

10-1-2007

## Embracing the Living Constitution: Justice Anthony M. Kennedy's Move away from a Conservative Methodology of Constitutional Interpretation

Lisa K. Parshall

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>

 Part of the [Judges Commons](#), [Legal History Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Parshall, Lisa K. (2007) "Embracing the Living Constitution: Justice Anthony M. Kennedy's Move away from a Conservative Methodology of Constitutional Interpretation," *North Carolina Central Law Review*: Vol. 30 : No. 1 , Article 3.  
Available at: <https://archives.law.nccu.edu/ncclr/vol30/iss1/3>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

## EMBRACING THE LIVING CONSTITUTION: JUSTICE ANTHONY M. KENNEDY'S MOVE AWAY FROM A CONSERVATIVE METHODOLOGY OF CONSTITUTIONAL INTERPRETATION

LISA K. PARSHALL\*

### INTRODUCTION

With the retirement of Sandra Day O'Connor, there has been an increased recognition of Justice Anthony M. Kennedy's key role as the remaining centrist, or swing voter, on the Court.<sup>1</sup> The 2005 term reveals the Justice's importance in the disposition of cases as Kennedy cast the critical vote in that Term's most divisive cases.<sup>2</sup> The recognition of Kennedy's pivotal position on the Court is not, however, entirely new. When Associate Justice Lewis F. Powell announced his retirement in 1987, it was widely anticipated that the next appointment to the Court would solidify the Court's conservative majority and allow for a restructuring of modern constitutional doctrine. The eventual selection of Kennedy was characterized as a "compromise,"<sup>3</sup>

---

\* Ph.D., 2001 from the State University of New York at Buffalo. Assistant Professor, Department of History & Government, Daemen College, Amherst, NY.

1. David Cole, *The Kennedy Court*, THE NATION, July 31, 2006, at 6, <http://www.thenation.com/doc/20060731/cole>; Tony Mauro, *Is the Honeymoon Over for the Roberts Court?*, LEGAL TIMES, July 5, 2006, <http://www.law.com/jsp/article.jsp?id=1151658325717>; Erwin Chemerinsky, *The Kennedy Court*, ACLU OPEN FORUM, Apr.-June 2006, [http://aclu-sc.org/attach/o/open\\_forum\\_2006\\_v2.pdf](http://aclu-sc.org/attach/o/open_forum_2006_v2.pdf); Dahlia Lithwick, *Swing for the Bleachers: The Tug of War for the Mind of Anthony Kennedy*, SLATE MAGAZINE, July 1, 2006, <http://slate.com/id/2144875>; Dahlia Lithwick, *Swing Time: Anthony Kennedy – the New Sandra Day O'Connor*, SLATE MAGAZINE, Jan. 17, 2006, <http://www.slate.com/toolbar.aspx?action=print&id=2134421>; Warren Richey, *Supreme Court's New Man in the Middle*, CHRISTIAN SCIENCE MONITOR, July 3, 2006, at 1; David G. Savage, *Ball in Justice Kennedy's Court; Moderate Sometimes has the Last Word on Key Rulings*, CHI. TRIB., July 2, 2006, at 3; and Billy House, *Kennedy is Court's New Swing Vote*, ARIZ. CENT., July 2, 2006, <http://www.azcentral.com/arizonarepublic/news/articles/0702newsupremes0702.html>. But see Douglas W. Kmiec, *Who Rules the High Court? In Kennedy's Swing Vote vs. Roberts' Consensus Building, the Chief Justice Holds Sway*, L.A. TIMES, July 8, 2006, at B 15.

2. David G. Savage, *Déjà Vu Once Again*, A.B.A. J., September 2006, at 12-13 (concluding that "with O'Connor's retirement, Kennedy stood alone in deciding the outcomes in the most divisive cases").

3. Sue Golden, *Justice Anthony M. Kennedy: A Trojan Horse Conservative*, 1 MD. J. CONTEMP. LEGAL ISSUES 229, 231 (1990); George J. Church & Amy Wilentz, *Far More Judicious*, TIME, Nov. 23, 1987, at 16; ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 328-329 (1989) (remarking that "Anthony Kennedy was what Justice Department Conservatives called an eighty percenter, meaning it was thought he could be counted on in 80 percent of the cases but not more"). The battle over Reagan's first nominee,

yet the consensus at the time of his appointment was that he would prove a reliable member of the conservative wing of the Rehnquist Court.<sup>4</sup> One commentator predicted that, with Kennedy's addition, "the Court will continue on a path that is in almost no way consistent with the outright rejection of originalism or endorsement of substantial judicial discretion or of a living Constitution."<sup>5</sup>

Indeed, early assessments recognized Kennedy's contributions to the conservative direction of the Rehnquist Court.<sup>6</sup> In these early years, it was reported that Justice Scalia had taken Kennedy "under his wing" and, in turn, Kennedy "admired Scalia's mental acuity and was generally inclined toward his strict constructionist philosophy."<sup>7</sup> Characterized as "one of the most conservative members of the Supreme Court," Kennedy was credited with moving the Court "steadily

---

Judge Robert H. Bork, reflected the importance of another conservative appointment and Bork's rejection was viewed by some as a repudiation of the extreme conservatism his judicial philosophy represented.

4. See DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 182 (1993) (suggesting that "[a]s he stood next to the new justice, [Rehnquist] had good reason to smile broadly, for [he] knew that he was standing next to his fifth vote") and THOMAS WALKER AND LEE ESPTEIN, *THE SUPREME COURT OF THE UNITED STATES*, 37 (1993) (relating that the liberals had "defeated the sixty-year-old Bork and in his place received the fifty-two-year-old Kennedy. Justice Kennedy's voting record has been easily as conservative as the liberal forces feared Bork's would be, and given their age differences there is every reason to expect that Kennedy's tenure will be much longer than Bork's would have been").

5. Michael J. Gerhardt, *Interpreting Bork: The Tempting of America*, 75 CORNELL L. REV. 1358, 1389 n.171 (1990). Gerhardt disputed claims that the failed nomination of Robert H. Bork signaled a national consensus against originalism and in favor of a dynamic constitution. See also *Id.* at 1388, n.168.

6. See DAVID ADAMANY, *THE SUPREME COURT*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 5, 17 (John B. Gates & Charles A. Johnson, eds., 1991) (noting that "The Rehnquist Court, especially since the addition of Justice Anthony Kennedy, is further restricting liberties established during the Warren Court"); Erwin Chemerinsky, *The Crowded Center*, A.B.A. J., Oct. 1994, at 78 (suggesting that at the time of Kennedy's appointment, the Court had "seemed destined to become a conservative bastion"); *Shifting Balance*, THE ECONOMIST, July 9 (1988) p. 20; *Negative on Affirmative Action*, THE ECONOMIST, June 17 (1989), p. 36 (suggesting that key affirmative actions of the 1988 Term are a likely "signal that Mr. Ronald Reagan's appointment of Justice Anthony Kennedy last year has completed the Supreme Court counter-revolution that has progressed in fits and starts since Mr. Richard Nixon appointed Mr. Warren Burger as chief justice in 1969"); Ted Gest et al., *Suddenly the Conservatives Start Stirring*, U.S. NEWS & WORLD REPORT, May 9, 1988, at 11 (concluding that "[t]he moving force behind the shift – if it comes – will be the recent addition to the bench of Anthony Kennedy, who may turn out after all to be the conservative fifth vote President Reagan has sought to tip the balance and bring an about-face on issues such as affirmative action, abortion and church-state separation"); Ted Gest et al., *Are You Smiling Robert Bork?* U.S. NEWS & WORLD REPORT, June 26, 1989, at 10 (noting that the more "moderate" Kennedy selected as Bork's replacement voted quite conservatively during his first term); Richard Lacayo, *Play it Again Says the Court; The Justices Decide to Reconsider a Major Civil Rights Ruling*, TIME, May 9 (1988), p.73 (commenting that, "[e]ven while cautioning that it was too soon to tell, court watchers were worried that conservative Justices had found in Kennedy the reliable fifth vote needed to forge a regular majority)."

7. Richard C. Reuben, *Man in the Middle*, CAL. LAWYER, Oct. 1992, at 35, 37.

to the right.”<sup>8</sup> Although he sometimes “defied prediction,” as in the 1989 ruling of *Texas v. Johnson*,<sup>9</sup> Kennedy was viewed as “crucial to the evolution of the new majority . . . cast[ing] critical votes on cases involving abortion, criminal law, drug testing, racial and sexual discrimination, affirmative action, and the death penalty.”<sup>10</sup>

By the 1991 Term, however, Kennedy had broken with the conservative bloc of the Court on a number of key issues, including school prayer and abortion.<sup>11</sup> Court watchers heralded the emergence of the Court’s new “center”<sup>12</sup> and noted Kennedy’s “move toward moderation.”<sup>13</sup> In more recent terms, Kennedy’s reputation as a swing Justice has continued to grow as his divergence with the conservative bloc has taken several dramatic turns.<sup>14</sup> In 1996, Kennedy authored *Romer v.*

8. Sue Golden, *Justice Anthony M. Kennedy: A Trojan Horse Conservative*, 1 MD. J. CONTEMP. LEGAL ISSUES 229, 245 (1990). See also Christopher E. Smith, *Supreme Court Surprise: Justice Anthony Kennedy’s Move Toward Moderation*, 45 OKLA. L. REV. 459, 463 (1992) (noting that although “Justice Kennedy did not establish himself as always a conservative or as the most conservative Justice . . . [he] earned a place in observers’ eyes as a consistent member of the Court’s conservative wing”).

9. *Johnson*, 491 U.S. 397 (Kennedy, J., concurring). See also Neil Skene, *Scalia and Kennedy Defy Predictions*, CONGRESSIONAL QUARTERLY, Apr. 7, 1990, at 1118 (remarking “[t]hat Scalia and Kennedy would be heirs to the First Amendment legacy of liberals Holmes and Brandeis was not exactly what people were expecting a couple of years ago.”).

10. Robert Glennon, *Will the Real Conservatives Please Stand Up?* 76 A.B.A. J. 49 (Aug. 1990).

11. *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating prayer at a public school graduation) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming constitutional protection of a right to privacy which includes a limited right to abortion).

12. Marcia Coyle, *Conservatives Divided by Independent Streak*, NAT’L L. J. July 6 (1992); Marcia Coyle, *Emergent Center is the Term’s Big Surprise*, NAT’L L. J. Aug. 31, 1992, at S1. See also Janet Hook, *Divided Court Redefines Roe, Oks Abortion Restrictions*, CONGRESSIONAL QUARTERLY, July 4, 1992, at 1958 (identifying “. . . a new bloc of moderates: Justices Sandra O’Connor, Anthony M. Kennedy and David H. Souter”).

13. Christopher E. Smith, *supra* note 8 at 460. “Many press accounts during the summer suggested that Kennedy had been ‘Blackmunized’ – metamorphosing from judicial conservative to liberal after several years of service on the Court.” Richard C. Reuben, *Man in the Middle*, 12 CALIFORNIA LAWYER 34, Oct. 1992. (Reuben’s article cites a Newsweek report that Harry Blackmun wrote to comfort Justice Kennedy: “Don’t worry, It’s not fatal.”). *Id.* at 36. See also Richard C. Reuben, *A Jurist in Transition*, L.A. DAILY J., Aug. 12, 1992, at 1.

14. See Marcia Coyle, *In Search of an Identity*, NAT’L L. J., Aug. 15, 1994, at C1 (noting that in the 1993 Term Kennedy was “the decisive swing vote in 13 of the 14 [five-four] cases.”). See also Richard Lacayo, *The Soul of a New Majority*, NEWSWEEK, Jul. 10, 1995, at 46-48 (noting that the factor in the Court’s conservative outcomes that Term was that “Sandra Day O’Connor and Anthony Kennedy, two perennial swing votes, swung regularly to the right”); Marcia Coyle, *A Working Majority*, NAT’L L. J., Jul. 31, 1995, at C1; Marcia Coyle, *Term Reveals a Pragmatic Supreme Court*, NAT’L L. J., July 29, 1996, at C2 (both similarly identifying O’Connor and Kennedy as “swing voters”); Marcia Coyle, *Swing Votes Inject Suspense Into New Term*, NAT’L L. J., Oct. 7, 1996, at A1 (citing O’Connor and Kennedy as “key to successes in the court’s most divisive cases”); KENNETH JOST, *THE SUPREME COURT YEARBOOK: 1995-1996*, 5 (1997) (“The two centrist justices often held the balance of power between two opposing camps . . .”); KENNETH JOST, *THE SUPREME COURT YEARBOOK: 1996-1997* 4, 6 (1998) (O’Connor and Kennedy were also the most likely of the conservatives to join with liberal justices in closely divided decisions.”); and Linda Greenhouse, *Supreme Court Weaves Legal Principles From a Tangle of Litigation*, N.Y. TIMES, June 30, 1998, at 1 (remarking that “Given the existing divisions on the

*Evans*,<sup>15</sup> a decision invalidating Colorado's state constitutional anti-gay rights amendment. In 2003, his decision in *Lawrence v. Texas*<sup>16</sup> invalidated Texas' criminalization of same-sex sodomy, overturning *Bowers v. Hardwick*<sup>17</sup> in the process. Despite having been a consistent supporter of the death penalty, Kennedy drew ire as well for joining the Court's invalidation of the death penalty for the mentally retarded and authoring the majority ruling which declared the execution of juvenile offenders unconstitutional in 2005.<sup>18</sup> "Initially a reliable conservative, Kennedy, along with fellow Reagan appointee Sandra Day O'Connor, [had become] a pivotal swing vote on a range of emotionally charged cultural issues from gay rights to affirmative action. In the process, Kennedy often found himself on the receiving end of attacks from disappointed conservatives."<sup>19</sup>

This paper argues that it is Kennedy's divergent methodological approach to constitutional interpretation that separates him from his conservative colleagues on these key issues. In sharp contradistinction to the originalist interpretive methodologies of Justice Antonin Scalia, Kennedy appears to have embraced the concept of a "living Constitution." Part I briefly reviews the debate over the notion of a "living Constitution," its incompatibility with interpretivist methodologies, the modern Court's renewed debate over concept, and the rejection of living constitutionalism by Justice Scalia. Part II examines the contrasting compatibility of this notion with Justice Kennedy's approach to constitutional interpretation. The examination of his decision-making, particularly on Eighth and Fourteenth Amendment jurisprudence reveals that Kennedy's methodology has increasingly differed from that of his conservative colleagues in his: (1) refusal to take a narrow and cabined view of text and tradition; (2) willingness to view history and tradition as ongoing and evolving; (3) willingness to address constitutional rights in question at a high level of generalization; (4) receptivity toward international trends and opinions; and (5) broad conception of the judicial role and emphasis on judicial independence. While Part III considers some of the limitations to proclaiming Ken-

---

Court, whichever side persuaded Justices Kennedy took a giant step toward winning the case."). On the pivotal vote, David Savage agrees that, "[t]hat role is probably shared by Justices Kennedy and O'Connor." David G. Savage, *Opinions on Rehnquist*, 82 A.B.A. J. 42, 42-43 (1996). See also Joan Biskupic, *Balance of Power*, WASH. POST, July 3, 1998, at A17.

15. 517 U.S. 620 (1996) (opinion by Kennedy, J.).

16. 539 U.S. 558 (2003) (opinion by Kennedy, J.).

17. 478 U.S. 186 (1986) (opinion by White, J.).

18. *Atkins v. Virginia*, 536 U.S. 304 (2002) (opinion by Stevens, J.) and *Roper v. Simmons*, 543 U.S. 551 (2005) (opinion by Kennedy, J.).

19. Liz Halloran, *The Supreme's Next Swing Man*, U.S. NEWS & WORLD REPORT, Nov. 13, 2005, at 57. See also Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST Apr. 9, 2005, at A03; Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, Jun. 27, 2005, at 1.

nedy an adherent, the evolutions in Kennedy's jurisprudence suggest that he is increasingly receptive to the notion of the "Living Constitution" – an approach to constitutional interpretation which views the Constitution's meaning as dynamic and evolving and which rejects strict adherence to text and historical tradition. This schism between Kennedy's flexible constitutionalism and his colleague's text-based originalism will have significant consequences for coalition building within the Court as the methodological distinctions between Kennedy and Scalia's interpretive approaches becomes more pronounced.

### PART I: THE LIVING CONSTITUTION DEBATE

The "Living Constitution" has become a metaphor for an organic vision of the Constitution, one which evolves in meaning, adapting to contemporary values and practices. "It regards constitutional law not as an expression of values written into the Constitution by the framers, but as the product of a continuing process of valuation carried on by those to whom the task of constitutional interpretation has been entrusted."<sup>20</sup> But the notion of a "Living Constitution" is more than a poetic image. The philosophy of a living constitution reflects the deeper distinction between "interpretivism" and "noninterpretivism" – the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter indicating the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."<sup>21</sup> In contrast to the interpretive methodologies of originalism or textualism, the "living Constitution" embraces a dynamic constitutionalism under which:

[T]he broad textual provisions are seen as sources of legitimacy for judicial development and explication of shared national values. These values may be seen as permanent and universal features of human social arrangements – natural law principles – . . . Or they may be seen as relative to our particular civilization, and subject to growth and change, as they typically are today.<sup>22</sup>

In 1975, Grey proclaimed the Living Constitution to be "at war with the pure interpretive model."<sup>23</sup> However, he explained that a philosophy of originalism, which focused on the intent of the framers could "contemplate the application of the framers' value judgments and in-

20. Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1034 (1981).

21. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980).

22. Thomas C. Grey, *Do We Have An Unwritten Constitution?* 27 STAN. L. REV. 703, 709 (1975).

23. *Id.*

stitutional arrangements to new or changed *factual* circumstances.”<sup>24</sup> Such, he asserted, was Marshall’s understanding in *McCulloch* when he wrote that the Constitution must be “adapted to the various crises of human affairs.”<sup>25</sup>

The reconciliation of original meaning with changing circumstances is exemplified by the doctrine of “liberal originalism” which seeks to apply the enduring values of individual liberty and limited government expressed in the Declaration of Independence to contemporary constitutional questions. Proponents of this approach believe that because the “Declaration is a timeless principle, framed in the Constitution, it is applicable to changing circumstances, depending . . . on assent to principle.”<sup>26</sup> With a focus on adaptability, liberal originalism resembles the notion of “living Constitution” which “is one reason that conservative originalists reject this interpretation. In their view, such adaptation threatens the moral stability of society.”<sup>27</sup> But, as Sandefur (2003) explains, whereas the “theory of living constitutionalism sees the *principles* of good government – if not the very nature of human beings themselves – as malleable and subject to progressive change, liberal originalism sees the principles of equality and entitlement to liberty as unchanging, even though their applicability to certain circumstances might evolve.”<sup>28</sup> Horwitz (1988) similarly contrasts the “traditional conception of constitutional interpretation [which] assumes that constitutional meaning is unchanging . . .” with a broader view of the “living Constitution” – the idea that “constitutional meaning changes with changing circumstances.”<sup>29</sup>

---

24. *Id.*

25. *Id.* See also William H. Rehnquist, *In Memoriam: William H. Rehnquist: The Notion of a Living Constitution*, 29 HARV. J. L. & PUB. POL’Y 401, 404-406 (2006).

26. Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J. L. & PUB. POL’Y 489, 508 (2003). One issue to which Sandefur argues the principles of the Declaration are applicable is in the support of a color-blind Constitution. Although some of Kennedy’s rhetoric was consistent with the notion of a color-blind Constitution, he does not appear to be an adherent to liberal originalism. In none of his written opinions has he invoked the notion of rights being protected by ideas grounded in the Declaration of Independence. Indeed, Kennedy’s only reference to the Declaration was his noticing in *Rosenberger v. Rector*, 515 U.S. 819 (1995) that the University of Virginia was founded by its author. When Justice Thomas invoked the principles of the Declaration in support of a color-blind Constitution and in protest to the continued legality of affirmative action, Kennedy declined to join his dissent. Offering his own dissenting opinion in *Grutter v. Bollinger*, he “reiterate[d his] approval of giving appropriate consideration to race in this one context” even though objecting to the majority’s failure to apply the standards of strict scrutiny to the affirmative admissions program at question in that case.” 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting).

27. Sandefur, *supra* note 26, at 508.

28. *Id.* at 509. Sandefur contrasts liberal originalism with what he calls “the leftist notion” of a living Constitution by noting that the latter assumes the evolution of values through social change whereas the former rests on immutable natural rights.” *Id.* at 516.

29. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 28 (Hill and Wang 1998).

Whether the elucidation of constitutional meaning ought to be derived according to historic or contemporary values is another dimension of the debate. In his exposition of the “living Constitution,” Chief Justice William Rehnquist distinguished what he called the Holmesian conception in which the framers laid down general language that gives “latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen,” from the broader view that the courts serve as the “voice and conscience of a contemporary society.”<sup>30</sup>

It is this latter, broader conception which embraces “constitutional doctrines protecting unspecified ‘essential’ or ‘fundamental’ liberties, or ‘fair procedure’ or ‘decency’ – leaving it to the judiciary to give moral content to these conceptions either once and for all or from age to age” (and which Grey proclaimed at odds with the interpretivist enterprise) that is at the center of the modern Court’s methodological debate.<sup>31</sup> Adherence to the broad conception of a “living Constitution” has been evident in the jurisprudence of several members of the Court across a broad array of constitutional issues.<sup>32</sup> Moreover, several members of the Court have referenced the debate in written essays and public addresses.<sup>33</sup> While many modern jurists have adopted a dynamic view of constitutional interpretation, the justice who has been most noted for his explicit adherence to a “living Constitution” was Justice William J. Brennan.<sup>34</sup>

---

30. Rehnquist, *supra* note 25, at 402. The latter view, he argued, ignores the democratic character of the Constitution in which the elected branches were the appropriate vehicle for the incorporation of evolving social values.

“The Constitution is in many of its parts obviously not a specifically worded document but one couched in general phrases in the Constitution; any particular Justice’s decisions when a question arises under one of the general phrases will depend to some extent on his own philosophy of constitutional law.” *Id.* at 405.

31. Thomas C. Grey, *Do We Have An Unwritten Constitution?* 27 *STAN. L. REV.* 703 (1975).

32. See also *Abbington v. Schemp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring) (arguing that “our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society”).

33. In a speech marking the Constitution’s bicentennial, for example, Marshall openly defended the notion of the Constitution as a living document, noting that he did “not believe that the meaning of the Constitution was forever ‘fixed . . .’” and preferred to “celebrate the bicentennial of the Constitution as a living document . . .” Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association, (May 6, 1987), [http://www.thurgoodmarshall.com/speeches/constitutional\\_speech.htm](http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm). See also *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Blackmun, J., concurring) (arguing that “the precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law”).

34. Brennan’s “living Constitution is both the dominant liberal constitutional concept and the polar opposite of Scalia’s textualism.” Julia Vitullo-Martin, *Justice Antonin Scalia: The Supreme Court’s most strident Catholic*, *COMMONWEAL*, March 28, 2003, at 11, 14. Brennan would argue that “[t]hose who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstances.” William J. Brennan, *The Constitution of the*



Indeed, Brennan is the outstanding example of a judge who has not taken stability alone as his legal polestar. Thus, he has been the leading opponent of the view that constitutional construction must be governed only by the original intention of the Framers. As explained by Brennan himself, "this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them." Throughout his tenure, Justice Brennan rejected this "original intention" jurisprudence. To him, the meaning of the Constitution is to be found in today's needs, not in a search for what was intended by its eighteenth-century draftsmen.<sup>35</sup>

Brennan's views were representative of the Warren Court's approach to constitutional adjudication, embracing the idea that the "Constitution endures because it is a vehicle for the most central values of American society; but those values necessarily evolve as society changes."<sup>36</sup> As such, conservative response to the liberalism of the Warren Court would include antipathy toward living constitutionalism and renaissance of originalism.

Although it has become commonplace to question Supreme Court nominees on their preferred methodology and acceptance of a broad version of a "living Constitution," the phrase itself is not commonly employed as self-descriptive of methodology.<sup>37</sup> A search of the 1991-2003 Terms of the Court reveals only three explicit references to the phrase, with each instance part of the remarks of the Solicitor General in memoriam of the passing of Justices White, Blackmun and Marshall.<sup>38</sup> In Justice White's case, the reference was to note that White was *not* an adherent of a "formula packaged as 'a living constitution,' 'original intent,' 'plain meaning,' or some other catechism . . . ."<sup>39</sup> In the case of Blackmun and Marshall, both were simply noted for their devotion to a "living Constitution."<sup>40</sup>

---

United States: Contemporary Ratification, Symposium at Georgetown University School of Law, (Oct. 12, 1985) ["Brennan Speech"].

35. Bernard Schwartz, "*Brennan vs. Rehnquist*" – *Mirror Images in Constitutional Construction*, 19 OKLA. CITY U. L. REV. 213, 230-31 (1994) (footnote omitted).

36. Horwitz, *supra* note 29 at 87.

37. Rehnquist, *supra* note 25 at 401, n.1 (referring to such questioning in the confirmation hearings for both himself and Justice Powell).

38. The search was for the term "living Constitution" in the United States Reports, available in PDF on the Supreme Court's webpage: <http://www.supremecourtus.gov/opinions/boundvolumes.html>.

39. Resolution Presented by the Solicitor General, Proceedings in the Supreme Court of the United States in Memory of Justice White, 537 U.S. v, xvii (Nov. 18, 2002) (commenting on the jurisprudence of Justice Byron R. White), <http://www.supremecourtus.gov/opinions/boundvolumes/537bv.pdf>

40. Marshall was noted for "[h]is dedication to the living Constitution and legal institutions of America kept him focused on the importance of individual rights and liberties." Resolution Presented by Solicitor General, Proceedings in the Supreme Court of the United States in Mem-

An additional Lexis search of Supreme Court case law similarly reveals only four appearances of a “living Constitution,” two of which were references to the titles of scholarly articles that contained the phrase.<sup>41</sup> Only Justice Powell, dissenting in an Eighth Amendment case holding that mandatory life-sentencing under a state recidivist statute did not constitute “cruel and unusual punishment,” would openly proclaim that “[w]e are construing a living Constitution.”<sup>42</sup>

Indeed, the most extensive discussion invoking the phrase in the case law was Justice Scalia’s rejection of the “living Constitution” in *McCreary v. The American Civil Liberties Union* (2005).<sup>43</sup> Juxtaposed against the “living Constitution,” the interpretive approach of originalism, which Scalia favors, has been characterized as “a form of legal fundamentalism that denies the legitimacy of changing constitutional meanings and thus resists any conception of the ‘living Constitution.’”<sup>44</sup> As a proponent of “new originalism” – which is “focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted”<sup>45</sup> – Scalia has been one of the most ardent critics and vocal opponents of the “living Constitution.”<sup>46</sup>

Scalia’s textualism and commitment to tradition has been viewed by some as “an attack on much of the twentieth-century jurisprudence,

---

ory of Justice Marshall, 510 U.S. v., vi (Nov. 15, 1993), available at <http://www.supremecourtus.gov/opinions/boundvolumes/510bv.pdf>.

It was observed of Blackmun that “[t]hrough his commitment to a living Constitution and to careful interpretation of the law, Justice Blackmun gave voice to what Lincoln called, in his First Inaugural Address, ‘the better angles of our nature.’” Resolution Presented by Solicitor General, Proceedings in Supreme Court of the United States in Memory of Justice Blackmun, 528 U.S. v., xxv (Oct. 27, 1999), <http://www.supremecourtus.gov/opinions/boundvolumes/528bv.pdf>.

41. See *Gibson v. Fla. Legislative Investigation Committee*, 372 U.S. 539, 561 n.3 (1963) (citing Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963)) and *Nat’l League of Cities v. Usery*, 426 U.S. 833, 868, n.9 (1976) (Brennan, J., dissenting) (arguing that the majority was enforcing its own conception of “a proper distribution of governmental power” which could not be reconciled with objections against a “freewheeling judiciary” which Rehnquist had raised in rejecting a “living Constitution”).

42. *Rummel v. Estelle*, 445 U.S. 263, 307 (1980). Powell was joined by Justices Brennan, Marshall and Stevens in rejecting the argument that applicability of the Eighth Amendment’s prohibitions was restricted to claims previously adjudicated under that Clause. See also *Oliver v. United States*, 466 U.S. 170 (1984) (opinion by Powell, J.) (arguing that “seminar constitutional provisions” ought to be construed broadly “to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials”).

43. 545 U.S. 844, 899 (2005).

44. Morton J. Horwitz, *The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32, 116 (1993).

45. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004). See also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989).

46. RALPH A. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION 2, 21-22 (University Press of Kansas) (2006). See also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38, 41-42, 44-45 (Amy Gutmann ed., Princeton University Press) (1997).

which has created a host of new constitutional rights by embracing such Holmesian ideas as ‘the balancing of competing interests’ and Justice William Brennan’s ‘living Constitution.’”<sup>47</sup> Revealing the contemporary disagreement over methodology, Scalia wrote in *McCreary* that:

This is not the place to debate the merits of the “living Constitution,” though I must observe that Justice Stevens’ quotation from *McCulloch v. Maryland* . . . refutes rather than supports that approach. Even assuming, however, that the meaning of the Constitution ought to change according to “democratic aspirations,” why are those aspirations to be found in Justices’ notions of what the Establishment Clause ought to mean, rather than in the democratically adopted dispositions of our current society?<sup>48</sup>

Despite the rare appearance of the phrase “living Constitution” in the decisions of the Court, the debate between notions of a Constitution whose meaning is fixed or adaptable is an old one,<sup>49</sup> and the renewed discussion over methodology is of critical importance. On the contemporary Court, the debate over the appropriate view of constitutional interpretation is no longer only between liberals and conservatives, between Brennan and Rehnquist,<sup>50</sup> or even Stevens and Scalia, but instead would seem to be taking place within the conservative majority, between Justices Kennedy and Scalia. Given the current composition of the Court, victory in the outcome of crucial cases is increasingly dependent on the crucial support of Justice Kennedy. Yet, on the methodological question, Kennedy has taken a divergent approach from fellow conservatives – an approach which is reminiscent of Brennan’s constitutionalism and the embracement of a “living Constitution.”

---

47. Julia Vitullo-Martin, *Justice Antonin Scalia: The Supreme Court's most strident Catholic*, COMMONWEAL, Mar. 28, 2003, at 11, 13.

48. 545 U.S. at 860 (citation omitted). Scalia’s remarks, which were directed at Justice Steven’s observations in *Van Orden v. Perry*, 545 U.S. 677 (2005), serves as a case in point for the argument below that the concept of a living constitutionalism is regularly employed and debated even where the precise phraseology is not present. Stevens had argued in *Van Orden* that “We serve our constitutional mandate by expounding the meaning of constitutional provisions with one eye towards our Nation’s history and the other fixed on its democratic aspirations.” *Id.* at 732.

49. After surveying some of the broader phrases of the Document, including the due process clause and the Eighth Amendment, Charles A. Beard, remarked that “[e]ver since the Constitution was framed, or particular amendments were added, dispute has raged among men of strong minds and pure hearts over the meaning of these cloud-covered words and phrases.” Charles A. Beard, *The Living Constitution*, SPEECH BROADCAST OVER THE NBC-RED NETWORK, (June 9, 1936), in VITAL SPEECHES OF THE DAY 631 (July 1, 1936).

50. Schwartz, *supra* note 34, at 230-31.

## PART II. JUSTICE KENNEDY AND THE LIVING CONSTITUTION

Justice Kennedy has never proclaimed himself to be an adherent of a "living Constitution."<sup>51</sup> Nevertheless, his recent jurisprudence has demonstrated an increased proclivity toward a broad, flexible approach to constitutional interpretation that gives primacy to evolving trends, reminiscent of living constitutionalism. Indeed, at least one critic has described him as exemplifying that approach: The living Constitution "involves using ancient but conveniently vague constitutional phrases to enforce 'evolving standards of decency,' to promote equality and to vindicate what sometimes-liberal Justice Anthony Kennedy liked to call 'the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"<sup>52</sup> On the view that "Justice Kennedy's jurisprudence is developing in fascinating and innovative directions," others have similarly, albeit more approvingly argued, that "[a]fter two decades on the Court, his jurisprudence is now taking shape as he is exploring new ways to expand the constitutional framework to deal with today's issues . . . [t]his evolving awareness of rights and privacy interests may stem from Justice Kennedy's romantic ideals of a *dynamic* Constitution."<sup>53</sup>

Kennedy's most direct language in support of the notion of an aspirational, living Constitution has been proffered in the form of remarks made to international and legal assemblies. These speeches provide crucial insight into the Justice's conception of law and the judicial role in constitutional interpretation. In his view, "The Constitution survives because it lives in the consciousness of our people. It survives because it has meaning and force and significance and inspiration in the context of our own day and age. *It is a living thing.*"<sup>54</sup>

From the tenor of Kennedy's remarks, it has been claimed that, "[c]ontrary to traditional originalist theory, Justice Kennedy feels that the present day Americans have a better understanding of the Constitution than the Framers themselves did."<sup>55</sup> Although he would not seem to be directly claiming interpretive superiority, Kennedy has indeed spoken of the advantage of modern perspective.

51. None of the sparse references to a living Constitution in the Supreme Court case law were made by Justice Kennedy. Similarly, a Lexis search of the rulings of the Ninth Circuit Court of Appeals – on which Kennedy sat from 1976-1988 – reveals no references to the "living Constitution" in cases in which he participated.

52. Stuart Taylor Jr., *In Praise of Judicial Modesty*, NAT'L J., Mar. 18, 2006, at 13.

53. Saby Ghoshray, *Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709, 729, 731 (2006) (emphasis added).

54. Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, *SPEECH TO THE GENERAL ASSEMBLY OF THE FLORIDA BAR'S ANNUAL MEETING* (June 24, 2005) (emphasis added) [hereinafter Kennedy, *FLORIDA SPEECH*].

55. Ghoshray, *supra* note 53, at 712-13.

[O]ne of the reasons that someone in my generation can dare presume to sit on the Supreme Court with Cardozo and Brennan and Holmes and Marshall, having preceded them . . . is because we have an advantage they don't. I have an advantage the framers of the Constitution didn't. I had the perspective of time. I can see the fall away of some of the ideas and the wisdom of others.<sup>56</sup>

In his view, our *understanding* of fundamental constitutional values is capable of enlightenment over time. Equally significant, Kennedy believes that such was the intention behind the Constitution's use of broad language.

The framers knew that they were not prescient enough and they were not brazen enough to specify all of the elements of justice. They knew this would become apparent only over time. They knew that the whole purpose of a constitution is to rise above the inequities and injustice that you can't see.<sup>57</sup>

Rather than believing that the fundamental constitutional values have changed, Kennedy believes that interpretive refinement is itself an enduring constitutional value. On this view, constitutional interpretation is a valiative process – one which involves an ongoing dialogue over the document's meaning. He explained:

Of course the law has transcendent meaning that exists over time. The whole dynamic of a great constitutional system is that it accommodates a duality. Each generation has the right to help shape its own destiny, its own future. It must do so consistently, however, by protecting those fundamental principles of freedom, which must be the underpinning of a decent, free, and progressive society. This duality cannot be accommodated unless certain truths are recognized as unchanging from one generation to the next.<sup>58</sup>

The primacy of the judiciary's role in identifying those "truths" in the Constitution's meaning would also seem to be a central part of Kennedy's constitutional philosophy. He believes "that there are neutral principles in the law . . . transcendent principles illuminating the idea of freedom and human spirituality . . ." that "in the hands of a sensitive, dedicated, and independent judiciary, can contribute to making our society more decent, more compassionate, more tolerant . . ."<sup>59</sup> In remarks reminiscent of the Warren Court's view of constitu-

56. Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, LECTURE AT THE RONALD REAGAN PRESIDENTIAL LIBRARY (Apr. 9, 2002), <http://www.reaganfoundation.org/pdfs/kennedy.pdf> [hereinafter, Kennedy, LECTURE].

57. Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, SPEECH TO THE AMERICA BAR ASSEMBLY, Honolulu, Hawaii (Aug. 5, 2006) [hereinafter Kennedy, HONOLULU SPEECH] transcript available at <http://www.democracyfornewhampshire.com/node/view/2688>

58. Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, SPEECH TO THE JUDICIARY AT THE HIGH COURT OF HONG KONG: (Feb. 5, 1999), <http://canberra.usembassy.gov/hyper/1999/WF990217/epf305.htm>.

59. *Id.*

tional interpretation, Kennedy elucidated his interpretation of judicial responsibility:

[T]he art of the law, the art of judging, is that you ask yourself, "Why am I doing this? Why am I thinking this?" . . . You ask, "Is it logical? Does it make common sense? Is it fair? Does it accord with the law? Does it accord with the Constitution? Does it accord with my own sense of decency and ethics and morality?" And if, at any point along the way, you think you might be wrong, you have to begin all over again.<sup>60</sup>

Justice Brennan similarly wrote of the difficult task of judging.<sup>61</sup> Yet, he maintained that judges cannot evade their difficult duty to resolve public dispute over constitutional interpretation, nor can they readily ignore the consequences of their rulings. This view of the "public nature, obligatory character, and consequentialist aspect"<sup>62</sup> of judicial responsibility would seem to be a view which Kennedy shares. Responding to public questions regarding the grant of certiorari in *Bush v. Gore*,<sup>63</sup> for example, Kennedy explained that he found the decision of whether to take the case a "no-brainer. We are the court of last resort for constitutional issues, and this was a state court that had ruled on a constitutional issue. You take the case if it's an important case like this."<sup>64</sup>

Kennedy's exalted view of the judicial role has been noted by judicial scholars. Edward Lazarus has characterized Kennedy as a judicial "romantic," by which he means that "at base, he has a deep emotional belief in the centrality of the Court's role as a guarantor of real life justice."<sup>65</sup> According to Lazarus, Kennedy has a:

[S]omewhat grandiose vision of Supreme Court justices as knights errant seeking constitutional truth and righting constitutional wrongs, regardless of their own personal preferences . . . . In keeping with this role, Kennedy's opinions often feature grand statements of principle, as in the areas of abortion and gay rights . . . .<sup>66</sup>

---

60. Kennedy, *supra* note 54.

61. Brennan, *supra* note 34.

62. *Id.*

63. 531 U.S. 98 (2000).

64. Kennedy Lecture, *supra* note 56. Kennedy further remarked that "we did not bring that litigation . . . [t]he democratic candidate brought that litigation . . .," suggesting that the Court was obliged to grant review of the issue, or at least, that the parties "not complain when the highest court takes it." *Id.* See also *Vieth v. Jubelirer*, 541 U.S. 267, 310 (2004) (Kennedy, J., concurring) ("It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied.").

65. Edward Lazarus, *The Pivotal Role of Justice Anthony Kennedy: Why the Supreme Court's Romantic May Only Become More Influential Over Time*, Aug. 7, 2003, <http://www.lp.findlaw.com/lazarus/20030807.html>.

66. Edward Lazarus, *Kennedy Center: The Court's New Swing Vote*, THE NEW REPUBLIC, Nov. 14, 2005, at 16.

Such views, Lazarus argues, are most evident in Kennedy's substantive due process jurisprudence in which he "emphasized the Court not just as a collection of dispute resolving judges, but rather as a hallowed institution that persists over, and transcends, time."<sup>67</sup> Ghoshray agrees: by "expanding the concept of liberty, privacy and rights – virtues enshrined by the living, dynamic Constitution . . . Justice Kennedy's romantic conception of the Constitution goes a long way in advancing this belief."<sup>68</sup> Kennedy's "love affair" with the American legal system and the "ability of the Court to declare the moral good," is evident in other substantive areas of the law as well, Lazarus argues, even in his federalism jurisprudence.<sup>69</sup> This trust in the ability of an independent judiciary, engaged in a dynamic constitutional interpretation that accommodates the duality of the Constitution's enduring and adaptable meaning, distinguishes Kennedy's jurisprudence from narrowly focused original meaning, text and tradition.

#### A. *Justice Kennedy, Text and Tradition*

Although he is not without regard for history or the importance of constitutional text and design, Kennedy has never been a proponent of original intent,<sup>70</sup> nor has he demonstrated a bent toward strict textualism. Ghoshray agrees, arguing that "[i]f Justice Scalia is the originalist, then Justice Kennedy should be considered the anti-originalist, as he clearly rejects the originalist ideal of defining constitutional rights by recourse to text and longstanding tradition."<sup>71</sup> Indeed, with regard to many of the key examples Rossum (2006) offers

---

67. Lazarus, *supra* note 65. What Lazarus casts as "romanticism" others have detected an attempted aggrandizement of the power that achieved through the casting of the pivotal vote (See Dahlia Lithwick, *Swing for the Bleachers: The Tug of War for the Mind of Anthony Kennedy*, SLATE MAGAZINE, July 1, 2006, <http://www.slate.com/toolbar.aspx?action=print&id=2144875>); a desire for historical lionization (See Terry Eastland, *The Tempting of Justice Kennedy*, Am. Spectator, Feb. 1993, at 32, 33); or simple infatuation with the sound of his voice. (See the remark of David Garrow, that in contrast to O'Connor's use of her pivotal position to "hammer out differences," Kennedy "is more attracted to the sound of his own voice" quoted in Tony Mauro, *Is the Honeymoon Over for the Roberts Court?* LEGAL TIMES, July 5, 2006). Even Lazarus has attributed infatuation with the judicial role as indicative of a general pomposity (See EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 428–29 (Random House) (1998)).

68. Ghoshray, *supra* note 53 at 735.

69. Lazarus, *supra* note 65.

70. Christopher Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming Its Role?* 24 AKRON L. REV. 393, 396 (1990). Smith cites as support for this conclusion the work of David O'Brien who quotes Kennedy's testimony in the confirmation hearings that original intent is a "methodology," but "doesn't tell us how to decide a case." *Id.* at n.66.

71. Ghoshray, *supra* note 53 at 712–13.

to illustrate Scalia's commitment to text and tradition, Kennedy reached opposite conclusions.<sup>72</sup>

Unlike Scalia, Justice Kennedy is often willing to adopt a purposive approach to interpreting constitutional language. In *United States v. Verdugo-Urquidez*,<sup>73</sup> Kennedy concurred in the decision that the Fourth Amendment does not apply to nonresident aliens located in foreign nations. Yet he was unable to agree to a textual basis for the conclusion.

I cannot place any weight on the reference to "the people" in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its force or its reach. Given the history of our Nation's concern over warrantless and unreasonable searches, explicit recognition of "the right of the people" to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.<sup>74</sup>

Similarly, in *Chavez v. Martinez* (2003),<sup>75</sup> a plurality found that, because the individual subjected to police interrogation was never subject to criminal proceedings, the text of the Self-Incrimination Clause did not apply.<sup>76</sup> The Court held that "the mere use of compulsive questioning, without more, violates the Constitution."<sup>77</sup> Justices Thomas and Scalia would have further rejected the due process claim raised by the individual who had been coercively questioned en route

72. Rossum, *supra* note 46 at 29-36. See, e.g., *Rodgers v. Tennessee*, 532 U.S. 451 (2001) (with Kennedy voting to uphold retroactive application of a decision abolishing a common-law rule concerning murder convictions and Scalia, J., dissenting); *Vieth v. Jubelirer*, 541 U.S. 267 (2003) (decision by Kennedy, J., retaining partisan redistricting as a justiciable question and Scalia, J., dissenting on grounds that such was nonjusticiable); *Lee v. Weisman*, 505 U.S. 577 (1992) (opinion by Kennedy J., and Scalia, J., dissenting from the invalidating prayer at public school graduation ceremonies); *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) (Kennedy J., concurring in decision declaring the creation of a Hasidic-dominated school district a violation of the First Amendment's Establishment Clause and Scalia, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Kennedy J., co-authoring plurality opinion and Scalia, J., dissenting); and *Romer v. Evans*, 517 U.S. 620 (1996) (opinion by Kennedy, J., and Scalia, J., dissenting). For cases in which Scalia and Kennedy agreed to the same outcome, but wrote separately, see *Texas v. Johnson*, 491 U.S. 397 (1989) (Scalia and Kennedy, JJ., concurring separately in the Court's invalidation of state flag burning statute); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (Scalia and Kennedy, JJ., concurring separately in upholding punitive damage awards); and *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990) (Scalia J., concurring in majority ruling that Kennedy, J., had joined, upholding state "clear and convincing evidence" requirement in right to die case). See also, *Troxel v. Granville*, 530 U.S. 57 (2000) (Scalia and Kennedy, JJ., dissenting separately from Court's decision upholding parental liberty rights against grandparents' claim of visitation privileges).

73. 494 U.S. 259, 276 (1990) (Kennedy, J., concurring).

74. *Id.*

75. 538 U.S. 760.

76. U.S. CONST. AMEND. V. The Fifth Amendment provides in relevant part, "No person shall be . . . compelled in any criminal case to be a witness against himself."

77. 538 U.S. at 767.



to medical treatment without having been advised of his constitutional rights.<sup>78</sup> Kennedy disagreed on both counts, prompting Thomas to accuse that this disagreement was attributable to “Justice Kennedy’s indifference to the text of the Self-Incrimination Clause, as well as a conspicuous absence of a single citation to the actual text . . . .”<sup>79</sup>

Kennedy, for his part, did not view the Self-Incrimination Clause as an “evidentiary rule” and chided his colleagues for restricting its application to circumstances leading to criminal prosecutions. “It damages the law. . . to downgrade our understanding of what the Fifth Amendment requires.”<sup>80</sup> Moreover, Kennedy’s separate opinion revealed his expansive view of due process as well as his emphasis on broad, purposive language over a specific textual provision:

In my view the Self-Incrimination Clause is applicable at the time and place police use compulsion to extract a statement from a suspect. The Clause forbids that conduct. A majority of the Court has now concluded otherwise, but that should not end this case. It simply implicates the larger definition of liberty under the Due Process Clause of the Fourteenth Amendment . . . . Turning to this essential, but less specific, guarantee, it seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person . . . . The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true *whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both.*<sup>81</sup>

While Kennedy does occasionally pay homage to the force history and tradition in resolving constitutional cases,<sup>82</sup> he recognizes the limits of discerning historical consensus and does not always find tradition dispositive.<sup>83</sup> In *Minnesota v. Carter* (2000),<sup>84</sup> a Fourth

---

78. See 538 U.S. at 774-776. In a portion of the opinion supported only by Rehnquist and Scalia, Thomas had also attempted in *Chavez* to reinstate *Glucksberg* standards under which only those rights “deeply rooted in this Nation’s history and tradition” are protected under the Due Process Clause.

79. 538 U.S. at 773, n.4.

80. *Id.* at 794.

81. *Id.* at 795-796 (Kennedy, J., concurring in part and dissenting in part) (citing *Brown v. Mississippi*, 297 U.S. 278, 285 (1936); *Palko v. Connecticut*, 302 U.S. 319 (1937); and *Rochin v. California*, 342 U.S. 165 (1952)) (emphasis added).

82. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 780-781 (2000) (Kennedy, J., dissenting) (noting that, in upholding a ban on leafleting, the majority had restricted “a mode of speech with deep roots in our Nation’s history and tradition”); *U.S. v. Bajakajian*, 524 U.S. 321, 345, 356 (1998) (Kennedy J., dissenting) (arguing that the majority’s approach “requires a reordering of a tradition existing long before the Republic” and stating his preference to “follow the long tradition of fines calibrated to the value of goods smuggled”).

83. See *Harmelin v. Michigan*, 501 U.S. 957, 997 (Kennedy, J., concurring) (stating that “[r]egardless of whether Justice Scalia or Justice White has the best of the historical argument, stare decisis counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years”); *Troxille v. Granville*, 530 U.S. 57, 96 (2000)

Amendment search and seizure case, Justice Scalia and Kennedy sparred over the historical understanding of privacy in the home. Scalia objected to what he perceived to be Kennedy's attempt to "cast doubt" on the evidence by pointing to disputes among scholars regarding common law traditions governing arrests in the home.<sup>85</sup> Additionally, Scalia disparaged Kennedy's suggestion "that, whatever the Fourth Amendment meant at the time it was adopted, it does not matter, since 'the axiom that a man's home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has *become* part of our constitutional tradition.'"<sup>86</sup>

In the context of criminal procedure protections, Kennedy was willing to incorporate *ongoing* history and tradition into an understanding of the Constitution's meaning. The rejection of a narrow, historical emphasis was also apparent in Kennedy's support for challenges against the racially-motivated use of peremptory strikes and excessive punitive damage awards. In both instances, Kennedy's acceptance of these practices, as established in tradition and common law, was circumscribed by his recognition of contemporary criticisms and the countervailing constitutional principles found in the Court's recent jurisprudence.

With regard to peremptory strikes, Justice Scalia consistently argued that, as a historical matter, the use of a limited number of dismissals of potential jurors without cause and at the unfettered discretion of trial counsel was an established practice that did not violate the text of the Sixth Amendment.<sup>87</sup> "What is true with respect to the Sixth Amendment is true with respect to the Equal Protection Clause as

---

(Kennedy, J., dissenting) (suggesting that "history, legal traditions and practices do not give us clear definitive answer"); and *Clark v. Arizona*, 126 S. Ct. 2709, 2748-49 (2006) (Kennedy, J., dissenting) (noting that "[w]hile Arizona's rule is not unique, either historically or in contemporary practice, this fact does not dispose of [the defendant's] constitutional argument").

84. 525 U.S. 83 (1998) (opinion by Rehnquist, C.J.).

85. *Id.* at 94, n.2 (Scalia, J., concurring).

86. *Id.* (quoting 525 U.S. at 100) (Kennedy, J., concurring) (emphasis added).

87. See *Holland v. Illinois*, 493 U.S. 474, 478 (1990) (opinion by Scalia, J.). Scalia wrote: "A prohibition upon the exclusion of cognizable groups through peremptory challenges have no conceivable basis in the text of the Sixth Amendment, and is without support in our prior decisions . . . ."

well," he argued.<sup>88</sup> "[T]hat explains why peremptory challenges coexisted with the Equal Protection Clause for 120 years."<sup>89</sup>

Kennedy, on the other hand, would maintain that the "exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights,"<sup>90</sup> authoring a number of rulings extending Equal Protection as grounds for challenging peremptory juror dismissal.<sup>91</sup> The consequence of this line of rulings, Scalia argued, was to "imperil a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution neither knows nor tolerates this vandalizing of our people's traditions."<sup>92</sup> For Kennedy, however, the modern reality was that ongoing discrimination in the selection of jurors cast doubt on the neutrality and dignity of judicial proceedings and could not be tolerated.

The long-standing historical practice of awarding of punitive damages initially led Kennedy to support their imposition where a jury felt warranted; thus, in *Pacific Life v. Haslip* (1990)<sup>93</sup> he agreed that "the judgment of history should govern the outcome in the case before us."<sup>94</sup> At the same time, however, Kennedy eschewed a blind adherence to the practice, observing that, while "Justice Scalia's historical approach to questions of procedural due process has much to commend it," he could not "say with the confidence maintained by Justice Scalia . . . that widespread adherence to a historical practice always forecloses further inquiry when a party challenges an ancient institution or procedure as violative of due process."<sup>95</sup> Rather, he explained, "[o]ur legal tradition is one of *progress from fiat to rationality*."<sup>96</sup>

88. See *Powers v. Ohio*, 499 U.S. 400, 429 (1991) (Scalia J., dissenting). Scalia would maintain that "[s]ince all groups are subject to the same peremptory challenge (and will be made the object of it, depending on the nature of the particular case) it is hard to see how any group is denied equal protection." *J.E.B. v. Alabama*, 511 U.S. 127, 159 (1994) (Scalia, J., dissenting). But see *J.E.B. v. Alabama*, 511 U.S. 127, 151 (1994) (opinion by Blackmun, J.) (Kennedy, J. concurring in a decision extending rulings on peremptory challenges to claims of gender discrimination). Scalia dissented in each of these cases.

89. *J.E.B. v. Alabama*, 511 U.S. 127, 159 (1994) (Scalia J., dissenting).

90. *Holland v. Illinois*, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring).

91. See *Powers v. Ohio*, 499 U.S. 400 (1991) (opinion by Kennedy, J.) (holding that the use of peremptories to exclude otherwise qualified voters on the basis of race violated the Equal Protection Clause; and recognizing standing of white criminal defendant to challenge the exclusion of black voters); *Edmonson v. Leesville Concrete*, 500 U.S. 614 (1991) (extending rulings regarding peremptory challenges to civil cases); and *Campbell v. Louisiana*, 523 U.S. 392 (1998) (extending rulings regarding peremptory challenges for discrimination in the selection of grand jury forepersons).

92. 511 U.S. at 163.

93. 499 U.S. 1 (1990) (opinion by Blackmun, J.).

94. *Id.* at 40 (Kennedy, J., concurring).

95. *Id.*

96. *Id.* (emphasis added).

Moreover, whereas Scalia could find no textual support for the Court's intervention, Kennedy could countenance that the Due Process Clause imposed a substantive restriction on punitive damages that was judicially enforceable. In his *TXO Production v. Alliance Resources* (1992)<sup>97</sup> concurrence, Kennedy conceded that punitive damages could be so excessive as to be "unfair, arbitrary, or irrational" in violation of the Due Process Clause.<sup>98</sup> On that view, and despite Scalia's vigorous dissent, Kennedy joined the majority in *BMW v. Gore* (1996),<sup>99</sup> invalidating a punitive award of four million dollars against an automotive dealer for failure to inform a customer of pre-delivery damage to a purchased vehicle that had totaled less than one-thousand dollars. He extended this logic in *State Farm Mutual Auto Insurance v. Campbell* (2003),<sup>100</sup> authoring the majority decision which, while declining to impose a "bright-line ration" regarding maximum-allowable boundary of punitive awards, nevertheless concluded that "our jurisprudence and the principle it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."<sup>101</sup> Scalia dissented from this "novel" conclusion, adhering to his position that text and tradition precluded judicial intervention in excessive punitive damage awards which, he argued, had *always* been regarded as controversial but constitutional.<sup>102</sup>

---

97. *TXO Prod. v. Alliance Res.*, 509 U.S. 443 (1992) (opinion by O'Connor, J.). The lone dissenter in *Haslip*, Justice O'Connor had warned against the dangers of unchecked punitive awards. The award of damages, she cautioned, was a "powerful weapon" which remained largely unchecked by meaningful jury instruction. While arguing that the states be given ample room for experimentation, O'Connor, nevertheless urged that current practices of awarding punitive damages be reevaluated and more meaningful procedural protections be put into place. O'Connor renewed these concerns in *TXO Productions*, emphasizing that "jurors are not infallible guardians of the public good." 509 U.S. at 473 (O'Connor, J., dissenting). The risk of prejudice led O'Connor to the conclusion that the jury had been motivated by "considerations inconsistent with due process." *Id.* In making this point, she cited Justice Kennedy three times in as many paragraphs. For his part, Kennedy openly acknowledged that O'Connor's view that the jury was potentially motivated by an antipathy toward a wealthy corporation was certainly plausible. His reading of the record, however, suggested a different explanation which was not violative of the Due Process Clause. 509 U.S. at 568 (Kennedy, J. concurring). Nevertheless, there was a clear dialogue between the two that suggested Kennedy was receptive to persuasion.

98. 509 U.S. at 469 (Kennedy, J., concurring).

99. *BMW v. Gore*, 517 U.S. 559 (opinion by Stevens, J.). See also *Honda Motor v. Oberg*, 512 U.S. 414 (1994) (opinion by Stevens, J.) (Kennedy joins decision holding that a state law restricting judicial review of punitive damage awards to only those cases where there was "no evidence" to support the verdict varied sufficiently from traditional procedural protects as to violate standards procedural due process.).

100. 538 U.S. 408 (2003) (opinion by Kennedy, J.).

101. *Id.* at 425.

102. *Id.* at 429.

B. *Kennedy and the 'Evolving Standards of Decency'*

Justice Kennedy's move away from pure reliance on text and tradition and evolution toward the "living Constitution" is even more clearly demonstrated in his interpretation of the Eighth Amendment ban on "cruel and unusual punishment."<sup>103</sup> The interpretation of the Eighth Amendment exemplifies the division between adherents and opponents of a "living Constitution." Judicial approbation of capital punishment has been long-based on the textual references and historical practices which suggests that capital punishment was not considered to be "cruel and unusual" in violation of the Constitution.<sup>104</sup> However, in the first case in which the Court rejected a legislatively authorized form of punishment, it ruled that the precise definition of cruel and unusual was not "fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."<sup>105</sup> In its classic statement in *Trop v. Dulles* (1958), the Court reaffirmed that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>106</sup> These early cases further introduced the concept of proportionality by evaluating the severity of the punishment in relation to the underlying offense.

Early in his tenure, Kennedy recognized a limited proportionality requirement under the Eighth Amendment which *stare decisis* compelled. Writing in concurrence in *Harmelin v. Michigan* (1991),<sup>107</sup> he stressed the necessity of deferring to the determinations of the legislative branch in criminal sentencing.<sup>108</sup> When considering whether capi-

103. The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted." U.S. CONST. AMEND. VIII.

104. Members of the Court have relied on textual references in the Constitution to the deprivation of "life, liberty and property" consistent with the due process, in the Fifth and Fourteenth Amendments and the Fifth's prohibition on putting one twice in jeopardy of "life or limb" as well as a long history of legislative practice to conclude that the death penalty is not *per se* unconstitutional. See *Gregg v. Georgia*, 428 U.S. 238 (1976) (opinion by Stewart, J.).

105. *Weems v. United States*, 217 U.S. 349, 378 (1910).

106. 356 U.S. 86, 101. The Court "scrutinized the severity of the penalty in relation to the offense, examined the practices of other civilized nationals of the world, and concluded that . . . [expatriation] was an excessive and, therefore, an unconstitutional punishment" for a conviction of wartime desertion (408 U.S. at 328).

107. 501 U.S. 957 (1991).

108. Kennedy concurred in the Rehnquist Court's decision upholding the imposition of mandatory life sentencing for a narcotics conviction against Eighth Amendment challenge, failing to find mandatory sentencing in *noncapital* cases unconstitutional and rejecting the argument that life imprisonment was disproportionate or excessive. The Eighth Amendment did not, in his view, enact any particular penological theory, and could not be used to discount the legislative conclusion that harsh sentencing for narcotics violations served important goals of retribution and deterrence: The "Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine – in terms of violence, crime and social displacement – is momentous enough to warrant the deterrence and retribution of a life sentence without parole." 501 U.S. at 1003. He recognized that, under the Eighth

tal punishment was a disproportionate punishment for certain classes of offenders, Kennedy thus initially voted with the conservative bloc. In *Penry v. Lynaugh*,<sup>109</sup> he supported the continued execution of the mentally retarded and, in *Stanford v. Kentucky*,<sup>110</sup> he similarly voted to uphold the application of the death penalty to sixteen and seventeen-year-old offenders.

In a major jurisprudential shift that took place without Kennedy's participation, a plurality instituted a categorical ban on execution of fifteen-year-old offenders. In *Thompson v. Oklahoma* (1988)<sup>111</sup> a plurality reasoned that a person who had not yet reached the age of sixteen did not possess the requisite maturity to be fully culpable for their actions. The Court's conclusion was informed by a survey of state practices regarding the treatment of minors on a number of issues, finding "complete or near unanimity among all 50 states and the District of Columbia in treating a person under 16 as a minor for several important purposes," not the least of which was demarcation between juvenile and adult criminal prosecution.<sup>112</sup> The opposition to juvenile execution adopted by variety of legal organizations further supported the Court's finding of a consensus against the execution of minors. Justice Stevens further noted that world-wide the death penalty had been mostly abolished but, that in those few countries where it had been retained, juvenile executions were generally excluded.<sup>113</sup> Finally, a review of actual executions led "to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."<sup>114</sup>

Despite having catalogued social indicators, the *Thompson* plurality maintained that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty."<sup>115</sup> The plurality opinion made clear that its decision to invalidate the execution of fifteen year olds was predicated upon its own authority to interpret the Constitution's vague command against "cruel and unusual punishment." Applying the principles of proportionality to the understanding of adolescent development, the majority concluded that the

---

Amendment, absolute proportionality in sentencing was not required; rather, the Amendment forbade only sentencing which was grossly disproportionate to the offense.

109. 492 U.S. 302 (1989) (opinion by O'Connor, J.). See also *Washington v. Harper*, 494 U.S. 210 (1990) (opinion by Kennedy, J., upholding the involuntary administration of medication to mentally ill prisoner where the state demonstrates a legitimate penological interests) and *Penry v. Louisiana*, 498 U.S. 38 (1990) (Kennedy joins unanimous decision remanding challenge to the administration of medication used to make an inmate fit for execution).

110. 492 U.S. 361 (1989) (opinion by Scalia, J.).

111. 487 U.S. 815 (opinion by Stevens, J.).

112. *Id.* at 824.

113. *Id.* at 830.

114. *Id.* at 832.

115. *Id.* at 833 (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)).

legislative purposes of retribution and deterrence underlying the death sentence were inapplicable given the diminished capacity of youthful offenders.<sup>116</sup> Justice O'Connor concurred with the judgment, voting to invalidate the sentence on the narrower grounds that the state sentencing statute had not given proper consideration to the question of juvenile execution.<sup>117</sup> Although acknowledging that a "national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist," O'Connor still could not find sufficient evidence to allow the Court to displace the legislative judgment of those states authorizing juvenile executions.<sup>118</sup> *Thompson* thus declared the execution of fifteen-year-olds unconstitutional, leaving unresolved the constitutionality of executing minors who had not yet turned eighteen.

Just a year later, in *Stanford v. Kentucky*,<sup>119</sup> a plurality refused to extend *Thompson's* prohibition, effectively retaining sixteen as the minimum age for constitutional execution. Authored by Scalia, *Stanford* applied the "evolving standards of decency," yet focused rather narrowly on state legislative practice. Rather than broadly considering the disparate treatment of juveniles under state law, Scalia focused primarily on the number of states which authorized juvenile execution, further emphasizing that "individualized consideration is a constitutional requirement."<sup>120</sup> *Stanford* did not consider public opinion, the views of professional organizations or interest group advocacy as legitimate evidence of a national consensus, giving primacy instead to the narrower consideration of legislative practice. Even the evidence that states only infrequently executed minors did not persuade the plurality that a majority of legislatures viewed the practice as abhorrent. Rather than indicating "that death should never be imposed on offenders under 18 . . .," Scalia argued non-enforcement more likely revealed only that "prosecutors and juries believe that it should be rarely imposed."<sup>121</sup> Concluding that it is "American conceptions of decency that are dispositive," *Stanford* also rejected reliance on international norms, deeming such evidence irrelevant to its assessment of what constitutes cruel and unusual punishment.<sup>122</sup>

---

116. *Id.* at 834-38.

117. *Id.* at 856-59.

118. *Id.* at 848-49.

119. 492 U.S. 361 (1989) (decided together with *Wilkins v. Missouri*, 492 U.S. 361). Justice O'Connor concurred in the judgment, finding insufficient evidence of a national consensus that the execution of minors who were sixteen or older at the time of the offense constitutes cruel and unusual punishment.

120. *Id.* at 375 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

121. *Id.* at 374 (emphasis in original).

122. *Id.* at 370, n.1 (emphasis added). Justice Brennan, joined by Marshall, Stevens and Blackmun dissented on this point, arguing that the "choices of governments elsewhere in the

On the same day that the Court rejected a categorical ban on the execution of 16–18 year-olds, it also considered whether executing the mentally retarded violated Eighth Amendment standards of decency. In *Penry v. Lynaugh*,<sup>123</sup> a majority declared that the Eighth Amendment erected no categorical bar to the execution of the mentally challenged, provided that the individual met the legal requirements for competency to stand trial. Writing for the Court, O'Connor gave particular deference to legislative practices, noting that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."<sup>124</sup> Without sufficient legislative evidence of a consensus *against* such executions, O'Connor could not conclude that executing the mentally retarded constituted cruel and unusual punishment. Kennedy voted with the majority in both the *Stanford* and *Penry* cases.

Beginning in 2002, however, Kennedy's assessment of social consensus regarding the death penalty for the mentally retarded would change, triggering another major shift in the Court's jurisprudence. Surveying the trends in state legislative practice post-*Penry* in *Atkins v. Virginia* (2002),<sup>125</sup> Stevens found it "fair to say that a national consensus has developed against [executing those with mental impairment]."<sup>126</sup> The primary evidence on which the majority's conclusion was based was the increasing number of state laws rendering this category of offender death-ineligible. Stevens additionally reviewed scientific and psychological literature detailing the diminished capacity of those classified as mentally retarded; medical consensus that such offenders do not possess requisite culpability led the majority to discount the utility of traditional legislative purposes of retribution and/or deterrence justifying the ultimate sanction. "[U]nless the imposition of the death penalty on a mentally retarded person measurably contributes to both of these goals," the Court concluded that execution of the mentally retarded "is nothing more than the purposeless imposition of pain and suffering, and hence an unconstitutional punishment."<sup>127</sup> The majority's ruling in *Atkins* was further bolstered by its cursory mention of public opinion and of international trends in a footnote to the opinion.<sup>128</sup>

---

world also merit attention as indicators [of] whether a punishment is acceptable in a civilized society" *Id.* at 384.

123. *Stanford*, 492 U.S. at 302.

124. *Id.* at 330-31.

125. 536 U.S. 304 (opinion by Stevens, J.).

126. *Id.* at 316.

127. *Id.* at 319-320 (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)).

128. *Id.* at 316, n.21.



The Court revisited the issue of the juvenile death penalty in *Roper v. Simmons* (2005),<sup>129</sup> similarly finding a national consensus had emerged to invalidate the practice of executing those who were not yet eighteen years of age at the time the offense was committed. This time, Stevens assigned authorship of the majority opinion to Justice Kennedy. The starting point of Kennedy's inquiry embraced the principles of evolving social standards expressed in *Trop v. Dulles*.<sup>130</sup> In an observation that would have pleased Justice Brennan, Kennedy began his *Roper* decision noting that

By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to the "evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.<sup>131</sup>

The overall evidence, according to Kennedy, that a national consensus against the juvenile death penalty had emerged, was consistent with established Eighth Amendment principles which limit the imposition of the ultimate penalty to all but "a narrow category of crimes and offenders."<sup>132</sup> As in *Atkins*, the Court found that fewer jurisdic-

---

129. 543 U.S. 551 (2005) (opinion by Kennedy, J.). Several members of the Court had been pushing to revisit the issue. In 2002, the Supreme Court had rejected a stay of execution in the case of *Patterson v. Texas*, 536 U.S. 984 (2002). In separate dissents, Justice Stevens and Justice Ruth Bader Ginsburg, both joined by Justice Stephen Breyer, advocated revisiting the constitutionality of the juvenile death penalty. Ginsburg referenced the intervening *Atkins* ruling while Stevens pointed to an "apparent consensus that exists among the States and the international community against the execution of a capital sentence imposed on a minor." 536 U.S. at 984. Shortly thereafter in *In Re Stanford*, 537 U.S. 968 (2002), the petitioner's whose conviction was upheld in *Stanford* brought to the Court a *habeas* petition challenging the constitutionality of juvenile execution. Once again, the Stevens-Ginsburg-Breyer trio dissented from the majority's denial of certiorari and called directly for the reversal of precedent. "The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society," Stevens wrote. "We should put an end to this shameful practice." 537 U.S. at 972.

130. *Trop v. Dulles*, 356 U.S. 86 (1958).

131. 543 U.S. at 560-61 (quoting *Trop v. Dulles*, 356 U.S. at 100-101 (1958)).

132. *Id.* at 568 (noting the susceptibility of juveniles to outside influences, Kennedy cited with approval research that avers that "youth is more than a chronological fact." 543 U.S. at 569 (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982) at 115). He further observed that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* at 573. At the same time, however, the opinion recognized that "a line must be drawn," and found that "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Id.* at 574. He explained that juveniles, as a class, were different from

tions supported execution of this category of offender. Kennedy's tally revealed a strikingly similar pattern in the decreasing number of states to retain execution for juveniles. The only notable difference in the comparison of trends for the mentally retarded and juveniles, he found, was that, for the former, the number of states that had moved in the direction of abolition following *Penry* (sixteen) was greater than the number that had similarly withdrawn support of juvenile executions following *Stanford* (five). Kennedy's explanation for the less dramatic rate of change regarding juvenile executions was that repudiation of it was in effect even before *Stanford* had been announced. "If anything, this [data] shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier than the impropriety of executing the mentally retarded."<sup>133</sup> In any case, the Court found consistency in both the direction and rate of change. Thus, although the basis on which he determined that the Eighth Amendment "now" forbade the execution of juveniles were the objective referents he found in legislative enactments and state practice, Kennedy's assessment of those indicators was based on the *trends*, the *evolving* recognition that the practice was repugnant to the Constitution. "[T]hose indicia have changed," he wrote, and with them, so did Kennedy's vote on the constitutionality of executing juvenile offenders.<sup>134</sup>

Scalia's vitriolic dissent, joined by Thomas and Rehnquist, characterized the ruling as a "mockery" of precedent, displacing legislative judgment on the "flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists."<sup>135</sup> Discounting the twenty states that have abolished the death penalty altogether, Scalia argued that the "consensus" against juvenile executions fell far short of a majority (18 states).<sup>136</sup>

---

other offenders: their "lack of maturity and underdeveloped sense of responsibility;" their vulnerability "to negative influences and outside pressures, including peer pressure;" and the transitory nature of their developing characters, all "render suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 570. Although, "in general, we leave to legislatures the assessment of the efficacy of various criminal penalty schemes," the Court argued that the "absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* at 621. This "diminished culpability" of juvenile offenders lessened the force of legislative justifications for imposing the severe penalty of death.)

133. *Id.* at 566-67.

134. *Id.* at 573. The Court also found evidence of congressional disapprobation, noting that the Federal Death Penalty Act of 1994 did not grant or authorize juvenile executions (18 U.S.C. §3591). *Roper* dismissed the United States' reservation in signing the International Covenant on Civil and Political Rights (ICCPR) (entered into force Mar. 23, 1976) in 1992, arguing that it "provides only minimal evidence that there is not now a national consensus against juvenile executions." *Id.* at 567.

135. *Id.* at 608.

136. *Id.* at 609.

Beyond overruling the policy endorsed by *Stanford*, which in Scalia's view allowed for individualized consideration of defendants and respected legislative support for juvenile executions, *Roper* had repudiated the deferential approach taken in that case. He accused the Court of "proclaim[ing] itself the sole arbiter of the Nation's moral standards — and in the course of discharging that awesome responsibility purport[ing] to take guidance from the views of foreign courts and legislatures."<sup>137</sup> Arguing that a lack of judicial deference in sentencing had "no foundation in law," Scalia wrote that the "reason for . . . legislative primacy is obvious and fundamental: 'In a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'"<sup>138</sup> By invoking foreign materials in support of its non-deferential judgment, Scalia believed the Court had demonstrated infidelity to American principles, affirming nothing more than the "Justice's own notion of how the world ought to be . . . ."<sup>139</sup>

### C. *Kennedy's Support for Substantive Due Process and a Broad Conception of Liberty*

The differences of opinion between Kennedy and Scalia regarding how the Supreme Court ought to approach constitutional interpretation — as a living document or one whose meaning is fixed according to text and tradition — have been perhaps most evident in the Court's substantive due process jurisprudence. Under conventional due process analysis, tradition is the touchstone of fundamental rights and "[t]he use of tradition to define constitutional rights . . . remains a major tenet of modern jurisprudential orthodoxy."<sup>140</sup> Most modern jurists, therefore, give some level of deference to tradition and history in the ascertainment of a claimed right's fundamentality.<sup>141</sup> Yet, the Justices vary dramatically in their interpretation of tradition and history, in whether they conceive of history and tradition as static or evolving and whose traditions they are willing to consider.

One foundation for Kennedy's potential receptivity to the concept of a "living Constitution" has been his support for substantive due process and expansive view of the liberty clause of the Fourteenth

137. *Id.* at 608.

138. *Id.* at 615 (quoting *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976)).

139. *Id.* at 628.

140. Robert F. Nagel, *Disagreement and Interpretation*, LAW. & CONT. PROBS., Autumn 1993, at 19.

141. *Id.* Nagel writes: ("[T]he range of Justices who in modern times have relied on tradition to define rights is impressive; it includes Earl Warren, William Douglas, Arthur Goldberg, John Marshall Harlan, Warren Burger, Lewis Powell, Thurgood Marshall, Harry Blackmun, William Rehnquist, Antonin Scalia, Anthony Kennedy, Sandra Day O'Connor and John Paul Stevens." *Id.*)

Amendment. At the time of his appointment Kennedy was quite candid in acknowledging his support for substantive due process.<sup>142</sup> In his view, the term “liberty,” was intended to be a “spacious phrase.”<sup>143</sup> Central to the American concept of the rule of law, he explained, was the belief “[t]hat there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go.”<sup>144</sup> Thus, he argued that “it may well be the better view, rather than to talk in terms of unenumerated rights to recognize that we are simply talking about whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts.”<sup>145</sup> The difficult question, he admitted was how to determine what principles best guide the demarcation of rights protected as an aspect of one’s liberty. “There is a line,” he explained, “[i]t is wavering; it is amorphous; and it is uncertain.”<sup>146</sup> But [discerning that line] is the judicial function.”<sup>147</sup> He indicated that “we are very much in a stage of evolution and debate” – a debate in which “the public and the legislature have every right to contribute.”<sup>148</sup>

Kennedy had expressed similar views in a 1986 speech entitled *Unenumerated Rights and the Dictates of Judicial Restraint* in which he stated that, while

[o]ne can conclude that certain essential, or fundamental, rights should exist in any just society . . . [it] does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.<sup>149</sup>

Yet, when asked for clarification on the question of whether the Court should *enforce*—be it via the liberty clause or some other constitutional provision—a constitutional right to marry and raise children, Kennedy responded, “I think that most Americans think that they have those rights, and I hope that they do. Whether or not they are enforceable by the courts in those specific terms is a matter that remains open.”<sup>150</sup>

---

142. “[T]here is a substantive component to the due process clause,” he stated, and “I think the value of privacy is a very important part of that substantive component.” *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. 165 (1987) [hereinafter *Hearings*].

143. See *id.* at 86.

144. *Id.*

145. *Id.* at 87.

146. *Id.* at 86.

147. *Id.*

148. *Id.* at 166.

149. *Id.* at 374.

150. *Id.* at 170.

Invited to expand upon the appropriate judicial standards in “determining which private consensual activities are protected by the Constitution and which are not,” Kennedy gave a lengthy reply:

A very abbreviated list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of the person to obtain his or her own self-fulfillment, the inability of the person to reach his or her own potential.

On the other hand, the rights of the State are very strong indeed. There is the deference that the Court owes to the democratic process, the deference that the Court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, and the respect that must be given the legislature because it knows the values of the people.<sup>151</sup>

He explained that the “task of the judge is to try to find objective referents for each of those categories.”<sup>152</sup> Whether due process served as a sort of “blank check,” however, Kennedy demurred, answering “certainly not.”<sup>153</sup>

In his early tenure on the Court, Kennedy’s decision making exhibited an initial reticence toward an expansive recognition of rights consistent with his reply that due process was not open-ended. He voted to preserve the privacy and liberty interests that the Court had previously announced, but, with the exception of his vote to join a majority in recognizing that right to “life” includes a reciprocal, limited “right to die,” he generally eschewed the recognition of any new “life” or “liberty” interests and was deferential toward competing state interests.<sup>154</sup>

His opinion for the Court in *Medina v. California* (1991),<sup>155</sup> for example, upheld a state requirement that a defendant who alleges that he is incompetent to stand trial bears the burden of proof in demonstrating his incompetence by a preponderance of the evidence as fundamentally fair. Kennedy explained that, under established law, the criminal prosecution of a person who was legally incompetent was for-

---

151. *Id.* at 180.

152. *Id.*

153. *Id.* at 173.

154. See *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990) (opinion by Rehnquist, C.J.). See also *Washington v. Harper*, 494 U.S. 210, 221-222 (1989). Just as the Court refrained from expanding the *life* interests protected by the Fourteenth Amendment, it similarly repudiated invitations to announce any new *liberty* protections. See *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454 (1988); *Deshaney v. Winnebago County*, 489 U.S. 189 (1989); *Siebert v. Gilley*, 500 U.S. 226 (1991); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Sandin v. Conner*, 515 U.S. 472 (1995).

155. 505 U.S. 437.

bidden by the Due Process Clause.<sup>156</sup> But, what was *not* established by either law or tradition was a burden on the state in demonstrating competency as a legal requirement for prosecution. As such, there was no basis to indicate that a minimal, requisite showing by the defendant violated a “principle of justice so rooted in the traditions and conscience of our people as to be fundamental.”<sup>157</sup>

*Medina* further declined to accept a balancing approach to the adjudication of Due Process claims<sup>158</sup> which, in Kennedy’s view, was inappropriate in the realm of criminal law in which states exercise primary authority. Kennedy insisted that “because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area.”<sup>159</sup> So long as the State provided procedures which would allow the defendant to present his competency claims fairly, Kennedy was satisfied that the constitutional obligation imposed by the Due Process Clause had been met.<sup>160</sup>

Deference to the state was apparent as well in Kennedy’s decision to join the Court in *Michael H. v. Gerald D.* (1989).<sup>161</sup> The case involved a biological father’s claim of a substantive right to parental relationship with a child where state law restricted parental status to the individual legally married to mother at the time of birth. Writing for the Court, Scalia explained that the purpose of the paternal presumption law was to ensure the legal legitimacy of children born in wedlock and to protect the privacy and integrity of the marital rela-

156. See *Drope v. Missouri*, 420 U.S. 162 (1976).

157. *Medina*, 505 U.S. at 445 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)).

158. See *Mathews v. Elridge*, 424 U.S. 319 (1976). See also *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (opinion by Stevens, J.) (Kennedy joins unanimous ruling that a state requirement that defendant establish incompetency by “clear and convincing evidence” violated the due process clause.). The Court in *Cooper* applied the standards established in *Medina* in determining that the clear and convincing standard did infringe protections rooted in traditional principles of justice. *Cooper*, 517 U.S. at 364.

159. *Medina*, 505 U.S. at 446. Kennedy could not conclude that it was fundamentally contrary to the ideal of liberty to require that a defendant prove the assertion of legal incompetence by the minimal standard of “preponderance of the evidence.” See also *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (opinion by Stevens, J.) (Kennedy joins unanimous ruling that a state requirement that defendant establish incompetency by “clear and convincing evidence” violated the due process clause.). The Court in *Cooper* applied the standards established in *Medina* in determining that the clear and convincing standard did infringe protections rooted in traditional principles of justice. *Cooper v. Oklahoma*, 517 U.S. at 364.

160. *Medina*, 505 U.S. at 443. As Justice Kennedy explained:

The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the opened-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.

161. 491 U.S. 110 (opinion by Scalia, J.).

tionship.<sup>162</sup> Reviewing the historical record, Scalia found no tradition of parental rights outside the marriage which would indicate a liberty interest “so deeply embedded within our traditions as to be a fundamental right.”<sup>163</sup>

Significantly, although Kennedy joined in the Court’s judgment in *Michael H.*, he refused to join footnote six of the opinion and signed onto O’Connor’s concurrence which objected that portion of the ruling. Footnote six argued that the historical analysis of traditional liberty interests be conducted at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”<sup>164</sup> and was a direct rejection of Brennan’s alternative, broader approach that sought to view the Constitution as a “living charter.”<sup>165</sup> Although he did not elect to join Brennan in dissent, Kennedy was not willing to “foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”<sup>166</sup>

Kennedy’s vote in *Michael H.* appeared to signal rejection of a historically cabined methodology in favor of a less-rigid balancing approach, representing a critical turning point in his jurisprudence. Yet, by ascribing to the majority opinions in the 1997 cases *Vacco v. Quill*<sup>167</sup> and *Washington v. Glucksberg*,<sup>168</sup> upholding state laws criminalizing physician-assisted suicide, Kennedy committed himself to the proposition that the

[e]stablished method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed . . . .” Second, we have required in substantive due process cases a “careful description” of the asserted fundamental liberty interest.<sup>169</sup>

Although it failed to circumscribe asserted rights to the most specific level of generalization, the “*Glucksberg* test” nevertheless sought to restrict the protection afforded by the Due Process Clause to a carefully defined category of rights grounded in history and tradition.

---

162. *Id.* at 126.

163. *Michael H.*, 491 U.S. at 125.

164. *Id.* at 127-28, n.6.

165. *Id.* at 141.

166. *Id.* at 132 (O’Connor, J., concurring).

167. 521 U.S. 793.

168. 521 U.S. 702. In *Glucksberg*, the Court concluded that “the asserted ‘right’ to assistance in committing suicide [was] not a fundamental liberty interest protected by the Due Process Clause.” *Id.*

169. *Id.* at 720-21.

Yet, despite having signed onto *Glucksberg*, however, Kennedy would increasingly adopt a more evolving and less historically-bounded concept of due process.<sup>170</sup> When the Court revisited the issue of competency standards in *Cooper v. Oklahoma* (1996)<sup>171</sup> – this time addressing whether a state could require criminal defendants to demonstrate their lack of competency by “clear and convincing evidence” – Kennedy joined the majority in finding a Due Process violation. Stevens’ opinion for the Court looked to both “traditional and modern practices.”<sup>172</sup> Detailing the current status of state laws and legislative trends, he concluded that “[t]he near-uniform application of a standard that is more protective of the defendant’s rights than Oklahoma’s clear and convincing evidence rule supports our conclusion that the heightened standard offends a principle of justice that is deeply ‘rooted in the traditions and conscience of our people.’”<sup>173</sup>

Scalia, surprisingly, did not object in *Cooper* to the Court’s reliance on contemporary practices or its indication that historical traditions were probative although not determinative of the Court’s judgment. But he did object in *County of Sacramento v. Lewis* (1998)<sup>174</sup> when a majority failed to apply *Glucksberg*’s prescribed due process analysis in evaluating the claim that death resulted from a high speed police chase. Proclaiming that the majority’s application of the “shocks the conscience” standard – under which police behavior that is so egregious or shocking to the conscience as to violate the concept of fundamental fairness is deemed a denial of Due Process – a return to atavistic, arbitrary method of constitutional interpretation, Scalia turned instead to *Glucksberg* and the specificity of *Michael H.*<sup>175</sup> Finding no historically-grounded “substantive right to be free from ‘deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender,’” he concurred in the Court’s judgment that no violation of due process had occurred.<sup>176</sup>

---

170. For statements on an evolving concept of due process, see *Poe v. Ullman*, 367 U.S. 497, 542 (1967) (Harlan, J., dissenting) (referring to tradition as a “living thing.”); *Rochin v. California*, 342 U.S. 165, 172 (1952) (arguing that the Court must be “mindful of reconciling the needs both of continuity and change in a progressive society”); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (arguing that “[r]epresenting as it does a living principle, due process is not confined within a permanent catalog of what may at a give time be deemed the limits or essentials of fundamental rights”); *Duncan v. Louisiana*, 391 U.S. 145, 183 (1968) (Harlan J., dissenting) (noting that in due process analysis, “old principles are subject to re-evaluation in light of later experiences”).

171. 517 U.S. 348 (opinion by Stevens, J.).

172. *Id.* at 356.

173. *Id.* at 362 (quoting *Medina v. California*, 505 U.S. 437, 445 (1992)). Interestingly, *Cooper* was a unanimous ruling; Justice Scalia did not dissent despite the Court’s reliance on contemporary practice.

174. 523 U.S. 833 (opinion by Souter, J.).

175. *Id.* at 861.

176. *Id.* at 862 (Scalia, J., concurring in judgment).



Kennedy wrote in concurrence to reiterate that “[i]t can no longer be controverted that due process has a substantive component.”<sup>177</sup> He agreed that in this case the “shocks the conscience” standard was an appropriate method of inquiry for consideration of the claim. He did not share Scalia’s concerns for arbitrary application, as in his view, the test was sufficiently well established in the case law to provide a “beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning.”<sup>178</sup> Most importantly, while expressing that he found Scalia’s historical authorities “persuasive,” he added that “. . . history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>179</sup> There is room as well for an objective assessment of the necessities of law enforcement.”<sup>180</sup>

Kennedy’s willingness to depart from historically bound conceptions of due process and to incorporate an objective assessment of present realities was evident as well in his dissent in *Troxel v. Granville* (2000).<sup>181</sup> In that case, the Court invalidated state laws allowing petitions for visitation privileges from “any person” when serving “the best interests of the child,” as a violation of parental liberty which, it conceded, was “perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>182</sup> Concerned that the state visitation law presumed traditional families to be the norm and discounted the importance of non-parental relationships to a minor child, Justice Kennedy dissented. Despite the recognition that had heretofore been given to parental liberty in the raising of children, he argued that that liberty was not absolute. The interests of the child needed to be factored into the equation: “The almost infinite variety of family relationships that pervade our *ever-changing society* strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent’s liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.”<sup>183</sup>

Moreover, Kennedy’s *Troxel* dissent did not find “clear and definitive” answers regarding the scope of parental liberty in relation to third party visitation rights in “[o]ur nation’s history, legal tradition or

---

177. *Id.* at 856 (Kennedy, J., concurring).

178. *Id.* at 857 (Kennedy, J., concurring) (citing *Collins v. City of Harker Heights*, 503 U.S. 115 (1992)).

179. *Lewis*, 523 U.S. at 857.

180. *Id.* at 857 (Kennedy, J. concurring). His conclusion would, furthermore, aver to the “present needs” of law enforcement. *Id.* at 858.

181. 530 U.S. 57 (opinion by O’Connor, J.).

182. *Id.* at 65.

183. *Id.* at 90 (Stevens, J. dissenting) (emphasis added).

practices”<sup>184</sup> – the authority to which the *Glucksberg* analysis was confined. The absence of a third party’s historical right to petition for visitation, in his view, did not equate a parental “constitutional right to prevent visitation in all cases not involving harm.”<sup>185</sup> As such, Kennedy turned to contemporary practices; finding an “almost universal adoption of the best interests standard,” he could not support a fundamental right of parents to be free from state laws giving hearing to visitation petitions.<sup>186</sup>

Receptivity toward social trends was also readily apparent in his refusal to overturn the Court’s landmark abortion ruling *Roe v. Wade*.<sup>187</sup> Although in the first several abortion-related cases in which he participated, he voted in favor of the states’ asserted interests in the regulating of abortion,<sup>188</sup> when the opportunity to dispense with *Roe* was squarely presented, Kennedy refused. In *Planned Parenthood v. Casey*,<sup>189</sup> the Court’s three moderate conservatives—O’Connor, Kennedy and Souter—coauthored an opinion that modified the framework of *Roe* while reaffirming its central holding. In so doing, the plurality adopted an expansive view of due process, one which rejected *Michael H.*’s most-specific-level-of-generalization standard as “inconsistent with our law.”<sup>190</sup> Instead, *Casey* adopted the position that “tradition is a living thing,” requiring the Court to exercise reasoned judgment in evaluating the history from which tradition was born “as well as the traditions from which it broke.”<sup>191</sup>

This dynamic view of due process counseled regard for “[m]atters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>192</sup> The plurality wrote that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>193</sup> This statement (sometimes referred to as the “mystery of life” passage) extolled the evolving nature of rights. Kennedy’s support for the passage, and probable authorship, indicates an approach that is vastly different from that manifested in *Michael H.* and *Glucksberg*. *Casey*’s proclamation that “[l]iberty finds no refuge

---

184. *Id.* at 96 (Kennedy, J. dissenting).

185. *Id.* at 97.

186. *Id.* at 100.

187. 410 U.S. 113 (1973).

188. See *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

189. 505 U.S. 833 (1992).

190. *Id.* at 847.

191. *Id.* at 850 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)).

192. *Id.* at 851.

193. *Id.*

in a jurisprudence of doubt”<sup>194</sup> and recognition that “[a]n entire generation has come of age free to assume *Roe*’s concept of liberty,”<sup>195</sup> further reveals the importance of sensitivity toward contemporary values in constitutional interpretation. Thus, as one author argues, “*Planned Parenthood v. Casey* was as much about the legitimacy of constitutional change as it was about the right to abortion created by *Roe*.”<sup>196</sup> Indeed, the Justices of the plurality spoke directly to the issue of constitutional legitimacy in their closing remarks:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.<sup>197</sup>

The promise of liberty had been denied homosexuals in *Bowers v. Hardwick* (1986),<sup>198</sup> when the Court rejected the claim that the Constitution protected a right to engage in homosexual activity. Relying heavily on deference to legislative tradition and concluding that “[p]roscriptions against that conduct have ancient roots,” *Bowers* denied that there was a “right to engage in homosexual sodomy.”<sup>199</sup> Writing in dissent, Justice Blackmun voiced his hope that the “Court soon [would] reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.”<sup>200</sup>

A decade later, in the case of *Romer v. Evans*,<sup>201</sup> a majority would leave *Bowers* momentarily undisturbed but would conclude that intolerance and animosity toward gays and lesbians was not a legitimate basis for a state constitutional amendment proscribing “all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their ‘homosexual, lesbian or bisexual orientation, conduct, practices or relationship.’”<sup>202</sup> Writing for the Court, Kennedy determined that the enactment failed

---

194. *Id.* at 844.

195. *Id.* at 860.

196. Horwitz, *supra* note 44 at 35.

197. *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992).

198. 478 U.S. 186 (1986) (opinion by White, J.).

199. *Id.* See also *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring).

200. *Id.* at 214.

201. 517 U.S. 620 (1996).

202. *Id.* at 621.

to meet the requirements of basic equal protection. Invoking a landmark dissent proclaiming that the Constitution “neither knows nor tolerates classes among citizens,”<sup>203</sup> he wrote, “[u]nheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”<sup>204</sup> Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, bitterly dissented, accusing the majority of bending to shifting public opinion. “The Court has mistaken a Kulturkampf for a fit of spite,” Scalia proclaimed, and so had usurped the right of the citizens of Colorado to “preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws.”<sup>205</sup>

Despite having left *Bowers* undisturbed, *Romer* was viewed as indicative of a potential shift in the Court’s stance on gay and lesbian rights. In 2003, the Court would take the step of overruling *Bowers* directly. Kennedy began *Lawrence v. Texas* with an expansive discussion of liberty that “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>206</sup> Whereas, in previously considering state bans on homosexual activity, the Court had asked whether the Constitution conferred a fundamental right to practice homosexual sodomy, Kennedy’s *Lawrence* inquiry asked “whether the petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause . . . .”<sup>207</sup> The refocusing of the central question soundly rejected analysis at the most specific level of the exercise of the asserted right, re-orienting the debate toward the broader privacy rights of all consenting adults.

In Kennedy’s view, the jurisprudential shifts of *Casey* and *Romer* had further eroded the foundation of *Bowers*. Referring to the “mystery of life” passage from *Casey*, he wrote that “persons in homosexual relationships may seek autonomy for these purposes, just as heterosexual persons do.”<sup>208</sup> From *Romer*, Kennedy drew the lesson that legislation motivated by animus was impermissible, stigmatizing those to whom it discriminatorily applied. Having drawn the moral foundation of *Bowers* into question, *Romer* rendered “[its continuance as precedent demean[ing to] the lives of homosexual persons.”<sup>209</sup>

---

203. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

204. 517 U.S. at 623 (1996).

205. *Id.* at 636 (Scalia, J., dissenting).

206. 539 U.S. 558, 562 (2003) (opinion by Kennedy, J.).

207. *Id.* at 564.

208. *Id.* at 574.

209. *Id.* at 575.

*Lawrence* dismissed the historical foundation proffered in *Bowers*, denying any “definitive historical judgment” and discerning “no long-standing history in the country of laws directed at homosexual conduct as a distinct matter.”<sup>210</sup> Moreover, the lack of enforcement against private, consensual acts indicated that public disapproval of homosexuality did not frequently translate into the actual practice of prosecution. *Bowers*’ “historical premises,” he concluded were “not without doubt” and “at the very least, [were] overstated.”<sup>211</sup> More importantly, *Lawrence* found history irrelevant, determining that the “laws and traditions in the past half century are of most relevance here. These references show [an] *emerging awareness* [that] liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>212</sup> Relying “heavily on the idea of a growing national consensus against legislating on matters of morality,”<sup>213</sup> Kennedy “dwelt on the way that knowledge and societal attitudes had changed over the past half a century regarding homosexuality, treating this just as significant, if not more so, than prior history in deciding whether the right claimed was important enough to merit constitutional protection as an aspect of ‘liberty.’”<sup>214</sup> The Court “may finally be acknowledging through this shift in rhetoric and method that as the pace of social change has accelerated, a jurisprudence of rationality evaluated for challenged legislation must become more meaningful if the basic principles of substantive due process . . . are to be given due weight.”<sup>215</sup>

Kennedy concluded that because “*Bowers* was not correct when it was decided, and it is not correct today, and is hereby overruled.”<sup>216</sup> The penultimate paragraph of *Lawrence* solidified Kennedy’s acceptance of an evolving constitutional interpretation consistent with the notion of a living Constitution:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the

---

210. *Id.* at 568.

211. *Id.* at 571.

212. *Id.* at 572 (emphasis added).

213. Jeffrey Rosen, *Kennedy Curse*, THE NEW REPUBLIC, July 31, 2003, at 17.

214. Arthur S. Leonard, *Lawrence v. Texas and the New Law of Gay Rights*, 30 OHIO N.U. L. REV. 189, 209 (2004).

215. *Id.*

216. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>217</sup>

*Lawrence* thus stands as “a major victory not only for human rights but for a view of the Constitution as a ‘living’ document whose protections expand as society changes . . . a stunning repudiation by a conservative court of the idea that constitutional interpretation must rest on the ‘original intent’ of the Founding Fathers, or on a narrow reading of the document’s text.”<sup>218</sup>

The significance of the constitutional methodology employed in *Lawrence* was lost upon Scalia, who argued in dissent that *Bowers* ought to have been retained. The only rights that are fundamental, he argued, are those that, as stated in *Glucksberg*, are “deeply rooted in this Nation’s history and tradition.” According to his review, the weight of history supported the definitive conclusion of *Bowers*—that there was no fundamental right to engage in homosexual sodomy—and that the State’s conclusion that same-sex was “immoral and unacceptable” was an adequate basis for prohibiting the conduct.<sup>219</sup> He feared the Court’s deviation from *Glucksberg* would erode the foundation of all tradition-based legislation, leaving the constitutional interpretation susceptible to shifting winds of public opinion. He wrote: “Today’s opinion is the product of a Court, which is the product of a law-profession culture that has largely signed on to the so-called homosexual agenda . . . It is clear from this [ruling’s language] that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”<sup>220</sup> Adding to Scalia’s consternation over what he viewed as the judicial usurpation of the democratic process, was the reliance which *Lawrence* had placed on foreign law and jurisdictions when assessing the changing views on private, consensual sexual conduct.

#### D. Kennedy’s Receptivity to International Opinion and Law

As evidenced in *Roper* and *Lawrence*, integral to Kennedy’s evolution away from text and tradition and toward a dynamic, living view of constitutional interpretation, has been his reliance on international

217. *Id.* at 578-79.

218. Eric Foner, *Our Living Constitution: Lawrence v. Texas Gives New Meaning to American Freedom*, IN THESE TIMES, Aug. 11, 2003, at 16, available at <http://www.inthesetimes.com/site/main/article/598>.

219. At the same time, Scalia scorned Kennedy for overruling *Bowers* while refusing to declare same-sex intimacy a “fundamental right.” He argued that by applying “an unheard-of form of rational basis review that will have far-reaching implications beyond this case,” the Court had engaged in result-oriented decision-making and muddled applicable constitutional standards. *Lawrence*, 539 U.S. at 586. Other critics of *Lawrence* have accused Kennedy of resurrecting an unprincipled and unconvincing constitutional methodology” Rosen, *supra* note 213 at 16.

220. *Lawrence*, 539 U.S. at 602.

trends and opinions when assessing Eighth Amendment and Due Process issues. After overruling *Stanford*, *Roper* addressed its conclusions in relation to international trends and opinion, noting that the United States was singular in its authorization of the juvenile death penalty.<sup>221</sup> Careful to emphasize that such evidence was not controlling, Kennedy observed that the degree of international opposition to the execution of minors buttressed the Court's ruling, providing "respected and significant confirmation for our own conclusions."<sup>222</sup> Justice Ginsburg characterized *Roper* as "perhaps the fullest expressions to date on the propriety and utility of looking to 'the opinions of [human]kind.'"<sup>223</sup> Beyond simply continuing the trend, *Roper* "blesses in the contemporary era a new doctrine of constitutional adjudication, what has been called 'constitutional comparativism,' that is very far indeed from mere flirtation," and "invites the deployment of a sweeping body of legal materials . . . ."<sup>224</sup>

*Lawrence* was even more explicit in referencing specific foreign case law.<sup>225</sup> In striking down Texas's statute the majority ruling appealed to *Dudgeon v. United Kingdom*,<sup>226</sup> a European Court of Human Rights decision at odds with continued criminalization of same-sex conduct. This ruling, rejecting all bans against private, adult, consensual and non-commercial homosexual conduct, was "authoritative," yet not controlling.<sup>227</sup> After noting that the Texas law was anathema to these emerging international norms, and contrary to European law, *Lawrence* refocused its attention to its validity in "our own constitutional system."<sup>228</sup>

It is important to emphasize that in neither case in which Kennedy invoked foreign sources, was international precedent or practice held

---

221. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

222. *Lawrence*, 539 U.S. at 602.

223. Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication," SPEECH BEFORE THE AMERICAN SOCIETY OF INTERNATIONAL LAW, (Apr. 1, 2005) <http://www.asil.org/events/AM05/ginsburg050401.html> (quoting from the Declaration of Independence). Among the other recent decisions that Ginsburg identified as having relied, in part, on international materials were *Atkins v. Virginia*, 536 U.S. 304 (2002), *Lawrence v. Texas*, 539 U.S. 558 (2003), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004).

224. Kennedy Anderson, *Foreign Law and the U.S. Constitution*, 131 POL'Y REV. 33, 33-34, (2005) <http://www.policyreview.org/jun05/anderson.html>.

225. See Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L. J. 193 (2003) (characterizing *Lawrence* as a "startling" shift of "tectonic" proportions).

226. *Dudgeon v. United Kingdom*, A45 Eur. Ct. H.R. 4 (1981) available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695350&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

227. See Jer Welter, *Constitutional Law Chapter: Sexual Privacy After Lawrence*, 7 Geo. J. Gender & L. 723, 724-30 (2006).

228. *Lawrence*, 539 U.S. at 573.

to be controlling. The responsibility for interpreting the Constitution rested with the justices alone, and reference to external indicators was merely “instructive” to a conclusion the majority had already reached. Still, some scholars have argued that “Kennedy’s embrace of foreign law may be among the most significant developments on the Court in recent years – the single biggest factor behind his evolution from a reliable conservative into the likely successor to Sandra Day O’Connor as the Court’s swing vote.”<sup>229</sup>

Ghoshray (2006) “argue[s] that behind Justice Kennedy’s missionary zeal to cite foreign law, there exists his ever-expanding view of personal liberty, which has been shaped by his general lack of insularity with foreign cultures.”<sup>230</sup> Indeed, Kennedy has explicitly linked the broad conception of liberty proffered in *Casey* and *Lawrence* with the importance of a global constitutional dialogue. Far from “lessening our fidelity to the Constitution,” Kennedy has maintained that the “affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>231</sup> In a recent speech he suggested that

Law is a liberating force. It’s a promise; it’s a covenant; it says that you can hope, you can dream, you can dare. You can plan; you have joy in your existence. That’s the meaning of the law as Americans understand it and that’s the meaning of the law as we must explain it to a doubting world where the verdict is still out.<sup>232</sup>

By calling the bar to action, Kennedy would seem to view the judiciary as a catalyst for change in promoting democratic values.<sup>233</sup> His invocation of foreign law in support of his interpretation of the Constitution serves to communicate American receptivity to a global dialogue which simultaneously imparts American democratic ideals and forces a reexamination of values in the exchange.<sup>234</sup> For Kennedy,

---

229. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005.

230. Ghoshray, *supra* note 53 at 734. Other explanations for Kennedy’s amenability to consulting international opinion similarly include a personal “passion for foreign cultures and ideas.” Toobin, *supra* note 229 at 42. Toobin details the cosmopolitan aspects of Kennedy’s career, including his extensive interaction with his judicial counterparts in other nations. His interview includes a concession from Kennedy that one “can’t help but be influenced by what you see and what you hear.” *Id.* at 48.

231. *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

232. Kennedy, HONOLULU SPEECH, *supra* note 57.

233. Kennedy, FLORIDA SPEECH, *supra* note 54; Kennedy, HONOLULU SPEECH, *supra* note 57. See also, Mary Vorsino, *Justice Kennedy calls for Democracy Worldwide*, HONOLULU ADVERTISER, Aug. 6, 2006, at 27A, available at <http://www.the.honoluluadvertiser.com/article/2006/Aug/06/In/FP608060347.html>.

234. Toobin, *supra* note 229 (recounting Kennedy’s belief that “Liberty isn’t for export only”).



“embedded in democracy is the idea of progress.”<sup>235</sup> Reliance on foreign laws thus does more than “provide the judiciary with new tools to interpret the American Constitution as it seeks to walk in sync with emerging social norms . . . ,”<sup>236</sup> it provides for the opportunity for the shaping of those ideals.

In many ways the debate over comparative constitutionalism mirrors the ongoing debate between originalism and living constitutionalism. As National Public Radio (NPR) correspondent Nina Totenberg explains,

This fight over foreign law has become something of a proxy for the real fight Scalia and Justice Thomas have with a majority of the Supreme Court, a fight over whether the Constitution should be read as it would have been by its creators back in 1789, or whether its overall value should be applied in the modern context as a . . . “living” Constitution.<sup>237</sup>

Anderson (2005) makes a similar point when he notes that, in their public exchange on the use of foreign material, the justices have “treated the essential question as being, first and foremost, the philosophy of judging. . . .”<sup>238</sup>

Those justices who are willing to embrace comparative analysis accept the propriety of looking beyond original and legislative intent to derive the Constitution’s meaning. The evolving nature of a “living” document makes the contemporary views of the broader world community relevant to the interpretation of constitutional text. Originalism, on the other hand, “is plainly incompatible with the broad use of foreign and international legal materials . . . because it looks not at all at how other peoples in other countries today do things.”<sup>239</sup> Unsurprisingly then, Scalia has emerged as the most outspoken opponents of comparative constitutional analysis. For critics like Scalia, the invocation of extraterritorial values constitutes a “dangerous” practice.<sup>240</sup> In his view, “[t]he basic premise of the Court’s argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand.”<sup>241</sup>

The applicability of foreign law and the legitimacy of comparative constitutionalism has thus become one more area in which originalists

---

235. Justice Anthony M. Kennedy, *SPEECH AT THE AMERICAN BAR ASSOCIATION ANNUAL MEETING* (Aug. 9, 2003), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html).

236. Ghoshray, *supra* note 53, at 742.

237. *Morning Edition: Supreme Court Increasing Use of References to Foreign Law in Decisions* (National Public Radio July 13, 2005).

238. Anderson, *supra* note 224.

239. *Id.*

240. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

241. *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

and living constitutionalists are vying to establish the orthodoxy of their respective methods of constitutional interpretation. The acrimony between the justices on the issue of comparative constitutionalism reveals a "major fault line in contemporary constitutional adjudication . . . ." <sup>242</sup> That Kennedy is increasingly found on the opposite side of the divide as his conservative counterparts on the issue of comparative constitutionalism is further evidence of his endorsement of a "living Constitution." <sup>243</sup>

### PART III. LIMITATIONS ON KENNEDY'S LIVING CONSTITUTIONALISM

Embracing the "living Constitution" requires more than the mere recognition of evolving sensibilities and changed circumstances when adjudicating the Constitution's meaning. Rather, the philosophy of a living Constitution reflects the deeper distinction between originalist and nonoriginalist methodology, a normative willingness to accept that the Constitution may evolve in *both its application and meaning*. In his flexible approach to text and tradition, his recognition of evolving social trends, and his endorsement of an aspirational Constitution, Kennedy has revealed a jurisprudence infused with the notion of a "living Constitution." Before pronouncing him a full-blown adherent, considerations of the limitations on his living constitutionalism are warranted.

A cautionary lesson can be derived from Charles Reich's interpretation of Justice Black's majority opinion in *Gideon v. Wainwright* <sup>244</sup> as evidence of that Justice's adherence to the notion of a "living Constitution." Reich lauded Black's "method of construing provisions of the Bill of Rights in the light of contemporary problems" in a piece entitled, "Mr. Justice Black and the Living Constitution." <sup>245</sup> According to Newman (1994), although gracious in his response, Black was "surprised" by his former clerk's characterization. <sup>246</sup> Indeed, the positivist Black took a rather dim view of attempts to update the Constitution's meaning through judicial interpretation. As such, he apparently did

242. Childress, *supra* note 225, at 194.

243. In a significant recent development, Kennedy provided a crucial vote in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (opinion by Stevens, J.), holding that the Bush Administration's procedures for the treatment of detainees violated Common Article 3 of the Geneva Conventions. The Court's ruling renders the United States' War on Terror "subject to the international standards that govern all wars. In short, it refutes American exceptionalism." David Cole, *The 'Kennedy Court'*, THE NATION, July 31, 2006, at 30.

244. 372 U.S. 335 (1963) (announced a constitutional right to state-provided assistance of counsel in all felony cases).

245. Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 714 (1963).

246. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 529 (1994).

not find the “living Constitution” concept an apt descriptor of his jurisprudence, suggesting to the author that he had included a “wee bit of the Reich as well as the Black philosophy,” and privately complaining that his jurisprudence had been misunderstood.<sup>247</sup>

The imposition of interpretive framework when a justice has not clearly articulated his or her philosophy is potentially problematic insofar as it may reflect the scholar’s vision more so than the justices. For example, Barnett (2005) has offered arguments framing Kennedy’s *Lawrence* ruling as embracing a “libertarian constitutional revolution” consistent with Barnett’s advocated view of constitutional interpretation.<sup>248</sup> *Lawrence*, according to Barnett, is “potentially revolutionary” insofar as it seems to adopt a “presumption of liberty” in

---

247. *Id.*

248. The ambiguity of Kennedy’s ruling is complicated by his having invalidated Texas’ sodomy statute under the lowest level of review. Presumably, if he had considered the right to engage in same-sex intimacy fundamental, he should have required that Texas produce some compelling reason for its legislation. One might argue that his reliance on the lesser standard is nevertheless irrelevant. If the legislation was not justified by even a legitimate state interest then it is reasonable to assume that state could not produce a compelling one. Indeed, Texas had apparently conceded that it had no compelling rationale to present. “At oral argument, in the Court of Appeals, counsel for the state conceded that ‘he could not even see how he could begin to frame an argument that there was a compelling State interest . . .’” Brief of Petitioners at 4, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

Elsewhere, I have argued that *Lawrence* does indeed reflect a departure from traditional due process analysis in which rights are categorized as fundamental or non-fundamental, triggering the appropriate level of review as strict-scrutiny or rational-bases, respectively. Instead of viewing rights as dichotomously categorized as fundamental – i.e., “deeply rooted” – or not, I suggested that Kennedy was carving a new tier of mid-level scrutiny for rights that have not been deeply grounded in history or tradition, but which are, in light of contemporary sensibilities, are nevertheless emerging in the political consciousness as deserving of constitutional protection. Thus, I suggested that perhaps Kennedy is aligning the Court’s due process jurisprudence with that of the Equal Protection Clause by introducing the idea of three-tiered review which distinguishes between non-fundamental, fundamental, and emerging rights (rights which are fundamental not on the basis of tradition and history but on the basis of an emerging awareness of the importance of these rights to the concept of liberty in the modern society). Such an approach would redefine the traditional approach to due process claims but would not reflect a radical departure from conventional due process analysis. See Lisa K. Parshall, *Redefining Substantive Due Process: Justice Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237 (2005).

Of course, one need go that far in understanding Kennedy’s unconventional application of traditional due process analysis in *Lawrence* [and *Romer*]. Barber (1984) refers to the requirement for “reasonableness inherent in our concept of a constitutional law, [under which] courts have an obligation to decide appropriate cases by declaring acts of legislation invalid if they believe them to be beyond identifiable versions of the public interests.” SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 128 (1984). On that view, Kennedy’s failure to apply heightened scrutiny would seem to reflect nothing more than his belief that the most basic requirement of due process – reasonableness – was not satisfied and that, as such, there was no need to consider whether the right in question was fundamental or not. Not only does a basic reasonableness inquiry as a limiting principle account for his failure to proceed to traditional due process analysis, it would also seem to represent his acceptance of a dynamic Constitution. “The Constitution is fully law only when it meets the continuing test of reaffirmation . . . . For these reasons admittedly irrational or unreasonable, laws cannot be viewed as pursuant to or consistent with the Constitution . . . .” *Id.* at 127.

favor to "the Court's well-established fundamental rights methodology."<sup>249</sup> Kennedy, however, has rejected being labeled a libertarian and other scholars have rejected Barnett's thesis.<sup>250</sup>

It also may be the case that Kennedy's jurisprudence is still evolving. Unlike Black, Kennedy has not articulated a coherent, overarching jurisprudence which would seem at immediate odds with the notion of a "living Constitution." Indeed, his rhetoric and decision making have increasingly adopted a dynamic view of constitutional interpretation, one which emphasizes evolving trends and enlightened understanding of the Constitution's broad provisions. Still, it simply may be that, combined with his frequent reliance on narrow, or case-based analyses,<sup>251</sup> Kennedy's constitutionalism is not sufficiently or finitely well-formed enough to confidently draw the conclusion that he either has or has not adopted a living vision of constitutional interpretation.<sup>252</sup>

Even assuming that Kennedy has embraced living constitutionalism, a secondary objection that could be raised is the limiting effect of *stare decisis* on such a dynamic jurisprudence as the concept of *stare decisis* guarantees a certain degree of staticism in constitutional interpretation. Yet, while Kennedy has professed a commitment to the concept, he has never viewed *stare decisis* as an inexorable command.<sup>253</sup> In-

249. Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1585-88 (2005).

250. DeParle, *supra* note 19. Carpenter (2004) also rejects the thesis that Lawrence is potentially a radical departure from established Due Process jurisprudence. Dale Carpenter, *Is Lawrence Libertarian?* 88 MINN. L. REV. 1140 (2004). Instead, Carpenter concludes that *Lawrence* does, in fact, recognize a fundamental right, and thus adheres to the modern framework of substantive due process. In addition to characterizing the liberty interest at issue in *Lawrence* in terms reflective of the Court's fundamental rights jurisprudence, he argues that the ruling does attempt to ground protection of the right in the nation's history and tradition. *Id.* at 1153. At the same time, however, Carpenter too hints that this right was not "discovered" fully formed, but rather has evolved. *Id.* at 1163-64. The "emerging awareness" of which Lawrence spoke "could be seen in several legal developments . . . which seriously eroded *Hardwick* as precedent." *Id.* at 1164.

251. As an advocate of case-by-case methodology, Justice Kennedy has expressed the belief that "the slow elaboration of the principles of justice" is "the surest way to interpret the Constitution." Kennedy, HONOLULU SPEECH, *supra* note 57. See also, *Blakely v. Washington*, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting, arguing that "[c]ase-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legislatures may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and the evolution of the law, is basic constitutional theory in action."). Ghoshray also suggests that "Justice Kennedy urges us to examine the moral content of liberty from scratch in each case." Ghoshray, *supra* note 53, at 713.

252. One scholar has argued that Kennedy is comfortable with indeterminate constitutional philosophy. "Kennedy sees all kinds of potential permutations and is quite content to let them percolate unresolved – like provocative questions posed during an academic seminar." Douglas W. Kmeic, *Who Rules the High Court? In Kennedy's Swing Vote vs. Roberts' Consensus Building, the Chief Justice Holds Sway*, L.A. TIMES, July 8, 2006, at B15.

253. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

deed, the guiding factors of *Casey*, to which Kennedy ascribed, are sensitive to ongoing social and legal developments.<sup>254</sup> Included among the criteria are (1) whether precedent “defies practical workability”; (2) whether abandonment would create a hardship for those who had relied on precedent; (3) “whether related principles of law have so far *developed* as to have left the old rule no more than a remnant of abandoned doctrine”; and (4) “whether factors *have so changed, or have come to be seen so differently*, as to have robbed the old rule of significant application or justification.”<sup>255</sup>

*Casey*’s factors for reconsidering the application of precedent reflect a nonoriginalist methodology which clearly takes evolving social standards into account when “the judgment of the Court in the earlier decision may have been influenced by prevailing views as to economic and social policy which have since been abandoned.”<sup>256</sup> As *Casey* explains, “In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court’s constitutional duty.”<sup>257</sup> Of course, identification of those circumstances, and the sources from which such an assessment is to be derived, remains problematic, and potential judicial selectivity is precisely what causes originalists, such as a Scalia, to object. *Lawrence*’s application of the *Casey* criteria is illustrative of both the non-limitation of *stare decisis* to an evolving understanding of the Constitution and the criticism that it is not a reliable restraint.<sup>258</sup>

The prudential concerns which underlie the *Casey* factors may also raise criticisms that constitutional adjudication may be unnecessarily influenced by majoritarian influences. Devins (2006) argues that the substantive due process jurisprudence of the post-1987 Rehnquist Court was heavily influenced by majoritarian concerns. He maintains that the failed nomination of Robert H. Bork to replace retiring Justice Lewis F. Powell – the seat to which Kennedy would ultimately be appointed – signified a national rejection of Bork’s antipathy toward the protection of enumerated rights. The social influences, conveyed through the Senate confirmation proceedings, resulted in the selection

254. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-855 (1992) (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965), *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924), *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-174 (1989), *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932)).

255. *Id.* (emphasis added).

256. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting) cited in *Casey*, 505 U.S. at 855.

257. 505 U.S. at 864.

258. See 539 U.S. at 592 (Scalia, J., dissenting) (arguing that the majority’s application of the criteria has “exposed *Casey*’s extraordinary deference to precedence for the results-oriented expedient that it is.”).

of Justices (here he identifies Kennedy and Souter) who support outcomes favoring privacy and liberty protections and a Court that was “willing to conform to majoritarian pressures in its substantive due process decision making.”<sup>259</sup>

The manifestation of these majoritarian pressures, he suggests, are evident in the Rehnquist’s opinion in *Glucksberg*, which proclaimed to rely on the Court’s “usual approach” to the disposition of substantive due process claims – the determination of whether the asserted right is so rooted in tradition and history as to be ranked as fundamental.<sup>260</sup> But, Devins argues, while Rehnquist would seem to have *enhanced* the Court’s “usual” and originalism-oriented approach “by limiting substantive due process to rights that are *both* ‘deeply rooted’ and ‘implicit in ordered liberty’,” he also employed contemporary criterion in his assessment of a fundamental right to die by exploring contemporary democratic debate on the issue as exhibited in “recent” state practices and international opinion.<sup>261</sup> Moreover, the Rehnquist ruling sought to establish a “factual” basis for the moral judgment and legitimate interests of the legislature in banning physician-assisted suicide but did not rule out future challenges to such bans. Thus, according to Devins, *Glucksberg* could be read both as an extension of “objectively ‘deeply rooted in this Nation’s history and tradition’” approach *and* as an invitation to examine contemporary practices.<sup>262</sup>

The explanation for Rehnquist’s use of a methodology that is “indeterminate to the point of being irrelevant,” Devins suggests, was the necessity of keeping Kennedy and O’Connor in the majority fold. The argument runs that majoritarian influences and an antipathy toward the *Bowers* decision – which had embraced the “deeply-rooted” in history approach – would have enhanced Kennedy’s attention to the “social meaning” of the decision’s outcome. Thus it was, he suggests, that in *Lawrence* “Kennedy highlighted [the] ever-growing public acceptance of gay rights.”<sup>263</sup> He further argues that “[s]wing Justices do not have fixed preferences and, as such, are more likely to pay attention to the views of elected officials, elites and the American people.”<sup>264</sup> For Kennedy and O’Connor in particular, Devins maintains that the

---

259. Neal Devins, *Substantive Due Process, Public Opinion, and the “Right” to Die*, in *THE REHNQUIST LEGACY* 327, 337 (Craig Bradley, ed., 2006).

260. *Id.* at 330.

261. *Id.* at 330-331.

262. “And even if the right is not fundamental, plaintiff’s lawyers can still insist that the Court should apply rational basis review in such a way as to require the state to demonstrate a true factual connection between the law and its stated purpose.” Devins, *supra* note 259, at 332.

263. *Id.* at 340.

264. *Id.* at 339.

“refusal . . . to sign onto the conservative social agenda” is attributable to the social and political fallout of the debate over Bork.<sup>265</sup>

A far simpler explanation would be that Rehnquist’s *Glucksberg* opinion was indeed responding to the need to attract the votes of Kennedy and O’Connor, but that the indeterminate methodology primarily reflected the Chief Justice’s awareness that Kennedy disfavored an approach which would strictly wed the recognition of substantive due process rights to history and tradition without consideration toward contemporary views. Of course, Kennedy’s preference for dynamic constitutionalism in itself might be a byproduct of majoritarian concern. Chinn (2006) argues that *Lawrence* was “evidence of latent majoritarianism . . . indicated via pervasive under-enforcement of the sodomy statute.”<sup>266</sup> He further finds that “Kennedy also paid much attention to another consideration partly prudential in nature: evidence of majoritarian preferences at a *national* level moving away from the sentiment embodied in the state sodomy laws.”<sup>267</sup>

Clearly, by the emphasis on emerging awareness and changes in social trends and legislative practices, Kennedy’s decision making on punitive damages, the juvenile death penalty, abortion and gay rights indicates his sensitivity toward evolving majority opinion. In his view, there was room for an objective judicial assessment of competing interests in which no single mode of historical analysis was determinative. Incorporating evolving social trends, he was willing to consider societal support for an asserted interest, not only as a historic referent, but as a measure of emerging support, as an indication of how a growing acceptance of a liberty interest developed as a new generation “comes of age” relying on its protections. Yet his overall approach would not seem driven by majoritarian views particularly as conveyed through legislative elites as Congress has expressed disapprobation of the outcomes *Casey*, *Roper*, *Romer* and *Lawrence*,<sup>268</sup> as well as for the

265. *Id.* at 340. Devin writes:

Not wanting to be labeled a political lackey of the President who appointed them, Justices O’Connor and Kennedy paid close attention to the battles between Congress and the Reagan-Bush administrations over their efforts to reshape constitutional law through judicial appointments. . . For the most part, O’Connor and Kennedy sought to avoid these imbroglios by denying certiorari on cases raising divisive social issues. And when forced to decide, O’Connor and Kennedy explicitly distanced themselves from the Bork-inspired political “fires” and, in so doing, frequently embraced centrists (if not left of center) decision making. *Id.*

266. Stuart Chinn, *Democracy-Promoting Judicial Review in a Two Party System: Dealing With Second-Order Preferences*, 38 *POLITY* 478, 498 (2006).

267. *Id.* at 499.

268. See Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, *WASH. POST*, April 9, 2005 at A03 (detailing the commentary by representatives of several conservative groups calling for Kennedy’s impeachment); Ruth Marcus, Editorial, *Booting the Bench; There’s New Ferocity in Talk of Firing Activist Judges*, *WASH. POST*, April 11, 2005, at A19 (noting that in a nationally televised interview, Sen. Rick Santorum only “moderately demurred from the notion of im-

Court's reliance of foreign sources in domestic constitutional interpretation.<sup>269</sup> On the issue of reliance on foreign sources in domestic constitutional interpretation, in particular, several members of the Court, including Justice Kennedy, have demonstrated recalcitrance in the face of congressional disapproval as expressed through a variety of Court-curbing measures.<sup>270</sup>

Moreover, Kennedy has expressly emphasized independent judicial judgment. For example, clear in his *Roper* opinion was Kennedy's support for the exercise of *independent* judicial evaluation of the evolving standards of decency. Doing so reflected an important shift in his own jurisprudence as he had previously joined the *Stanford* plurality rejecting outright "the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty."<sup>271</sup> In contrast, *Roper* returned the Court to exercise of independent judicial assessment of the indicators of social consensus. Kennedy explained that "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question," was but a "*beginning point*" for judicial review.<sup>272</sup> While "[t]his data gives us essential instruction, the majority concluded that the Court "must determine, in the exercise of our own independent judgment, whether the death penalty is disproportionate to juveniles."<sup>273</sup>

Even if heavily influenced by majoritarian opinion, Kennedy's *Roper* opinion makes clear that it is the justice's evaluation of those referents that are determinative. The reference to "objective referents" then may be a reflection of popular influence on the Court, or may be, as Scalia has alleged, evidentiary support for the justices' own interpretation of constitutional meaning. In Kennedy's case, with his emphasis on the duality of enduring and evolving constitutional values, the discernment of those values and their meaning to contemporary constitutional questions would seem to be a role for which the

---

peaching Justice Anthony M. Kennedy"); Jason DeParle, *In Battle to Pick Next Justice, Right Says, Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1 (reporting that "some notable conservatives [were] calling for Kennedy's impeachment"); Carl Hulse, *Delay Outlines Strategy Against Federal Judges*, N.Y. TIMES, April 20, 2005), at A20 (reporting that Speaker of the House, Tom Delay (R-TX) had disparaged the *Roper* ruling as "outrageous," and alluding to plans by the House Judiciary committee to review the constitutional mandate of "good behavior," as it relates to judicial life-tenure).

269. For a discussion of Congressional measures aimed at curbing the Court's reliance on foreign jurisprudence *See*, David T. Hutt and Lisa K. Parshall, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive versus the Court*, 33 OHIO N.U. L. REV. 113 (2006).

270. *See id.*

271. *Simmons*, 543 U.S. at 562 (quoting *Stanford*, 492 U.S. at 377-78).

272. *Id.* at 564.

273. *Id.*



Supreme Court is well-suited. Kennedy appears to view constitutional interpretation as a valutive process, a dialogue between generations, with the Supreme Court as the primary translator of those values. In the elevated rhetoric of *Roper* and *Lawrence*, there is a sense that Kennedy is attempting to speak to future generations who may better appreciate the momentous nature of these rulings. "His sense of justice and equality is a work in progress, informed by what he learns . . . ." <sup>274</sup> Such a view comports quite well with the notion of a "living Constitution" – a belief that the "Constitution endures because it is a vehicle for the most central values of American society, but those values necessarily evolve as society changes." <sup>275</sup>

Finally, it can be argued that Kennedy's endorsement of a dynamic Constitution is not unique, that despite Scalia's best efforts to cast the notion of a "living Constitution" as an unorthodox method of constitutional interpretation, most modern jurists have recognized and endorsed a dynamic rather than a static vision of the Constitution's meaning. But dismissal of the importance of Kennedy's receptivity toward dynamic interpretative methodology on the grounds that it reflects merely the predominant view of constitutional interpretation ignores the evolution that is apparent in Kennedy's jurisprudence. Kennedy's decision-making on the appropriate use of text and tradition, the meaning of the Eighth Amendment, and the proper mode of due process analysis reveals a major shift in his interpretive paradigm. More importantly, the significance of his shift in methodology is obvious, leading to the imposition of limitations on punitive damages and peremptory strikes, the invalidation of the death penalty for mentally retarded and juvenile offenders, and an expanded definition of liberty that preserves a limited right to reproductive freedom and sexual intimacy. On each of these issues, Kennedy's vote determined the doctrinal outcome both because of his pivotal status in the context of the current composition of the Court and because he has moved toward a more dynamic view of constitutional interpretation.

### CONCLUSION

While Kennedy appears to be moving closer to the idea of a "living Constitution," he has yet to clearly articulate a dynamic constitutional theory. The challenge for Kennedy would seem to be the same as with which Horwitz (2003) charged the Court: "to articulate a theory of

274. Dahlia Lithwick, *No Man is an Island: Anthony Kennedy's Surprising Charge to the American Bar Association*, SLATE MAGAZINE, Aug. 7, 2006, <http://www.slate.com/id/2147247> (last visited Jan. 24, 2008). Lithwick suggests that Kennedy's broad worldview, coupled with this sense that "justice has a purpose" has served as the foundation of conservative's attacks on his jurisprudence.

275. Horwitz, *supra* note 29, at 87.

dynamic fundamentality . . . that acknowledges the existence of a 'living Constitution' without abandoning the search for fundamental truths."<sup>276</sup> Just as Horwitz argues that the modern Court is mired in its search for a dynamic interpretation by a willingness to surrender the concept of immutable constitutional principles – what Horwitz calls a static originalism – so too would Kennedy seem unable to completely abandon the idea that Constitution embodies "objective truths."<sup>277</sup> The notion of unchanging principles, in other words, has resonance in Kennedy's written opinions in which he speaks of an "emerging awareness" of rights protected by the Constitution, or certain *truths* to which earlier generations had been blind. Kennedy's jurisprudence thus is consistent with the idea that acceptance of previously unrecognized rights "will frequently come because such ideas reflect some underlying truth about the world."<sup>278</sup>

Ultimately, this failure to unleash constitutional interpretation from the notion that evolving standards reflect objective truths to which past generations have been blind, would preclude him from adopting a notion of the "living Constitution" as broad as Justice Brennan or Marshall's. Yet, his clear methodological preference for a mode of interpretation which takes account of an *ongoing* history and tradition, keeps Kennedy separate and apart from his conservative colleagues. Ultimately, then, it is methodology, perhaps unguided by clear theory, that has propelled Kennedy closer to Brennan's views and further away from Scalia's on some key issues. Scalia's propensity for castigating proponents of the "living Constitution" – going so far in one instance as referring to them as "idiots" – may only serve to widen the methodological breach.<sup>279</sup> Given the differences in methodologies, "[i]t is simply not possible for Scalia – who argues that judges are to be governed only by the 'text and tradition' of the Constitution, not by their 'intellectual moral, and personal perceptions' to

---

276. Horwitz, *supra* note 44, at 41. In contrast of viewing Casey's reliance on substantive due process as an illegitimate effort to read judicial values into the Constitution, Horwitz wrote that the plurality recognized the necessity of maintaining the appearance of legitimacy. But Horwitz faults the Casey plurality for its failure to articulate a clear theory for constitutional change. This adherence to originalistic principles of fundamental, immutable principles, and "neutral theory" of constitutional interpretation, he argues, has produced an unworkable jurisprudence.

277. See Kennedy, HONOLULU SPEECH, *supra* note 57. Kennedy's rhetorical remark: "Would you talk about process, knowing that there are certain truths that are not evident to us now – that we are blind to the injustices and prejudices of our own times?" Process alone "really doesn't suffice; it's not elevating enough. So you must talk about substance."

278. Sandefur, *supra* note 26, at 518.

279. Describing living Constitutionalism, Scalia said, "That's the argument of flexibility and it goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break." He continued, "But you would have to be an idiot to believe that . . . [t]he Constitution is not a living organism, it is a legal document." *Scalia blasts advocates of 'living Constitution,'* ASSOCIATED PRESS, Feb. 14, 2006, <http://www.msnbc.msn.com/id/11346274> (last visited Jan. 24, 2008).

build a strong, lasting, and principled coalition that includes Justices O'Connor and Kennedy."<sup>280</sup>

With O'Connor's absence and the increased recognition of Kennedy's centrality and pivotal vote, it has become imperative that the framing of any constitutional argument presented to the Court takes Kennedy's views and preferences into consideration. Given the reality of Kennedy's frequently pivotal vote, "[t]he real pitch in ideological cases has to be made to Justice Kennedy, and that's going to have to be made on a case-by-case basis."<sup>281</sup> Should a majority of the Court continue to advance originalist methodology in the consideration of constitutional rights, or adopt an approach which focuses narrowly on tradition and history at the most specific level of generality, they will be in certain jeopardy of losing Kennedy's vote.

In defense of the "living Constitution," Justice Brennan stated:

We current Justices read the Constitution in the only way we can: as twentieth-century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be: what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.<sup>282</sup>

Increasingly, it would seem, Justice Kennedy has come to embrace that view as a guiding tenet of his constitutional interpretation. Liberal and moderate justices, who are more likely to similarly engage in a mode of interpretation which contemplates a dynamic Constitution, are likely to have an easier time attracting Kennedy's support.

---

280. Rossum, *supra* note 46, at 204.

281. *Kennedy is Court's new swing vote*, The ARIZONA REPUBLIC, July 2, 2006, <http://www.azcentral.com/arizonarepublic/news/articles/0702newsupremes0702.html> (quoting Washington lawyer Thomas Goldstein).

282. Brennan SPEECH, *supra* note 34.