

# AN EMPIRICAL ANALYSIS OF THE CONFIRMATION HEARINGS OF THE JUSTICES OF THE REHNQUIST NATURAL COURT

*Jason J. Czarnezki\**  
*William K. Ford\*\**  
*Lori A. Ringhand\*\*\**

## INTRODUCTION

The interpretive or judicial philosophies of Supreme Court Justices can be thought of as “packages of beliefs” about how to interpret the law, packages that go by names like formalism, originalism, and textualism.<sup>1</sup> Given the reasonable assumption that a judge’s judicial philosophy could matter for how he or she will decide cases, the judicial philosophy of a nominee to the Supreme Court is of great interest to members of the Senate who vote on a nominee’s confirmation. Figuring out a nominee’s judicial philosophy is, consequently, one purpose of the confirmation hearings in the Senate, and Senators often claim to base their votes on their assessments of a nominee’s judicial philosophy. During Justice Ginsburg’s hearings, for example, Senator Joseph Biden, then chair of the Judiciary Committee, said the following: “A Senator has not only the right, but the duty to weigh carefully a nominee’s judicial philosophy and, even more

---

\* Assistant Professor of Law, Marquette University Law School; A.B., J.D., University of Chicago.

\*\* Assistant Professor, The John Marshall Law School; B.A. California State University, Fullerton; J.D., University of Chicago; Ph.D. Candidate, University of California, Santa Barbara.

\*\*\* Associate Professor of Law, University of Kentucky College of Law; J.D. University of Wisconsin Law School; B.C.L. Oxford University. The authors wish to thank Scott Moss, Jonathan Milby, Nick Jones, Nathan Goodrich, and the attendees of the Randall-Park Distinguished Speaker Series for their helpful comments and suggestions.

1. See Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 850 (2006).

importantly, the consequences of that philosophy for the country."<sup>2</sup>

Many Supreme Court observers believe, however, that nominees reveal little useful information at their confirmation hearings.<sup>3</sup> While an occasional nominee (such as Robert Bork) will discuss his or her views in detail, most nominees are more guarded.<sup>4</sup> Nominees repeatedly refuse to answer specific questions, or to disclose information about how they would vote in particular cases. For example, Sandra Day O'Connor refused to state how she "might vote on a particular issue which may come up before the Court," and additionally declined to "endorse or criticize specific Suprem[e] Court decisions presenting issues which may well come before the Court again."<sup>5</sup> Ruth Bader Ginsburg said, "[a] judge sworn to decide impartially can offer no forecast, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process."<sup>6</sup> Antonin Scalia even resisted questions about whether *Marbury v. Madison* represents a settled principle of law.<sup>7</sup>

Obviously, what types of questions the Senators should ask—or the nominees should answer—is far from clear. Few,

2. *The Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 114 (1993) [hereinafter *Ginsburg Hearings*].

3. See, e.g., Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 918 (1983); William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109, 109 (1987). See generally Todd L. Wheeler, *I Can't: Ethical Responses and the Roberts Confirmation Hearings*, 19 GEO. J. LEGAL ETHICS 1067 (2006).

4. See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 96–97 (2005).

5. Rees, *supra* note 3, at 919 (quoting *The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 57 (1981) [hereinafter *O'Connor Hearings*]).

6. Wheeler, *supra* note 3, at 1077 (quoting *Ginsburg Hearings, supra* note 2) (alteration in original).

7. *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. at 33–34, 83–84, 88 (1986) [hereinafter *Scalia Hearings*]. Other nominees were not so coy about *Marbury*. See, e.g., *The Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 93 (1987) [hereinafter *Kennedy Hearings*] (statement of Judge Kennedy) ("*Marbury v. Madison* is one of the essential structural elements of the Constitution of the United States. As we all know, the doctrine of judicial review is not explicit in the Constitution. I have very little trouble finding that it was intended.").

however, disapprove of questions about a nominee's judicial philosophy. Consider Senator Specter's comments during Kennedy's hearings:

On the subject of judicial philosophy, our introductory statements today have already negated to some extent the conclusion of harmony in these hearings. You have already heard a fair difference of views. And the first question I asked of you when you and I sat down to talk—and I thank you for the almost 3 hours we spent together in two extensive sessions. The first question I asked you was whether you thought that judicial philosophy was an appropriate subject for inquiry. You said you thought that it was, and we proceeded to talk. And I did not ask you about your views on any specific cases, and I would not in private or in public. But I do believe that there are broad parameters which are appropriate for discussion.<sup>8</sup>

During these same hearings, Senator Leahy described this inquiry into judicial philosophy as the most important one at the hearings, saying that “[n]o issue is more central to a decision on the appointment of a Justice.”<sup>9</sup> And while some Senators have expressed reservations about the scope of questions relating to judicial philosophy,<sup>10</sup> as Senator Specter's comment suggests,

---

8. *Kennedy Hearings*, *supra* note 7, at 68. Specter then went on to describe a similar experience with Robert Bork: “That was the first question I asked of Judge Bork as well, whether he thought judicial—we were talking about judicial ideology at that time, and Judge Bork said in response that he did not like the term ‘ideology’ because it had political connotations, but he thought judicial philosophy was an appropriate subject for inquiry.” *Id.*

9. *Kennedy Hearings*, *supra* note 7, at 59. Leahy described the term “judicial philosophy” as “[a nominee’s] approach to the Constitution, and to the role of the Supreme Court in discerning and enforcing its commands.” *Id.*

10. See *Ginsburg Hearings*, *supra* note 2, at 219 (statement of Sen. Cohen) (“The additional question that we are seeking to probe is that of your judicial philosophy. . . . But even that examination of philosophy is not without its limits. . . . What I think we are trying to do, and are only really qualified to do, is to examine your philosophy to determine whether we find it so extreme that it might call into question those other requisites that I mentioned before [e.g., intelligence, competence, and temperament].”). Senator Hatch seemed potentially hostile to questions about judicial philosophy early in Kennedy's hearings. He said:

I just want to make a recommendation to you. There are a lot of comments about how you will have to go into philosophy here, and you are going to have to go into judicial theories, and concepts, and that you can treat them any way you want to.

Let me just say this: I think we, as a committee, have to refrain from delving into your personal views with regard to constitutional doctrine.

*Kennedy Hearings*, *supra* note 7, at 41. However, Hatch later asked questions about originalism, questions clearly going to the topic of judicial philosophy. See *id.* at 192 (“And so I would ask you, in your opinion, whose intent does govern, or whose meaning does govern?”); *id.* at 193 (“Let me just say the cases may evolve, circumstances may

many others have emphasized the legitimacy of the topic.<sup>11</sup> In general, however, questions about interpretive methods such as the role of precedent or legislative history do not provoke explicit reactions of impropriety.<sup>12</sup> So while Senate confirmation hearings have numerous purposes, discovering a nominee's judicial philosophy is clearly one of them.<sup>13</sup> But this raises a basic question: Do the exchanges between the nominees and the Senators actually reveal anything useful about a nominee's judicial philosophy?

Despite the importance of this question, surprisingly little work has been done comparing the statements made by nominees at their confirmation hearings with their subsequent behavior on the Supreme Court. If the hearings reveal substantively valuable information about nominees' views, then we would expect to find a relationship between the Justices' statements and their judicial decisions. This Article is an initial look at that relationship. Specifically, we examine statements involving the nominees' views on *stare decisis*, originalism and legislative history, and also statements involving their views on the rights of criminal defendants. We then rank order the nominees' confirmation hearings statements on these issues, and evaluate whether the rankings correlate with the Justices' voting patterns or, in the case of legislative history, the content of their opinions. Given the focus of this Symposium—*Empirical and Mathematical Inquiries of the Rehnquist Court*—we focus on the Rehnquist

---

change, doctrines may change, applications of the Constitution may evolve, but the Constitution itself does not evolve unless the people actually amend it. Do you agree with that?").

11. See, e.g., *Ginsburg Hearings*, *supra* note 2, at 114 (statement of Sen. Biden) ("I have said many times and I want you to know that I believe my duty obliges me to learn how nominees will decide, not what they will decide, but *how* they will decide. This obligation for Senators to inquire into and understand the judicial philosophies of a Supreme Court nominee is neither new nor disputed any longer . . .") (emphasis added); *Kennedy Hearings*, *supra* note 7, at 71 (statement of Sen. Heflin) ("Judge Kennedy, in these hearings you will be questioned on your views of the Constitution, your judicial philosophy, your commitment to equal justice under law.").

12. See, e.g., *Kennedy Hearings*, *supra* note 7, at 141 (statement of Judge Kennedy) ("Well, I do not wish to resist your line of questioning [about original intent], because I think it is very important; it goes to the judicial method.").

13. See EPSTEIN & SEGAL, *supra* note 4, at 96. One purpose not mentioned thus far is Senator DeConcini's concern that a nominee is a "listener." See *The Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 133 (1990) [hereinafter *Souter Hearings*] (statement of Sen. DeConcini) ("I want to say, Judge, you have said many impressive things today; many of them have left a very favorable impression with me. Most important to me is that you are very convincing, that you are a listener; nothing is more important in communication than to listen.").

Natural Court (the period from 1994 to 2005 when the same nine Justices served together).<sup>14</sup> This focus allows for consistent comparison of voting and decisionmaking patterns among the nine Justices.

Part II of this Article provides a description and historical account of the Rehnquist Natural Court and its Justices—Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Part II also examines the various purposes *other* than revealing judicial philosophies that the confirmation hearings may serve. Part III describes our quantitative dataset, methodology and results, including our use of blind surveys to rank confirmation hearing statements. Since we know of no other study that attempts to measure confirmation hearing statements, we hope this symposium piece facilitates further discussion on how one might best evaluate confirmation hearing statements, and, thus, how we might improve upon our preliminary methodology (e.g., improving the survey instrument, including other areas of law, changing the population of the survey participants, or finding other ways besides surveys to operationalize confirmation hearing statements). Part IV explains and uses a different methodology. This Part compares confirmation hearing statements about the role of legislative history with the percentage of authored cases invoking legislative history. Part V discusses our conclusions and presents suggestions for additional research.

## II. THE CONFIRMATION HEARINGS AND THE REHNQUIST NATURAL COURT

The late Chief Justice William Rehnquist presided over the U.S. Supreme Court longer than any other Chief Justice in the twentieth century.<sup>15</sup> His Court at various times included Justices as different from each other as William Brennan, Thurgood Marshall, Ruth Bader Ginsburg, Antonin Scalia, and Clarence Thomas. From 1994 to 2005, however, the same nine Justices—Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia,

---

14. A "natural Court" is a period of time during which the membership of the Court remains stable. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 313 (1st ed. 1994).

15. Chief Justice Rehnquist's tenure over the Court was in fact the fourth longest in history: John Marshall presided over the Court for 34 years (1801 to 1835); Roger Taney's term lasted 28 years (1836 to 1864); Melville Fuller's term extended 22 years (1888-1910); and Justice Rehnquist's lasted 19 years (1986 to 2005). See RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* lvii (6th ed. 2000).

Kennedy, Souter, Thomas, Ginsburg and Breyer—sat together. This extraordinary period—eleven terms without any change of personnel—constituted the second longest natural court period in the history of the U.S. Supreme Court.<sup>16</sup>

These nine Justices were nominated by five different presidents over the span of 23 years.<sup>17</sup> Control of the Senate over the course of these nominations also changed: Democrats controlled the Senate during seven of the nominations (Stevens, Thomas, Souter, Kennedy, Rehnquist (1971), Breyer, and Ginsburg), while Republicans had that honor during three (Scalia, O'Connor, and Rehnquist (1986)).<sup>18</sup> And of course, Robert Bork's failed confirmation hearings—widely considered a seminal event in the recent history of the confirmation process—occurred in 1987, after the Rehnquist, O'Connor and Scalia hearings, but before the hearings of the remaining Justices.<sup>19</sup>

16. The longest natural Court was presided over by Justice John Marshall. That Court lasted twelve years, from 1812 to 1824. See EPSTEIN ET AL., *supra* note 14, at 304.

17. President Nixon first nominated Justice Rehnquist; President Ford nominated Justice Stevens; President Reagan nominated Justices O'Connor, Scalia, and Kennedy, and also elevated Justice Rehnquist to Chief Justice; President George H.W. Bush nominated Justices Souter and Thomas; and President Clinton nominated Justices Ginsburg and Breyer. *Id.* at 289.

18. GEORGE L. WATSON & JOHN A. STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS 52 (1995).

19. Contrary to some contemporary assumptions, Robert Bork was not the first nominee rejected or vigorously disputed on ideological grounds. Approximately 20% of Supreme Court nominations fail. See EPSTEIN ET AL., *supra* note 14, at 173. Many of these fail for overtly political reasons: President Washington's effort to elevate Justice John Rutledge to Chief Justice failed because of Justice Rutledge's outspoken opposition to the Jay Treaty. See James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 337 (1989). President Jackson's nomination of Roger Taney, while ultimately successful, faced stiff opposition because of a dispute between President Jackson and the Senate regarding reauthorization of a national bank. See *A Great Judicial Character, Roger Brooke Taney*, 18 YALE L.J. 10, 16–17 (1908). President Wilson's nomination of Louis Brandeis in 1916 was almost derailed by the American Bar Association's opposition to his sociological style of jurisprudence (magnified by its anti-Semitism). See generally John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965). John Parker's nomination was rejected in 1930 because of the opposition of organized labor and the NAACP. See Richard L. Watson, Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50(2) MISS. VALLEY HIST. REV. 213, 213–14 (1963). Two of Richard Nixon's nominees (Clement Haynsworth and G. Harrold Carswell) had similar difficulties. See Stephen L. Wasby & Joel B. Grossman, *Judge Clement F. Haynsworth, Jr.: New Perspective on His Nomination to the Supreme Court*, 1990 DUKE L.J. 74, 74; Bruce H. Kalk, *The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration*, 42 AM. J. LEGAL HIST. 261, 261 (1998). The widespread assumption that confirmation hearings are now more "political" than in the past may be attributable to the increase in interest group participation in the hearings. See Lee Epstein, Jeffrey A. Segal, Nancy Staudt & René Lindstädt, *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145, 1150 (2005). Thus, it is not clear to some of the authors that Judge Bork's failed nomination was in fact the watershed event it often

Not surprisingly given these varied political contexts, the content of the confirmation hearings for the nine Justices differed, both in style and substance. Justices O'Connor and Scalia were confirmed by unanimous votes in a Republican-controlled Senate.<sup>20</sup> Justice Rehnquist's elevation to Chief Justice and Justice Thomas's hearing, in contrast, were vigorously contested and each of these Justices won Senate approval by relatively narrow margins.<sup>21</sup> The nominations of Justices Ginsburg and Breyer, initiated by a Democratic president and confirmed by a Democratic Senate, were much less contentious.<sup>22</sup> The issue areas focused on during the confirmation hearings also varied a great deal. For example, questions about abortion were more prominent in the later hearings than in the earlier ones, while questions about the use of legislative intent in statutory interpretation increased dramatically after Justice Scalia's confirmation.

Despite the rich research possibilities created by these hearings, there is little scholarship examining the substantive content of them.<sup>23</sup> Much of the existing literature uses empirical analysis to examine the role of the Senate in the confirmation process, but does not attempt to analyze and compare the nominees' substantive statements at their hearings, much less compare those statements themselves to the nominees' subsequent voting records once on the Court. The legal literature likewise has neglected this area. Although there is an abundance of law review articles discussing the confirmation process and the Senate's role

---

is portrayed as.

20. EPSTEIN ET AL., *supra* note 14, at 290; *see also* Charles M. Cameron, Albert D. Cover & Jeffrey Segal, *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990).

21. Justice Rehnquist was elevated to Chief Justice by a Senate vote of 65 to 33. Justice Thomas was confirmed by a Senate vote of only 52 to 48. EPSTEIN ET AL., *supra* note 14, at 290.

22. Justices Ginsburg and Breyer are widely believed to have been "consensus nominations," meaning that President Clinton solicited input from Republican Senate leaders (particularly Sen. Orrin Hatch) before naming his choices. *See* Janet Malcolm, *The Art of Testifying: The Confirmation Hearings as Theatre*, THE NEW YORKER, Mar. 13, 2006, at 70.

23. Several books have been published in the past few years examining the nomination and confirmation process. These books include: RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* (2005); 3 *FEDERAL ABORTION POLITICS: A DOCUMENTARY HISTORY*, JUDICIAL NOMINATIONS (Neal Devins & Wendy L. Watson eds., 1995); LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* (4th ed. 2007); EPSTEIN & SEGAL, *supra* note 4; DENIS STEVEN RUTKUS & MITCHEL A. SOLLENBERGER, *JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977-2002* (2004).

in it, we are aware of none that attempt to connect confirmation hearing statements to subsequent judicial behavior.<sup>24</sup>

This Article is a first step in remedying that oversight. We are aware, of course, that there is much going on at the Justices' confirmation hearings that does not involve sincere efforts by Senators to gain information about the sincere preferences of nominees. We assume, for example, that Senators are (among other things) satisfying interest groups by voicing their concerns,<sup>25</sup> signaling policy preferences to the Court as a whole,<sup>26</sup> and strengthening or weakening other Senators' commitment to the nominee.<sup>27</sup> And the nominee, of course, is attempting to get confirmed. Nonetheless, one goal of the hearings clearly is to generate information about how a nominee will answer constitutional questions if confirmed.<sup>28</sup> We believe it is worthwhile to examine the extent to which this goal is being met.

### III. SURVEY-BASED ANALYSIS OF SUPREME COURT CONFIRMATION HEARINGS

#### A. DATA & METHODOLOGY

We reviewed the complete printed transcripts of the Senate confirmation hearings for the nine members of the Rehnquist Natural Court.<sup>29</sup> We included Justice Rehnquist's hearings for

---

24. This rich literature includes Sen. Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 ARIZ. L. REV. 1 (1992); Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467 (1998); Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359 (1997); Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087 (1993); William G. Ross, *The Senate's Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYRACUSE L. REV. 1123 (1998); and Gerald Walpin, *Take Obstructionism Out of the Judicial Nominations Confirmation Process*, 8 TEX. REV. L. & POL. 89 (2003).

25. See Mary Sherris, *Colorado Republican Federal Campaign Committee v. Federal Election Commission: Maintaining What Remains of the Federal Election Campaign Act Through Constitutional Compromise*, 30 AKRON L. REV. 561, 561 (1997).

26. See Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1338 (2006).

27. Margaret Williams & Lawrence Baum, *Questioning Judges About Their Decisions: Supreme Court Nominees Before the Senate Judiciary Committee*, 90(2) JUDICATURE 73, 74-75 (2006).

28. See *supra* text accompanying notes 3, 9 and 12; see also Williams & Baum, *supra* note 27, at 75.

29. Transcripts of Nomination Hearings for Supreme Court Justices are available at the following web address: [http://www.senate.gov/pagelayout/reference/one\\_item\\_and\\_](http://www.senate.gov/pagelayout/reference/one_item_and_)

both his Associate Justice and Chief Justice nominations. After reviewing the transcripts of the hearings, we extracted all the statements related to the nominees' commitment to *stare decisis*, commitment to originalism, and commitment to the protection of the rights of criminal defendants. With the help of student volunteers, we then set out to rank order the nominees in terms of their commitment to these three items. We were not only interested in the rank order of the Justices (e.g., who made statements indicating a preference for originalism, who objected to originalism, and who fell in between), but also in the spatial distances of their ordering (e.g., while Justices may dislike the exclusionary rule to varying degrees, those that object to it outright are closer in space to each other than those who wish to see the doctrine modified).

In order to achieve these ordinal and spatial rankings, we took the statements extracted from the transcripts and created three packets of quotations, one each for *stare decisis*, originalism, and the rights of criminal defendants. Each packet contained one page of quotations per justice. In some instances, the quantity of relevant text for a Justice exceeded our limit of one page. As we did not want to overwhelm the students with text and risk that they would not read the quotations carefully, we removed repetitive or extraneous material. Just as the initial process of identifying relevant statements in the transcripts involved some subjective judgments, so too did this process of paring down the statements to a single page of quotations. Unless we were to ask the students to read the entire transcript for each Justice, which clearly was not feasible, the subjective nature of this process was unavoidable. The consolidated quotations for each packet are fully disclosed in Appendix A.

We distributed these packets of quotations to 119 second and third year law students. Each student received one packet. For reasons of cost and convenience, students are often used as stand-ins for the general population, especially in experimental research.<sup>30</sup> For our purposes, however, law students offered ex-

---

teasers/Supreme\_Court\_Nomination\_Hearings.htm.

30. See, e.g. Greg Pogarksy & Linda Babcock, *Damage Caps, Motivated Anchoring, and Bargaining Impasse*, 30 J. LEGAL STUDIES, 143, 150 (2001) (using a convenience sample of 462 undergraduate and graduate students from the "University of Arizona's business college, the MBA program at the University of Chicago, and the Harvard Business School subject pool (consisting of undergraduates in the Boston area)"); Michael E. Morrell, *Citizens' Evaluations of Participatory Democratic Procedures: Normative Theory Meets Empirical Science*, 52 POL. RES. Q. 293, 303 (1999) (using a convenience sample of "undergraduates enrolled at a major southwestern university"); Thomas E. Nelson, Zoe

pertise that the general population lacks. Nevertheless, considerations of cost and convenience played a role here too. Law professors or experienced appellate practitioners, for example, would offer even greater expertise, but students are more accessible.

Students were not told the source of the quotations or even that they came from the nine Justices on the Rehnquist Natural Court. Instead, the instruction sheet handed out with the packet stated as follows: "The United States Senate has held dozens of confirmation hearings for potential Justices of the United States Supreme Court. Attached are quotations from the confirmation hearings of nine of those nominees."<sup>31</sup> By not telling the students the sources of the quotes, pre-existing conceptions of individual Justices should not have affected the students' responses. Indeed, one of the primary reasons for asking to students to evaluate the statements rather than evaluating the statements ourselves was to avoid the potential effects of being familiar with the nominees' later behavior.

Students were asked to read the quotations contained on the sheets attached to the instructions and do one of following, depending on which topic area that they were randomly assigned:

- (1) Rank each nominee's relative commitment to *stare decisis*.
- (2) Rank each nominee's relative commitment to using originalism as a method of constitutional interpretation. A commitment to "originalism" as a method of interpretation should be understood for these purposes as a Justice's commitment to interpreting the Constitution as it was understood by the Framers and/or the public at the time of its enactment.
- (3) Rank each nominee's relative commitment to protecting the rights or interests of criminal defendants.

---

M. Oxley, & Rosalee A. Clawson, *Toward a Psychology of Framing Effects*, 19 POL. BEHAV. 221, 229 (1997) (using a convenience sample of 116 undergraduates enrolled in political science courses); Ellen D. B. Riggle & Mitzi M. S. Johnson, *Age Difference in Political Decision Making: Strategies for Evaluating Political Candidates*, 18 POL. BEHAV. 99, 104 (1996) (using a convenience sample of 40 young adults enrolled in undergraduate political science courses and 40 older adults from a volunteer subject pool).

31. The instruction sheet for each packet is available and on file with authors.

Students ordered the Justices (i.e., each sheet) from 1 to 9, with 1 representing the Justice showing the least commitment to *stare decisis*, originalism, or the rights of criminal defendants, and with 9 representing the greatest commitment. No two Justices could receive the same number.<sup>32</sup> The students' rankings yielded an average score for each Justice somewhere between 1 and 9 (generated by calculating the sum of student rankings for a given Justice, divided by the number of students ranking that issue area). These average scores, found below in Tables A, D, and G, provide a measure of the relative commitment of each Justice to the three issue areas as stated in their confirmation hearings.

Having thus developed a relative ranking of the Justices' levels of commitment based on their confirmation hearing statements, we next needed something to compare those commitment levels to. We opted to compare the commitment rankings to the Justices' individual votes as derived from political scientist Harold Spaeth's Supreme Court Database, as modified for one co-author's prior projects.<sup>33</sup> We rely on voting data from the 1994-2004 Terms (the Rehnquist Natural Court period). These data allow us to count the Justices' individual votes to overturn existing precedent (to compare to the *stare decisis* commitment rankings), to track the ideological direction of the Justices' votes in criminal cases (to compare to the rights of criminal defendants' commitment rankings), and to calculate agreement rates between Justices in constitutional cases (to compare to the originalism commitment rankings).<sup>34</sup> Each of these comparisons is discussed in turn below.

### B. *STARE DECISIS*

As stated in the Introduction, if confirmation hearings reveal substantively valuable information about the nominees' judicial philosophies, then (assuming the nominees' views remain constant) one should expect a strong correlation between the Justices' relative commitments to particular interpretive ap-

---

32. Most students took between 35 and 45 minutes to complete the exercise.

33. A list of changes made to the publicly available Spaeth Database is available at <http://www.uky.edu/Law/faculty/ringhand/ChangestoDataset.doc>.

34. We considered measuring the Justices' commitment to protecting the rights of criminal defendants by looking at the ideological direction of each Justice's votes in criminal cases across the entire span of the Justice's career. We opted against this, however, because Spaeth's directional coding is relative, meaning that a Justice's vote will be liberal or conservative only in relation to the other possible outcome in the case as presented.

proaches and their judicial behavior on the bench. We evaluate this possibility here in relation to the nominees' views on *stare decisis*. Justices whose confirmation hearing statements ranked them as the most committed to *stare decisis* should vote to invalidate relatively fewer existing precedents than those Justices whose statements ranked them as less committed.

The Justices' relative commitments to *stare decisis*, as determined by the student rankings of their confirmation hearing statements, is shown in Table A below. As illustrated, Justice Rehnquist showed the least commitment to precedent, obtaining an average student ranking of only 2.949. Justices Ginsburg and Scalia showed the greatest commitment, with each of these Justices achieving a 5.564 average. The differences between the nominees are not sharp, however. All but one of the nominees are located within the middle third of the range, i.e., from 4.0 to 6.0.

Table A: Justice Rankings Based on Confirmation Hearing Statements: Commitment to *Stare Decisis*/Precedent

Justices	Average Score	Std. Dev.	Min.	Max.
Rehnquist	2.949	2.127	1	9
Souter	4.333	2.579	1	9
Stevens	4.436	2.280	1	9
O'Connor	4.564	2.349	1	9
Thomas	5.026	2.211	1	9
Kennedy	5.026	2.631	1	9
Breyer	5.026	1.899	1	9
Scalia	5.564	2.654	1	9
Ginsburg	5.564	2.162	1	9

Scale = 1 to 9 where 9 equals greatest commitment. N = 39.

If confirmation hearing statements provide useful information about future judicial behavior, we would expect based on these rankings that Justice Rehnquist would vote to invalidate the most precedents, while Justice Scalia and Ginsburg would vote to invalidate the fewest. An examination of the Justices' votes to overturn precedent shows that this is only partially borne out. Using the modified Spaeth database, we counted the

Justices' votes to overturn precedent in cases decided in the 1994 through 2000 Terms in which all nine Justices participated.<sup>35</sup> A Justice's vote is counted as a vote to alter precedent if the Justice writes or joins an opinion specifically stating that an earlier case is being or should be "overruled," as well as decisions stating that past precedent should be "disapproved" or is "no longer good law."<sup>36</sup> Decisions in which an opinion distinguishes an existing precedent from the case at bar are not counted.<sup>37</sup>

Table B reports the results based on the Spaeth data. Of the 535 cases decided from 1994 to 2000 by all nine Justices, Justice Thomas cast the most votes to invalidate precedent (4.3% of the cases) and Justice Souter cast the least (1.3% of the cases). Based on only the percentage of votes to overturn precedent and without regard to the importance of any particular vote, Thomas appears to be the Justice least committed to precedent. This result seems plausible, based on the substance of his votes. Thomas has, for example, suggested reconsideration of well-established precedents such as *Calder v. Bull* (1798)<sup>38</sup> and *Smith v. Kansas City Title & Trust Co.* (1921).<sup>39</sup> He also has suggested reconsidering the Court's Commerce Clause jurisprudence to a greater extent than the other Justices in the majority in *United States v. Lopez*,<sup>40</sup> though in *Lopez* he conceded that *stare decisis* might prevent a return to the original understanding (as he sees it) of the Commerce Clause.<sup>41</sup> Interestingly, the five "conservative" members of the Rehnquist Natural Court occupy the five highest slots in terms of altering precedent, supporting earlier findings that the Rehnquist Court was an "activist" court in that it aggressively used its power to invalidate existing precedents.<sup>42</sup> The

---

35. This time frame obviously does not include the entire Rehnquist Natural Court period, but it is the only time frame for which reliable data were available.

36. See Sara C. Benesh & Harold J. Spaeth, *The Supreme Court Justice-Centered Judicial Databases: The Warren, Burger and Rehnquist Courts (1953-2000 Terms)* 31 (March 2003) (prepared for the S. Sidney Ulmer Project for Research in Law and Judicial Politics, University of Kentucky). <http://www.as.uky.edu/polisci/ulmerproject/flpdcodebk.pdf>.

37. *Id.*

38. See *Eastern Enters. v. Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring).

39. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320-22 (2005) (Thomas, J., concurring).

40. *Compare* 514 U.S. 549, 549-68 (1995) (majority opinion), *with id.* at 584-603 (Thomas, J., concurring).

41. *Id.* at 601 n.8 (Thomas, J., concurring) ("Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.")

42. The "conservative" Justices on the Rehnquist Natural Court voted to overturn

four “moderate/liberal” Justices, on the other hand, each voted to alter precedent less than two percent of the time.<sup>43</sup>

Table B: Votes to Alter Precedent: 1994 through 2000 Terms

	Whether Justice Voted to Alter Precedent		Total	% Altered
	No	Yes		
Thomas	512	23	535	4.3%
Scalia	516	19	535	3.6%
Kennedy	519	16	535	3.0%
Rehnquist	523	12	535	2.2%
O'Connor	523	12	535	2.2%
Breyer	525	10	535	1.9%
Stevens	526	9	535	1.7%
Ginsburg	527	8	535	1.5%
Souter	528	7	535	1.3%
Total	4699	116	4815	2.4%

Note: Includes only cases in which all nine Justices participated.

As shown in Table C below, only Justices O'Connor, Breyer and Ginsburg placed near where their confirmation hearing statements indicated they would. Justice Rehnquist, whose confirmation hearing statements showed a notably low commitment to precedent relative to his fellow Justices, was in the middle of the pack in actual practice. Justices Scalia and Thomas, as noted above, were far from their presumptive positions.

---

more precedents and to invalidate more federal statutes than did their more “liberal” colleagues. See Lori A. Ringhand, *Judicial Activism on the Rehnquist Natural Court*, 24 CONST. COMMENT. (forthcoming Spring 2007). Since “conservatives” control the majority of the Court, they may seek to grant cert. to cases where they seek to reverse more liberal precedent. Given that these more conservative Justices can control the docket, they are free to vote in accordance with their views of *stare decisis* as stated in their confirmation hearings. However, the “liberals,” to the extent they fear a conservative Court decision, may not wish to grant cert. in cases they otherwise would prefer hearing in order to reverse Court precedent.

43. *Id.*

Table C: Comparison of Rankings versus Actual Votes to Overturn Precedent

Least Committed to Precedent	Survey Ranking	% Altered Precedent
1	Rehnquist (2.949)	Thomas (4.3%)
2	Souter (4.333)	Scalia (3.6%)
3	Stevens (4.436)	Kennedy (3.0%)
4	O'Connor (4.564)	O'Connor (2.2%)
5	Thomas (5.026)	Rehnquist (2.2%)
6	Kennedy (5.026)	Breyer (1.9%)
7	Breyer (5.026)	Stevens (1.7%)
8	Scalia (5.564)	Ginsburg (1.5%)
9	Ginsburg (5.564)	Souter (1.3%)
Most Committed		

The overall correlation between the Justices' commitments to *stare decisis* as measured by their confirmation hearing rankings and the actual number of votes cast to overturn precedent is weak: 0.289. Confirmation hearing statements about a nominee's purported commitment to *stare decisis* appear to reveal very little about how most nominees will vote once on the bench.

### C. ORIGINALISM

Most members of the Rehnquist Natural Court spoke at length at their confirmation hearings about originalism as an interpretive method, though Justice Stevens discussed the issue much less than his colleagues. While all of the Justices hedged their comments a bit, there was interesting variety in their statements. Justice Thomas, for example, offered the ambivalent statement that "[o]ur notions of what [the liberty clause of the Fourteenth Amendment] means evolves with the country, it moves with our history and our tradition."<sup>44</sup> Justice Ginsburg of-

44. *The Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. at 274 (1991) [hereinafter *Thomas Hearings*].

ferred up a somewhat confusing weather analogy: “[W]hat a judge should take account of is not the weather of the day, but the climate of an era. The climate of the age, yes, but not the weather of the day, not what the newspaper is reporting.”<sup>45</sup> Justice O’Connor made perhaps the strongest pro-originalism statement, saying:

I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed, and . . . I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, its research on the history of that particular provision.<sup>46</sup>

Based on these and other statements, the students ranked the Justices’ relative commitments to originalism as an interpretive method.<sup>47</sup> As shown in Table D, Justice Ginsburg ranked as the Justice least committed to originalism, with an average ranking of only 2.447. Justice O’Connor showed the greatest perceived commitment, with an average ranking of 6.947.

Table D: Justice Rankings Based on Confirmation Hearing Statements: Commitment to Originalism

Justices	Average Score	Std. Dev.	Min.	Max.
Ginsburg	2.447	1.606	1	7
Souter	4.211	2.506	1	9
Kennedy	4.237	2.696	1	9
Stevens	5.079	2.019	1	9
Rehnquist	5.158	2.736	1	9
Thomas	5.395	2.087	1	9
Scalia	5.684	2.157	1	9
Breyer	5.842	2.319	2	9
O’Connor	6.947	2.514	1	9

Scale = 1 to 9 where 9 equals greatest commitment. N = 38.

45. *Ginsberg Hearings*, *supra* note 2, at 303.

46. *O’Connor Hearings*, *supra* note 5, at 67.

47. The students were provided with the following definition of originalism: “A commitment to ‘originalism’ as a method of interpretation should be understood for these purposes as a Justice’s commitment to interpreting the Constitution as it was understood by the Framers’ and/or the public at the time of its enactment.”

Measuring a Justice's commitment to originalism, or any other judicial philosophy, is quite difficult, since what counts as an originalist outcome is likely to be disputed in many cases.<sup>48</sup> Here, we consider the extent to which one Justice joined a concurring or dissenting opinion written by a second Justice. This information—agreement with concurrences and dissents (“special opinions”) written by another Justice—focuses precisely on whether the agreeing Justices had similar rationales for a decision. The decision to join a *majority* opinion does not always tell us much about whether a Justice agrees in any great depth with the analysis presented in the opinion; a decision to join a special opinion is a more finely tuned tool, one that almost certainly indicates agreement not just with the outcome but also with the reasoning. Justices who agree with each other's reasoning processes should be more likely to join each other's special opinions.

Of the 278 constitutional cases we examined, the average agreement rate between all of the Justices in special opinions is 2.3%. As can be seen in the shaded areas in Table E below, however, certain Justices joined the concurring or dissenting opinions of their peers at a much greater rate than the average. Justice Thomas joined the concurring or dissenting opinions drafted by Justice Scalia 15.5% of the time. Justice Ginsburg joined the non-majority opinions of Justices Souter and Stevens at rates of 10.1% and 11.5%, respectively.

---

48. See generally Czarnezki & Ford, *supra* note 1.

Table E: Agreement Rates in Constitutional Cases (1994-2004)

Authors	Joiner of Concurring or Dissenting Opinion								
	Breyer	Ginsburg	Kennedy	O'Connor	Scalia	Souter	Stevens	Thomas	Rehnquist
Breyer		4.7%	0.4%	2.5%	1.1%	4.7%	3.2%	0	1.1%
Ginsburg	4.3%		1.1%	1.1%	0.4%	4.7%	4.3%	0.4%	1.4%
Kennedy	1.1%	2.5%		2.9%	2.9%	1.1%	1.1%	2.2%	2.9%
O'Connor	5.0%	1.4%	1.8%		2.2%	2.5%	1.1%	2.2%	4.0%
Scalia	0.4%	1.1%	1.8%	2.2%		0.7%	1.1%	15.5%	4.0%
Souter	5.8%	10.1%	1.1%	0.7%	0.7%		5.8%	0.4%	0.4%
Stevens	5.8%	11.5%	1.1%	0.4%	0.4%	9.0%		0	0.4%
Thomas	0	0	1.8%	0.7%	8.3%	0	0.4%		3.6%
Rehnquist	0.4%	0	2.2%	1.8%	2.2%	0	0	3.2%	

Note: N=278 cases. Includes only cases from Rehnquist Natural Court, and only cases in which the constitutionality of a state (including state subdivisions) or federal action was the sole issue presented to the court. "Agreed" means that the named Justice joined a concurring or dissenting opinion authored by the other Justice

If the Justices' commitments to originalism as expressed in their confirmation hearings is manifesting itself in their constitutional opinions, we would expect to see higher agreement rates in special opinions between Justices with similar originalism rankings.<sup>49</sup> We would, in other words, expect to see some correlation between the Justices who expressed similar levels of commitment to originalism as an interpretive method (i.e. closer ranking scores) and the willingness of those Justices to join the reasoning in special opinions written by Justices with similar levels of commitment. To test this possibility, we first determined the differences in the originalism scores for each pair of Justices. For example, Souter and Kennedy's originalism scores were relatively close together, while O'Connor and Ginsburg's scores were relatively far apart. We then looked at how often the Justices in each pair signed on to one another's special opinions. The smaller the difference between two Justices' originalism scores, the more often they should join each other's special opinions. Table F contains the results.

---

49. We do not mean to imply that originalism can in fact answer all (some of the authors would add "or most") constitutional questions; it plainly cannot. See Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 *LAW & SOC'Y REV.* 113 (2002). We assert only that Justices claiming an adherence to originalist methods should agree with the reasoning of other Justices claiming an adherence to such methods.

Table F: Comparison of Ranking Score Difference versus  
Number of Concurring or Dissenting Opinions of Other Justice  
in Pair

Justice Pair		Score Diff.	Opinions Joined	Justice Pair		Score Diff.	Opinions Joined
Souter	Kennedy	0.026	6	Scalia	O'Connor	1.263	12
Rehnquist	Stevens	0.079	1	Scalia	Kennedy	1.447	13
Scalia	Breyer	0.158	4	Souter	Scalia	1.473	4
Rehnquist	Thomas	0.237	19	Thomas	O'Connor	1.552	8
Thomas	Scalia	0.289	66	Kennedy	Breyer	1.605	4
Thomas	Stevens	0.316	1	Souter	Breyer	1.631	29
Thomas	Breyer	0.447	9	Souter	Ginsburg	1.764	41
Rehnquist	Scalia	0.526	17	Rehnquist	O'Connor	1.789	16
Stevens	Scalia	0.605	1	Kennedy	Ginsburg	1.79	10
Rehnquist	Breyer	0.684	4	Stevens	O'Connor	1.868	4
Stevens	Breyer	0.763	25	Stevens	Ginsburg	2.632	44
Stevens	Kennedy	0.842	6	O'Connor	Kennedy	2.71	13
Stevens	Souter	0.868	42	Rehnquist	Ginsburg	2.711	4
Rehnquist	Kennedy	0.921	14	Souter	O'Connor	2.736	9
Rehnquist	Souter	0.947	1	Thomas	Ginsburg	2.948	1
O'Connor	Breyer	1.105	21	Scalia	Ginsburg	3.237	4
Thomas	Kennedy	1.158	11	Ginsburg	Breyer	3.395	26
Thomas	Souter	1.184	1	O'Connor	Ginsburg	4.5	7

As shown above, Justices Souter and Kennedy had the closest originalism rankings, yet joined each other's concurring or dissenting opinions only six times. By contrast, some Justice pairs with wide originalism score gaps agreed with each other frequently (e.g., Ginsburg-Breyer; Stevens-Ginsburg). It turns out that these originalism scores do not correlate with agreement rates between Justices.

#### D. THE RIGHTS OF CRIMINAL DEFENDANTS

The last issue area we tested using the student ranking was the commitment of the Justices to protecting the rights of criminal defendants. Unlike originalism and *stare decisis*, this part of the project tested the Justices' views about a particular area of law, rather than their purported commitment to an interpretive approach or methodology. We were interested in whether this type of questioning—questions about particular issue areas rather than judicial philosophy—provided useful information about future judicial behavior. As in our discussion of *stare decisis* above, we tested whether Justices whose confirmation hearing statements expressed a strong preference for protecting the rights of criminal defendants (e.g., indicated support for *Miranda*, the exclusionary rule, or similar protections) were in fact more likely to vote to protect criminal defendants in criminal cases.

The ranking of the Justices' relative commitments to the protection of criminal defendants (based again on their confirmation hearing quotes) is shown in Table G below. As illustrated, Justice O'Connor showed the least commitment to the rights of criminal defendants, with an average score of only 2.474. Justice Ginsburg, in contrast, showed the greatest commitment, with an average score of 7.816.

Table G: Justice Rankings Based on Confirmation Hearing Statements: Commitment to Protecting the Rights of Criminal Defendants

Justices	Average Score	Std. Dev.	Min.	Max.
O'Connor	2.474	1.983	1	8
Rehnquist	3.553	2.368	1	9
Kennedy	3.579	1.926	1	9
Breyer	4.395	1.980	1	8
Scalia	4.474	1.899	1	9
Souter	5.079	1.937	1	9
Thomas	6.684	1.919	1	9
Stevens	6.947	1.916	1	9
Ginsburg	7.816	1.829	2	9

Scale = 1 to 9 where 9 equals greatest commitment. N = 38.

To measure the Justices' relative commitments to protecting the rights of criminal defendants once on the bench, we again used information culled from the revised Spaeth Supreme Court database. The Spaeth data allowed us to identify all of the criminal law cases decided during the Rehnquist Natural Court period (the 1994 to 2004 Terms).<sup>50</sup> It also identifies each Justice's vote in those cases as "liberal" or "conservative." A "liberal" vote in this category of cases is one in favor of the criminal defendant; a "conservative" vote is the opposite.<sup>51</sup>

Not surprisingly, Justices of the Rehnquist Court commonly thought of as the most conservative were more likely to vote conservatively in criminal cases: Justices Thomas, Rehnquist and Scalia all voted for the conservative outcome in more than 75% of these cases. Justice Thomas cast the most such votes, voting conservatively in 78.0% of the 214 criminal cases examined. Justices Kennedy and O'Conner voted for 68.7% and 66.4%, respectively, while each of the "moderate/liberal" Justices voted conservatively in less than 45.5% of the cases. Justice Stevens

50. "Criminal" cases are those cases which Spaeth codes as value=1. Only those cases in which all nine Rehnquist Natural Court Justices participated were included.

51. See The Justice-Centered Rehnquist Court Database, 1986-1998 Terms. <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>.

voted conservatively the least often, doing so in only 27.1% of the cases.<sup>52</sup>

Table H: Directional Votes in Criminal Cases (1994–2004)

Justices	Conservative	%	Liberal	%	Total
Thomas	167	78.0%	47	22.0%	214
Rehnquist	160	76.9%	48	23.1%	208
Scalia	161	75.2%	53	24.8%	214
Kennedy	147	68.7%	67	31.3%	214
O'Connor	142	66.4%	72	33.6%	214
Breyer	97	45.5%	116	54.5%	213
Souter	84	39.3%	130	60.7%	214
Ginsburg	79	36.9%	135	63.1%	214
Stevens	58	27.1%	156	72.9%	214
Total	1095	57.1%	824	42.9%	1919

If confirmation hearing statements are providing useful information about a Justice's future commitment to protecting the rights of criminal defendants, we would expect Justices who expressed the strongest commitment to such rights to cast the most "liberal" votes in criminal cases. As shown below in Table I, there is some support for this expectation.

52. Six of Chief Justice Rehnquist's votes in these criminal cases were deemed not ideological codable by Spaeth, as was one of Justice Breyer's votes. This accounts for the disparity in the total number of votes cast for these Justices.

Table I: Comparison of Rankings versus Actual Votes in Criminal Cases

Least Committed to Defendant Rights	Survey Ranking	% Liberal Vote
1	O'Connor (2.474)	Thomas (22.0%)
2	Rehnquist (3.553)	Rehnquist (23.1%)
3	Kennedy (3.579)	Scalia (24.8%)
4	Breyer (4.395)	Kennedy (31.3%)
5	Scalia (4.474)	O'Connor (33.6%)
6	Souter (5.079)	Breyer (54.5%)
7	Thomas (6.684)	Souter (60.7%)
8	Stevens (6.947)	Ginsburg (63.1%)
9	Ginsburg (7.816)	Stevens (72.9%)
Most Committed		

Justices Stevens and Ginsburg both evidenced the greatest commitment to the rights of criminal defendants in their confirmation hearing statements, and both of these Justices cast the most votes to protect criminal defendants while on the Rehnquist Natural Court. Also, seven of the nine Justices fell on the “correct” (as predicted by their confirmation hearing statements) side of the large gap in liberal voting percentages found between Justice O’Connor and Justice Breyer. Using that gap as a dividing line between the Justices, only Justices Thomas and Breyer showed inconsistent voting patterns in these cases (Justice Breyer voted for more liberal outcomes than anticipated, while Justice Thomas voted for notably fewer). Overall, the correlation between survey rankings based on confirmation hearing votes and actual votes to alter precedent is 0.5376. While this is only a moderate correlation, it is stronger than the correlation found in our *stare decisis* analysis and much stronger than the correlation in the originalism analysis.

#### IV. ADDITIONAL ANALYSIS OF SUPREME COURT CONFIRMATION HEARINGS: LEGISLATIVE HISTORY

We also examined the Justices’ confirmation hearing statements in an additional area—the use of legislative history in statutory interpretation. As before, we extracted the statements

from the hearings in which the nominees spoke about their views on legislative history. This time, however, we did not rely on student evaluators. Instead, we evaluated the quotations ourselves. There were several reasons for taking an alternative approach with this topic. We were primarily concerned that we would not have enough student participation to include four different sets of quotations, but there also is some value in taking alternative approaches to studying this topic. In evaluating the statements about legislative history, however, we knew the identities of the speakers. While we were not conscious of any impact from this knowledge, we cannot rule out the possibility that it influenced our rankings of the nominees.

Legislative history is one of the most common interpretive aids available to judges, but judges, like legal scholars, disagree about its proper use and even whether to use it at all.<sup>53</sup> It is not self-evident that the differing views on legislative history actually matter when it comes to deciding real cases, but we proceed on the assumption that judges' differing views on legislative history may matter and therefore consider whether the confirmation hearings provide any insight into the nominees' subsequent use of legislative history once they are on the Court.

The proper use of legislative history is discussed in seven of the nine nominees' hearings. There is virtually nothing on this topic in Stevens' hearings, but there is a ready explanation for this lack of discussion; The status of legislative history as an interpretive aid has varied over the years. In 1930, Max Radin claimed that there was "no general agreement" on whether it is appropriate to use it in statutory interpretation.<sup>54</sup> In the view of many observers, the legal community later reached a consensus in favor of legislative history, and Stevens' hearings occurred during this period of consensus.<sup>55</sup> While O'Connor and

---

53. See, e.g., *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 283 (1996) (Scalia, J., concurring in part and concurring in the judgment) ("The text's the thing. We should therefore ignore drafting history without discussing it, instead of after discussing it."); *Archer-Daniels-Midland Co. v. United States*, 37 F.3d 321, 323-24 (7th Cir. 1994) (opinion by Posner, J.) ("Legislative history is in bad odor in some influential judicial quarters, but it continues to be relied on heavily by most Supreme Court Justices and lower-court judges; and in the case of statutory language as technical and arcane as that of the DISC provisions, the slogan that Congress votes on the bill and not on the report strikes us as pretty empty.") (citation omitted); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

54. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930).

55. See Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 296 (1982); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 380

Rehnquist discussed the topic, they did so only briefly. In the mid-80s, however, the consensus began to weaken, in large part because of comments made by Scalia at various law schools in 1985 and 1986.<sup>56</sup> And not surprisingly, Scalia spoke at length about the topic during his hearings. Oddly, there was virtually no discussion of the topic at Kennedy's hearings, even though they were only about a year after Scalia's, but setting Stevens and Kennedy aside, we found substantive comments in the other nominees' hearings, although Justices O'Connor and Rehnquist spoke only briefly on the topic.

Of the seven nominees to address the issue, Justice O'Connor was the most favorably disposed towards the use of legislative history. She offered no qualifications on its use, such as a preference for limiting it to situations where the statutory text is unclear. Instead, she simply included it on the list of useful aids when interpreting statutes: "[I]t seems to me important in construing statutes that the Court look at the specific legislative enactment itself, the language used, and any legislative history which is available in connection with it, as aids in the proper interpretation. These are crucial factors."<sup>57</sup> Rehnquist, in contrast to O'Connor, offered the most common qualification to the use of legislative history, i.e., that one should look at it only when the statutory language is not clear.<sup>58</sup>

It is difficult to draw any rigid distinctions between the comments offered by Justices Thomas, Breyer, Ginsburg, and Souter, though if forced to do so, we would likely place them in the preceding order. All four nominees were generally positive about the use of legislative history, though each one of them offered some qualification beyond that stated by Justice Rehnquist. Of the four, Justice Thomas was perhaps the most positive, insofar as he suggested the least concern about using legislative history. He did acknowledge, however, that "some legislative history is perhaps more accurate or better than others."<sup>59</sup> The "point" of statutory

---

(1947) ("Despite earlier doubts, committee reports, committee amendments, responsible explanations on the floor, and similar legislative materials may now be considered by a federal court interpreting a statute, even when the words, taken alone, have an unambiguous meaning."); *Legislation*, 50 HARV. L. REV. 813, 826 (1937) ("A few courts have forbidden the use of these materials, but the strong approval of a considerable body of authority now points to their free employability.");

56. See *Scalia Hearings*, *supra* note 7, at 74 (statement of Sen. Heflin).

57. *O'Connor Hearings*, *supra* note 5, at 134.

58. *Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 182 (1986) [hereinafter *Rehnquist CJ Hearings*].

59. *Thomas Hearings*, *supra* note 44, at 213.

interpretation, according to Justice Thomas, is to discern Congress' intent, and he did not "know how one can go about that process, the process of interpreting ambiguous statutes, without looking to legislative history."<sup>60</sup> Justice Breyer was a bit more cautious. He referenced the potential misuse of legislative history, offering Judge Harold Leventhal's now clichéd analogy between using legislative history and looking for one's friends at a cocktail party.<sup>61</sup> But Justice Breyer did make clear that he believed that "an open question in a statute is best understood through the use of legislative history."<sup>62</sup> Thus, both Justices Thomas and Breyer described legislative history as an essential tool for judges struggling with unclear statutory language.<sup>63</sup>

Justices Ginsburg and Souter both endorsed the use of legislative history when the text is unclear, but each of these Justices also emphasized the reliability of some sources over others.<sup>64</sup> Justice Ginsburg said she approached legislative history with "hopeful skepticism,"<sup>65</sup> and suggested that a unanimous committee report is more reliable than a statement by a single member (though even on this point she hedged).<sup>66</sup> Justice Souter emphasized the need to find sources that represent the views of the entire institution. A statement by one member on the floor is therefore less reliable than other sources.<sup>67</sup> These Justices, then, clearly emphasized the concern that some materials are much less likely to reveal the thinking of Congress as a whole. Justices Thomas and Breyer did not ignore this concern, but they were somewhat less specific in their discussions of it.

While Justice Scalia offered the most criticism of legislative history, he was not as hostile to it as might be expected from his subsequent behavior on the bench, such as his occasional refusal

---

60. *Id.*

61. *The Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 171 (1994) ("[Judge Leventhal] said, oh, it is like going to a cocktail party and looking over the crowd and picking out your friends. What he is describing is a misuse of legislative history.").

62. *Id.* at 296.

63. This is consistent with the Court's decisions in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.") and *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

64. *Ginsburg Hearings*, *supra* note 2, at 224, 326; *Souter Hearings*, *supra* note 13, at 131.

65. *Ginsburg Hearings*, *supra* note 2, at 224; *see also id.* at 326.

66. *Id.* at 224.

67. *Souter Hearings*, *supra* 13, at 131.

to join sections or footnotes of majority opinions that deal with legislative history.<sup>68</sup> During his hearings, Justice Scalia described legislative history as “a significant factor in interpreting a statute,” adding that he would use what seemed to him as “reliable legislative history when it is available to be used”<sup>69</sup> and that he would “not exclude it as a basis for [his] decisions as [he had] not in the past.”<sup>70</sup> In large part, his comments might not be all that distinguishable from Justices Souter and Ginsburg. In one exchange, however, he did go further than those Justices in expressing his skepticism about legislative history:

Senator Simon. . . . Do you still believe, if you were writing on a blank slate, you would call all of legislative history into question?

Judge Scalia. Yes. If I could create the world anew, I suppose I still would, but I will no more be able to create the world anew when I am sitting on the Supreme Court than I could when I was sitting on the court of appeals, if I ever get to sit up there.”<sup>71</sup>

Largely because of this statement, we opted to rank Justice Scalia as the nominee most hostile to the use of legislative history, at least among the seven Justices who commented on the topic.

Thus, while the Justices’ views of the use of legislative history in statutory cases cannot be ordered decisively, the Justices’ confirmation statement can be meaningfully used to divide the Justices into four groups. These groups distribute the Justices in descending order, with the Justices most favorably disposed to the use of legislative history in Group One and those most skeptical of such use placed in Group Four. Justice O’Connor is in the first group since she offered no qualifications on the use of legislative history, suggesting that legislative history is always a welcome part of any effort at statutory interpretation. Justice Rehnquist is in the second group, because he offered only the most common qualification on such use—that legislative history be used only when the language of the statute is not clear. Jus-

---

68. See, e.g., *S.D. Warren Co. v. Maine. Bd. of Env’tl. Prot.*, 126 S. Ct. 1843, 1846 (2006); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 113 (2004); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 420 (2003); *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 955 (1997); *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 215 (1996).

69. *Scalia Hearings*, *supra* note 7, at 65.

70. *Id.* at 66.

71. *Id.* at 105–06.

tices Thomas, Breyer, Ginsburg, and Souter comprise the third group due to their higher degree of skepticism about particular forms of legislative history; and finally Justice Scalia is in the fourth group for what appears to be only a grudging acceptance of legislative history in some situations. It is worth noting again, however, that Justices O'Connor and Rehnquist did not speak at length on this topic. If the Senators had been more persistent at the hearings, these groupings may have been different.

Do the confirmation hearing statements, so grouped, match up with the nominees' subsequent performance on the Court? There are two relevant sources of systematic information on the use of legislative history on the Supreme Court from which to draw our comparison data: Michael H. Koby's *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*,<sup>72</sup> and James J. Brudney and Corey Ditslear's *The Decline and Fall of Legislative History*.<sup>73</sup> Koby's study provides a count of legislative history references from 1980 to 1998.<sup>74</sup> Included in Koby's definition of legislative history are committee reports, congressional debates, committee hearings, and the text of bills.<sup>75</sup> Although Koby is a bit thin on his methodological details, his counts appear to include both positive and negative references to legislative history in majority, concurring, and dissenting opinions.<sup>76</sup>

Table J presents Koby's results for the nine Justices of the Rehnquist Natural Court. Setting aside Justices Stevens and Kennedy, Justice O'Connor was the most frequent user of legislative history, which is consistent with our examination of the confirmation hearing testimony. Justice Scalia used legislative history the least, which also matches up with the confirmation hearing testimony. Justice Rehnquist's position, however, is not consistent. One explanation is that Justice Rehnquist changed his view of legislative history over time. The last four years represented in Koby's data, 1995 to 1998, are the four years in which

---

72. Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999).

73. James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220 (2006).

74. Koby, *supra* note 72, at 373. Koby replicates another study that is also thin on methodological details. See Carro & Brann, *supra* note 55, at 298 (describing the methodology for identifying cases as relying on LEXIS searches but without providing the search terms).

75. Koby, *supra* note 72, at 373.

76. See *id.* at 392.

Justice Rehnquist used legislative history the least often. Thus, the hearings may have accurately indicated Justice Rehnquist's views at the time despite the fact that he changed his mind in his later years on the Court. Justice Thomas' results are perhaps the most striking. On average, Justice Thomas used legislative history in 17% of his opinions, putting him closer to Justice Scalia (9.3%) than Justices Breyer (34.4%), Ginsburg (32%), and Souter (39%). Thus, Justice Thomas' confirmation hearing comments were the least revealing of his actual performance on the bench, as his comments during the hearings suggested he would be at least as favorably disposed towards legislative history as those Justices.

Table K provides a measure of the Justices' use of legislative history based on Brudney and Ditslear's data on decisions from 1969 to 2005 involving the "law of the workplace." Their dataset includes 649 majority opinions on issues like union-management relations, employment discrimination, and related subjects. Unlike Koby, Brudney and Ditslear excluded from their tally any opinions in which the reference to legislative history was actually a *rejection* of its value. Their data thus represent a smaller universe of cases, but the data are a more accurate assessment of the positive role of legislative history, at least in these "law of the workplace" cases. Based on this methodology, the predictive value of the Justices' confirmation hearing statements appears low. With these data, Justice O'Connor now ranks fourth rather than second in terms of using legislative history. Based on their confirmation hearing statements, one would expect O'Connor to rely on legislative history more than Justices Souter and Ginsburg. Justice Rehnquist is again closer to the bottom than the top. As should be expected from his confirmation hearing statements, Justice Scalia's use of legislative history is quite low, though Justice Thomas' use is even lower. In this respect, Thomas' position again does not match up with expectations based on his testimony, though it remains possible that he changed his views after being confirmed. In sum, the hearings were a mixed bag for the Senators in terms of figuring out how the nominees compared to one another.

**Table J: Justices' Reliance on Legislative History (KOBY)**

Justice	1981	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	AVG
<b>Stevens</b>	36%	28%	23%	69%	76%	72%	40%	45%	67%	60%	30%	69%	42%	34%	48%	35%	26%	25%	27%	45%
<b>O'Connor</b>			51%	56%	67%	64%	47%	57%	47%	55%	55%	54%	35%	6%	22%	10%	13%	23%	31%	41%
<b>Souter</b>												75%	38%	50%	59%	17%	25%	26%	24%	39%
<b>Breyer</b>																75%	47%	8%	7%	34%
<b>Ginsburg</b>															37%	17%	22%	47%	36%	32%
<b>Kennedy</b>									14%	21%	9%	63%	15%	17%	62%	27%	67%	25%	15%	30%
<b>Rehnquist</b>	52%	40%	44%	46%	31%	52%	14%	38%	25%	30%	9%	37%	23%	67%	38%	6%	0%	0%	0%	29%
<b>Thomas</b>													5%	13%	24%	26%	27%	13%	12%	17%
<b>Scalia</b>								5%	24%	2%	16%	13%	14%	3%	9%	4%	15%	4%	3%	9%

Note: Majority, concurring, and dissenting opinions are included without subject-matter restrictions. Source: Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 Harv. J. on Legis. 369, 393-94 Table III (1999).

Table K: Justices' Reliance on Legislative History  
(Brudney & Ditslear)

Justice	1969-2005
Souter	44%
Stevens	40%
Ginsburg	36%
O'Connor	31%
Breyer	29%
Rehnquist	26%
Kennedy	23%
Scalia	4%
Thomas	0%

Note: Only majority opinions involving the "law of the workplace" are included. Source: Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 *Jurimetrics J.* 292, 298 (1981-1982).

## CONCLUSIONS

As noted in the Introduction, Senator Leahy described the inquiry into a nominee's judicial philosophy as the most important issue of the hearings.<sup>77</sup> One would therefore hope the hearings generate accurate information about the nominees that could actually inform a Senator's vote. While admittedly preliminary, our results indicate that the confirmation hearings are providing very little substantive information as to future judicial behavior. Based on the student evaluations, Senators should perhaps focus their questions on specific issue areas rather than 'big picture' issues involving interpretative methods—or at least expect to learn more from these questions. Our limited data support this recommendation in that the nominees' rankings involving criminal defendants are more consistent with the nominees' subsequent behavior than the rankings involving *stare decisis* and originalism. Based on our own evaluation of the statements involving legislative history, we did find some predictive value in the answers provided by the nominees; however, it's not clear if the Justices' views on legislative history have system-

77. *Kennedy Hearings*, *supra* note 7, at 59 (statement of Sen. Leahy).

atic effects on case outcomes. These findings are interesting, insofar as they offer little support for the common senatorial practice (or desire) of trying to predict judicial behavior by asking questions about judicial philosophy or interpretive methodology.<sup>78</sup>

Any recommendation about questions, however, must be qualified. Our survey results are by no means definitive. The student rankings, in all three areas, show a high degree of variation. In all but five situations, each Justice received the full range of possible ranks in each issue area. Moreover, the standard deviations in the Justices' rankings were relatively high, particularly with regard to *stare decisis* and originalism. This variation may support a recommendation that Senators wanting real information should focus on issue areas rather than interpretive methods: questions about interpretive methods (or interpretive methods themselves) may be so malleable that very little meaningful information will be conveyed in response to such questions. There are, however, other possible reasons for the variations. It is possible, for example, that the full scope of information conveyed at a confirmation hearing cannot be captured by looking solely at a nominee's responses to questions. Context matters. It may be that in stripping the identities of the nominees and the nature of the questions asked (and of the questioner) we stripped away too much critical contextual information, thereby making it impossible for our survey participants to make meaningful distinctions between the Justices' statements, even though such distinctions may have been possible if more information were provided.

Alternatively, our student rankers may not have been up to the task presented to them. We assumed second and third year law students could act as a reasonably good proxy for an interested and reasonably informed but non-expert public (the audience of constituents that the Senators themselves presumably care about). This assumption may not be correct. Moreover, legal elites, public opinion leaders, and the Senators themselves may see different things in the same statements than could our student evaluators. If this is the case, it is possible that the confirmation hearing statements are in fact providing meaningful in-

---

78. On the other hand, Senator Simpson actually noted to Anthony Kennedy that "even though you hold these particular philosophies, we also know there is no predictability as to how you'll act when you get on the high court bench." *Id.* at 50. But this acknowledgement did not stop Simpson from claiming to have a significant interest in Kennedy's judicial philosophy. *Id.*

formation to the Senators or other groups. Repeating the survey with other groups, including groups with both more and less specialized knowledge, might yield interesting insights into how different audiences perceive the information presented at the hearings. One might also use far more sophisticated methods of content analysis and more detailed coding schemes to assess the hearings, thus enabling a more context rich assessment of the positions presented by the nominees.

A final point: in the end, we are not surprised by the relatively weak correlations between statements made at the hearings and subsequent judicial behavior. We expect that even more nuanced research methodologies would yield similar results. Confirmation hearings are, after all, a strategic environment where Senators ask certain questions to please constituents and nominees answer questions to land a job. The nominees' incentives, therefore, are almost certainly to provide as little information as possible. Moreover, even genuinely held interpretive preferences may make very little difference in directing results in actual cases. Our point, then, is not to generate astonishment at the lack of correlation between nomination statements and judicial performance, but to stimulate thinking on how the confirmation hearings could be better structured to provide more reliable predictors of judicial performance if, indeed, such predictors are a desirable or feasible way of increasing judicial accountability. *These* are the questions we hope this work provokes, and that future researchers in this area will pursue.

## APPENDIX A

## Breyer: Originalism

[120] Would you agree, then, that the meaning of the law is to be ascertained according to the understanding of the law when it was enacted? A: Almost always. Almost always. . . . The reason that I hesitate a little is because of course, there are instances, particularly with the Constitution and other places, where it is so open and unclear as to just how the Framers or the authors intended it.

[170] I think the Constitution is a set of incredibly important, incredible valuable principles, statements in simply language that have enabled the country to exist for 200 years, and I hope and we believe many hundreds of years more. That Constitution could not have done that if, in fact, it was not able to have words that drew their meaning in part from the conditions of the society that they govern. And, of course, the conditions and changed conditions are relevant to deciding what is and what is not rational in terms of the Constitution, as in the terms of a statute or in any other rule of law.

[223] One goes back to history and the values that the Framers enunciated. One looks to history and tradition, one looks to the precedents that have emerged over time. One looks, as well, to what life is like at the present, as well as the past. And one tries to use a bit of understanding as to what a holding one way or the other will mean for the future.

[269] I think judges have started with text . . . They go back to the history; they look at what the Framers intended; they look at traditions over time; they look at how those traditions have worked out as history has changed; and they are careful, they are careful, because eventually. . . other people will look back at the interpretations this generation writes if they are judges and they will say: were they right to say that that ought permanently to have been the law? If the answer to that question is yes, then the judges of today were right in finding that that was a basic value that the Framers of the Constitution intended to have enshrined.

[287] Where a clause is unclear, there is no escaping the requirement to find its meaning. . . . To find the meaning, you begin with the text, but as you say, the text is very unclear in the example you are thinking of. You go back into history, and you look at what the Framers are likely to have intended. And often—or at least sometimes, anyway—that will not answer the question, because they may have in-

tended the meaning to encapsulate certain important values, which values may stay the same, but the conditions in which they are applied may have changed. So you look to precedent, you look to tradition, and you look to history if the case is really difficult. And you have to have some understanding of the practical facts of how people live.

[287] Those are intellectual checks that try to make the factors that I mentioned factors that do not unchain the personality of the judge, that hold the judge back from legislating, but permit the Constitution to adapt to changing circumstances in a way that I believe the Framers intended.

[355] [W]hat the Framers thought is that the Constitution should adapt, preserving certain basic values. So what are those values? And we are back to where I started with a holistic approach. . . . I think the word “dignity” is important. At the most basic level, the Preamble to the Constitution lists what the Framers were up to—establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.

[192] I cannot say that precedent always answers the question, but it is terribly important to refer to the precedent, and the opinion grows out of prior precedent. That is normal. The history is important as well, both because it reflects an intent of the Framers and because it shows how, over the course of 200 years, that intent has been interpreted by others. The present and the past traditions of our people are important because they can show how past language reflecting past values, which values are permanent, apply in present circumstances. And some idea of what an opinion either way will mean for the lives of the people whose lives must reflect those values, both in the past and in the present, and in the future, is important.

### Kennedy: Originalism

[85] [T]he object of our inquiry is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed. One of the reasons why, in my view, the decisions of the Supreme Court of the United States have such great acceptance by the American people is because of the perception by the people that the Court is being faithful to a compact that was made 200 years ago. The Framers sat down in a room for three months. . . . The object of our inquiry is to see what that documents means.

[138] The Framers, because they wrote a Constitution, I think well understood that it was to apply to exigencies and circumstances and

perhaps even crises that they could never foresee. So any theory which is predicated on the intent the Framers had, what they actually thought about, is just not helpful. Then you can go one step further on the progression and ask, well, should we decide the problem as if the Framers had thought about it? But that does not seem to me to be very helpful either. What I do think is that we can follow the intention of the Framers in a different sense. They did do something. They made certain public acts. They wrote. They used particular words. They wanted those words to be followed. We can see from history more clearly now, I think, what the Framers intended, than if we were sitting back in 1789. . . . We have a great benefit, Senator, in that we have had 200 years of history. History is not irrelevant. History teaches us that the Framers had some very specific ideas. As we move further away from the Framers, their ideas seem almost more pure, more clarified, more divorced from the partisan politics of their time than before. So a study of the intentions and the purposes and the statements and the ideas of the Framers seems to me, is a necessary starting point for any constitutional decision.

[140] Q: Does this mean that you are in any way adverse to evolving interpretations of the Constitution that accommodate new technology or current trends in society? A: [I] recognize that any State must contain within it the ability to change in order to preserve those values that [are deemed] essential. As applied to a judge, I think that it is consistent with the idea that constitutional values are intended to endure from generation to generation and from age to age.

[140] [T]he doctrine of original intent is not necessarily helpful as a way to proceed in evaluating a case; but that really it is one of the things that we want to know. The doctrine of original intent does not tell us how to decide a case. Intention, though, is one of the objectives of our inquiry. If we know what the Framers intended in the broad sense that I have described, then we have a key to the meaning of the document. I just did not think that original intent was very helpful as a methodology, as a way of proceeding, because it just restates the question.

[141] Original intent, broadly conceived as I have described it, is extant in far more cases than we give it credit for. I think that in very many cases, the ideas, the values, the principles, and rules set forth by the Framers, area guide to the decisions. And I think they are a guide that is sufficiently sure that the public, and the people accept the decisions of the court as being valid for that reason. If there is not some historical link to the ideas of the Framers, then the constitutional decision, it seems to me, is in some doubt. . . . But I think that in almost all cases there is an intent, at least broadly stated; the question is whether it is

narrow enough to decide the particular case. It is, I think, an imperative that a judge who announces a constitutional rule be quite confident, be quite confident, that it has an adequate basis in our system of constitutional rule; and that means an adequate basis in the intention of the Constitution.

[151] Well, I am not saying that the official purpose, the announced intention, the fundamental theory of the amendment as adopted will in all cases be the sole determinant. But I think I am indicating that it has far more force and far more validity and far more breadth than simply what someone thought they were doing at the time. I just do not think that the 14<sup>th</sup> amendment was designed to freeze into society all of the inequities that then existed. I simply cannot believe it.

[152] Q: Well, I agree with you about that, and I agree with you about *Brown v. Board* being correctly decided. A: But that cannot be because society has changed between 1878 and 1896. . . I think what the Framers had in mind was to rise above their own injustices. It would serve no purpose to have a Constitution which simply enacted the status quo.

[171] You look to see how the great Justices that have sat on the court for years have understood and interpreted the Constitution, and from that you get a sense of what the Constitution really means.

[230] [The] Court can use history in order to make the meaning of the Constitution more clear. As the court has the advantage of a perspective of 200 years, the Constitution becomes clearer to it, not more murky. . . . And this doesn't mean the Constitution changes. It just means that we have a better perspective of it. This is no disparagement of the Constitution. It is no disparagement of the idea that the intentions and the purposes of the Framers should prevail. To say that new generations yield new insights and new perspective does not mean the Constitution changes. It just means that our understanding of it changes. The idea that the Framers of the Constitution made a covenant with the future is what our people respect and that is why they follow the judgments of the Supreme Court, because they perceive that we are implementing the understanding of the Framers. I am committed to that principle.

#### Thomas: Originalism

[135] I think, Senator, that the role of a judge is a limited one. It is to interpret the intent of Congress, the legislation of Congress, to apply that in specific cases, and to interpret the Constitution, where called upon, but at no point to impose his or her will or his or her opinion in

that process, but rather to go to the traditional tools of constitutional interpretation, or adjudication, as well as to statutory construction, but not, again, to impose his or her own point view or his or her predilections or preconceptions.

[179] But to understand what the Framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body, to get your understanding.

[238] I think that knowing what [the Founders] views are is a context for understanding our Constitution, knowing what they believed in is a context for understanding the separation of powers or perhaps even understanding the notion of limited government and the rights of individuals. . . . Now, the beliefs of the Founders could be part of the history or tradition to which we look, but you do not make an independent search of natural law, and I have not suggested that.

[273] How do we look at history and tradition, how do we determine how our country has advanced and grown, it is a very difficult enterprise. It is an amorphous process at times, but it is an important process.

[274] I also indicated that the concept doesn't stop there, it is not frozen in time. Our notions of what [the liberty clause of the 14th Amendment] means evolves with the country, it moves with our history and our tradition.

[274] The concept [of natural law] is a broad concept. . . maybe that is one of the reasons the Founders used that concept. It is one that evolves over time. I don't think that they could have determined in 1866 what the term in its totality would mean for the future. . . . but in constitutional adjudication, what the courts have attempted to do is to look at the ideals, to look at the values that we share as a culture, and those values and ideals have evolved, in that specific provisions have evolved over time.

[277] Q: So, natural law does impact on the adjudication of cases?  
A: To the extent that the Framers believed it. Q: We both admit, you looking at the Framers and me looking at the Framers, we may come to two different conclusions of what they meant by natural law. A: But we also agree that the provisions that they chose were broad provisions, that adjudicating through our history and tradition, using our history and tradition evolve.

[393] And as I have indicated and the Court has attempted to do, attempted to root the interpretation or analysis in those areas in history and tradition of this country, the liberty component of the due process clause, and I think that that is an appropriate restraint on judges.

## Stevens: Originalism

[42] And to the extent that open areas remain in our Constitution, and inevitably a large number do. . . the judge, I think, has the duty, really, to do two things. One, to do his best to understand what was intended in this kind of situation, and yet to realize that our society does change and to try to decide the case in a context that was not completely understood and envisioned by those who drafted the particular set of rules. . . . I think he has to be guided by history, by tradition, by his best understanding of what was intended by the Framers, and yet he also must understand that he is living in a different age in which some of the considerations that happen today must inevitably affect what he does.

[44] [O]ne must study the document, the language used, and the intent of the Framers, and the way in which one thinks the Framers would have sized up the problem now presented.

[72] And I think there is certainly some truth to the notion that one has to consider both the social conditions at the time the amendment was adopted or the intent of the Framers and the background in which a particular punishment is being given out today.

## Rehnquist: Originalism

[CJ-132] I think a judge has the obligation, when sitting in a Federal system like ours under a written Constitution, to attempt to use every bit of information and every method he can in order to find out what the Constitution means. Certainly a large part of this is the written word that the Framers used, not the undisclosed intentions of the Framers, but the words that they used.

[CJ-279] Well, there are a number of provisions in the Constitution that are sufficiently general so that they have application far beyond what the Framers, the people who ratified the Constitution, had before them at the time. In 1787, there was not a steamboat, there was not a railroad, there was not an airplane; yet they gave Congress no power over buggies or over post roads; they said Congress shall have the power to regulate commerce among the several States. And that provision is obviously broad enough to embrace any number of things that have come after. . . . The fact that there were not any public schools in 1787 does not mean that those clauses of broad general applicability would not have application where appropriate to institutions that have come after the Framers.

[AJ-55] My notion would be that one attempts to ascertain a constitutional meaning. . . by use of the language used by the Framers, the

historical materials available, and the precedents which other Justices of the Supreme Court have decided in cases involving a particular provision.

[AJ-81] Well, I think the Framers drafted a document. . . which was capable of forming a framework of government, not just in 1789, but in our own day. And there is no question in my mind that the principles laid down then, as subsequently interpreted, must be applied to very changed conditions which occur now rather than then. But, I think even now it is to the Constitution and to its authentic interpretation that we must turn in solving constitutional problems, rather than to simply an outside desire to be “in step with the time.”

[AJ-138] I think that in interpreting the Constitution, one goes first to the document itself, to the historical materials that may be available, casting light on what the Framers may have intended, and to the decisions made by the Supreme Court construing it.

#### O'Connor: Originalism

[67] I do not believe that it is the function of the judiciary to step in and change the law because the times have changes or the social mores have changed. . . I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of the provision is—based on the intent of the Framers, its research on the history of that particular provision. I was not intending to suggest that those changes were being made because some other branch had failed to make the change as a matter of social policy.

[84] Obviously the Constitution is the basic document to which the Justices must refer in rendering decisions on constitutional law. In analyzing a question of intent of the Framers of that document is vitally important.

[102] I think there was an element indeed of the examination of the intent of the drafters of the [14th] amendment. I am sure that particular case [*Brown*] was impacted also by perceptions of the social impacts the that particular instance. What I was trying to say was that in some cases in which our Court has reached a contrary result after a period of years to a previous decision they do so occasionally based on a reexamination of the legislative history and of the intent of the Framers in an effort to determine whether the prior determination was correct.

## Scalia: Originalism

[37] Let us assume that somebody runs in from Princeton University, and on the basis of the latest historical research, he or she has discovered a lost document which shows that it was never intended that the Supreme Court should have the authority to declare a statute unconstitutional. I would not necessarily reverse *Marbury v. Madison* on the basis of something like that. To some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on.

[48] I cannot say that I have a fully framed omnibus view of the Constitution. Now there are those who do have written pieces on constitutional interpretation, and here is the matrix, and here is how you do it. I think it is fair to say you would not regard me as someone who would be likely to use the phrase, living Constitution. On the other hand, I am not sure you can say, he is pure and simply an original meaning . . . . What I think is that the Constitution is obviously not meant to be evolvable so easily that in effect a court of nine judges can treat it as though it is a bring-along-with-me statute and fill it up with whatever content the current times seem to require. To a large degree, it is intended to be an insulation against the current times, against the passions of the moment that may cause individual liberties to be disregarded, and it has served that function valuably very often. So I would never use the phrase, living Constitution. Now, there is within that phrase, however, the notion that a certain amount of development of constitutional doctrine occurs, and I think there is room for that. I frankly—the strict original intentist, I think would say that even such a clause as the cruel and unusual punishment clause would have to mean precisely the same thing today that it meant in 1789 . . . so that if lashing was fine then, lashing would be fine now. I am not sure I agree with that. I think that there are some provisions of the Constitution that may have a certain amount of evolutionary content within them. I have never been—what should I say—as I said earlier, I have not developed a full constitutional matrix. You are right though, in suspecting me to be more inclined to the original meaning than I am to a phrase like “living Constitution.”

[88-89] Q: [T]he Supreme Court throughout history has had the responsibility to declare that certain widely accepted practices violate the Constitution—for example, deciding that segregated schools were unconstitutional, and that legislative districts had to be apportioned fairly. Are you saying that as a Supreme Court Justice, you would oppose decisions which prohibited widely accepted practice? A: There is an ongoing debate that has always been ongoing, but it is more publicly

known now, about strict constructionism verses a more evolutionary theory of the Constitution. And I am speaking particularly about decisions of the court that give content to provisions of the Constitution that are not sufficiently explicit to strike down particular practices. If a practice that constitutes plainly racial discrimination existed in all the States, it would make no difference whether it existed from the beginning of the 14th Amendment down to the present. If it is facially contrary to the language, obviously, there is no problem. . . [J]udges have authority to give such content, no doubt, but I do not know how a judge intuits that a particular practice is contrary to our most fundamental beliefs, to the most fundamental beliefs of our society, when it is one that was in existence when the constitutional provision in question was adopted and is still in existence. . . . I would find it very difficult . . . to strike down a provision on the basis of substantive due process . . . where it is a provision that State legislatures generally adopted at the time the 14th amendment was passed and continue to generally adopt. . . . I am not comfortable with imposing my moral views on society. I need something to look to. And what I look to is the understanding of the people. A strict constructionist would say use only the understanding at the time of the 14th Amendment. The evolutionist would say no, the understanding today as well. Whichever of those two you use—and as I said in some earlier questioning, I am a little wishy-washy on that point—but whichever of the two you use, it seems to me that either one or the other has to reflect the new right you have found.

[104] But, as I've said, some cases that are so old, even if you waived in my face a document proving that they were wrong when decided in 1803, I think you'd have to say, sorry, too late.

[108] Q: What is your approach to [original intent]? A: Well, it is where I start from, Senator. I think the first step is to—and I use the term “original meaning” rather than “original intent,” which is maybe something of a quibble, but I think that one is bound by the meaning of the Constitution to the society to which it was promulgated. And if somebody should discover that the secret intent of the Framers was quite different from what the words seem to connote, it would not make any difference. In any case, I start from the original meaning, and I think there is room for dispute as to what extent some of those elements of meaning are evolvable, such as the cruel and unusual punishment clause. The starting point, in any case, is the text of the document and what it meant to the society that adopted it. I think it is part of my whole philosophy, which is essentially a democratic philosophy that even the Constitution is, at bottom . . . a democratic document. It was adopted by the people's acceptance of it, by their voting for it, and its legitimacy depends upon democratic adoption at the time it was en-

acted. Now, some of its provisions may have envisioned varying application with varying circumstances. That is a subject of some dispute and a point on which I am quite wishy-washy. But I am clear on the fact that the original meaning is the starting point and the beginning of wisdom.

### Ginsburg: Originalism

[118] I think the Framers are shortchanged if we view them as having a limited view of rights, because they wrote, Thomas Jefferson wrote, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these”—among these—“are life, liberty, and the pursuit of happiness,” and that government is formed to protect and secure these rights.

[119] Now, it is true—and it is a point I made in the Madison Lecture—that the immediate implementation in the days of the Founding Fathers in many respects was limited. “We the people” was not then what it is today. The most eloquent speaker on that subject was Justice Thurgood Marshall, during the series of bicentennial celebrations, when songs in full praise of the Constitution were sung. Justice Marshall reminded us that the Constitution’s immediate implementation, even its text, had certain limitations, blind spots, blots on our record. But he said that the beauty of this Constitution is that, through a combination of judicial interpretation, constitutional amendment, laws passed by Congress, “We the people” has grown ever larger. So now it includes people who were once held in bondage. It includes women who were left out of the political community at the start. I hope that begins to answer your question. The view of the Framers, their large view, I think was expansive. Their immediate view was tied to the circumstances in which they lived.

[127] Q: What about this statement: The only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended. A: I think all people could agree with that. But as I tried to say in response to the chairman’s question, trying to divine what the Framers intended, I must look at that matter two ways. One is what they might have intended immediately for their day, and the other is their larger expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future. And I know of no better illustration of that than to take the words of the great man who wrote the Declaration of Independence. Thomas Jefferson said: Were our state a pure democracy, there would still be excluded from our deliberations women who, to

prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.” Nonetheless, I do believe that Thomas Jefferson, were he alive today, would say that women are equal citizens. . . . So I see an immediate intent about how an ideal is going to be recognized at a given time and place, but also a larger aspiration as our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time.

[127-128] The judge has a law—whether it is a statute that Congress passed or our highest law, the Constitution—to construe, to interpret, and must try to be faithful to the provision. But it is no secret that some of these provisions are not self-defining. There is nothing a judge would like better than to be able to look at a text and say this text is clear and certain, I do not have to go beyond it to comprehend its meaning. But often that is not the case, and then a judge must do more than just read the specific words. The judges will read on to see what else is in the law and read back to see what was there earlier. The judge will look at precedent, to see how the words in this provision or in similar provisions have been construed. The effort is always to relate to the intent of the lawgiver or the lawmaker, but sometimes that intent is obscure.

[189] It is part of our history—a sad part of our history, Senator . . . , but undeniably part of our history—that the 14th amendment, that great amendment that changed so much in this Nation, was not intended by its Framers immediately to change the status of women. . . . Times changed, and eventually, after nearly a century of struggle, women achieved the vote. They became full citizens. And many people thought that when women became full citizens, entitled to the vote, they had achieved equality. The vote should have qualified women as full and equal citizens with men, entitled to the same equal protection before the laws. [Y]es, it took bold and dynamic interpretation in view of what the Framers of the 14th Amendment intended. The Framers of the 14th amendment meant no change, they intended no change at all in the status of women before the law. But in 1920, when women achieved the vote, they became full citizens, and you have to read the Constitution as a whole, changed, as Thurgood Marshall said, over the years by amendment and by judicial construction.

[221] The point was that, at last, the country had come to appreciate that women were full and equal citizens with men; that the perception of women’s place that marked the 19th century and the 18th century had become obsolete; that when the 19th amendment gave women the right to vote, they become full and equal citizens entitled to the same protection mean had under the 14th amendment.

[239] Q: [D]oes the nominee wish to interpret the Constitution as a static document, or . . . wish the Court to initiate creative changes or creative new approaches? A: I have said that I associate myself with Justice Cardozo who said our Constitution was made not for the passing hour but for the expanding future. I believe that is what the Founding Fathers intended.

[303] I also said what a judge should take account of is not the weather of the day, but the climate of an era. The climate of the age, yes, but not the weather of the day, not what the newspaper is reporting.

### Souter: Originalism

[128-129] I have tended to shy away from the use of the term "original intent" in describing any approach of mine. I have done so, because the phrase "original intent" has frequently been used to mean that the meaning or the application of a constitutional provision should be confined only to those specific examples that were intended to be the objects of its application when it was, in fact, adopted. . . . I do not believe that the appropriate criterion of constitutional meaning is this sense of specific intent, that you may never apply a provision to any subject except the subject specifically intended by the people who adopted it. . . . If you were to confine the equal protection clause only to those subjects which its Framers and its adopters intended it to apply to, it could not have been applied to school desegregation. . . . The reason *Brown* was correctly decided is not because they intended to apply the equal protection clause to school desegregation, but because they did not confine the equal protection clause to those specific or a specifically enumerated list of applications, the equal protection clause is, by its very terms, a clause of general application. What we are looking for, then, when we look for its original meaning is the principle that was intended to be applied, and if that principle is broad enough to apply to school desegregation, as it clearly was, then that was an appropriate application for it and *Brown* was undoubtedly correctly decided.

[161-162] [T]he interpretive position that I start with when I am looking at a provision which has not been construed is one of original meaning, and in my discussion yesterday I distinguished that from the theory that would confine that meaning to those applications which were originally and specifically intended by the Framers or by the adopters of that provision to be its application. . . . But my interpretive position is not one that original intent is controlling, but that original meaning is controlling. . . . [T]he ultimate criterion of meaning for me . . . [is] not specific intent, but the principle intended.

[231-232] [I]n dealing with the question of what enumerated rights may be regarded as fundamental and what require a lesser standard of scrutiny, the courts from time to time have tried different tests. . . . I think I indicated my own view of the best approach to these problems is the one which is probably best identified with the late Justice Harlan. Justice Harlan said that we cannot approach these questions of weighing the value of asserted rights without an inquiry into the history and traditions of the American people, in order to try to find on a historically demonstrable basis their commitment to a set of values which either do or do not support the claim that a particular right in question is fundamental.

[235] My approach to interpretation is not a specific intent approach. The approach has got to take into consideration the text of the provisions in question and it is not to be confined, the meaning of that text is not to be confined by reference simply to the specific applications that may have been, as it were, in the mind either individually or institutionally of the people who proposed the amendment. We are looking, when we look for original meaning, we are looking for meaning and for principle. We are not confining ourselves simply to immediately intended application.

[266] Q: Now, let us assume for a moment that this original intent school of thought is historically correct—that, as many argue very strongly, the Framers did have a very narrow view of the establishment clause—would this lead you to modify the principle of neutrality that has been accepted by the Supreme Court for decades? A: It would lead me to raise the question but it would not give me the answer. There are basically two other considerations. The first in this, as in any such case, is the claim of precedent. The second consideration which may fall, to a degree, under the claim of precedent, which is, at least, I think worth stating, stating separately, is whether, in fact, assuming that was the view of the Framers, the best way to affect it today is the way that the Court has, in fact, already taken. So that I do not regard the issue in this or in any other case as simply being a simple issue of what exactly was the original understanding because we are not being asked to adjudicate on a clean slate.

[267] [L]et's assume that we found that the establishment clause had a very narrow intended meaning. Do we ignore, essentially, the development of the law for the last 40 [years] . . . Or the last 200 years? The answer is, no, we don't deal with constitutional problems that way.

[277] In the search for a content to the concept of privacy, we are not really looking for something new, as opposed to something which the constitutions assumed. We are looking for the principle that was intended to be recognized. The material on which we are going to base

our conclusions is basically the corpus of material that we regard as reliable evidence about the understanding of the limits of State or, in appropriate cases, national power. Those limits in those materials include everything from things like Federalist Papers, debates, philosophical treatises of the times in question, which reflected a concept of limited power, and we certainly do not ignore the precedents of the Court that over the years have tried to treat with the subject.

[303] I mentioned that when I speak of original intent, or the intentionalist school, I am talking particularly about that view that the meaning of the provision or the application of the provision should somehow be confined to those specific instances or the provision should somehow be confined to those specific instances or problems which were in the minds of those who adopted and ratified the provision, and that the provision should be applied only to those instances or problems. I do not accept that view. . . . Principles don't change, but our perceptions of the world around us and the need for those principles do.

#### Thomas: Stare Decisis/Precedent

[135] I think overruling a case or reconsidering a case, Senator, is a very serious matter. Certainly, the case would have to be—you would have to be of the view that a case is incorrectly decided, but I think even that is not adequate. There are some cases that you may not agree with that should not be overruled. Stare decisis provides continuity to our system, it provides predictability, and in our process of case-by-case decision making, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case indirect, but that it would be appropriate, in view of stare decisis, to make that additional step of overruling that case.

[246] I think that the principle of stare decisis, the concept of stare decisis, is an important link in our system of deciding cases in our system of judicial jurisprudence. The reason I think it is important is this: we have got to have continuity if there is going to be any reliance, if there is going to be any chain in our case law. I think that the first point in any revisiting of the case is that the case be wrongly decided, that one thing it is incorrect. But more than that is necessary before one can rethink it or attempt to reconsider it. And I think that the burden is on the individual or on the judge or the Justice who thinks that a precedent should be overruled to demonstrate more than its mere incorrectness. And at least one factor that would weigh against overruling a

precedent would be the development of institutions as a result of a prior precedent having been in place. But, again, I think the first step is that the precedent be incorrect, and the second step in the analysis has to be more than the mere incorrectness of that precedent.

[339] In the statutory area of law, in the case law involving statutes, there seems to be less of an inclination on the part of judges to reconsider or overrule cases, primarily because of the view or the feeling that if it were wrong to begin with, then the legislature would have corrected it, and I think that sort of underscores the point that Senator [X] was making yesterday about revisiting statutory interpretation cases or precedent. In the area of constitutional cases or constitutional law cases, at least those cases are very, very, important, but the feeling is or the sentiment is on the part of the court that those cases can only be revisited in a realistic way by the judiciary, since the amendment process is one that is very remote, as far as the possibility of occurring, and that those cases are more likely to be revisited or reconsidered. Again, I don't think there is precise calculus in approaching those two areas. I do think that you start with the case being wrong, one has to view that case as wrong, and I think one has to understand and take into account the continuity in our legal system, and has to understand or I think demonstrate why this continuity should in some way be broken. I don't think that is necessarily an easy task, and it is certainly one that should be considered with a high level of seriousness and high level of concern about what the judge is doing, even if the case is found to be wrong.

[420] Senator, I think it is important for any judge to take into account, even when he or she disagrees with a particular case, to recognize that there is the additional burden and additional question of whether or not this case should be overruled; that is a question about the doctrine of stare decisis. I do not think that judges should assume, simply because they disagree with a particular case, that we are operating as though there was no prior case law or there are no precedents and feel free to act as though they are not in any way controlled or restrained or constrained by prior case law. My sentiments, without expressing a particular judgment on that case, my sentiments would be toward a preferences for recognizing that there is a significant weight to be given to existing case law and that the burden is on the judge who wants to change that precedent, to not only show why it is wrong, but why stare decisis should not apply.

#### Kennedy: Stare Decisis/Precedent

[135] In any case, Senator, the role of the judge is to approach the subject with an open mind, to listen to the counsel, to look at the facts

of the particular case, to see what the injury is, see what the hurt is, to see what the claim is, and then to listen to his or her colleagues, and then to research the law. What does the most recent precedent, the precedent that is before the Court if it is being examined for a possible overruling, and what does that precedent say? What is its logic? What is its reasoning? What has been its acceptance by the lower courts? Has the rule proven to be workable? Does the rule fit with what the judge deems to be the purpose of the Constitution as we have understood it over the last 200 years? History is tremendously important in this regard.

[135] Now, as you well appreciate, and as you certainly know, Senator, *stare decisis* is not an automatic mechanism. We do not just pull a *stare decisis* lever or not pull it in any particular case. *Stare decisis* is really a description of the whole judicial process that proceeds on a case by case basis as judges slowly and deliberately decide the facts of a particular case, and hope their decision yields a general principle that may be of assistance to themselves and to later courts.

[136] *Stare decisis* ensures impartiality. That is one of its principle uses. It ensures that from case to case, from judge to judge, from age to age, the law will have a stability that the people can understand and rely upon, that judges can understand and rely upon, and that attorneys can understand and rely upon. That is a very, very important part of the system.

[136] Now there have been discussions that *stare decisis* should not apply as rigidly in the constitutional area as in other areas. The argument for that is that there is no other overruling body in the constitutional area. In a *stare decisis* problem involving a non-constitutional case, the Senate and the House of Representatives can tell us we are wrong by passing a bill. That cannot happen in the constitutional case. On the other hand, it seems to me that when judges have announced that a particular rule is found in the Constitution; it is entitled to very great weight. The court does two things: it interprets history and it makes history. It has got to keep those two roles separate. *Stare decisis* helps it to do that.

[171] This is what *stare decisis* is all about. You look to see how the great Justices that have sat on the court for years have understood and interpreted the Constitution, and from that you get a sense of what the Constitution really means. An English representative in the House of Commons once said that "history is philosophy teaching by example"; and I think that the law can be described the same way.

[230] As you know, Senator, *stare decisis* has an element of certainty to it, which most Latin phrases do, but it really is a description of

the entire legal process. Stare decisis is the guarantee of impartiality. It is the basis upon which the case system proceeds, and without it we are simply going from day to day with no stability, with no contact with our past. And so stare decisis is very important, but, obviously, if a case is illogical, if it cannot be reconciled with all the parallel precedent, if it appears that it is simply out of accord with the purposes of the Constitution, then it must be overruled.

#### Breyer: Stare Decisis/Precedent

[192] I cannot say that precedent always answers the question, but it is terribly important to refer to the precedent, and the opinion grows out of prior precedent. That is normal.

[291] My view is that stare decisis is very important to the law. Obviously, you can't have a legal system that doesn't operate with a lot of weight given to stare decisis, because people build their lives, they build their lives on what they believe to be the law. And insofar as you begin to start overturning things, you upset the lives of men, women, children, people all of the country. So be careful, because people can adjust, and even when something is wrong, they can adjust to it. And once they have adjusted, be careful of fooling with their expectation.

[291] [I]t seems to me that there are identifiable factors that are pretty well established. If you, as a judge, are thinking of overturning or voting to overturn a preexisting case, what you do is ask a number of fairly specific questions. How wrong do you think that prior precedent really was as a matter of law, that is, how badly reasoned was it? You ask yourself how the law has changed since, all the adjacent laws, all the adjacent rules and regulations, does it no longer fit. You ask yourself how have the facts changed, has the world changed in very important ways. You ask yourself, insofar, irrespective of how wrong that prior decision was as a matter of reasoning, how has it worked out in practice, has it proved impossible or very difficult to administer, has it really confused matters. Finally, you look to the degree of reliance that people have had in their ordinary lives on that previous precedent.

[291] Those [the above considerations] are the kinds of questions you ask. I think you ask those questions in relation to statutes. I think you ask those questions in relation to the Constitution. The real difference between the two areas is that Congress can correct a constitutional court, if it is a statutory question, but it can't make a correction, if it is a constitutional matter. So be pretty careful.

## Rehnquist: Stare Decisis/Precedent

[CJ-227] Q: Do you believe that it is your responsibility to keep voicing your view on an issue even if stare decisis leads the Court to decide a specific case in another way? A: I think generally, yes, Senator, that if one sees a constitutional case issue a particular way and simply is not persuaded, that in most cases it is a part of function of a judge to say something in dissent. I think on statutory cases, it may be somewhat different. The ballgame is over when the Supreme Court decides a statutory case. Congress can change the result if they do not like it. And I think there, a dissent, particularly a sole dissent, has a good deal less to be said for it.

[CJ-270] Stare decisis is the principle, of course, that . . . once the Supreme Court has decided a case, that that decision settles the law for the future. And I think . . . when you are looking at a statutory question—that is, let us suppose that in 1950, the Supreme Court has said that a particular Act of Congress means thus-and-so, and now . . . someone is coming back and saying, “Well, the Court was wrong in 1950. If you really look at the legislative history and construe the words the way they ought to be construed, it did not mean thus-and-so.” I think every responsible judge would reject that sort of an attack, except under the most extraordinary situation, because when you are talking about a statute, Congress can change the result if it does not like the conclusion the court reaches. If you turn to a similar constitutional question that perhaps was decided in 1950, and now you are urged to reverse it and overturn it. . . , there is more flexibility, more play in the joints, but still a very strong presumption in favor of the earlier decision, it seems to me. But nonetheless, the stare decisis principle has a more flexible application when you are talking about constitutional decisions than when you are talking about simple statutory decisions.

[AJ-19] I feel that great weight should be given to precedent. I think the Supreme Court has said many times that it is perhaps entitled to perhaps somewhat less weight in the field of constitutional law than it is in other areas of the law. But, nonetheless, I believe great weight should be given to it. I think that the fact that the Court was unanimous in handing down a precedent makes a precedent stronger than if a court was 5 to 4 in handing down the precedent. And I think the fact that a precedent has stood for a very long time, or has been reexamined by a succeeding number of judges, gives it added weight.

[AJ-55] [T]o the extent that a precedent is not that authoritative in the sense of having stood for a shorter period of time, or having been handed down by a sharply divided court, then it is of less weight as a

precedent. This is not to say that there is not a presumption in favor of precedent in every instance.

[AJ-138] I think it is important in constitutional law although I think traditionally it is regarded as less binding in the area of constitutional law than it is, for example, in the area of statutory construction. I think it is nonetheless important and an important factor to be considered because basically it represents the judgment of what nine other Justices who took the oath of office to faithfully administer the Constitution thought it meant on the facts before them then. And I think any decision rendered in that matter is entitled to great weight by a subsequent Court in considering the same question.

[AJ-168] I think one would approach a unanimous decision, particularly one that has been reexamined and reaffirmed, with the greatest deference. That doesn't say you never decide otherwise.

[AJ-168] Again, an 8-to-1 decision is not one lightly to be disregarded, but nonetheless, if upon reexamination giving the weight that you ought to give to a precedent it appears wrong, then it is wrong.

#### Stevens: Stare Decisis/Precedent

[40] I think there would be times when the Court might be called upon to reexamine earlier decisions which might have been incorrectly decided. But I think it is still an important value and perhaps particularly so at the national level because there is so much more reliance on past decisions in the Federal system when it is a decision of the U.S. Supreme Court. . . . [T]here is important value in a system of law which is largely developed on a case-by-case basis to give appropriate respect to that which has been decided before, but yet there are occasions when the desirability of certainty and predictability is outweighed by other factors.

[40] I would say that I certainly would weigh very carefully any decision that had already been reached by a prior Court and I would be most reluctant to depart from prior precedent without a clear showing that departure was warranted. I would feel bound, but not absolutely 100-percent bound; I think I could not, in good conscience, say that. I think there are occasions, particularly in constitutional adjudication, where it is necessary to recognize that a prior decision may have been erroneous and should be reexamined.

[41] [I]t is my understanding that decisions that appeared to be unanimous in prior years were not, in fact, always so. There are private papers of some of the Justices that indicate that it was more customary then than it has been in recent years for Justices to go along with the majority opinion rather than to voice dissent. So sometimes the unani-

mous opinion is somewhat deceptive and I think one has to be a little bit careful about overstating reliance on the factor of unanimity. But I would agree that to the extent that the decision was unanimous rather than closely divided you would tend to give more respect to it and feel more comfortable in figuring that it really did command a unanimous view. And also I think in the 5-to-4 decisions usually the countervailing argument is spelled out in some detail so you have, right on the face of the decision, reasons to consider the opposite conclusion as well.

#### O'Connor: Stare Decisis/Precedent

[83] Stare decisis of course is a crucial question with respect to any discussion of the Supreme Court and its work. I think most people would agree that stability of the law and predictability of the law are vitally important concepts. Justice Cardozo pointed out the chaos that would result if we decided every case on a case-by-case basis without regard to precedent. It would make administration of justice virtually impossible. Therefore, it plays a very significant role in our legal system. We are guided, indeed, at the Supreme Court level and in other courts by the concept that we will follow previously decided cases which are in point. Now at the level of the Supreme Court where we are dealing with a matter of constitutional law as opposed to a matter of interpretation of congressional statute, there has been some suggestion made that the role of stare decisis is a little bit different in the sense that if the Court is deciding a case concerning the interpretation, for example, of a congressional act and the Court renders a decision, and if Congress feels that decision was wrong, then Congress itself can enact further amendments to make adjustments. Therefore, we are not without remedies in that situation. Whereas, if what the Court decided is a matter of constitutional interpretation and that is the last word, then the only remedy, as you have already indicated, is either for an amendment to the Constitution to be offered or for the Court itself to either distinguish its holdings or somehow change them. We have seen this process occur throughout the Court's history. There are instances in which the Justices of the Supreme Court have decided after examining a problem or a given situation that their previous decision or the previous decisions of the Court in that particular matter were based on faulty reasoning or faulty analysis or otherwise a flawed interpretation of the law. In that instance they have the power, and indeed the obligation if they so believe, to overturn that previous decision and issue a decision that they feel correctly reflects the appropriate constitutional interpretation. What I am saying in effect is, it is not cast in stone but very important.

[84] I am sure that in each instance it is a very significant thing for a Justice to overturn precedent, particularly that of long standing.

#### Scalia: Stare Decisis/Precedent

[32] The Supreme Court is bound to its earlier decisions by the doctrine of stare decisis in which I strongly believe.

[37] Q: Well, what weight do you give the precedents of the Supreme Court? A: It depends upon the nature of the precedent, the nature of the issue. Let us assume that somebody runs in from Princeton University, and on the basis of the latest historical research, he or she has discovered a lost document which shows that it was never intended that the Supreme Court should have the authority to declare a statute unconstitutional. I would not necessarily reverse *Marbury v. Madison* on the basis of something like that. To some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on. Now, which of those you think are so woven in the fabric of law that mistakes made are too late to correct, and which are not, that is a difficult question to answer. It can only be answered in the context of a particular case, and I do not think I should answer anything in the context of a particular case.

[45] Q: [A Supreme Court Justice] said that a precedent might be less authoritative if it had stood for a shorter period of time or if it was a decision by a sharply divided court. . . . Would you agree with that general sentiment? A: Well, I think the length of time is a considerably important factor. The *Marbury v. Madison* example that I gave in response to [a previous question.] I am not sure that I agree with [the Justice] that the closeness of the prior decision makes that much difference. I mean, if *Marbury v. Madison* had been 5 to 4, I am not sure I would reverse it today. But I can understand how some judges might consider that that is an appropriate factor as well. I agree—I certainly agree with the former. The latter would not have occurred to me, but maybe.

[104] I agree with the statement that longstanding cases are more difficult to overrule than recent cases. . . . [A]s I've said, some cases that are so old, even if you waived a document in my face proving that they were wrong when decided in 1803, I think you'd have to say, sorry, too late.

#### Ginsburg: Stare Decisis/Precedent

[197-198] The soundness of the reasoning is certainly a consideration [in a sound theory of stare decisis]. But we shouldn't abandon a

precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits. So if a precedent settles the construction of a statute, stare decisis means more than attachment to the soundness of the reasoning. Reliance interests are important; the stability, certainty, predictability of the law is important. If people know what the law is, they can make their decisions, set their course in accordance with that law. So the importance of letting the matter stay decided means judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way. That is not enough. If it is a decision that concerns the Constitution . . . then the Court knows the legislature, in many cases, can't come to the rescue. If the judges got it wrong, it may be that they must provide the correction. But even in constitutional adjudication, stare decisis is one of the restraints against a judge infusing his or her own values into the interpretation of the Constitution. . . . One of the things Brandeis said when he overruled *Swift v. Tyson* in *Erie* was that the *Swift* regime had proved unworkable. "Is it working" is a major consideration regarding stare decisis. Reliance interests did not support retaining *Swift* because there was no stable law to rely on. What had been generated was confusion and uncertainty. Private actors didn't know whether the law governing their transaction would be the law as declared by the Federal court or the law declared by the State court, until they had a disagreement and litigation commenced. So how has a precedent worked in practice? What about reliance interests? Those things count, as well as the soundness of the decision. Stare decisis is also important because it keeps judges from infusing their own value judgments into the law.

[198] Q: [For purposes of stare decisis, do] you have some feeling that criminal law ought to be put on the same par and on the same equal basis as commercial or property law? A: I don't think that reliance is absent from the criminal law field. Recall that precedent is set for the way the courts will behave, the way the police will behave, the way prosecutors will behave. One can't say that, in criminal law, reliance doesn't count. Adhering to precedent fosters the stability, the certainty, the clarity of the law; stare decisis across the board serves those purposes. We have distanced ourselves from the British practice which, until very recently, so solidly entrenched stare decisis that the House of Lords, the Law Lords, would not overrule any precedent. That rigidity became unworkable and the Law Lords admit some leeway. But stare decisis is a firm principle of our law and important in all areas.

[317] I believe, too, that stare decisis has an important role to play in constitutional interpretation. . . . One doesn't lightly overrule prece-

dent even in the constitutional area. But Brandeis made an obvious point, although he said it so well. Correction can come by legislation if the Court messes up on a matter of statutory interpretation. That often can't be done when the question is one of constitutional interpretation.

[318] Yes, [time and acceptance are major factors to be considered before overturning a past decision]. How [has] it been working? What expectations, what reliance interests has the decision generated? Those are major factors.

#### Souter: Stare Decisis/Precedent

[67-68] [T]he doctrine of stare decisis which we speak of in that shorthand kind of way is a series of considerations which courts bear in mind in deciding whether a prior precedent should be followed or should not be. Some such doctrine or some such rule is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed simply to random decisions on a case-to-case basis. The problem that the doctrine of stare decisis addresses is the problem of trying to give a proper value to a given precedent when someone asks a court to overrule it and to go another way. . . .

The first thing, kind of the threshold question that, of course, you start with on any issue of precedent, is the question of whether the prior case was wrong. We don't raise precedential issues unless we are starting with the assumption that there is something inappropriate about the prior decision. Now, that decision may have been right at the time and there now be a claim that, in fact, it is wrong to be applied now. But the first question that we have to ask is: If we were deciding the case today, if we were living in a kind of Garden of Eden and we didn't have the precedent and this was the first case, would we decide it the same way? If the answer is no, we would not do so, then we look to a series of factors to try to decide how much value we ought to put on that precedent even though it is not one that we particularly like or would think appropriate in the first instance. One of the factors which is very important I will throw together under the term of reliance. Who has relied upon that precedent, and what does that reliance count for today? . . .

We ask in some context whether private citizens in their lives have relied upon it in their own planning to such a degree that, in fact, it would be a great hardship in overruling it now. We look to whether legislatures have relied upon it, in legislation which assumes the correctness of that precedent. We look to whether the court in question or other courts have relied upon it, in developing a body of doctrine. If a

precedent, in fact, is consistent with a line of development which extends from its date to the present time, then the cost of overruling that precedent is, of course, going to be enormously greater and enormously different from what will be the case in instances in which the prior case either has not been followed or the prior case has simply been eroded, chipped away at, as we say, by later determinations.

Beyond that, we look to such factors as the possibility of other means of overruling the precedent. There is some difference, although we may have trouble in weighting it, there is some difference between constitutional and statutory interpretation precedent, which Congress or a legislature can overrule, so we look to other possibilities. In all of these instances, we are trying to give a fair weight to the claim of that precedent to be followed today, even though in some respect we find it deficient on the merits.

[133] If we are talking about a 5-to-4 decision that is 50 years old and has spawned a body of consistent, supporting precedent which is basically the foundation of the law that we have, the fact that it was 5 to 4 originally is a matter of small or no consequence at all. If, on the other hand, we are talking about a 5-to-4 decision which was rendered the year before and in between there are arguably inconsistent precedents with it, then, of course, you are not going to be able to give it that much weight. I suppose the real significance of its being 5 to 4 under those circumstances is that if it were unanimous it is virtually unlikely that there would be the arguably inconsistent precedents following it. So I just think the numbers analysis standing by itself is a misleading analysis.

[142] [C]onstitutional precedent is always, in theory, subject to re-examination. Our theory of precedent tries to give some indication of the force which a given precedent should have when reexamination is requested.

[257] I accept as a general rule, just as you said, Senator, that statutory interpretations are entitled to the highest claim to be followed for the very reason that as statutory interpretations, if there is anything wrong with them, legislatures—in this case, the Congress—can take action to change them.

[258] I do not accept the position that never under any circumstances can a statutory interpretation be reexamined. I think “never” is a pretty strong word. But there is very, very strong claim of precedent to be followed in those circumstances.

[324] Q: Now, it is interesting that, in a matter of this sort, where [your court] in 1984 had overruled a decision of [your court] from 1980, and the case came up again in 1986, just 2 years later, and the court had

seemed perfectly willing to change back and forth, that you found it important to maintain the decision. Why? A: Because the case struck me as a classic example of the kind of case in which there has got to be an opportunity for reliance upon what the court does. We were dealing in that case with the issuance of insurance policies. We have obligations to both parties to those policies to come up with a coherent body of law which can be understood and which those parties can rely upon in making their business arrangements. We simply cannot go back and forth in cases of that sort every couple of years, and therefore, I believed we were in a situation in which the demand for reasonable reliance certainly outweighed my concern to go back and sort of rewrite the history . . . in the way that I would have done, if I had been able to that in the first place.

#### Breyer: Rights of Criminal Defendants

[137] In respect to the constitutionality of the death penalty, it seems to me that the Supreme Court has considered that matter for quite a long time, in a large number of case. And indeed, if you look at those cases, you will see that the fact that there are some circumstances in which the death penalty is consistent with the cruel and unusual punishment clause of the Constitution is, in my opinion, settled law. At this point it is settled.

[182] It [honesty in sentencing] is there; that is, the sentence given is the sentence served, and I think that that has helped in the Federal system; that is, I think people who understand the differences between the Federal and the State systems have begun to understand that the sentence that is given is the sentence that will be served, with very few—15 percent leeway. That has helped.

[238] Insofar as you are suggesting that you have to remember that privacy is what Brandeis said is the most civil and the most important right of civilized people, and so forth, is a right that really is protected by the fourth amendment against unreasonable searches, unreasonable seizures. Insofar as you are suggesting beware of fixed rules interpreting that, because if you just follow fixed rules, you will discover that technology outdates the rules, and remember to protect the basic value which might be threatened by some kind of technology that we have not heard of, or that we have heard of but we didn't know could get that far. I agree with that.

[239] Basically, we were in agreement about the rule of law that the police and right, even without a warrant, to go look for that gun, if they reasonably thought they were in danger. And the majority thought, no, no, they are not in danger, because, after all, this guy is

handcuffed to the bed. I thought, well, a handcuff, you know, a lot can happen. I mean, they might say, "I want to go to the bathroom" and they unlock it, he knows the gun is there, they do not, I don't know how strong the bed is, and so in my mind is that the police were reasonable in thinking that there was a danger; and they knew there was a gun there and so they ought to look for it.

[256] [regarding the exclusionary rule] [T]he basic idea, of course is that it is very puzzling to people, very puzzling, what Cardozo said. He said, "well, why should the criminal go free, because the constable has blundered?" And the answer to that is, over the course of time and a long period of time, people learned that the protection in the fourth amendment, totally innocent people wouldn't be broken into in the middle of the night, that confessions wouldn't be extracted through violence, that the only way to make those meaningful in practice was to have this exclusionary rule. And it has become I think fairly widely accepted. The exact contours of it, and the shape and size and on the border how it should look, and so forth, I recognize, but that is a matter of considerable controversy and debate, and Congress or others might well criticize or want to do it this way or that way or the other way.

[257] T]he great debate, as you recognize in this area, particularly with the death penalty, is involved, is habeas corpus tells us we don't want to have this or any person have a penalty particularly of this sort, if the trial was fundamentally unfair. Of course, people keep coming on again and again and they say, well, it was fundamentally unfair, and then the courts say no, it was OK, and then they have a new reason and a new reason and so the problem is this problem of delay. At the same time, people might sometimes come up with reasons that they for good cause couldn't present before. So I understand how you are trying to balance those two things, the need for fundamental fairness and the need to avoid unreasonable delay.

[360] I think that if in fact I could have read the statute, "three prior convictions," to mean what you say—three prior convictions—the case would have been much easier. The problem in the case arose from the fact that you could not read it that way because the Supreme Court had said at least some of those things that say "convictions" are not convictions. They had said, for example, that one of those previous convictions was a conviction that was obtained without the person having a lawyer; then, it is not a conviction, even though it says "conviction." So the dilemma—and this why it was so very difficult—is it assumed by everybody, everybody agrees, that you cannot just read "conviction" to mean conviction. Certain ones do not count. Those without a lawyer, for example, do not count. And now the question is are there some other ones that do not count. And the simplest thing

seemed to me to be to say those that are unconstitutional do not count, because if you do not do it that way, you would have to say there are some unconstitutional convictions which are convictions, and there are other unconstitutional convictions—those without a lawyer—which are not convictions. And I did not understand how to draw that distinction.

### Kennedy: Rights of Criminal Defendants

[113] Well, Senator, I do not think that there is a choice between order and liberty. We can have both. Without ordered liberty, there is no liberty at all. One of the highest priorities of society is to protect itself against the corruption and the corrosiveness and the violence of crime. In my view judges must not shrink from enforcing the laws strictly and fairly in the criminal area. They should not have an identity crisis or self-doubts when they have to impose a severe sentence. It is true that we have a system in this country of policing the police. We have a system in this country that requires courts to reverse criminal convictions when the defendant is guilty. We have a system in this country under which relevant, essential, necessary, probative, convincing evidence is not admitted in the court because it was improperly seized. This illustrates, I suppose, that constitutional rights are not cheap. Many good things in life are not cheap and constitutional rights are one of them. We pay a price for constitutional rights. My view of interpreting these rules is that they should be pragmatic. They should be workable.

[113] We have paid a very heavy cost to educate judges and police officers throughout this country, and the criminal system works much better than many people give it credit for. . . . On the other hand, it is sometimes frustrating for the courts, as it is frustrating for all of us, to enforce a rule in a hyper-technical way when the police or the prosecutor have made a mistake in good faith. The good faith exception to the exclusionary rule is one of the Court's recent pronouncements to try to meet some of these concerns. It remains to be seen how workable that exception is.

[136] I would like to underscore that I have not committed myself as to the constitutionality of the death penalty. I have stated that if it is found to be constitutional, it should be enforced.

[204] The purposes [of the exclusionary rule] are in the nature of a deterrent. The purpose of the exclusionary rule is to advise law enforcement officers in advance that if they do not follow the rules of the fourth amendment, the evidence they seize is not going to be usable. Now, if the rule goes beyond that point, and a police officer in all good faith, after studying the rule, makes a snap decision that a warrant is

valid, or a considered decision that a warrant is valid, then I think the system out to give some recognition to that reasonable exercise of judgment on his part.

[205] The *Miranda* rule, it seems to me, again, we have paid the major cost by installing it. We have now educated law enforcement officers and prosecutors all over the country, and it has become almost part of the criminal justice folklore. . . . Well, I think that since it is established, it is entitled to great respect.

[205] Well, the *Miranda* rule, as I said, is in place. It was a sweeping, sweeping rule. It wrought almost a revolution. It is not clear to me that it necessarily followed from the words of the Constitution. Yet it is in place now, and I think it is entitled to great respect. . . . I think [*Miranda*] went to the verge of the law.

[220] I have indicated that the decisions of the Warren Court went to the very verge of the law at least. We are talking about criminal procedure cases, the ones we have mentioned. That we have paid a heavy cost for imposing those rules on the criminal system; that they seem to be part of our constitutional system now; and that I think a very strong argument would have to be mounted in order to withdraw those decisions. I do think the decisions have evinced on an explicit basis, the fact that they involve pragmatic, preventative rules announced by the Court, and the Court itself has admitted that they are not necessarily demanded by the Constitution.

[233] Well, I guess we disagree on whether [the constitutionality of the death penalty] is well settled. These decisions are very close. . . . I have indicated that in my view, if [the death penalty] is held constitutional it should be swiftly and efficiently enforced. I recognize also that capital punishment is recognized in the Constitution, in the 5th amendment.

### Thomas: Rights of Criminal Defendants

[133] The death penalty is the harshest penalty that can be imposed, and it is certainly one that is unchangeable. And we should be most concerned about providing all the rights and all the due process that can be provided and should be provided to individuals who may face that kind of a consequence. I would be concerned, of course, that we would move too fast, that if we eliminate some of the protections that perhaps we may deprive that individual of his life without due process. So I would be in favor of reasonable restrictions on procedures, but not to the point that individuals—or I believe that there should be reasonable restrictions at some point, but not the point that an individual is deprived of his constitutional protections.

[133] Of course, we would like to make sure that the victims [of crimes] are involved in the process, but we should be very careful, in my view, that we don't somehow undermine the validity of the process; that an individual who is a criminal defendant is in some way harmed by that other than just simply getting it right and making sure that the total impact of the conduct is known. I think that there are concerns on both sides. From the standpoint of the victims, that is important. But there are also the constitutional rights of the criminal defendant.

[135] I think that the court and the law enforcement community have come to accept the use of the exclusionary rule up to a point, and the court is looking for ways to make sure that the purposes of the exclusionary rule are advanced, as opposed to simply being used in a way that is rote.

[423] Philosophically, Senator, there is nothing that would bother me personally about upholding [the death penalty] in appropriate cases. My concern, of course, would always be that we provide all of the available protections and accord all of the protections available to a criminal defendant who is exposed to or sentenced to the death penalty.

#### Rehnquist: Rights of Criminal Defendants

[CJ-211] [T]he constitutional rights of the defendants are essential and vital. But they also stand against the right of society and limit the right of society, in the traditional view of criminal law, to apprehend the guilt and exonerate the innocent. And obviously, it was intended that the Bill of Rights have this restrictive function, but I have expressed the view in my opinions that this endless expansion of constitutional rights for defendants by judicial construction is not a welcomed thing because it does tend to impair in a way that the Constitution did not intend to have it impaired, the right of society to fairly and justly administer criminal law, with proper respect not just for the defendant, but for the victim and for the social interest in seeing the law enforced.

[AJ-43] I made the statement saying that the abandonment of the field arrest procedures and the consequent, or perhaps not necessarily consequent, delay in bringing the defendants before an arresting magistrate, or a committing magistrate, was, I thought, defensible because the requirements that a defendant be brought before a magistrate were that he be brought before the magistrate within a reasonable time, and that in my opinion a reasonable time in this situation should take into consideration the necessity of the arresting officer, having made the arrest, continuing to be in the field to prevent the occurrence of other violence.

[AJ-44] I do not think arresting without probable cause is ever proper. . .

[AJ-44] It suggests to me that whereas there may have been probably cause for the arrest of the great number of people, the. . . police were faced with such as overwhelming situation of violation of law that they chose to try to keep the streets free, and rather than to preserve the necessary information that would enable them to later show either that there had been probable cause for an arrest, or probable cause to bind a man over.

[AJ-45] I think the one thing that happened was that the number of people who were involved. . . was an overwhelmingly large number. . . . As a result, they were faced with a choice of either, when an individual policeman arrested a law violator, or someone he thought was a law violator, of himself taking that man to a stationhouse, booking him, and going through the usual procedures, or simply having the man taken in some other manner to the stationhouse. And the policeman then would stay on the streets to try to arrest the next bunch who were coming along. And as I understand it, they were very deliberately trying to obstruct the movement of traffic, frequently by hazardous means. I think the. . . police opted in favor of the latter choice, and I cannot find it in myself to fault them for it.

[AJ-67] I think, from the law enforcement point of view, we were skeptical of the notion that some sort of judicial hearing should be required before an investigation be even undertaken which, I think, would have the most deleterious effect on effective law enforcement, in effect, preventing the commencement of an investigation which might ultimately end up in a showing of probable cause before the investigation could even start.

[AJ-139] Senator, I have made public statements. . . in support of the constitutionality of pretrial detention. . . .

### Stevens: Rights of Criminal Defendants

[56] I also place an extremely high value on the interests protected by the due process clause insofar as it guarantees fair procedure to every defendant.

[75] I have had occasion to write at least one opinion in what was a rather severe attempt by the prosecutor to make use of information in an arrest, or maybe he was trying to use a misdemeanor, for impeachment purposes which we thought was clearly improper, and I have also written an opinion on the subject to the extent to which a prior conviction is properly used for impeachment purposes when the

defendant elects to testify in his own behalf, and we have expressed concern about the use of convictions.

[76-77] The closest one [opinion that I have written] that I can recall was a case involving the execution of a search warrant which pursuant to a statute authorized entry into a domicile if entry had been refused. The officers knocked down the door, and a few seconds later, busted it down, and entered a home and conducted a search. We found that the waiting of an interval of 2 or 3 seconds did not constitute consent.

[77] I think it is true that the public sometimes has difficulty understanding why evidence which tends to establish guilt in a fairly convincing way must be excluded from trial, it is somewhat inconsistent with the truth determining function of the trial, but of course the countervailing value at stake is the great interest in the privacy of the citizen and the concern that, unless the exclusionary rule is enforced, there may not be an adequate deterrent to police conduct which none of us would approve. So again there is a tension here.

[78] I don't hesitate in saying that I think one of the most important aspects of procedural fairness is availability of counsel to the litigant on either side. I could not overemphasize the importance of the lawyer's role in the adversary process and it is unquestionably a matter of major importance in all litigation.

#### O'Connor: Rights of Criminal Defendants

[73] I think it is a serious concern to a lot of people that there is no finality in the criminal justice field to a given decision, even after an appeal has been heard and resolved, long after the conviction in question, and even after one series of post-conviction petitions for relief, there are others that can be followed in an unending series. I think that is one thing that has caused the public to have some concern about the proper function of the judicial system in that area.

[79] [T]he exclusionary rule, of course, is one that has caused general public discontent on occasion with the function of the criminal justice system, to the extent that perfectly valid, relevant evidence is excluded solely on the basis that it was obtained in violation of some occasionally technical requirement.

[80] It [the exclusionary rule] is in fact I think a judge-made rule as opposed to one of constitutional dimensions, as I understand it. As a result, the Supreme Court presumably could alter that judge-made rule without doing violence to some constitutional provision or principle. There have been expressions by several sitting Justices that they would

like to reexamine that. I think the rule may well come before the Court and could well be the subject of a reexamination.

[129] If people have been previously convicted of offenses and these convictions are known, or if for example someone has been charged with an offense and released on bail and then charged again with another offense and these factors in the record are known, these things perhaps—speaking purely as a matter of personal belief and not as a reflection on the legal issues involved—possibly merit consideration in the determination of bail.

[146] My experience. . . is that the application of *Miranda* has not resulted in an inability of the police to still be reasonably successful in their efforts to gain information and obtain statements. It has, no doubt, precluded some but on a broad, general basis I cannot say that I think the police have been unable to cope with it.

[146-147] I think the exclusionary rule, from my simple observation. . . , has proven to be much more difficult in terms of the administration of justice. There are times when perfectly relevant evidence and, indeed, sometimes the only evidence in the case has been excluded by application of a rule which, if different standards were applied maybe would not have been applied in that situation, for instance, to good faith conduct on the part of the police. I am not suggesting, and do not want to be interpreted as suggesting that I think it is inappropriate where force or trickery or some other reprehensible conduct has been used but I have seen examples of the application of the rule which I thought were unfortunate. . . .

[147] I would not think that the *Miranda* rule has actually affected the crime rate. Conceivably, the exclusionary rule has had some effect in some areas of the crime rate, possibly drug enforcement.

[166] But we must, I think, within the judicial system itself strive constantly to resolve criminal cases rapidly. I think delay in that area simply promotes a disillusionment of people with the ability of the system to function. So we have to be concerned about the speed in which we handle these matters. I think we have to be concerned within the judicial branch about at what point we can say that a case has been fairly litigated and fairly reviewed on appeal or on post-conviction review and now it is at an end. There must be some way to more effectively do that. That has to be a concern of people on the bench as well as legislators. We have to be concerned, I suppose, with the imposition of fair and appropriate remedies. It will always be a concern, I am sure, to judges on the bench that there are appropriate facilities in which to place convicted defendants if an incarcerative sentence is appropriate. We have to be concerned, I think, with insuring that there is the power

at least to order those who are convicted to make restitution in appropriate instances and the means of enforcing that.

[204] My experience with the criminal justice system has resulted in some disappointments in the lack of effectiveness; the recidivism rate is extremely high, and the crime rate generally is extremely high. We have to ask why. . . . If there is a way to provide more prison space, it is evident that there is a great need for that at both the State and the Federal level.

[211] [W]ithout expressing any opinion on the eighth amendment implications, if any, I am generally in favor of giving trial judges discretion to impose lengthy sentences if necessary, including up to life sentences, for repeat offenders. That concept seems to me to be generally a valid one. It has been my observation that a life sentence can be a lot shorter in actuality than a lengthy term of years. Be that as it may, I think discretion is appropriate.

#### Scalia: Rights of Criminal Defendants

[34] As to the second part [of your question], Senator, what do I think of [Miranda] warnings, I am happy to answer it as a policy matter, assuming the question is not, you know, what do I think as to the extent to which those warnings, in one circumstance or another, are required by the Constitution. As a policy matter, I think—as far as I know, everybody thinks—it is a good idea to warn a suspect of his rights as soon as it is practicable. I do not know of anyone who thinks it should be otherwise.

[35] Q: Would you favor some limitation on the extent of the number of post-trial appeals which allow inmates under death sentences to avoid executions for years after the commission of their crimes? A: Well, Senator, nobody likes frivolous appeals, I suppose, in any matter, criminal or civil. But to the extent that your question is asking about legislation, I should not have a view about it.

[87] Q: What about the speedy trial, public trial and jury trial provisions of the 6th amendment; are they incorporated under the due process clause? A: Indeed.

[87-88] Q: And impartial trial, notice of charges, confrontation, compulsory process, right to counsel, under the 6th amendment [and the cruel and unusual punishment clause of the 8th amendment]; are they incorporated by the due process clause of the 14th amendment? A: That is what the cases have held, and it would be massive change to go back on them.

## Ginsburg: Rights of Criminal Defendants

[217] One of the things that I have done every other year with my law clerks . . . is to visit the local jail and . . . the nearest penitentiary. We visited . . . the facility for the criminally insane . . . I do that to expose myself to those conditions, and also for my law clerks. Most of them will go on to practice in large law firms specializing in corporate business, and won't see the law as it affects most people. That is one of the things I do to stay in touch.

[229-230] One of the cases in which I participated—a decision the Supreme Court reversed—might serve as an example. The case involved the fourth amendment. The Supreme Court had decided that if police officers stop a car, open the trunk and find a suitcase in it, they can't open the suitcase without a warrant. Cases then trooped before the lower courts involving other containers in cars—cardboard boxes and plastic bags, for example. Lower courts began to draw a “luggage line”; some applied a “worthy container” doctrine to determine when police officers needed a warrant. One was needed for a leather suitcase, for sure; lower courts were not so sure about lesser containers. My court, in that time of uncertainty, got the case of a leather pouch and a paper bag, side-by-side in a car trunk. The three-judge panel held that the police needed a warrant before they could open the leather pouch, but didn't need a warrant to open the paper bag, because it was a flimsy, unworthy container. I wrote an opinion for the full court saying we have now seen an array of container cases, going from the leather suitcase to the lowly paper bag, and we can't expect police officers to make worthy container judgments on the spot. Either you can open a container or you can't without a warrant. Because the Supreme Court held that police officers could not open a suitcase without a warrant, my court held police could not open any closed container without a warrant.

[263] Q: Do you believe . . . that the death penalty under all circumstances . . . is incompatible with the eighth amendment's prohibition against cruel and unusual punishment? A: At least since 1972 and, if you date it from *Furman*, even earlier, the Supreme Court, by large majorities, has rejected the position that the death penalty under any and all circumstances is unconstitutional. . . . I can tell you that I do not have a closed mind on this subject. I don't think it would be consistent with the line I have tried to hold to tell you that I will definitely accept or definitely reject any position. I can tell you that I am well aware of the precedent, and I have already expressed my views on the value of precedent.

[296] Q: [Is it] improper for a trial court . . . to impose a harsher sentence on a defendant who chooses to exercise his or her constitutional right to a trial rather than plead guilty? A: You can't punish someone for exercising a constitutional right. If you punish someone for exercising a constitutional right, that person has no right.

[327] [327] The purpose of the *Miranda* warnings is to make certain that a defendant's rights are known to the defendant, so the defendant can exercise them—the right not to speak and the information that, if you do, your words can be used against you, the right to an attorney and the knowledge that if you are unable to pay for counsel, a lawyer will be provided for you by the State. Those, it seems to me, are constitutional rights that should be brought home to every defendant. Now, sophisticated defendants will know them without being told, but the unsophisticated won't. This practical approach, the *Miranda* warnings, has become familiar to all, thanks to television. I think it has worked.

[315-316] Q: How do you feel about the mandatory [minimum] penalties? Are they putting too much discretion over sentencing in the hands of prosecutors, and not in the hands of judges? A: [T]here was recently published a very intelligent comment by Judge Weinstein of the Eastern District of New York concerning mandatory sentences. He recommended appointment of a commission to do a careful study of how they are working out in practice. The perception is very strong among many judges . . . that it is deceptive to think discretion has been removed. It has indeed been removed from the sentencing judges, because mandatory minimums don't give the judges any choice. . . . So the judges' sense is that the discretion has been transferred from them to the prosecutor, who can choose to indict for a lesser weight [of a drug] than the weight actually found at the time the defendant was arrested. There is much concern that these mandatory minimum sentences are transferring discretion from the judge to the prosecutor and that they may be deceptive in other respects, because the likelihood of apprehension—not the sentence length—may be the strongest deterrent. . . . So I think the time has come when a study, a close look at how mandatory minimums have been working would make a contribution of great value.

[335-336] I can only tell you the code of conduct I would adopt for myself wherever I am, here or abroad, and that is the Constitution of the United States. I would consider it binding on me. I can perhaps cite an example. [A] former Federal judge . . . was sent to judge a hijacking in Berlin. It was a sensitive case in the international community. A plane was hijacked from Poland, I believe, to take people who had been in East Germany into West Germany. The hijacking presented a

sensitive question within Germany. So a court that had been created in World War II, called the United States Court for Berlin, was resurrected, and a U.S. district judge, Judge Stern was sent there. He was told by the State Department that the alleged hijackers would have only such rights as the State Department chose to give them. Judge Stern, said, I am a Federal judge, the Constitution is my law, and that is the law I am going to apply in any proceeding over which I preside. He made sure that the defendants had very able counsel . . . and that they got the full panoply of rights we accord criminal defendants. . . . It is a wonderful example, I think, of the way any Federal official should behave at home or abroad. The Constitution and the Federal law should be our guide wherever we are.

### Souter: Rights of Criminal Defendants

[178] I was in law enforcement once, and there were times when I used to chafe over the difficulty that law enforcement had in conforming to some of the [Supreme Court's] decisions. One of the things I am glad of is that that is an era which has, in large measure, passed. We do not have the same problems that we had 20 years ago. There are some who would say there is a greater pragmatic appreciation on the Supreme Court. . . . We have learned to live with much in the last 20 years, and we have lived with it reasonably well.

[205] [T]he basis for the exclusionary rule [as explained in *Mapp v. Ohio*] was to induce the police, to induce the executive branch of the government from engaging in activities which violated 4th amendment rights, and the theory was that if the police could not profit, if the prosecution could not profit by using evidence illegally seized, there would therefore be an inducement to avoid seizing evidence illegally, so that the object of the exclusionary rule as a means to enforce the values of the fourth amendment was a very pragmatic one. But the focus of that explanation was, of course, on police conduct. . . . [W]hat the *Leon* case is saying is that if the mistake which leads us to conclude that there has been a 4th amendment violation was a mistake not made by the police, but made by the judge or a magistrate who issued the warrant, that should not preclude the introduction of evidence on the theory described in *Mapp*. If the mistake is not the police's mistake, then you gain nothing in influencing police conduct by keeping the evidence out. . . . I think the *Leon* rule is entirely consistent with the rationale for the exclusionary rule in *Mapp*.

[208] I would not take the position, I do not think anyone takes the position that sentences have got to be imposed absolutely, without judicial discretion. But I do think very strongly that the judicial discre-

tion which is exercised in sentencing should be a very structured and disciplined discretion, otherwise the problem of disparity in sentencing is simply insoluble. . . . My concern about the effectiveness of this perception of injustice is not limited simply to the perception of the public. I think there should be an equal concern for the perception of the defendants who are sentenced. If there is going to be any hope for any rehabilitative effect in sentencing, particularly on young and early offenders, it seems to me it has got to rest upon a reasonable perception that the system in which the sentence has been imposed is itself a fair system.

[208] [T]here was for a long time, certainly in the early years in which I was practicing law and engaged in the criminal justice system, an unspoken feeling that somehow the white collar criminal should at least get one free chance or the feeling that the white collar criminal, even when caught, should never in fact be sentenced to incarceration. This seemed to me was both morally unjust and socially indefensible.

[226-228] Q: Your dissenting opinion seemed to recognize the importance of the State's interest [in detecting drunk drivers]. I would appreciate it if you could explain your reasoning. A: I think one of the points of common ground from which all of the parties and all of those with strong opinions on that case begin is that when there is a stop for a sobriety checkpoint, there is, to a very limited degree, a search and seizure and inquiry subject to 4th amendment standards. . . . What . . . the court did—and what, indeed, I did in my dissent—was to engage basically in an analysis which balanced the State and the private interests involved to determine whether the stop and the inquiry could be regarded as a reasonable one within the standards applicable to search and seizures. . . . What we are particularly concerned with in these kinds of cases is that the discretion of the police be something other than an uncontrolled roving . . . The concern is to require a very tightly controlled discretion on the part of the police . . . which does not go one iota beyond what is necessary to satisfy the public interest in detecting driving under the influence before a tragedy occurs. . . . I said that in judging what is reasonable, we have to take into consideration the potential danger which the activity poses and the State's expression of that danger by its decision to regulate or not to regulate it. And what might, indeed, be a perfectly reasonable inquiry in a highly dangerous and regulated activity, like driving, would not be reasonable at all in an innocent pursuit like walking down Main Street and doing errands. And I therefore concluded that there was not a danger, that a sobriety checkpoint approval under the 4th amendment was going to be taken as thin end of the wedge for an assault on civil liberties. I think that view has since been recognized.

[248] I recognize that, as a simple matter of the text, the Constitution of the United States recognizes capital punishment. Beyond that, given the fact that there will be capital punishment cases before the Court and I believe are on its docket now, I do not think I can go very far on a discussion, without getting into something that is going to be before the Court.

[280] [T]he issue that we had to confront in that case is whether to recognize that there are certain constitutional rights of a defendant, which are indeed so personal and fundamental that they may not be waived by someone on the defendant's behalf, that they would be exceptions to the general rule the defendant is bound by decisions of counsel, and we held in that case that the right of a trial by a full jury was indeed just such a right, and because the defendant had not on the record indicated a waiver of his right to 12, we reversed the conviction.