

# THE CHANGING SUPREME COURT AND PRISONERS' RIGHTS

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## INTRODUCTION

The final years of the Rehnquist Court era represented a period of extraordinary<sup>1</sup> compositional stability<sup>2</sup> on the U.S. Supreme Court as the same nine Justices<sup>3</sup> served together for the period from 1994 to 2005.<sup>4</sup> Beginning in 2005, the Court's composition changed significantly over a relatively short period of time with the departures of Chief Justice William Rehnquist,<sup>5</sup> Justice Sandra Day O'Connor,<sup>6</sup> Justice David Souter,<sup>7</sup> and Justice John Paul Stevens<sup>8</sup> and their

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1. *See* MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 67 (2005) ("You have to go back to the years from 1811 to 1823 to find a longer period with no changes in personnel on the [Supreme] Court (and then there were only seven justices anyway).").

2. *See, e.g.*, JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 5 (2007) ("The Court . . . had functioned as a unit for more than a decade, unaltered since the seating of Justice Breyer in 1994 . . . .").

3. The nine Justices were Chief Justice William Rehnquist, Justice John Paul Stevens, Justice Sandra Day O'Connor, Justice Antonin Scalia, Justice Anthony Kennedy, Justice David Souter, Justice Clarence Thomas, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer. *See* Christopher E. Smith & Thomas R. Hensley, *Decision-Making Trends of the Rehnquist Court Era: Civil Rights and Liberties Cases*, 89 JUDICATURE 161, 165 (2005).

4. The period of stability lasted from the confirmation of Justice Stephen Breyer to replace retiring Justice Harry Blackmun in 1994 until the next departure from the Court, that of Chief Justice William Rehnquist in 2005, who was replaced by Chief Justice John Roberts. *See* David Margolick, *Scholarly Consensus Builder: Stephen Gerald Breyer*, N.Y. TIMES, May 14, 1994, available at <http://www.nytimes.com/1994/05/14/us/man-supreme-court-scholarly-consensus-builder-stephen-gerald-breyer.html>; David E. Rosenbaum, *An Advocate for the Right*, N.Y. TIMES, July 28, 2005, at A16.

5. Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, available at <http://www.nytimes.com/2005/09/04/politics/04court.html>.

6. Linda Greenhouse, *With O'Connor Retirement and a New Chief Justice Comes an Awareness of Change*, N.Y. TIMES, Jan. 28, 2006, available at <http://www.nytimes.com/2006/01/28/politics/politicsspecial1/28memo.html>.

7. Kate Phillips, *Souter and Justices Exchange Farewells*, THE CAUCUS (June 29, 2009, 2:11 PM), <http://thecaucus.blogs.nytimes.com/2009/06/29/Souter-and-justices-exchange-farewells/>.

8. Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement Is Political Test for Obama*, N.Y. TIMES, Apr. 9, 2010, available at <http://www.nytimes.com/2010/04/10/us/politics/10stevens.html>.

attendant replacements by, respectively, Chief Justice John Roberts (2005),<sup>9</sup> Justice Samuel Alito (2006),<sup>10</sup> Justice Sonia Sotomayor (2009),<sup>11</sup> and Justice Elena Kagan (2010).<sup>12</sup> Such changes in the Court's composition inevitably affect its decisionmaking.<sup>13</sup> This seems particularly true for the recent changes that commentators claim "transformed"<sup>14</sup> the Court and constituted "one of the most fateful shifts in the country's judicial landscape."<sup>15</sup> In addition, there are other key factors that affect trends in Supreme Court decisionmaking,<sup>16</sup> most notably the treatment of precedent by particular Justices on the Court at any given moment.<sup>17</sup> This Article will discuss the potential impact of those changes on one particular area of law: prisoners' rights. The recent changes in the Court's composition raise questions about the preservation and enforcement of legal protections for individuals held in jails and prisons.

### I. REHNQUIST COURT JUSTICES

In discussing the impact of changes in the Supreme Court's composition, this Article will use the usual definitions employed by judicial scholars for categorizing Justices' votes and case outcomes as "liberal" and "conservative."<sup>18</sup>

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9. Sheryl Gay Stolberg & Elisabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES, Sept. 30, 2005, available at <http://www.nytimes.com/2005/09/30/politics/politicsspecial1/30confirm.html>.

10. David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, available at <http://www.nytimes.com/2006/02/01/politics/politicsspecial1/01confirm.html>.

11. Charlie Savage, *Sotomayor Sworn In as New Justice*, THE CAUCUS (Aug. 8, 2009, 12:49 PM), <http://thecaucus.blogs.nytimes.com/2009/08/08/sotomayor-sworn-in-as-new-justice/>.

12. Peter Baker, *Kagan Is Sworn In as Fourth Woman, and 112th Justice, on the Supreme Court*, N.Y. TIMES, Aug. 7, 2010, available at <http://www.nytimes.com/2010/08/08/us/08kagan.html>.

13. See LAWRENCE BAUM, THE SUPREME COURT 27 (4th ed. 1992) ("The policies that any government body makes are determined in part by the attitudes and perspectives of the people who serve in it. This is particularly true of the Supreme Court . . . . Indeed, the single most important factor shaping the Court's policies at any given moment may be the identity of its members.").

14. GREENBURG, *supra* note 2, at 5.

15. *Id.*

16. See BAUM, *supra* note 13, at 130 ("The factors that affect decisions of the Supreme Court can be placed in four general categories: (1) the state of the body of law that is applicable to a case; (2) the environment of the Court, including other policy makers, interest groups, and public opinion; (3) the personal values of the [J]ustices concerning the desirability of alternative decisions and policies; and (4) interaction among members of the Court.").

17. *Id.* at 130, 132.

18. The terms "liberal" and "conservative" in this Article characterize Supreme Court decisions in the manner used in the Supreme Court Judicial Database, in which "[l]iberal decisions in the area of civil liberties are pro-person accused or convicted of crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American] . . . and anti-government in due process and

In essence, liberal votes and decisions are those that support claims of rights by prisoners, and conservative votes and decisions are those that endorse the authority of corrections officials.<sup>19</sup> These labels and classifications can be problematic for specific rights issues, such as gun owners' rights and property rights, in which politically conservative jurists favor individuals' claims and politically liberal jurists support assertions of state authority.<sup>20</sup> In the case of prisoners' rights, however, these labels and classifications seem more closely aligned with Justices' typical voting patterns in constitutional rights cases, as indicated in Table 1 for those Justices who served during the stable composition period (1994-2005) of the later Rehnquist Court era.<sup>21</sup> The ordering of the Justices from most conservative to most liberal according to their voting records for prisoners' rights cases aligns closely with their ranking for voting in a broader array of criminal justice cases<sup>22</sup> and in constitutional rights cases generally.<sup>23</sup> As the following section will discuss, the departures and replacements of specific Justices, especially the two most liberal Justices in prisoners' rights cases, Justices Stevens and Souter,<sup>24</sup> raise questions about future Supreme Court decisionmaking in such cases during the Roberts Court era.

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privacy." Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989).

19. *Id.* ("Liberal decisions in the area of civil liberties are pro-person accused or *convicted of crime* [i.e., convicted offenders in prisons and jails].") (emphasis added)). Therefore, "[b]y contrast, conservative decisions favor the government[, including government officials who run prisons and jails,] in civil rights and liberties cases." Smith & Hensley, *supra* note 3, at 162.

20. *See, e.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (where consistently conservative Justices Scalia, Roberts, Thomas, and Alito supported individual gun rights claims against a local law restricting handgun ownership and possession); *Kelo v. City of New London*, 545 U.S. 469 (2005) (where consistently liberal Justices Stevens, Souter, Ginsburg, and Breyer supported the city's eminent domain authority against property rights claim of an individual homeowner).

21. Data are drawn from Christopher E. Smith & Anne M. Corbin, *The Rehnquist Court and Corrections Law: An Empirical Assessment*, 21 CRIM. JUST. STUD. 179, 186 tbl.5 (2008).

22. *See* Christopher E. Smith et al., *Criminal Justice and the 2003-2004 United States Supreme Court Term*, 35 N.M. L. REV. 123, 130-32 (2005).

23. Smith & Hensley, *supra* note 3, at 164 tbl.3.

24. *See infra* Table 1.

**Table 1.** Individual Justices' Liberal-Conservative Voting Percentages in Constitutional Corrections Law Cases, 1986 Term Through 2004 Term.<sup>25</sup>

Justice	Conservative Voting Percentage	Liberal Voting Percentage
Clarence Thomas	88% (23)	12% (3)
Antonin Scalia	87% (33)	13% (5)
William Rehnquist	78% (29)	22% (8)
Sandra Day O'Connor	71% (27)	29% (11)
Anthony Kennedy	69% (22)	31% (10)
Stephen Breyer	43% (10)	57% (13)
Ruth Bader Ginsburg	42% (10)	58% (14)
David Souter	39% (11)	61% (17)
John Paul Stevens	16% (6)	84% (32)

#### *A. Key Departures*

A key aspect of composition change from the Rehnquist Court era to the Roberts Court era is the identity and role of each Justice who left the Court. By considering their roles in prisoners' rights cases, one can ponder the potential impact of their replacements and the overall prospects for the future of prisoners' rights cases in the Supreme Court.

1. *John Paul Stevens*.—Justice Stevens demonstrated an extraordinary record of support for identifying and protecting rights for prisoners during his thirty-five-year career on the Supreme Court.<sup>26</sup> As a Republican appointee of President Gerald Ford in 1975,<sup>27</sup> Justice Stevens arrived at the Court amid expectations that he would be moderately conservative.<sup>28</sup> He immediately demonstrated his liberal orientation toward prisoners' rights when, in a case argued just four months after he began his service as an Associate Justice, Stevens dissented against a decision that denied a right to pre-transfer hearings for prisoners being sent to institutions with less favorable living conditions.<sup>29</sup> On behalf of himself and the two holdover liberals from the Warren Court era, Justices William Brennan<sup>30</sup> and Thurgood Marshall,<sup>31</sup> Justice Stevens articulated a strong endorsement of rights

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25. Data are drawn from Smith & Corbin, *supra* note 21, at 186 tbl.5.

26. See Christopher E. Smith, *The Roles of John Paul Stevens in Criminal Justice Cases*, 39 SUFFOLK U. L. REV. 719, 733-36 (2006).

27. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 322-24 (2d ed. 1985).

28. *Id.* at 324 ("Stevens was considered difficult to categorize, but 'centrist' was the label most often attributed to him; he was professionally perceived as a 'legal conservative.'").

29. *Meachum v. Fano*, 427 U.S. 215, 229-35 (1976) (Stevens, J., dissenting).

30. See ABRAHAM, *supra* note 27, at 264 ("Justice Brennan . . . champion[ed] a generously expansive interpretation of the Bill of Rights and the Civil War amendments.").

31. *Id.* at 290 ("Marshall and Brennan thus rendered themselves into *the* two most reliable, indeed, certain unified libertarian activists on the high bench. They voted together to the tune of ninety-seven percent in almost all cases involving claims of infractions of civil rights and liberties in general and of allegations of denials of the equal protection of the laws in race and gender cases

that endure during incarceration, even for those convicted of heinous crimes:

For if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore.<sup>32</sup>

Justice Stevens continued to support prisoners' claims such that in his initial years of service during the Burger Court era, he earned the following observation from one scholar: "In no other area of criminal justice did Stevens differentiate himself as much from the Burger Court majority as in prisoners' rights cases. He supported the prisoner in 16 of the 17 cases considered."<sup>33</sup>

An important factor underlying his level of support for prisoners' claims was a fact that was little known until his final years of service on the Supreme Court. During his years as an attorney in Chicago, Stevens actively participated in the prisoner assistance committee of the Chicago Bar Association by undertaking pro bono representation of incarcerated offenders.<sup>34</sup> In a speech to the Chicago Bar Association, Justice Stevens explicitly acknowledged that his pro bono experience had shaped his perceptions of prisoners' claims:

In closing, I want to express my thanks to the Chicago Bar Association for the many lessons about the law that I learned during my active membership in the Association. Association assignments taught me that prisoners are human beings and some, though not all, of their claims have merit . . . that the intangible benefits of pro bono work can be even more rewarding than a paying client.<sup>35</sup>

Related to the actual experience of representing convicted offenders in court, Justice Stevens may be one of the few Justices to actually visit prisons and see firsthand the conditions under which convicted offenders live.<sup>36</sup> As an attorney,

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in particular." (internal citation omitted)).

32. *Meachum*, 427 U.S. at 233 (Stevens, J., dissenting).

33. Bradley C. Canon, *Justice John Paul Stevens: The Lone Ranger in a Black Robe*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 343, 370-71 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

34. See Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 TEMP. POL. & CIV. RTS. L. REV. 83, 98-100 (2007).

35. Justice John Paul Stevens, Address at the Chicago Bar Association's 125th Anniversary Dinner and Celebration (Sept. 16, 1998) (on file with author).

36. In looking at the background experiences of Justices on the Rehnquist Court and the Roberts Court, there is no public information indicating that any of them, other than Stevens, ever represented a criminal defendant or convicted offender; thus, they would not have had a reason to visit a correctional institution in order to speak with a client. The non-judicial occupations of the Justices include the following: former prosecutors (Sonia Sotomayor and Samuel Alito); former law professors (Antonin Scalia, Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, and Elena Kagan); former attorneys with high positions in the federal government or Congress in

Justice Stevens visited prisons in order to provide advice and prepare case presentations for his convicted offender-clients.<sup>37</sup> He also visited prisons as a federal appellate judge with other judges interested in the issue of prison reform.<sup>38</sup> When asked in an interview if he knew whether other Supreme Court Justices had actually visited correctional institutions, he said that he believed Justice Ruth Bader Ginsburg had visited jails or prisons, but he was unaware of whether other Justices had made such visits.<sup>39</sup> Other than Justice Clarence Thomas, who may have visited an incarcerated nephew,<sup>40</sup> there is no evidence to indicate that other Justices have firsthand exposure to correctional institutions.

Firsthand exposure to prisons is potentially significant for jurists such as Justice Stevens, whose decisionmaking includes an empathetic component<sup>41</sup>—namely, a consideration of context and consequences.<sup>42</sup> Thus, Justice Stevens has been described as a jurist “who eschews theory in favor of practical reason” and who “deliberately make[s] decisions that would create the most reasonable results on the facts as he understood them”<sup>43</sup> as he advances his “love of fairness in each individual case.”<sup>44</sup> By contrast, jurists who seek to

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Washington, D.C. (John Roberts, William Rehnquist, Antonin Scalia, Stephen Breyer, Clarence Thomas, and Elena Kagan); former state attorney general (David Souter); and former state legislator (Sandra Day O’Connor). *See Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited May 26, 2011); *see also Rehnquist Court (1994-2005)*, OYEZ PROJECT, <http://www.oyez.org/courts/rehnquist/rehn6> (last visited May 26, 2011).

37. Interview with Justice John Paul Stevens, U.S. Supreme Court, in Washington, D.C. (July 29, 2010).

38. *Id.*

39. *Id.*

40. Thomas’s nephew, Mark Martin, is serving a thirty-year sentence in federal prison for selling cocaine. KEVIN MERIDA & MICHAEL FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 39-40 (2007). Thomas and his wife became legal guardians to Mark Martin’s son and are raising him in their Virginia home. *Id.* at 40. In the aftermath of Martin’s arrest that led to his long-term incarceration, Thomas was described by his family as “keeping his distance” and not wanting to be involved, yet he also kept his imprisoned nephew informed of the son’s progress in school by sending letters and report cards, so it is not clear from published reports about the extent to which Thomas visits his nephew in prison. *Id.*

41. *See* Christopher E. Smith, *An Empathetic Approach to Criminal Justice*, SCOTUSBLOG (May 12, 2010, 2:03 PM), <http://www.scotusblog.com/2010/05/an-empathetic-approach-to-criminal-justice> (regarding Justice Stevens’s retirement).

42. According to one analyst, Justice Stevens prefers to establish standards instead of doctrinal rules in order to guide judges in a case-by-case evaluation of situations based on his “general desire to avoid wrong decisions, and to get each case as right as he can.” Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543, 557 (1996).

43. Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 157, 178 (Earl M. Maltz ed., 2003).

44. *Id.* at 179.

create rigid rules through the application of a particular theory of interpretation, while claiming to be unconcerned about the context of cases or the consequences of their decisions, may more readily make decisions affecting prisoners' rights without any actual knowledge about the realities of prison life.<sup>45</sup>

Central to Justice Stevens's decisionmaking is what one scholar described as a belief that "the Court should protect *individual dignity* . . . [through] creative application of constitutional principles, such as due process."<sup>46</sup> Justice Stevens drew from this emphasis to serve as the Court's most outspoken and consistent advocate of consideration for the recognition of constitutional rights for convicted offenders and pretrial detainees.<sup>47</sup> He criticized the Court's deferential posture toward asserted security concerns of corrections officials that are used to curtail protections against unnecessarily intrusive searches,<sup>48</sup> limit access to family photos and reading materials,<sup>49</sup> and make it difficult for injured prisoners to prove that officials used excessive force against them.<sup>50</sup> Although he spent most of his career protesting against the Court's limited view of Eighth Amendment protections<sup>51</sup> and its failure to recognize prisoners' retention of due process liberty interests<sup>52</sup> and rights under the First<sup>53</sup> and Fourth Amendments,<sup>54</sup> Justice Stevens

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45. Justice Thomas aspires to interpret the Constitution consistently according to the original intent of the Framers. Christopher E. Smith, *Bent on Original Intent*, 82 A.B.A. J. 48, 48 (1996). This aspiration leads him to argue that the Constitution grants virtually no rights to prisoners other than a due process right of access to the courts that is limited to the existence of a mail slot in the prison into which prisoners can place petitions to be mailed to a courthouse. *See* Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 24 (1997). His viewpoint remains unwavering and unconcerned with practical consequences, even as it would deny constitutional protection to prisoners who are assaulted by corrections officers as in *Hudson v. McMillian*, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting), or chained to a post in the prison yard on a hot day without adequate access to water or toilet facilities, as in *Hope v. Pelzer*, 536 U.S. 730, 758 (2002) (Thomas, J., dissenting).

46. William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1090 (emphasis added).

47. *See* Smith, *supra* note 26, at 733-36.

48. *Bell v. Wolfish*, 441 U.S. 520, 580-81 (1979) (Stevens, J., dissenting).

49. *Beard v. Banks*, 548 U.S. 521, 545-47 (2006) (Stevens, J., dissenting).

50. *Hudson*, 503 U.S. at 12-13 (Stevens, J., concurring).

51. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 115-16 (1976) (Stevens, J., dissenting) (complaining that the Court's subjective "deliberate indifference" test would provide inadequate protection for prisoners' Eighth Amendment right to medical care).

52. *See, e.g.*, *Hewitt v. Helms*, 459 U.S. 460, 481 (1983) (Stevens, J., dissenting) (arguing for greater recognition of a due process liberty interest that should trigger procedural rights prior to disciplinary transfers to administrative segregation).

53. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 421-25 (1989) (Stevens, J., concurring in part and dissenting in part) (advocating greater recognition of prisoners' rights to receive publications).

54. *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 542-43 (1984) (Stevens, J., concurring in part and dissenting in part) (disagreeing with the majority's rejection of any Fourth Amendment privacy

had a few opportunities to write majority opinions that condemned inhumane prison conditions<sup>55</sup> and treatment of prisoners.<sup>56</sup> In the aftermath of his retirement, it remains to be seen whether any other Roberts Court Justices will assume Justice Stevens's role as the outspoken advocate for consideration of prisoners' rights.

2. *David Souter*.—Justice Souter was appointed to the Supreme Court by Republican President George H.W. Bush because of an expectation that he would support conservative case outcomes.<sup>57</sup> During his first term on the Court from 1990 to 1991, "Souter provided a quiet, dependable vote for the Court's increasingly strong conservative majority."<sup>58</sup> Justice Souter's initial performance included his decisive fifth vote in *Wilson v. Seiter*<sup>59</sup> to extend the difficult-to-prove, subjective "deliberate indifference" standard to all Eighth Amendment conditions-of-confinement prison lawsuits.<sup>60</sup> As noted by scholars, "[i]n subsequent terms, however, [Justice Souter] . . . established an increasingly liberal voting record,"<sup>61</sup> as indicated by Table 1 data concerning his relatively liberal voting record in prisoner cases.<sup>62</sup>

Although he was actively engaged as an opinion author in the Court's debates about procedures for habeas corpus petitions,<sup>63</sup> Justice Souter rarely wrote opinions on prisoners' constitutional rights cases. He wrote for a unanimous Court in *Farmer v. Brennan*<sup>64</sup> and thereby reinforced the Court's subjective test for Eighth Amendment claims.<sup>65</sup> *Farmer v. Brennan* concerned a transsexual prisoner who was violently victimized when he was transferred, over his vocal

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interests in personal property in prison cells).

55. *Hutto v. Finney*, 437 U.S. 678, 700 (1978) (endorsing the authority of U.S. district judges to order remedies when prisoners were placed in conditions of inadequate nutrition, communicable diseases, or pervasive violence).

56. *Hope v. Pelzer*, 536 U.S. 730, 734-35, 746 (2002) (identifying Eighth Amendment violation and denying qualified immunity to correction officer defendants who chained a prisoner to a bar in the prison yard without adequate access to shade, water, or toilet facilities).

57. *See TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT* vii-x (2005).

58. Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 238, 243 (1992).

59. 501 U.S. 294 (1991).

60. *See CHRISTOPHER E. SMITH, LAW AND CONTEMPORARY CORRECTIONS* 218 (2000).

61. YARBROUGH, *supra* note 57, at x.

62. *See supra* Table 1.

63. *See, e.g., Bowles v. Russell*, 551 U.S. 205, 215 (2007) (Souter, J., dissenting) (disagreeing with strict enforcement of filing deadlines); *Lindh v. Murphy*, 521 U.S. 320, 326-37 (1997) (interpreting the timing and applicability of limitations on habeas petitions as a result of the Antiterrorism and Effective Death Penalty Act of 1996); *Withrow v. Williams*, 507 U.S. 680, 694-95 (1993) (stating that collateral review through habeas corpus is available for claimed violations of *Miranda* rights).

64. 511 U.S. 825 (1994).

65. *See SMITH, supra* note 60, at 227-28.

protests, to a high-security prison that held many violent offenders.<sup>66</sup> Souter's opinion concluded:

We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.<sup>67</sup>

In contrast to Souter's majority opinion, his liberal colleagues Justices Stevens and Blackmun concurred in the result as a matter of respect for precedent, but each wrote an opinion to protest the continued use of the "deliberate indifference" standard for Eighth Amendment prisoner cases.<sup>68</sup>

Justice Souter's other opinions addressing prisoners' rights concerned constitutional rights lawsuits over allegedly improper imprisonment,<sup>69</sup> the standing requirement for prisoners seeking to challenge the adequacy of their legal resources for pro se litigation,<sup>70</sup> Ex Post Facto Clause violations from changing parole rules,<sup>71</sup> and the authority of federal judges to issue injunctions in prisoner cases.<sup>72</sup> Despite his general level of support for many prisoners' rights claims,<sup>73</sup> as compared to Justice Stevens, Justice Souter was markedly less supportive of and assertive about the protection of prisoners' rights.

3. *Sandra Day O'Connor*.—As an appointee of conservative President Ronald Reagan in 1981,<sup>74</sup> Justice O'Connor demonstrated a conservative voting record in civil rights and civil liberties cases,<sup>75</sup> and she is included by scholars in their lists of "Justices who are conservative on criminal procedure."<sup>76</sup> Yet she had a penchant for seeking middle ground when the Court was deeply divided,<sup>77</sup>

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66. *Farmer*, 511 U.S. at 828-30.

67. *Id.* at 837.

68. *Id.* at 851-52 (Blackmun, J., concurring); *see also id.* at 858 (Stevens, J., concurring).

69. *Heck v. Humphrey*, 512 U.S. 477, 491 (1994) (Souter, J., concurring).

70. *Lewis v. Casey*, 518 U.S. 343, 393 (1996) (Souter, J., concurring in part and dissenting in part).

71. *Garner v. Jones*, 529 U.S. 244, 260 (2000) (Souter, J., dissenting).

72. *Miller v. French*, 530 U.S. 327, 350 (2000) (Souter, J., concurring in part and dissenting in part).

73. *See supra* Table 1.

74. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 6 (2007).

75. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 254 (1993).

76. *Id.* at 30.

77. Justice O'Connor had "importance as an accommodationist on a divided bench where neither the conservative nor liberal bloc held the balance of power and a centrist justice could broker compromise." NANCY MAVEETY, QUEEN'S COURT: JUDICIAL POWER IN THE REHNQUIST ERA 4-5 (2008) (citation omitted).

as she did most famously for the issue of abortion.<sup>78</sup> Therefore, she has been characterized as “more influential in the Court majorities than any of her associate colleagues.”<sup>79</sup> Her role as the conservative “*crucial contributor*”<sup>80</sup> in the middle of the Court made her influential in the development of prisoners’ rights jurisprudence.<sup>81</sup>

Justice O’Connor’s most influential prisoners’ rights opinion was *Turner v. Safley*,<sup>82</sup> a case in which the Court faced allegations of two different rights violations: denial of the asserted right to get married and denial of the asserted right to correspond with other prisoners.<sup>83</sup> In the Justices’ initial discussion of the case at conference, four Justices (Rehnquist, Scalia, White, and Powell) concluded that there were no rights violations, and four Justices (Stevens, Brennan, Marshall, and Blackmun) concluded that both rights were violated.<sup>84</sup> Justice O’Connor received the assignment to write the majority opinion because her decisive vote determined the existence of two different 5-4 decisions: one to uphold the regulation on correspondence and the other to reject the regulation prohibiting prisoner marriages.<sup>85</sup> Justice O’Connor created a four-part test, anchored on a rational basis assessment that is deferential to prison officials’ assertions of security concerns,<sup>86</sup> that has subsequently been applied to evaluate an array of constitutional claims by prisoners.<sup>87</sup> Indeed, the conservative Justices were apparently so pleased with the deferential nature of O’Connor’s *Turner* test that they switched their votes and endorsed the Court’s rejection of the marriage regulation.<sup>88</sup>

Meanwhile, the Court’s liberal Justices were so displeased with the formulation of a test that would nearly always lead prison officials to prevail when challenged by prisoners’ rights claims that they redrafted a dissent to

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78. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Justice O’Connor co-authored an opinion with Justices Anthony Kennedy and David Souter that preserved *Roe v. Wade*, 410 U.S. 113 (1973), while permitting broader regulation by states, as long as such regulation did not impose an “undue burden” on women’s choices concerning abortion in the first two trimesters of pregnancy. See THOMAS R. HENSLEY ET AL., THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 845-46 (1997).

79. MAVEETY, *supra* note 77, at 4.

80. *Id.*

81. Christopher E. Smith, *Justice Sandra Day O’Connor and Corrections Law*, 32 HAMLINE L. REV. 477, 478-79 (2009).

82. 482 U.S. 78 (1987).

83. *Id.* at 81-82.

84. Smith, *supra* note 81, at 488.

85. *Id.*

86. *Id.* at 489-91.

87. See, e.g., *Beard v. Banks*, 548 U.S. 521, 535 (2006) (finding that prison officials can deny access to publications and family photos); *Overton v. Bazzetta*, 539 U.S. 126, 132-34 (2003) (finding no visitation rights for prisoners).

88. Smith, *supra* note 81, at 489-90.

emphasize that it was too deferential to prison officials.<sup>89</sup> In the words of Justice Stevens's dissent,

if the standard can be satisfied by nothing more than a “*logical connection*” between the regulation and any legitimate penological concern perceived by a cautious warden . . . it is virtually meaningless. Application of the standard would seem to permit disregard for inmates’ constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.<sup>90</sup>

In another important case, Justice O’Connor wrote the majority opinion that established the test for evaluating claims that corrections officers’ uses of force were excessive and violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>91</sup> In *Whitley v. Albers*, an uninvolved prisoner was seriously injured by a shotgun blast when corrections officers stormed a cellblock to rescue a hostage.<sup>92</sup> Justice O’Connor’s majority opinion emphasized the need for judges to show deference to the judgments of corrections officials.<sup>93</sup> She articulated a test that imposed liability for a rights violation only when corrections officials inflicted “unnecessary and wanton pain” by applying force “maliciously and sadistically for the very purpose of causing harm.”<sup>94</sup> This difficult-to-prove, subjective standard makes it challenging for prisoners to establish that their Eighth Amendment rights have been violated, even in contexts in which they suffer injuries and corrections officers had the option of using less force in the incident.<sup>95</sup> The Court subsequently applied this same subjective standard to the use of force in prison contexts other than the aftermath of significant disorder.<sup>96</sup> For example, a majority of Justices applied the *Whitley* test when corrections officers allegedly beat a handcuffed and shackled prisoner, thereby breaking his tooth and bruising his face.<sup>97</sup>

Justice Thurgood Marshall’s dissent criticized O’Connor’s opinion for suggesting “that the existence of more appropriate alternative measures for controlling prison disturbances is irrelevant to the constitutional inquiry.”<sup>98</sup> Justice Marshall challenged O’Connor and the majority to consider whether they could really accept a decision by “prison officials . . . to drop a bomb on a

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89. *Id.* at 491-92.

90. *Turner v. Safley*, 482 U.S. 78, 100-01 (1987) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

91. *Whitley v. Albers*, 475 U.S. 312 (1986).

92. *Id.* at 314-17.

93. *Id.* at 321-22.

94. *Id.* at 320-21 (citation omitted).

95. Smith, *supra* note 81, at 483-85.

96. *Hudson v. McMillian*, 503 U.S. 1, 7-8 (1992).

97. *Id.* at 4, 7-8.

98. *Whitley*, 475 U.S. at 333 (Marshall, J., dissenting).

cellblock in order to halt a fistfight between two inmates," even if the innocent prisoners injured by the bomb in the cellblock were unable to prove that corrections officials acted with malicious and sadistic intent.<sup>99</sup>

Although Justice O'Connor created two key tests that make it difficult for prisoners to prevail in legal actions over certain constitutional claims, she resisted efforts by her more conservative colleagues to interpret and apply those tests in ways that would be even more restrictive of prisoners' rights. For example, she rejected the effort by Justices Thomas and Scalia to apply the deferential *Turner* test to prisoners' claims about equal protection violations.<sup>100</sup> Indeed, Justice O'Connor wrote the majority opinion declaring that judges must apply the non-deferential strict scrutiny test,<sup>101</sup> rather than the *Turner* test, to prisoners' claims about racial segregation.<sup>102</sup> After her retirement, when sitting by designation as a member of a panel on the U.S. Court of Appeals for the Eighth Circuit, Justice O'Connor continued to communicate her view that the *Turner* test should be applied only in limited contexts as she joined a unanimous opinion that declined to apply that test in a prisoners' rights case concerning an alleged violation of the Establishment Clause of the First Amendment.<sup>103</sup> With respect to her *Whitley* test for Eighth Amendment violations in use-of-force cases, she resisted efforts by Justices Thomas and Scalia to impose an additional "significant injury" requirement, as she wrote the majority opinion in a case that permitted a prisoner to sue for a beating at the hands of guards that caused "minor" injuries not requiring medical attention.<sup>104</sup> Thus, unlike her more conservative colleagues who reject nearly every constitutional claim by prisoners,<sup>105</sup> Justice O'Connor was open to protecting rights for prisoners in such specific contexts.<sup>106</sup>

4. *William H. Rehnquist*.—Chief Justice Rehnquist was originally appointed to the Court as an Associate Justice in 1971 by President Richard Nixon.<sup>107</sup>

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99. *Id.* at 333-34.

100. *Johnson v. California*, 543 U.S. 499, 530 (2005) (Thomas, J., dissenting).

101. See *HENSLEY ET AL.*, *supra* note 78, at 618 ("Under this strict scrutiny approach, the burden of proof shifts to the government, which must demonstrate that the classification is 'narrowly tailored' to achieve a 'compelling interest.' . . . [T]his test has been used to strike down many racial classifications.").

102. *Johnson*, 543 U.S. at 509 (majority opinion).

103. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426 (8th Cir. 2007).

104. *Hudson v. McMillian*, 503 U.S. 1, 4, 7-8 (1992).

105. See, e.g., Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 603 (1995) ("Justices Thomas and Scalia have established themselves as advocates for a return to the 'hands-off' judicial policy of yesteryear with respect to prison conditions and the treatment of convicted offenders.").

106. For example, Justice O'Connor joined Justice Stevens's majority opinion in *Hope v. Pelzer*, 536 U.S. 730, 745 (2002), which declared that prison officials violated the Eighth Amendment when they chained a prisoner to a bar in the prison yard for many hours without adequate access to shade, water, and toilet facilities.

107. *ABRAHAM*, *supra* note 27, at 314-16.

Rehnquist was recognized as possessing an “ideologically doctrinaire conservative approach to constitutional law,”<sup>108</sup> and he “quickly became the leader of the ‘right’ or ‘conservative’ wing of the Court.”<sup>109</sup> For example, among all Supreme Court Justices who served from 1946 through 2005, Rehnquist demonstrated the lowest rate of support for defendants’ claims in criminal procedure cases (17.3%).<sup>110</sup> This was a rate even lower than that of his notably conservative colleagues, Justices Thomas (21.1%) and Scalia (25.3%).<sup>111</sup>

As an Associate Justice, Rehnquist wrote notable dissents against the majority’s declarations about prisoners’ right to have access to a law library<sup>112</sup> and the authority of federal judges to issue remedial orders to improve conditions of confinement.<sup>113</sup> Rehnquist wrote the majority opinion in *Bell v. Wolfish* that rejected a variety of claims by federal pretrial detainees, including objections to strip searches when leaving the visiting room.<sup>114</sup> This opinion was viewed as a signal to federal judges to be more deferential to the policies and practices of corrections officials.<sup>115</sup> After he was elevated to the office of Chief Justice by President Ronald Reagan, Rehnquist wrote the majority opinion applying the *Turner* test to a right not discussed in the *Turner* case. He used the test for First Amendment free exercise of religion.<sup>116</sup> Chief Justice Rehnquist took a deferential approach and accepted corrections officials’ reasons for denying low-security Muslim prisoners the opportunity to participate in a weekly prayer service that Rehnquist acknowledged to be of “central importance” to the prisoners’ religious practices and beliefs.<sup>117</sup>

Despite his record of conservatism, Chief Justice Rehnquist joined several opinions that recognized rights for prisoners, including due process rights in certain disciplinary proceedings,<sup>118</sup> a limited right to medical care,<sup>119</sup> and rights related to correspondence between prisoners and outside family members.<sup>120</sup> He strongly advocated for judicial deference to the decisions of corrections

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108. *Id.* at 315.

109. *Id.* at 317.

110. See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 535 tbl.6-4 (4th ed. 2007).

111. See *id.* at 536 tbl.6-4. These percentages, as well as the percentage calculated *supra* note 110, were calculated from the Supreme Court Data Base Project.

112. *Bounds v. Smith*, 430 U.S. 817, 837 (1977) (Rehnquist, J., dissenting).

113. *Hutto v. Finney*, 437 U.S. 678, 710 (1978) (Rehnquist, J., dissenting).

114. *Bell v. Wolfish*, 441 U.S. 520, 561-62 (1979).

115. See Christopher E. Smith, *Chief Justice William Rehnquist and Corrections Law*, 31 CORR. COMPENDIUM 6, 7 (2006).

116. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350-51 (1987).

117. *Id.* at 351-52.

118. *Wolff v. McDonnell*, 418 U.S. 539, 543 (1974).

119. *Estelle v. Gamble*, 429 U.S. 97, 107-08 (1976).

120. *Procurier v. Martinez*, 416 U.S. 396 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

officials,<sup>121</sup> yet he used language to demonstrate his recognition that unacceptable prison conditions existed and that judges were sometimes justified in intervening to protect prisoners' rights.<sup>122</sup> Thus, Chief Justice Rehnquist's conservative approach to prisoners' rights was not based on a categorical rejection of the idea that the Constitution protects incarcerated offenders and pretrial detainees.

### B. Key Returnees

1. *Clarence Thomas*.—Clarence Thomas was appointed to the Supreme Court in 1991 by President George H.W. Bush with the expectation that he would provide a consistent vote for conservative outcomes.<sup>123</sup> He has fulfilled the expectations of political conservatives,<sup>124</sup> and in the area of prisoners' rights, he has gone beyond merely voting to endorse the policies and practices implemented by corrections officials.<sup>125</sup> Justice Thomas has articulated a new vision of the role of constitutional rights in corrections, or stated more accurately, the near-absence of a role of constitutional rights in prisons and jails.<sup>126</sup>

Justice Thomas's first prisoners' rights case on the Supreme Court was *Hudson v. McMillian*, an Eighth Amendment case concerning a prisoner who sustained minor injuries when beaten by corrections officers as he was led down a hallway in handcuffs and shackles.<sup>127</sup> On behalf of himself and Justice Scalia, Thomas wrote a dissenting opinion that did not merely argue for a "significant injury" requirement in Eighth Amendment excessive-use-of-force lawsuits. Rather, he also argued against the existence of any Eighth Amendment protections for prisoners.<sup>128</sup> Justice Thomas aspires to interpret the Constitution

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121. See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

122. *Id.* at 562 ("The deplorable conditions and Draconian restrictions of some of our [n]ation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems.").

123. See JOYCE A. BAUGH, SUPREME COURT JUSTICES IN THE POST-BORK ERA: CONFIRMATION POLITICS AND JUDICIAL PERFORMANCE 42 (2002) ("[T]he nomination was praised by conservative groups who saw Thomas's appointment as a great opportunity to solidify a conservative majority on the Supreme Court which could further repudiate earlier Court rulings, especially on the issue of abortion.").

124. See Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC, *supra* note 43, at 70, 81 ("Justice Thomas is usually a reliable conservative and antilibertarian voice on criminal law matters that do not have free speech dimensions. Persons accused or convicted of crimes rarely gain his vote.").

125. CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY 91-98 (2000).

126. See *id.*

127. *Hudson v. McMillian*, 503 U.S. 1, 4-5 (1992).

128. See *id.* at 18-21 (Thomas, J., dissenting).

according to the Framers' original intentions.<sup>129</sup> Thus, he used his interpretation of history to make this argument:

Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration. . . .

Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naïve as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.<sup>130</sup>

The following year, Justice Thomas again wrote a dissent on behalf of himself and Justice Scalia in an Eighth Amendment case in which the majority permitted a lawsuit to proceed based on the risk of physical harm to a non-smoker housed in a cell with a chain-smoking cellmate.<sup>131</sup> Justice Thomas reiterated his originalist argument that the Eighth Amendment does not apply to conditions, actions, and events that occur inside prisons:

Thus, although the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose “punishment.” At a minimum, I believe that the original meaning of “punishment,” the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions. In my view, that burden has not yet been discharged.<sup>132</sup>

Scholars subsequently criticized Justice Thomas for claiming that the Framers were aware of harsh prison conditions and did not intend for the Eighth Amendment to protect prisoners from the effects of such conditions.<sup>133</sup> In reality, the prison was not invented and developed as a mechanism for punishing offenders through long-term incarceration until the nineteenth century.<sup>134</sup> The forms of criminal punishment at the time that the Framers created the Eighth Amendment were execution, whipping, branding, holding in stocks, and other non-incarcerative physical punishments.<sup>135</sup> Jails during that era were used to

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129. Smith, *Bent on Original Intent*, *supra* note 45, at 48.

130. *Hudson*, 503 U.S. at 18-19 (Thomas, J., dissenting).

131. *Helling v. McKinney*, 509 U.S. 25, 35 (1993); *id.* at 37 (Thomas, J., dissenting).

132. *Id.* at 40 (Thomas, J., dissenting).

133. See, e.g., SMITH & BAUGH, *supra* note 125, at 91-92.

134. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 77-82 (1993).

135. See *id.* at 48-50.

house pretrial detainees and debtors. They were not institutions for long-term punitive incarceration.<sup>136</sup> Thus, in writing and ratifying the Eighth Amendment at the end of the eighteenth century, the Framers could not have had awareness, knowledge, or specific intentions concerning an institution that had yet to be developed.

At some point during the following decade, Justice Thomas learned about the history of prisons in the United States; in his concurring opinion in *Overton v. Bazzetta*, he cited the work of several historians in declaring that “[i]ncarceration in the 18th century . . . was virtually nonexistent as a form of punishment” and prisons “were basically a nineteenth-century invention.”<sup>137</sup> This discussion was not a “mea culpa” for his previous erroneous assertions regarding the Framers’ awareness about the “harsh conditions” in yet-to-be-invented prisons.<sup>138</sup> Indeed, he made no reference to his prior assertions. Instead, he shifted his approach and based his assertions about the absence of constitutional rights for prisoners on a new theory about the states’ prerogative to define what rights, if any, protect prisoners under each state’s definition of “incarceration”:

The proper inquiry, therefore, is whether a sentence validly deprives the prisoner of a constitutional right enjoyed by ordinary, law-abiding persons. Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State’s prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations.<sup>139</sup>

Thomas’s opinion still purported to be an originalist approach that relied on history and traditional practice to guide constitutional interpretation.<sup>140</sup> He simply articulated a new rationale to support his consistent argument that the Constitution provides virtually no rights for prisoners other than a limited right to mail legal petitions to a courthouse.<sup>141</sup> However, even with respect to the one limited aspect of a prisoner’s right of access to the courts, Justice Thomas took an extremely restrictive view by asserting that “[states are] not constitutionally required to finance or otherwise assist the prisoner’s efforts, either through law

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136. *Id.* at 49-50.

137. *Overton v. Bazzetta*, 539 U.S. 126, 142 (2003) (Thomas, J., concurring) (citations omitted).

138. *Hudson v. McMillian*, 503 U.S. 1, 18-21 (1992) (Thomas, J., dissenting).

139. *Overton*, 539 U.S. at 140 (Thomas, J., concurring).

140. *See id.* at 142 (“Moreover, the history of incarceration as punishment supports the view that the sentences imposed on respondents terminated any rights of intimate association. From the time prisons began to be used as places where criminals served out their sentences, they were administered much in the way Michigan administers them today [with no entitlement to see family visitors].”).

141. *Lewis v. Casey*, 518 U.S. 343, 381 (1996) (Thomas, J., concurring) (“In the end, I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process Clause and the principle articulated in *Ex parte Hull*, is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court.”).

libraries or other legal assistance. Whether to expend state resources to facilitate prisoner lawsuits is a question of policy and one that the Constitution leaves to the discretion of the States.”<sup>142</sup> To Justice Thomas, this is not actually a “right of access to the courts,” but a “right not to be arbitrarily prevented from lodging a claimed violation of a federal right in . . . court.”<sup>143</sup> Because Justice Thomas would not require the expenditure of state resources in support of a right of access, the right would be illusory for most prisoners, who would lack not only access to material in a law library, but also to pens, paper, envelopes, and stamps necessary to prepare and mail a petition.<sup>144</sup> Thus, Justice Thomas has an extraordinarily limited view of prisoners’ rights. The fact that he replaced one of the Court’s foremost advocates of prisoners’ rights, Justice Thurgood Marshall,<sup>145</sup> means that Justice Thomas’s presence on the Supreme Court for the past two decades represents a significant rightward shift in the votes and opinions on prisoners’ rights cases emanating from that seat on the bench.

2. *Antonin Scalia*.—Appointed to the Supreme Court by President Ronald Reagan in 1986, Justice Scalia has been described by Professor Jeffrey Rosen as “the purest archetype of the conservative legal movement that began in the 1960s in reaction to the Warren Court.”<sup>146</sup> As indicated previously, he is one of the Justices least likely to support a prisoner’s legal claim.<sup>147</sup> Like Justice Thomas, Scalia is an advocate of the originalist approach to interpreting the Constitution.<sup>148</sup> Justice Scalia was the lone Justice to join Justice Thomas’s dissenting opinions that employed erroneous originalist arguments against the application of any Eighth Amendment protections to prisoners.<sup>149</sup> He did not join Justice Thomas’s 2003 opinion that shifted the basis for denying constitutional protections by according deference to states’ definitions of the rights that exist for prisoners during incarceration.<sup>150</sup> In 2006, however, Scalia did endorse Thomas’s view about state authority to control the definition of deprivations—including an absence of rights—associated with incarceration.<sup>151</sup>

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142. *Id.* at 381-82.

143. *Id.* at 381.

144. SMITH & BAUGH, *supra* note 125, at 98.

145. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 369 (1981) (Marshall, J., dissenting) (objecting to the placement of two prisoners in a small cell specifically designed to house only one prisoner); *Bell v. Wolfish*, 441 U.S. 520, 563 (1979) (Marshall, J., dissenting) (arguing for the protection of pretrial detainees’ rights); *Estelle v. Gamble*, 429 U.S. 97, 108 (1976) (establishing prisoners’ limited right to medical care under the Eighth Amendment).

146. JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 146 (2009) (quoting Jeffrey Rosen, *The Leader of the Opposition*, NEW REPUBLIC (Jan. 18, 1993), <http://www.tnr.com/article/politics/the-leader-the-opposition-0>).

147. See *supra* Table 1.

148. See BISKUPIC, *supra* note 146, at 283-84.

149. See *supra* notes 128-36 and accompanying text.

150. See *supra* notes 137-40 and accompanying text.

151. *Beard v. Banks*, 548 U.S. 521, 536 (2006) (Thomas, J., concurring). Justice Scalia joined this opinion.

Justice Scalia exerted significant influence over the definition and existence of prisoners' rights through two majority opinions in which he ingeniously exploited the malleability of judicial language in order to create new precedent that curtailed rights for prisoners.<sup>152</sup> Justice Scalia relied on Justice Thurgood Marshall's majority opinion creating a right of access to prison law libraries as an essential component of the right of access to the courts.<sup>153</sup> What Marshall had written as a step to create a necessary expansion of rights, Scalia subsequently used as if it was intended to define the limit of said right.<sup>154</sup> In addition, Justice Scalia used the concept of standing to make it difficult for prisoners to establish that they need additional legal assistance in order to gain effective access to the courts. He had long advocated the use of standing requirements in order to limit the number of cases—and policy-related issues—that could be placed in front of judges.<sup>155</sup> In this case, his use of the standing requirement created an impenetrable "catch-22" situation for many prisoners with low literacy levels, mental problems, or lack of facility with the English language: they need to go to court on their own, without additional assistance in order to prove that they are unable to go to court on their own, without additional assistance.<sup>156</sup> Obviously, if a prisoner could prove to a judge that he struggles with education, language, or IQ problems, he would simultaneously be proving that he could make use of the courts without the additional assistance that he was requesting. For those who truly needed extra assistance to gain access to the courts, it would be impossible for them to effectively present that need in court, and therefore, they would be effectively barred from asserting their rights in the judicial process.<sup>157</sup> Any impediments to effectively preparing and presenting legal petitions will affect the protection of all rights for prisoners because judicial enforcement of any right depends on a prisoner's access to the courts.<sup>158</sup>

Justice Scalia also altered the test used to examine whether conditions of confinement in prisons violate the Eighth Amendment prohibition on cruel and unusual punishments. In *Wilson v. Seiter*, the Court considered an array of claims about food, ventilation, and other issues at an Ohio prison.<sup>159</sup> In two prior cases about general living conditions, the Supreme Court had made objective assessments concerning whether crowded cells, minimal food, and exposure to communicable diseases violated the Eighth Amendment.<sup>160</sup> The Justices

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152. See Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 B.U. PUB. INT. L.J. 73, 84-91 (2001). Those two opinions were *Lewis v. Casey*, 518 U.S. 343 (1996), and *Wilson v. Seiter*, 501 U.S. 294 (1991).

153. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

154. Smith, *supra* note 152, at 90.

155. *Id.*

156. See *id.*

157. See *id.* at 91.

158. *Id.*

159. *Wilson v. Seiter*, 501 U.S. 294, 296 (1991).

160. In the prior cases, *Rhodes v. Chapman*, 452 U.S. 337 (1981), and *Hutto v. Finney*, 437 U.S. 678 (1978), the Justices looked at the actual conditions to make an objective assessment of

examined whether the conditions imposed the “unnecessary and wanton infliction of pain,” were “grossly disproportionate to the severity of the crime,”<sup>161</sup> or “transgress[ed] today’s ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”<sup>162</sup> In *Wilson*, Justice Scalia avoided discussing these precedents on prison conditions and instead treated as controlling precedent two cases that were about very specific Eighth Amendment issues—medical care<sup>163</sup> and the use of force,<sup>164</sup> neither of which were the focus of the claims in *Wilson*. He selectively chose to use these other precedents in order to announce a new rule requiring a subjective evaluation of prison conditions.<sup>165</sup> Justice Scalia’s opinion required prisoners to prove “deliberate indifference” on the part of corrections officials in order to show that prison conditions violated the Eighth Amendment.<sup>166</sup>

In a concurring opinion, Justice Byron White noted that Scalia’s approach would permit prison officials to preside over inhumane living conditions as long as the prison officials claimed that they cared about the conditions but were unable to improve the situation due to a lack of funding from the state legislature.<sup>167</sup> As Justice Stevens had complained years earlier, when the “deliberate indifference” test was first applied in a prison medical care case, “whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.”<sup>168</sup> Notwithstanding the criticisms of the four Justices who declined

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“cruel and unusual punishments” instead of relying on a subjective evaluation of the motives of the corrections officials in order to determine Eighth Amendment violations. *See Rhodes*, 452 U.S. at 346-47 (“[J]udgment[s] should be informed by objective factors to the maximum possible extent.’ . . . In *Estelle v. Gamble* . . . we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. . . . In *Hutto v. Finney* . . . the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivations of basic human needs. Conditions other than those in *Gamble* and *Hutto*, alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities.” (internal citations omitted)); *Hutto*, 437 U.S. at 687 (“The [district] court took note of the inmates’ diet, the continued overcrowding, the rampant violence, the vandalized cells, and the ‘lack of professionalism and good judgment on the part of maximum security personnel.’ . . . The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court’s conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.” (internal citation omitted)).

161. *Rhodes*, 452 U.S. at 345-347 (citation omitted).

162. *Hutto*, 437 U.S. at 685 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

163. *Estelle*, 429 U.S. at 98.

164. *Whitley v. Albers*, 475 U.S. 312 (1986).

165. *Smith*, *supra* note 152, at 84-85.

166. *Wilson v. Seiter*, 501 U.S. 294, 302-04 (1991).

167. *Id.* at 311 (White, J., concurring).

168. *Estelle*, 429 U.S. at 116-17 (Stevens, J., dissenting).

to join Scalia's *Wilson* opinion, the precedent has made it significantly more difficult for prisoners to prove that prison conditions violate the Eighth Amendment.<sup>169</sup>

Overall, Justice Scalia's originalist orientation leads him to take a restrictive view of the existence of prisoners' rights. Moreover, his skillful and effective manipulation of precedent has assertively imposed impediments to the effectuation of the right of access to the courts for many prisoners and made it much more difficult for prisoners to prove that substandard prison conditions violate the Eighth Amendment.

3. *Anthony Kennedy*.—Justice Anthony Kennedy, an appointee of President Ronald Reagan, generally supports corrections officials in prisoners' rights cases presented to the Supreme Court.<sup>170</sup> He is well-known for playing a key role in determining case outcomes when the Court is deeply divided.<sup>171</sup> He parted company with the Court's conservatives to provide pivotal votes for liberal majorities to preserve a right of choice for abortion,<sup>172</sup> prevent the criminalization of gay and lesbian adults' private, non-commercial sexual conduct,<sup>173</sup> and prohibit the death penalty for mentally retarded<sup>174</sup> and juvenile murderers,<sup>175</sup> as well as for sex offenders who victimize children.<sup>176</sup> Unlike Justices Scalia and Thomas, Kennedy is not an originalist; thus, as indicated by his decisions concerning capital punishment,<sup>177</sup> he applies the flexible *Trop v. Dulles* standard for determining Eighth Amendment violations.<sup>178</sup> With respect to prisoners' rights generally, however, Justice Kennedy tends to provide a dependable vote in support of corrections' officials policies and practices.

Justice Kennedy has not been assertive in presenting concurring and dissenting opinions in prisoners' rights cases. He has written several majority

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169. Smith, *supra* note 152, at 87.

170. *See supra* Table 1.

171. Charles Lane, *Kennedy Reigns Supreme on Court*, WASH. POST, July 2, 2006, at A6.

172. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

173. Lawrence v. Texas, 539 U.S. 558 (2003).

174. Atkins v. Virginia, 536 U.S. 304 (2002).

175. Roper v. Simmons, 543 U.S. 551 (2005).

176. Kennedy v. Louisiana, 554 U.S. 407 (2008).

177. For example, in *Roper*, Justice Kennedy wrote:

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.

*Roper*, 543 U.S. at 560-61 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

178. *Trop*, 356 U.S. at 100-01 ("[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (internal citation omitted)).

opinions that reject rights claims by convicted offenders. In *McKune v. Lile*, for example, over the objections of four dissenters, Kennedy wrote the plurality opinion and announced the judgment of the Court rejecting a prisoner's assertion of a Fifth Amendment self-incrimination violation.<sup>179</sup> At issue in *McKune* was an institutional treatment program for sex offenders that required an offender to reveal all acts he had ever committed, leaving open the possibility that he could be prosecuted for any admissions.<sup>180</sup> If the offender refused to participate in the treatment program, he faced transfer to a higher-security institution with fewer privileges and more difficult and dangerous living conditions.<sup>181</sup> In *Washington v. Harper*, over the objections of three dissenters, Justice Kennedy wrote the majority opinion permitting state officials to forcibly medicate a mentally ill prisoner.<sup>182</sup> In *Wilkinson v. Austin*, Justice Kennedy spoke for a unanimous Court in rejecting a claim that Ohio prisoners had received inadequate procedural protections before being classified for assignment to a supermax prison.<sup>183</sup> Overall, Justice Kennedy is inclined to support corrections officials' policies and procedures over claimed rights violations that are asserted by prisoners.

4. *Stephen Breyer*.—Justice Breyer was appointed to the Supreme Court by Democratic President Bill Clinton in 1994,<sup>184</sup> and he has been characterized as the Court's "liberal pragmatist."<sup>185</sup> As indicated by his divided record in voting on prisoners' rights cases,<sup>186</sup> he is willing to support claims by prisoners for some issues, but he also joins the conservatives on the Court in supporting corrections officials quite regularly. Justice Breyer has written relatively few opinions in prisoners' rights cases. In *Sandin v. Conner*,<sup>187</sup> he wrote a dissenting opinion that objected to the majority's narrow view of the liberty interests at stake when a prisoner was transferred to administrative segregation as punishment for violating institutional rules.<sup>188</sup> Justice Breyer wrote the majority opinion in *Richardson v. McKnight*, holding that corrections officials at private prisons may not benefit from qualified immunity when they are defendants in prisoners' civil rights lawsuits.<sup>189</sup> He also wrote a dissenting opinion, joined by Justice Stevens, arguing for greater flexibility for judges to issue orders under his interpretation of the Prison Litigation Reform Act.<sup>190</sup> Overall, Justice Breyer is not an

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179. *McKune v. Lile*, 536 U.S. 24, 48 (2002) (plurality opinion).

180. *Id.* at 30.

181. *Id.* at 30-31.

182. *Washington v. Harper*, 494 U.S. 210, 236 (1990).

183. *Wilkinson v. Austin*, 545 U.S. 209, 229-30 (2005).

184. Christopher E. Smith et al., *The First-Term Performance of Justice Stephen Breyer*, 79 *JUDICATURE* 74, 74 (1995).

185. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 206 (2007).

186. *See supra* Table 1.

187. 515 U.S. 472 (1995).

188. *Id.* at 491-505 (Breyer, J., dissenting).

189. *Richardson v. McKnight*, 521 U.S. 399, 411 (1997).

190. *Miller v. French*, 530 U.S. 327, 353-62 (2000) (Breyer, J., dissenting) (discussing the

outspoken defender of broad rights for prisoners.

5. *Ruth Bader Ginsburg*.—Much like Justice Breyer, Justice Ginsburg votes to endorse prisoners' claims for some issues, but she also votes regularly to support corrections officials' actions.<sup>191</sup> She has written very few opinions in prisoners' rights cases. In a rare prisoners' rights opinion by Justice Ginsburg in *Edwards v. Balisok*,<sup>192</sup> her concurrence took a broader view than that of Justice Scalia's majority opinion about the nature of colorable claims when prisoners challenge disciplinary procedures.<sup>193</sup>

In another of her opinions, a dissent joined by Justice Stevens in *Sandin v. Connor*, Justice Ginsburg used broad language about the liberty interests retained by prisoners. This opinion may indicate that she could respond forcefully if a new majority on the Roberts Court seeks to issue new decisions diminishing prisoners' procedural rights. In this case concerning the right to due process for a prisoner sent to disciplinary segregation, Ginsburg wrote:

I see the Due Process Clause itself, not Hawaii's prison code, as the wellspring of the protection due . . . [the plaintiff]. Deriving protected liberty interests from mandatory language in local prison codes would make of the fundamental right something more in certain States, something less in others. Liberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the "Liberty" enshrined among "unalienable Rights" with which all persons are "endowed by their Creator. . . ."

Deriving the prisoner's due process right from the code for his prison, moreover, yields this practical anomaly: a State that scarcely attempts to control the behavior of its prison guards may, for that very laxity, escape constitutional accountability; a State that tightly cabins the discretion of its prison workers may, for that attentiveness, become vulnerable to constitutional claims. An incentive for ruleless prison management diserves the State's penological goals and jeopardizes the welfare of prisoners.

To fit the liberty recognized in our fundamental instrument of government, the process due by reason of the Constitution similarly should not depend on the particularities of the local prison's code. Rather, the basic, universal requirements are notice of the acts of misconduct prison officials say the inmate committed, and an opportunity to respond to the charges before a trustworthy decisionmaker.<sup>194</sup>

The viewpoint expressed by Justice Ginsburg in this opinion echoes Justice Stevens's broad support for prisoners' rights, at least with respect to due process

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Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

191. *See supra* Table 1.

192. 520 U.S. 641 (1997).

193. *Id.* at 649-50 (Ginsburg, J., concurring).

194. *Sandin v. Conner*, 515 U.S. 472, 489-90 (1995) (Ginsburg, J., dissenting) (internal citations omitted).

issues.

### *C. Summary Assessment of Justices at Point of Transition to a New Era*

As indicated by the foregoing discussion, the Supreme Court has lost its most ardent and outspoken advocate for prisoners' rights: Justice Stevens, as well as the Justice who, after Stevens, was most likely to vote in support of prisoners' claims (Justice Souter). Their retirements raise questions about whether their replacements will be as supportive of prisoners' rights and whether any Justice will assume Justice Stevens's role of consistently articulating arguments for the importance of prisoners' rights. For the latter role, it is possible that remaining Justices Ginsburg and Breyer will be more proactive in choosing to write concurring and dissenting opinions that defend prisoners' rights. However, their voting records in prisoners' rights cases<sup>195</sup> and infrequent opinions in such cases provide little evidence that Rehnquist Court holdovers will fill the advocacy role previously performed by Justice Stevens.

The two conservative retirees, Chief Justice Rehnquist and Justice O'Connor, both acknowledged the existence of prisoners' rights. Rehnquist was seldom supportive of recognizing more than limited rights, while O'Connor was instrumental in developing the key test for determining whether specific rights claims would prevail over corrections officials' implemented policies and practices. Although they were not defenders of prisoners' rights in their votes and opinions, they were more supportive of prisoners' rights than the conservative Justices who remain on the Court. Justice Kennedy has been much like Rehnquist and O'Connor in voting to support corrections officials' practices,<sup>196</sup> and like Rehnquist and O'Connor, Kennedy has not written opinions advocating wholesale changes in prisoners' right precedents. By contrast, Justices Thomas and Scalia are quite explicit about their desire to overturn precedents and thereby drastically constrict, if not eliminate, most constitutional protections for prisoners. Thus, the key question for the transition into the Roberts Court era is whether Thomas and Scalia will gather sufficient support from Kennedy and the newcomers in order to create significant changes in the law of prisoners' rights.

## II. THE ROBERTS COURT

The Roberts Court era officially began after the death of Chief Justice Rehnquist in 2005 led to the appointment and confirmation of Chief Justice John Roberts.<sup>197</sup> The new Supreme Court did not present significant possibilities for differentiating itself from the Rehnquist Court, however, until the departure of a critical mass of Justices created the possibility that the high court could decide cases in a distinctively different way with new combinations of Justices determining case outcomes and precedential reasoning. The retirement of Justice

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195. *See supra* Table 1.

196. *See id.*

197. *See* Stolberg & Bumiller, *supra* note 9.

Stevens in 2010 meant that there were a total of four new Justices added to the Court since 2005. As a result, genuine possibilities for new directions existed, especially as the newest Justices were not merely carbon-copy replacements of the departed Justices.

#### *A. The New Justices*

1. *John G. Roberts*.—Chief Justice John Roberts came to the Supreme Court with prior experience as both a Deputy Solicitor General who presented cases to the Court and as a federal appellate judge.<sup>198</sup> In the Solicitor General's office, he actually had the experience of appearing before the Supreme Court in 1991 to argue in favor of the prisoner's claim<sup>199</sup> in *Hudson v. McMillian*, an Eighth Amendment case concerning an assault committed upon a handcuffed prisoner by corrections officers.<sup>200</sup> He returned in 1993 to argue against the prisoner's claim<sup>201</sup> in *Helling v. McKinney*.<sup>202</sup> The case concerned whether a prisoner housed with a chain-smoking cellmate could pursue an Eighth Amendment claim based on potential future harms to his health.<sup>203</sup> One cannot infer from these advocacy experiences any specific conclusions about Chief Justice Roberts's viewpoints about prisoners' rights. He may have had a role in determining the U.S. government's position in each case, but he did not have the ultimate authority over the argument to be presented; that authority rested with higher officials in the Solicitor General's office and the Department of Justice. These experiences do indicate, however, that Roberts had knowledge about Eighth Amendment issues in prisons prior to becoming a judge.

Although "Chief Justice Roberts is not wedded to a single judicial methodology like the originalism and textualism that are the touchstones for Justices Scalia and Thomas,"<sup>204</sup> his voting record in criminal justice cases is consistently conservative.<sup>205</sup> Overall, Jeffrey Toobin concluded that "Roberts's

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198. Todd S. Purdum et al., *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N.Y. TIMES, July 21, 2005, available at <http://www.nytimes.com/2005/07/21/politics/21nominee.html>.

199. *Hudson v. McMillian*, 503 U.S. 1, 3 (1992); *see also* *Hudson v. McMillian: U.S. Supreme Court Case Summary and Oral Argument*, OYEZ PROJECT, [http://www.oyez.org/cases/1990-1999/1991/1991\\_90\\_6531](http://www.oyez.org/cases/1990-1999/1991/1991_90_6531) (last visited May 29, 2011).

200. *Hudson*, 503 U.S. at 4.

201. *See Helling v. McKinney: U.S. Supreme Court Case Summary & Oral Argument*, OYEZ PROJECT, [http://www.oyez.org/cases/1990-1999/1992/1992\\_91\\_1958](http://www.oyez.org/cases/1990-1999/1992/1992_91_1958) (last visited May 29, 2011).

202. 509 U.S. 25 (1993).

203. *Id.* at 27-28.

204. Adam Liptak, *The Roberts Court Comes of Age*, N.Y. TIMES, June 29, 2010, at A1, available at <http://www.nytimes.com/2010/06/30/us/30scotus.html>.

205. Madhavi M. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2008-2009 Term*, 29 MISS C. L. REV. 1, 7 tbl.4 (2010); Michael A. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2007-2008 Term*, 36 S.U. L. REV. 33, 42 tbl.3 (2008); Michael A. McCall et al., *Criminal Justice and the 2006-2007 United States Supreme Court Term*, 76 UMKC L. REV. 993,

record is not that of a humble moderate but, rather, that of a doctrinaire conservative.<sup>206</sup> With respect to the Eighth Amendment, Roberts did differentiate himself from the Court's other conservatives—Justices Scalia, Thomas, and Alito—by concluding that a sentence of life without possibility of parole for a juvenile who commits a non-homicide offense can, in some cases, violate the Eighth Amendment prohibition on cruel and unusual punishment.<sup>207</sup> It is not yet known how his views about the Eighth Amendment might apply to prisoners' rights cases because he has consistently voted to uphold the prerogatives of "the executive branch over the legislature."<sup>208</sup> Therefore, it is natural to wonder whether he will be less protective of the Eighth Amendment in the executive-branch domain of prison administration.

The primary difference between Chief Justice Roberts and his predecessor, Chief Justice Rehnquist, may involve the perception of many commentators that Roberts is intent on leading the Court aggressively toward reshaping the law in a conservative manner on many issues.<sup>209</sup> As noted by one commentator,

Indeed, the [C]ourt appears poised to move to the right . . . . Chief Justice Roberts has certainly been planting the seeds . . . . If his reasoning takes root in future cases, the law will move in a conservative direction on questions as varied as what kinds of evidence may be used against criminal defendants and the role the government may play in combating race discrimination.<sup>210</sup>

In his role as Chief Justice, Rehnquist took a stand against the elimination of *Miranda* rights as a matter of preserving established precedent rather than following his judicial philosophy.<sup>211</sup> By contrast, observers have noted Roberts's (as well as other conservative Justices') support for overruling precedents concerning a variety of issues.<sup>212</sup> Indeed, U.S. Senator Sheldon Whitehouse (D-

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998 tbl.3 (2008) [hereinafter McCall et al., *2006-2007 United States Supreme Court Term*].

206. Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER, May 25, 2009, at 42, available at [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin).

207. *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Roberts., C.J., concurring).

208. Toobin, *supra* note 206, at 42.

209. See, e.g., Adam Cohen, *Last Term's Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007, available at <http://www.nytimes.com/2007/07/09/opinion/09mon4.html>; Simon Lazarus, *The Most Activist Court*, AM. PROSPECT, June 29, 2007, available at [www.prospect.org/cs/articles?article=the\\_most\\_activist\\_court](http://www.prospect.org/cs/articles?article=the_most_activist_court).

210. Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES, June 30, 2009, at A1, available at <http://www.nytimes.com/2009/07/01/us/01scotus.html>.

211. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").

212. See, e.g., E.J. Dionne, *Alito Draws Spotlight on Activist Court*, COLUMBUS DISPATCH, Feb. 3, 2010, available at [http://www.dispatch.com/live/content/editorials/stories/2010/02/03/dion02.ART\\_ART\\_02-03-10\\_A11\\_EQGFUJO.html?sid=101](http://www.dispatch.com/live/content/editorials/stories/2010/02/03/dion02.ART_ART_02-03-10_A11_EQGFUJO.html?sid=101) ("[A] truth that many have tried to ignore: The Supreme Court is now dominated by a highly politicized conservative majority intent

R.I.) harshly criticized Chief Justice Roberts for his lack of respect for precedent:

Finally, Roberts announced in his concurring opinion in *Citizens United v. Federal Election Commission*<sup>213</sup>] a theory that, if a precedent is “hotly contested,” it has lesser precedential value and can be replaced. This doctrine would allow a determined group of judicial sappers to selectively undermine and then topple ramparts of precedent with which they disagreed—simply on the basis of their willingness persistently to “hotly contest” those precedents they dislike.<sup>214</sup>

In light of the persistent efforts of Justices Thomas and Scalia to “hotly contest” prisoners’ rights precedents<sup>215</sup> as well as their explicit desire to reverse the Supreme Court’s rights-defining decisions,<sup>216</sup> Roberts’s presence on the Court may help form a critical mass of Justices who are eager to diminish the limited rights possessed by prisoners.

2. *Samuel Alito*.—Justice Samuel Alito, who was confirmed in 2006 after

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on working its will, even if that means ignoring precedents and the wishes of the elected branches of government. . . . On the contrary, I salute . . . [Justice Alito] because his candid response brought home to the country how high the stakes are in the battle over the conservative activism of Chief Justice John Roberts’ [C]ourt.”); Toobin, *supra* note 206 (“[T]he last day of Roberts’s second full term as Chief Justice . . . the Justices overturned a ninety-six-year-old precedent in antitrust law and thus made it harder to prove collusion by corporations. Also that year they upheld the Partial Birth Abortion Ban Act, in Kennedy’s opinion, even though the Court had rejected a nearly identical law just seven years earlier. . . . In all these cases, Roberts and Alito joined with Scalia, Clarence Thomas, and Kennedy to make the majority. On this final day, Breyer offered an unusually public rebuke to his new colleagues. ‘It is not often in the law that so few have so quickly changed so much,’ Breyer said.”).

213. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010). *Citizens United* is a controversial decision in which a narrow majority on the Court shifted from existing law in order to endorse free speech rights for corporations that prevent the government from limiting corporate spending in election campaigns.

214. Sheldon Whitehouse, *Judicial Activism*, NAT’L L.J., Nov. 1, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202474148401&slreturn=1&hbxlogin=1>.

215. See, e.g., *Beard v. Banks*, 548 U.S. 521, 536 (2006) (Thomas, J., concurring); *Overton v. Bazzetta*, 539 U.S. 126, 140-42 (2003) (Thomas, J., concurring); *Lewis v. Casey*, 518 U.S. 343, 381-82 (1996) (Thomas, J., concurring); *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting); *Hudson v. McMillian*, 503 U.S. 1, 18-21 (1992) (Thomas, J., dissenting); *Wilson v. Seiter*, 501 U.S. 294 (1991); SMITH & BAUGH, *supra* note 125, at 91-98; Smith, *supra* note 152, at 84-91; see also *supra* text accompanying notes 127-69; see generally BISKUPIC, *supra* note 146.

216. See, e.g., *Helling*, 509 U.S. at 42 (Thomas, J., dissenting) (“The text and history of the Eighth Amendment, together with pre-*Estelle* precedent [which established a limited right to medical care for prisoners], raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence. And *Estelle* itself has not dispelled these doubts. Were the issue squarely presented, therefore, I might vote to overrule *Estelle*.”)

appointment by President George W. Bush,<sup>217</sup> is significantly more conservative than his predecessor, Justice Sandra Day O'Connor.<sup>218</sup> Justice Alito's voting record shows him to support the claims of individuals in criminal justice cases less frequently than O'Connor did.<sup>219</sup> Like Justices Thomas and Scalia, Alito is an originalist.<sup>220</sup> As demonstrated by the originalist opinions of Thomas, the application of this originalism leads to the rejection of judicial recognition of constitutional rights for prisoners.<sup>221</sup> Moreover, during his confirmation hearings, Justice Alito was less committed to the preservation of precedent than Chief Justice Roberts had been at his confirmation hearings a few months earlier.<sup>222</sup> Indeed, Justice Alito has demonstrated his desire to overturn rights-protecting precedents in criminal justice through the extraordinary action of suggesting during the middle of an oral argument that the Court shift its focus from the narrow issues briefed and argued by the parties and instead consider a wholesale reversal of right-to-counsel precedent.<sup>223</sup> Thus, Justice Alito appears to be a prime candidate to join Justices Thomas and Scalia, and possibly Chief Justice Roberts, in an attempt to curtail prisoners' rights.

3. *Sonia Sotomayor*.—As the appointee of a liberal Democratic President, Justice Sonia Sotomayor was expected to be generally supportive of constitutional rights claims, much like her predecessor, Justice Souter.<sup>224</sup> However, her prior experience as a prosecutor made some observers wonder whether she might be more conservative in criminal justice-related cases.<sup>225</sup>

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217. Kirkpatrick, *supra* note 10.

218. See, e.g., Simon Lazarus, *More Polarizing Than Rehnquist*, AM. PROSPECT, May 14, 2007, available at [http://prospect.org/cs/articles?article=more\\_polarizing\\_than\\_rehnquist](http://prospect.org/cs/articles?article=more_polarizing_than_rehnquist) ("[T]he consistently right-leaning Alito has replaced the pragmatic centrist Sandra Day O'Connor . . .").

219. For example, near the end of her career, Justice O'Connor supported claims by individuals in over 30% of the Court's non-unanimous criminal justice decisions during the 2003-04 term. Smith et al., *supra* note 22, at 133 tbl.4. By contrast, Justice Alito supported individuals' claims in only 6% of the Court's criminal justice cases during his first full term on the Court. McCall et al., *2006-2007 United States Supreme Court Term*, *supra* note 205, at 998 tbl.4.

220. See Steven G. Calabresi, *Introduction*, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 1, 6 (Steven G. Calabresi ed., 2007) ("Justice Alito . . . seems to be a firm originalist.").

221. See cases cited *supra* note 215; see also SMITH & BAUGH, *supra* note 125, at 91-98; *supra* text accompanying notes 127-40.

222. See Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006, available at <http://www.nytimes.com/2006/01/15/weekinreview/15rosen.ready.html>.

223. Marcia Coyle, *As Nominee Is Announced, High Court Issues Police Interrogation Ruling, Two Others*, NAT'L L.J., May 27, 2009, available at <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202430979440&rss=careercenter&s/return=1&hbxlogin=1>.

224. Greg Stohr, *Sotomayor's Record Suggests Similarities with Souter*, BLOOMBERG NEWS SERV., May 27, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=az1wvdAlNThs&refer=home>.

225. See James Oliphant, *Sotomayor Is Remembered as a Zealous Prosecutor*, L.A. TIMES, June 9, 2009, available at <http://www.latimes.com/news/nationworld/nation/la-na-sotomayor-prosecutor9-2009jun09,0,7206855.story> ("Her experience as an assistant district attorney in New

In her second term on the Court, Justice Sotomayor provided a clue that she may emerge as the Court's new outspoken leader who will defend prisoners' rights. In *Pitre v. Cain*,<sup>226</sup> she wrote a dissent from the Court's denial of certiorari in a case concerning a Louisiana prisoner who was allegedly punished because he stopped taking his AIDS medication as a protest against an impending transfer.<sup>227</sup> As described in Sotomayor's dissent:

He alleges that respondents at the facility punished him for . . . [his refusal to take the medication] by subjecting him to hard labor in 100-degree heat. According to Pitre, respondents repeatedly denied his requests for lighter duty more appropriate to his medical condition, even after prison officials twice thought his condition sufficiently serious to rush him to an emergency room.<sup>228</sup>

The lower courts concluded that his allegations were insufficient to state a plausible Eighth Amendment violation, and his case was dismissed.<sup>229</sup> Justice Sotomayor, alone among all of the Supreme Court Justices, argued that

[e]ven assuming respondents had a legitimate penological interest that outweighed a right to refuse HIV medication, that interest would not permit respondents to punish Pitre, or to attempt to coerce him to take medication, by subjecting him to hard labor that they knew posed "a substantial risk of serious harm."<sup>230</sup>

She further argued that "Pitre's allegations, if true, describe 'punitive treatment [that] amounts to gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits.' . . . I cannot comprehend how a court could deem such allegations 'frivolous.'"<sup>231</sup> Her tone and assertiveness in this dissent from denial of certiorari are reminiscent of the prisoners' rights opinions of Justice Stevens,<sup>232</sup> so perhaps Justice Sotomayor will assume his previous role as the Court's prisoners' rights advocate.

4. *Elena Kagan*.—In contrast to Sotomayor, the other Democratic appointee, Justice Elena Kagan,<sup>233</sup> the actual replacement for Justice Stevens in 2010, is so new to the Court that it is impossible to assess how she will decide prisoners' rights cases. Her prior professional experience as a law school dean and Solicitor General of the United States<sup>234</sup> did not require expertise on prisoners' rights cases.

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York made her something of a law-and-order judge, experts say, especially when it came to police searches and the use of evidence.").

226. 131 S. Ct. 8 (2010).

227. *Id.* at 8-10.

228. *Id.* at 8.

229. *Id.*

230. *Id.* at 9 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

231. *Id.* at 10 (quoting *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)).

232. See *Smith, supra* note 26, at 733-36.

233. *Baker, supra* note 12.

234. *Id.*

But her earlier experience as a law clerk for the liberal Supreme Court Justice Thurgood Marshall made her familiar with petitions filed by convicted offenders.

#### *B. Prisoners' Rights Cases in the Roberts Court Era*

There are, as yet, very few prisoners' rights cases decided by the Roberts Court from which to draw conclusions about the decisionmaking orientations of the replacements for the departed Rehnquist Court Justices. One case involving substantive prisoners' rights was *Beard v. Banks*,<sup>235</sup> which concerned "whether a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates [whose bad behavior led them to be placed in the long-term segregation unit] 'violate[d] the First Amendment.'"<sup>236</sup> Corrections officials claimed that this rule was necessary for security reasons and to create incentive rewards for improved behavior.<sup>237</sup> Over the dissenting opinions of Justices Stevens and Ginsburg, Chief Justice Roberts joined Justices Kennedy and Souter in endorsing the plurality opinion of Justice Breyer that applied the deferential four-part reasonableness test<sup>238</sup> from *Turner v. Safley*.<sup>239</sup> They concluded that the regulation denying access to materials was permissible despite the fact that the practice violated one prong of the *Turner* test by providing no alternative means to exercise the relevant First Amendment right.<sup>240</sup> This was arguably an especially deferential application of an already-deferential test for violations of prisoners' rights.

Yet by joining the Breyer plurality opinion, Chief Justice Roberts distinguished himself from fellow conservatives Justices Thomas and Scalia, whose views were expressed in a concurring opinion by Justice Thomas.<sup>241</sup> Thus, the newcomer did not endorse the more restrictive and distinctive viewpoint, first articulated by Thomas in *Overton v. Bazzetta*,<sup>242</sup> that states define the rights for their own prisoners through their laws, regulations, and policies: "Because the Constitution contains no such definition, '[s]tates are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—provided only that those deprivations are consistent with the

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235. 548 U.S. 521 (2006).

236. *Id.* at 524-25 (citation omitted).

237. *Id.* at 531.

238. See SMITH, *supra* note 60, at 88 ("This kind of test is often referred to as a rational basis test (or the *reasonableness test*) in constitutional law.").

239. 482 U.S. 78, 89-91 (1987).

240. See *Beard*, 548 U.S. at 532 ("But these circumstances simply limit, they do not eliminate, the fact that there is no alternative. The absence of any alternative thus provides 'some evidence that the regulations [a]re unreasonable,' but is not 'conclusive' of the reasonableness of the [p]olicy." (citation omitted)).

241. See *id.* at 536 (Thomas, J., concurring).

242. 539 U.S. 126, 138-42 (2003) (Thomas, J., concurring).

*Eighth Amendment.”*<sup>243</sup> This case was decided during Chief Justice Roberts’s first term on the Supreme Court, so it remains to be seen whether his views on the application of the *Turner* test are aligned with those of Justice Breyer or move closer toward the even more restrictive perspectives of Justices Thomas and Scalia.

Justice Alito did not participate in *Beard v. Banks* because he had previously decided the case as a judge on the U.S. Court of Appeals for the Third Circuit.<sup>244</sup> As a member of a three-judge panel on the intermediate appellate court, Alito dissented against the majority’s decision that found in favor of the prisoners.<sup>245</sup> In his dissenting opinion, Alito applied the *Turner* test in a deferential fashion similar to that ultimately applied in Justice Breyer’s plurality opinion.<sup>246</sup> Although it is clear which outcome Justice Alito would have supported on the Supreme Court, it is unknown whether Alito was inclined to join his fellow originalists, Thomas and Scalia, and support their more restrictive view of prisoners’ rights. As a judge on the court of appeals, he was likely to feel obligated to follow the Supreme Court’s precedents by using the *Turner* test rather than utilizing Justice Thomas’s distinctive analytical approach, even if that approach more accurately reflected Justice Alito’s own perspective on constitutional interpretation.

Procedural matters were at the heart of the other cases that have divided the Roberts Court Justices<sup>247</sup> and may shed light on the Justices’ orientation toward prisoners’ claims. In *Bowles v. Russell*,<sup>248</sup> a prisoner relied on a district court’s order which gave him seventeen days to file his appeal from a denial of habeas corpus relief.<sup>249</sup> However, the relevant statute actually only provided a fourteen-day period in which to file such appeals.<sup>250</sup> Justice Thomas wrote the opinion for a conservative majority, also consisting of Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, that declared the fourteen-day deadline to be a strict jurisdictional rule imposed by the statute.<sup>251</sup> In dissent, Justice Souter, on behalf of Justices Stevens, Ginsburg, and Breyer, used uncharacteristically strong language to object to the unfairness of the majority’s strict rule:

The [d]istrict [c]ourt told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on

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243. *Beard*, 548 U.S. at 537 (Thomas, J., concurring) (quoting *Overton*, 539 U.S. at 139).

244. *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005), *rev’d*, 548 U.S. 521 (2006).

245. *Id.* at 148-50 (Alito, J., dissenting).

246. *Id.* at 149-50.

247. There was one unanimous decision, *Jones v. Bock*, 549 U.S. 199, 223 (2007), in which the Supreme Court decided that the U.S. Court of Appeals for the Sixth Circuit had imposed excessively restrictive rules related to the exhaustion of remedies requirement under the Prison Litigation Reform Act.

248. 551 U.S. 205 (2007).

249. *Id.* at 206-07.

250. *Id.* at 207.

251. *Id.* at 214.

February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.<sup>252</sup>

Souter argued that the Supreme Court should use its equitable authority to recognize an exception under the circumstances of this case in order to advance the interests of fairness.<sup>253</sup> Although this case did not concern constitutional rights for prisoners, it may provide a clue about the sensitivity of Chief Justice Roberts and Justice Alito to issues of fairness in cases involving prisoners and their legal claims.

A similar split in the Court emerged in *Haywood v. Drown*<sup>254</sup> concerning New York's effort to eliminate its state courts' jurisdiction over federal constitutional rights lawsuits by prisoners.<sup>255</sup> In this case, Justice Kennedy provided the decisive fifth vote for Justice Stevens's majority opinion that employed the Supremacy Clause to invalidate New York's actions.<sup>256</sup> Chief Justice Roberts and Justice Alito, along with Justice Scalia, joined Justice Thomas's dissenting opinion.<sup>257</sup> It is possible that this case is most revealing about the Justices' disagreements concerning the Supremacy Clause and federalism rather than prisoners' rights. There is no question, though, that New York's actions were directed specifically at prisoners and their options for pursuing constitutional rights claims in the courts.

### C. Schwarzenegger v. Plata

In November 2010, the Roberts Court, including the four Justices appointed after the close of the Rehnquist Court era, heard oral arguments in *Schwarzenegger v. Plata*.<sup>258</sup> The editors of the *New York Times* called it "the most important case in years about prison conditions."<sup>259</sup> California challenged an order from a special three-judge district court requiring a reduction in prison populations.<sup>260</sup> The lower court found that prison overcrowding was a cause of significant Eighth Amendment violations in conditions of confinement, especially with respect to inadequate medical care.<sup>261</sup> The underlying litigation had been ongoing for twenty years and had been the subject of seventy previous district

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252. *Id.* at 215 (Souter, J., dissenting).

253. *See id.* at 216-17.

254. 129 S. Ct. 2108 (2009).

255. *Id.* at 2111-12.

256. *Id.* at 2117.

257. *Id.* at 2118 (Thomas, J., dissenting).

258. Coleman v. Schwarzenegger, No. CIV S-90-0520, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009), *appeal docketed*, No. 09-1233 (Apr. 14, 2010).

259. Editorial, *The Crime of Punishment*, N.Y. TIMES, Dec. 6, 2010, at A26, available at <http://www.nytimes.com/2010/12/06/opinion/06mon1.html>.

260. Marcia Coyle & Tony Mauro, *Hot Bench in Prison Battle*, NAT'L L.J., Dec. 6, 2010.

261. *Id.*

court orders, none of which remedied the prison condition problems.<sup>262</sup> The questions and concerns raised by individual Justices at oral argument may provide clues about their orientations toward prisoners' rights.

Justice Alito questioned the prisoners' attorney about the necessity and potential consequences of a reduction in prison populations.<sup>263</sup> He appeared to be quite skeptical about the desirability of reducing prisoner populations, both because he thought it was merely an indirect means of remedying the prison medical care issues and, more importantly, because he anticipated grave potential harm to society.<sup>264</sup> The former prosecutor used stark terms to raise concerns about a possible increase in crime:

If—if I were a citizen of California, I would be concerned about the release of 40,000 prisoners. And I don't care what you term it, a prison release order or whatever the . . . terminology you used was. If 40,000 prisoners are going to be released, do you really believe that if you were to come back here 2 years after that, you would be able to say they haven't—they haven't contributed to an increase in crime . . . in the State of California? In the—in the amicus brief that was submitted by a number of States, there is an extended discussion of the effect of one prisoner release order with which I am familiar, and that was in Philadelphia; and after a period of time they tallied up what the cost of that was, the number of murders, the number of rapes, the number of armed robberies, the number of assaults. You don't—that's not going to happen in California?<sup>265</sup>

Chief Justice Roberts emphasized a similar point from a different angle by asserting that the district court did not fulfill the requirements of the Prison Litigation Act by failing to give substantial weight to considerations of public safety in any remedial order involving release of prisoners:

I don't see that the district court did what was required by the Act with respect to the plan that it's ordering. . . . It just simply said, oh, we're sure—I'm sure the State wouldn't do anything to hurt public safety—after telling the State you've got to give me a plan in 2 years that gets [the prison population down] to 137.5 [percent of capacity]. . . . Well, they said we're sure, because . . . [the district court said,] "We trust that the State will comply with its duty to ensure public safety as it implements the constitutionally required reduction." The State is saying it cannot meet the 137.5 [percent of capacity] in 2 years without an

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262. *Id.*

263. Transcript of Oral Argument at 42-48, Schwarzenegger v. Plata, 130 S. Ct. 3413 (2010) (No. 09-1233), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-1233.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1233.pdf).

264. *Id.*

265. *Id.* at 47-48.

adverse impact on public safety.<sup>266</sup>

Interestingly, this assertion by Roberts led Justice Sotomayor to lead the prisoners' attorney through a series of statements, effectively seeking to refute Roberts on behalf of the attorney:

JUSTICE SOTOMAYOR: I have several questions but . . . I'm not sure why you have not been responding to Justice—to the Chief Justice. Didn't the district court discuss different safe ways . . . of reducing the population—

MR. SPECTER: Yes.

JUSTICE SOTOMAYOR: —and said, we're not imposing them because we want the State to do—to choose among them?

MR. SPECTER: Yes, Your Honor.

JUSTICE SOTOMAYOR: As I've looked at the State's final plan, I thought that they had in fact not only accepted all of the recommendations, but they added a couple of additional remedies that the court had not suggested.

MR. SPECTER: Yes, Your Honor.

JUSTICE SOTOMAYOR: Is it a fair statement that the district—that the three-judge panel was saying, if you do these things—that's their finding—you can do it without affecting public safety? Wasn't that what they were saying?

MR. SPECTER: Yes, Your Honor. If I didn't make that clear, I meant to.<sup>267</sup>

In addition, when questioning the attorney for California, Justice Sotomayor used graphic references to the nature of the problems in the prisons in order to challenge the state's assertion that it just needed to be given an additional undefined period of time to remedy the problems:

So when are you going to get to that? When are you going to avoid the needless deaths that were reported in this record? When are you going to avoid or get around [to] people sitting in their feces for days in a dazed state? When are you going to get to a point where you're going to deliver care that is going to be adequate?<sup>268</sup>

Justice Kagan's most revealing question was addressed to California's attorney when she expressed skepticism about the Supreme Court second-guessing the lower courts that had been dealing with the details of the case for two decades:

Mr. Phillips, my trouble listening to you is that it seems as though you're asking us to re-find facts. You know, you have these judges who have been involved in these cases since the beginning, for 20 years in the

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266. *Id.* at 51-52.

267. *Id.* at 55-56.

268. *Id.* at 15.

Plata case, who thought: We've done everything we can, the receiver has done everything he can; this just isn't going anywhere and it won't go anywhere until we can address this root cause of the problem.

And that was the view of the judges who had been closest to the cases from the beginning and the view of the three-judge court generally. So how can we reach a result essentially without, you know, re-finding the facts that they have been dealing with for 20 years?<sup>269</sup>

Based on the questions and comments of the new Justices, it appeared that Justices Sotomayor and Kagan were likely to endorse the lower court's order to remedy the prisoners' rights violations that had remained unresolved for decades. By contrast, it also appeared that Chief Justice Roberts and Justice Alito were likely to reject the lower court's order by placing their own concerns about crime above the need to uphold the rights of prisoners. In this case, both sets of Justices may simply cast the same votes that their predecessors would have cast, although there is evidence that both Justice Alito and Chief Justice Roberts may be even less inclined than Justice O'Connor and Chief Justice Rehnquist, respectively, to recognize and protect rights for prisoners.<sup>270</sup>

#### CONCLUSION

Although many states are seeking to reduce their prison populations amid government budget crises,<sup>271</sup> there are still significant numbers of people held in correctional institutions—1.6 million as of the end of 2009.<sup>272</sup> These individuals are entirely dependent on corrections officials for food, shelter, medical care, sanitation facilities, and the other elements of habitable living conditions. Living inside closed institutions, they also face risks that they could be subjected to discrimination, physical abuse, or denial of opportunities to practice their religion unless there are mechanisms to ensure that such abuses and deprivations do not occur. The history of American corrections contains numerous examples of brutality, neglect, and horrific living conditions when corrections officials are unsupervised and unaccountable.<sup>273</sup> Despite some commentators' belief that judges should avoid ordering intrusive remedies for constitutional rights violations,<sup>274</sup> the judicial definition and enforcement of constitutional rights for

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269. *Id.* at 30.

270. *See supra* notes 210-23 and accompanying text.

271. Krissah Thompson, *States Reduce Prison Populations as Budgets Shrink*, WASH. POST, Mar. 3, 2010, available at [www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030302154.html?hpid=moreheadlines](http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030302154.html?hpid=moreheadlines).

272. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISONERS AT YEarend 2009—ADVANCE COUNTS 1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/py09ac.pdf>.

273. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 323, 329-30 (M.D. Ala. 1976) (imposing court-ordered remedies for prison conditions deemed "unfit for human habitation" by an officer from the U.S. Public Health Service).

274. *See generally* RICHARD E. MORGAN, *DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN*

prisoners played a key role in improving living conditions and professionalizing and bureaucratizing institutions that were often administered through autocratic fiat and discretionary violence.<sup>275</sup>

As indicated by the preceding sections of this Article, changes in the Supreme Court's composition create the possibility that the nature of support for or opposition to the recognition of specific prisoners' rights has also changed. In particular, the Court has lost its staunchest, most outspoken advocate for prisoners' rights, Justice Stevens.<sup>276</sup> Although newcomer Justice Sotomayor shows signs of fulfilling Justice Stevens's former role,<sup>277</sup> it remains to be seen whether she will actually do so.<sup>278</sup> In addition, Justice Alito is likely to be less supportive of prisoners' rights than was his predecessor, Justice O'Connor, particularly because his originalist perspective may lead him to join the other originalists, Justices Thomas and Scalia, in arguing against the existence of all but the most minimal legal protections for incarcerated offenders.<sup>279</sup> Moreover, Chief Justice Roberts is perceived to be less respectful of precedent than was his predecessor, Chief Justice Rehnquist,<sup>280</sup> so that if so inclined, he could provide an additional vote to contribute to Justice Thomas's stated desire to reconsider prisoners' rights precedent.<sup>281</sup> Because the Court remains split between the Justices who are conservative and those who appear to be relatively liberal, the pace of change may depend on which Justice is next to depart and who resides in the White House at the moment of departure, thereby possessing the authority to choose the replacement.

The most dramatic potential changes in prisoners' rights could develop if Justice Thomas succeeds in gaining a total of five votes to support his distinctive viewpoint. He already has the support of Justice Scalia and probably Justice Alito, the other originalist. Much will depend on whether he can gain the support of Chief Justice Roberts and whoever replaces either Justice Ginsburg (age seventy-seven) or Justice Kennedy (age seventy-four), if either one of them is the

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OUR TIME (1984); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003).

275. *See generally* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

276. *See supra* notes 26-56 and accompanying text.

277. *See supra* notes 225-32, 267-68 and accompanying text.

278. Justice Ruth Bader Ginsburg could also be an outspoken advocate for specific rights for prisoners. However, she is unlikely to fulfill Justice Stevens's extended role as prisoners' rights advocate because her age and health make it unlikely that she will remain on the Supreme Court for many more terms. In 2010, she reached the age of 77. *See Biographies of Current Justices of the Supreme Court*, *supra* note 36. In light of her prior bouts with colon cancer and pancreatic cancer, she is likely to be nearing the end of her career. Carrie Johnson & Rob Stein, *Ginsburg Undergoes Surgery for Cancer*, WASH. POST, Feb. 6, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/05/AR2009020501695.html>.

279. *See supra* notes 217-23, 264-67 and accompanying text.

280. *See supra* notes 209-14 and accompanying text.

281. *See supra* note 215 and accompanying text.

next Justice to retire.<sup>282</sup> In general, Justice Thomas argues that incarcerated offenders possess only those rights granted to them by the states under each state's own definition of "incarceration" and the deprivations attendant to incarceration.<sup>283</sup> Specifically, Justice Thomas has expressed a desire to reconsider the precedent of *Estelle v. Gamble*, reversal of which would eliminate prisoners' limited right to medical care and eliminate the original precedent that made the Eighth Amendment applicable to conditions inside prisons.<sup>284</sup> Because he advocates that the Cruel and Unusual Punishment Clause only applies to sentences announced by judges and not to the implementation of those sentences in prisons,<sup>285</sup> achieving his vision through the alteration of precedent would leave prisoners without any federal constitutional protections against inhumane living conditions and use of excessive force by corrections officers.

In addition, Justice Thomas argues that states have no constitutional duty to supply resources and supplies (such as law libraries, paper, envelopes, and stamps) to aid prisoners in preparing and submitting appeals, habeas corpus petitions, and civil rights lawsuits to the courts.<sup>286</sup> In effect, if Justice Thomas were to attain his vision of prisoners' rights by gaining sufficient votes to eliminate existing precedents with which he disagrees, it appears prisoners would be left with only one limited constitutional right that Justice Thomas is willing to acknowledge: a due process-based right of access to the courts that is limited to prisoners' access to a mail slot where they can place letters to a courthouse, provided they have their own resources with which to write and mail those letters.<sup>287</sup> With such a limited version of the right of access to the courts, it would not be possible for most prisoners to file habeas petitions and other actions for vindicating legal rights. Although the vision of Justice Thomas may sound too extreme to become a reality in our modern twenty-first century, due to changes in the Court's composition, he may be within one vote of achieving his restrictive vision and thereby transforming—through extreme limitations—the supervisory role that federal courts have played to protect against inhumane policies and practices in prisons.

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282. Justice Ginsburg was born in 1933, and Justice Kennedy was born in 1936. *Biographies of Current Justices of the Supreme Court*, *supra* note 36.

283. *See supra* notes 137-39 and accompanying text.

284. *See supra* note 216 and accompanying text.

285. *See supra* note 130 and accompanying text.

286. *See supra* notes 142-44 and accompanying text.

287. *Id.*