THE MALLEABILITY OF CONSTITUTIONAL DOCTRINEAND ITS IRONIC IMPACT ON PRISONERS' RIGHTS

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I. INTRODUCTION

The meaning of words and phrases in the U.S. Constitution is not self-evident.[1] Some phrases seem relatively straightforward, yet the judicial interpretation of these phrases may limit their applicability in ways that are not apparent from reading the text.[2] The Fourteenth Amendment's Equal Protection Clause, for example, only provides strong protection against governmental discrimination based on race, gender, and a few other categories,[3] even though the text of the Amendment itself does not imply any such limitations.[4] Other words and phrases in the Constitution are inherently ambiguous. For example, the Fourth Amendment prohibits "unreasonable searches and seizures,"[5] but it is not clear what is meant by

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[1] The Constitution includes phrases such as the right to a "speedy trial," U.S. CONST. amend. VI, that necessarily require judges to interpret and provide definitions. In the foregoing example, the word "speedy" implies "quickly" or "without undue delay," however only a judicial interpretation can determine if a trial taking place after excessive delay violated the Sixth Amendment.

[2] For example, the Sixth Amendment states that "In *all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." (emphasis added). U.S. CONST. amend. VI. Despite the clear language indicating that the right to trial by jury shall exist in "all" criminal prosecutions, the U.S. Supreme Court has declared that there is no Sixth Amendment right to a jury trial when the defendant is charged with petty offenses, which each can draw no more than six months of incarceration upon conviction. Lewis v. United States, 518 U.S. 322 (1996).

[3] *See* CHRISTOPHER E. SMITH, COURTS AND THE POOR 85 (1991) ("The Supreme Court applied strict scrutiny, [the strongest protection], to discriminatory racial classifications after *Brown v. Board of Education*, but the application of such protections to other categories of victimized people has been limited and inconsistent.").

[4] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[5] U.S. CONST. amend. IV.

"unreasonable."[6] Thus the text is subject to interpretation.

U.S. Supreme Court justices interpret words and phrases in accordance with their own judicial philosophies and policy preferences.[7] Some justices may claim that their interpretations are determined by the original meanings intended by the people who drafted the Constitution and its amendments.[8] Other justices see the Constitution as a flexible document with an evolving meaning and these justices premise their interpretations on the advancement of aspirational values, such as enhancing freedom and human dignity.[9] Because the Constitution is subject to varying interpretations, it is a malleable document in which its meaning can change in the hands of succeeding generations of Supreme Court justices.[10] As judicial interpretations change, so, too, do the policies shaped by those interpretations, including policies affecting corrections and prisoners' rights.[11]

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[6] In a dissenting opinion in California v. Acevedo, 500 U.S. 565 (1982), Justice Stevens observed that the Court would permit a police officer to make a warrantless search of a container within an automobile if he or she believed that there was probable cause to do so, but the Court would not permit such a warrantless search of a container carried by a pedestrian. Stevens' comment illustrates the unpredictable directions of interpretation that can occur when the Court attempts to interpret a simple, but ambiguous phrase such as the prohibition on "unreasonable searches and seizures."

[7] *See* LAWRENCE BAUM, THE SUPREME COURT 150 (6th ed. 1998) ("[P]olicy preferences certainly provide the best explanation for differences in the positions that the nine justices take in the same cases, because no other factor varies so much from one justice to another.").

[8] *See* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 36-37 (1996) (describing Justice Scalia's originalist judicial philosophy); Christopher E. Smith, *Bent on Original Intent*, 82. A.B.A. J. 48 (1996) (describing Justice Thomas' originalist judicial philosophy).

[9] According to Justice Brennan,

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

William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 204 (David M. O'Brien ed., 1997).

[10] The Constitution is susceptible to dramatic changes in interpretation and meaning. One of the most famous examples is the change from the Court's 8-to-1 decision endorsing racial segregation by state governments in Plessy v. Ferguson, 163 U.S. 537 (1896), to the Court's unanimous decision outlawing state-sponsored racial segregation in Brown v. Board of Education, 347 U.S. 483 (1954).

[11] *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 13-15, 46-50 (1998) (describing the evolution of judicial decisions concerning the Eighth Amendment and

Justices with differing judicial philosophies and policy preferences battle each other, figuratively, if not literally, to establish their preferred definitions of constitutional provisions as the guiding precedents for lower courts to follow.[12] Within the Supreme Court, justices seek to gain majority support for their interpretations in order to establish the judicial doctrines that shape law and policy. In theory, these doctrines will only be altered or overturned when a new majority forms on the Supreme Court, either through new appointees or through incumbent justices changing their views. In reality, however, the malleability of judicial doctrines and legal language may permit justices to change judicial doctrines without formally altering existing precedents.[13] Instead, they may use existing interpretations of words and phrases in new ways that alter the policy directives aimed at government officials and citizens. This article will examine two examples of judicial doctrines and reasoning that were enunciated by liberal Supreme Court Justice Thurgood Marshall, for the purpose of establishing and expanding constitutional rights for prisoners, but were subsequently appropriated by conservative Supreme Court Justice Antonin Scalia in order to advance contrary objectives. These examples help to demonstrate the fragility of policies resting on judicial interpretation and, more importantly, to show how profoundly prisoners' rights were affected by the effective exploitation of malleable legal language and constitutional doctrine.

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attendant impacts on policies affecting prison conditions and practices).

[12] The figurative battles among the justices are not visible to the public, but scholars have revealed examples of these such battles in their research on the Supreme Court's decision-making. In Webster v. Reproductive Health Services, 492 U.S. 490 (1989), for example, the issue of abortion deeply divided the Court. In the decision-making process for that case, "[t]he Justices responded [to the draft majority opinion] by bombarding Chief Justice Rehnquist with letters and memoranda objecting to the draft opinion. In the end, the Chief Justice lost his majority and had to speak only for a plurality which could not cast Roe [v. Wade, 410 U.S. 113 (1973),] into limbo." BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 56 (1996).

[13] For example, in a series of cases concerning the discriminatory use of peremptory challenges in jury selection, the Supreme Court formally prohibited discrimination by race and gender in an attorney's' discretionary exclusion of potential jurors. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42 (1992); J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127 (1994). However, in Purkett v. Elem, 514 U.S. 765 (1995), the apparent prohibition on discrimination proved illusory. Without changing any precedents, the Court permitted the possibility of discrimination by allowing trial judges to accept pretextual justifications for the apparently systematic exclusion of potential jurors by race or by gender. *See also* Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 JUDICATURE 185 (1996) (analyzing trial judges' evaluations of the peremptory challenge).

II. A STUDY IN CONTRASTS: THURGOOD MARSHALL AND ANTONIN SCALIA

Scholars who study U.S. Supreme Court decisions are accustomed to monitoring, documenting, and classifying individual justices' approaches to interpreting the Constitution. Judicial scholars from political science, in particular, employ specific empirical methods to count, characterize, and classify the case decisions of various justices.[14] The studies produced by these scholars demonstrate patterns—sometimes predictable ones—in individual justice's decisions on specific issues and help to reveal differences in the consequences of a justice's values and philosophies.[15] Such empirical studies are often supplemented by qualitative analysis of judicial reasoning.[16] Within judicial opinions, the justices' enunciation of justifications for specific case outcomes further illuminates the decisionmakers' priorities and values.[17]

Studies of decisionmaking and opinions by U.S. Supreme Court justices during the Warren, Burger, and Rehnquist Court eras demonstrate consistent differences in the decision-making patterns and philosophies of Thurgood Marshall and Antonin Scalia. Marshall, a Democratic appointee of President Lyndon Johnson, was a famous civil rights advocate who consistently supported expansive definitions of individuals' constitutional rights.[18] By contrast, Scalia, a Republican appointee of President Ronald Reagan, is unlikely to support the claims of individuals in most civil rights and liberties cases.[19] According to an analysis from the Supreme Court Judicial Database, among the twelve justices who served on the Supreme Court from 1986 through 1992, Marshall was the justice most likely to support claims of individuals with a "liberal" vote score of 77.2 percent for the civil rights, civil liberties, and governmental powers issues examined.[20] By contrast, Scalia was the second most "conservative" justice because he supported the "liberal" position in

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[14] *See, e.g.*, Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986-1991 Terms*, 48 POL. RES. Q. 837, 850 (1995) (analyzing individual justice's voting behavior in civil rights and liberties cases).

[15] *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND ATTITUDINAL MODEL (1993) (detailed empirical analysis of individual justice's voting behavior).

[16] *See* THOMAS R. HENSLEY ET AL., THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 863-65 (1997) (describing systematic method for qualitative analysis of Supreme Court decisions).

[17] *See, e.g.*, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY (2000) (identifying a justice's values and policy preferences through evaluation of the justice's judicial opinions).

[18] HENSLEY ET AL., *supra* note 16, at 60-61, 84-86, 89.

[19] *Id.* at 71-73, 84-89.

[20] RICHARD A BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 64 (1997).

only 37.8 percent of the 900+ cases examined in the study.[21] In civil rights and liberties cases from 1986 through 1991, while Scalia generally agreed with his conservative colleagues (Rehnquist, Kennedy, White, and O'Connor) in nearly 80 percent (or more) of the Court's cases, his annual agreement percentage with Marshall averaged only 39.8 percent.[22]

Although Marshall and Scalia agreed with each other in a limited number of constitutional rights cases, such as the support for individuals in Confrontation Clause cases,[23] their decisions generally diverged in prisoners' rights cases decided by the Supreme Court from 1986 through 1991. In *Kentucky v. Thompson*,[24] Marshall was among the dissenters when Scalia and other members of the majority decided that Kentucky prisoners had no liberty interest under the Due Process Clause that limited officials' authority to bar specific visitors. In *Thornburgh v. Abbott*,[25] Marshall was among the justices who dissented in part against a decision, which Scalia supported, that endorsed regulations permitting prison officials to block prisoners' access to certain publications. In *O'Lone v. Shabazz*,[26] Marshall was among the dissenters when Scalia and other members of the majority decided that prison officials' asserted interests in order and security overrode Muslim prisoners' right to free exercise of religion with respect to leaving a work detail to attend Friday afternoon services. In *Murray v. Giarratano*,[27] Marshall was among the dissenters who objected to the Court's rejection of a claim that death row inmates were entitled to the appointment of counsel for the pursuit of state habeas corpus relief. Scalia was a member of the majority and endorsed Chief Justice Rehnquist's plurality opinion.

Despite this history of disagreement, Scalia was able to draw from Marshall's ideas. Scalia produced two important prisoners' rights majority opinions that generated significant change in law and policy by drawing from two seminal opinions expanding rights that Marshall had written in the 1970s.[28] Indeed, in both instances, Scalia employed Marshall's ideas as critical linchpins for new decisions. These decisions significantly limited the potential for prisoners to seek judicial intervention to correct unconstitutional conditions and practices that violated prisoners' legal protections. In exploiting the language of a philosophical opponent to turn correctional law in new directions, Scalia illustrated the malleability of doctrinal rationalizations in constitutional law and the powerful impact on prisoners' rights.

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[21] *Id.*

[22] HENSLEY ET AL., *supra* note 16, at 84-86.

[23] Coy v. Iowa, 487 U.S. 1012 (1988); Maryland v. Craig, 497 U.S. 836 (1990).

[24] 490 U.S. 454 (1989).

[25] 490 U.S. 401 (1989).

[26] 482 U.S. 342 (1987).

[27] 492 U.S. 1 (1989).

[28] Wilson v. Seiter, 501 U.S. 294 (1991); Lewis v. Casey, 518 U.S. 343 (1996).

III. A TALE OF TWO RIGHTS EIGHTH AMENDMENT AND ACCESS TO THE COURTS

Prisoners' right of access to the court and their Eighth Amendment constitutional protection against cruel and unusual punishments illustrate the malleability of constitutional doctrines. Malcolm Feeley and Edward Rubin characterize the Eighth Amendment prohibition on cruel and unusual punishments as a "grant of jurisdiction" for judicial decisionmaking rather than legal language that guides, limits, or constrains judges' interpretations.[29] Although the language of the Eighth Amendment does not impose constraints, a judge could use his or her own interpretive philosophy to create constraints. For example, Justice Clarence Thomas seeks to rely on the Framers' originally intended meanings in interpreting the Eighth Amendment and he sees no original intention to protect rights for prisoners.[30] Thomas' approach is problematic, however, because of many flaws and inconsistencies in originalist jurisprudence[31] and his incomplete grasp of prison history.[32] Thomas' effort to constrain the meaning of the Eighth Amendment has failed to attract the support of any justices other than Scalia.[33] Instead, the Supreme Court has invited judicial officers to interpret the Eighth Amendment in a flexible manner because of the continued vitality of the Warren Court's long-standing

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[29] FEELEY & RUBIN, *supra* note 11, at 206.

[30] SMITH & BAUGH, *supra* note 17, at 50.

[31] The purported utility of constitutional interpretation by original intent is fraught with difficulties because of problems in knowing what the Framers intended, whose intentions should govern, and whether the Framers intended for their understandings to be eternal. *See* Judith A. Baer, *The Fruitless Search for Original Intent*, *in* JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING 49-71 (Michael W. McCann & Gerald L. Houseman eds., 1989); STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 7-23 (1987).

[32] Thomas asserts that the Framers of the Constitution did not intend for the Eighth Amendment to protect prisoners from inhumane conditions of confinement. *See* Hudson v. McMillian, 503 U.S. 1, 19, 20 (1992) ("Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were judges and commentators so naive 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."). Thomas, however, never confronts the historical reality that there were no prisons as we know them today when the Framers drafted the Eighth Amendment in 1789. The country had just started to experiment with incarceration as a criminal punishment with the establishment of Philadelphia's Walnut Street Jail and Connecticut's Newgate Prison in 1790. LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 48-50, 79-82 (1993). Thus, if the Framers did not intend for the Eighth Amendment to apply to prisons, it was because they did not have knowledge of prisons, not because they made a considered judgment to give government complete discretion over allowing inhumane conditions of confinement in correctional institutions. *See* Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 23-24 (1997) (analyzing Justice Thomas's opinions on prisoners' rights).

[33] *See* Helling v. McKinney, 509 U.S. 25, 37 (1993) (Scalia, J., dissenting).

declaration in *Trop v. Dulles*[34] that the Amendment shall "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[35] Thus, in many respects, the Eighth Amendment serves as the prime illustration of Feeley and Rubin's description of opportunities for overt judicial policymaking with little justifiable pretense that judges' decisions are guided by the constitutional text:

> At some point, however, the legal text becomes so vague and the judge-made law so comprehensive and precise that the term"interpretation" seems like more of a conceit than a description. At some further point, the conceit fails, the fig leaf falls, and the judicial action is revealed as naked public policy making and law creation.[36]

Prisoners' right of access to the courts is arguably even more wide-open for judicial policymaking than the Eighth Amendment because there is no particular portion of constitutional text that clearly serves as the basis for the right, unless one relies on the all-purpose, open-ended phrase "due process" in the Fifth and Fourteenth Amendments. The initial Supreme Court decision that laid the groundwork for the recognition of a right of access to the courts was *Ex parte Hull* in 1941.[37] In *Hull*, the Court invalidated a Michigan prison regulation that permitted prison officials to screen prisoners' habeas corpus petitions and block those that the officials deemed inappropriate for submission to a court. Although an interpretation of the Constitution's provision concerning the preservation of the Writ of Habeas Corpus could provide a textual basis for the *Hull* decision,[38] the subsequent expansion of the right of access to courts for legal actions aside from habeas corpus indicates that Article I is neither the source nor the sole source of prisoners' right of access.[39] Thus, even critics of the Court's prisoners' rights decisions, such as Justice Thomas, concede that the Due Process Clause protects prisoners' opportunity to communicate with courts.[40] In a concurring opinion in

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[34] 356 U.S. 86 (1958).

[35] *Id.* at 100.

[36] FEELEY & RUBIN, *supra* note 11, at 206.

[37] 312 U.S. 546 (1941).

[38] The relevant provision of the Constitution states that, "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

[39] The Court obviously did not rely on the Habeas Corpus Suspension Clause as the source of prisoners' right of access to the courts because the relevant cases regarding access have included concerns over prisoners' ability to file actions other than habeas corpus petitions. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (explaining that state officials must provide law libraries or legal assistance to ensure prisoners' right of access to the courts).

[40] Among the Supreme Court's justices, "[o]nly Scalia agrees with Thomas that the framers never intended for the Eighth Amendment to apply to prison conditions and that the framers' intentions must control prisoners' rights cases." SMITH & BAUGH, *supra* note 17, at 178. Scalia's majority opinion in Lewis v. Casey, 518 U.S. 343 (1996), however acknowledges

Lewis v. Casey, Justice Thomas wrote, "In the end, I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right [is] rooted in the Due Process Clause . . . ."[41] Using the vague Due Process Clause as its acknowledged textual source, judges define prisoners' right of access to the courts within the constraints provided by politics and policy rather than by constitutional text.

According to Feeley and Rubin, the Eighth Amendment's Cruel and Unusual Punishments Clause and the due process protection for prisoners' right of access to the courts constitute "grants of jurisdiction"[42] rather than text-based directives. Consequently, the initial definers of these rights had significant opportunities to advance their preferred policy positions.[43] With respect to each right, Justice Thurgood Marshall seized the opportunity by developing legal doctrines and underlying justifications that to broadened legal protections.[44] Later, however, Justice Antonin Scalia further diminished prisoners' rights by using Marshall's doctrines to interpreting these two rights.[45]

A. The Eighth Amendment and Conditions of Confinement

Although individual state courts made decisions preventing specific abuses from occurring in prisons within their jurisdictions,[46] courts in general—and the federal courts in particular—are regarded as adopting a "hands-off" approach to corrections prior to the 1960s.[47] Federal district judges began to apply the Eighth Amendment to conditions in correctional institutions during the 1960s. Judicial examinations of prison conditions first focused on specific practices, such as corporal punishment,[48] but eventually judges assumed significant managerial and supervisory control over prisons because of glaring problems with sanitation, safety, and other issues.[49]

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the existence of a right of access to the courts for prisoners.

[41] *Lewis*, 518 U.S. at 381 (Thomas, J., concurring).

[42] FEELEY & RUBIN, *supra* note 11, at 206.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Donald Wallace, *The Eighth Amendment and Prison Deprivations: Historical Revisions*, 30 CRIM. L. BULL. 3-29 (1994).

[47] John J. DiIulio, Jr., *Introduction: Enhancing Judicial Capacity*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS 3-4 (John J. DiIulio, Jr. ed., 1990).

[48] Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); Jackson v. Bishop, 404 F.2d 371 (8th Cir. 1968).

[49] *E.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (district judge's decision ordering broad reforms in conditions within the Alabama prison system).

1. Justice Marshall and the Eighth Amendment

The U.S. Supreme Court's first full opinion on the application of the Eighth Amendment to prison conditions came in *Estelle v. Gamble*.[50] In *Estelle*, a prisoner filed a civil rights action against prison officials for providing him with tardy and inadequate medical care.[51] The prisoner injured his back when a bale of hay fell on him while he worked in the prison's farm operations.[52] Justice Marshall's majority opinion advanced prisoners' rights by giving the high court's stamp of approval to the application of the Eighth Amendment to practices and conditions in prisons and by recognizing that prisoners possess a right, albeit limited, to medical care.[53] Although this right was merely a prohibition against prison officials' deliberate indifference to prisoners' serious medical needs, the case had enormous significance because it was the high court's first identification of a specific right encompassed by the Eighth Amendment that concerned conditions of confinement rather than formal punishment actions. The decision opened the door to a seemingly limitless horizon of potential areas of prison policy and practice that could be covered by the Eighth Amendment. In subsequent decisions, the Supreme Court explicitly endorsed the power of lower court judges to use the Eighth Amendment to order prison reform.[54] The justices also acknowledged that the Eighth Amendment provides a basis for judicial scrutiny of prison overcrowding and other conditions of confinement.[55]

Justice Marshall wrote the majority opinion in *Estelle v. Gamble*.[56] Over the course of his career, he established himself as one of the Supreme Court's most outspoken proponents of strong constitutional rights,[57] including rights for prisoners. In several cases, Justice Marshall stood as the lone justice most concerned with protecting incarcerated offenders from inhumane treatment.[58]

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[50] 429 U.S. 97 (1976).

[51] *Id.*

[52] *Id.*

[53] *See* MICHAEL MUSHLIN, THE RIGHTS OF PRISONERS, Vol. 1, 121-82 (2d ed. 1993) (describing cases defining prisoners' limited right to medical care).

[54] Hutto v. Finney, 437 U.S. 678, 687 (1978).

[55] *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("[Prison] [c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.").

[56] *Estelle*, 429 U.S. at 97.

[57] *See, e.g.*, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 290 (2d ed. 1985) ("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 in particular.").

[58] *E.g.*, in Bell v. Wolfish, 441 U.S. 520, 576-77 (1979) (Marshall, J., dissenting) (criticizing the suspicionless body cavity searches imposed on unconvicted pretrial detainees after meeting with visitors; police conducted these searches even though the detainees wore difficult-to-remove one-piece jumpsuits and were under constant observation by corrections

Consistent with his effort to expand constitutional protections for individuals, Justice Marshall identified a right to medical care possessed by incarcerated offenders.[59] Relying on the Eighth Amendment's Cruel and Unusual Punishments Clause as the source of a prisoner's right to medical care, Justice Marshall flexibly interpreted the Eighth Amendment's ambiguous prohibition on "cruel and unusual punishments," to advance his policy preference.[60] Justice Marshall equated withholding medical care from prisoners with the torturous treatment of prisoners that the Framers sought to prevent in the Eighth Amendment.[62] He also noted that the unnecessary infliction of pain caused by depriving prisoners of medical care was inconsistent with the contemporary standards of decency identified in *Trop v. Dulles* as the test for defining Eighth Amendment violations.[63] According to Justice Marshall,

> In the worst cases, such a failure [to provide medical to prisoners] may actually produce physical "torture or a lingering death,"... the evils of most immediate concern to the drafters of the [Eighth] Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological interests....The infliction of unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."[64]

Because justices are cognizant of correctional institutions' to maintain security and order, prisoners' rights are never absolute.[65] Even justices who seek to expand legal protections for convicted offenders generally typically balance the scope of the recognized right against the correctional institution's interests in order and

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officers, making it highly unlikely that a detainee could obtain contraband and hide it on his or her body); Rhodes v. Chapman, 452 U.S. 337, 371 (1981) (Marshall, J., dissenting) (noting that each prisoner's living space was smaller than "most windows in the Supreme Court building").

[59] *Estelle*, 429 U.S. at 103.

[60] *Id.* at 102.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 103-04.

[65] For example, in O'Lone v. Shabazz, 482 U.S. 342 (1987), a case concerning prisoners' First Amendment right to the free exercise of religion, the majority opinion stated that, "'[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' . . . The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives–including deterrence of crime, rehabilitation of prisoners, and institutional security" (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

security.[66] In *Estelle v. Gamble*, Justice Marshall implicitly acknowledged institutional interests by limiting the scope of a prisoner's right to medical care.[67] In *Estelle* Justice Marshall declared "that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment."[68] To initiate a civil rights lawsuit for deprivation of medical care in violation of the Eighth Amendment, prisoners must show prison officials—either doctors, administrators, or custodial staff—were *"deliberately indifferen[t]* to [the] prisoner's *serious* medical needs."[69] Justice Marshall explained that his formulation spared corrections officials from the prospect of liability for both inadvertent failures to provide adequate medical care and negligent misdiagnoses.[70]

The lone dissenter in *Estelle v. Gamble,* Justice John Paul Stevens, complained that the violation of Eighth Amendment rights should not depend on proof of officials' subjective motivations but should rest only on the nature of the "punishment" inflicted.[71]

> [B]y its repeated references to "deliberate indifference" and the "intentional" denial of adequate medical care, I believe the Court improperly attaches significance to the subjective motivation of the [prison officials] as a criterion for determining whether cruel and unusual punishment has been inflicted. Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standards has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it. Whether the conditions in Andersonville (the prisoner of war camp during the Civil War) were the product of design, negligence or mere poverty, they were cruel and inhuman.[72]

In two subsequent cases concerning alleged Eighth Amendment violations in conditions of confinement within correctional institutions, the majority opinion did not focus on the subjective motives of prison officials.[73] Instead, the Court followed Justice Stevens' approach in *Estelle* by focusing objectively on the

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[66] Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), for example, the majority of justices supported prison officials' ban on prisoners' activities to recruit members for their union. In dissent, Justices Marshall and Brennan did not focus on an absolute First Amendment right under which prisoners could form a union. Instead, they focused on the district court's analysis of whether the prisoners' union organizing activities threatened or disrupted the prison's operations. Thus, they indicated their support for striking a balance between prisoners' rights and the institution's essential objectives.

[67] *Estelle*, 429 U.S. at 105-06.

[68] *Id.* at 104.

[69] *Id.* at 105-06 (emphasis added).

[70] *Id.*

[71] *Id.* at 116-17 (Stevens, J., dissenting).

[72] *Id.* (citations omitted).

[73] *See* Rhodes v. Chapman, 452 U.S. 337 (1981); Hutto v. Finney, 437 U.S. 678 (1978).

conditions themselves.[74] In *Hutto v. Finney*, Justice Stevens' majority opinion endorsed the lower court holding that lengthy detention in overcrowded isolation cells violated the Cruel and Unusual Punishments Clause.[75] Justice Stevens' opinion did not purport to explain the circumstances under which prison conditions violate the Eighth Amendment, however it relied on an objective assessment of the prison conditions rather than an examination of prison officials' subjective motivation.[76] In *Rhodes v. Chapman*, the Supreme Court examined allegations about prison overcrowding.[77] Justice Lewis Powell's majority opinion described objective tests for determining whether conditions of confinement violate the Eighth Amendment and explained the Court's decision in *Hutto* as resting on an objective assessment of "unquestioned and serious deprivation[s] of basic human needs."[78]

2. Justice Scalia's Creativity

In 1991, the Supreme Court examined another case raising allegations of unconstitutional prison conditions due to overcrowding and problems with ventilation, sanitation, and other aspects affecting food and housing.[79] Following the Court's decision in *Rhodes v. Chapman*, the Court became more conservative as a result of Republican appointees, Justices Scalia, Anthony Kennedy and David Souter.[80] It was this more conservative Court that decided *Wilson v. Seiter*.[81] Justice Scalia wrote the Court's opinion in *Wilson* for a five-member majority.[82] Justice Byron White wrote a concurring opinion for the four remaining justices who agreed that the prisoner's claim should be rejected, but who disagreed with Justice Scalia's reasoning.[83]

In his majority opinion, Justice Scalia adopted Justice Marshall's "deliberate indifference" test articulated in *Estelle v. Gamble*, heretofore only applied to prison medical cases, and announced that henceforth the subjective motivations of prison officials would be the linchpin for analyzing all claims regarding unconstitutional conditions in prisons.[84] Justice Scalia's reasoning relied on *Estelle*, a medical care

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[74] *Id.*

[75] 437 U.S. at 685-88.

[76] *Id.*

[77] *See Rhodes*, 452 U.S. at 337.

[78] *Id.* at 345-47 (The tests Powell described were whether the prison conditions imposed "the wanton and unnecessary infliction of pain" and "grossly disproportionate to the severity of the crime.") The tests are ambiguous but they do not rely on the subjective approach of examining the correction officials' state of mind.

[79] *See* Wilson v. Seiter, 501 U.S. 294 (1991).

[80] JOHN FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 145-48 (2001).

[81] 501 U.S. 294 (1991).

[82] *See Wilson*, 501 U.S. at 295.

[83] *Id.* at 306.

[84] *Id.* at 299.

case, and on *Whitley v. Albers*,[85] an excessive use of force case, as the guiding precedents for this decision.[86] Justice Scalia did not follow prior prison conditions cases, *Hutto* and *Rhodes,* that relied on objective evaluations of prison conditions.[87] Justice Scalia apparently avoided discussing and relying on the precedents in which the Court had actually addressed conditions of confinement in prisons because those precedents emphasized objective evaluations of prison conditions.[88] Rather, Justice Scalia plucked a single concept, wantonness, within a common phase (i.e., "the *wanton* and unnecessary infliction of pain") from the opinions in *Estelle*, *Whitley*, and *Rhodes* to assert that *Rhodes* and the other Eighth Amendment cases stood for the proposition that subjective intent is the most important element of Eighth Amendment cases.[89] Justice Scalia relied on *Rhodes* to require subjective intent, despite the fact that the *Rhodes* decision discussed Eighth Amendment violations in terms of objective assessments of prison conditions.[90] As noted in Justice White's concurring opinion in *Wilson*, even the *Whitley* precedent specifically endorsed an objective test for evaluating the constitutionality of prison conditions.[91] Justice Scalia did not acknowledge the endorsement of an objective test because his goals were better served by emphasizing that *Whitley*'s language focused on purposeful actions employed by officials "maliciously and sadistically for the very purpose of causing harm" to establish liability for excessive use of force while quelling a prison disturbance.[92]

By shifting the Court's focus from an objective assessment of conditions to a subjective test of prison officials' motives, Justice Scalia made it significantly more difficult for prisoners to establish that prison conditions—no matter how terrible—

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[85] 475 U.S. 312 (1986).

[86] *Id.* at 296-306.

[87] *Id.*

[88] *Id.*

[89] According to Justice Scalia's opinion, "[s]ince we said [in *Estelle*], only the 'unnecessary *and wanton* infliction of pain' implicates the Eighth Amendment, . . . a prisoner advancing such a claim must, at a minimum, allege, 'deliberate indifference' to his 'serious' medical needs" (internal citations omitted). *Wilson*, 501 U.S. at 297. Justice Scalia also quoted the majority opinion from *Whitley* and highlighted his focus on its mention of "wantonness" as the justification for imposing a subjective test. "It is *obduracy and wantonness, not inadvertence or error in good faith,* that characterizes the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Id.* at 299 (internal citations omitted).

[90] *See Rhodes*, 452 U.S. at 345-52 .

[91] According to Justice White, "Moreover, *Whitley* expressly supports an objective standard for challenges to conditions of confinement. There, in discussing the Eighth Amendment, we stated: . . . harsh 'conditions of confinement' may constitute cruel and unusual punishment unless such conditions 'are part of the penalty that criminal offenders pay for their offenses against society.'" *Wilson*, 501 U.S. at 309 (White, J., concurring) (internal citations omitted).

[92] *See Wilson*, 501 U.S. at 302.

violated the Eighth Amendment.[93] In addition, Justice Scalia rejected the practice of many lower court judges who were willing to find constitutional violations based on overall conditions rather than on specific, demonstrable deprivations of human needs.[94]

Justice White noted that Justice Scalia's new test would be unworkable because prison conditions may be the product of "cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time."[95] Justice Scalia's approach is seriously flawed, as Feeley and Rubin observed, because "Justice Scalia, who adopts his typically snide tone in answering Justice White's concurrence, fails to address White's perceptive observation that 'wantonness' is an incoherent notion when dealing with institutional behavior."[96] Moreover, Justice White observed that "prison officials may be able to defeat a [Title 42 U.S.C. section] 1983 [civil rights] action challenging inhuman prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature, rather than by any deliberate indifference on the part of prison officials."[97] Thus, conditions in a prison could be unfit for human habitation, yet Justice Scalia's approach would preclude a finding of an Eighth Amendment violation so long as prison officials indicated that they were not indifferent to prison living conditions, but were unable to change the conditions because of "insufficient funding from the state legislature."[98]

Justice Thurgood Marshall enunciated the "deliberate indifference" test in 1976 to advance prisoners' rights by recognizing that the Eighth Amendment applies to protect incarcerated offenders and their limited right to medical care.[99] Fifteen years later, Justice Scalia appropriated the test as a means to advance the contrary policy goal of limiting prisoners' abilities to challenge prison conditions as violations of the Eighth Amendment.[100] Justice Scalia's motives and preferences with respect to prisoners and the Eighth Amendment became clearer in 1993 when he joined Justice Thomas' dissenting opinion in *Helling v. McKinney*.[101] In *Helling*, a seven-member majority, including dependable conservative Chief Justice Rehnquist, declared that a prisoner could pursue an Eighth Amendment claim concerning conditions of confinement for potential threats to his health based on his placement in a cell with a cigarette smoker.[102] In his *Helling* dissent, Justice Thomas argued that the Eighth Amendment should never apply to protect

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[93] *Id.*
[94] *Id.* at 294, 304-05.
[95] *Id.* at 310 (White, J., concurring).
[96] FEELEY & RUBIN, *supra* note 11, at 49.
[97] *Wilson*, 501 U.S. at 310 (White, J., concurring).
[98] *Id.* at 311.
[99] Estelle v. Gamble, 429 U.S. 97 (1976).
[100] *Wilson*, 501 U.S. at 297-300.
[101] 509 U.S. 25 (1993).
[102] *Id.* at 35.

prisoners.[103] According to Justice Thomas, the framers of the Eighth Amendment did not intend for it to protect prisoners.[104] Rather, the Cruel and Unusual Punishments Clause was only intended to prevent judges and juries from imposing improper sentences, not to govern the implementation of proper incarcerative sentences announced in court.[105] On behalf of Justice Scalia, Justice Thomas wrote, "The text and history of the Eighth Amendment, together with pre-*Estelle* precedent, raise substantial doubt in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of the sentence."[106] Justice Thomas went on to say that "[w]ere the issue squarely presented, therefore, I might vote to overrule *Estelle*"—the case which, in his estimation, improperly applied the Eighth Amendment to prisoners.[107] Justice Scalia, an apparent opponent of Justice Marshall's decision in *Estelle*, used Justice Marshall's *Estelle* test as a means to advance policy preferences diametrically opposed to Justice Marshall's efforts to provide constitutional protections for incarcerated offenders.

Justice Scalia's selective and manipulative use of Justice Marshall's language from *Estelle* raises the spectre that Justice Scalia was disingenuous in his *Wilson v. Seiter* opinion. If Justice Scalia had stated his true position, as indicated by his support for Justice Thomas' dissent in *Helling*, he would have stated in *Wilson* that the prisoner should lose his Eighth Amendment claim regarding conditions of confinement because the Eighth Amendment is inapplicable to such claims. If Justice Scalia had been so forthright, however, it is unlikely that he would have formed a majority because Justice Thomas is the only other justice who adopts that view. Instead, Justice Scalia skillfully appropriated Justice Marshall's "deliberate indifference" test for medical care from *Estelle* and mischaracterized or ignored the Court's actual precedents concerning general conditions of confinement, *Rhodes* and *Hutto*, that both mandated objective tests. To advance his goal, as revealed in *Helling*, of eliminating Eighth Amendment protections for prisoners, Justice Scalia imposed a standard that would be extraordinarily difficult for prisoners to meet. It is exceptionally difficult for prisoners to prove corrections officials' subjective intent with respect to conditions of confinement, especially when the possibility exists for corrections officials to defeat such lawsuits by claiming that there are inadequate resources for maintaining appropriate conditions of habitability.

B. Prisoners' Right of Access to the Courts

As mentioned in the foregoing discussion, most commentators point to *Ex parte Hull* as the genesis of the Supreme Court's recognition of prisoners' right of access

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[103] Justice Thomas stated in dissent that he has "serious doubts about th[e] premise" that "deprivations suffered by a prisoner constitute 'punishmen[t]' for Eighth Amendment purposes." *Id.* at 37-38.

[104] *Id.* at 38.

[105] *Helling*, 509 U.S. at 40.

[106] *Id.* at 42.

[107] *Id.*

to the courts.[108] *Ex parte Hull* assured that corrections officials cannot block the filing of habeas corpus petitions.[109] Subsequently, the Court opened the door to federal civil rights lawsuits by prisoners in 1964 when it ruled that incarcerated offenders could file actions against corrections officials under section 1983.[110] The Court expanded the right to access in 1969 by declaring that corrections officials must permit prisoners to assist each other in preparing legal filings unless the prison provides an alternative means of assistance.[111] Justice Marshall influenced the development of prisoners' right of access to the courts in his majority opinion in *Bounds v. Smith* in 1977.[112] This opinion provided the second important source for Justice Scalia's subsequent manipulation of judicial language and intentions in an effort to limit the rights of incarcerated offenders.

1. Marshall and the Right of Access

In *Bounds*, Marshall clarified the nature of prisoners' entitlements under the right of access. The Court rejected North Carolina's argument that its constitutional obligation extended no further than permitting prisoners to assist each other in preparing petitions and briefs to be filed in court. Marshall's majority opinion imposed an affirmative obligation upon corrections officials "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate [legal] assistance from persons trained in law."[113] Marshall's opinion expanded the scope of prisoners' right of access by imposing obligations upon corrections officials. However, Marshall's opinion also gave officials a choice of the means employed in providing prisoners with meaningful access to the courts. Rather than require states to provide lawyers or other forms of legal assistance, Marshall left open the possibility of merely offering prisoners a law library that would provide the resources necessary for the preparation of *pro se* petitions.[114] Marshall refuted North Carolina's assertion that prisoners were not capable of making use of law libraries.[115] According to Marshall,

> We reject the State's claim that inmates are "ill-equipped to use the tools of the trade of the legal profession," making libraries useless in assuring meaningful access. . . .[T]his Court's experience indicates that *pro se* petitioners are capable of using lawbooks to file cases raising claims that are

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[108] 312 U.S. 546 (1941).
[109] *Id.* at 549.
[110] *See* Cooper v. Pate, 378 U.S. 546 (1964).
[111] *See* Johnson v. Avery, 393 U.S. 483 (1969).
[112] 430 U.S. 817 (1977).
[113] *Id.* at 828
[114] *Id.* at 832.
[115] *Id.* at 826

serious and legitimate even if ultimately unsuccessful. . . .[116]

However, if Marshall's goal was to ensure that all prisoners have access to the courts, he miscalculated the means necessary for achieving that goal when he declared that "adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts."[117] Many thousands of prisoners have limited education, literacy problems, learning disabilities, mental illnesses, a lack of fluency in English, and other impediments that prevent them from being able to use law libraries effectively.[118] The futility of relying on law libraries alone was described in sarcastic terms by one U.S. district judge:

> In this court's view, access to the fullest law library anywhere is a useless and meaningless gesture in terms of the great mass of prisoners. The bulk and complexity have grown to such an extent that even experienced lawyers cannot function efficiently today without the support of special tools, such as computer research systems of FLITE, JURIS, LEXIS, and WESTLAW. To expect untrained laymen to work with entirely unfamiliar books, whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of constitutional duty. Access to full law libraries makes about as much sense as furnishing medical services through books like: "Brain Surgery Self-Taught," or "How to Remove Your Own Appendix," along with scalpels, drills, hemostats, sponges, and sutures.[119]

Marshall's opinion advanced prisoners' constitutional protections by giving them a right of access to law libraries (if other forms of assistance are not provided), but Marshall overestimated the usefulness of this right as a means of assuring access to the courts.

2. Scalia's Impact

Justice Scalia used Marshall's *Bounds* precedent as his primary reference in writing the majority opinion in *Lewis v. Casey* in 1996.[120] Scalia emphasized Marshall's words in *Bounds,* that "meaningful access to the courts is the touchstone,"[121] in rejecting a U.S. district judge's detailed remedial order designed to ensure access to library resources and legal assistance for "lockdown" prisoners, illiterate prisoners, and non-English-speaking prisoners. Although the district judge had determined that assistance for law-trained persons was necessary to

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[116] *Id.*

[117] *Bounds*, 430 U.S. at 826.

[118] Christopher E. Smith, *Examining the Boundaries of* Bounds*: Prison Law Libraries and Access to the Courts*, 30 HOWARD L.J. 27, 34-35 (1987).

[119] Falzerano v. Collier, 535 F. Supp. 800, 803 (D. N.J. 1982).

[120] 518 U.S. 343 (1996).

[121] *Bounds*, 430 U.S. at 823 (citing Ross v. Moffitt, 417 U.S. 600 (1974)).

effectuate many prisoners' right of access to the courts, Scalia seized upon Marshall's words concerning the capability of prisoners to utilize law library materials in order to presume that prisoners do not, without very specific proof to the contrary, require additional special assistance in preparing their legal filings.[122] Marshall's argument in *Bounds* refuted North Carolina's claim that there was no point in providing access to legal resources. While Marshall's argument sought to expand prisoners' access to the courts, Scalia used it to narrow their access. Scalia, in effect, made it much more difficult for prisoners to claim that the inadequacy of reliance on law libraries by imposing a strict standing requirement that must be met before federal courts can examine whether additional legal resources are needed to fulfill the right of access to the courts. Scalia's standing requirement may arguably create a "catch-22" situation if prisoners are expected to prepare and successfully file in court legal papers demonstrating that they are incapable of preparing and successfully filing legal papers in court.[123]

If Marshall had been able to establish a right to legal assistance as part of the right of access to the courts, then it might have been more difficult for Scalia to use the standing concept to impede prisoners' access. By requiring institutions to provide legal advisors, whether staff attorneys, paralegals, or others trained in law, judges would have avoided forcing prisoners to struggle with unfamiliar legal materials or face the seemingly insurmountable challenge of demonstrating an injury-in-fact through *pro se* efforts. Marshall's *Bounds* precedent expanded prisoners' rights by imposing on institutions an affirmative obligation to provide law libraries, but this doctrine was ultimately self-limiting in its effectiveness, both because it overestimated the capabilities of prisoners and because it provided Scalia with a tool for limiting judicial power and impeding prisoners' access to the courts. The likely consequences of Scalia's *Lewis* opinion are consistent with his demonstrated preference for reducing cases in the federal courts, especially those concerning criminal offenders. This preference is reflected in his speeches,[124] his emphasis on standing requirements,[125] his participation in tightening habeas corpus procedures,[126] and his strict imposition of procedural rules on prisoner *pro se* litigants.[127] Because the judicial protection of all rights for prisoners, including due process rights and Eighth Amendment rights, rests on prisoners' ability to raise

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[122] *Lewis v.Casey*, 518 U.S. at 350.

[123] CHRISTOPHER E. SMITH, LAW AND CONTEMPORARY CORRECTIONS 82-83 (2000).

[124] *See, e.g.*, Stuart Taylor, *Scalia Proposes Major Overhaul of U.S. Courts*, N.Y. TIMES, Feb. 16, 1987, at 1 (describing speech by Justice Scalia urging that mechanisms be developed to limit the number of cases filed in the federal courts).

[125] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 17 881-99 (1983).

[126] CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 44 (1993).

[127] *See* Linda Greenhouse, *Scalia Tightens Policy on Death Penalty Appeals*, N.Y. TIMES, Feb. 22, 1991, at B16 (reporting on Scalia's decision as a Circuit Justice to refuse to extend time limits for *pro se* litigants on death row).

claims in court, Scalia's opinion has a far-reaching impact for limiting the effectuation of prisoners' rights beyond access to the courts. As one scholar has noted, the right of access is "perhaps the most basic of rights possessed by inmates; certainly it is the foundation for every other right an inmate has .... Without access [to the courts], inmates have no way of vindicating their rights through judicial action."[128] If Scalia's opinion in *Lewis v. Casey* makes it more difficult for prisoners to prepare legal filings, they will have less ability to protect their right to religious freedom, their protection against unconstitutional prison conditions, and the full array of other legal actions that limit excessive or abusive exercises of power by the government.

IV. MALLEABILITY OF LAW AND PRISONERS' RIGHTS

Although at least one scholar argues that Scalia's opinion in *Wilson v. Seiter* still left room for federal district judges to intervene in prison overcrowding cases,[129] Scalia's approach has the potential for significant impact, both because of the need for plaintiffs to demonstrate deliberate indifference by corrections officials and because judges can longer find violations of overall conditions.[130] Judges must find that specific conditions violate the Eighth Amendment rather than finding deficiencies in the totality of conditions.[131] Scalia's opinion in *Lewis v. Casey* makes it more difficult for prisoners to gain additional legal assistance beyond access to a law library and is regarded as instructing to lower court judges to show greater restraint in examining prisoners' claims. In both instances, Scalia advanced his policy preferences for a diminution of prisoners' rights,[132] less judicial intervention into prisons,[133] and fewer prisoners' cases in the federal courts.[134] Scalia managed to advance his policy preferences in both cases by relying on opinions written by Thurgood Marshall that Marshall clearly intended as a means

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[128] MICHAEL MUSHLIN, THE RIGHTS OF PRISONERS, Vol. 2, 3-4 (1993).

[129] Jack Call, *Prison Overcrowding Cases in the Aftermath of* Wilson v. Seiter, 75 PRISON J. 390 (1995).

[130] Some of the potential impact of Scalia's opinion in *Wilson v. Seiter* will never be fully tested because of subsequent legislative action in the form of the Prison Litigation Reform Act, Pub. L. No. 104-134, section 801, 110 Stat. 1321 (1996), a statute that imposed restrictions on judges' ability to order remedies in conditions of confinement cases. *See* Note, *Is Congress Handcuffing Our Courts?*, 28 SETON HALL L. REV. 282 (1997).

[131] *Wilson*, 501 U.S. at 304-05.

[132] Justice Scalia has joined with Justice Thomas in advocating that the Eighth Amendment protections be withdrawn from incarcerated offenders. *See* Christopher E. Smith, *The Constitution and Criminal Punishment*, 43 DRAKE L. REV. 593, 601-03 (1995).

[133] *See, e.g.*, BRISBIN, *supra* note 20, at 241-42 ("Scalia has written extensively about Eighth Amendment provisions .... Throughout the opinions there are themes drawn from Reasoned Elaboration jurisprudence, especially the postulates that courts should adhere to statutes and precedents, avoid clashes with elected representatives about the proper penalties for criminal actions, and avoid policy experimentalism.").

[134] Taylor, *supra* note 124, at 1.

to expand constitutional protections for incarcerated offenders.

A. Marshall and the Creation of Opportunity

Could Thurgood Marshall have written his opinions in ways that would have precluded Scalia from appropriating his words for contrary purposes? Not necessarily. Thurgood Marshall enunciated the "deliberate indifference" test in *Estelle* and endorsed prisoners' ability to use law libraries in *Bounds* with the intention and effect of expanding constitutional protections for incarcerated offenders. If he could have foreseen Scalia's opinions in *Wilson* and *Lewis*, he might very well have sought to establish clearer, stronger rights in the first instance, such as an objective test for prison conditions in *Estelle* and a right to legal assistance, rather than law libraries, in *Bounds*. However, judges obviously have a limited capacity to anticipate future events, including the consequences of their own decisions. More importantly, the development of judicial doctrine, especially on controversial issues such as the expansion of rights for convicted offenders, may necessarily be an incremental process in which justices must modify the expressions of their views in order to garner sufficient support from colleagues to move the law in the desired direction.[135] The need to gain majority support for an opinion seems to lend itself to compromise, accommodation, and, ultimately, incremental steps in establishing judicial policies concerning many issues.[136] When the Supreme Court first examines a particular issue, efforts to establish the "best" or "strongest" judicial policy in the eyes of a particular justice may run the risk of alienating colleagues whose votes are needed to maintain the majority[137] or of conflicting with justices' desires to use incremental steps as the means to gain

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[135] For example, Justice Brennan was unsuccessful in his efforts to have gender labeled a "suspect classification" deserving of "strict scrutiny" analysis in equal protection cases. He could garner only four votes in favor of giving the same level of constitutional protection against gender discrimination as the Court provided against race discrimination under the Equal Protection Clause. Frontiero v. Richardson, 411 U.S. 677 (1973). However, when Brennan modified his position by suggesting a "moderate scrutiny" test for gender that would provide protection for many kinds of official discrimination, but not provide as much protection as that provided against race discrimination, he was able to gain the support of a majority of justices. Craig v. Boren, 429 U.S. 190 (1976). *See also* SUSAN GLUCK MEZEY, IN PURSUIT OF EQUALITY: WOMEN, PUBLIC POLICY, AND THE FEDERAL COURTS 18-20 (1992) (describing the Supreme Court's development of equal protection doctrines affecting gender discrimination).

[136] *See* BAUM, *supra* note 7, at 165 ("The negotiation among justices. . . reflects their interest in winning support from their colleagues. It also reflects their willingness to modify their positions as a means to achieve a collective result that reflects their own views at least moderately well.").

[137] If justices are too extreme or strident, they may diminish their own potential influence within the Supreme Court by repelling rather than persuading their colleagues. *See* SMITH, *supra* note 123, at 85-102 (describing Scalia's stridency on the issue of abortion and the evidence that he may have driven away potential allies on the issue).

public acquiescence and preserve the Court's image as a nonpolitical, legal institution.[138]

B. Scalia and the Exercise of Creativity

Another reason that Marshall may not have been able to preclude having his words used by Scalia for contrary purposes is that the malleability of legal language and judicial reasoning creates abundant opportunities for judges to use their ingenuity to shape law and policy according to their preferences. Perhaps these examples simply show that Scalia can be a particularly effective justice in successfully achieving his goals when he sets aside his penchant for criticizing and condemning his colleagues' opinions.[138] We now know from Scalia's support for Thomas' dissenting opinion in *Helling* that Scalia does not believe that the Eighth Amendment should apply to prison conditions. It is possible that he had not yet reached that conclusion when he wrote the *Wilson* opinion two years earlier in 1991. However, Scalia's knowledge and expertise about constitutional law from his stellar career as a law professor and federal judge[139] make it difficult to believe that his advocacy of originalism[140] had not already led him to that conclusion before he was appointed to the Supreme Court.[141]

Alternatively, perhaps he seized the opportunity in *Wilson* to make an incremental step toward the vision that Thomas would later enunciate in *Helling*. Without risking the loss of majority support from his colleagues, Scalia made it more difficult for prisoners to win conditions-of-confinement cases without openly espousing his actual position opposing the Eighth Amendment's applicability to corrections contexts. Similarly, Scalia's *Lewis* opinion may be a pragmatic step toward Thomas' position, one Scalia has not yet explicitly endorsed, that prisoners' right of access to the courts imposes no affirmative obligations on corrections officials to provide law libraries or other assistance, but merely bars them from

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[138] Some justices have demonstrated their concern that the Supreme Court not move too quickly on controversial issues lest the Court's public image be threatened in the process. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (expressing great concern about preserving a controversial precedent to protect the Court's public image in majority opinion in controversial abortion case that was co-authored by three justices).

[138] SMITH, *supra* note 123, at 85-102.

[139] HENSLEY ET AL., *supra* note 16, at 72.

[140] Scalia has long been a strong, visible advocate of originalism, the judicial philosophy relied upon by Thomas to reach the conclusion that prisoners should not be protected by the Eighth Amendment. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

[141] Scalia's confident style and relatively consistent voting record appear to make him one of the justices least likely to have doubts about his initial views on an issue or to change his mind on an issue. *See* Christopher E. Smith, *Justice Antonin Scalia and the Institutions of American Government*, 25 WAKE FOREST L. REV. 783, 804-05 (1990) ("Scalia's opinions, by contrast, evince the consistent confidence and self-righteousness of a 'prophet' who possesses a clear, fixed vision of how cases should be decided.").

blocking prisoners' access to a mailbox.[142] Thomas sees no obligation to provide pens and paper to prisoners, let alone law libraries and legal advice. Scalia's opinion in *Lewis v. Casey* will deny prisoners access to legal advice and, consequently, will preclude the possibility that the prisoners can present an effective case in court to prove that they have a special need for legal assistance.

Scalia demonstrated his impressive creativity by characterizing non-prison conditions cases (*Estelle, Whitley*) as the primary precedents for *Wilson* rather than the comparable conditions-of-confinement cases (*Hutto, Rhodes*) that employed the objective test he sought to undercut and avoid. His ingenuity in (mis)characterizing these precedents to his advantage is reminiscent of his avoidance of many strict scrutiny-based Free Exercise precedents that he labeled as "hybrid" cases and therefore not controlling when he reshaped First Amendment doctrines in *Employment Division of Oregon v. Smith.*,[143] Scholars have described *Smith* as "different and totally unexpected"[144] because it made a surprising deviation from the precedents of the prior twenty-seven years. Although "[a]ttorneys for both parties, as well as Court observers, assumed beyond question that this . . . case would be decided by the Court under the strict scrutiny standard . . . . [that] the Court had typically used since 1963,"[145] Scalia surprised the legal community by declaring that the minimal scrutiny, rational basis test should be applied in free exercise cases. The application of this new test resulted in a reduction of religious freedom rights that was so stunning that a bipartisan majority in Congress attempted to counteract Scalia's creative decision by enacting a statute designed to enforce compliance with the strict scrutiny standard.[146] The statute, however, was subsequently struck down by the Court.[147]

As a result of Scalia's creative free exercise opinion, state and local governments no longer need to show a compelling justification for laws and policies that impinge on individuals' right to engage in practices that are central to their religious beliefs. In *Employment Division of Oregon v. Smith*, like the Eighth Amendment and prisoners' access-to-the-courts cases, Scalia managed to alter judicial doctrines significantly without formally overturning any doctrinal precedents.[148] Thus Scalia's actions in exploiting the malleability of law and his skillful appropriation of Justice Marshall's judicial opinions may simply demonstrate further examples of a strategic technique employed by Scalia to advance his policy preferences and move constitutional law in new directions,

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[142] According to Thomas, "[Prisoners' right of access] is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court. . . . There is no basis in history or tradition for the proposition that the State's constitutional obligation is any broader." *Lewis*, 518 U.S. at 381 (Thomas, J., concurring).

[143] 494 U.S. 872 (1990).

[144] *Id.*

[145] *Id.*

[146] Religious Freedom Restoration Act of 1993.

[147] City of Boerne v. Flores, 521 U.S. 507 (1997).

[148] HENSLEY ET AL., *supra* note 16, at 229.

without arousing the same attention and opposition that can emerge from advocating a reversal of precedent in a straightforward manner.

V. CONCLUSION

When Thurgood Marshall wrote the majority opinions in *Estelle v. Gamble* and *Bounds v. Smith*, he made a major impact on corrections law. In *Estelle*, his opinion established a prisoner's right, albeit a limited one, to medical care and, more importantly, the Supreme Court's endorsement of the Eighth Amendment's applicability to conditions of confinement in correctional institutions. In *Bounds*, Marshall's opinion strengthened prisoners' right of access to the courts and led to the establishment of prison law libraries at corrections institutions throughout the country. Ironically, however, the words and concepts that Marshall employed in expanding prisoners' rights were later used by Antonin Scalia to create limitations on the rights of convicted offenders. Scalia plucked out the subjective intentions test ("deliberate indifference") that Marshall applied to the Eighth Amendment medical care right in *Estelle,* applied the test to all conditions of confinement cases, and thereby made it significantly more difficult for prisoners to prevail in such cases, even when institutional conditions may fall below generally acknowledged standards of habitability. Scalia also used Marshall's argument about prisoners' abilities to use legal materials to create a strong presumption that prisoners' right of access to the courts is fulfilled by the availability of legal materials alone, despite the evident illiteracy and other problems that make it difficult, if not impossible, for many prisoners to represent themselves effectively in legal cases.

Scholars continue to debate whether the Supreme Court and constitutional law are effective vehicles for shaping public policy and producing social change.[149] Many of these debates concern whether judicial decisions can be effectively communicated and implemented.[150] The corrections law examples of Thurgood Marshall's words coming from Antonin Scalia's mouth illustrate another important aspect of the efficacy, or lack thereof, of constitutional law as a vehicle for policymaking. The malleability of legal language and judicial doctrines creates ample opportunities for ingenious and creative uses of phrases and concepts to advance policy objectives contrary to those for which the phrases and concepts were created. With respect to prisoners' rights, Scalia's opinions demonstrate the fragility of constitutional protections based on judicial decisions. With the deft use of his pen, Scalia's appropriation of Marshall's words not only limited the possibilities for prisoners to effectively challenge conditions of confinement in corrections institutions (*Wilson v. Seiter*), he also took a step toward making it more difficult for many prisoners to gain judicial protection for all constitutional rights and statutory entitlements (*Lewis v. Casey*). *Wilson v. Seiter* can be seen as a incremental step toward what was later revealed to be Scalia's true position,

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[149] David A. Schultz, *Courts and Law in American Society, in* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 1-16 (David A. Schultz ed., 1998).

[150] CHRISTOPHER E. SMITH, COURTS AND PUBLIC POLICY 38-57 (1993).

namely a doctrine that denies the Eighth Amendment applicability to conditions in corrections institutions.[151] It remains to be seen whether *Lewis v. Casey* can similarly be viewed as an incremental step toward the view, as yet only expressed by Clarence Thomas, that prisoners' right of access to courts is so limited as to require no affirmative assistance from corrections officials other than making sure that nothing blocks the prisoners' ability to place a letter to the courts in a mailbox.[152]

Despite the ultimately ironic uses to which Scalia put Marshall's words, Marshall's opinions continue to have impact because Scalia did not negate all of the implications of *Estelle* and *Bounds*. *Estelle* still provides a limited right to medical care and *Bounds* still serves as the basis for prisoners' access to law libraries. These elements of prisoners' rights are likely to survive, but not because they are enshrined in the language of law. Scalia's opinions demonstrated clearly that the malleability of judicial language makes the interpretation of legal language susceptible to change in the hands of other judges. Instead, the limited rights established by Marshall's opinions are likely to survive because they have become institutionalized in the policies and routines of correctional institutions. Prisons throughout the country have implemented policies for providing medical care and purchased legal materials for their prison law libraries. As with other policies and practices established by corrections institutions since the initial intrusion of judicial norms in corrections administration in the 1960s,[153] the existence of medical treatment and library resources may be firmly established. This is so because:

> the establishment and routinization of policies based on existing legal standards may serve to keep those standards in place even if subsequent judicial decisions and statutory enactments reduce the scope of legal protections for prisoners and thereby permit a wider range of restrictive, discretionary practices by correctional officials.[154]

Implementation of policies does not necessarily ensure that they will become eternal. However, institutionalization and implementation make policies less susceptible to the immediate changes that can be applied to fragile policies that rest primarily on malleable judicial doctrines.

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[151] *Helling*, 509 U.S. at 37 (Thomas, J., dissenting).

[152] SMITH & BAUGH, *supra* note 17, at 92-93.

[153] *See* JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 105-37 (1977) (describing initial judicial action and intrusion of judicial norms into prisons in the 1960s and 1970s).

[154] Christopher E. Smith, *The Governance of Corrections: Implications of the Changing Interface of Courts and Corrections*, *in* CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 152 (Charles M. Friel ed., 2000).