *supra* note 44, at 11–12 (describing the urban uprisings that "marked a turning point in the history of the Great Society"); *id.* at 309–20 (providing an extended discussion of "[w]hiplash" and the war on crime).

60. *See* UNGER, *supra* note 43, at 248–50.

61. WOODS, *supra* note 44, at 12 ("By 1966, the mantra of the conservative coalition had become law and order."); *id.* at 386, 388 (discussing how Nixon leveraged themes of law and order to win the presidential election). On Nixon's campaign and election, see generally MICHAEL NELSON, RESILIENT AMERICA: ELECTING NIXON IN 1968, CHANNELING DISSENT, AND DIVIDING GOVERNMENT (2014).

62. *See generally* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016) (tracing the Burger Court's more conservative direction on many issues but also noting the development of more robust doctrines on sex equality, reproductive rights, and affirmative action during those years).

63. *Id. passim* (tracing Burger and Rehnquist Court opinions that reversed or limited Warren Court opinions); *see* Adam Liptak, *An 'Imperial Supreme Court' Asserts Its Power, Alarming Scholars*, N.Y. TIMES (Dec. 19, 2022), https://www.nytimes.com/2022/12/19/us/politics/supreme-court-power.html [https://perma.cc/6URK-8XYL] (summarizing scholarly studies concluding that the Court is exerting power, reversing the decisions of federal and state political branches, and overruling precedents at a pace never exceeded in its history).

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There have been a great many treatments of Brennan and the Warren Court's jurisprudence on the merits; below I will focus on how Brennan's methodology was explicitly *teleological*, in the sense of being directed to particular ends outside law itself. That commitment, I will show, was connected to Brennan's personal background and historical context as just discussed.

II. BRENNAN'S TELEOLOGICAL JURISPRUDENCE

A. *Two Kinds of Teleology in Brennan's Jurisprudence*

Legal scholars used the term "teleology" in various ways. Most basically, teleology, which comes from the Greek words telos, meaning "end," and logos, meaning "reason," involves explanation by reference to a goal, end, or purpose.[64] Coming originally from Aristotle, teleological explanations can take a variety of forms.[65] One form of explanation uses the term teleology broadly in a manner that makes it roughly synonymous with consequentialism or utilitarianism.[66] That definition need not encompass attention to the "good," as law professor Lewis Kornhauser points out.[67] I do not intend the term teleological merely in this sense of being utilitarian rather than deontological in its explanatory thrust; instead I am referring to the definition that contemporary philosopher John

64. *Teleology*, ENCYC. BRITANNICA (July 25, 2023), https://www.britannica.com/topic/teleology [https://perma.cc/XBS2-ERFR].

65. *See generally* MONTE RANSOME JOHNSON, ARISTOTLE ON TELEOLOGY (2005) (discussing the origins and uses of teleological thinking by Aristotle).

66. Lewis A. Kornhauser, *Choosing Ends and Choosing Means: Teleological Reasoning in Law*, *in* HANDBOOK OF LEGAL REASONING AND ARGUMENTATION 387, 387 (Giorgio Bongiovanni et al, eds. 2018). For examples of legal scholars using the term teleology to explain methods of legal reasoning in this way, see Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 295 (2006), which offers a definition of utilitarianism as a subset of teleological reasoning and analyzes the value of the United States Constitution's Confrontation Clause through a teleological lens; John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975), which analyzes the teleological or ends-based aspect of the Court's reasoning in *United States v. O'Brien*, 391 U.S. 367 (1968), the case that defined standards for analyzing First Amendment protections for expressive conduct containing both speech and non-speech aspects. *See also* Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 410–11 (2008) (conducting a comparative analysis of various nations' methods of constitutional interpretation and referring to the teleological interpretive methods used in Europe as looking to "the present goals, values, aims and functions that the constitutional text is designed to achieve").

67. Kornhauser, *supra* note 66, at 387.

Rawls gives to teleological explanation. That definition focuses on conceptions of what is the proper end or goal in terms of what is the "good" in relation to which policies or rules should be evaluated.[68] Rawls says that teleological explanations focus on the "good" rather than the "right"—the right then comes to be defined as that which maximizes the good. Accordingly, institutions or acts are right when, of the available alternatives, they produce the most good according to an actor's (or institution's) definition of what is good.[69] When I say that Brennan's methodology of constitutional interpretation is teleological I mean this partly in this Rawlsian sense: Brennan explicitly espoused a methodology for constitutional interpretation that seeks to move law toward the "good" in relation to which he believed law should be evolving. That "good" or end, as Brennan was never shy about saying, was the advancement of human dignity.[70] Brennan explicitly articulated the "good" toward which he believed constitutional law should always be moving, and then did his best to move law toward that end through his judging—in other words, to achieve the "right" outcomes in relation to this defined "good."

I also want to suggest the possibility, or even a good probability, that Brennan's theory of constitutional interpretation was teleological in a second, somewhat less obvious sense as well. A second definition of teleology refers to "exhibiting or relating to design or

68. JOHN RAWLS, A THEORY OF JUSTICE 22 (rev. ed. 1999) (noting that some teleological doctrines specify the "good" as the realization of human excellence, as in philosophical perfectionism); *see also* Kornhauser, *supra* note 66, at 387 (noting that Rawls' definition of teleological reasoning involves goals that are moral in nature); *id.* at 388 (noting that teleology or consequentialism can be ethical in nature). For an example of a legal scholar referring to teleological reasoning in this way, see Timothy P. Terrell, *Statutory Epistemology: Mapping the Interpretation Debate*, 53 EMORY L.J. 523, 538–39 (2004), which refers to teleological theory as focused on "the 'good,' in the sense of some goal or end that would . . . enhance human society."

69. RAWLS, *supra* note 68, at 22. Here, Rawls is relying on philosopher William Frankena. *Id.* at 22 n.11. Frankena helpfully breaks explanations into the familiar categories of deontological theories, which "assert that there are other considerations that may make an action or rule right or obligatory besides the goodness or badness of its consequences—certain features of the act itself other than the *value* it brings into existence, for example," versus teleological ones, which look at the value of what is brought into being. *See* WILLIAM FRANKENA, ETHICS 15 (2d ed. 1973). For an example of this definition being used by a legal philosopher, see Neil MacCormick, *Argumentation and Interpretation in Law*, 6 RATIO JURIS. 16, 17 (1993) (distinguishing teleological from deontological reasoning).

70. Sometimes Brennan also described the good or end toward which law should be striving as the achievement of "freedom, justice[,] and peace in the world." *See, e.g.*, William J. Brennan, Jr., Assoc. Just., Sup. Ct., Address at the Louis Marshall Award Dinner of the Jewish Theological Seminary of America (Nov. 15, 1964) [hereinafter Brennan, Marshall Award Speech].

purpose especially in nature."[71] This second definition often has a religious valence, in the sense that the design or purpose toward which some aspect of human affairs should be moving is one coming from some concept of the divine. Although it is today perhaps quite unpopular to say this, I want to point out that the evidence suggests that, at a highly abstract level, Brennan's jurisprudence was teleological in this second, *religious* sense of that concept. Brennan seemed to assume a divine presence or influence operating on the development of the world—and law. In other words, he seemed to understand "things in nature" as "pursuing ends or goals or as designed to fulfill a purpose devised by a mind that transcends nature."[72] This type of teleology with a religious valence has fallen out of style in most, but not all, academic writing, though the Roberts Court may be in the process of reviving it.[73] Such religiously tinged teleology was neither popular during Brennan's times nor a predilection he ever acknowledged. Because he never discussed the question, it is impossible to tease out how much of an influence teleological thinking with a religious bent had on Brennan's jurisprudence. But it does seem to be there, especially in his belief in the world's inevitable progress toward "freedom, justice[,] and peace in the world,"[74] as he sometimes put it, as well as in his central concern with advancing principles of human dignity that can be directly traced to particular strands of religious—and specifically Catholic—social justice thinking in his era, as discussed further in Section II.B below.

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71. *Teleological*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/teleological [https://perma/cc/79KQ-URWR].

72. ENCYC. BRITANNICA, *supra* note 64.

73. Examples of religiously based natural law scholarship in recent decades include Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1513–14 (2011), which presents thoughts on natural law at the Fordham Law School Natural Law Colloquium, including that *District of Columbia v. Heller*, 554 U.S. 570 (2008), was an opinion based on natural law; and Fred Lawrence, *David Novak on Natural Law: An Appraisal*, 44 AM. J. JURIS. 151, 151–53 (1999), which reviews a conservative Jewish philosopher's book on natural law. For the influence of natural law thinking, of both secular and religious varieties, on the history of United States constitutional law, see STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 96–118 (2021), which traces the strong influence and then decline of natural law thinking among American lawyers. For an argument that the Court is implicitly applying a religious teleology in some of its opinions, see Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the Dobbs Decision*, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html [https://perma.cc/CW6L-Z3Z9] (arguing that religion plays a "pervasive role" on the current Court and that *Dobbs* should be relabeled a "religion case").

74. *See, e.g.*, Brennan, Marshall Award Speech, *supra* note 70.

Brennan was, not surprisingly, most likely to exhibit these tendencies toward teleological thinking with a religious valence when speaking before audiences of faith. In a 1964 speech before the Jewish Theological Seminary in New York City, for example, Brennan specifically referred to law in connection with "an unchanging value for free men: the Old and New Testament teach that . . . every individual has Rights because as a child of God he is endowed with human dignity."[75] At other times Brennan described the aspiration toward which law should be striving as reaching the "shining city upon a hill," a seeming reference to the book of Matthew in the New Testament.[76] Brennan referred to such "a shining city upon a hill" as the aspiration for American constitutional law before both secular and faith-based audiences and over a period of decades.[77] These references arguably reflect a genuinely held, religiously inflected vision of the proper ends of constitutional interpretation pitched at a high level of abstraction.

By all appearances a practicing Catholic, Brennan conducted himself in accordance with those faith beliefs in his personal life.[78] But Brennan firmly disavowed ever bringing any specifics of his religious faith into his constitutional interpretation, and he stuck to this commitment, as shown by the many times he incurred the disfavor of Catholic leaders on specific subjects such as school prayer and obscenity.[79] At a highly abstract plane of teleological reasoning, however, Brennan arguably remained influenced by his religious faith, as I discuss further in Section II.B below.

B. *Brennan's Dignity Jurisprudence*

As he repeatedly explained, Brennan had a clear—in fact quite simple—view of the proper end of law. Brennan believed that the law's primary objective should be the promotion of the right to human dignity. Many scholars have pointed out Brennan's central

75. *Id.*

76. Brennan, *Contemporary Ratification*, *supra* note 3, at 445; *see also Matthew* 5:14-6 (English Standard Version) ("You are the light of the world. A city set on a hill cannot be hidden.").

77. Brennan, *Contemporary Ratification*, *supra* note 3, at 445.

78. STERN & WERMIEL, *supra* note 8, at 165–66.

79. Brennan explained, for example, that he could not bring "a religiously held sexual ethic" to the constitutional interpretation of free speech in the obscenity context. *See* Brennan, Marshall Award Speech, *supra* note 70; STERN & WERMIEL, *supra* note 8, at 172–75, 255 (discussing Catholic leaders' disapproval of Brennan's jurisprudence).

preoccupation with promoting the dignity rights of individuals, some with approval[80] and others with varying levels of criticism.[81] As to the *fact* of Brennan's commitment to this view of the proper end for constitutional law interpretation, there really can be no argument.

A more difficult question might be what Brennan meant by the concept of dignity, except that here too the meaning Brennan ascribed to this principle was not that complicated. Although, as scholars have pointed out, the concept of dignity has ancient roots and a variety of connotations throughout history,[82] Brennan's use of this concept refers to its modern meaning in the 1948 United Nations Universal Declaration of Human Rights ("UDHR"),[83] as he repeatedly confirmed.[84] Historians trace the concept of dignity in the UDHR partly to "religiously inspired" foundational principles articulated in the 1937 Irish Constitution as well as the secular German concept reflected in its Basic Law.[85] The concept of the dignity of the individual in the UDHR thus had origins that were, in part, explicitly religious, specifically Catholic, and, even more specifically, Irish.[86] Brennan, growing up in the religiously and intellectually lively household of his youth as described above,[87] most likely absorbed it during his formative years.

What Brennan almost certainly heard at home is the Catholic social justice teaching of John R. Ryan, one of Bill Sr.'s favorite

80. *See* Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Brennan*, 7 WM. & MARY BILL RTS. J. 223 *passim* (1998).

81. *See, e.g.*, DAVID E. MARION, THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN, JR.: THE LAW AND POLITICS OF "LIBERTARIAN DIGNITY" *passim* (1997) (presenting a balanced critique of Brennan's jurisprudence from the perspective of social conservatism).

82. *See* MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 3–10, 12–13, 20–21 (2012) (discussing the use of the term in ancient Greek and Kantian philosophy as well as examining a variety of other Western historical sources).

83. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

84. *E.g.*, Brennan, Marshall Award Speech, *supra* note 70 (citing the United Nations Declaration of Human Rights as the source for his concept of dignity).

85. Samuel Moyn, *The Secret History of Constitutional Dignit*y, *in* UNDERSTANDING HUMAN DIGNITY 95, 95–96 (Christopher McCrudden ed., 2013).

86. *See id.* at 97–98 (tracing the roots of the modern concept of the dignity of the individual through various Catholic papal encyclicals and other statements in the pre-war and World War II eras); *see also id.* at 111 (concluding that "individual dignity originally entered world and constitutional politics as some Catholic actors struggled to establish it as a valuable tool"); ROSEN, *supra* note 82, at 53 (discussing "the Catholic influence on the [UDHR] . . . in ensuring both that dignity was given such a prominent place and that it was connected with the idea of inviolable human rights").

87. *See supra* Section I.A.

theologians.[88] Here is how Ryan explained the concept of individual dignity in one of his most well-known books:

> [T]he individual is endowed by nature, or rather, by God, with the rights that are requisite to a reasonable development of his personality, and . . . these rights are, within due limits, sacred against the power even of the State; . . . man's [sic] natural rights must not be . . . interpreted that the strong, and the cunning, and the unscrupulous will be able, under the pretext of individual liberty, to exploit and overreach the weak, and simple, and honest majority.[89]

Ryan further explained when and why government should intervene and why eighteenth-century doctrines supporting "a maximum of industrial freedom for the individual" were "baneful" and wrong:

> [When] the strength, cunning, or selfishness of his fellows [hinders the individual] from doing and enjoying those things that are essential to reasonable life. . . . [T]he absence of State intervention means the presence of insuperable obstacles to real and effective liberty. In a word, political and legal freedom are not an adequate safeguard to the welfare of the individual.[90]

Ryan's writing accords with Brennan's vision of government's duties to provide the resources needed for human flourishing.[91] All of the opinions and doctrinal innovations for which Brennan is best known flow from the idea that advancing human dignity is the proper end of constitutional interpretation. He explained how he saw this connection explicitly at times, and implicitly at others, but it is almost always visible in his opinions and provides the central theme in his extrajudicial writings as well.

Extended readings of two of his many opinions, *Goldberg v. Kelly* and *Paul v. Davis*, illustrate this point. *Goldberg v. Kelly*, one of his most famous opinions, involved a due process challenge to a

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88. STERN & WERMIEL, *supra* note 8, at 11, 166.

89. JOHN AUGUSTINE RYAN, A LIVING WAGE 64 (1906). As Ryan further explained:

> [E]very individual is an "end in himself," and has a personality of his own to develop through the exercise of his own faculties. Because of this equality in the essentials of personality, men [sic] are of equal intrinsic worth, have ends to attain that are of equal intrinsic importance, and consequently have equal natural rights to the means without which these ends cannot be achieved.

Id. at 46–47. Ryan argued that these natural rights included "the right to live and the right to marry," *id.* at 67–68, as well as the right to a living wage, which the state had a duty to enforce. *Id.* at 301–02.

90. *Id.* at 297–98.

91. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (requiring Texas to provide public education to the children of undocumented immigrants in an opinion written by Brennan).

state welfare agency that had cut off the plaintiffs' public assistance benefits.[92] Brennan's opinion for the majority drew on innovative scholarship theorizing that government entitlements had become a new form of "property."[93] Emphasizing that such assistance "provides the means to obtain essential food, clothing, housing, and medical care" and that termination of aid prior to a hearing would "deprive an eligible recipient of the very means by which to live while he waits" and leave that person "immediately desperate," Brennan concluded that the government owed due process rights before terminating benefits for those receiving government assistance,[94] just as it would owe due process to anyone being deprived of property. To Brennan, the question involved the "Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders."[95] This new rule preserving individuals' ability to retain public assistance benefits would foster human dignity:

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity.[96]

It is worth counterpoising Justice Black's dissent here because it exemplifies the criticism that Brennan's approach often engendered. Assailing Brennan for equating the unconscionable (i.e., "cut[ting] off a welfare recipient in the face of . . . 'brutal need'") with the unconstitutional, Black argued that Brennan had devised a balancing formula based "solely on the collective judgment of the majority [of the Court] as to what would be a fair and humane procedure in this case."[97] What the majority was doing, Black argued, was imposing its own policy preferences, even though the Constitution's framers had envisioned that "[t]he Judicial Department was to have no part whatever in making any laws."[98] The logical outgrowth of the Court's approach, according to Justice Black, was

92. 397 U.S. 254, 255 (1970).

93. *Id.* at 262 n.8 (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

94. *Id.* at 264 (emphasis omitted).

95. *Id.* at 264–65.

96. *Id.* at 265.

97. *Id.* at 275–76 (Black, J., dissenting).

98. *Id.* at 273.

that "the Constitution would always be 'what the judges say it is' at a given moment," creating a "constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable."[99] Black predicted that the Court's application of the Fourteenth Amendment Due Process Clause to government decisions about whether to terminate a recipient's public assistance benefits would end up placing an untenable administrative burden on state and local governments and result in policies that would make it harder for claimants to obtain welfare in the first place.[100] Black and others would repeat similar critiques many times, sometimes presciently, as time would tell.

Another case illustrating how Brennan deployed the concept of dignity, this time in dissent, is *Paul v. Davis*.[101] That case considered whether a police department violated an individual's due process rights when it circulated a flyer containing his photo and wrongful accusations that he was a shoplifter.[102] Writing for the majority, Justice Rehnquist held that reputation alone was not a sufficient liberty or property interest to trigger application of the Due Process Clause.[103] In dissent, Brennan argued that the Court permitted police actions that may "condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society."[104] As he had in *Goldberg v. Kelly*, Brennan focused on the plight of a lone individual facing a dehumanizing government system. As Brennan stated, "I have always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth."[105]

This view is visible again in his opinions checking the government's power in other situations involving potential violations of

99. *Id.* at 277.
100. *Id.* at 279.
101. 424 U.S. 693, 734–35 (1976) (Brennan, J., dissenting).
102. *Id.* at 694–96.
103. *Id.* at 701.
104. *Id.* at 714.
105. *Id.* at 734–35.

individual constitutional rights, such as habeas law[106] and the right of aggrieved individuals to sue the government for damages.[107] The underlying concern driving Brennan's analysis always involved protecting the relatively powerless individual from government abuse.

On a host of other subjects, Brennan's commitment to dignity jurisprudence explains his analysis. Even in the context of movements to advance group rights, on Brennan's view it was an individual's dignity rather than a group's advancement that should prevail. In *Connecticut v. Teal*, for example, Brennan made clear that it was the dignity rights of the individual to be free from discrimination that mattered.[108] There he wrote that an employer's steps to ensure that the "bottom line" of its selection process avoided disparate impact did not cure the harm caused to the individuals who were screened out due to the use of a selection mechanism not justified by business necessity.[109] As Brennan wrote, "Every *individual* employee is protected against . . . discriminatory treatment."[110]

In his speeches, Brennan further explicated his commitment to individual dignity rights. In explaining his views on criminal procedure, Brennan noted that "incarceration strips a man of his dignity," and the Court must "demand strict adherence to fair procedure" because "[t]here is no worse injustice than wrongly to strip a man of his dignity."[111] Likewise, on the constitutional standards governing the role of defense counsel, Brennan claimed that lawyers in this role should "above all . . . function as the instrument and defender of the client's autonomy and dignity."[112] Indeed, the Warren Court's opinions expanding constitutional rights in the criminal justice context, which Brennan often had a hand in even

106. *See* Fay v. Noia, 372 U.S. 391, 398–99 (1963) (allowing a criminal defendant to pursue relief under the federal writ of habeas corpus even though he had not exhausted his state remedies). I am grateful to Steve Wermiel for this point.

107. *See* Monell v. Dep't. of Soc. Servs. of N.Y.C., 436 U.S. 658, 690 (1978) (holding that, under the original meaning of the Civil Rights Act of 1871, individuals have the right to sue municipalities for violations of their constitutional rights); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that individuals have an implied cause of action to sue a federal agency for violation of their Fourth Amendment rights).

108. 457 U.S. 440, 453–54 (1982).

109. *Id.* at 452–53, 455.

110. *Id.* at 455.

111. Brennan, *Contemporary Ratification*, *supra* note 3, at 442.

112. Jones v. Barnes, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting).

when he did not write them, are all based on ideas about the dignity rights of even the most abject persons despised as criminals.[113]

So too in Brennan's view on the unconstitutionality of the death penalty: "[t]he calculated killing of a human being by the state involves . . . an absolute denial of the executed person's humanity."[114] In his concurrences and dissents in death penalty cases, Brennan read the text of the Eighth Amendment's Cruel and Unusual Punishment Clause to prohibit this punishment in all circumstances. In *Furman v. Georgia*, where the majority invalidated that state's capital punishment system because of its arbitrary and uneven application, Brennan concurred, canvassing at length the evidence of the Founders' understanding of the Eighth Amendment's words and drawing from this history the "primary principle" that "a punishment must not be so severe as to be degrading to the dignity of human beings."[115] Because the "calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity," Brennan reasoned, the death penalty was unconstitutional in all circumstances.[116] Several years later, when the Court upheld Georgia and other states' reformed death penalty laws in *Gregg v. Georgia*, Brennan dissented, elaborating on and reiterating the views he stated in *Furman*:

> The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] . . . inconsistent with the fundamental premise of the [Cruel and Unusual Punishment] Clause that even the vilest criminal remains a human being possessed of common human dignity."[117]

A similar focus on the dignity of individuals can be found in many other Brennan opinions.[118] Even when Brennan did not

113. *E.g.*, Miranda v. Arizona, 384 U.S. 436, 460 (1966) (stating that dignity is the constitutional foundation underlying the Fifth Amendment privilege against self-incrimination).

114. Brennan, *Contemporary Ratification*, *supra* note 3, at 444.

115. 408 U.S. 238, 256–57, 263, 268, 271 (1972) (Brennan, J., concurring).

116. *Id.* at 290, 305, 310. In a long opinion, Brennan elaborated on his views, but explained that, at their core, was the conviction that "[d]eath, quite simply, does not" "comport[ ] with human dignity." *Id.* at 305.

117. 428 U.S. 153, 227, 230 (1976) (Brennan, J., dissenting) (quoting Furman v. Georgia, 408 U.S. at 273).

118. There are many examples of Brennan's use of the dignity concept in his opinions. *E.g.*, Schmerber v. California, 384 U.S. 757, 762 (1966) (stating that the policies underlying constitutional privileges in the criminal context "point to one overriding thought: the constitutional foundation underlying the privilege[s are] the respect a government—state or federal—must accord to the dignity and integrity of its citizens"); Herbert v. Lando, 441 U.S.

specifically use the term, his focus on dignity came through. His opinion opening the door to federal court review of states' decisions regarding the drawing of voting districts in *Baker v. Carr*[119] can certainly be read this way: what Brennan thought the United States Constitution demanded is that every individual's vote have equal weight or worth so that every individual's voice would matter.[120] As Brennan later explained about subsequent cases in this line, recognition of the one-person, one-vote rule as a new constitutional principle "redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process."[121]

Brennan's opinions on First Amendment rights likewise have the promotion of individual dignity as their underlying rationale, as Professor Morton Horwitz points out in a short but insightful book on the Warren Court.[122] Brennan's opinion in *New York Times Co. v. Sullivan*, which cabined libel and defamation law protections

153, 183 n.1 (1979) (Brennan, J., dissenting) ("Freedom of speech is . . . intrinsic to individual dignity."); Roberts v. U.S. Jaycees, 468 U.S. 609, 624–25 (1984) (arguing that gender discrimination, even by a private organization, "deprives persons of their individual dignity"). Even when Brennan did not use the word "dignity," concerns about preventing the government from abridging individual dignity rights drove his analysis. *See, e.g.*, U.S. Dep't. of Agric. v. Moreno, 413 U.S. 528, 529, 534 (1973) (invalidating a federal statute that prohibited unrelated persons living together in a household unit from receiving food stamps on the ground that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest"); Boddie v. Connecticut, 401 U.S. 371, 386–87, 389 (1971) (Brennan, J., concurring) (arguing that denying an indigent litigant access to the court because she could not pay the filing fee violated both due process and equal protection principles); Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that Texas could not deny public education to children of undocumented immigrants because doing so would deprive them of the ability to participate effectively in society).

119. 369 U.S. 186 (1962). For a discussion of criticism of this opinion, see *infra* Section III.A.

120. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 116–25 (1980) (discussing the Warren Court's voting rights cases).

121. Brennan, *Contemporary Ratification*, *supra* note 3, at 442.

122. MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE *passim* (1998). Horwitz reads Brennan's opinions in cases such as *Speiser v. Randall*, 357 U.S. 513 (1958), which struck down a California statute requiring individuals seeking certain tax exemptions to swear loyalty oaths, and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which announced high burdens of proof for public figures seeking to sue media outlets for defamation and libel, as stemming from Brennan's recognition "that Cold War witch-hunts not only unjustly persecuted many people but also led to the stagnation of American political, cultural, and intellectual life, as fear of being singled out and persecuted for strong or deviant opinions spread." HORWITZ, *supra* note 122, at 69–70. Brennan also wrote the majority opinion protecting the right to use litigation as a form of political expression in *NAACP v. Button*, 371 U.S. 415 (1963). For more on Brennan's First Amendment jurisprudence as reflected in this case and others, see Mark Tushnet, *The Warren Court as History: An Interpretation*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 1, at 1, 9–10. *See also* Post, *supra* note 1, at 130–35.

for statements about public officials, sought to create more space for public discourse on the issues of the day,[123] which Brennan saw as key to humans' capacities to develop intellectually and politically. Brennan's efforts to develop a workable doctrine on obscenity (which left him frustrated and at which he concluded he had failed)[124] were motivated by a desire to leave public discourse open about *all* aspects of the development of human personality, including sexuality.[125] Through contemporary lenses, one might note a failure on Brennan's part to factor into his analysis the dignity interests of the individuals, especially women, violated by demeaning and degrading portrayals in pornography, as well as harms of pornography to the healthy development of human personality.[126] However, that dignity rights critique of the Court's approach to obscenity would not arise until later.[127]

Brennan is sometimes accused of not being a textualist, but this claim misses the mark. As scholars have pointed out, Brennan was indeed a textualist, more so than some other, more conservative Justices.[128] As Brennan saw it, the Constitution's text, especially the Bill of Rights, articulated the fundamental principle he endorsed, so reading the broad, general principles stated in the Constitution's text through a dignity rights lens made great sense. As he put it, "The challenge is . . . to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is *the great design* of the Constitution to secure."[129] Of course, as experts on the history of the dignity concept point out, its modern meaning evolved

123. 376 U.S. 254, 269–270 (1964).

124. HORWITZ, *supra* note 122, at 101, 103–04 (observing that Brennan's attempt to develop workable doctrine on obscenity collapsed and that he viewed this as a personal failure).

125. Roth v. United States, 354 U.S. 476, 487 (1957) ("Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.").

126. *E.g.*, Allison Baxter, *How Pornography Harms Children: The Advocate's Role*, A.B.A CHILD L. PRAC. TODAY (May 2014), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/may-2014/how-pornography-harms-children--the-advocate-s-role/ [https://perma.cc/P4QU-6GYW] (discussing research showing how easy access to pornography has harmed human development, including the capacity to engage in rewarding intimate relationships).

127. *See* HORWITZ, *supra* note 122, at 103 (discussing Catharine MacKinnon and Andrea Dworkin's critiques that a great deal of pornography reflects male fantasies of degrading women). For a further discussion of this topic, see *infra* Section III.B.2.

128. *See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 213 n.15 (1994) (arguing that Brennan was both a textualist and an originalist).

129. Brennan, *Contemporary Ratification*, *supra* note 3, at 440 (emphasis added).

only gradually over the course of the nineteenth and early twentieth centuries.[130] But it is certainly true that dignity provides a general frame for many of the specific rights stated in the Constitution. These include the First Amendment and its expression of rights to freedom of conscience, expression and political engagement;[131] the protections of individual rights in criminal and civil proceedings, in the Fourth, Fifth, Sixth, and Eighth Amendments, as well as the Fifth and Fourteenth Amendment Due Process Clauses; the rights to equality and protection of civil rights in the Fourteenth Amendment; and protection of rights to political participation in the Fifteenth, Nineteenth, and other amendments that address voting rights. In the many cases discussed above, Brennan provided new gloss but did not invent constitutional law out of whole cloth, as he is sometimes accused of doing.

Justice Brennan was far from the first Justice, nor the last, to employ the concept of human dignity in deciding cases.[132] Justice Murphy used it in his dissent in *Korematsu v. United States* to point out that critiques of the Nazis' violations of human dignity should likewise apply to the United States' internment of Japanese Americans during World War II.[133] A concept closely related to dignity (namely, its opposite, "inferiority") drove the Court's ruling in *Brown v. Board of Education*.[134] Indeed, the concept is evident in Court opinions in many eras, up to and including the Roberts Court.[135] In the per curiam opinion of Justices O'Connor, Kennedy,

130. *See* Laura Kittel, *Human Dignity in the Universal Declaration of Human Rights*, *in* THE INHERENCE OF HUMAN DIGNITY 13, 15–17 (Angus J. L. Menuse & Barry W. Bussey eds., 2021) (summarizing historians' views and the evidence about the origins and development of the concept of human dignity in the UDHR).

131. U.S. CONST. amend. I. *See generally* BURT NEUBOURNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 5–12 (2015) (discussing the many rights articulated in the First Amendment's text).

132. For an exhaustive study of the Court's use of the concept of dignity rights, see Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011). Henry's study concludes that, as of 2011, the Court invoked the term dignity in nine hundred or more opinions, nearly half of which are after 1946. *Id.* at 178. For a list of all of Brennan's decisions invoking the term dignity, broken down by majority opinions, concurrences, and dissents, see *id.* at 230–31.

133. 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) ("To give constitutional sanction . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual.").

134. 347 U.S. 483, 494–95 (1954); STERN & WERMIEL, *supra* note 8, at 148.

135. For a list of all thirty-four opinions invoking the term "dignity" during the tenure of the Roberts Court through 2011, see Henry, *supra* note 132, at 232–33. Numerous Courts have invoked the concept of dignity in many arenas. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 770 (2013) (declaring unconstitutional a federal law prohibiting same-sex marriages on grounds of "interference with the equal dignity of same-sex marriage"); Citizens

and Souter in *Planned Parenthood v. Casey*, for example, those Justices wrote that abortion "involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[136] In *Gonzales v. Carhart*, the partial birth abortion case, a different group of Justices invoked "dignity" with respect to "human life."[137]

Contrasting these two opinions demonstrates how the concept of dignity can end up on both sides of the balance in weighing opposing arguments. In still other contexts, dignity rights point in one direction but may conflict with other interests, such as federalism. An example is Justice Kennedy's rationale in *Obergefell v. Hodges*, which struck down state laws that denied the right of same-sex couples to marry on the grounds that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."[138]

C. *What Brennan's Jurisprudence Assumes*

A close analysis of Brennan's writings reveals the assumptions on which his approach to constitutional interpretation rested. These assumptions were integral to his jurisprudence, and his repeated mention of them suggests that he viewed them as important too. Some of those assumptions were as follows: the Court should push constitutional law reform, the proper ends of law are

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United v. Fed. Elections Comm'n, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) (citing prior case law and stating that "[f]reedom of speech helps 'make men free to develop their faculties,' it respects their 'dignity and choice'") (quoting Whitney v. California, 274 U.S. 357, 375 (1927)); Hope v. Pelzer, 536 U.S. 730, 738 (2002) (stating that the "basic concept underlying the Eighth Amendment . . . is nothing less than the dignity of man") (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)); Winston v. Lee, 470 U.S. 753, 760 (1985) (noting that the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State") (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)); Cohen v. California, 403 U.S. 15, 16, 24 (1971) (ruling that wearing a jacket stating "Fuck the Draft" was protected by the constitutional right of free expression, which is strongly protected "in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests"); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (noting that the Eighth Amendment enforces "broad and idealistic concepts of dignity") (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); Rochin v. California, 342 U.S. 165, 166, 174 (1952) (describing pumping a suspect's stomach after he appeared to swallow evidence of drug dealing as "brutal and . . . offensive to human dignity").

136. 505 U.S. 833, 851 (1992).

137. 550 U.S. 124, 157 (2007).

138. 576 U.S. 644, 666 (2015) (citation omitted). Justice Kennedy uses the word "dignity" nine times in his opinion. Chief Justice Roberts uses the term "dignity" nineteen times in his dissent, which focuses on states' responsibility to determine policies related to marriage.

ascertainable, and the United States citizenry would support the Court's teleology. This Section explores each of these assumptions.

1. The Court Should Push Constitutional Law Reform

Traditional views disapprove of rapid change in law, but Brennan believed that constitutional law should be changing—and rapidly at that. Observing the great progress that was taking place not only in law and social policy but also technology, agriculture, manufacturing, and more, Brennan thought it was his duty to accelerate constitutional law's development to keep pace.[139] Constitutional law should not only keep up with the pace of social change, but, in Brennan's view, it should push to make it faster. Jurisprudentially speaking, Brennan was a man in a hurry. As he put it, "The modern activist state is a concomitant of the complexity of modern society; it is inevitably with us. We must meet the challenge rather than wish it were not before us."[140] There was a "contemporary revolution of rising expectations the world over," and the law needed to meet them.[141] Americans, "an aspiring people, a people with faith in progress," looked to "[o]ur amended Constitution" as the "lodestar" for those aspirations.[142]

That Brennan was strongly influenced by the pace of change he saw around him is evident in remarks such as the following, delivered in 1965:

> Th[e] evolution of constitutional doctrine in our lifetimes only reflects the momentous changes we have witnessed in our society. It is a truism that the change that has swept the world in our century has altered the lives of nearly every person in it. Has this time of change run its course? I don't think so. The chances are better that for a world on the threshold of the space age, even more momentous changes lie ahead.[143]

As illustrated in this quote referring to a coming "space age," Brennan often focused on technological progress as a metaphor to capture the general sense of accelerating change. Technological

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139. *See* William J. Brennan, Jr., The Role of the Court—The Challenge of the Future, Address at the Edward Douglass White Lecture Series at Georgetown University Law Center (Mar. 19, 1956), *in* WILLIAM J. BRENNAN, JR.: AN AFFAIR WITH FREEDOM (Stephen J. Freidman ed. 1967) at 315, 319–21 [hereinafter Brennan, Future Challenge].

140. Brennan, *Contemporary Ratification*, *supra* note 3, at 440.

141. Brennan, Marshall Award Speech, *supra* note 70, at 13.

142. Brennan, *Contemporary Ratification, supra* note 3, at 433.

143. Brennan, Future Challenge, *supra* note 139, at 319.

progress fueled Brennan's generally indomitable optimism about the future.[144]

To meet the increased expectations of a world in which progress was accelerating, Brennan wanted to discard those aspects of inherited jurisprudence that slowed the pace of progress. Thus, Brennan denounced nineteenth century positivism, which had "isolat[ed] law from the other disciplines" and was "wholly unconcerned with the broader extralegal values pursued by society at large or by the individual."[145] The good news, in Brennan's perspective, was that law "[was] again coming alive as a living process responsive to changing human needs."[146]

Brennan explained that he viewed the Court as having such a central role in addressing human needs because of "the American habit" to cast "social, economic, philosophical, and political questions in the form of lawsuits in an attempt to secure ultimate resolution by the Supreme Court."[147] It often came to pass that "important aspects of the most fundamental issues confronting our democracy . . . finally arrive[d] in the Supreme Court for judicial determination."[148] And because these issues often were ones "upon which contemporary society [was] most deeply divided," his "burden," as he put it, was "to wrestle with the Constitution in this heightened public context, to draw meaning from the text in order to resolve public controversies."[149] In other words, to Brennan there was nothing illegitimate about the nine members of the Court resolving the most controversial questions of their times; this responsibility was built into the United States Constitution's design and legal culture.

144. Brennan usually saw great possibility in this acceleration of the pace of change, which he generally described as progress that was benefitting humans around the globe. *Id.* But he was not oblivious to its dangers, as he connected the need to foster human dignity—i.e., to elevate respect and regard for all our human fellows—with avoiding the folly of nuclear warfare. *See id.* at 331–32.

145. *Id.* at 320.

146. *Id.* at 321.

147. Brennan, *Contemporary Ratification, supra* note 3, at 434.

148. *Id.*

149. *Id.*

2. The Proper Ends of Law Are Ascertainable

Although on all reports Brennan was a humble person,[150] and he frequently expressed how fallible and inadequate he felt in the face of the huge responsibility he faced,[151] he thought that he and the other members of the Court were generally up to the task of resolving the often-monumental issues that came before the Court.

Brennan had, after all, articulated a decision-making approach that was coherent and understandable: in areas of interpretive uncertainty, the Justices should apply the principle of human dignity as the decision-making rule. Sometimes Brennan described this area of discretion as quite narrow,[152] and on other occasions as quite broad.[153] Into that area of flexibility, as he saw it, Justices were *not* injecting their own personal philosophies, opinions, or predilections,[154] but were instead following the clearly articulable "substantive value" of human dignity.[155]

On procedural issues, Brennan thought the role of judges was especially clear when viewed through this lens: judges should be "the special guardians of legal procedures, of the standards of decency and fair play that should be the counterpoise to the extensive affirmative powers of government."[156] This statement was perhaps not very controversial—the Court had gradually taken an increasingly active role in policing due process fairness in criminal trials throughout the twentieth century.[157] But Brennan thought that even his more controversial rulings, such as *Baker v. Carr*, were

150. STERN & WERMIEL, *supra* note 8, at 244, 286–87.

151. *E.g.*, Brennan, *Contemporary Ratification*, *supra* note 3, at 434 (stating that "the process of deciding can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge").

152. *See, e.g.*, Brennan, Marshall Award Speech, *supra* note 70 ("The range of free activity is relatively small. . . . Narrow at best is any freedom that is allocated to us. How shall we make the most of it in service to mankind?") (quoting BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 60–61 (1924)).

153. *See, e.g.*, Brennan, Future Challenge, *supra* note 139, at 324 (stating that there are "very few cases where the constitutional answers are clear").

154. Brennan, *Contemporary Ratification*, *supra* note 3, at 433 ("[T]he Constitution cannot be for me simply a contemplative haven for private moral reflection.").

155. *Id.* at 437 ("To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of . . . substantive value choices . . . .").

156. Brennan, Future Challenge, *supra* note 139, at 317.

157. *Cf.* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (tracing the Court's gradual awakening to racial injustice as it handled cases involving egregious race-based violations of due process rights).

straightforwardly justifiable on similar process-related grounds.[158] Enforcing "the constitutional guarantee that each citizen will have an equal voice in his government" ensured "a more effective operation of the processes by which political judgments are reached."[159] Through this way of viewing what the Court was doing, the "highly significant movement in constitutional doctrine that ha[d] to be assimilated rapidly"[160] was not as sudden or drastic as critics asserted. Once understood, the Court's interpretive methodology and the results of its application make sense. Whether Brennan was right about this is the subject of Part III below.

Seen from this perspective, the rationale underlying the Warren Court's rapid development of new doctrines becomes clear. At each juncture, when a majority of Justices agreed, the Court tracked toward outcomes that best enhanced the human dignity principles characteristic of progress in progressives' eyes. It can certainly be argued that in these individual-rights-expanding opinions the Court failed to consider many countervailing considerations, but it is not accurate to assert that its jurisprudence lacked an ascertainable basis. It had a theory, and a pretty simple one at that.

3. The United States Citizenry Would Support the Court's Teleology

Above all else, history has proven one assumption evident in Brennan's jurisprudence to be wrong: his belief that progress would continue in one direction, which the members of the Court could see and usher in more rapidly. Connected to that assumption of a continual arc of progress was a belief in the growing enlightenment of the general citizenry. Brennan optimistically assumed that a sufficient majority of citizens, after being properly educated, would come to accept the Warren Court's value commitments.[161]

Brennan's assumptions along these lines are apparent in both his speeches and his opinions. He of course understood that some

158. *See* 369 U.S. 186, 237 (1962).

159. Brennan, Future Challenge, *supra* note 139, at 329.

160. William Brennan, *Constitutional Adjudication,* 40 NOTRE DAME LAW. 559, 561 (1965).

161. Of course, Brennan was perspicuous and thus well aware that the tide had turned against him in his later years on the Court but, according to his biographer who interviewed him extensively, he remained convinced that the tide would come back his way, though perhaps not until after his death. Written comments from Professor Stephen Wermiel to author (Feb. 13, 2023) (on file with author).

of the Court's opinions were causing consternation in certain quarters, but he thought that criticism would die down as society continued to evolve and citizens came to better understand what the Court was working to accomplish. In one speech, for example, Brennan pointed to the difficult cases that "rais[ed] conflicts between the individual and governmental power—the area which in [his] time ha[d] primarily absorbed the Court's attention" and urged "all Americans" to be sensitive to and understanding of "how intense and troubling these conflicts can be."[162] Public education would produce this understanding:

> If all segments of our society can be made to appreciate that there are such conflicts, and that they require difficult choices, which in most cases involve constitutional rights—if this alone is accomplished—we will have immeasurably enriched our common understanding of the meaning and significance of our freedoms, as well as have a better appreciation of the Court's function and its difficulties.[163]

Key to Brennan's optimism was his view that the American population was becoming "more unified" in outlook.[164] It is puzzling why he expected such future unity given that it certainly had not existed in the past. Brennan pointed to the population "becoming primarily urban and suburban," apparently believing that Americans who had left rural life would share similar outlooks.[165] Here Brennan ignored the obvious facts that, first, many Americans would continue to live in rural communities[166] and, second, conservatives live in urban and suburban communities too, and they would continue to push back hard against Brennan's progressive values.

Brennan was not oblivious that rapid social change bothered citizens whom he viewed as less adaptable and more comfortable with tradition and stability. Quoting influential journalist and social

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162. Brennan, Future Challenge, *supra* note 139, at 324.

163. *See id.* at 325.

164. Brennan, Marshall Award Speech, *supra* note 70 ("Our political and cultural differences cannot stop the progress which is making us a more united Nation."). Brennan used virtually the same words in a speech a few months later. Brennan, Future Challenge, *supra* note 139, at 319–20.

165. *See* Brennan, Marshall Award Speech, *supra* note 70. The data show that urbanites and suburbanites tend to have more progressive social views than those dwelling in rural areas. *See* Susan D. Carle, Comment, *Unpaid Internships and the Rural-Urban Divide*, 80 WASH. & LEE L. REV. 539, 546 (2023) (summarizing this data).

166. Indeed, the rural/urban divide may be among the most important conflicts in the U.S. today, accounting in substantial part for the increased political polarization that many see as a threat to the future of U.S. democracy. *See* Carle, *supra* note 165, at 546–47.

commentator Walter Lippmann, Brennan referred, somewhat derisively, to "the unease of the old Adam who is not ready for a modern age."[167] To the ever-optimistic Brennan, however, to identify this problem was not to flag a serious danger to his constitutional law agenda, but instead to pose a charge to religious and educational institutions to inculcate progressive values. As past leaders of religion's "great traditions" had, religious leaders of the present should serve "as instruments with which to change the world, to seek justice and righteousness."[168] Educational institutions should engage in "a complete reorientation of approach toward the indispensable liberal arts training [that] is urgent in our new society."[169] They should instill "a breadth of outlook . . . unlike any required in the previous history of mankind," teach a "universality of viewpoint characteristic of the liberally educated individual," and develop students' "sensitiv[ity] to the many diverse cultures which reflect the myriad manifestations of the human spirit."[170]

Brennan further called on bar associations and lawyers to engage in public constitutional law education as a matter of professional obligation.[171] He could be touchy about criticism, as his biographers note,[172] and he called on lawyers to avoid unwarranted denunciations of the Court.[173] The fact that he felt this way is not surprising, given that a good deal of criticism was coming in. I turn to those critiques below.

III. CRITICISM AND REVERSAL

A. *Brennan's Critics*

In his lifetime and beyond, both colleagues on the Court and a wider community of legal scholars and other commentators energetically criticized Brennan's jurisprudence. This onslaught of

167. Brennan, Marshall Award Speech, *supra* note 70 (quoting Walter Lippmann, *A Virtual Despair,* WASH. POST, Aug. 4, 1964, at A13).

168. *Id.* (quoting Arthur J. Goldberg, Assoc. Just., Sup. Ct., Address on Religion and Human Rights (Apr. 15, 1964)).

169. *Id.*

170. *Id.*

171. Brennan, Future Challenge, *supra* note 139, at 328.

172. *See, e.g.*, STERN & WERMIEL, *supra* note 8, at 157 ("Brennan craved academic approval more than he cared to admit."); *id.* at 461–63 (discussing Brennan's antipathy toward the press, which he viewed as sometimes misreporting his opinions).

173. Brennan, Future Challenge, *supra* note 139, at 328.

critique contributed to the process through which Brennan and the Warren Court's interpretive methodology came to fall out of favor.

The punches Brennan experienced most immediately came from his colleagues, such as Justice Black in his dissent in *Goldberg v. Kelly*, as already discussed.[174] Justice Frankfurter was another such voice, as depicted in Professor Brad Snyder's excellent biography of that Justice.[175] In *Baker v. Carr*, for example, where Brennan wrote the majority opinion newly declaring as justiciable the application of the Equal Protection Clause to states' electoral districting practices,[176] Frankfurter dissented to condemn "a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands."[177] In *Plyler v. Doe*, in which Brennan's majority opinion espoused a right of children of undocumented parents to attend public school,[178] Justice Burger accused Brennan of confusing sympathy with legal analysis,[179] much like Justice Black's criticism in *Goldberg v. Kelly*.[180] In *Plyler*, Burger wrote:

> Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. . . . However, the Constitution does not constitute [the Court] as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense."[181]

Burger further argued that removing responsibility for education policy from the state legislature would, in the end, be counter-productive to the goal of gradually advancing society as a whole, for "[w]hen the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy."[182] The Court, Burger added,

174. *See supra* text accompanying notes 97–100.

175. *See generally* SNYDER, *supra* note 57. I discuss this book in Susan D. Carle, *Review Essay*: *A Brief Intellectual History of the Idea of Judicial Restraint*, 49 L. & SOC. INQUIRY 1 (2023), https://www.cambridge.org/core/journals/law-and-social-inquiry/article/failed-idea-of-judicial-restraint-a-brief-intellectual-history/494B696B3AD836101F110A79A75EAF31.

176. 369 U.S. 186, 210, 237 (1962).

177. *Id.* at 267 (Frankfurter, J., dissenting).

178. 457 U.S. 202, 221–22 (1982).

179. *Id.* at 243 (Burger, J., dissenting).

180. 397 U.S. 254, 276 (1970) (Black, J., dissenting).

181. 457 U.S. at 242 (Burger, J., dissenting).

182. *Id.* at 253.

was doing no more than "encourag[ing] the political branches to pass their problems [on] to the Judiciary."[183]

These examples capture the criticisms Brennan and the other progressive members of the Warren Court encountered as they sought to push constitutional law doctrine toward the end of enhancing individual dignity. Depending on the issue and time period, Justices Black, Frankfurter, Harlan, White, Burger, Powell, Rehnquist, and Scalia accused the Court of illegitimate activism. Through their opinions they let the nation know how differently they viewed matters of constitutional interpretation. Frequently they formed voting majorities to reverse course on Warren Court precedents. Through these activities, they contributed to a growing drumbeat that would, in time, lead to a counter-revolution on the Court at least as drastic as the one the Warren Court had heralded.

Not only Brennan's colleagues but legal academics, too, contributed critiques. Legal academics' perspectives fell along a spectrum. Some provided qualified support, seeking to justify the Court's approach at deeper theoretical levels. These scholars offered tweaks and suggestions to shore up what were sometimes obvious analytic deficiencies in opinions that reflected the patched-together compromises necessary to develop majority opinions among Justices with varying viewpoints. John Hart Ely, most famously, offered a theoretical justification for activist judicial review based in protecting and enhancing democratic processes.[184]

Other criticisms were measured in tone, such as Professor Archibald Cox's 1968 weighing of the arguments in favor of the Court's use of power to bring about broad institutional reforms, on the one hand, against the arguments opposing the Court's intrusion into federal and state functions, on the other. The later arguments, Cox noted, pointed to the conclusion that the Court's activism violated the allocation of functions among the branches that the Constitution prescribed.[185]

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183. *Id.* at 254.

184. ELY, *supra* note 120, *passim*; *see also* Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 18, 25, 32–33, 44 (1970) (offering a defense of the Warren Court based partly in the Reconstruction amendments' purpose of putting the right to racial equality "into the main stream of constitutional-law method" and partly in the Ninth Amendment, especially with respect to the right to contraceptives found in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

185. ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM *passim* (1968).

Still others were harder hitting. These tended to involve deeply elaborated treatments of the need for the Court to refrain from judicial overreach. The evolution of Alexander Bickel's classic work shows this growing concern. In his 1962 book, *The Least Dangerous Branch*,[186] Bickel strove to articulate a theory of judicial review that justified the decision in *Brown* in the face of criticism from Professor Herbert Wechsler and others that the Court had failed to sufficiently ground that decision in defensible "neutral principles."[187] Bickel argued that, in limited circumstances, the Court would be justified in stepping into the political operation of government to bring "principle" to bear on government actions in the form of "general propositions" or to "organiz[e] ideas of universal validity" in a "given universe of a culture and a place."[188] Such principles might be "grounded in ethical and moral presuppositions,"[189] but their application should be limited with "extreme severity."[190] As examples of such rare situations, Bickel pointed to public school desegregation, as well as the abolition of the death penalty.[191]

But Bickel thought that the Court had gone too far in opening the door for federal judicial supervision of the states' political processes because it should not be attempting to decide among choices state legislatures could rationally make.[192] By 1970, Bickel's critique of *Baker v. Carr* and other Warren Court decisions had taken on a noticeably harsher tone. Bickel found the "velocity" of the Court's pace of change far too much.[193] Pointing to the Warren Court's "assumption of continuous progress" (i.e., the assumption that Section II.C.1 above identified in Brennan's speeches), Bickel warned that there was no reason to suppose—and by that time plenty of evidence to doubt—that history would turn out that way.[194] In its haste and confidence, Bickel argued, the Court's

186. *See* LEAST DANGEROUS BRANCH, *supra* note 35, at 235–41.

187. *Id.* at 56–65, 69; *see also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (expressing sympathy for the holding in *Brown* but extensively criticizing multiple aspects of its reasoning).

188. LEAST DANGEROUS BRANCH, *supra* note 35, at 199.

189. *Id.*

190. *Id.* at 200. Among the many dangers Bickel saw in the Court applying new principles too often, he cited a "lack of candor," "manipulative process," abandoning traditional principles in favor of others without sufficient justification, and involving itself in "judgments of expediency" and in second guessing political institutions. *Id.*

191. *Id.* at 240.

192. WARREN COURT, *supra* note 35, at 180–81.

193. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 40 (1970).

194. *Id.* at 117 (pointing to "indications that the society of the rather near future may be forming beyond the horizon on which the Warren Court's gaze was fixed" and "that it may

jurisprudence had developed many flaws, including "erratic subjectivity," "analytical laxness," and lack of intellectual coherence.[195] The Court was pushing particular "substantive objectives . . . [favoring] excluded group[s]" rather than simply nullifying their exclusion and then leaving political processes to work out substantive results.[196] Instead of articulating impersonal and durable principles, it was pushing "egalitarianism"—the Warren Court's "music," as Bickel put it.[197] But that goal was leading to the enlargement of the dominion of law and the centralization of national institutions in a manner inconsistent with a theory of political democracy.[198]

Most interesting was Bickel's critique of *Reynolds v. Sims*. The one-person, one-vote rule that decision ultimately ushered in, Bickel argued, took away the system of checks and balances central to Madisonian political theory.[199] Under Madisonian theory, minority groups could maneuver to exercise their bargaining power to have some say in political results. In a strictly majoritarian system, however, they would not have such power. The end result of the Court's approach, Bickel argued, was the creation of a system with only one locus of power rather than many; that locus of power was increasingly the Court.[200] But, Bickel argued, in the vast, complex, and changeable society of the United States (the same one Brennan saw, as discussed in Section II.C.1 above), the Court was the "most unsuitable instrument for the formation of policy."[201] To

be taking on shapes the Court did not perceive and its law cannot accommodate"); *see also id.* at 174 (accusing the Warren Court of not having sufficient "pragmatic skepticism" or appreciation of the uncertainties of historical truth, which "would have produced more caution, and less speedy development of doctrine").

195. *Id.* at 45, 55, 76, 81. As examples, Bickel gave *Katzenbach v. Morgan*, 384 U.S. 641 (1966), where the Court held that Congress could enact legislation under the Fourteenth and Fifteenth Amendments that granted voting rights protections greater than those the Court held were constitutionally required, and *Flast v. Cohen*, 392 U.S. 83 (1968), which authorized taxpayer suits to enforce the constitutional prohibition against government support of religion. Justices Brennan and Warren, respectively, had authored those opinions; in Bickel's view they announced grounds for decision that were supposedly limited but were, in truth, "not limitable." BICKEL, *supra* note 193, at 76.

196. *Id.* at 85.

197. *Id.* at 13, 103.

198. Bickel had much more to say in a critical vein as well, including that the Court was imposing value judgments disguised through unjustifiable uses of history, *id.* at 98–99, and exercising an "imperfectly bridled managerial drive," *id.* at 104.

199. *See* BICKEL, *supra* note 193, at 109–10, 116–17 (citing Reynolds v. Sims, 377 U.S. 533, 565–66 (1964)).

200. *Id.* at 114–15.

201. *Id.* at 175.

address "problems with complex roots and unpredictably multiplying offshoots," Bickel argued, "society is best allowed to develop its own strands out of its tradition; it moves forward most effectively, perhaps, in empirical fashion" and uses methods of problem-solving unavailable to courts.[202] Courts, Bickel asserted, were "too principle-prone and principle-bound," "too remote from conditions," "not accessible to all the varied interests that are in play in any decisions of great consequence," "passive," and unable to sufficiently time their approaches.[203]

Bickel's analysis of the flaws of judicial activism was profoundly important in warnings about the unintended consequences that can flow from the best of intentions in constitutional adjudication. He was wrong in some respects. His references to Madisonian democracy echoed some of the themes of political theorist Robert Dahl, who had investigated how minority rights come to be asserted in highly imperfect democracies.[204] But the nation's long history of Black voter disfranchisement disproves Bickel's assumption that racial minorities would necessarily gain political power through bargains cut with political elites. Ely's theories about the importance of the Court's role in protecting rights to political participation have better stood the test of time.

In other respects, however, Bickel's general points provided a possible roadmap for righting the balance between political democracy and unduly activist judicial review. If practiced consistently, judicial restraint would prevent the Court from the wild swings that make it look like a partisan political institution. The Court, however, did not take this direction. It reversed course, to be sure, but continued to employ heavy-handed teleological or values-based reasoning just as Brennan and the Warren Court had previously done. Instead of exercising a lighter hand, the Court simply began to impose a different set of values, all while denying that it was doing so.[205]

Bickel's critique of the Warren Court came across as nonpartisan, carrying with it his history as a defender of both *Brown* and rare additional Court interventions on key matters of human

202. *Id.*
203. *Id.*
204. *See id.* at 116–17. *See generally* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).
205. *See infra* Part IV.

rights. Under his logic, *Obergefell v. Hodges* arguably stands as another rare instance of upholding principles of "universal validity"[206] —i.e., the classic liberal principle of leaving individuals alone to live the most intimate aspects of their lives the way they wish. *Obergefell* enforced "a proposition 'to which widespread acceptance may fairly be attributed,'"[207] as the bipartisan support for government nonintervention in marriage shows.[208]

In others' hands, Bickel's points took on a stronger political valence.[209] Bickel's friend and colleague Professor Robert Bork pressed a far-right perspective. Especially in his later years, Bork railed against feminists, gay rights advocates, and others with progressive ideas in a viperous tone inconsistent with recognizing the inherent dignity and worth of all.[210] These responses prompted political showdowns rather than pointing out new directions that could remove the Court from the culture wars consuming American society.[211] Far from promoting lessons of temperance, Bork and others spurred on the right's formidable political army with powerful, sustaining ideas aimed at smashing all vestiges of the Warren Court. Similar hits came from political candidates that sought to win voters by demonizing the Warren Court. These politicians often appealed to the very concerns about loss of stability and tradition that Brennan thought educational, religious, and other civic institutions would stamp out in a more enlightened age.[212] In short, the Warren Court's jurisprudence proved historically contingent,

206. *See* LEAST DANGEROUS BRANCH, *supra* note 35, at 199. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015) (striking down numerous state laws prohibiting same-sex marriage on the grounds of the Equal Protection Clauses of the Fourteenth Amendment).

207. *See id.* at 240.

208. *See, e.g.*, Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022) (using the Full Faith and Credit Clause as a basis for requiring all states to recognize marriages conducted in any other state); 168 CONG. REC. 8827, 8829 (2022).

209. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 2, 73, 84, 100, 238, 240 (1990) (arguing, inter alia, that: "Americans do not like th[e] outcomes" of a "politicize[d]" Court; the Warren Court engaged in "unprincipled activism," which led to the dissatisfaction with it that was widely shared; rights were created by judges so that they could do whatever they wished; substantive due process meant whatever "can attract five votes on the Court"; and Brennan "created a 'human dignity' clause, found nowhere in the Constitution, that makes unconstitutional the death penalty, which is found several times in the Constitution").

210. *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE *passim* (1996).

211. For a sustained argument for using constitutional law debate to instead highlight the values that unite the country, see H. JEFFERSON POWELL, THE PRACTICE OF AMERICAN CONSTITUTIONAL LAW (2022).

212. *See supra* Section II.C.3.

as all ideas turn out to be. History belied Brennan's sunny optimism that technology would soon eliminate world poverty and enlighten the masses. The close of the twentieth century did not see the dawning of a generally progressive world view shared by most citizens, which Brennan expected would make them generally supportive of Court progressivism.

To point out that the jurisprudence of Brennan and the Warren Court rested on historically contingent assumptions is not to say that enhancement of human dignity as the proper end of constitutional law is not a good idea, or even the best of the available alternatives; that is a question for robust, open debate, this Article argues. What this observation acknowledges is the reality that, if an approach along the lines of Brennan's dignity rights jurisprudence were to be revived, such a revival would require constructing a new set of workable underlying assumptions to support it. Constitutional scholars working in the field of dignity law are doing just that,[213] as are human rights theorists in a variety of contexts and countries.[214] In the United States, scholars are looking to transnational dignity rights concepts to inform doctrinal development in a wide variety of areas.[215] The results of such work, while not today in the ascendency in the United States, stand ready for use as circumstances present opportunities for them to be deployed.

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213. *E.g.*, UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013) (collecting scholarship on various aspects of the dignity discourse); JAMES R. MAY & ERIN DALY, ADVANCED INTRODUCTION TO HUMAN DIGNITY AND LAW (2020); MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012).

214. For a German theologian's extended philosophical treatment of human dignity as a natural law concept, see EBERHARD SCHOCKENHOFF, NATURAL LAW & HUMAN DIGNITY: UNIVERSAL ETHICS IN AN HISTORICAL WORLD (Brian McNeil, trans., Cath. Univ. Press 2003) (1996).

215. A few examples include Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365, 369, 380 (2020), in which Resnik surveys the Court's use of the concept of dignity in its Eighth Amendment jurisprudence and proposes principles to limit government discretion in imposing punishments; Reva Siegel, *Dignity and the Duty to Protect Unborn Life*, *in* UNDERSTANDING HUMAN DIGNITY, *supra* note 85, at 511–13, in which Siegel analyzes the competing dignity claims invoked in abortion rights law in Europe and the United States; Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1594 (2006), in which Resnik traces the "silent seepage" of the concept of dignity from the UDHR to United States constitutional law; and Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21–27 (2004), in which Jackson discusses the transnational development of dignity rights law and notes the dignity rights clause in Montana's state constitution.

Brennan was right in some regards. Change *is* a certainty. All Courts, including originalist Courts, must adapt constitutional principles to new historical challenges. The demise of Brennan's methodology shows that all ideas need assessment and revision over time. Critics have identified many problems in Brennan's human dignity jurisprudence, as noted above. Several important problems from a contemporary perspective, as I explore below, are a lack of guardrails for constitutional interpretation, insufficient guidance about how to balance among often-competing dignity interests, and a lack of theory as to when the Court should interfere in the policy judgments of the political branches.

B. *What Dignity Rights Jurisprudence Failed to Address*

1. Guardrails

As already discussed, Brennan failed to sufficiently foresee the unpredictability of historical change. The factors that supported the rise of the Warren Court, including the short-term convergence of all three branches of federal government on a progressive agenda,[216] are unlikely to return any time soon, leaving contemporary progressives with large unanswered questions about what legal strategies they should pursue today.[217] Because Brennan was unduly optimistic about the nation's political future, he failed to develop a jurisprudence that would provide guardrails against the ascendency of a Court with ambitions about bringing about legal change that were just as big as his own but views about the directions for such legal change that progressives would find odious. Brennan thought the arc of history would bend toward progressivism. He did not sufficiently think through the consequences of adopting an activist methodology that a Court with very different views about the proper ends of law could just as easily deploy.

2. Balancing Interests

Nor did Brennan provide sufficient guidance about how to apply his dignity rights jurisprudence in situations requiring either *balancing* various aspects of human dignity or balancing dignity

216. *See supra* Section I.B.

217. I address some of those questions in Susan D. Carle, *Reconstruction's Lessons*, 13 COLUM. J. RACE & L. 734 (2023).

against other important interests. As all lawyers know, doctrinal change can result in unintended consequences that create problems elsewhere in the complex systems that legal rules support. Black's dissent in *Goldberg v. Kelly* argued this: adding due process rights at the point of termination of government benefits uses up government resources that could otherwise be devoted to other aspects of the benefits system, as Brennan undoubtedly recognized but did not discuss. Providing more due process rights on termination results in fewer resources being available to provide such benefits at the outset, leaving more individuals in economic destitution, which is itself a violation of dignity rights.[218] Brennan's critics made this point, but Brennan did not respond to it, leaving supporters of his approach without sufficient guidance on a problem that needs to be addressed in order to make dignity rights jurisprudence work.

Another obvious problem Brennan failed to address is this: very often, considerations based on dignity rights point in divergent directions depending on how one weighs certain individuals' dignity rights against those of others. Stark examples are virulently misogynistic pornography and hate speech. Providing robust protection to almost all types of speech opens the floodgates to communication of ideas and values, to be sure, but some of those ideas and values promote the degradation of women and other traditionally subordinated identity groups. Put otherwise, radical protection of free speech supports a great amount of speech, but the speech that pours out can severely damage the dignity of human beings. That damage, moreover, is far from randomly distributed: it falls on the very members of traditionally marginalized groups that Brennan's dignity-based jurisprudence sought to protect. To point this out is not to assert that these harms to individuals' dignity rights outweigh the harm of suppressing free expression, but the tension cannot simply be ignored, although Brennan never really confronted it.

Courts in other countries have adopted a different balance between free speech and the protection of individual dignity rights.

218. For a related critique of Brennan and the Warren Court's jurisprudence on criminal justice, see Mark Tushnet, *The Warren Court and the Limits of Justice*, *in* 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS 433, 444 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010). Tushnet convincingly argues that the anti-formalism of Brennan and the Warren Court provided insufficient guidance to the line-level government officers responsible for implementing legal rules.

The high court of Brazil, for example, concluded in *State v. Ellwanger* that the harm caused by antisemitic speech outweighed the defendant's free speech rights.[219] This somewhat resembles the approach the Supreme Court previously endorsed in *Beauharnais v. Illinois*, which permitted suits for identity group defamation,[220] but which Brennan's opinion in *New York Times Co. v. Sullivan* superseded.[221]

Representing a new generation of United States constitutional law scholars, Daniel Rauch has called for a reexamination of this aspect of *New York Times Co. v. Sullivan*.[222] Rauch contests Brennan's assumption that it enhances First Amendment values to make defamation lawsuits hard to win for the very broad set of persons currently considered "public figures" and those engaged in public debate under *Sullivan*.[223] As Rauch points out, in today's political climate, *Sullivan*'s "actual malice" standard bars legal redress to politically involved persons who find themselves "cancelled" by exceptionally base types of defamation, such as being called a pedophile or a perpetrator of other heinous wrongdoing.[224] In *Sullivan*, Brennan was, admirably, trying to protect *merited* critiques of public figures.[225] Nonetheless, that precedent also results in shutting down the political speech of persons who are subject to the kinds of extreme, scurrilous accusations common in today's viral age. In short, Rauch shows that enhancing the open exchange of ideas, as Brennan's First Amendment jurisprudence tried to do, ends up being more complicated than he and the Warren Court envisioned.

The answers to questions about how to balance various individuals' dignity rights and various types of dignity interests are often difficult. That this is true, however, is not a point that defeats the idea of dignity rights jurisprudence per se. Instead, it goes to the

219. S.T.F.J., HC 82.424/RS, Relator: Min. Moreira Alves, 17.09.2003, 524, Diário da Justiça [D.J.], 19.03.2004 (Braz.).

220. 343 U.S. 250, 266 (1952). Writing for a narrow majority, Frankfurter held that extreme racial and religious propaganda intended to have a strong emotional effect fell outside the First Amendment's protections. *Id.* at 261.

221. 376 U.S. 254, 264 (1964).

222. Daniel E. Rauch, *Defamation as Democracy Tort*, 172 U. PA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4423892 [https://perma.cc/BL8X-SJPV].

223. *Id.* (manuscript at 4, 7, 27–28).

224. *Id.* (manuscript at 66, 68–69).

225. *Id.* (manuscript at 35); *see Sullivan*, 376 U.S. at 264.

need to develop dignity rights jurisprudence further in light of the lessons of history. The choice of whether to adopt the teleology of dignity rights as a core standard in constitutional law and, if so, how to update its foundational assumptions for current conditions, persists.

3. Avoiding Policy Judgments

Of all the criticisms of Brennan's jurisprudence, the one that sticks the most, in this author's judgment at least, is Bickel's warning about the harm of too much judicial intervention into matters that the Constitution assigns to the political branches. John Hart Ely's theory about the Court's necessary role in protecting the conditions that allow democracy to operate identifies situations in which judicial intervention should potentially occur.[226] But in other situations, as I discuss further in Part IV below, Justices Black, Frankfurter, and other dissenting Justices' concerns about the consequences of the Court's heavy-handed supervision of the political branches remain unaddressed.[227]

Critiques of the Warren Court on this point would be more devastating if they exposed a failing of the liberal Warren Court that the conservative Roberts Court does not share. To the contrary, the Roberts Court engages in activism just as the Warren Court did. The real opposite of Court activism would be an interpretive methodology that does not use teleological reasoning, in other words, a methodology under which the Justices eschewed imposing value judgments. But that methodology would stymie the Court from delivering judgments in many cases, as Bickel pointed out. Perhaps for this reason, no modern Court to date has used that approach with any consistency. Indeed, it may be highly improbable that individuals with the enormous power held by Supreme Court Justices could consistently restrain themselves from furthering their value commitments in judging case outcomes that have such high

226. ELY, *supra* note 120, at 75–77, 105. Ely based his theory on the Court's explication of when it would engage in searching scrutiny of core constitutional rights in *United States v. Carolene Products Co. Id.* at 75–77 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

227. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 557, 593 (2013) (striking down a congressional act that had received almost unanimous bipartisan support); District of Columbia. v. Heller, 554 U.S. 570, 635–36, 714 (2008) (striking down a law designed to curtail gun possession in a dense urban area with a very significant gun violence problem). For a further discussion of these cases, see *infra* Part IV.

stakes for the country;[228] this is perhaps an unrealistic expectation of Justices, who are called on to exercise the great power they possess and who feel pressure to resolve the disputes before them.

The Court's history suggests that judicial restraint may be a mode of judging that the Court cannot discipline itself to carry out.[229] It may be, in other words, that judging inevitably requires a resort to teleological assumptions to some extent, although that is not a proposition this Article sets out to prove. This Article's point is merely that differing teleological commitments are visible in the Court's jurisprudence through successive eras and should be identified, acknowledged, and assessed on their respective merits. Judges should acknowledge and openly articulate their normative judgments—i.e., their teleology—just as Brennan did. This would spare legal scholars from having to do this excavation, as so many are today in a mushrooming, highly critical literature about the Roberts Court. I review a small sampling of this literature below.[230]

IV. TELEOLOGICAL JURISPRUDENCE AND THE ROBERTS COURT

The current Roberts Court mirrors the Warren Court in its most extreme moments, just flipped upside down. What is different is that the members of the Roberts Court import extra-textual values into their opinions even while claiming not to do so. In this way, they are disingenuous in a way that Brennan was not. Roberts Court scholars of many ideological stripes are exposing the untenable analytic bases for the Court's claims to have eschewed teleological reasoning, as I will discuss below after giving two case examples to illustrate my basic point.

228. *See* Carle, *supra* note 175 (advancing the argument that judicial restraint is contrary to human nature, and that the founders failed to realize that even though they were careful to design the other branches of government to counter human foibles).

229. *Id.*

230. A leading voice who has become increasingly emphatic on this point is Professor Richard H. Fallon. *See* Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 28 (2011) (concluding that "it would be impossible to mount an intellectually honest and persuasive defense of any version of originalism without referring to the attractiveness of the consequences that it would likely yield in the generality of cases"); Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1498 (2021) ("If originalist Justices tell us that they have found uniquely correct factual meanings that provide determinate resolutions to constitutional disputes, we should view their claims with skepticism.").

First, a note about constitutional interpretation basics, about which most constitutional law practitioners, including Brennan,[231] would agree. Judge and Professor Michael W. McConnell, a leading originalist, explains that the basic steps of constitutional interpretation involve, first, the interpreter considering the Constitution's text, because "when the text is clear it is binding."[232] Second, when the text is not clear, as is often the case, the interpreter should examine original public meaning as well as practice and precedent.[233] But those methods of analysis may not produce a clear answer either. At that point, McConnell argues, the Court should refrain from overruling government action because there is no legitimate basis for doing so.[234] This is the approach Bickel advocated for, as discussed in Part III above.

If these were the only steps needed for constitutional interpretation, far less disagreement would reign. Where disagreement arises is in a possible next step in the interpretive process. This step, which McConnell calls the "normative" approach and I have termed teleological reasoning, supports judges, in McConnell's words, infusing the Constitution "with content that will bring about a better world."[235] McConnell characterizes this move as resting on the belief that judges "are more likely to make the kind of normative judgments we hope for, than the elected representatives of the people."[236] As is apparent in McConnell's description, he generally is not in favor of moves to normativity.

McConnell then proceeds to show multiple instances of the Roberts Court, and especially Chief Justice Roberts, moving to normative judgments.[237] He focuses especially on the First Amendment context. McConnell argues that judges should not move to normativity.[238] To not do so, however, would require them to refrain from

231. *See supra* Section II.C.

232. Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1747 (2015).

233. *Id.* at 1788, 1790–91.

234. *Id.* at 1776–77, 1791.

235. *Id.* at 1779–80.

236. *Id.* at 1780.

237. *Id.* at 1783–84 (stating that, in the First Amendment context, "[w]e are shifting . . . to a jurisprudence where the outcome depends on the judiciary's independent analysis of the public policy underlying the restriction").

238. *Id.* at 170. *But see* LEAST DANGEROUS BRANCH, *supra* note 35, at 141 (proposing that judges should refrain altogether from deciding issues when doing so would not be prudent under Bickel's theory of constitutional interpretation but should, in limited circumstances, apply values to decide certain especially important matters).

judging whenever text and original meaning are not clear, which is very often the case on the controversial matters for which interpretive resolution is difficult. This is the kind of restraint Bickel suggests the Court should often exercise[239] and is, as already discussed, another alternative on the table in the ongoing debates about constitutional interpretation.

A case that many scholars, including conservatives, have criticized as having been driven by Chief Justice Roberts' policy preferences rather than textualism and original meaning is *Shelby County v. Holder*.[240] There, a Roberts Court majority struck down a centerpiece provision of the Voting Rights Act of 1965 ("VRA") known as "Section 4" or the "preclearance" requirement, which Congress renewed in 2010 pursuant to its enforcement authority under the Fourteenth and Fifteenth Amendments.[241] Congress's purpose in Section 4 was to impede states that had historically discriminated on the basis of race in their voting practices from instituting changes in voting procedures that would perpetuate that history of discrimination. Remarkably, the Court invalidated Congress's action despite Congress having voted almost unanimously, with overwhelming bipartisan support, to reauthorize the VRA after compiling a "massive legislative record" of thousands of pages to support its decision.[242] This result stands in blatant contradiction to the goal of removing the Court from the role of second-guessing the political branches.[243] It also negates Congress's specifically assigned enforcement powers under the Fourteenth and Fifteenth Amendments. As Justice Ginsberg pointed out in dissent, the Court failed to apply its purported textualist and originalist commitments in disregarding the plain meaning of the Fifteenth Amendment, under which authority the VRA was enacted.[244] Instead, Justice Roberts' majority opinion relied on a purported constitutional law principle he termed the "equal sovereignty"

239. LEAST DANGEROUS BRANCH, *supra* note 35, at 141.

240. 570 U.S. 529 (2013).

241. *Shelby Cnty.*, 570 U.S. at 534–38, 557; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

242. 152 CONG. REC. 15,325 (2006); *Shelby Cnty.*, 570 U.S. at 580 (Ginsburg, J., dissenting).

243. Only when it results in the outcome Justice Roberts prefers does he preach the catechism of judicial restraint. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (stating that "[s]ometimes . . . 'the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches'").

244. *Shelby Cnty.*, 570 U.S. at 567 (Ginsburg, J., dissenting).

doctrine,[245] which most scholars, even conservatives, agree he basically made out of whole cloth as applied in *Shelby*. As conservative Judge Richard A. Posner pointed out, "the [C]ourt's invocation of 'equal sovereignty' is an indispensable prop of the decision" but "there is no doctrine of equal sovereignty."[246]

Rationalizing the overruling of Congress's well-supported decision to reauthorize Section 4 of the VRA thus posed a difficult challenge. The Constitution's text provided no help; the Fifteenth Amendment authorizes Congress to do precisely what it did in deciding to continue regulating jurisdictions with a history of voting exclusion.[247] Nor did the evidence of original public meaning provide any assistance: the overwhelming evidence of the Fifteenth Amendment's original public meaning shows Congress's focus on *a particular set of states* for special attention.[248] Precedent as to the appropriate standard of review also pointed against the result Roberts wanted to reach. His solution? He simply failed to mention the precedential case, *City of Boerne v. Flores*, at all.[249]

What was a Chief Justice to do when facing such a tripartite challenge—from text, original meaning, *and* precedent—to the result he wanted to reach? He reached *outside* constitutional text,

245. *Id.* at 540, 542, 544–45.

246. Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking Down the Law is All About Conservatives' Imagination*, SLATE (June 26, 2013, 12:16 AM), https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html [https://perma.cc/J3JK-PJXS]; *see also* Eric Posner, *Supreme Court on the Voting Rights Act: Chief Justice John Roberts Struck Down Part of the Law for the Lamest of Reasons*, SLATE (June 25, 2013, 1:44 PM), https://slate.com/news-and-politics/2013/06/supreme-court-on-the-voting-rights-act-chief-justice-john-roberts-struck-down-part-of-the-law-for-the-lamest-of-reasons.html [http://perma.cc/UH7N-98E4] ("Roberts is able to cite only the weakest support for this principle. . . . None of the usual impressive array of founding authorities show up in his analysis . . . .").

247. U.S. CONST. amend. XV, § 2; *see* Carle, *supra* note 217, at 780.

248. *See* Carle, *supra* note 217, at 780 (noting the history of Black voter suppression in former Confederate and border states where slavery had been practiced, as well as Congress's passage of Reconstruction-era statutes that regulated voting and other civil rights matters in those states). *Cf.* McConnell, *supra* note 232, at 1755 (noting that originalism calls for looking at the period of framing and ratification of the Fourteenth Amendment as "informed by the series of Reconstruction Acts passed under the authority of the new Amendments") (citation omitted).

249. In *City of Boerne v. Flores*, the Court instructed Congress that it must make a showing that legislation it adopted pursuant to its Reconstruction-Era amendments powers was "congruen[t] and proportional[]" to the constitutional problem it was addressing. 521 U.S 507, 520 (1997). Taking its direction from these instructions, Congress created a voluminous record supporting the VRA Extension Act. *See* 152 CONG. REC. 15,260–325 (2006). Since *Boerne* pointed against the result Roberts wanted, he simply did not cite that precedent, which should have established the standard for the Court's review.

original meaning, and precedent to invent a new idea with no historical provenance as Roberts applied it.[250] That concept was the "principle that all States enjoy equal sovereignty"[251]—in other words, an idea that supported Justice Roberts' views about what result constitutional law *ought* to achieve. Despite the state-specific remedies contemplated in the original public meaning of the Fifteenth Amendment, Roberts applied his values by refurbishing a phrase for use in a new context. Little different from Brennan and the Warren Court in methodology, Roberts merely imposed a very different set of beliefs about the ends constitutional law should achieve.

District of Columbia v. Heller provides another example.[252] In that case, considering a D.C. law regarding firearm control, the Court first looked to the text of the Second Amendment, which the dissent thought important as well.[253] But doing that did not get the *Heller* majority all the way to its desired conclusion that it should strike down a law prohibiting hand guns in homes in a dense urban setting rife with gun violence.[254] On that question, the text and original public meaning are silent. This required Justice Scalia to go elsewhere else—namely, to the common law right to self-defense.[255] In other words, Scalia made an interpretive move beyond text and original public meaning to find principles in law that he liked, just as Brennan read a dignity rights framework into the Constitution.

Scalia also cited evidence of modern public preferences in *Heller*, noting that today handguns are "overwhelmingly" the weapon of choice of Americans for the lawful purpose of protecting self,

250. The Court first discussed an "equal[] [state] sovereignty" principle in an earlier VRA case, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193, 203 (2009). Historians who have searched for the history of the "equal [state] sovereignty" principle as Roberts used it in *Northwest Austin* and then in *Shelby County* have concluded that it had virtually no historical provenance prior to its introduction in *Northwest Austin*. *E.g.*, Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1207 (2016) ("equal sovereignty . . . is an invented tradition"); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1169 (2016) (concluding after extensive historical analysis that "when Congress acts to enforce the Reconstruction amendments, [geographic targeting] is not only permissible, it is arguably *preferable*").

251. Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013).

252. 554 U.S. 570 (2008).

253. *Id.* at 573, 636.

254. I am not arguing one way or the other on the constitutionality of the D.C. law; my point is that text and original meaning do not answer this question.

255. 554 U.S. at 606.

family, and home.[256] But why should it matter to an originalist that Americans *today* want to use handguns? What Scalia was doing was applying a value he holds, which he saw reflected in common law and the purported current preferences of American citizens, to clinch a case result. In other words, he brought extra-constitutional values, or views about the proper ends of constitutional law, to the decision-making process just as Brennan did when he opted to enhance human dignity in determining results in ambiguous cases. Scalia's values were very different from Brennan's, but both Justices brought in value choices, as one enthusiastically acknowledged but the other denied.[257]

An even more egregious example is the Court's holding invalidating state gun carry regulation in *Bruen*, which, conservative originalist Judge Michael Luttig convincingly argues, in fact ignores centuries of law recognizing the right of governments to regulate the carrying of guns in public.[258]

Many other examples could further drive home this point. Instead of continuing with a case-by-case analysis, however, the territory can be covered more efficiently by turning to the rapidly growing literature aimed at exposing the many ways the Roberts Court has imported value-based reasoning to reach results "essentially because the Court agreed" with the policies at issue, even while denying that it did so.[259] Scholars who have made such points

256. *Id.* at 628.

257. The Court's failure to defer to the considered policy judgments of state governments continued in its opinion in New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2150 (2022). Although in *Heller* Scalia had noted reassuringly that most nineteenth century courts regarded prohibitions against carrying concealed weapons as lawful under the Second Amendment and that "nothing in [the] opinion should be taken to cast doubt on [such] longstanding" reasonable gun regulation, 554 U.S. at 626, the Court in *Bruen* struck down just such a longstanding state regulation of concealed carry weapons. 142 S. Ct. at 2133. Here again, the Second Amendment's text does not reveal what the drafters thought about concealed carry limitations, but state practice viewed concealed carry regulations as constitutionally permissible, just as Scalia had noted in *Heller*. *See* 554 U.S. at 626 ("[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.") (citations omitted). Nonetheless, the *Bruen* majority stated that this evidence was not relevant, 142 S. Ct. at 2131–32, even though it had just held in *Dobbs* that state practices regarding abortion *were* highly relevant to Fourteenth Amendment interpretation. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248–49 (2022).

258. 142 S. Ct. 2111 (2022); *supra* note 257; Brief of J. Michael Luttig et al., as Amici Curiae in Support of Respondents *passim*, New York State Rifle & Piston Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

259. McConnell, *supra* note 232, at 1783 (criticizing Chief Justice Roberts for upholding government speech restrictions simply because "the Justices agreed with the policy of the government").

span the spectrum from originalist conservatives to non-originalist liberals.[260]

An especially devastating recent critique comes from Professor Richard Fallon. He describes multiple areas in which the current Court disregards originalist methods when it suits its desired outcomes to do so. His examples include, not only the First and Fourteenth Amendments, but also the Court's jurisprudence on standing, Article III, the Fourth Amendment, the Takings Clause, and more.[261] He concludes that the Court's conservatives "seldom rely on originalist premises to support conclusions that they would find ideologically uncongenial"; engage in "hypocrisy" and "intellectual dishonesty"; and, in so doing, "diminish rather than enhance the respect that we owe to them and their rulings."[262]

In the Fourteenth Amendment context, Professor Peter Smith has shown how the Court manipulates the level of generality at which it defines original meaning to reach the result the majority prefers.[263] Smith gives many historical examples,[264] but the most

260. *See, e.g.*, *id.*; William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 334 (2019) (noting that the current Justices are picking and choosing when to observe stare decisis and when to overrule precedent with no guiding principles other than their own arbitrary discretion); ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 63, 165 (2022) (pointing out originalism's indeterminacy and offering the Eleventh Amendment and sovereign immunity, campaign finance laws, and race conscious remedial measures as examples of the Court's "hypocrisy" in current Establishment Clause jurisprudence as well as voting rights); David Cole, *Egregiously Wrong: The Supreme Court's Unprecedented Turn*, N.Y. REV. BOOKS (Aug. 18, 2022), https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole/ [https://perma.cc/WS63-NA5R] (giving more examples of how originalism fails to constrain discretion).

261. Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality* 20–23, 28 (Harvard Pub. L., Working Paper No. 23–15, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347334 [https://perma.cc/PP42-FTDJ].

262. *Id.* at 8, 9, 26, 30, 32.

263. Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 487 (2017).

264. For example, in *Brown*, the Court's conclusion that the Fourteenth Amendment bars public school desegregation required the Court to define that Amendment's meaning at a high level of abstraction to avoid evidence (inconclusive to be sure) that many persons involved in drafting and ratifying that Amendment condoned segregated public schools. *See* Smith, *supra* note 263, at 496, 505. Scholars like Alexander M. Bickel, "who strongly supported the outcome in *Brown* struggled to justify the decision's rather obvious departure from the original understanding of the Fourteenth Amendment." *Id.* at 501 (citing Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 65 (1955)). Michael W. McConnell also defended *Brown* on originalist grounds. *Id.* at 502–03 (citing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950, 952–53 (1995)). As both Bickel and McConnell acknowledge, however, substantial evidence in the historical record points the other way too. *Id.*

When the Court finally declared anti-miscegenation statutes unconstitutional in *Loving v. Virginia*, 388 U.S. 1, 2 (1967), it again moved to a high level of generality and disregarded

recent one comes from *Dobbs v. Jackson Women's Health Organization*, where the majority defined original public meaning based on the specific laws regulating abortion in existence as of the date of the Fourteenth Amendment's ratification.[265] Another option would have been to use Professor Jack Balkin's originalist interpretation of the right at issue as equality in the right to bodily autonomy. Balkin's approach raises the level of generality at which the relevant right is defined so as to encompass a right to reproductive freedom.[266] It captures the gist of fifty years of precedent. By changing the level of generality to specific legislation as of 1868, the Court provided a rationale for overruling that long line of cases based on a more abstractly defined right to bodily autonomy.

Responding to this dramatic reversal of precedent in *Dobbs*, Professor Reva Siegel traces the Roberts Court's purported originalism to "a backlash to the decisions of the Warren and Burger Courts," and argues that the case exemplifies the Court's own version of living originalism, which seeks to return to "imagined communities of the past—entrenching norms, traditions, and modes of life associated with old status hierarchies."[267] The Court, in other words, was imposing its conservative values, not reaching a result mandated by text or original meaning.

Many other professors have made similar showings. Professor Kyle Velte surveys a host of examples of cases in which the Court has been, as she puts it, "gas lighting" the public—in other words,

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evidence of specific original public meaning as of 1868; only by doing so could it conclude that it was unconstitutional to restrict choice of marriage partner on the basis of race, even though many state laws did exactly that in 1868. Smith, *supra* note 263, at 508–11. What motivated the ruling in *Loving* were changed norms and sensibilities. Thus *Loving* is arguably an example of Bickel's point that sometimes the Court is justified in enforcing value propositions because of "widespread acceptance" and considerations of "ideas of universal validity in [a] given universe of culture and a place." *See* LEAST DANGEROUS BRANCH, *supra* note 35, at 199, 240. In *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015), Justice Kennedy wrote for the majority to extrapolate from *Loving* a high-level fundamental right to choose a marriage partner based on sex as well as race. Justice Scalia, writing in dissent, argued for the opposite result by defining original public meaning based on the specific marriage practices accepted as of the date of the Fourteenth Amendment's ratification. *Id.* at 715 (Scalia, J., dissenting) ("When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases.").

265. 142 S. Ct. 2228, 2248–49 (2022).

266. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 328–29 (2007) (offering an interpretation of the original public meaning of the Fourteenth Amendment at a sufficiently high level of abstraction to encompass the right to abortion).

267. Reva B. Siegel, *Memory Games: Dobb's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1127–28 (2023).

engaging in "manipulation and lies intended to make . . . victim[s] doubt their capacity, attitude, and/or reality."[268] As well as cases already mentioned, Velte's examples include the Court's invention of a "most favored nation[s]" rule for religious institutions subject to COVID-19 regulations, through which the Court decided, usually in "shadow docket," thinly reasoned orders, that if any exemptions to COVID-19 regulations existed, religious institutions had to enjoy them too, so that religious congregations could continue to meet (and contribute to pandemic COVID-19 spread) even during COVID-19 shutdowns.[269] Another example she discusses is the Court's opinion in *Kennedy v. Bremerton School District*,[270] where the majority both misstated the status of existing law and claimed that the facts showed that the public school football coach who engaged in prayer during and after games was engaged in a "brief, quiet, personal" act, despite abundant evidence, including photographs, that the act was a public spectacle to which players and others flocked.[271] Still another is the Court's invention of a new "major questions" doctrine to block federal climate change regulation.[272]

Professor Steven Vladeck further shows how the Court has begun to use its "shadow docket" to issue important orders that deviate from settled principles of law, often late at night or right before holidays to minimize press coverage, with very little or no reasoning.[273] Still other scholars have examined how the Roberts Court's "ostensibly neutral rules" on standing and procedure help implement its conservative majority's policy preferences as well.[274] Professor Lise Beske, for example, has shown how the Court uses standing rules and separation of powers doctrine "to profound substantive effect."[275] The Court's "[h]ostility to the private lawsuit," Beske concludes, accords with its "anti-administrativist,

268. Kyle C. Velte, *The Supreme Court's Gaslight Docket*, 95 TEMPLE L. REV. (forthcoming 2023) (manuscript at 2, 20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4405367 [https://perma.cc/SA4H-JTS3].

269. *Id.* (manuscript at 21–22) (citing Tandon v. Newsom, 141 S. Ct. 1294 (2021)).

270. *Id.* (manuscript at 25–27) (citing *Tandon,* 142 S. Ct. 2407 (2022)).

271. *Id.* (citing *Tandon,* 142 S. Ct. at 2433).

272. *Id.* (manuscript at 42–43) (citing West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2610 (2022)).

273. STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC *passim* (2023).

274. Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 64 (2023).

275. *Id.*

deregulatory drive" and "pro-business bent."[276] Criticism of the Court's use of standing doctrine to manipulate case results has continued in connection with opinions in its 2022 term[277] (just concluded as this Article goes to publication) and more scholarship is likely in this arena very soon.

Another body of literature focuses on the Court's First Amendment jurisprudence, showing how far it deviates from the original public meaning to which the Court claims it must adhere. Professor Jud Campbell is among the scholars doing this work, [278] along with others.[279] Campbell shows that the citizens of the founding era regarded speech and press freedoms as "natural rights that were expansive in scope but weak in their legal effect, allowing for restrictions of expression to promote the public good."[280] He further shows how values regarding speech neutrality only gradually evolved during the twentieth century.[281] In the ultimate of ironies, he explains, it was the liberal Justices of the 1960s who developed the modern "neutrality paradigm" that the Roberts Court likes so much today.[282]

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276. *Id.* at 62, 64.

277. For example, in *Biden v. Nebraska*, Justice Elena Kagan in dissent accused the Court of "exercis[ing] authority it does not have" and "violat[ing] the Constitution," in deciding in favor of objections to the United States Secretary of Education's student loan cancellation plan, where those objections were "just general grievances" and did not assert "the particularized injury needed to bring suit." 143 S. Ct. 2355, 2386 (2023) (Kagan, J., dissenting).

278. *See* Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 861 (2022).

279. Examples include LENARD W. LEVY, EMERGENCE OF A FREE PRESS xii–xv (1985), which argues that the Founders' view of the First Amendment's protections was far narrower than modern doctrine, and Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2167, 2167 (2015), which argues that, contrary to current doctrine, early American courts and legislators did not distinguish between low- and high-value speech but instead prohibited prior restraint of all speech while permitting criminal prosecution of any speech that appeared to pose a threat to the public order. *But see* David M. Rabban, *Review: The Ahistorical Historian: Lenard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 796, 800, 802, 855 (1985) (disagreeing with some of Levy's conclusions).

280. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 246 (2017).

281. *Id.* at 317–18.

282. *See* Campbell, *supra* note 278, at 861, 936–42 (canvassing 1960s cases). There are many examples of the Roberts Court's extension of the neutrality standard. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015) (finding unconstitutional a town ordinance that provided more speech-protective rules for political signs than for directional signs); R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992) (striking down a city ordinance prohibiting the placement on public or private property of burning crosses, Nazi swastikas, and similar graffiti likely to cause anger, alarm or resentment on the basis of race, religion, or gender); Snyder v. Phelps, 562 U.S. 443, 454, 458–59 (2011) (disallowing on First Amendment

As the cases and literature discussed above show, the Justices' discretionary choices as they reason to achieve the case outcomes they prefer are not infrequently based in the normative ends or conceptions of the "good" they believe constitutional law should advance. Their guide in the exercise of this discretion is normativity, in McConnell's terminology, or teleological commitments under the vocabulary I deploy here.

CONCLUSION

As I have shown above, many of the Roberts Court's most important decisions employ teleological methods, just as the Warren Court and Brennan openly used these methods in their era of ascendency. The critical analyses of the Roberts Court scholars from a wide variety of perspectives have disproved the claims of the Roberts Court's conservative majority to be following strict, nondiscretionary rules in interpreting the Constitution. If these members of the Roberts Court are relying on their own extra-constitutional value system, just as Brennan openly acknowledged he was doing, then the real question becomes what version of teleological reasoning the People of the United States prefer. Should it be one that seeks to enhance human dignity in cases in which more than one outcome can be reached after examination of the Constitution's text and broad principles along with the Court's precedents? Or should it be one based on the values that the Roberts Court predictably upholds, based in tradition and steering constitutional law in directions consistent with a right-wing political agenda? Alternatively, is the best approach somewhere in the middle, accepting generally the aspirational aims of Brennan's interpretive methodology but fixing some of the problems history has exposed? Such lessons include avoiding unintended consequences, designing rules that are acceptable both when the Court affirms one's preferred values and when it does not, developing tests that acknowledge and work out conflicts among various dignity interests, and avoiding second guessing policy decisions the Constitution assigns to the political branches. Another potential option on the table is practicing the judicial restraint for which Bickel argued, rather than just giving lip service to this principle while applying it only when

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grounds a claim for emotional distress the father of a dead veteran filed against protesters who interrupted his son's funeral with chants including "Thank God for Dead Soldiers" and "Fag Troops"). These cases apply the First Amendment absolutism Brennan and other members of the Warren Court pioneered. Campbell, *supra* note 278, at 924–27.

doing so suits the conservative supermajority's desired outcome.[283] The point is that these are all choices, not commands based on logic or prescription.

Decisions about what ends constitutional law should advance are complex and difficult and should be subject to extensive debate. Opening the doors to such debate requires frankness. The fact that choices exist must be acknowledged. The Court should not claim to be acting without discretion when it in fact has not eliminated teleology from its reasoning. It makes value choices, and often does so most obviously in stretching to reach its preferred outcomes in the most consequential cases of our times.

Such choices produced the two ends of the spectrum embodied in Brennan's "good" of maximizing human dignity and the Roberts Court's conservative supermajority's values based in the political agenda of the far right. Although these latter Justices claim to stick to text and original public meaning, they are in fact pursuing, at their own break-neck speed, extra-constitutional conceptions about law's proper ends. They should be called to account for this as a first step toward candid assessment and critique.

283. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (declining to review claims of partisan gerrymandering of electoral districts on the ground that, inter alia, "we have no commission to allocate political power and influence in the absence of a constitutional directive").