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The Praise of Silly: Critical Legal Studies and the Roberts Court

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THE PRAISE OF SILLY:^{*}
CRITICAL LEGAL STUDIES AND THE ROBERTS COURT

James F. Lucarello^{**}

I. INTRODUCTION

This Comment demonstrates that the Supreme Court is lying to you in its opinions. Why is it lying? The short answer to this question is quite simple: It is being silly.

There is nothing inherently wrong with being silly. In fact, some praise silliness, as a heightened and healthy understanding of the indeterminate world that incorporates our reality.¹ Silliness, how-

^{*} Desiderius Erasmus is the author of *The Praise of Folly*. In the early sixteenth century, Erasmus attempted to ease the violent tensions growing between the Lutherans and Catholics. *The Praise of Folly* was a satirical work designed to demonstrate that God's divinity is a concept that mankind can never understand completely; as such, it was folly to fight and kill over divinity's different theories.

It is upon this foundation that this Comment was written. In fact, this Comment's title is homage to Erasmus' great work. Therefore, the term "Silly" is not designed to be an affront to the Supreme Court or the Justices. On the contrary, the Author of this Comment has the highest respect for all the Justices and the positions they hold. The term "Silly" was selected because, just like the term "Folly," it is a naked term that contains no secret meaning; it is a term that everyone can understand and apply. It is the Author's hope that this simple word will help simplify a complex and interesting topic. In sum, the term "Silly" was selected for its positive effects on the reader and not for any inadvertent negative connotations.

^{**} J.D. candidate, May 2010, Touro Law Center. This Comment is dedicated to two professors. The first, Dr. Joseph Tempesta, is a recently retired Professor of History at Ithaca College. Dr. Tempesta always warned his students about the dangers of reading the great works of the past; specifically, that we would be forced to see those author's topics and theories rehashed in the present, as if they were novel. He was right, as usual. The Second, Professor Rodger Citron, who was the driving force behind this Comment. It was his enthusiasm and guidance that made the writing of this Comment not only possible, but also enjoyable. Francesco Guicciardini said that prudence stems from both knowledge and experience. See generally FRANCESCO GUICCIARDINI, *DIALOGUE ON THE GOVERNMENT OF FLORENCE* (Alison Brown ed., 1999) (1527). As such, the Author wishes to dedicate this Comment to Dr. Tempesta and Professor Citron whose knowledge and experience makes them the most prudent men he knows.

¹ See generally DESIDERIUS ERASMUS, *THE PRAISE OF FOLLY* (Robert M. Adams trans., W.W. Norton & Company 1989) (1511).

ever, is only praise-worthy when it is understood and utilized purposefully. The silliness of most of the Justices on the Supreme Court, on the other hand, is a product of self-delusion and fundamentalism, which makes their silliness not silly at all.

This Comment demonstrates the Supreme Court's silly subterfuge through a sampling of decisions selected from the Roberts Court's 2007 Term. However, to begin this "non-legal process,"² one must first have a working knowledge of Critical Legal Studies ("CLS").

The essential claim of CLS is that all law is politics.³ Since there can be no objective way of developing a universal system of jurisprudence, all jurisprudence is, therefore, indeterminate and subjective.⁴ "[T]his indeterminacy of judicial decisionmaking demonstrates that the 'rule of law is a myth.'"⁵ The reality and logical process behind this conclusion seems sound. However, the truly fascinating aspect of CLS is not its message, but rather, the reactions that the theory has caused. This simple theory has created a virulent backlash, and in some circumstances scholars have even called for the resignation of professors whom embrace CLS's message.⁶

Why has this single legal theory created such controversy? Why are legal scholars so adamantly against it? Does this theory have absolutely no redeeming qualities and, therefore, no place in legal jurisprudence? The answer to this last question is obviously no; any legal theory, even if it is inherently flawed, has at least some scholarly worth. Yet, CLS is interesting in one very fundamental respect: CLS "is" an important legal theory that has a specific place and function within American jurisprudence. Despite the importance of

² This term is based on the jurisprudential concept of "Legal Process." Legal Process asserts that judicial opinions can be, and should be, based on objective legal reasoning utilizing precedent. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Legal Process is in direct conflict with CLS; as such, this Comment uses the term "non-legal process" to refer to judicial opinions that are based on partisan political reasoning.

³ Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5 (1984).

⁴ *Id.* at 8-9.

⁵ Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 992 (1994) (quoting Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TUL. L. REV. 15, 49 (1990)).

⁶ Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

this theory, CLS has been unjustly forced into the equivalent of a jurisprudential blacklist, and those whom embrace this theory are branded as nihilists.

CLS has often been characterized as nihilism, or anarchy, reworked into a legal philosophy. This comparison, in some respects, is both fair and accurate, however, it is incomplete.⁷ CLS is also based firmly on the acceptance of the diversity and equality of all jurisprudential thought.⁸ If CLS is correct—and all jurisprudential thought is subjective and indeterminate—then CLS must, therefore, also view all jurisprudential thought as both equal and relevant. Thus, CLS is not about discovering the correct application of the law, but rather an ever-evolving conversation on what the law ought to be.⁹ All theories being equally subjective, it is the conversation and politics involved with the creation, establishment, and adjudication of the law that is important, and not the ever-present fictitious search of objectivity and universal truth.

CLS is based upon the idea that the legal system is not a secluded sector of our society divorced from the political and social morals that govern.¹⁰ The legal system is simply another construct, formed by many voices representing the diverse sets of jurisprudential ideologies. In stark contrast to actual reality, society creates a “false reality”¹¹ that requires both law and our system of jurisprudence to be objective, neutral, and determinant.

It is not the purpose of this Comment to claim that this false reality is unwarranted. Quite the contrary, the false reality is vital to our system of jurisprudence. For example, this Author concedes that the false reality of determinant control is essential in the ministerial functions of law. Thus, it is important to understand that even though CLS’s nihilistic ideology may be logically sound, that fact, alone, does not mean that society must apply it in all cases. CLS does, however, have an important function, and that function is essential to understanding the opinions of the Supreme Court.

This Comment, through CLS, demonstrates that the Supreme

⁷ Singer, *supra* note 3, at 5.

⁸ See *id.* at 9.

⁹ *Id.* at 26.

¹⁰ MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 243-44 (1987).

¹¹ CHARLES A. REICH, THE GREENING OF AMERICA 85 (Bantam Books 1970) (using a derivative of Charles Reich’s term “false consciousness”).

Court is lying to you when it asserts that its opinions are based upon objective legal doctrines divorced from politics. This Comment is not an attempt to convert those who already hold a certain jurisprudential belief. On the contrary, this Comment will attempt to demonstrate that CLS's main premise celebrates diversity within jurisprudential thought, and requires many voices to function—especially, with respect to the Supreme Court.

Part II advocates the importance of CLS being the underlining notion within the inner workings of the Supreme Court. This part will establish that indeterminacy and subjectivity are not evils that must be controlled, but rather judicial realities incorporated within all the opinions of the Supreme Court.

Part III will demonstrate the Supreme Court's silliness and CLS's ever-present effect through three controversial decisions of the Roberts Court, involving three different areas of constitutional law. The first is *Morse v. Frederick*,¹² which represents how CLS manifests itself into the various approaches Justices can take within the same constitutional issue. Second, *Kennedy v. Louisiana*¹³ will reveal how CLS is present in the standards the Supreme Court applies; specifically, in death penalty cases. Finally, *District of Columbia v. Heller*¹⁴ represents the embodiment of a legal process decision; as such, it most aptly demonstrates the sheer silliness of writing within the confines of the false reality.

This Comment is a reaction. It is an attempt to understand why we as a society allow our highest court to lie to us. In sum, our legal system requires the greatest legal thinkers of our day to render judgments through the lens of an unattainable objectivity in order to create the illusion of determinacy. The idea that the Supreme Court is forced into this role is silly. Are we so entrenched in our false reality that we cannot imagine a world without it? Are we choosing the evil we know, over the evil we do not? Whatever the reason, it is this Comment's purpose to demonstrate the silliness that our current jurisprudential system creates. This silliness would be funny, if it was not so insulting.

¹² 551 U.S. 393 (2007).

¹³ 128 S. Ct. 2641 (2008).

¹⁴ 128 S. Ct. 2783 (2008).

II. CLS WITHIN THE SUPREME COURT

The Supreme Court is comprised of highly intelligent judicial minds appointed for life. Constitutionally, it is a court of limited jurisdiction that is responsible for deciding a particularized facet of cases or controversies. The vast majority of the cases that the Court grants certiorari require some type of constitutional interpretation. The caseload of the Supreme Court has drastically dropped over the past twenty years, and is now at about sixty-eight cases per session.¹⁵ The Court is the final word on any matter that falls within the jurisdiction of the United States. Considering these general facts, the Supreme Court is an anomaly within the judicial system. As an anomaly, the Court's role and function requires a vastly different process for judgment formation than the other courts within the United States. Thus, it is silly to hold the Justices of the Supreme Court to the same decision making processes that control lower courts.

Notwithstanding the necessities associated with the ministerial areas of the law, the Supreme Court is not an area within our system of jurisprudence that requires a formalistic application of the law. Moreover, when formalistic approaches are applied within the Court they produce disingenuous interpretations of legal matters that control almost all other facets of our society. It is fair to articulate that many cases that come before the Supreme Court are simple applications of established law that can be determined and applied quickly.¹⁶ However, there are many cases, which are not as simple. For some matters no controlling precedent exists that binds the Justices, and the Supreme Court is free to establish new precedent.¹⁷ In other cases, no good law or precedent exists that binds them, and the Justices should not be required to apply them.¹⁸ It is important to note that this Comment's position is that the Supreme Court has, or should have, this unrestricted authority.

The authority of the Court is implicit through the size of the

¹⁵ Erwin Chemerinsky, *An Overview of the October 2006 Supreme Court Term*, 23 *TOURO L. REV.* 731, 732 (2008).

¹⁶ See Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 *TUL. L. REV.* 1533, 1552 (2008).

¹⁷ See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁸ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.")

Court itself. It is vital to have a diversified bench that is able to intelligently navigate the outer edge of our nation's law. Each Justice is important, not only for their judicial prowess, but also for their individual politics and biases. If an objective legal position was all that is required in jurisprudence, and everything this Comment is stating is wrong, then why does society care about the sex, race, or religion of a nominee?¹⁹ Society is concerned because individualism is vital to the Supreme Court; however, it is also vital to balance the internal politics that occurs within each Justice, because it ensures a more diversified and prudent opinion that reflects a greater portion of the populace. This essential process is stunted by the false reality, which is silly because it is no longer relevant if one understands CLS.

In order to understand why CLS is against the false reality, it is necessary to understand the fairytale that the false reality represents. This Comment will use a highly simplified version of this fairytale for brevity and flare. Justices are nominated by the President, the highest political office, and approved by the Senate, the highest political office for a state representative. After this highly political process appoints the Justice a miraculous transubstantiation²⁰ occurs: That which was political (the nomination and approval) now is wholly legal (the Justice). In this idealistic fairytale the new legal entity is totally devoid of all biases (i.e. politics) and becomes completely objective (i.e. legal), bound only by the Constitution of the United States of America and the laws derived thereof.

CLS, as it applies to the Supreme Court, is an attempt to extract the philosophy from the fairytale—Justices are political and should be.²¹ If Justices are not political—and to say such is an egregious fabrication—why do we classify them as liberal or conservative?²² It is possible that, as external observers, we place the Justices into these false classifications based upon the incidental affects their

¹⁹ See Peter Baker and Neil Lewis, *Republicans Press Judge about Bias and Activism*, N.Y. TIMES, July 15, 2009, at A1; Sheryl Stolberg and Neil Lewis, *Sotomayor Fends off Republican Queries on Abortion and Guns*, N.Y. TIMES, July 16, 2009, at A1.

²⁰ The miracle within Roman Catholic and Eastern Orthodox theology of the Eucharistic elements at their consecration becoming the body and blood of Jesus Christ while keeping the form of bread and wine. WEBSTER'S DICTIONARY 1255 (9th ed. 1989).

²¹ See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 40-41 (2005) (arguing that the Supreme Court is not fully political when deciding constitutional cases).

²² See, e.g., Andrew D. Martin et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1524-25 (2007).

decisions have on political matters. For example, Justice John Paul Stevens stated that he is judicially conservative, and that the reason why he is considered a liberal is because society has increasingly become more conservative since his appointment in 1975.²³ This is an interesting response; it answers a question based on the internalized thought processes that affects a decision making process of a Justice by evoking the externalized classifications others give to the effects of that decision. This argument is based on the premise that the cause and the effect are incidentally related to each other. However, it does so without giving serious consideration to the correlation of the effect to the cause. Therefore, this argument is inherently flawed, because it fails to consider that the Justice might be a political creature. In other words, its major premise is predicated on the assumption that Justices are not political, which is the exact question being asked.

All Justices are political figures, and this is a good thing. This realization is in direct conflict with our false reality. The false reality is based upon law as a principled discipline based on neutral reasoning.²⁴ It is almost blasphemous to consider it otherwise; however, this fear is unjustified. In fact, one can easily believe the true philosophy without believing the false reality's fairytale.

The very nature of the judicial process is designed to control the implications set forth in CLS, not to deny them. In fact, one could easily say that the Supreme Court should embrace CLS, because by its function it is our nation's greatest example of CLS.

The Supreme Court is but one facet of our nation's polity. The Court's form is most similar to that of an aristocracy—an educated collection of intelligent representatives that rule for life. Within this collective, many different philosophies are—hopefully—represented and utilized. When cases are granted certiorari, the Justices, through open conflict, discuss and analyze the dispute. All views are expressed and some arguments are incorporated within the majority, while others become concurrences or dissents. The end product is a modified decision formed not only from judicial expertise, but also from their personal biases. However, the most important aspect is that the whole process is tempered through the active exchange of ideas through conversation.

Two situations exist where the Supreme Court blatantly de-

²³ Jeffery Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, at A2.

²⁴ Wechsler, *supra* note 2, at 19.

cides cases based on the Justices' personal politics. The first type involves matters of first impression. In these situations the Court has never promulgated a ruling on a particular question-of-law or statute, and the issues involved are usually sufficiently ambiguous.²⁵ When there is no law directly on point, the Justices must, by implication, decide the issues based on their understanding of the concepts as they apply it to their own personal philosophies and politics. Any attempt to deny this judicial-political process is disingenuous. An example of this situation is the decision in *Bush v. Gore*.²⁶ With no law on point, the Justices were free to decide the case based on their own personal views. It is generally accepted that both the majority and the two dissents utilized notions of legal precedent, however, none were overwhelmingly persuasive. If viewed from an existing political bias, one side was extremely convincing; however, which one depends on your political position and not your objective view of the law. Thus, the real issue involved in the *Bush v. Gore* was politics, and the majority opinion can easily be characterized as political.

The vote was, for all intents and purposes, along party lines. The five Justices who would have likely voted for Bush—Rehnquist, O'Connor, Kennedy, Scalia, and Thomas—formed a majority in favor of blocking the recount. The four Justices who likely would have voted for Gore—Stevens, Souter, Breyer, and Ginsburg—were in dissent. The Justices' reasoning further reinforced the sense that, in this case, the result drove the reasoning and not vice versa. In voting along partisan lines, all of the Justices acted against type and employed reasoning contrary to their own stated judicial philosophies and constitutional commitments.²⁷

Finally, the political nature of the decision is compounded by the fact that the Court held that this decision should not be used as precedent in any future interpretations.²⁸

²⁵ See, e.g., *Clinton v. Jones*, 520 U.S. 681, 705-06 (1997) (holding that the President could not stay a civil case brought against him while in office).

²⁶ 531 U.S. 98 (2000).

²⁷ David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1428-29 (2006).

²⁸ *Gore*, 531 U.S. at 109.

David Cole²⁹ suggests that the obvious political nature of the decision in *Bush v. Gore* led the public to question “the Court’s legitimacy as an institution guided by principle rather than politics.”³⁰ The Court’s brief public slip revealed its actual decision making process, and left the Justices scrambling to regain the perception of the false reality.³¹ Cole suggests that in subsequent decisions by the Court there was a conscious decision made by the Justices to cross their respective conservative or liberal voting lines in order to create the appearances of non-political legal objectivity.³² Such a conscious decision by the Justices is CLS. It is a political choice: the appearance of objectivity within decisions is more important than actual objectivity in the making of those decisions.³³

The second situation where the Supreme Court decides cases based on personal politics is when they seek to overturn precedent.

²⁹ Professor of Law, Georgetown University Law Center.

³⁰ Cole, *supra* note 27, at 1430.

³¹ *See id.* at 1431.

³² *Id.*

³³ Cole suggests that the Supreme Court, as the non-elected portion of our polity, is concerned with its legitimacy. *Id.* at 1430. Cole asserts that without objectivity the Supreme Court’s role and authority is jeopardized. *See id.* at 1430-31. Specifically, Cole poses the question: “[I]f decisions are politically driven, why shouldn’t they be decided in a democracy by officials accountable to the people through elections?” Cole, *supra* note 27, at 1431. This question confuses the idea of Polity with the idea of Democracy.

Polity is a governmental theory with the belief that the strongest form of government is the combination of all three traditional forms—Aristocracy, Democracy, and Monarchy. *See* NICCOLO MACHIAVELLI, *THE DISCOURSES* 109 (Bernard Crick ed., Leslie Walker trans., Penguin Books 1998) (1532). All three theories separately have their own benefits and shortcomings. Polity is an attempt to accentuate the positives while delineating the negatives. *See id.* at 431. These three forms may exist in any configuration, but they all must be present. The United States’ polity consists of the following: the executive branch representing monarchy; the legislative branch representing democracy; and the judicial branch representing aristocracy.

Cole’s question represents the idea that if a governmental body has political power it must, therefore, be tempered by the democratic practice of election. This is a viable and logical argument, but as CLS recognizes, it is not the only argument. The Supreme Court, as the embodiment of aristocracy, is supposed to be, by definition, comprised of the most learned people within society. These learned Justices should be unencumbered by the electoral process so that their duty is to the polity and not to any given majority. Making politically influenced decisions does not detract from the Supreme Court’s authority or legitimacy, because their authority should come from their position and not their individual ideologies.

There is further argument but, as CLS explains, that would be pointless venture right now. As such, you will have to make your own decision with respect to Cole’s question.

In these types of cases, the Supreme Court is knowingly overturning the law of a previous Court, and establishing a new precedent. The false reality's reasoning, justifying these decisions, is that the prior Court misinterpreted the matter and applied the wrong legal analysis.³⁴ However, this is a silly argument. As CLS explains, no argument is objectively right or wrong, therefore, how could the previous decision be considered wrong? The actual reality is that society has changed and now demands a new interpretation of the situation or that an experiment has failed and a new approach is required.³⁵

*Brown v. Board of Education*³⁶ is an example of this second situation. In *Brown*, the Supreme Court overturned the notion of "separate but equal" established in *Plessey v. Ferguson*,³⁷ and held that segregation in public schools was unconstitutional.³⁸ Some criticized the Court's reasoning in this landmark case.³⁹ The Court did not rely on precedent, nor did it fundamentally dismantle the reasoning of separate but equal. Instead, the Court relied on external scientific studies—not utilized in the lower courts—and made a decision based on broad conceptual arguments.⁴⁰ As such, some legal scholars questioned its binding strength as precedent.⁴¹ The reason for these scholars' uncomfortable acceptance of this decision was that it was a political decision that took sides on a highly volatile issue, instead of leaving the issue with the legislature.⁴² This reality does not make *Brown* an inherently bad decision. On the contrary, *Brown* is one of the most celebrated decisions in American jurisprudence.⁴³ In fact, it is made even more valuable, because it is one of the rare honest CLS

³⁴ See, e.g., *Lawrence*, 539 U.S. at 578-79 (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

³⁵ Compare *Lockner v. New York*, 198 U.S. 45, 64-65 (1905) (upholding the right to contract over a state's ability to regulate maximum number of work hours), with *Nebbia v. New York*, 291 U.S. 502, 516-17 (1934) (upholding a state's right to regulate on economic policies adapted to promote public welfare).

³⁶ 347 U.S. 483 (1954).

³⁷ 163 U.S. 537 (1896).

³⁸ *Brown*, 347 U.S. at 495.

³⁹ Wechsler, *supra* note 2, at 32.

⁴⁰ *Brown*, 347 U.S. at 495 n.11.

⁴¹ Wechsler, *supra* note 2, at 32.

⁴² CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 56 (Harvard University Press 1993).

⁴³ Jonathan Barron, *Amending No Child Left Behind to Prevent School Rezoning and Resegregation: A Response to the Tuscaloosa City Schools*, 42 COLUM. J.L. & SOC. PROBS. 373, 377 (2009).

decisions made by the Supreme Court, even though the Justices who wrote the decision would likely deny that politics played a role.

Another example that exemplifies this second approach is the Court's decision in *Lawrence v. Texas*.⁴⁴ In *Lawrence*, a Texas statute made it illegal for two consenting adults of the same sex to engage in so-called "deviate" sexual acts—i.e. anal sex.⁴⁵ The Court, in *Lawrence*, specifically overturned its 1986 decision in *Bowers v. Hardwick*.⁴⁶ The Court found that the issue as defined in *Bowers* was too narrow, and that the actual issue was "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty."⁴⁷ The majority applied a more searching standard of the rational basis test, which some scholars call "rational basis plus."⁴⁸ The Court determined that this legislation was designed to criminalize homosexuals by their definition, and that in order to enforce such legislation a state needed a legitimate governmental purpose. Justice O'Connor, in her concurrence, stated, "[m]oral disapproval of a group cannot be a legitimate governmental interest,"⁴⁹ as such, this statute was held to be unconstitutional.⁵⁰

This case represented a dramatic change in society. Homosexuality had increasingly become more public and accepted in vast areas across the country. The Justices in the majority recognized this change and created an opinion to fit their personal views. The Justices, first, utilized a heightened form of rational basis review to enforce a higher standard against the state.⁵¹ The majority, next, redefined the issue involved in the case so that the implications affected a broader sense of what are considered protected rights.⁵² Finally, the Court determined that the state legislature's reasoning for the statute

⁴⁴ *Lawrence*, 539 U.S. 558.

⁴⁵ *Id.* at 563, 578.

⁴⁶ *Bowers*, 478 U.S. 186. The *Bowers* Court rejected a claim to recognize a fundamental right for individuals to engage in certain sexual acts, such as sodomy. *Id.* at 191. Specifically, the Court defined the issue in the case as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws." *Id.* at 190.

⁴⁷ *Lawrence*, 539 U.S. at 564.

⁴⁸ *See id.* at 573-76.

⁴⁹ *Id.* at 583 (O'Connor, J., concurring).

⁵⁰ *Id.* at 578-79 (majority opinion).

⁵¹ *Id.* at 574 (stating that laws based on animosity towards a group have "no rational relation to a legitimate governmental purpose").

⁵² *Lawrence*, 539 U.S. at 566-67.

was not sufficient to support its actions.⁵³ This decision is a strong example of a political decision, because its expansion of rights was politically motivated; however, so were its limitations.

The holding in *Lawrence* did not establish absolute equality for homosexuals. Justice O'Connor, in her concurrence, expressed one major limitation on this decision:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.⁵⁴

Justice O'Connor was willing to declare a law unconstitutional in order to preserve homosexuals' rights to engage in their choice of sexual behavior. However, she directly states that she is unwilling to do the same for laws that deny homosexuals the right to marry. The future of this judicial-political decision remains unclear. However, considering the recent battles for same-sex marriage rights in California⁵⁵ and the extension of same-sex spousal rights in the New York surrogate's courts⁵⁶ this judicial political battle is far from over.

Considering the importance of politics in judicial decisions and the ever-present position it holds, it is simply silly to deny it. Why do the Justices lie? This is a vital question, because society does not benefit from the continuation of the false reality in this respect; in fact, it is harmed.

⁵³ *Id.* at 578.

⁵⁴ *Id.* at 585 (O'Connor, J., concurring).

⁵⁵ See Mary Frances Berry, *Gay But Equal?*, N.Y. TIMES, Jan. 16, 2009, at A29.

⁵⁶ See Noeleen G. Walder, *Man Found Entitled to Inherit Estate of his Same-Sex Partner*, N.Y.L.J., Feb. 3, 2009, at 1.

III. ANALYSIS OF SELECTED CASES

The Court over the span of its existence has covertly applied CLS to a vast amount of decisions. This Comment focuses on the 2007 Term of the Roberts Court; specifically, looking at three different constitutional areas, through three exceptionally political cases. It is important to understand why a case is decided in a certain way, and when the Supreme Court lies about its reasoning process it is the nation that suffers. CLS's influence on the Supreme Court is often hard to see, because the Justices refuse to tell the truth. However, CLS is always functioning, and, in the most politically charged cases, it is strong enough to pierce the false reality. Let us begin our analysis of the Roberts Court and start to discover why only the Justices, themselves, seem to consider the Supreme Court a non-political neutral body.

A. *Morse v. Frederick*

On January 24, 2002, a group of junior high school students held up a banner that read "BONG HiTZ 4 JESUS."⁵⁷ CLS's influence within *Morse* is found in the reasoning of the opinions, and the drastically different approaches of the four opinions.

The majority opinion, written by Chief Justice Roberts, held that a public school official might—without offending the First Amendment—restrict the speech of students, if said speech can reasonably be viewed as promoting drug use.⁵⁸ The majority dismissed the claim that Frederick's banner was political speech, or that it fostered a "national debate about a serious issue."⁵⁹ Next, the majority delved into the case law regarding free speech rights to public school students. The reasoning of the majority focused on *Tinker v. Des Moines*,⁶⁰ and how it was affected by the holding in *Bethel School District No. 403 v. Fraser*.⁶¹ Specifically, *Fraser* maintained that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and that

⁵⁷ *Morse*, 551 U.S. at 433-34 (Stevens, J., dissenting).

⁵⁸ *Id.* at 402 (majority opinion).

⁵⁹ *Id.*

⁶⁰ 393 U.S. 503 (1969).

⁶¹ 478 U.S. 675 (1986).

“the mode of analysis set forth in *Tinker* is not absolute.”⁶² Chief Justice Roberts then stated, “detering drug use by schoolchildren is an ‘important—indeed, perhaps compelling interest,’ ” and supported this position by analogizing this case to Fourth Amendment precedents regarding public school searches and seizures.⁶³ The majority concluded that the “special characteristics of the school environment, and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”⁶⁴

Justice Stevens’ dissent objected to the Court’s entire analysis; especially, the classifications of Fredrick’s banner, and the Court’s usage of the holding in *Tinker*.⁶⁵ Justice Stevens believed that *Tinker* was being eroded without justification, and that the school needed something more than the intent to prevent the promotion of drug use to justify censorship.⁶⁶ In sum, the dissent felt that Fredrick’s banner was a “nonsense message, not advocacy,” which was designed to attract television cameras, and not an invite to a conversation.⁶⁷ The dissent was disheartened that such “a silly, nonsensical banner” further eroded the important role that *Tinker* plays in protecting the free speech rights of students.⁶⁸

CLS exists within the drastically different interpretations the Justices may have on any topic. These different interpretations can partly be explained by the varying opinions the Justices have on judicial theory. The individual politics and passions that govern the reasoning process infect every decision a Justice makes, and when an issue is political the opinions and division of the Justices are also political. However, despite this influence the true effect of CLS in *Morse* is seen within the concurrences of Justice Thomas and Justice Breyer.

Justice Thomas concurred with the judgment of the majority, because it eroded from the holding in *Tinker*.⁶⁹ Justice Thomas,

⁶² *Morse*, 551 U.S. at 404-05.

⁶³ *Id.* at 405-407 (quoting *Vernonia Sch. Dist. No. 47J v. Acton*, 515 U.S. 646, 656-57 (1995)).

⁶⁴ *Id.* at 408 (citing *Tinker*, 393 U.S. at 506) (internal citation omitted).

⁶⁵ *Id.* at 434 (Stevens, J., dissenting).

⁶⁶ *Id.* at 437

⁶⁷ *Morse*, 551 U.S. at 444.

⁶⁸ *Id.* at 446.

⁶⁹ *Id.* at 422 (Thomas, J., concurring).

however, would rather overturn *Tinker* entirely.⁷⁰ He based his opinion on a historical analysis of the function that schools played within our society,⁷¹ and the legal doctrine of *in loco parentis*.⁷² For Justice Thomas, *Tinker* “extend[ed] [student speech rights] well beyond traditional bounds,”⁷³ and “[i]n place of [a] democratic regime, *Tinker* substituted judicial oversight.”⁷⁴

Conversely, Justice Breyer wanted the Court to avoid the First Amendment issue. Justice Breyer felt that, under the circumstances, qualified immunity protected Morse; therefore, the Court should refuse to consider the First Amendment issue.⁷⁵ Since the charged defendant was covered under qualified immunity, and an injunction would not have been effective against a suspension, the Court should have exercised judicial constraint.⁷⁶

Morse has five opinions: three attacked the main issues presented on the First Amendment issue—albeit with different results; one wanted to over-rule *Tinker*; and, the last wanted to avoid the issue all together. The use of three separate approaches to the same issue exemplifies the role CLS has in the judicial decisions of the Supreme Court. Where do all these approaches stem from? The truth is that no one can really ever know; however, people may speculate, and they should. We could simply state that this is another conservative against liberal (i.e., Republican v. Democrat) battle and draw our partisan party lines, but that argument is too simplistic.

There are many more than two sides on any issue, and it is a disservice to categorize the Supreme Court as simply liberal versus conservative. There are many other reasons why the Justices approach a specific case in a specific way. Considering that the only good result of Justices not being completely truthful about the reasoning behind their decisions is that it unintentionally fosters a conversation about what the true reasoning was behind the decision. However, unlike the conversation CLS strives for, this conversation focuses on the approach and not the true rationale of the Justices’ decisions.

⁷⁰ *Id.* at 410.

⁷¹ *See id.* at 411-12.

⁷² *Morse*, 551 U.S. at 413.

⁷³ *Id.* at 416.

⁷⁴ *Id.* at 420.

⁷⁵ *Id.* at 425 (Breyer, J., concurring).

⁷⁶ *Id.* at 433.

What should be taken from *Morse* is that politics drive the Justices, and the law and the facts are the means to reaching their goals. *Morse* demonstrates how CLS affects the various ways Justices can approach an issue. Now, let us focus on an example of how CLS is represented in the “accepted” standards used by the Supreme Court.

B. *Kennedy v. Louisiana*

CLS’s application within the Supreme Court is sometimes expressed within the judicial standards the Justices use on any given issue. In *Kennedy v. Louisiana*, the Supreme Court held, in a five to four decision, “that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.”⁷⁷ CLS’s influence is present within the overall standards applied to the determination of death penalty cases, the debate over the general consensus regarding these crimes, and the constitutionality of applying the death sentence for these crimes.

The Eight Amendment states, in pertinent part, that “[e]xcessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.”⁷⁸ As explained by Justice Kennedy in the majority, the restriction on cruel and unusual punishment stems from the notion of proportionate Justice.⁷⁹ The appropriateness of the death penalty is then determined, not by the standards applied during the signing of the Constitution, but rather the norms that exist today.⁸⁰ Therefore, the standard evolves with society.⁸¹

This general approach the Supreme Court utilizes in death penalty cases embodies notions of CLS. The Court is required to determine a national standard on a major political issue. “The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability . . . change[s] as the basic mores of society

⁷⁷ *Kennedy*, 128 S. Ct. at 2650-51.

⁷⁸ U.S. CONST. amend. VIII.

⁷⁹ *Kennedy*, 128 S. Ct. at 2649.

⁸⁰ *Id.*

⁸¹ *Id.*

change.’”⁸² Thus, according to the Supreme Court, in death penalty cases the Court must make a determination on the moral center of the country with regards to a highly debatable political issue. The pending determinations of the Court can drastically affect the ability of states to legislate or employ the death penalty.⁸³ This standard creates a responsibility within the Supreme Court to make a political decision through two determinations.

The majority first looked to see if any objective data existed to indicate a “consensus against making a crime punishable by death.”⁸⁴ The majority relied heavily on the fact that six states adopted similar legislation, but differentiated four states on factual grounds.⁸⁵ Similarly, the Court recognized that Congress and forty-four other states have not capitalized child rape.⁸⁶ In addition, the Court dismissed allegations that some states have incorrectly declared that the death penalty is unconstitutional.⁸⁷ It rejected a claim that the recent adoption of these types of laws—within the six states—represented a “consistent direction of change,” and also refused to include five other states with similar proposed legislation as part of the determination.⁸⁸ Lastly, the Court looked at various statistics, regarding execution rates, and concluded that no consensus existed for capitalizing this offense.⁸⁹

Justice Alito’s dissent directly attacked each point made by the majority opinion. Justice Alito claimed that the majority mischaracterized the amount of favorable jurisdictions, and failed to realize the impact of six states capitalizing this crime.⁹⁰ In addition, Justice Alito recognized that the five states with pending legislation might have forestalled passage of their respected laws, because of the large hurdles associated with capital punishment prosecutions.⁹¹ Likewise,

⁸² *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

⁸³ *Id.* at 2672 (Alito, J., dissenting).

⁸⁴ *Kennedy*, 128 S. Ct. at 2651 (majority opinion).

⁸⁵ *Id.* (“Three States-Georgia, North Carolina, and Louisiana-did so with respect to all rape offenses. Three States-Florida, Mississippi, and Tennessee-did so with respect only to child rape.”).

⁸⁶ *Id.* at 2652.

⁸⁷ *Id.* at 2656.

⁸⁸ *Id.* at 2656-57.

⁸⁹ *Kennedy*, 128 S. Ct. at 2657-58.

⁹⁰ *Id.* at 2669 (Alito, J., dissenting).

⁹¹ *Id.* at 2667-68.

he believes that it is improper to characterize a change within the nation's capital punishment jurisdictions by comparing that number against the whole of the states that do not permit the death penalty at all.⁹² Justice Alito stated that the majority's skepticism was unwarranted with respect to the states' interpretation of the relevant case law, nor is the analysis on the capital punishment statistics accurate.⁹³ His final determination was that no adequate indicia of a national consensus existed against the extension to child rape cases.⁹⁴

The second aspect of the majority's analysis consisted of an interpretation of prior precedent, with respect to the issues presented.⁹⁵ The majority and dissent differed drastically on the interpretations of these cases. Both Justice Kennedy and Justice Alito agreed on the horrendous nature of the offense; however, the majority's interpretation of the mitigating factors involved led them to hold that capital punishment is reserved only for those crimes involving murder.⁹⁶ The dissent asserted that this conclusion is misguided, because this reasoning allows the death penalty to be used in felony murder cases—an accomplice watching his partner murder someone during the course of a felony; however, this prohibits the use of the death penalty if a repeat child rapist tortures numerous children.⁹⁷ The majority then determined that policy issues exist with respect to the adverse affects on reporting, unreliable testimony, and induced testimony, which may be associated with an extension of the death penalty to these cases.⁹⁸ The dissent claimed that “[t]hese policy arguments, whatever their merits, are simply not pertinent to the question [of] whether the death penalty is ‘cruel and unusual’ punishment.”⁹⁹ Lastly, the dissent did not understand the majority's sentence structuring argument.¹⁰⁰ For the dissent, the age of the victim may have been enough of a limit to application in this case. Yet, there also existed four states with narrower legislation that could be used if Louisiana's statute was considered too broad, and “it takes lit-

⁹² *Id.* at 2671-72.

⁹³ *Id.* at 2666, 2672.

⁹⁴ *Kennedy*, 128 S. Ct. at 2672-73.

⁹⁵ *Id.* at 2658 (majority opinion).

⁹⁶ *Id.*

⁹⁷ *Id.* at 2676 (Alito, J., dissenting).

⁹⁸ *Id.* at 2663-64 (majority opinion).

⁹⁹ *Kennedy*, 128 S. Ct. at 2673 (Alito, J., dissenting).

¹⁰⁰ *Id.*

the imagination to envision other limiting factors.”¹⁰¹

Some months after the Court rendered its decision, Louisiana petitioned the Court for a rehearing.¹⁰² Louisiana neglected to inform the Court that the United States military also permitted the execution of criminals who rape children.¹⁰³ Louisiana’s argument called into question the Court’s holding, since the Court in its decision relied on the fact that the federal government did not extend this sentence to child rapists.¹⁰⁴ The Court rejected this argument, stating that the military did not reflect the federal government as a whole, and that the military did not affect the general consensus of the nation as it pertains to not extending the death penalty to child rapists.¹⁰⁵

The majority opinion declared unconstitutional all legislation that applied the death penalty to child rape cases where the child is not killed. The politics in this case are obvious, and this determination was a direct application of CLS. Furthermore, the reaction of the Court to the new evidence brought by Louisiana is equally political. The standards applied were political, and the subsequent issues presented required the Supreme Court to make political determinations about the merits and morality of the death penalty, the policy decisions regarding its application, and twice about the consensus of the nation.

The holding was derived from the knowledge of the relevant law, but also from the effects the argument had on the individual Justices’ morals and politics. The questions involved in this case were not legal, but rather ethical and moral. Do you believe that the death penalty is appropriate for child rapists? The studies relied upon by the majority and groups against the death penalty clearly demonstrate that the death penalty is ineffective in preventing crime and far more costly than imprisonment. It is important to note that some scholars, including Justice Scalia, blame the high costs of execution on the restrictions and hurdles the Court has instituted since 1976;¹⁰⁶ at times,

¹⁰¹ *Id.* at 2674 (“[T]he Court need only examine the child-rape laws recently enacted in Texas, Oklahoma, Montana, and South Carolina, all of which use a concrete factor to limit quite drastically the number of cases in which the death penalty may be imposed.”).

¹⁰² *Kennedy v. Louisiana* 129 S. Ct. 1 (2008).

¹⁰³ *Id.* at 1 (referring to 10 U.S.C.A. § 920(b)(2) (West 2007)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2.

¹⁰⁶ Nina Totenberg, *Justice Stevens’ Reversal Brings Scalia’s Ire*, NAT’L PUB. RADIO, Apr. 20, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=89797005>.

Justice Scalia specifically attacks Justice Stevens and his prior decisions.¹⁰⁷ Regardless of whether one agrees with Justice Scalia's position, the reality is that capital punishment is more costly today. The real issue, then, for the Justices becomes whether this is appropriate retribution? In no sense can this issue be considered a "legal" decision—it is political. Therefore, the Court made a "political" decision rejecting another state's "political" decision concerning its own criminal law.

C. *District of Columbia v. Heller*

The final case analyzed by this Comment is of the highest import. *Heller* represents the most serious of the silly problems associated with not embracing CLS and the political nature of the Supreme Court. To fully appreciate the ramifications of not embracing CLS, it is important to fully analyze both the majority and dissenting opinions contained in *Heller*.

The primary issue in *Heller* was the constitutionality of the District of Columbia's gun control statutes, which prohibited the possession of a handgun and required that lawful firearms—while in the home—be dismantled and trigger locked.¹⁰⁸ The Supreme Court, in a five to four decision, held the statutes in violation of the Second Amendment.¹⁰⁹ Justice Scalia wrote for the majority, and Justices Stevens and Breyer wrote separate dissents.

Justice Scalia's majority opinion and Justice Stevens' dissent are prime examples of what happens when Justices deny CLS, and try to fabricate a judicial opinion without reference to the political considerations that naturally influence them. Simply reading through the analysis of both opinions not only daunts the reader,¹¹⁰ but also boggles the mind. The trivial basis utilized by Justice Scalia to establish that the right to bear arms is a fundamental right is only matched by the equally trivial attacks Justice Stevens supplied against it. These opinions—as they stand—are just as informative as asking: how many angles stand on a head of a pin?

¹⁰⁷ *Id.*

¹⁰⁸ *Heller*, 128 S. Ct. at 2787-88.

¹⁰⁹ *Id.* at 2787, 2821-22.

¹¹⁰ *See Heller*, 128 S. Ct. 2783. The opinion is sixty-nine pages when downloaded from LexisNexis.

Justice Scalia's opinion can be broken down into two sections. The first deals with the meaning of the Second Amendment. He begins by reiterating the wording of the Second Amendment: "*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*"¹¹¹ For the next twenty-nine pages Justice Scalia explains the importance of reading the operative clause ("*the right of the people to bear arms, shall not be infringed*") first. Then, only after fully appreciating this clause's meaning, can one understand the prefatory clause ("*A well regulated Militia, being necessary to the security of a free State*").

The National Rifle Association ("NRA") and gun manufacturers, through a myriad of lobbyists, funded this case for months. After countless man-hours the Supreme Court granted certiorari. After a highly publicized and criticized oral argument the lines were drawn. It has been over 215 years since the confirmation of the Bill of Rights, and what do we as a nation get as a response from the Court? We get a lesson in grammar. This is just silly!

Justice Scalia first established that the phrase "the right of the people" denotes a "presumption that the Second Amendment right is exercised individually and belongs to all Americans."¹¹² He supported this assertion by comparing this phrasing with the phrasing used in the First Amendment's Assembly and Petition Clause, the Fourth Amendment's Search and Seizure Clause, and the Ninth Amendment.¹¹³

The clause "To Keep and Bear Arms" was examined next. Justice Scalia first defined each term using the dictionaries and literary sources from the time period of the Framers.¹¹⁴ That is correct; two hundred-year-old dictionaries are one of the sources utilized to ensure our right to keep and bear arms. Next, after an impressive demonstration of literary and legal history, Justice Scalia determined that the right to bear arms refers to the individual's right to keep and bear arms for the purposes of confrontation.¹¹⁵ However, this interpretation was not used by the Court of Appeals, nor is this phrasing

¹¹¹ *Id.* at 2788 (citing U.S. CONST. amend. II) (emphasis added).

¹¹² *Id.* at 2791.

¹¹³ *Id.* at 2790.

¹¹⁴ *Id.* at 2792-93.

¹¹⁵ *Heller*, 128 S. Ct. at 2793.

used in any amicus brief submitted to the Court.¹¹⁶ As Justice Stevens alleged, “the Court appears to have fashioned it out of whole cloth.”¹¹⁷ Next, Justice Scalia attacked the definition of this phrase used by the dissent. He claimed that Justice Stevens’ analysis was flawed, because “[a] purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass.”¹¹⁸

Justice Scalia, then, explained the meaning of the entire operative clause, through the last section of the clause: “shall not be infringed.” He used this language as a basis to claim that the right discussed in the Second Amendment is a pre-existing right.¹¹⁹ He analyzed the history of this right within England, and asserted that this right was well established and recognized when the Framers drafted the Constitution.¹²⁰ As such, the individual right to keep and bear arms for the purpose of protection from confrontation is a pre-existing right protected by the Second Amendment.¹²¹

Are you confused yet?

Justice Scalia, then, stated that the prefatory clause could have been phrased as: “Because a well regulated Militia is necessary to the security of a free State”¹²² Thus, the prefatory clause simply states “one” reason why the Framers included this right within the Bill of Rights; however, the prefatory clause does not suggest that this reason was the “only” reason.¹²³ Justice Scalia, next, analyzed sources that demonstrated that this interpretation of the prefatory clause is similar to those used by analogues’ “arms bearing” verbiage used in contemporaneous state constitutions, post-ratification commentaries, pre-Civil War case law, post-Civil War legislation, post-Civil War commentaries, and relevant Supreme Court precedent.¹²⁴

¹¹⁶ *Id.* at 2828 (Stevens, J., dissenting).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2795 (majority opinion).

¹¹⁹ *Id.* at 2797.

¹²⁰ *See Heller*, 128 S. Ct. at 2798-99.

¹²¹ *Id.* at 2797.

¹²² *Id.* at 2789.

¹²³ *Id.* at 2801.

¹²⁴ *See id.* at 2802-16.

Try not to fall asleep.

Within the final few pages of this first section, the majority stated that the reader should not be surprised that this significant issue has not been addressed within the last 250 years, because “[f]or most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens.”¹²⁵ The incorporation of the Bill of Rights and the subsequent amendments to the states is too large of a topic for this Comment; however, it is important to recognize that incorporation represents the ideology of CLS as well.

Justice Scalia specifically recognized that this right to bear arms for personal protection is not unlimited.¹²⁶ There is a historical notion that allows the state to prevent the carrying of dangerous and unusual weapons.¹²⁷ This limitation on dangerous weapons is valid even though most modern weapons that would be essential in a Militia would be banned. “[T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”¹²⁸ In sum, the constitutional right to keep and bear arms has two purposes: personal protection and to ensure that your liberties are not infringed by a corrupt government. However, the state may limit the types of arms you have the right to keep, even if that means you cannot possibly accomplish the latter purpose. This reasoning has to be flawed, because the result is silly.

Finally, Justice Scalia focuses on the District of Columbia’s gun control statute, which banned the possession of personal handguns, and required all legal firearms to be dismantled and trigger-locked.¹²⁹ The majority first determined that this particular law touched upon matters of home protection; as such, this was a Second Amendment issue reviewed under strict-scrutiny.¹³⁰ Unsurprisingly, considering the standard, the majority held that both provisions vi-

¹²⁵ *Heller*, 128 S. Ct. at 2816.

¹²⁶ *Id.* at 2799.

¹²⁷ *Id.* at 2817.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Heller*, at 2817-18.

olated the Second Amendment.¹³¹ The District of Columbia may restrict who is allowed to own handguns, as long as they do not do so in an arbitrary and capricious manner, which includes a total ban.¹³² In addition, it is unconstitutional for a statute to require lawful firearms to be dismantled and trigger-locked, rendering them useless for home protection.¹³³ Finally, the majority stated that it understands the District of Columbia's reasoning; however, it cannot legislate in a manner that violates the Constitution.¹³⁴

The end—you made it!

The sheer amount of analysis the majority conducted was astounding: it delved into a history spanning from King James II and his disarmament of the Protestants; it utilized eighteenth century English/American dictionaries and commentaries; and it made an expansive survey of all relevant case law. Why did the majority conduct all of this analysis? To understand what two sentences meant to fifty-five delegates over 200 years ago? No! The majority did this research, because they had to legitimize the decision it wanted to give.

The opinion is an example of a traditional conservative opinion. Justice Scalia's opinions are always wonderful examples of both clarity and precision; however, in this opinion, what was he clear and precise about? We now know there is a fundamental right to bear arms, but why? Is it really possible that the right to bear arms is a fundamental right because of seventh-grade grammar class? Hopefully not; otherwise, this entire legal process is just silly. A more accurate explanation is that the five conservative Justices wanted to make the right to bear arms a fundamental right. Justice Scalia distorted and morphed the Second Amendment into an individual right to keep and bear arms for personal protection. The author of this Comment, honestly, thanks him for this right. Yet, the Author's approval is based on his own personal politics, and not from any respect for Justice Scalia's substantive analysis. It should be noted that the sheer discipline and hard work that was involved in the creation of the majority opinion is praiseworthy, even if the reasoning

¹³¹ *Id.* at 2821-22.

¹³² *Id.* at 2819.

¹³³ *Id.* at 2817.

¹³⁴ *See id.* at 2822.

is silly. Unfortunately, the majority is only half of the silliness of this case.

Justice Stevens' dissent follows the same silly progression as Justice Scalia's opinion, and Justice Stevens—quite eloquently—attacks each premise and scholarly work used by the majority. Justice Stevens' position is that the Second Amendment was established to assuage the fears of the anti-federalists; specifically, guaranteeing that a state was able to maintain a well-regulated Militia, in defiance of a corrupt Federal Government's standing army.¹³⁵ In essence, Justice Stevens thought that the majority completely misread the Second Amendment.

Justice Stevens attacked the majority's interpretation of each section within the operative clause. He asserted that the majority fails to recognize that the phrase "to keep and bear arms" was naturally used with a military connotation at the time of the Framers.¹³⁶ Justice Stevens stated that it is inconsistent with textualist interpretation—a theory often utilized by Justice Scalia—to consider the prefatory clause as simply one of many purposes.¹³⁷ "When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia."¹³⁸

Justice Stevens then utilizes the debates within the constitutional convention to demonstrate that the Framers intended this Amendment to extend only to military purposes.¹³⁹ Most notably, Justice Stevens refers to James Madison's first draft of the Second Amendment which stated: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service."¹⁴⁰ This original draft contained two additional references to the military use of the term "to keep and bear arms," which he believed demonstrated its purpose.¹⁴¹ However, Justice Scalia warned

¹³⁵ *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).

¹³⁶ *Id.* at 2829.

¹³⁷ *Id.* at 2826 (citing *Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the [C]onstitution is intended to be without effect.")).

¹³⁸ *Id.* at 2831.

¹³⁹ *See id.* at 2831-36.

¹⁴⁰ *Heller*, 128 S. Ct. at 2835.

¹⁴¹ *Id.*

that it is perilous in constitutional interpretation to give meaning to one text through the interpretation of a rejected draft.¹⁴²

Justice Stevens then attacked the four “legal” sources utilized by the majority to defend its position.¹⁴³ In regards to the relevant Supreme Court precedent, Justice Stevens stated that hundreds of judges have applied the Second Amendment standard utilized in *United States v. Miller*.¹⁴⁴ *Miller* held that the Second Amendment protected against regulation that infringed upon military purposes, but did not curtail the legislature’s ability to regulate nonmilitary use.¹⁴⁵ Justice Scalia disputed this use of *Miller*, claiming that the Second Amendment was not at issue in that case, because the type of weapons the defendants were transporting—sawed off shotguns—were not the type protected under the Second Amendment.¹⁴⁶ Justice Stevens claimed that Justice Scalia’s distinction goes to prove the weakness in his argument,¹⁴⁷ because *Miller* unanimously held that “the Second Amendment did not apply to the possession of a firearm that did not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’”¹⁴⁸

The final section of the dissent made two observations. First, that Justice Stevens was unsure and wary that the extension of the Second Amendment would increase the caseload of judges to the “breaking point.”¹⁴⁹ Second, Justice Stevens disagreed with the majority imputing on the Framers a policy choice that gave authority to the judiciary over that of the legislature:

The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun

¹⁴² *Id.* at 2796 (majority opinion).

¹⁴³ *See id.* at 2836-42 (Stevens, J., dissenting).

¹⁴⁴ 307 U.S. 174 (1939).

¹⁴⁵ *Heller*, 128 S. Ct. at 2823 (Stevens, J., dissenting) (citing *Miller*, 307 U.S. at 178).

¹⁴⁶ *Id.* at 2814 (majority opinion).

¹⁴⁷ *Id.* at 2845 (Stevens, J., dissenting).

¹⁴⁸ *Id.* (quoting *Miller*, 307 U.S. at 178).

¹⁴⁹ *Id.* at 2846-47.

control policy.¹⁵⁰

This argument suggests a separation of powers and federalism problem. For Justice Stevens this extension of judicial authority over that of the state legislatures is improper.¹⁵¹ The interesting aspect of this argument is that it is coming from Justice Stevens. This is a conservative argument, but Justice Stevens is considered one of the more liberal Justices.¹⁵² Why is he using this type of argument? This is a good argument to use against a conservative Justice who usually frowns on the extension of judicial authority and is now arguing for extension—Justice Scalia. It would seem that objectivity and legal reasoning are simply interchangeable tools, which the Justices swap with each other in order to make their personal opinions. Regardless, without compelling evidence to suggest otherwise, Justice Stevens could not agree with the majority.

Justice Stevens' dissent reads as an almost visceral reaction to the position of the majority.¹⁵³ It follows the same path as the majority, trying to break down the interpretations block by block. The final product is two decisions that take the exact same facts and come to two completely different interpretations. *Heller* is the epitome of CLS fighting the false reality.

These opinions are politically motivated. Whether it was conscious or unconscious the majority came to this decision before it did its analysis. The false reality, however, demanded that the Justices make an objective type of argument. In order to recognize a personal right to defend oneself with firearms, Justice Scalia had to argue, for thirty pages, the correct interpretation of a prefatory clause with respect to an operative clause. This is just silly. It would be funny, if it were not so insulting to the reader. To date, our society does not really know why the majority ruled the way it did; we can only speculate. This is the true tragedy of the false reality. The false reality forces upon society a silly fairytale, and deprives the nation the true interpretations/discussions of the most controversial jurisprudential issues

¹⁵⁰ *Heller*, 128 S. Ct. at 2847 (Stevens, J., dissenting).

¹⁵¹ *Id.*

¹⁵² Matthew J. Festa, *Dueling Federalists: Supreme Court Decisions With Multiple Opinions Citing The Federalist, 1986-2007*, 31 SEATTLE U. L. REV. 75, 76 (2007).

¹⁵³ Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 71 (2008).

of the day.

IV. CONCLUSION

“[A]ll of law’s texts, including those of the legal scholar, are works of fiction.”¹⁵⁴ This is an important concept within our jurisprudence. There is no objectively determinable truth that governs all issues. There is only the “conversation” about the individual good, which evolves with society.¹⁵⁵ Determinacy, objectivity, and neutrality within the law are a fiction that is necessary for the ministerial functions of law; however, with respect to the Supreme Court, these concepts hinder the conversation and natural development of constitutional jurisprudence.

CLS is often criticized as a philosophy that does “not try to transcend the uncertainty [of law]—they revel in it.”¹⁵⁶ This is a fair assessment. CLS is not afraid of the lack of determinacy and objectivity in the law. Since all law is political, the decisions of the Supreme Court already apply the principles of CLS; however, the Justices simply refuse to recognize this reality. This lack of recognition is evident from the various conclusions Justices come to on the same issues, the different approaches they take on any given issue, and even some of the standards they apply to the issues. The oldest problem within the jurisprudential system, today, is the disingenuous opinions it produces.

In order to fully understand a Supreme Court decision, it is vital to know the truth behind the decision making process. However, since “truth is inevitably qualified and contested, existing as an attitude or the product of imagination” the Supreme Court must honestly represent the reasoning behind its decisions.¹⁵⁷ When the Court hides its true intent within the false reality of legal reasoning it does a disservice to the entire nation. Major constitutional issues become judged through matters of grammatical interpretation instead of legal and political importance. This trivial reasoning process insults the reader and the system asks society to continue its self-delusion.

¹⁵⁴ PAUL KAHN, *THE CULTURAL STUDY OF THE LAW* 139 (1999).

¹⁵⁵ Singer, *supra* note 3, at 26.

¹⁵⁶ Owen M. Fiss, *The Death of the Law?*, 72 *CORNELL L. REV.* 1, 9 (1986).

¹⁵⁷ Arthur Austin, *The Post Modern Infiltration of Legal Scholarship*, 98 *MICH. L. REV.* 1504, 1512 (2000).

The Supreme Court is a political organ and it foolishly clings to an ideology constructed for lower courts. And so long as this is the standard, true understanding through conversation cannot occur. A blind adherence to legal reasoning is no longer essential for constitutional jurisprudence. In fact, many celebrated constitutional cases rarely rely on it—besides misguidedly with respect to format. “The lack of a rational foundation to legal reasoning does not prevent us from developing passionate moral and political commitments. On the contrary, it liberates us to embrace them.”¹⁵⁸ The Supreme Court simply needs to recognize the reality on how it has always functioned, and embrace its own liberation. Until then, the Justices will continue to lie, and that is just silly.

¹⁵⁸ Singer, *supra* note 3, at 9.

