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THE MYTH OF JURISPRUDENCE: INTERPRETIVE THEORY IN THE CONSTITUTIONAL OPINIONS OF JUSTICES REHNQUIST AND BRENNAN

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I. CONSTITUTIONAL THEORY AND THE MYTH OF JURISPRUDENCE: THE APPEAL OF PRINCIPLE(S)?

The last twenty years have seen a remarkable flowering of interest in the Constitution. Indeed, judging by the proportion of recent law review articles dedicated to revealing the real meaning of the Constitution one could easily conclude that the number of distinct constitutional theories is directly proportional to the number of professors of constitutional law.[1]

Yet for all of this proliferation of commentary, we are far from a consensus on what the Constitution means or even how to go about determining its meaning. This lack of consensus transcends mere professional disagreement. Disputes can be nasty enough even when contained within the academy. But

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1. In one sense, the field of constitutional interpretation very much resembles the logic of Reynolds v. Sims, 377 U.S. 533 (1964) (i.e., one person-one theory).

constitutional theorists have not always limited their theater of operations to the pages of scholarly journals. Many of the disputants in these debates have enlisted as aides-de-camp in partisan ideological warfare.[2]

Certainly, much of the stridency of the debate can be attributed to the ever-increasing centrality of the Constitution in American political discourse.[3] Advocates of any particular public policy preference can justify their claim by a variety of appeals. For example, they might claim that the policy is cost efficient, or popular, or moral, or consonant with tradition. They might even claim that it is wise. But if it can be asserted that the policy is *constitutional*, that is all to the better. Such an assertion immediately elevates the legitimacy of the preference. To paraphrase Ronald Dworkin, "the Constitution is trumps."[4] Hence, debates over constitutional theory seem important because very different political agendas *may* be advanced should one theory gain clear public and professional acceptance over others.

Constitutional theory is important for a second reason. For many members of the legal community it is a critical element in what one might call the "myth of jurisprudence." Simply stated, the "myth" asserts that judges are to be bound by principles—principles that should be knowable, universal, consistent, and neutral.[5] The "myth" derives from the need to

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2. To illustrate this point one need only note that advocates of some schools of constitutional interpretation (Gary McDowell, Terry Eastland, Charles Cooper, Grover Rees to name just a few) have been appointed to positions in recent Republican administrations. Others have obtained federal judgeships (e.g., Antonin Scalia, Robert Bork, William Winter, Richard Posner). Adherents of competing constitutional theories have correspondingly carried their academic criticisms into the larger political arena. The nomination of Robert Bork to the Supreme Court galvanized all of these competing visions. His nomination triggered scathing criticisms by a number of scholars representing interpretive approaches antithetical to Bork's, most notably Laurence Tribe (who considered his criticisms sufficiently important to testify against Bork before the Senate) and Ronald Dworkin (who carried the battle into the popular press).

3. This reverence for the U.S. Constitution as the core political symbol in American politics is, in historical terms, a fairly recent development. *See* M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1987); Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071 (1936).

4. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-103 (1978).

5. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

legitimate judging. Why, for example, should anyone accept the verdict of a court? How can we be certain that a judge is not merely invoking her own value preferences to decide our case? The "myth of jurisprudence" assuages some of those concerns and attaches a certain degree of legitimacy to judge-made law. That is, if judicial decisions can be made to appear driven by the "rule of law" rather than human caprice or ideology, then parties in legal disputes will be more likely to accept those results as legitimate and, perhaps, even final.

Debates over constitutional theory are in part, then, an attempt to confirm the validity of the "myth" by demonstrating that there is one true, legitimate set of principles upon which the Constitution is based. However, as with the Round Table's quest for the Holy Grail and Einstein's search for a unifying theory to explain all of the great forces of the universe, *the* interpretation of the Constitution has so far proven elusive and illusory. Walter Murphy has perhaps said it best: the "root of the problem of constitutional interpretation lies in the stubborn refusal of the real world to stand still so that immutable general principles can have immutable applications to human behavior."[6]

In this article we examine the role that constitutional theory plays in the jurisprudence of two outspoken and politically divergent Justices of the United States Supreme Court: William J. Brennan and William H. Rehnquist. The two do not often agree on matters of constitutional law. Indeed, it is unlikely that two more disparate notions of what the Constitution means have coexisted on the Supreme Court for such an extended period.[7] Political conservatives see Rehnquist as their judicial champion; liberals equally revere Brennan. As we shall soon see, those reputations are well-deserved. The more problematic question here, however, is not whether Brennan and Rehnquist reach radically different conclusions in constitution-

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6. Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?* (Book Review), 87 YALE L.J. 1752, 1771 (1978).

7. One indicator of the differences between Brennan and Rehnquist is their voting. According to Phase I of the U.S. Supreme Court Judicial Data Base, Justice Brennan voted to support a "liberal" outcome in 77.2 percent of the 1,556 cases he participated in which had formal opinions. On the other hand, Justice Rehnquist voted for the "liberal" outcome in only 19.6 percent of the 1,350 cases he helped to decide. Segal & Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103 (1989).

al cases. Rather, it is whether or not those differences are derived from different, but principled, constitutional theories. The question is not a harmless one. Much of the energy and passion expended on the pursuit of *the* constitutional theory is predicated on the notion that jurisprudence matters—that the very authority and stability of a constitutional system is threatened when judges do not take the Constitution seriously and use political jurisprudence to subvert principled jurisprudence. How principled, then, are the constitutional *theories* of Rehnquist and Brennan? And, more importantly, do they take their own theories seriously when deciding constitutional cases?

To assess these questions we first present a distinction between *interpretive* constitutional theory and *substantive* constitutional theory. Second, we show how the very different sorts of constitutional results attained by Justices Brennan and Rehnquist are often assumed to proceed from quite different interpretive grounds. Finally, and most important, we present a systematic content analysis of the Justices' opinions over a ten year period (1973-1982) and categorize their different types of constitutional arguments. This affords a direct and powerful test of the differences between the two Justices in their interpretive theories. The results are surprising and at a minimum provide the most systematic evidence to date of the relevance of interpretive theory to constitutional rhetoric.

II. THE TWO FORMS OF CONSTITUTIONAL THEORY

Much of the confusion surrounding debates over constitutional theory results from the failure to recognize that there are two different kinds of constitutional theory. On the one hand, a Justice can strive to develop a substantive understanding of *what* the Constitution means. Such a substantive constitutional theory should be coherent, consistent, and well-integrated. As noted below, Justices Rehnquist and Brennan have *substantive* constitutional theories that completely fulfill those criteria. Their theories are at least as sophisticated and internally consistent as those of any Justice in the post-War period.

There is, however, another very distinct kind of constitutional theory. Instrumental or interpretive theory is not directly concerned with *what* the Constitution means. Instead, it fo-

cuses on *how* one should go about ascertaining what it means. The two kinds of theory are different, though not necessarily mutually exclusive. A Justice might, for example, resolve constitutional cases in decidedly atheoretical ways, being neither coherent in substance nor consistent in his mode of interpretation.[8] Or a Justice might have a very coherent substantive understanding of the Constitution, achieving outcomes that are quite predictable from case to case, and yet not utilize any consistent interpretive approach in arriving at his conclusions. "Strong" constitutional theory requires, however, that a Justice not only develop a firm, sure sense of what the Constitution means (i.e. *substantive* theory), but also be able to ground his conclusions in a well-articulated interpretive theory. A "strong" theory of the Constitution is especially convincing because its interpretive validity reinforces its substantive conclusions.

Concern for interpretive theory is far more central to judicial decision making than in most other political arenas. The policy decisions of legislators and executives may be based on any of a variety of concerns: their own political values, a desire to serve their constituents, appeals for party solidarity, interest group pressures, and strategic judgments vis-a-vis other political actors to name just a few. Rarely, however, are they ever asked to formally explain the principles they applied in reaching those decisions. This is not to suggest that presidents and members of Congress are "unprincipled." But the legitimacy of executive and legislative decisions is usually judged by the success of the policy outcomes and not by the neatness or coherence of their core principles.

By contrast, decisions of the Supreme Court are usually justified by elaborate written opinions that announce which litigant has won, establish principles of law binding on all other American courts, and offer a public rationale for the decision.[9] To acquire maximum legitimacy, judicial opinions must

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8. Some have suggested that Earl Warren might well fit this categorization. Anthony Lewis has suggested that Warren's opinions were "unanalytical," unconcerned with "stability, intellectuality [or] craftsmanship," and focused almost entirely on achieving a just result "unencumbered by precedents or conflicting theories." *See* Lewis, *Earl Warren*, in 4 L. FRIEDMAN AND F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2723-24 (1969); Rodell, *It Is the Warren Court*, in L. LEVY, THE SUPREME COURT UNDER EARL WARREN 137-42 (1972).

9. In truth, only Opinions of the Court fulfill the first two functions. But all

present arguments to the Court's "attentive public" that are clear and persuasive.[10] The standard in constitutional cases is even higher. The "myth of jurisprudence" insists that the arguments in constitutional cases appear authoritative and commanded by some irrefutable reading of the Constitution. It is not enough for a Justice to explain his vote by claiming, "Well, that's just how I feel it should turn out!"[11] The implementation of the substantive results of many constitutional disputes is often advanced (or undermined) by the credibility of the ways in which a Justice uses interpretive theory in her arguments.

III. BRENNAN V. REHNQUIST: PARTISANS OF THE CONSTITUTION

We can now take up the question of whether or not Rehnquist and Brennan exemplify "strong" constitutional theory. We need to demonstrate (1) that each Justice has a coherent *substantive* theory of the Constitution, (2) that each Justice has expressed a clear preference for a particular *interpretive* theory, and (3) that there is a tight fit between each Justice's substantive and interpretive visions—that coherent substantive outcomes in constitutional cases are achieved by the consistent application of their own interpretive theory. There is substantial evidence to suggest that the first of these conditions—that Rehnquist and Brennan represent consistent, albeit different, substantive visions of the Constitution—is true.

Nearly everyone agrees that William Rehnquist's substantive jurisprudence during his nearly twenty years on the Supreme Court has been consistent, so much so that one commentator noted that "[i]f there is virtue in consistency, then Justice Rehnquist is indeed a virtuous man."[12] Given a general description of the facts and the legal questions involved in a

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judicial opinions, whether majority, concurring, or dissenting, are characterized by some degree of justification or appeal to principle.

10. Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 L. & SOC'Y REV. 357 (1968).

11. *See* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

12. D. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST: THE EARLY YEARS 133 (1987).

particular case, Rehnquist's vote is very predictable.[13] One of the earliest and best assessments summarized Rehnquist's jurisprudence in three simple decision rules:

> (1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
> (2) Conflicts between state and federal authority . . . should, whenever possible, be resolved in favor of the states; and
> (3) Questions of the exercise of federal jurisdiction . . . should, whenever possible, be resolved against such exercise.[14]

Little has been discovered in recent years to alter Shapiro's original observations. Powell[15] and Davis[16] contend that Rehnquist has developed a theory of "Our Federalism" that elevates Shapiro's second rule to primary importance. Fiss and Krauthammer[17] counter that Rehnquist's embrace of federalism and states' rights is a camouflage for a deeper, equally consistent support for property rights and laissez-faire economics—a value that Davis in particular sees as subordinate to Rehnquist's concerns about federalism. But Riggs and Proffitt[18] confirm Shapiro's initial assessment of Rehnquist's jurisprudence by noting that in *constitutional* cases (as opposed to cases involving statutory interpretation) Rehnquist consistently supports state power (Shapiro's rule #2) and deference to legislative majorities (Shapiro's rule #1).

All of these studies found consistency in Rehnquist's judicial philosophy by a close reading of his opinions. Analytical

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13. This is no small claim. The so-called "swing Justices" on the recent Court (at various times this group has included Justices Blackmun, Stevens, Stewart, Powell, White, and even O'Connor and Burger) have often been praised for their political "judiciousness," but criticized for their lack of principled consistency.

14. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976).

15. Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982).

16. S. DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 32-37 (1989); Davis, *Federalism and Property Rights: An Examination of Justice Rehnquist's Legal Positivism*, 39 W. POL. Q. 250 (1986).

17. Fiss & Krauthammer, *The Rehnquist Court: A Return to the Antebellum Constitution*, NEW REPUBLIC, Mar. 10, 1982, at 14.

18. Riggs & Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555 (1983).

approaches that focus on Rehnquist's votes rather than his written arguments have reached similar conclusions. Heck has noted that Rehnquist's "voting record . . . is characterized by almost unstinting hostility to the assertion of civil liberties claims."[19] Segal has found that Rehnquist will deny almost every illegal search and seizure claim by a criminal defendant as a matter of course.[20] Spaeth and Teger have found similar anti-defendant voting behavior in double jeopardy cases.[21] Rehnquist also has consistently opposed "liberal" economic policies and "egalitarian" social policies.[22]

Thus, whether we examine *what* he did (as measured by his votes in Supreme Court cases) or *why* he did it (as assessed by a reading of his written arguments) William Rehnquist seems to be a Justice with a clear and coherent substantive constitutional theory—a theory which consistently prefers law-and-order values over civil liberties values, supports states' rights in contests with federal power, opposes expansion of equal protection claims into areas not related to race, and supports the reasonableness of government actions (especially state actions) when in conflict with claims of individual rights. In sum, William Rehnquist consistently reads the Constitution as expressing support for conservative political values.[23]

If Rehnquist is, as many argue, the quintessential conservative jurist, then William Brennan is increasingly portrayed as one of the few defenders of liberalism of the Supreme Court. He is, in the eyes of one commentator, the Justice who most "deserves to be remembered as the cutting edge of Warren Court liberalism."[24] Like Rehnquist, Brennan's substantive

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19. Heck, *Civil Liberties Voting Patterns in the Burger Court, 1975-1978*, 34 W. POL. Q. 193, 202 (1981); *See also* Segal & Spaeth, *supra* note 7.

20. Segal, *Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases*, 48 J. POL. 938 (1986).

21. Spaeth & Teger, *Activism and Restraint: A Cloak for the Justices' Policy Preferences*, in SUPREME COURT ACTIVISM AND RESTRAINT 277 (S. Halpern & C. Lamb 1982).

22. S. GOLDMAN, CONSTITUTIONAL LAW: CASES AND ESSAYS 162 (1987); *See also* Ducat & Dudley, *Dimensions Underlying Economic Policymaking in the Early and Later Burger Courts*, 49 J. POL. 521 (1987); Dudley & Ducat, *The Burger Court and Economic Liberalism*, 39 W. POL. Q. 236 (1986).

23. This is not to suggest that Rehnquist never varies from these positions. As noted earlier (*see supra* note 7) he did support a liberal outcome almost 20% of the time, though almost always in non-controversial, unanimous decisions. Instead, the positions identified here are the central tendencies.

24. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA

constitutional principles seem to have changed little in his long tenure on the Court.[25] Few who have studied his opinions would disagree with the following list of Brennan's decision rules:

> (1) The procedural rights of claimants under the due process clauses of the fifth and fourteenth amendments should be read as broadly as possible.
> (2) The claims of racial and political minorities to legal remedies under the equal protection clause should be promoted whenever the state's interest is minimal.
> (3) Government regulation of the economy (especially federal regulation) should be granted wide latitude consistent with basic principles of post-New Deal federalism.
> (4) Claims by individuals that a government is interfering with a right guaranteed by the first amendment should be resolved by upholding the right in question unless there is an overwhelming interest on the part of the state.

Several commentators have suggested a few modifications to this judicial portrait. Both Heck and Ringelstein[26] and Denvir[27] have argued that Brennan's commitment to free speech and free press claims occasionally turned on whether or not the speech in question is "political." They assert that Brennan was less likely (but only by a bit) to protect obscene and commercial speech and thus was not as absolutist on free speech as, say, Justice William O. Douglas. Brennan was also more sympathetic in recent years to the notion of federalism as an important protection against encroachments on individual liberty. Generally, he was willing to defer to state courts and state constitutions whenever they were more favorably inclined toward civil rights and civil liberties claims than the federal courts.[28] But many suspect that his concerns for federalism

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CLARA L. REV. 841 (1980).

25. Brennan was appointed to the Supreme Court by President Eisenhower and took his seat on the bench in October 1956. He retired in 1990.

26. Heck & Ringelstein, *The Burger Court and the Primacy of Political Expression*, 40 W. POL. Q. 413 (1987).

27. Denvir, *Justice Brennan, Justice Rehnquist, and Free Speech*, 80 NW. U.L. REV. 285 (1985).

28. Corrigan, *Justice Brennan's Philosophy of Federalism*, 20 J. MARSHALL L. REV. 149 (1986). *See also* Brennan's own views on federalism in Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945 (1964), and more recently in Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

were as much tactical as principled. During the period under Chief Justices Burger and Rehnquist many of Brennan's most cherished Warren Court doctrines were modified or eviscerated. Thus, Brennan looked increasingly to the states for protection of those principles.[29] At root, Justice Brennan's constitutional decisions are best explained by his egalitarian sentiments and his expansive view of civil liberties, particularly political freedoms.

Quantitative assessments of Brennan's voting behavior confirm this view of his substantive constitutional theory. Not surprisingly, nearly every empirical study of the Burger and Rehnquist Courts puts Brennan and Rehnquist at opposite ends of several different value-continua. While Rehnquist nearly always opposes free speech claims, Brennan nearly always supported them.[30] While Rehnquist is consistently unsympathetic to defendants' claims based on the exclusionary rule, Brennan was just as likely to find a constitutional violation.[31] Rehnquist routinely votes to deny access to cases making constitutional claims; Brennan just as routinely voted to hear the substantive merits of those same cases.[32] On broad measures of liberalism on economic matters, egalitarianism in general, and support for civil liberties Brennan was the Court's most consistent liberal (in conjunction with Thurgood Marshall) while Rehnquist remains its most consistent conservative.

IV. THE NOTION OF A LIVING CONSTITUTION: WILLIAM REHNQUIST ON INTERPRETIVE THEORY

We know that William Rehnquist and William Brennan represent very different *substantive* views of the Constitution. But do they also reflect different *interpretive* approaches? Supreme Court Justices generally have been reticent about discussing controversial issues in their off-the-bench comments.

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29. Friedelbaum, *Justice Brennan and the Burger Court: Policy-making in the Judicial Thicket*, 19 SETON HALL L. REV. 188, 209 (1989).

30. *See* Heck, *supra* note 19.

31. *See* Segal, *supra* note 20.

32. One study has shown how, in recent years, denial of access almost always has a conservative bias. In effect, denial of access works to prevent far more liberal-oriented substantive claims from being heard than conservative-oriented claims. *See* Rathjen & Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969-1976*, 36 W. POL. Q. 71 (1983).

But William Rehnquist has on at least one occasion used a public address as a "bully pulpit" from which to explain his own theory of constitutional interpretation—and to castigate what he considered to be illegitimate alternative approaches. In "The Notion of a Living Constitution"[33] Rehnquist took issue with the claim that the Supreme Court ought to be "the voice and conscience of contemporary society."[34] This was "a living Constitution with a vengeance"—an interpretive theory which, if followed, would destroy the Court's legitimacy.[35] Citing John Marshall (another "trump" in matters constitutional!), Rehnquist argued that any claim of the judiciary to institutional independence must be based on its special responsibility to safeguard the people's sovereignty as expressed in the Constitution. This was the only justification for permitting an obviously undemocratic and anti-majoritarian body such as the Court to exist. Continued tolerance of the judiciary in a republican society, Rehnquist continued, depended upon a Justice's commitment to merely "interpreting an instrument framed by the people."[36] Justices must be detached, objective, and, most importantly, "should not change the meaning of the Constitution."[37]

Rehnquist conceded that "there is obviously wide room for honest difference of opinion over the meaning of general phrases in the Constitution."[38] But he objected strenuously to any interpretive theory that was not at all obliged to ground itself in the constitutional text or the values of its Founders:

> Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislators, and state and federal administrative officers concerning what is best for

33. Rehnquist, *The Notion of a Living Constitution*, VIEWS FROM THE BENCH 127, 127-36 (M. Cannon & D. O'Brien 1985).

34. *Id.*

35. *Id.* at 128.

36. *Id.* at 129.

37. *Id.*

38. *Id.*

the country.[39]

Rehnquist offered three additional reasons to challenge the notion of the "living Constitution" as a legitimate constitutional theory. First, such a view ignored the role of the Constitution as fundamental law. Rehnquist conceded that the intent of the Framers was not always an appropriate guide for a world they could not possibly have envisioned. Yet it did not follow that *judges* should take responsibility for adapting the Constitution to an ever-changing nation. Instead, it was clear that the Founders created a constitutional system granting vast powers to the President, the Congress, and the states. If there was to be a "living Constitution," it should live through the actions of these other institutions. Second, Rehnquist observed that it was precisely those moments in history when the Court sought to bring the Constitution into conformity with contemporary values that it performed most badly and thus jeopardized its legitimacy. He offered *Dred Scott*[40] and *Lochner*[41] as examples of courts unilaterally seeking to place values into the Constitution (the unalterability of Negro inferiority and the liberty of contract) that were extratextual. Doing so, even in response to widely-held sentiments of the day, did the Court and the Constitution much harm. Finally, Rehnquist conceded that values were a vital part of all political judgments. But he insisted that these value judgments should be left to the people's representatives except in those cases where the choice of values was clearly constrained within the textual Constitution.[42]

Rehnquist said little about the importance of constitutional doctrine in this address, but remarks made at his original Senate confirmation hearings in 1973 fill out his interpretive map. When asked about his views on precedent the nominee responded that while precedent should be accorded great weight, it should receive somewhat less weight in the field of constitutional law than in other areas of the law. What mattered more was the Constitution itself and the values of those who framed it. By implication, where Court precedents depart-

39. *Id.* at 130.
40. Scott v. Sandford, 60 U.S. 393 (1857).
41. Lochner v. New York, 198 U.S. 45 (1905).
42. *See* Rehnquist, *supra* note 33, at 131-36.

ed from those authorities Rehnquist believed that their validity could be tested anew.[43]

V. THE IDEAL OF HUMAN DIGNITY: WILLIAM BRENNAN ON INTERPRETIVE THEORY

The ideological portrait of the Supreme Court changed much during William Brennan's years on the Court. Where the dominant coalition for much of the first half of his tenure was largely liberal and activist (a coalition in which Brennan himself was an enthusiastic participant), the Court has taken on a substantially more conservative hue in recent years. That development surprises no one. Each of the last eight appointments to the Court has been made by Republican Presidents committed in principle (if we assume that campaign promises are principles!) to nominating judges of a more conservative, less activist bent. Observers disagree about whether this new coalition has radically transformed and undermined the constitutional values of the Warren Court. But there is little doubt about Brennan's perception of recent events. His dissents—more numerous and more passionate with each passing Court term—reflected the views of a Justice fighting a rearguard action to preserve his hard-won constitutional vision against the predations of a Court increasingly attracted toward the constitutional theory of William Rehnquist.[44]

For most of his Supreme Court years Brennan's off-the-bench remarks reflected the sort of safe blandness that comes with being a spokesman for the prevailing orthodoxy. But as that orthodoxy has been challenged, both in public discourse and by many of his more conservative colleagues on the bench, Brennan's public addresses became more pointed and more plaintive. The stakes were high. The matter before the bar was the legitimacy of judicial lawmaking in the Warren years and, by implication, the legitimacy of his own theory of constitutional interpretation. As Brennan remarked at the outset of his Georgetown address, at issue is nothing less than "my life's work."[45]

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43. *See* Riggs & Proffitt, *supra* note 18, at 559.

44. A useful analysis of Justice Brennan's dissents can be found in Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMPLE L. REV. 307 (1988).

45. Presentation of Justice William Brennan, *The Constitution of the United*

Brennan's criticism of his critics (principally political conservatives and jurisprudential "interpretivists") opened with an attack on the "jurisprudence of original intention."[46] He asserted that an historicist approach to constitutional interpretation was doomed to futility, noting that "all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality."[47] If Clio indeed spoke with such an unmistakable voice, then, Brennan suggested, the Constitution should be interpreted by a board of historians, not a panel of judges. But his criticism did not end there. Brennan was equally perplexed by the shifting definition of "Framers" and asked whose intentions were the most relevant? Were the "Framers" the thirty-eight men who signed the Philadelphia document, the delegates at the state ratifying conventions, or the representatives chosen to the First Congress? Brennan concluded with a withering volley: "the idea of an original intention is [not] a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states."[48]

Brennan then took direct issue with Rehnquist's notion that the Supreme Court, as an anti-majoritarian institution, ought not to substitute its own substantive values for those of elected representatives. Such a reliance on majoritarianism, according to Brennan, "ultimately will not do."[49] Could the Court, notes Brennan, defer to a legislature determined to impose an arbitrary social caste system or sponsor a wholesale confiscation of private property? "One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature."[50]

How then did Brennan propose that Justices interpret the Constitution? His response was considerably more ambiguous than Rehnquist's:

> We current Justices read the Constitution in the only way

States: Contemporary Ratification, Georgetown University Text and Teaching Symposium (Oct. 12, 1985).

46. *Id.* at 4.
47. *Id.* at 4.
48. *Id.* at 4.
49. *Id.* at 5.
50. *Id.* at 6.

> we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.[51]

And what are the "great principles" of the Constitution? Brennan declined to stipulate all of these principles, preferring to leave it to judges present and future to interpret the constitutional text through the "internal dialogue of reason and passion."[52] But Brennan offered one "great principle" which his own internal dialogue had extracted—an "underlying vision of human dignity" exemplified particularly in the Bill of Rights.[53] Laudable though the notion of "human dignity" is, it is based on an appeal to values and understandings that are not self-evident in the constitutional text.[54]

VI. JUSTIFICATION IN CONSTITUTIONAL OPINIONS: FIVE TYPES OF INTERPRETIVE ARGUMENTS

As noted earlier there is no shortage of interpretive theories available to a Supreme Court Justice. Several scholars have attempted to make some sense of this fertile theoretical landscape by categorizing these theories according to the styles of argument or modes of analysis.[55] We have chosen to classify constitutional arguments by asking the following question: To what authority does the Justice appeal whenever he makes a claim in a written opinion?

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51. *Id.* at 7.

52. Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988).

53. *Id.* at 22.

54. For a detailed illustration of how Brennan employs this notion of "human dignity" in his constitutional jurisprudence, *see* Brennan, *Constitutional Adjudication and the Death Penalty: A View From the Court,* 100 HARV. L. REV. 313 (1986).

55. *See* P. BOBBITT, CONSTITUTIONAL FATE (1982); Harris, *Bonding Word and Polity: The Logic of American Constitutionalism,* 76 AM. POL. SCI. REV. 34 (1982); W. MURPHY, J. FLEMING & W. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION (1986) [hereinafter MURPHY, FLEMING & HARRIS].

Textual argument takes as its authority the Constitution itself and grounds itself in the "plain meaning of the words." It seeks no other source of authority or validation. A Justice using textual argument would apply etymology, semantics, and, most typically, contemporary understandings of constitutional phrases. Sometimes also referred to as "clause-bound interpretivism"[56] this style of argument is best represented by much of the jurisprudence of Hugo Black. His literal reading of the First Amendment ("Congress shall make no law . . . " is archetype textual argument.

Historical argument has been the focus of much recent public and academic controversy. "Intentionalists" maintain that "the historically demonstrable intentions of the framers should be binding on contemporary interpreters of the Constitution."[57] Supporters of historical argument assert that the very idea of constitutionalism commands respect for the judgments and values of those who wrote and ratified the Constitution. Any other approach would break the bond of faith with the Founders and, more importantly, would allow Justices to sit as a rump constitutional convention.[58] A Justice employing this type of argument will typically cite debates at the Philadelphia Convention, the several state ratifying conventions, the *Federalist* essays, or the prevailing political ideas and practices contemporaneous to the Founding period as authority for his decision.

Structural argument also gives substantial deference to the text and history of the Constitution. But instead of focusing on the meaning of isolated words and phrases of the Constitution, a structuralist would be more interested in the overall design and purpose of the constitutional enterprise.[59] No single

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56. J. ELY, DEMOCRACY AND DISTRUST 1-41 (1980).

57. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886 (1985).

58. It is not our purpose here to document fully the extensive contributions that historicists have made to the literature on constitutional interpretation. But a representative sample of such works would surely include R. BERGER, GOVERNMENT BY JUDICIARY (1977); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 (1979); Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701 (1985); G. MCDOWELL, EQUITY AND THE CONSTITUTION (1982); W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

59. *See, e.g.* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). *See also* MURPHY, FLEMING & HARRIS, *supra* note 55; Harris, *supra*

clause, for example, independently supports such constitutional precepts as separation of powers, checks and balances, or even federalism. Yet a Justice might well wish to go beyond such a "clause-bound" approach and find authority for such principles emanating from several related provisions in the Constitution. Justice Douglas' discovery of constitutionally protected zones of privacy in the "penumbras, formed by emanations" from the Bill of Rights is an example of structural argument.[60]

Doctrinal argument, on the other hand, generally ignores the text of the Constitution and the intentions of its Framers. Instead, doctrinal argument derives its authority from a commitment to the "rule of law"—a rule of law constructed from the body of past judicial decisions. According to this view, continual reexamination of the Framers' intent or reassessments of the constitutional text deny to constitutional law the stability and reliability that any legal system requires. Rather than reinterpret the Constitution *de novo* in every dispute, a doctrinalist Justice would rely on established precedents.[61] Thus, any time a Justice cites decisions, doctrines, tests, or rules provided by previous Courts as authority for her opinion in a given constitutional case we classify it as doctrinal argument.

Extrinsic argument allows a Justice to move farthest from the constitutional text in justifying an opinion. Advocates of extrinsic argument believe that, at root, the activity of judging involves choosing amongst competing values. They maintain that values validated by constitutional interpretation (usually involving some of the hardest choices in society) should not be defined only by the narrow parameters of legal formalism or textual exegesis. There is much less agreement among advocates of extrinsic argument, however, as to which structure of values has the strongest claim to authority. Ely would prefer a variety of democratic theory he terms "representa-

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note 55.

60. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

61. Few commentators have suggested that constitutional interpretation should derive entirely from this common-law tradition. But several have argued that constitutional precedent occupies a "first position." *See* H. HART, THE CONCEPT OF LAW (1961); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); Wechsler, *supra* note 5.

tion-reinforcing;"[62] Posner has argued that judges should be more sensitive to considerations of economic utility and market rationality;[63] Dworkin, Perry, and Richards, although each constructs his theory differently, would have judges appeal to justifications grounded in moral philosophy or rights-based theories.[64] Others claim that interpretive authority can be discovered as the result of an ongoing conversation within the legal community.[65] Even Alexander Bickel's admonition to judges to consider the "passive virtues" (that is, to assess the political consequences of their constitutional interpretations) is an appeal to extrinsic argument.[66] What is common to all of these seemingly disparate interpretive theories is that they rely for their authority on sources or considerations that cannot be directly linked to the text or structure of the Constitution.[67] In that sense, these are all forms of extrinsic argument.

VII. INTERPRETING INTERPRETIVE THEORY: CONTENT ANALYSIS OF JUDICIAL OPINIONS

From their own writings, then, we can say that both Rehnquist and Brennan have working interpretive theories of the Constitution—or, to be more precise, that they have a hierarchy of theories, for neither Justice has committed himself wholeheartedly to only one interpretive approach. However,

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62. ELY, *supra* note 56, at 87-104.

63. R. POSNER, THE ECONOMICS OF JUSTICE (1981).

64. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); R. DWORKIN, A MATTER OF PRINCIPLE (1985); R. DWORKIN, LAW'S EMPIRE (1986); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); D. RICHARDS, THE MORAL CRITICISM OF LAW (1977).

65. *See* L. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING (1985); Leyh, *Toward a Constitutional Hermeneutics*, 32 AM. J. POL. SCI. 369 (1988); Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35 (1985).

66. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

67. Some have described the debate over constitutional jurisprudence as one pitting "interpretivists" (folks who, it is said, "interpret" the Constitution by close adherence to the constitutional text) versus "noninterpretivists" (folks who, it is said, are not bound by a strict reading of that text in deciding constitutional cases). This dichotomy fails on two accounts. First, as we note above there are at least five different modes of constitutional argument. Others have suggested even more. But there most certainly are not just two. Second, all of these modes involve interpretation of the Constitution. What is at issue is not *whether* the Constitution should be interpreted, but rather what kinds of analysis and justification are most legitimate in the interpretive process.

each Justice *has* been willing to assert that certain approaches are intrinsically more authoritative than others. Textual and historical argument are the rhetorical weapons of choice for Rehnquist. When those sources are ambiguous or unavailable, structural argument can be used. Doctrinal argument can be appropriate when the first three, more preferred, approaches produce uncertainty. But standing precedent can be challenged if the Constitution "commands" it (i.e. when established doctrine cannot be squared with the text or the intention of its Framers). Extrinsic argument seems unacceptable to Rehnquist in all circumstances. Brennan, on the other hand, is more skeptical of historical approaches than Rehnquist. He has conceded that history and text must be part of the mix that a Supreme Court judge considers, but he is clearly committed to certain values of equality and "human dignity" that are extratextual. Extrinsic argument is thus not only acceptable, but in some circumstances is essential to interpreting the Constitution in a meaningful way.

Here again Justices Brennan and Rehnquist occupy positions that are almost diametrically opposed. Just as their substantive theories of the Constitution differ dramatically, so too do their interpretive theories. On the surface this seems to confirm the widely-held view that interpretive theory matters. That is, judges who adopt one kind of interpretive approach will be "compelled" by that approach to arrive at particular results. Or, to put it another way, a different set of public policies will "win" if a judge uses an historicist interpretive approach than if he consistently pursues extrinsic argument.[68] But this assumption begs a most important question. Do Rehnquist and Brennan actually live up to the canons of their self-professed interpretive theories? Do they do, in constitutional cases, what they say they should do? Systematic content analysis is a particularly useful approach for examining this question.

Content analysis is not new to legal scholarship. Many

68. It is tempting to say for the post-New Deal Court that textualism and historicism are constitutional theories most favored by conservatives, while liberals are more inclined toward extrinsic argument. Here, certainly, the more conservative Justice (Rehnquist) and the more liberal Justice (Brennan) each publicly endorse the interpretive theories that such a model predicts. But for reasons that will become apparent later we are unwilling to accept this notion.

scholars search for recurring themes or common rhetorical devices in written opinions. But most of these studies are not systematic. For example, while researcher X may have concluded after a careful reading of Justice Z's opinions that Z's jurisprudence is "twitterpated," those findings can often be challenged on at least two counts. First, X may have biased those findings by a selective reading of the record (the problem of anecdotalism). Second, researcher Y may have reached a different conclusion than X (that Z's jurisprudence was "pixillated" rather than "twitterpated") while looking at much the same record. Yet there are usually no commonly acknowledged criteria by which to determine whether X or Y's interpretation is the more correct (the problem of reliability).

The systematic content analysis utilized here differs from such approaches because it provides more rigorous procedures for obtaining reliable or reproducible data. To counter the problem of anecdotalism we examined *all* of the opinions of Justices Rehnquist and Brennan in constitutional cases over a ten-year period (1973-1982). We make no judgments as to which cases or opinions are more "important;" all of the written opinions are treated equally. To counter the problem of reliability we have established procedures for coding constitutional arguments that are intersubjectively verifiable.[69]

Rather than categorize an entire opinion as utilizing one form of argument or another we focus on each paragraph of an opinion as our unit of analysis. By the conventions of English usage a paragraph should be thematically unified and express one central idea. Many of us violate this convention repeatedly and without remorse. But while legal language is many things, it is certainly formal. As such, we expect Justices

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69. The statistic used for confirming reliability across a three-coder panel is *pi*. This is the most appropriate statistic because of the nominal nature of the coding categories. *See* K. KRIPPENDORF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY 133-54 (1980).

The procedures for this type of content analysis can be costly because the coding rules must be pre-tested and the rules and procedures modified if reliable data are not obtained on a subset of the entire universe of cases. After two pre-tests on a randomly selected subset of the cases the reliability statistic reached conventional levels of acceptance. This means that the classification process can be replicated and the data represent variations in real phenomena. This is not to stress the "objective" character of the classification but only to emphasize that other analysts using these same protocols will reach identical or very similar conclusions about the type of argument embodied in any given paragraph.

will use only one mode of argument in any given paragraph, or that one particular type of argument will be the central thrust of a paragraph. Examining each paragraph in an opinion offers other advantages as well. If a Justice uses more than one mode of argument in a case, then paragraph-by-paragraph analysis is more sensitive to those differences. It also enables us to avoid the pitfall of treating summary opinions of one or two paragraphs in the same way as much longer opinions in which arguments are more fully developed. Finally, paragraphs are a common unit of analysis in communication research involving written texts.[70]

To determine whether a case involves a constitutional question we have employed the West keynote system as used in the *Supreme Court Reporter.* If a case is identified in a West headnote as addressing an issue of *constitutional law,* or if the headnote makes reference to any provision in the Constitution or its Amendments, then it is included in our study.[71] All written opinions in these constitutional cases, whether they are majority, dissenting, or concurring, are included. Excluded are dissents from memoranda decisions, denials of *certiorari,* and opinions written by Rehnquist or Brennan while sitting as Circuit Justices.

The content analysis required three coders to independently assign each paragraph from those opinions to one of seven categories. Five of those categories represent the modes of constitutional argument discussed earlier: textual, historical, structural, doctrinal, and extrinsic.[72] Two additional categories were needed. Many opinions, particularly those written for the Court, include paragraphs that discuss the facts of the case and its litigation history. Such paragraphs are classified as *statement of the facts.* In addition, opinions written in constitutional cases also often include arguments and discussions that are

70. *Id.* at 105-08.

71. The West Publishing Company uses a panel of experts in assigning its headnotes. This group decision process does not guarantee the degree of reliability present in our content analysis of the opinions themselves, but it is decidedly more reliable than the judgments of a single individual.

72. A complete description of the protocols that were used to assign paragraphs to each of the categories is not included here because it is quite lengthy. They are described fully in G. Phelps and J. Gates, *Judicial Opinions and Jurisprudential Approaches: A Content Analysis,* paper presented to the Annual Meeting of the American Political Science Association (Sept. 1-4, 1989).

unrelated to the constitutional matters at hand. These paragraphs might deal with matters of statutory construction, or rules of procedure, or administrative law. These are classified as *nonconstitutional argument.* This distinction is important because this study is only interested in constitutional argument.

VIII. THE INTERPRETIVE MAP OF THE JUSTICES

Between 1973 and 1982 Justice Rehnquist wrote opinions in 251 constitutional cases; Justice Brennan wrote in 276 cases. These opinions produced 8368 paragraphs which were content analyzed by the three-person panel of coders.[73] The coding protocols generated data that are sufficiently reliable to suggest that the categories used make sense.[74] What can we learn about the nature of these two judges' constitutional jurisprudence? Has each adhered to the interpretive theories that each advocated? Have they exhibited the sort of consistency in their interpretive approaches that would suggest evidence of a "strong" constitutional theory?

Table 1 displays the results for all categories of argument. First of all, one cannot help but note the proportion of the rhetoric in constitutional cases that does *not* engage in constitutional argument. About half of all the paragraphs either discuss the facts of the case or deal with matters other than constitutional interpretation. Not surprisingly, a substantial portion of almost any Opinion of the Court is spent discussing the history of the litigation, setting out the facts of the case, and structuring the issues to facilitate analysis. Moreover, many cases dealing with constitutional questions also involve corollary statutory questions.[75] Because of the volume of factual

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73. The coders included the authors and a graduate assistant who had a background in constitutional law.

74. In a more technical sense, this means that the data is replicable. The three coders were unanimous in their assignments of paragraphs to particular categories 82.1% of the time. The *pi* coefficient (the most common measure of intercoder reliability) among the coders was 0.741. Communications researchers usually insist on a minimum of 0.6 for *pi.* Thus the content analysis used here is reliable by conventional standards.

75. As an example, we noted a number of discrimination cases in which Justices moved back and forth between consideration of the Equal Protection Clause (constitutional argument) and interpretation of the various Civil Rights Acts (arguments that focus on statutory rather than constitutional matters).

TABLE 1
TYPE OF ARGUMENT IN CONSTITUTIONAL CASES BY JUSTICES BRENNAN AND REHNQUIST.
(n=paragraphs)

Type of Argument	*Brennan*	*Rehnquist*	*Z-scores (prob.)*
Statement of the Facts	26.09% (1045)	30.26% (1320)	4.25 (p<.001)
Nonconstitutional	23.32 (934)	21.60 (942)	1.88 (p=.06)
Textual	0.85 (34)	1.77 (77)	3.73 (p<.001)
Historical	1.22 (49)	1.54 (67)	1.26 (p=.21)
Structural	1.05 (42)	1.67 (73)	2.46 (p=.01)
Doctrinal	37.77 (1513)	34.20 (1492)	3.40 (p<.001)
Extrinsic	9.71 (389)	8.96 (391)	1.18 (p=.24)
TOTAL	100.0% (4006)	100.0% (4362)	

Average Percentage of Agreement = 81.9%
Pi = 0.877
n = 8368

and non-constitutional argument displayed in Table 1 there is a real risk that those numbers will distort any potentially sig-

nificant differences in the kinds of *constitutional* arguments used by the Justices. Table 2, therefore, arrays only the data related to constitutional argument.[76]

Several observations are immediately apparent:

1. **The dominant mode of constitutional argument for *both* Rehnquist and Brennan is doctrinal.** On the one hand, this shouldn't surprise us. *Stare decisis* is a root principle of the common law tradition. Much of a judge's legal training and experience is dedicated to inculcating a healthy regard for precedent. Grounding one's claims in past precedents is also a relatively safe route to travel. Judges who immerse their argument in precedent are perceived as possessing the proper "judicial temperament." More to the point, the corpus of case law is so vast and diverse that judges with very different substantive theories of the Constitution can make equally persuasive appeals to the same body of precedent in obtaining those different results.

The negligible difference between Rehnquist and Brennan in their willingness to use doctrinal argument is, nonetheless, striking. After all, the history of the Supreme Court in the twenty or so years prior to Rehnquist's arrival had been marked by results that were much more congruent with Justice Brennan's substantive vision than with Rehnquist's. We might expect, therefore, that consistent appeals to doctrinal argument should give an advantage to outcomes favored by Brennan. Moreover, Rehnquist has gone on record as expressing a willingness to ignore precedent when the text, history, or structure of the Constitution commanded it. (The veiled assertion here, of course, was that Rehnquist would be willing to aggressively challenge liberal precedents wherever the constitutional assumptions on which they were based appeared "soft").[77] On his self-professed continuum of interpretive theory, arguments drawn from doctrine clearly have a lesser claim

76. There was some concern that our data might be skewed artificially by our practice of coding every paragraph without regard for length. That is, a four-page paragraph with a dozen or more case citations and lengthy footnotes was treated no differently from a one-sentence paragraph on the order of "We respectfully dissent." They each would have been counted as one paragraph. Hence, we instituted a second level of analysis in which we weighted each paragraph by the number of printed lines it contained. Those weighted percentages are virtually indistinguishable from the data reported in Tables 1 and 2.

77. *See supra* notes 33-42 and accompanying text.

TABLE 2
TYPE OF CONSTITUTIONAL ARGUMENT IN CONSTITUTIONAL CASES BY JUSTICES BRENNAN AND REHNQUIST

Type of Argument	*Brennan*	*Rehnquist*	*Z-scores (prob.)*
Textual	1.68% (34)	3.67% (77)	3.981 (p<0.001)
Historical	2.42 (49)	3.19 (67)	1.499 (p<0.14)
Structural	2.07 (42)	3.48 (73)	2.765 (p<0.006)
Doctrinal	74.64 (1513)	71.05 (1492)	2.595 (p<0.01)
Extrinsic	19.19 (389)	18.62 (391)	0.467 (p<0.65)
TOTAL	100.0% (2027)	100.0% (2100)	

than historical, textual, or structural arguments. Despite these expectations Rehnquist actually grounds his constitutional opinions in doctrine *more than twenty times as often* as he appeals to either history or text or structuralism.

2. Neither Rehnquist nor Brennan employ textual, historical, or structural argument to any great extent and they do not differ substantially in their level of use of these types of argument. The historical mode of argument is in many ways at the core of the debates over the role of interpretive theory in Supreme Court decisionmaking. Advocates and critics of historicism represent seemingly irreconcilable approaches to constitutional interpretation. Yet the difference in the two Justices' use of historical arguments is so small as to be statisti-

cally insignificant.

Like his hero Cardozo, Brennan concedes that the history and text of the Constitution are important contextual elements to be considered in judging. But in his Georgetown speech Brennan adamantly argued that "clause-bound" historicism was both impractical and unwise.[78] Hence, his reluctance to rely on these sorts of arguments in his opinions is predictable. Rehnquist is another story. Taken together, textual, historical, and structural approaches account for little more than 10% of Rehnquist's constitutional argument despite his purported preference for these modes of analysis. A number of factors might explain this anomaly. Rehnquist may believe that resort to these approaches is appropriate only when existing precedents are based on a "clear mistake" by an earlier Court. He may be selective regarding the kinds of substantive issues in which he invokes "interpretivist" approaches, reserving those kinds of argument for when he wishes to challenge prevailing orthodoxy (for example, much has been made of his historical arguments in establishment cases and his structural arguments in federalism cases), but holding them in abeyance on issues less central to his substantive vision of the Constitution. Whatever the explanation(s), it is clear that there is a wide gap between Rehnquist's publicly proffered interpretive theory and his actual jurisprudence in constitutional cases.

3. Extrinsic argument is the second most common interpretive approach used by Justices Rehnquist and Brennan in constitutional cases, and Rehnquist is about as likely to utilize extrinsic argument as is Brennan. These results are in some respects the most curious of all. The widest gulf between Rehnquist's "Living Constitution" address and Brennan's Georgetown speech is precisely over the matter of extrinsic argument. Rehnquist finds no place whatsoever for it in constitutional jurisprudence. Brennan just as adamantly believes that without consideration of important extratextual values the Constitution would write only with the "dead hand of the past." Yet there is no substantial difference between the two Justices in their willingness to resort to extrinsic argument! They each invoke extrinsic argument about 19% of the time in their constitutional opinions. For Rehnquist these results are

78. Brennan, *supra* note 45.

remarkable indeed. He calls upon extrinsic argument nearly twice as often as historical, textual, and structural argument combined. It would seem that the notion of a living Constitution is alive in William Rehnquist's jurisprudence, despite his assertions to the contrary.

In at least one important sense, though, it is possible that our analysis might have failed to recognize important differences in the interpretive approaches of these two Justices. Majority opinions differ from non-majority (dissenting and concurring) opinions in a couple of important ways. When writing for the Court, a Justice must often consider the views of other coalition members. The author may have to include the ideas of other Justices in order to bring them into the majority, or may have to modify his own presentation to prevent defections.[79] As a result, majority opinions are often corporate efforts in which the interpretive preferences of the author become substantially diffused.[80] In a dissent or concurrence, though, a Justice needs to speak for no one but himself. Precisely because such opinions are *not* law, we might expect Rehnquist and Brennan to give freer voice to their preferred modes of constitutional interpretation.[81] Table 3 shows the distribution of constitutional arguments by Rehnquist and Brennan in both majority and non-majority opinions.

4. There are marginal differences in the sorts of constitutional arguments employed by Rehnquist and Brennan in their non-majority opinions, but none of the differences is substantial. Once again, the notion that Rehnquist and Brennan express very different interpretive approaches to the Constitution proves unconvincing. Even in these most personalistic kinds of opinions the two Justices differ very little in their choice of interpretive approaches. Brennan was not much more likely to use extrinsic arguments than Rehnquist (in fact, he used extrinsic argument slightly *less* often than

79. *See* W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCIENCE REV. 43 (1968).

80. A famous illustration, apocryphal though it may be, of the corporate quality of majority opinions is Woodward and Armstrong's account of Warren Burger's "opinion" in U.S. v Nixon, 418 U.S. 683 (1974). They suggest that Burger's contribution to that opinion amounted to little more than the introduction. The rest was the work of other Justices. B. WOODWARD & S. ARMSTRONG, THE BRETHREN 314-47 (1979).

81. A. BARTH, PROPHETS WITH HONOR 3-21 (1974).

TABLE 3
TYPE OF CONSTITUTIONAL ARGUMENT BY TYPE OF OPINION

Type of Argument	*Majority Opinions*		*Non-Majority Opinions*	
	Brennan	*Rehnquist*	*Brennan*	*Rehnquist*
Textual	1.11%	3.70%	1.99%	3.64%
	(8)	(38)	(26)	(39)
	(Z=3.68; p>0.001)		(Z=2.39; p>0.02)	
Historical	3.34	2.92	1.91	3.45
	(24)	(30)	(24)	(37)
	(Z=0.49; p>0.62)		(Z=2.29; p>0.02)	
Structural	2.09	2.53	2.06	3.48
	(15)	(26)	(27)	(47)
	(Z=0.61; p>0.54)		(Z=2.08; p>0.04)	
Doctrinal	81.34	80.25	70.97	62.22
	(584)	(825)	(929)	(667)
	(Z=0.57; p>0.56)		(Z=4.51; p>0.0001)	
Extrinsic	12.12	10.60	23.07	26.30
	(87)	(109)	(302)	(282)
	(Z=0.98; p>0.33)		(Z=1.82; p>0.07)	
TOTAL	100.00%	100.00%	100.00%	100.00%
	(718)	(1309)	(1028)	(1072)

Rehnquist); Rehnquist was not much more likely to appeal to historical justifications than was Brennan. There are ten possible points where we can compare the respective interpretive approaches of the two Justices.[82] Yet none of these comparison-pairs reveals any substantial differences.[83]

82. There are five different categories of constitutional argument (textual, historical, structural, doctrinal, and extrinsic) and two different kinds of opinions (majority and non-majority). This produces ten different comparison-pairs. For example, we can compare Rehnquist and Brennan with respect to each Justice's use of doctrinal argument in their majority opinions; or each Justice's use of extrinsic argument in their non-majority opinions.

83. Tests for statistical significance answer only one question: whether the

Given the length of the period under study (ten years) and the thousands of paragraphs that were analyzed, it is quite striking that the differences in the constitutional arguments employed by Rehnquist and Brennan are so very small. This is thin stuff, indeed, on which to build the case that Brennan and Rehnquist represent different interpretive approaches in their constitutional jurisprudence.

IX. CONCLUSION: DOES INTERPRETIVE THEORY MATTER?

William Rehnquist and William Brennan represent very different substantive visions of the Constitution. Moreover, they have each expressed a preference for a particular interpretive approach in deciding constitutional cases. It is tempting to suggest that each Justice, therefore, represents a different kind of "strong" constitutional theory—that Rehnquist's preference for an historical-textual approach to interpretation is linked with his support for conservative outcomes in constitutional cases, while Brennan's support for extrinsic kinds of argument is linked to his constitutional liberalism. These data show no such linkage. Each Justice used a variety of arguments in justifying his opinions. And those different kinds of arguments were utilized by each Justice to about the same degree. Neither Rehnquist nor Brennan consistently adhered to *any* one particular interpretive theory (much less adhering to the theories each has publicly endorsed.)

These data raise important questions about the relevance of interpretive constitutional theory to the real world of judging. If we cannot find any substantial differences between the kinds of arguments employed by Rehnquist and Brennan—polar opposites in terms of their substantive understandings of the Constitution—then are we likely to find such differences between any other Justices? If a clear, consistent interpretive theory of the Constitution cannot be discovered in

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variation between A and B is *statistically* significant. It either is or it isn't. In this instance, there *are* statistically significant differences between several of these comparison-pairs. But the differences in those percentages (for example, the difference between Brennan's and Rehnquist's use of historical argument in non-majority opinions is 1.54%—a difference that is significant *statistically* speaking) are just too insubstantial to offer much encouragement for those who wish to maintain that Rehnquist or Brennan exhibit clear and distinctive interpretive theories.

the jurisprudence of either of these two ideologically disparate Justices, then are we likely to find clear, consistent *interpretive* constitutional theory anywhere on the Court? If we cannot, from the texture of their own arguments, take these two Justices at their word when each claims that there is a "proper" way to read and interpret a constitution, then can we take seriously the claim of *any* Justice that he or she reached a particular outcome by the command of the law rather than by the predilection of their politics?

The idea that judicial decisionmaking is a principled activity is central to the notion of the rule of law and also to most theories of constitutional jurisprudence. When we examine these two Justices at their words, however, we find that the type of arguments used to support a particular position are remarkably similar and of little difference in a statistical sense. We suspect, in fact, that Justices invoke particular *interpretive* approaches only when those approaches converge with their *substantive* understanding of the Constitution.[84] These results must be disquieting for those who continue to debate the importance of interpretive theories to the constitutional adjudication of the Supreme Court.

84. This observation admittedly goes beyond the issues addressed in this study. We are, after all, talking only about two Justices. Moreover, it is important to note that our analysis gauges only the constitutional *rhetoric* of the Justices. These data do not address the question of precisely what factor(s) *controlled* the Justices' decisions. Nevertheless, these data are clearly compatible with the growing body of literature on the centrality of political ideology in judicial decisionmaking. *See* Segal & Cover, *Ideological Values and the Votes of U. S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).