

# A TALE OF TWO JUSTICES (SCALIA AND BREYER)

Arnold H. Loewy<sup>†</sup>

|   |      |
|---|------|
| I. INTRODUCTION .....                             | 1203 |
| II. WHAT'S RELEVANT.....                          | 1204 |
| III. THE IMPORTANCE OF CERTAINTY .....            | 1205 |
| IV. HOW BROAD OR NARROW SHOULD OPINIONS BE? ..... | 1206 |
| V. CONCLUSION .....                               | 1207 |

## I. INTRODUCTION

On the Friday and Monday bracketing the second weekend in November, Texas Tech University School of Law was privileged to host two of the more interesting Justices on the United States Supreme Court, Antonin Scalia and Stephen Breyer.<sup>1</sup> To say that the sessions (one for the general public and one just for law students) were interesting is surely to understate. I have been privileged to comment on what we learned from these presentations.

Let us begin with perhaps the most touted and least significant difference between them: Scalia is a conservative and Breyer is a liberal.<sup>2</sup> Part of the reason this difference is the least significant is that it is at best a half-truth. Of the four Justices typically typed as “liberals” over the past fifteen years,<sup>3</sup> it appears to me Breyer is the one most likely to stray from the liberal side.<sup>4</sup>

---

<sup>†</sup> George R. Killam, Jr. Professor of Criminal Law, Texas Tech University School of Law. Many thanks to Diana Le and Christina Woods for their excellent research assistance in preparing this article.

1. See Justice Antonin Scalia and Justice Stephen Breyer, Presentation at the Texas Tech University School of Law's Sandra Day O'Connor Distinguished Lectures Series (Nov. 12, 2010) (public lecture at the Lubbock Civic Center); Justice Antonin Scalia and Justice Stephen Breyer, Presentation at the Texas Tech University School of Law's Sandra Day O'Connor Distinguished Lecture Series (Nov. 15, 2010) (lecture to law students and faculty). Although neither of these presentations were recorded, my comments are based on my personal notes from both events.

2. See Richard G. Wilkins, Scott L. Worthington & David Buchanan, *Supreme Court Voting Behavior: 1996 Term*, 25 HASTINGS CONST. L.Q. 35, 43 (1996); Betsy Blaney, *Scalia, Breyer Spar Over Capital Punishment, Judicial Philosophy*, ASSOCIATED PRESS, Nov. 12, 2010, [http://www.huffingtonpost.com/2010/11/12/scalia-breyer-spar-capital-punishment\\_n\\_783081.html](http://www.huffingtonpost.com/2010/11/12/scalia-breyer-spar-capital-punishment_n_783081.html).

3. See Wilkins, Worthington & Buchanan, *supra* note 2. Here, I refer to Justices Stevens, Ginsburg, Souter, and Breyer. Justice Sotomayor, and especially Justice Kagan, have not been on the court long enough to chalk up a track record, and it is probably too early to describe either as “liberal” or “conservative.” Again, especially Kagan.

4. Concededly, I base this opinion on my observations and assessment rather than a hard vote

Even more clearly, Justice Scalia, though in some ways the darling of conservatives, has frequently strayed from the conservative course. For example, in Fourth Amendment cases such as *Arizona v. Hicks*,<sup>5</sup> *Kyllo v. United States*,<sup>6</sup> and *Arizona v. Gant*,<sup>7</sup> he led sharply divided Courts into adopting an expansive view of the Fourth Amendment. And, of course, he famously joined a five to four majority in constitutionalizing the right to burn the American flag.<sup>8</sup> Additionally, he has led the Court in expanding (or some would say properly maintaining) the scope of the Confrontation Clause.<sup>9</sup>

Indeed, in at least some of the above-mentioned cases, Breyer was on the conservative (or state) side.<sup>10</sup> Consequently, despite popular opinion to the contrary, I do not believe that the liberal/conservative split really reflects the difference between the Justices. So, let us turn to the core differences between the Justices.

## II. WHAT'S RELEVANT

The Justices differ at the core as to what is relevant. In the public debate at the Lubbock civic center, Justice Breyer suggested that the text of the Constitution is relevant but so are precedent, purpose, history, and consequences.<sup>11</sup> In Breyer's view, no one of these considerations necessarily trumps the others.<sup>12</sup> Indeed, to the extent that one surpasses the others, it would probably be precedent.<sup>13</sup> Justice Breyer extremely loathes overruling prior decisions unless there is a very good reason for doing so.<sup>14</sup> He certainly would not allow text to supersede everything.<sup>15</sup>

Justice Scalia, on the other hand, would allow text to trump everything else, especially consequences.<sup>16</sup> In his view, if you don't like the consequences, blame it on the framers' choice of words.<sup>17</sup> We are bound by the meaning of their words at that time.<sup>18</sup> In Scalia's, but not Breyer's, view, it is what they said that counts, not what they meant to say.<sup>19</sup>

---

count (which, of course, would involve resolving what constitutes "liberal").

5. See *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987).

6. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

7. See *Arizona v. Gant*, 129 S. Ct. 1710, 1724-25 (2009) (Scalia, J., concurring).

8. See *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

9. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004); *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

10. See *Gant*, 129 S. Ct. at 1725-26 (Breyer, J., dissenting).

11. See sources cited *supra* note 1.

12. See sources cited *supra* note 1.

13. See sources cited *supra* note 1..

14. See *Gant*, 129 S. Ct. at 1725-26 (2009) (Breyer, J., dissenting).

15. See sources cited *supra* note 1.

16. See sources cited *supra* note 1.

17. See sources cited *supra* note 1.

18. See sources cited *supra* note 1.

19. See sources cited *supra* note 1.

Another point of difference is the propriety of contemporary updating. For example, if the death penalty was permissible when the Constitution was adopted, is that permissibility chiseled in stone? For Scalia, the answer is easy: (1) The death penalty was permitted when the Constitution was adopted, and (2) the Fifth Amendment forbids the deprivation of “life, liberty, or property, without due process of law.”<sup>20</sup> Therefore, the words of the framers cannot be construed to forbid the death penalty. Flogging at a whipping post, yes, but capital punishment, no.

For Breyer, the question is not so easily answered. He would look for a contemporary meaning of the Cruel and Unusual Punishment Clause.<sup>21</sup> Adhering to that view, he has joined the Court in several cases holding that “death is different” and requires rules that might not be required in other types of cases.<sup>22</sup> Scalia, on the other hand, rejects that view, consistently adhering to the view that capital punishment is like anything else because the framers said so.<sup>23</sup>

Let us examine a case where their differences in philosophies might matter. Hypothesize the following: Assume that in some future death penalty case, the defense establishes that 10% percent of the people convicted and sentenced to death were actually innocent. And further hypothesize that 10% of those convicted people were actually executed.<sup>24</sup> Justice Scalia, who sees consequences as irrelevant, would almost certainly vote to affirm the conviction. He would see it as a simple, easy case. Justice Breyer, on the other hand, would consider the statistics relevant and plausibly (though, of course we do not know this statement to be true) determinative.

Obviously, it is for the reader to decide which of these methodologies is preferable, but starkness of the difference transcends the simplistic liberal/conservative dichotomy that is sometimes used to explain their differences.

### III. THE IMPORTANCE OF CERTAINTY

Another place that the Justices differ is the importance of certainty. Justice Scalia prefers clear rules whereas Justice Breyer is not as concerned

---

20. U.S. CONST. amend. V (emphasis added); see sources cited *supra* note 1.

21. U.S. CONST. amend. VIII; see sources cited *supra* note 1.

22. See, e.g., *Baze v. Rees*, 553 U.S. 35, 84, 107-13 (2008) (Breyer, J., concurring); *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008).

23. See *Baze*, 553 U.S. at 87-93 (Scalia, J., concurring).

24. These numbers seem rather modest compared to the numbers that caused then-Governor Ryan of Illinois to declare a state moratorium on the death penalty several years ago. From 1977 to 2000, twelve death row inmates were executed while thirteen were exonerated. See Ill. Gov’t News Network, *Governor Ryan Declares Moratorium On Executions, Will Appoint Commission to Review Capital Punishment System* (Jan. 31, 2000), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=359>.

about clarity.<sup>25</sup> As Breyer stated in his meeting with the law students, "I'm happy with the mess."<sup>26</sup> This is not to say that Justice Breyer is opposed to certainty—only that he believes that it is not realistically attainable.<sup>27</sup> Thus, we are brought to our third and final distinction between the Justices, the proclivity for broad or narrow opinions.

#### IV. HOW BROAD OR NARROW SHOULD OPINIONS BE?

This question has been around for decades, if not centuries. Kathleen Sullivan, in her provocative article, referred to the battle of "rules and standards."<sup>28</sup> A rule is a clear statement of precisely what is required.<sup>29</sup> A standard is a guideline.<sup>30</sup> By way of illustration, a speed limit of sixty miles per hour is a rule. A speed limit of "safe and reasonable speed" is a standard. Obviously, there is something to be said for both rules and standards and much of it depends on the specifics of the case.

On the whole, Justice Breyer's jurisprudence appears to favor standards, as is apparent from his "I'm happy with the mess" statement.<sup>31</sup> Justice Scalia, on the other hand, clearly favors rules.<sup>32</sup> He generally eschews any form of balancing because he does not believe that there are judicially discoverable standards to balance.<sup>33</sup> For example, in a negative Commerce Clause case,<sup>34</sup> Justice Scalia notably rejected balancing in favor of a three-part rule.<sup>35</sup> In doing so, he famously remarked that balancing these interests "is more like judging whether a particular line is longer than a particular rock is heavy."<sup>36</sup>

---

25. See sources cited *supra* note 1.

26. See sources cited *supra* note 1.

27. See sources cited *supra* note 1.

28. See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-59 (1992).

29. See *id.* at 58.

30. See *id.*

31. See *supra* note 26 and accompanying text.

32. See sources cited *supra* note 1.

33. See *supra* note 2.

34. See U.S. CONST. Art. I, § 8, cl. 3. Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" *Id.* Historically, the Court has held some, but not all, state legislation that impacts interstate commerce is unconstitutional. Compare *Granholt v. Heald*, 544 U.S. 460, 466 (2005) (holding the New York statutes that imposed additional burdens on out-of-state wineries were unconstitutional under the Commerce Clause), with *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986) (holding that Maine's ban on importing baitfish served a legitimate local purpose and did not violate the Commerce Clause).

35. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring). Scalia argues that under the Commerce Clause, a state statute is invalid if "it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose. When such a validating purpose exists, it is for Congress and not us to determine it is not significant enough to justify the burden on commerce." *Id.*

36. *Id.* at 897.

I want to emphasize how different the rule/standard dichotomy is from the liberal/conservative dichotomy. For example, in the 1960s, it was the liberals who were pushing for rules, typified by the *Miranda* decision, which enunciated the clearest set of rules ever known for coerced confession cases.<sup>37</sup> The conservatives on the Court decried the decision, suggesting that a balancing standard (which had been the law for decades) should have been retained.<sup>38</sup>

Ironically, Justice Scalia flatly rejects *Miranda* and would go back to the old multi-factored test, which (again ironically) the government does not want.<sup>39</sup> The reason the government and, so far as I can tell, most police officers like *Miranda* is because it has the effect of sanitizing police-obtained confessions.<sup>40</sup>

Thus, Scalia's principles are in conflict. He likes rules but only rules fairly attributable to the language of the Constitution. Therefore, if he cannot find the principles of *Miranda* embodied in the Constitution, he will employ his hated standards over a judicially created rule. And, of course, it matters not that the rule benefits the police because of his view that consequences are irrelevant.

## V. CONCLUSION

Perhaps the best way to assess the jurisprudence of each Justice is to imagine the following hypothetical: Assume that we were given the following three choices: (1) we could have a Supreme Court exactly as it is today; (2) we could have a Supreme Court populated by nine Justice Scalias; or (3) we could have a Supreme Court populated by nine Justice Breyers.

For me, the choice is easy. I would choose today's Court. The presence of Justice Scalia reminding us to take seriously the words of the document we are supposed to be construing is monumentally important. Similarly, we would not want to lose Justice Breyer's case-by-case, multi-factored approach.<sup>41</sup>

37. See *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

38. See *Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936). At least since *Brown v. Mississippi*, the Court employed the balancing standard in coerced confession cases. See *Miranda*, 384 U.S. at 507.

39. See *Dickerson v. United States*, 530 U.S. 428, 436, 457, 463 (2000) (Scalia, J., dissenting). The government refused to argue that *Miranda* should be overruled, and thus, the Court was forced to appoint an amicus, Professor Paul Cassell of the University of Utah S. J. Quinney College of Law, to argue the case. *Id.* at 441 n.7.

40. See *Oregon v. Elstad*, 460 U.S. 298, 318 (1985) (holding that the Self-Incrimination Clause does not warrant the suppression of a confession made after proper *Miranda* warnings and a valid waiver of rights); Alfredo Garcia, *Is Miranda Dead, was it Overruled, or is it Irrelevant?*, 10 ST. THOMAS L. REV. 461, 499 (1998) (arguing that "*Miranda* provides an ancillary benefit to law enforcement").

41. Justice O'Connor, for whom this lecture series is named, frequently used the same approach. See, e.g., 44 *Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 529-30 (1996) (O'Connor, J., concurring);

Also factoring into the mix is that these are not the only two ways of deciding cases. For example, Justice Kennedy described some of his judicial philosophy to me during a time when my class was visiting him at the Supreme Court. Justice Kennedy emphasized that a too sweeping decision may result in the Court deciding a question without giving that precise question appropriate consideration. On the other hand, he suggested that a too narrow decision (good for this case and this case only) might not be broad enough to give lower courts sufficient guidance. Put differently, Justice Kennedy seemed less satisfied with an indeterminate mess than Justice Breyer (though perhaps not as dissatisfied as Justice Scalia).

What this should tell us is that the contrariety of ideas and methodologies on the Court makes it richer. And that, of course, is a good thing. Justice Scalia is there to remind the Court that text needs to be taken seriously, rules need to be clear enough that the populace will understand them, and neither will be malleable in the hands of judges.<sup>42</sup> Justice Breyer, on the other hand, reminds us to take things slowly, but once we do decide a question, we should take that precedent seriously.

Well, that brings us to the real bottom line: If we had to make our second choice, would we be better off with a Court containing nine Scalias or nine Breyers? A piece of me does not want to answer that question, preferring to leave it to the reader to make a choice. But, as one who has taught his students to not shy away from difficult questions, I do not believe that option is open to me.

So, I would choose a Court of nine Breyers over a Court of nine Scalias. Why? It is certainly not because of not wanting to resolve large questions. Sometimes rules are just better than standards.<sup>43</sup> Nor is it based on Breyer's greater reverence for precedent. My bottom line reason is Scalia's rejection of the relevance of consequences.

Let me give two examples. In Scalia's world, the fact that the United States, probably acting at the behest of its police officers, wanted to keep *Miranda* was irrelevant. Presumably, even if he were persuaded that the uncertainty of the totality of the circumstances coerced confession test<sup>44</sup> was a problem for police officers, and that the relative simplicity of *Miranda* was preferred by them,<sup>45</sup> that would be irrelevant. I am not

---

O'Connor v. Ortega, 480 U.S. 709, 718 (1987); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987); Town of Newton v. Rumery, 480 U.S. 386, 399 (1987) (O'Connor, J., concurring).

42. Compare with Justice Black, who was said to have written his opinions so that the man on the street could understand them. Indeed, I once taught Justice Black's granddaughter, who told me that the Justice (her grandfather) used to read opinions to her mother (his daughter) when she was eleven to make sure that the ordinary person could understand what he was saying.

43. See Sullivan, *supra* note 28, at 62-66.

44. See, e.g., Watts v. Indiana, 338 U.S. 49, 53-54 (1949).

45. I use the term "relative simplicity" because anybody who has seriously studied *Miranda* and its progeny knows that there can be excruciatingly tough cases. See, e.g., Berghuis v. Thompson, 130 S. Ct. 2250 (2010); Davis v. United States, 512 U.S. 452 (1994).

arguing that the consequences of retaining *Miranda* are necessarily better than the consequences of overruling it. Indeed, some would argue quite the contrary.<sup>46</sup> But, I am concerned that Justice Scalia would consider that an irrelevancy.

My second example is capital punishment. In our earlier hypothetical about a study showing that innocent people had been executed in (let us suppose) alarming numbers, Justice Scalia's response would be that the Constitution permits capital punishment and calls for the judgment of guilt to be made by a jury required to find guilt beyond a reasonable doubt.<sup>47</sup> If that happened, we really do not care how many innocent people are killed.

Frankly, opinions reaching such results are fine as dissenting opinions. They may cause those in the majority to rethink their premises in order to be sure of their correctness. But, I do not believe that historically the Court has ever ignored consequences. To be sure, there have been times when the Court's weighing of consequences was not to my liking,<sup>48</sup> which is different from simply declaring them irrelevant. While it is possible that Scalia may not truly believe that any consequence, however extreme, is irrelevant, I am willing to take him at his word. And based on that word, if I could only have one of the two Justices' philosophies represented on the Court, I would choose Breyer's.

---

46. See, e.g., Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 498-99 (1996).

47. See *supra* note 23 and accompanying text.

48. See, e.g., *Lochner v. New York*, 198 U.S. 45, 56-58 (1905).