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Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History

R. Randall Kelso

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**R. Randall Kelso**

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I. INTRODUCTION

Any judge faced with the task of interpreting a document must decide what role various sources of meaning will play in the act of judicial interpretation. With regard to constitutional interpretation, the judge must decide, among other things, how much weight to give arguments about the plain meaning of the Constitution's text, the text's purpose or spirit, and historical evidence concerning the intent of the framers and ratifiers of the Constitution. In addition, the judge must decide how much weight to give judicial precedent interpreting the Constitution, legislative and executive practice under the Constitution, and arguments concerning the consequences of a particular judicial decision, which are arguments of policy.

The purpose of this Article is to discuss the various ways judges might balance these competing sources of constitutional meaning, and to suggest that in our history four main approaches to constitutional interpretation have predominated at different times. The genesis of this Article derives from three main sources. First, for the Fall, 1993 semester, I decided to adopt a new constitutional law casebook, the recently released *Constitutional Law: Themes for the Constitution's Third Century* (1993). Working through the material in a new casebook typically stirs creative forces, particularly a book as rich in extra material as this book. This is also helpful when you provide the students with lots of self-generated supplementary material to place the themes of the book into context.

Second, on June 12-16, 1993, I attended the AALS Conference on Constitutional Law in Ann Arbor, Michigan. Spurred on by comments and prepared materials by Professor Sanford Levinson at that conference, I re-read Professor Philip Bobbitt's book *Constitutional Fate*. I also read for the first time his more recent book *Constitutional Interpretation*.

2. Thus, a shorter version of this article was presented to the students as supplementary material during the fall semester.
3. See Association of American Law Schools, Conference on Constitutional Law Materials (June 12-16, 1993, University of Michigan Law School, Ann Arbor, Michigan) [hereinafter Conference Materials]. A listing of all the topics discussed at the AALS Conferences is on file with the author.
Third, during the past year, I published an article that discussed the four main judicial decisionmaking styles in our legal history: natural law, formalism, Holmesian, and instrumentalism. In that article, I applied those judicial decisionmaking styles to recent Supreme Court cases on legislative versus executive separation of powers issues, but I noted that Supreme Court cases generally seemed to fit that interpretive model. Building on earlier works by Karl Llewellyn and Grant Gilmore, this model broke our constitutional history into four ages: (1) the natural law era of 1789-1872, which corresponds roughly to the Marshall and Taney Courts, with Justice Story as a bridge between the two; (2) the formalist era of 1872-1937, which corresponds to the Slaughterhouse Cases and the Lochner era; (3) the Holmesian, New Deal Court era of 1937-1954, which involved the rejection of Lochner against the backdrop of President Roosevelt's court-packing plan in 1937; and (4) the modern instrumentalist era of 1954-1986, which was inaugurated by Brown v. Board of Education and lasted through the Warren and Burger Courts. The current Rehnquist Court seems to be splintered, with different Justices appealing to different aspects of these four earlier traditions.

8. Id. at 581-638.
9. Id. at 532-63. The new Farber et al. constitutional law casebook, cited in supra note 1, provides a similar overview of constitutional history which tracks generally these four ages. See FARBER ET AL., supra note 1, at 1-15 (describing the pre-Lochner era from 1787-1873); id. at 15-19 (dealing with the Lochner era from 1873-1937); id. at 19-23 (regarding the New Deal Court up to the Warren Court, 1937-1953); id. at 23-27 (explaining Brown v. Board of Education, the Warren Court and beyond, and 1953-today).
10. Thus, as I suggested in my recent article, with regard to separation of powers issues, and perhaps more generally, there appear to be two formalists on the Court (Justices Scalia and Thomas); two Holmesians (Chief Justice Rehnquist and Justice White); two instrumentalists (Justices Blackmun and Stevens); and three Justices who appear to approach judicial decisionmaking from the perspective of the framers and ratifiers' original natural law judicial decisionmaking approach (Justices O'Connor, Kennedy, and Souter). Kelso, supra note 7, at 581-608. As discussed herein, my prediction is that Justice Ginsburg will likely also follow this original natural law approach to judicial decisionmaking. See infra text accompanying notes 129-34, 154-60, 277-78. As discussed in Appendix A, I predict that Justice Breyer will also follow this style of interpretation. See infra note 604 and accompanying text. This approach is typified by the writings of James Madison and Alexander Hamilton in The Federalist Papers and elsewhere, and the Supreme Court decisions of Chief Justice Marshall and Justice Story, see infra text accompanying notes 106-78, though of course these individuals, as well as others during the late 18th and early 19th century, did not agree on every proposition of constitutional interpretation. See generally infra notes 148-51, 195-202 and accompanying text.

Appendix A provides a tabular summary of this categorization of the current Justices on the Supreme Court, with a brief textual elaboration. As indicated in my previous article, this is not to say that the Justices have self-consciously adopted one of these four decision-making styles in deciding cases. Rather, once the styles are described, the decision-making styles of the Justices seem to be reflected more in one style than the other. Of course, no judge is a perfect model of consistency . . . . Nevertheless, the
Taking these three sources of inspiration into account, I prepared for my students during the fall of 1993 an overview of styles of constitutional interpretation. This Article is a more elaborate statement of that overview. Part II of this Article, drawing heavily on Professor Bobbitt's work in *Constitutional Fate*, summarizes the main kinds of constitutional arguments, that is, the main sources of meaning to which judges appeal in deciding constitutional cases. Part III of this Article then discusses the natural law decisionmaking style of 1789-1872. In Part III, this Article not only summarizes the elements of the natural law constitutional interpretation style, but also discusses how that style approaches the four basic issues faced in our constitutional history: (1) issues of justiciability and the role of the courts in our democratic system; (2) issues of governmental structure (separation of powers and federalism); (3) issues of protecting economic rights; and (4) issues of protecting civil rights and civil liberties (such as Equal Protection, Due Process, and the First Amendment). Part IV of this Article discusses in the same manner the three other interpretation styles: formalism, Holmesian, and instrumentalism. Part V provides a brief conclusion.

II. THE MAIN SOURCES OF MEANING IN CONSTITUTIONAL INTERPRETATION

Any judge faced with the task of interpreting the Constitution must decide what role various sources of meaning will play in the act of constitutional interpretation. Broadly stated, there are four main sources of meaning: contemporaneous sources of meaning, subsequent events, non-interpretive

four decision-making approaches can help to clarify what appear to be systematic differences among the Justices in decision-making style.

Kelso, supra note 7, at 581.

In addition, it must be noted that these four decisionmaking styles are presented as "ideal" types against which variations in actual judicial decisionmaking can be measured. As indicated in my previous article, many variations of these ideal types are possible. See, e.g., id. at 538 n.24. Further, it should be noted:

[G]iven the idiosyncracies that each judge brings to the task of judicial decision-making, it would be rare for any judge to represent a pure example of any decision-making style. Further, "the separation of judicial decision-making styles into four 'ideal' types . . . should not obscure the fact that in most cases judges resort to a mixed blend of justificatory arguments. . . . To repeat, what differentiates judges of the various decision-making styles are largely matters of degree and emphasis, not rigid categorical differences."

Id. at 600 n.259 (quoting R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 119 (1984)).

11. See infra text accompanying notes 15-105.
12. See infra text accompanying notes 106-78.
13. See infra text accompanying notes 179-282.
14. See infra text accompanying notes 283-601.
considerations, and individual bias.

Each of these four sources contains a number of sub-categories. For example, contemporaneous sources of meaning (that is, those sources of meaning which existed at the time a constitutional provision was ratified) include the text of the Constitution, the structure of government contemplated by the Constitution, and the history surrounding the constitutional provision’s drafting and ratification. For subsequent events, there are the sub-categories of judicial construction of the Constitution (doctrinal precedents), and legislative and executive practice under the Constitution. Non-interpretive considerations involve arguments concerning the consequences of a judicial construction from the perspective of justice or sound social policy, and considerations of politics. Individual bias involves consideration of general interpretive bias and consideration of specific case bias, both doctrinal bias and party bias.

This summary of sources of constitutional meaning owes its genesis to Professor Philip Bobbitt. In his 1982 book, Constitutional Fate, Professor Bobbitt described six main kinds of constitutional arguments: textual, structural, historical, doctrinal, prudential, and ethical. The first three of these arguments (textual, structural, and historical) are reflected in the three sub-categories of meaning under contemporaneous sources of meaning: text, structure, and history. Professor Bobbitt’s fourth category, doctrinal argument, is reflected in the sub-category of subsequent events which deals with judicial construction of the Constitution (doctrinal precedents). The other sub-category of subsequent events—subsequent legislative or executive practice—is not identified as a separate source by Professor Bobbitt in

15. See infra text accompanying notes 28-66. The term “contemporaneous” is used in this article in part to conform to use by Supreme Court Justices of the term “contemporaneous” to refer to sources of meaning contemporaneous with a constitutional provision’s drafting and ratification. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568 (1985) (Powell, J., dissenting) (“As contemporaneous writings and the debates at the ratifying conventions make clear, the States’ ratification of the Constitution was predicated on this understanding of federalism.”).
16. See infra text accompanying notes 67-83.
17. See infra text accompanying notes 84-96.
18. See infra text accompanying notes 97-105. A tabular summary of all of these sources of meaning appears in Appendix B. Appendix C provides a table which summarizes how each of the four approaches to judicial decisionmaking discussed at infra text accompanying notes 106-601 (discussing natural law, formalism, Holmesian, and instrumentalism) uses the sources of meaning summarized in Appendix B.
19. BOBBITT, supra note 5, at 9-119.
Constitutional Fate, but is added here for the sake of completeness.22 Professor Bobbitt's fifth category, prudential argument, is reflected in the sub-categories of non-interpretive considerations which deal with the consequences of an act for sound social policy and for political considerations.23

Discussion of Professor Bobbitt's sixth category, ethical argument, is a bit more complicated. Professor Sanford Levinson has noted,

[T]here are, within American law, cases illustrating a distinctive seventh "modality" of "natural law" or "justice." This differs quite radically from "ethos" [or ethical argumentation], which I teach as a modality calling upon lawyers to exercise a certain kind of cultural-anthropological skill in discerning the underlying value commitments of a given social order.24

Upon this understanding, Professor Bobbitt's ethical argument is reflected in this Article as the version of historical argument which elaborates the general concept (or "ethos") behind a constitutional provision, rather than the specific examples held by the framers and ratifiers about a provision.25 Professor Levinson's seventh modality of "justice" is reflected in this Article in non-interpretive consideration of the consequences of a particular interpretation from the perspective of justice.26

22. See supra text accompanying note 16; infra text accompanying notes 77-83. However, Professor Bobbitt does touch upon aspects of subsequent legislative and executive practice in his 1991 book Constitutional Interpretation. See BOBBITT, supra note 6, at 56-57 (discussing Missouri v. Holland, discussed herein infra text accompanying notes 82-83).

23. Compare BOBBITT, supra note 5, at 59-73 with supra text accompanying note 17 and infra text accompanying notes 84-96.

24. Levinson, supra note 4, at 29.

25. Compare BOBBITT, supra note 5, at 93-119 with infra text accompanying notes 59-66, 123-35, 252-82. The basic distinction between the general concept, or "ethos," of a provision and the provision's specific examples, or conceptions, is discussed infra note 64.

26. Compare Levinson, supra note 4, at 29 with supra text accompanying note 17 and infra text accompanying notes 91-94, 145-60. For discussion of a natural law decisionmaking style which embraces such non-interpretive considerations of justice, see infra notes 145-47 and accompanying text. For discussion of such non-interpretive consideration of justice being part of the modern instrumentalist decisionmaking tradition, see infra text accompanying notes 501-07, 578-80. That Professor Levinson's view of constitutional interpretation is similarly that judges should, and based upon some modern theories of interpretation perhaps must, take contemporary principles of justice into account in deciding constitutional cases seems clear from Sanford Levinson, Law as Literature, 60 TEX. L. REV. 373 (1982); Sanford Levinson, What Do Lawyers Know (And What Do They Do With Their Knowledge?): Comment on Schauer and Moore, 58 S. CAL. L. REV. 441 (1985). In this regard, Professor Levinson's approach tracks that described by David Couzens Hoy, cited infra note 85.

It must be noted, however, that the dominant natural law judicial decisionmaking tradition at the founding and thereafter probably rejected such non-interpretive consideration of principles of
Finally, how judges choose among these sources as a general matter and in specific cases—that is, aspects of general interpretive bias and specific case bias—are touched on by Professor Bobbitt in his recent book, *Constitutional Interpretation.*27

A. Contemporaneous Sources of Meaning

As previously stated, contemporaneous sources of meaning are sources which exist at the time a constitutional provision or amendment is ratified. These sources include the text of the provision in question, arguments of constitutional structure, and arguments of history.

1. Text

In considering the text of a constitutional provision, as in considering the text of a statute, a judge must decide whether to read the text literally (and thus risk missing the spirit, or purpose, behind why the text was adopted) or whether to interpret the provision in light of both its letter and spirit.28 It has been said that there is "no surer way" to misread a document than "to read it literally."29 As Justice Oliver Wendell Holmes noted, "[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."30

justice in favor of judges considering only those principles of justice embedded in the Constitution by the framers and ratifiers of the Constitution or intended by them to guide constitutional interpretation. See infra notes 148-54 and accompanying text. Thus, such non-interpretive use of principles of justice to guide constitutional interpretation is not properly part of the American natural law judicial decisionmaking tradition.

27. Compare BOBBITT, supra note 6, at 31-42 (discussing "The Problem of Indeterminacy") with supra text accompanying note 18 and infra text accompanying notes 97-105. Additional treatment of the problem of indeterminacy caused by general and specific interpretive bias appears in this article at infra notes 36, 44, 58, 64, 86 and accompanying text.


29. Giuseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).

30. United States v. Whitridge, 197 U.S. 135, 143 (1905) (Holmes, J.). Similarly, Professor Karl Llewellyn once noted, "If a statute is to make sense, it must be read in the light of some assumed purpose." Llewellyn, supra note 28, at 400. Professor Lon Fuller once asked, "[I]s it really ever possible to interpret a word in a statute without knowing the aim of the statute?" Lon Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630, 664.
On the other hand, it has been noted that purposes are elusive, and that judges may see purposes in a provision that reflect the judge's own views, rather than the views of the drafters. As stated in a concurring opinion in Public Citizen v. United States Department of Justice, "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."31

If the judge chooses to interpret a provision in light of both its letter and spirit, the judge must then decide how to determine the purpose, or purposes, of the text. Some purposes are stated in the Constitution itself. For example, the preamble to the Constitution states that the Constitution was drafted "in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . . . ."32 Such purposes, however, are very general and do not provide unequivocal guidance on how to interpret specific constitutional provisions. They may provide, however, some background understanding of the constitutional enterprise embarked on by the framers and ratifiers.33

(1958). For approaches to judicial decisionmaking which embrace purposive interpretation, see infra text accompanying notes 106-10 (analyzing the natural law judicial decisionmaking style); notes 370-72 (analyzing the Holmesian style); notes 507-10 (analyzing the instrumentalist style).

31. 491 U.S. 440, 473 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring). This skepticism with use of purposes to help determine the drafters' intent is typical of a formalist approach to judicial decisionmaking, see infra text accompanying notes 286-87, though Justice Kennedy's specific concern in this sentence, and in his concurrence, that purposes not be used to override clear text, is typical also of a natural law approach to judicial decisionmaking, see infra notes 36, 107 and accompanying text (discussing Joseph Story's and William Blackstone's views on not allowing the spirit or purpose of a text to override clear, explicit, textual meaning), or Holmesian approach, see infra notes 372, 382 and accompanying text (discussing Justice Holmes' and Justice Felix Frankfurter's views on purposes and legislative history not being used to override clear textual meaning). For discussion of Justices Kennedy and O'Connor as following a natural law approach, and Chief Justice Rehnquist as following a Holmesian approach, see supra note 10 and infra Appendix A, and sources cited therein.

32. U.S. CONST. pmbl.

33. See, e.g., WILLIAM CROSSKEY, POLITICS AND THE CONSTITUTION 374-79 (1953) (arguing that the preamble covers virtually all the subjects for which a government might regulate, and thus the Constitution must have been intended to create plenary power in the federal government to act, subject to the specific limitations on governmental power indicated by clear constitutional text); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 457-517 (5th ed. 1891) (1833) (discussing more limited inferences to be drawn from the preamble, stating that the preamble's "true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them." id. § 462). See generally Milton Handler et al., A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation, 12 CARDOZO L. REV. 117 (1990).

Note that even under Justice Story's more limited approach, Story emphasizes: [The] importance of examining the preamble, for the purpose of expounding the language . . . has been long felt, and universally conceded . . . [T]he preamble . . .
A second way to determine a constitutional provision's spirit is to consult historical sources surrounding the provision’s passage. These historical sources may aid in determining the provision’s purpose, or purposes. A judge must decide which of these sources are appropriate to use, what weight to give each, and at what level of generality to view historical insights.\textsuperscript{34}

Finally, some judges may be so convinced of the spirit or purposes that must have motivated the text under consideration that the judge may simply take judicial notice of these purposes without engaging in any textual or historical analysis.\textsuperscript{35}

Once a judge determines the spirit or purposes of a constitutional provision, the judge must decide the extent to which these purposes will be allowed to override the literal meaning of the text when conflicts arise. Factors which might be relevant in making this determination include the clarity of the textual language (the more clear the language, the more weight it is given); how much conflict exists between the letter and spirit of the provision (a clear conflict between letter and spirit suggests either that the letter of the language was not well-drafted or the judge has misidentified the provision’s purposes); and does the literal meaning trample on fundamental rights otherwise protected (suggesting that the literal meaning is not well-drafted, given our framers and ratifiers' commitment to protecting certain fundamental rights).\textsuperscript{36}

is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute. STOR\textsuperscript{Y}, \textit{supra}, § 459. Justice Story then indicates how each of the various clauses of the preamble are related to various mischiefs which had arisen under the Articles of Confederation which needed to be remedied. \textit{See id.} §§ 463-68 (discussing inferences to be drawn from “we the people,” not “we the states”); \textit{id.} §§ 469-81 (“more perfect union”); \textit{id.} §§ 482-89 (“establish justice”); \textit{id.} §§ 490-93 (“ensure domestic tranquility”); \textit{id.} §§ 495-96 (“provide for the common defense”); \textit{id.} §§ 497-506 (“promote the general welfare”); \textit{id.} §§ 507-516 (“secure the blessings of liberty to ourselves and our posterity”).

34. \textit{See infra} text accompanying notes 57-66 (discussing historical sources).

35. For general discussion about the appropriateness of judges taking judicial notice of facts, see M\textit{C}C\textit{O}RM\textit{I}CK \textit{ON EVIDENCE} § 328, at 919-20 (Edward W. Clearly ed., 3d ed. 1984); \textit{9 JOHN H. W\textit{I}G\textit{M}ORE, EVIDE\textit{NCE IN TRIALS AT COMMON LAW,} § 2565, at 694 (Chadbourn ed. 1981). \textit{See also} JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, ch. VII (1898).

36. For a traditional phrasing of these observations about literal text versus purpose, \textit{see STORY, supra} note 33, § 427 (“It has been observed, with great correctness, that although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter yet the spirit is to be collected chiefly from the letter. It would be dangerous in the extreme to infer from extrinsic circumstances that a case, for which the words of an instrument expressly provide, shall be exempted from its operation.”); \textit{id.} § 428 (“No construction of a given power is to be allowed which plainly defeats or impairs its avowed objects. . . . This rule results from the dictates of mere commonsense, for every instrument ought to be so construed, ut \textit{fres} \textit{magis valeat, quam pereat} [so that the venture at hand may succeed, not fail].”); \textit{id.} § 455 (“While, then, we may well resort to the
2. Structure

Arguments of constitutional structure raise two kinds of problems. First, a judge must decide to what extent any particular provision of the Constitution must be read against the backdrop of other related provisions of the Constitution. As Professor Harry Jones has noted about the related enterprise of statutory interpretation, "[A]ny serious effort on the part of judges to discover the thought or reference behind the language of a statute must be based upon a painstaking endeavor to reconstruct the setting or context in which the statutory words were employed." 37

As with statutory interpretation, this inquiry into context can involve resort to verbal maxims of grammatical construction, 38 policy maxims of construction, 39 and the title of the section, section headings, or related meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe; and, as has been already stated, that must be the truest exposition which best harmonizes with its design, its objects, and its general structure.

For general discussion about how the framers and ratifiers viewed this problem of text versus purpose, see H. Jefferson Powell, The Political Grammar of Early Constitutional Law, 71 N.C. L. REV. 949, 952-64 (1993), and sources cited therein. For modern-day discussion of this tension, see Stephen F. Williams, Rule and Purpose in Legal Interpretation, 61 U. COLO. L. REV. 809, 809-11 (1990), and sources cited therein. It should be noted that the intent in this article is not to resolve any questions raised by the text versus purpose debate, but merely to note that this tension has been part of constitutional interpretation since the beginning, and that, because of general and specific interpretive bias, different judges in the formalist, Holmesian, natural law, and instrumentalist traditions have resolved this tension in different ways. See generally supra notes 28-31 and accompanying text.


38. Verbal maxims include those canons of construction that focus on grammatical rules of understanding. Some of the most famous of these maxims construe technical words technically; expression of one thing excludes another (expressio unius est exclusio alterius); where general words follow an enumeration of specific words, the general words are to be held as applying only to the same general kind or class as the specific words (ejusdem generis); and qualifying or limiting words are to be referred to the last antecedent. See generally Llewellyn, supra note 28, at 404-06 (canons of construction numbered 15, 18-28). As Llewellyn indicates, these verbal maxims of construction are merely rules of thumb which can be overridden if broader considerations of purpose or intent suggest otherwise. Id. at 404-06 ("parry" listed to counterbalance the "thrust" of each verbal maxim). This view that verbal maxims of construction must be used cautiously is an old, traditional view of the common law. See, e.g., Story, supra note 33, § 448 (stating that while "[t]hese maxims, rightly understood and rightly applied, undoubtedly furnish safe guides to assist us in the task of exposition . . . they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text and the objects of the instrument."). On verbal maxims of construction generally, see Kelso & Kelso, supra note 10, at 272-73.

39. Policy maxims involve rules of construction based upon general assumptions about the drafters and their intent. Some of the most famous policy maxims construe penal provisions strictly and remedial provisions broadly, and they presume reasonableness of the drafters' action. The maxims also hold that clear expression is needed for provisions to have retroactive application and

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provisions in the same section or other parts of the Constitution. As Professor Reed Dickerson has noted, at its broadest level, contextual interpretation can even involve "the totality of relevant factors in the general cultural environment external to the specific language being interpreted that are shared by the users of the language in the particular speech community and taken account of by the particular communication." These arguments regarding policy maxims, verbal maxims, and related provisions are traditional considerations and part of the eighteenth and nineteenth-century judicial decisionmaking tradition, as Justice Joseph Story noted in his Commentaries on the Constitution of the United States. These contextual approaches are still part of contemporary interpretation techniques. While most judges fully embrace contextual review, some judges, notably formalists, may minimize elements of context and focus mostly on literal, textual meaning.

Second, a judge must have some theory of constitutional structure to guide contextual interpretation. There are three main elements of constitutional

that no one should be permitted to profit from his own wrong. See generally Llewellyn, supra note 28, at 401-03 (canons of construction numbered 2-3, 7-9). As with verbal maxims, policy maxims are mere rules of thumb that can be overridden by other considerations. Id. at 401-04 ("parry" listed to counterbalance the "thrust" of each policy maxim). See Kelso & Kelso, supra note 10, at 273-74 (regarding policy maxims).

40. See generally Llewellyn, supra note 28, at 401-04 (canons of construction numbered 4-6, 9-11, 16-17, and their limitations); Kelso & Kelso, supra note 10, at 273. For a general overview to interpreting documents in light of their context, see Reed Dickerson, The Interpretation and Application of Statutes 103-36 (1975) ("The Statute and Its Context").

41. Dickerson, supra note 40, at 110. For an overview of some of the techniques of this broader contextual inquiry, see id. at 116-36.

42. See, e.g., Story, supra note 33, § 429 (discussing the policy maxim that "[w]here a power is remedial in its nature, there is much reason to contend that it ought to be construed liberally"); id. § 448 (discussing verbal maxims of construction, while noting "they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text and the objects of the instrument"); id. § 451 ("[E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it."); id. § 452 ("But, in the next place, words from the necessary imperfection of all human language acquire different shades of meaning . . . . We must resort then to the context, and shape the particular meaning . . . ").


44. See infra text accompanying notes 286-88 (formalist approach); notes 111-16, 383-85, 512-14 (natural law, Holmesian, and instrumentalist approaches). As with the debate between text versus purpose, see supra note 36, the intent of this article is not to resolve questions regarding when, or how much, weight should be given to various elements of context, including verbal and policy maxims. Rather, the intent of this article is to note that such considerations have always played a part in constitutional interpretation, and that due to general and specific interpretive bias different judges are more or less receptive to arguments of context. For further discussion of this point concerning the limited intent of this article in light of general and specific interpretive bias, see infra notes 58, 64, 86.
structure: separation of powers considerations, federalism, and the role of the courts in our democratic society.

With regard to separation of powers, a judge must ask whether the framers and ratifiers adopted a strict separation of powers approach with legislative, executive, and judicial powers strictly separate, or whether they adopted a constitution which focuses more on the sharing of powers and checks and balances. For example, a judge following a strict separation of powers approach would be reluctant ever to permit judges to exercise the executive power of appointing a prosecutor, as happens under the independent prosecutor law. A sharing of powers approach would be more likely to permit such an arrangement.

With regard to federalism, a judge must consider the relative power of the federal government versus the power of state governments in our constitutional system. Some judges in our history have tended to have a "states' rights" orientation. Other judges have been oriented more towards viewing our Constitution as sanctioning very strong federal governmental power.

Finally, judges must decide what role the courts should play in enforcing constitutional mandates. For example, a judge might take the view, once stated by Professor James Thayer, that courts should defer to governmental action out of respect for the other branches of the federal government, or out of respect for state governments, unless the unconstitutionality of the governmental action is "so clear that it is not open to rational question." Under this approach, only if contemporaneous sources and subsequent events clearly indicate that the government's action is unconstitutional—rather than merely on balance leading to that conclusion—should the Court find the governmental action unconstitutional.

45. See generally Kelso, supra note 7, at 567-72, and sources cited therein (summarizing the historical case for either a strict separation of powers approach or a sharing of powers, checks and balances approach, and concluding that the sharing of powers, checks and balances approach best represents the framers and ratifiers' intent, while acknowledging that nonetheless, a formalist judge is likely to adopt a strict separation of powers approach).
47. See Morrison, 487 U.S. at 673-97. On this sharing of powers, checks and balances approach to separation of powers doctrine generally, see infra text accompanying notes 191-94, 414, 557.
48. See infra text accompanying notes 196, 201-09, 318-24, 420-22.
50. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 144 (1893). Professor Thayer's views are discussed more fully at infra text accompanying notes 381, 400-02.
unconstitutional. A slightly less deferential view counsels judges to exercise caution and restraint before deciding cases on the merits.

At the other extreme from this posture of judicial deference, a judge might conclude that courts have a special role to play in our democratic system to protect certain kinds of constitutional rights. For example, some judges may believe that courts have special obligations to provide protection for the disadvantaged or unempowered in society. Judges may also believe that courts have special obligations to protect individuals' civil rights or civil liberties. Indeed, Dean Jesse Choper has argued that courts should treat separation of powers and federalism cases as political questions, and thus refuse to decide them, so that courts can reserve their institutional capital for individual rights cases. Alternatively, Professor Philip Bobbitt has asked to what extent the structural relationship between the citizen and his government can account for proper court scrutiny of individual rights.

3. History

Arguments of history also raise a number of interpretive problems. First, a judge must decide what sources of history are appropriate to consider in determining the meaning of a constitutional provision. A number of possible historical sources exist: (1) existing judicial precedents at the time the provision is drafted and ratified, and prior legislative or executive practice, mostly in the

51. See Thayer, supra note 50, at 143-44, 148-52. See also FARBER ET AL., supra note 1, at 128-31.
52. See generally infra text accompanying notes 404-09 (discussing the Ashwander factors regarding judicial restraint, Professor Alexander Bickel's passive virtues approach to judicial decisionmaking, and Justice Felix Frankfurter's posture of judicial restraint).

[H]undreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state. . . . [I]t has been well said that there is no better test of a society than how it treats those accused of transgressing against it. . . . The constitutional vision of human dignity . . . [also] respects the rights of each individual to form and to express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite.

Id. See generally infra text accompanying notes 575-80.
54. See, e.g., Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 HARY. L. REV. 1, 2-5 (1987) (discussing the need to view the Constitution as a living document, with special focus on "the Bill of Rights and the other amendments protecting individual freedoms and human rights").
56. BOBBITT, supra note 6, at 85-92.
United States, but also English precedent and practice, to the extent history suggests that the English experience is relevant to understanding the choices made by the framers and ratifiers; (2) legislative history of the provision in question, like notes of the Constitutional Convention, records of state ratifying conventions, or House or Senate statements made during consideration of constitutional amendments; (3) thoughtful contemporaneous statements on constitutional provisions, like The Federalist Papers; and/or (4) other typical sources of historical inquiry (newspaper accounts, statements of respected organizations, reliable evidence of public opinion generally, etc.).

Second, a judge must decide what weight to give historical insights in light of other sources of constitutional interpretation: text, structure, subsequent events, and non-interpretive considerations.

Third, a judge must decide at what level of generality to view historical insights. For example, a judge could remain focused on the specific views seemingly held by the framers and ratifiers about a particular provision of the Constitution which emerge from historical inquiry. On the other hand, a judge could focus on the general concept held by the framers and ratifiers about

57. On use of these historical sources in constitutional interpretation generally, see BREST & LEVINSON, supra note 28, at 125-29 ("Discovering the Adopters' Purposes"); BOBBIT, supra note 5, at 9-24 (chapter on "Historical Argument"); Fallon, supra note 28, at 1198-99 ("Arguments About the Framers' Intent"). Of course, not each and every one of these historical sources is viewed by every judge as appropriate to use in determining the meaning of a constitutional provision. Different judges embrace different kinds of historical arguments somewhat differently. For an overview of these different approaches, see infra text accompanying notes 118-35 (natural law approaches towards history); notes 291-93, 300-01 (formalist approaches); notes 382-93 (Holmesian approaches); notes 528-33 (instrumentalist approaches).

58. For a general discussion of the problems in determining how much weight to give these various sources of constitutional interpretation, and an argument that the indeterminacy this question involves creates the possibility of moral choice, see BOBBIT, supra note 6, at 141-86. This article is not the place to respond directly to Professor Bobbitt's observations regarding indeterminacy. For purposes of this article, it is sufficient to note that judges have balanced considerations of text, structure, history, and subsequent events for more than 200 years in deciding cases under our Constitution; that each judge's balancing turns out to be relatively predictable over time; and that each judge's balancing tends to reflect one of the four main judicial decisionmaking styles discussed herein, natural law, formalism, Holmesian, or instrumentalism. Parts III and IV of this article discuss generally the role of text, structure, history, subsequent events, and non-interpretive considerations under each of these four judicial decisionmaking styles. For a valuable initial attempt to "solve the problem of how the various types of argument are combined or weighed against each other" by describing "the normatively best understanding that is reasonably consistent with what actually happens in our practice of constitutional interpretation," see Fallon, supra note 28, at 1243-68.

59. See infra text accompanying notes 61, 123-24, 128-30, 300-01, 474-78 (providing examples focusing on the specific views of the framers and ratifiers on a particular issue). For a more comprehensive treatment of the specific example versus general concept dichotomy, see infra note 64.
a provision.60 Very different results may come about depending upon which of these levels of generality is adopted.

For instance, a judge focused on specific historical views of the framers and ratifiers regarding the question of whether officially organized prayer in public schools is constitutional would note the specific tradition of permitting such prayer in public schools during most of our history.61 On the other hand, a judge focused on the general concept of separation of church and state embedded in the Establishment Clause62 might conclude that this general concept of separation means that officially organized prayer in public schools is unconstitutional.63

This difference between the specific examples (or conceptions) of an idea versus the broader, more abstract general concept reflected in the conceptions is explored more fully by Professor Ronald Dworkin in his book Law's Empire.64 In addition, judges may view concepts as possessing something of

60. See infra text accompanying notes 62-63, 125-27, 131-35, 251-82, 486-88, 529 (providing examples focusing on the general concept held by the framers and ratifiers in drafting a particular provision of the Constitution). For a more complete treatment of the specific example versus general concept dichotomy, see infra note 64.


62. See infra text accompanying notes 127, 256-57.

63. See, e.g., Lee, 112 S. Ct. at 2658 (Kennedy, J.), discussed infra text accompanying notes 127-28. For additional examples specifically contrasting the difference between specific examples and general concepts, see infra text accompanying notes 123-35 (natural law examples); notes 386-93, 486-88 (Holmesian examples).

64. See RONALD DWORKIN, LAW'S EMPIRE 71 (1986) (arguing that conceptions are the specific, discrete ideas or examples held by individuals, while concepts are the broader, more abstract idea reflected in the conceptions). See also Fallon, supra note 28, at 1198-99:

One helpful division distinguishes between "specific" or "concrete" and "general" or "abstract" intent. Specific intent involves the relatively precise intent of the framers to control the outcomes of particular types of cases. . . . Abstract intent refers to aims that are defined at a higher level of generality, sometimes entailing consequences that the drafters did not specifically consider and that they might even have disapproved. An example comes from equal protection jurisprudence. The authors of the [F]ourteenth [A]mendment apparently did not specifically intend to abolish segregation in the public schools. Yet they did intend generally to establish a regime in which whites and blacks received equal protection of the laws—an aspiration that can be conceived, abstractly, as reaching far more broadly than the framers themselves specifically had intended.

Id.

For discussion of the indeterminacy caused by viewing particular clauses of the Constitution at different levels of generality, see Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057 (1990), and sources cited therein; Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 574-79 (1982). For a more pointed critique of Dworkin's distinction between concepts and conceptions, see Stephen Munzer & James Nickel,
an evolving content, or view concepts more as possessing a static content.

B. Subsequent Juridical Events

Subsequent juridical events can be defined as official acts which take place after a provision's ratification which the legal order recognizes as effecting a provision's meaning. Under our constitutional tradition, such juridical acts include judicial decisions interpreting a provision, and legislative or executive


For purposes of this article, it is enough to note that historical sources can provide some guidance as to the level of generality intended by the framers and ratifiers upon their adoption of particular text, and that, as a matter of historical argument, the framers and ratifiers intended level of generality should control. See Michael J. Perry, The Legitimacy of Particular Conceptions of Constitutional Interpretation, 77 VA. L. REV. 669, 679 (1991) ("[A] judge should try not to articulate the most general aspect of the original understanding of a constitutional provision at a level of generality any broader than the relevant materials ("words, structure and history") warrant.").

Of course, to the extent that a judge adopts a non-interpretive approach towards constitutional interpretation, see infra text accompanying notes 84-96, the judge would have to decide what level of generality is best in some public policy or justice sense. The indeterminacy associated with choosing such a level would then come critically into play as a matter of interpretive methodology.

65. See infra text accompanying notes 125-35 (natural law examples); notes 528-33 (instrumentalist examples). As discussed therein, our understanding of a concept can evolve consistent with more enlightened reasoning into how the framers and ratifiers' basic understanding of the concept ought to be applied in modern times ("interpretive evolution") or more contemporary notions of that concept which transcend the framers and ratifiers' meaning ("non-interpretive evolution). See also infra notes 84-96, 145-54 (discussing "interpretive" versus "non-interpretive" review); infra note 598 (providing an Equal Protection Clause example of "interpretive" versus "non-interpretive" review).

66. See FARBER ET AL., supra note 1, at 78-81 (comparing notions of a "Static versus Living Constitution"); infra text accompanying notes 386-93, 487-89 (providing Holmesian examples). As discussed in infra text accompanying notes 386-93, a static understanding of a concept tends to fix its meaning at the time of ratification. It is thus linked to, though not identical with, the specific examples, or conceptions, approach discussed supra notes 61-64 and accompanying text. In general, the difference between a static concept and a specific examples approach is that a static concept approach permits consideration of the basic purposes the framers and ratifiers had in mind when drafting a constitutional provision, while a specific examples approach limits interpretation to the framers and ratifiers' specific examples, or conceptions, of the provision. The most dramatic example of this difference illustrated in this article appears at infra text accompanying notes 486-88 with regard to the Equal Protection Clause and the question of the constitutionality of segregated schools. For discussion of an example comparing each possible variation of these approaches—a non-interpretive evolving concept approach, an interpretive evolving concept approach, a static concept approach, and a specific examples or conceptions approach—with respect to the Equal Protection Clause analysis, see infra note 598.

67. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 77 (2d ed. 1985) ("[T]he juridical act is a declaration of intention directed toward legal effects that the legal order recognizes and guarantees.").
practice under a provision. These acts can affect a provision's meaning in a number of ways. In contrast, subsequent non-juridical events, that is, non-official acts such as an evolving community consensus or societal tradition, have a much more limited interpretive impact, and typically affect only how some judges view general concepts embedded in the Constitution, or view non-interpretive considerations.

1. Judicial Precedents

Court decisions interpreting a constitutional provision fix the meaning of the Constitution unless the Court changes its mind. As stated by Chief Justice Marshall in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."

Judicial precedents can affect the meaning of a constitutional provision in two ways. Under one approach, a court will change its mind—that is, overturn a prior decision—if the court concludes that the earlier court's analysis of contemporaneous sources (or non-interpretive considerations, if permissible to consider) "got it wrong." In such a case, the later court will typically feel free to overturn the prior decision as erroneous and to reinterpret the provision in question so that it represents an accurate reflection of contemporaneous sources (or non-interpretive considerations, if permissible to consider). Under this approach, the only real concerns with overruling such a precedent are whether such overruling would upset the "settled expectations" upon which people have relied in making serious financial, business, employment, or other kinds of important commitments, or whether the overruling would upset "settled law."

68. See infra text accompanying notes 71-83 (general observations); notes 137-44 (natural law examples); notes 295-301 (formalist examples); notes 434-36 (Holmesian examples); notes 530-31 (instrumentalist examples).

69. See infra text accompanying notes 125-35 (natural law examples); notes 529-33 (instrumentalist examples).

70. See infra text accompanying notes 501-06 (instrumentalist examples).

71. 5 U.S. (1 Cranch) 137, 177 (1803).

72. See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2884 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., White & Thomas, JJ.) ("The Justices should do what is legally right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled."). This first question is concerned with the question addressed here of whether the earlier decision was "right" or "wrong." The second question goes to the issue of settled law, discussed in infra text accompanying note 73.

73. On the issue of not upsetting parties' settled expectations, see Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991) (Rehnquist, J.) ("Considerations in favor of stare decisis are at their peak in cases involving property and contract rights, where reliance interests are involved, the opposite is true in cases such as the present one involving procedural and evidentiary rules.") (citations}
A second approach to judicial precedents holds that a sequence of court decisions—that is, a reasoned elaboration of precedents—can provide a gloss on meaning which subsequently changes what the Constitution means. Thus, the question is not just what contemporaneous sources (or non-interpretive considerations) suggest about a constitutional provision's meaning. Instead, just as the common law changes over time in response to court decisions, the proper meaning of a constitutional provision can change over time in response to court decisions elaborating its meaning in a particular way.  

This approach is grounded in the way documents have been interpreted for centuries under the English common law, and was so understood by the framers and ratifiers of our Constitution. As Professor Jefferson Powell has written about James Madison,

He consistently thought that "usus," the exposition of the Constitution provided by actual governmental practice and judicial precedents, could "settle its meaning and the intention of its authors." Here, too, [Madison] was building on a traditional foundation: the common law had regarded usage as valid evidence of the meaning of ancient instruments, and had regarded judicial determinations of that meaning even more highly.

Under this approach, a sequence of court decisions can provide a gloss on meaning which may alter a constitutional provision's interpretation as gleaned from examining contemporaneous sources (or non-interpretive considerations, omitted). On the issue of settled law, and the formalist, Holmesian, and natural law preference for certainty and predictability in the law (and thus their strong presumption against upsetting settled law), see supra note 72 and infra notes 163, 285-90, 369 and accompanying text. For further discussion on the issue of how a judge might go about deciding whether to overrule a precedent based upon a conflict between the judge's view of constitutional text, purpose, and history versus prior judicial decisions, see Symposium, The Federalist Society Sixth Annual Symposium on Law and Public Policy: The Crisis in Legal Theory and the Revival of Classical Jurisprudence—Panel V: The Conflict Between Text and Precedent in Constitutional Adjudication, 73 CORNELL L. REV. 401 (1988) [hereinafter Symposium].

74. See generally FARBER ET AL., supra note 1, at 78-81 stating:
[T]he Framers may have realized the futility of writing a bunch of specific answers in the stone of the Constitution. In that event, their 'specific intent' would have been to provide no hard-and-fast answers in the constitutional text, and to let the answers develop over time in a common-law fashion. After all, the Framers were common-law lawyers.

Id. See also Harry H. Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 284-310 (1973).

75. H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885, 939 (1985). "[A] constitution's meaning, 'so far as it depends on judicial interpretation,' is established by 'a course of particular decisions.'" Id. at 939 n.280 (quoting Madison in a letter to Judge Spencer Roane).
if permissible to consider). Thus, it would take something more to overrule a prior decision than just a later court deciding that the earlier court "got it wrong." Some factors that might be used to provide this extra impetus to overrule a prior decision, in addition to the lack of settled law or the Payne consideration of lack of reliance, include: 1) the prior decision turns out to be unworkable in practice; 2) the decision creates a direct obstacle to important objectives in other laws; 3) the decision has been rendered irreconcilable with related doctrines or its conceptual underpinnings have been removed or weakened by later decisions, later legislative or executive action, or a changed understanding of the facts; or 4) the decision is inconsistent with some strongly held principle of justice or social welfare policy.

2. Legislative and/or Executive Practice

As with judicial precedents, one approach towards subsequent legislative or executive practice under a constitutional provision states that a court should be sensitive to subsequent legislative and executive practice only to the extent that such practice adds understanding of, and is faithful to, contemporaneous sources of meaning (or non-interpretive considerations, if permissible to consider). For example, the views of the First Congress in 1789, filled with people who collectively played a large role in drafting the Constitution, have often been thought to have special relevance in determining the meaning of constitutional provisions. As stated in Myers v. United States,

We have devoted much space to this discussion and decision of the question of the presidential power of removal in the First Congress, not because a congressional conclusion on a constitutional issue is conclusive, but first because of our agreement with the reasons upon which it was avowedly based, second because this was the decision of the First Congress on a question of primary importance in the organization of the Government made within two years after the Constitutional Convention and within a much shorter time after its ratification, and third because that Congress numbered among its leaders those who had been members of the convention.

76. See Patterson v. McLean Credit, 491 U.S. 164, 171-74 (1989). Though Patterson was a statutory interpretation case, the Patterson analysis of when to overrule a prior decision was adopted for constitutional law purposes in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809-12 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter), discussed infra text accompanying notes 258-72.

77. 272 U.S. 52, 136 (1926). See also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401-02 (1819) ("The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351
A second approach towards legislative or executive practice states that later legislative or executive practice under a particular constitutional provision can provide a gloss on meaning, just as later judicial precedents can provide a gloss on meaning. As Justice Story observed in 1833, "[T]he most unexceptional source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed, and settled upon their own single merits." And James Madison noted about constitutional interpretation in 1830, "[T]he early, deliberate and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendency" is relevant in determining constitutional meaning. Indeed, though as a congressman in 1791 Madison opposed Congress creating a national bank as unconstitutional, in 1816, when he was President, Madison supported the bank's constitutionality based upon "repeated recognitions, under varied circumstances, of the validity of such an institution.

In the twentieth century, Justice Frankfurter made this same point about a pattern or practice of subsequent executive action. As stated by Justice Frankfurter in his concurrence in Youngstown Sheet and Tube Co. v. Sawyer,

[A] systematic, unbroken, executive practice, long pursued by the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President.

(1816):
It is an historical fact that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system.

Id. See generally BREST & LEVINSON, supra note 28, at 128 ("The Court has also cited the enactments of early Congresses as indicative of the original understanding of the constitutional provisions.").

78. STORY, supra note 33, § 408.


80. See BREST & LEVINSON, supra note 28, at 18 (quoting Madison). See also infra note 137 and accompanying text (discussing this point in the context of the natural law approach towards constitutional interpretation).

Justice Holmes also underscored this point in Missouri v. Holland. In that case, Justice Holmes stated,

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago.

C. Non-Interpretive Considerations

As defined by Professor Michael Perry,

[A court engages in non-interpretive review when] it makes the determination of constitutionality by reference to a value judgment other than the one constitutionalized by the Framers. Such review is “non-interpretive” because the Court reaches [the] decision without really interpreting, in the hermeneutical sense, any provision of the constitutional text (or any aspect of governmental structure)—although, to be sure, the Court may explain its decision with rhetoric designed to create the illusion that it is merely “interpreting” or “applying” some constitutional provision.

82. 252 U.S. 416 (1920).
83. Id. at 433. In addition to the considerations discussed here of the impact of precedent alone, or legislative or executive action alone, on constitutional interpretation, there is the related issue of how to resolve a tension between precedent and proposed legislative and executive action which would conflict with that precedent. On this related issue, see Symposium, supra note 73, at 371-400. An in-depth discussion of this problem is outside the scope of this article, except to note that the standard view is that the legislative and executive branches should follow clear judicial precedents on point. “[A]s long as it satisfied the Article III case or controversy requirements, then judicial precedent should be treated as creating a positive duty to comply.” Id. at 376. See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). A minority view is that while a judicial decision may be “binding on the parties to a case,” other actors in our democratic society (federal and state legislators, the President, state Governors, or just plain citizens) are not required to “accept [the Court’s] decisions uncritically.” Edwin Meese III, The Law of the Constitution, 61 TUL. L. REV. 979, 987 (1987). See generally Symposium, Perspectives on the Authoritativeness of Supreme Court Decisions, 61 TUL. L. REV. 977, 977-1095 (1987).
This kind of "non-interpretive" constitutional interpretation can be contrasted with arguments of text, structure, history, and subsequent juridical events. As opposed to these other sources of meaning, non-interpretive review involves a judgment about the impact of a particular constitutional interpretation in light of value considerations that the judge determines should be part of the Constitution, rather than the values being embedded in the Constitution or in subsequent juridical events, which are official acts to which all judges give some weight.85 These non-interpretive sources of value can derive from a supposed community consensus or societal tradition, values the judge thinks the community eventually will hold, or the judge's own values.86

85. The literature discussing "interpretive" versus "non-interpretive" review is voluminous. For a brief introduction to the "interpretive" versus "non-interpretive" debate, see GERALD GUNTER, CONSTITUTIONAL LAW 19-20 n.12 (12th ed. 1991), and sources cited therein; Perry, supra note 84, at 264-84 and sources cited therein. For additional articles on point, see Symposium on Constitutional Interpretation, 6 CONST. COMMENTARY 19-113 (1989); Ronald D. Rotunda, Original Intent, the View of the Framers, and the Role of the Ratifiers, 41 VAND. L. REV. 507 (1988). Though some commentators have suggested all interpretation must, of necessity, be non-interpretive, and thus must take into account contemporary notions of justice or sound social policy, see, e.g., David Couzens Hoy, Interpreting the Law: Hermeneutical and Poststructuralist Perspectives, 58 S. CAL. L. REV. 135, 136-57, 164-76 (1985), and sources cited therein, this article rejects that premise. See generally Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 NW. U. L. REV. 226 (1988) (discussing the possibility of drawing distinctions between: (1) interpretation based upon the original intent of the framers and ratifiers as determined by arguments of text, structure, and history, and (2) interpretation based upon contemporary notions of justice and sound social policy).

86. See Wellington, supra note 74, at 284-310 (discussing the community consensus model); Brennan, supra note 53, at 444 ("On this issue, the death penalty, I hope to embody a community, although perhaps not yet arrived, striving for human dignity . . . ."); John Hart Ely, The Supreme Court, 1977 Term, Foreword: On Discovering Fundamental Values, 92 HARV. L. REV. 1, 16-22, 43-54 (1978) (discussing a judge's own values approach, the community consensus model, and values the judge thinks the community eventually will hold). For a brief discussion of the intellectual tension among these three approaches, see KELSO & KELSO, supra note 10, at 156-60, 397-98 (1984).

In recent years, this debate has been rephrased by some commentators, including Professor Perry in a 1991 article, as being a debate between "originalist" and "non-originalist" perspectives. See Perry, supra note 64, at 669-74. Despite this recharacterization by some commentators, the terms "interpretive" and "non-interpretive" are used in this article for the following reason.

Virtually all commentators, and all judges, claim that their approach to constitutional interpretation is consistent with the original intent of how the framers and ratifiers would have wanted the Constitution interpreted, and thus is an "originalist" approach. See, e.g., id. at 687 ("It seems difficult, in American political-legal culture, to make a persuasive case for nonoriginalism. . . . That difficulty helps to explain why it is so hard to locate a real, live nonoriginalist, whether a judge or, even, academic theorist."). Because of disagreements about exactly how the framers and ratifiers intended the Constitution to be interpreted, all judges and commentators, whether formalist, Holmesian, instrumentalist, or natural law judges, are able to make non-frivolous arguments that their approach is consistent with the framers and ratifiers' intent. See, e.g., id. at 687 n.54 (arguing than even Justice Brennan's more liberal activist approach towards constitutional interpretation is plausibly understood as a version of "originalism"). For this reason, the term "originalist" does not serve to distinguish any approach from any other. However, as discussed by Professor Kay in his
article, cited in supra note 85, the terms “interpretivism” and “non-interpretivism” can be used in a way to distinguish among competing approaches to constitutional interpretation. Kay, supra note 85, at 229-36.

In any event, without regard to a semantical debate over whether “interpretivism” or “originalism” is the more appropriate term, it is perhaps more important to note that all of the various approaches towards constitutional interpretation discussed by Professor Perry in his 1991 article can be categorized by reference to the four styles of constitutional interpretation discussed in this article. For example, the approach towards constitutional interpretation identified in this article as formalist, see infra text accompanying notes 283-301 (discussing the formalist-textualist approach of Justice Scalia and the formalist-historical approach of Raoul Berger), is discussed by Professor Perry as “nonoriginalist textualism” and the “unsophisticated version of originalism” of Raoul Berger. See Perry, supra note 64, at 682 & n.44, 686-89. See also Fallon, supra note 28, at 1197-98 (discussing “textualist” versus historically based “originalist” versions of interpretation of constitutional text).

The approach towards constitutional interpretation identified in this article as the Holmesian version of original intent, see infra text accompanying notes 366-99, is reflected in Perry’s discussion of the interpretation theories represented by Judge Robert Bork and Former Attorney General Edwin Meese. Perry, supra note 64, at 681-84, 693-94. As is discussed herein, while theoretically this approach is willing to undertake a broad-based historical inquiry in order to determine the framers and ratifiers’ intent, and is willing to interpret a provision broadly in light of its general concept if that was the framers and ratifiers’ intent, often a Holmesian judge in practice will adopt a more narrow approach towards history and a more static approach towards concepts embedded in the Constitution by the framers and ratifiers. See infra text accompanying notes 382-93. Professor Perry reflects this reality in distinguishing between Robert Bork and Ed Meese in their broader, “better moments” versus their tendency sometimes to adopt the narrower or more static approach. Perry, supra note 64, at 693-94 & n.78.

Bork and many other enthusiasts of originalism (e.g., former Attorney General Edwin Meese) sometimes seem not to understand that the extent to which the originalist approach to constitutional interpretation constrains a judge depends on what the judge believes to be the original meaning of the provision: The more specific the original meaning, the greater the constraint; the more general the meaning, the lesser the constraint and the greater the latitude ....

Id.

Once the traditional natural law decisionmaking style of James Madison, Chief Justice Marshall, and Justice Story evolved to permit consideration of historical pieces of evidence like the Notes of the Constitutional Convention, see infra text accompanying notes 118-22, the “better” or “more sophisticated” version of originalism as discussed by Professor Perry is best reflected in what is described in this article as the natural law decisionmaking style. Compare infra text accompanying notes 106-78 with Perry, supra note 64, at 674-86, 695-701. This point is perhaps most explicitly made in Perry’s identification of his approach as related to that of Professor Michael Moore. See id. at 701 n.93. Professor Moore’s approach to interpretation is explicitly in the natural law tradition. See, e.g., Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 277 (1985). For further discussion of various versions of a natural law decisionmaking style, particularly with regard to the issue here of “interpretive” versus “non-interpretive” review, see infra text accompanying notes 145-54.

Finally, the fourth main approach to judicial decisionmaking described in this article, instrumentalism, see infra text accompanying notes 501-41, is reflected in the approach towards constitutional interpretation that is often associated with “nonoriginalism.” This is true despite Professor Perry’s comment, cited above, that perhaps even Justice Brennan’s approach towards constitutional interpretation can plausibly be understood as a version of originalism. See Perry, supra note 64, at 687 n.54. Professor Perry’s remark in his early 1981 article that many modern
Two main kinds of non-interpretive considerations can influence a judge's views about the meaning of a constitutional provision. First, there are considerations that derive primarily from an emphasis on the specific consequences that might occur from a particular interpretation. Second, there are considerations that derive primarily from the judge's general political views.

The legitimacy of "non-interpretive" review by judges is a matter of great controversy. One approach states that courts should refuse to engage in non-interpretive review of consequences or political considerations. Under this "interpretive" approach, a judge can consider consequences or political considerations only to the extent that such considerations can help illuminate what the framers and ratifiers of a provision had in mind. Just as judges may look into the purposes behind adoption of a constitutional provision to illuminate constitutional text, judges must be sensitive to the consequences of a particular interpretation in order to ensure that the framers and ratifiers' purposes are adequately carried out. However, under this "interpretive" theory, a judge should not read into the Constitution the values the judge determines should be part of the Constitution. No matter how bad the judge thinks the consequences are of a particular interpretation, if consideration of contemporaneous sources and subsequent juridical events suggest a particular meaning, that meaning should be adopted.\textsuperscript{87}

constitutional law cases "cannot plausibly be explained except in terms of non-interpretive review, because in virtually no such case can it plausibly be maintained that the Framers constitutionalized the determinative value judgment," Perry, supra note 84, at 265, seems more on the mark. In any event, whether "originalist" or not, for examples of this more activist, instrumentalist kind of constitutional review in addition to examples discussed at infra text accompanying notes 501-601, see The Result-Oriented Adjudicator's Guide to Constitutional Law, 70 Tex. L. Rev. 1325 (1992) (book review) (reviewing Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution (1991) and Harry W. Wellington, Interpreting the Constitution (1990)).

As a final point, it should be noted that in his recent book, Professor Perry uses the terms "interpretive minimalist" to refer to the formalist style's preference for clear and predictable rules, "normative minimalist" to refer to the aspects of the Holmesian judicial deference style, and "non-minimalist originalist" to refer either to the natural law style, which is discussed supra (noting Professor Perry's identification of his style as related to that of Michael Moore), or an instrumentalist style, which is suggested by Professor Perry's recent article, discussed infra note 87. See Michael J. Perry, The Constitution in the Courts: Law or Politics? 84-101 (1994).

\textsuperscript{87} See generally Perry, supra note 84, at 275-84, and sources cited therein; Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353 (1981), and sources cited therein. See also infra text accompanying notes 150-57 (discussing the natural law decisionmaking response to slavery prior to ratification of the Thirteenth Amendment). It must be noted that Professor Perry has recently indicated that he now supports a modest departure from this pure "interpretive" model. Where "the relevant legal premises do not conclude the question," Professor Perry now believes that it is appropriate for a judge in deciding the case to take into account a supposed community consensus ("the society's 'common sense'")), and that if leeways still remain following that consideration, then it is appropriate for the judge to take into account the judge's own values, including the judge's own religious values, if any. See Michael J. Perry, Religious Morality and
Of course, judges may well disagree about the meaning of a constitutional provision that emerges from consideration of contemporaneous sources and subsequent juridical events. Different judges will view arguments of text, purpose, structure, history, and subsequent events differently. In addition, judges may disagree about the extent to which these sources suggest that judges should pay attention to certain consequences and political considerations. Such disagreements are particularly likely in light of the considerations of interpretive bias discussed later in Section II.D.88

In contrast to these views, the defenders of “non-interpretive” review argue that, to some extent, judges must update the Constitution to deal with contemporary community problems and to achieve sound social results.89 As Professor Perry has stated,

The justification for the practice, if there is one, must be functional: if noninterpretive review serves a crucial governmental function that no other practice realistically can be expected to serve, and if it serves that function in a manner that . . . accommodates the principle of electorally accountable policymaking, then that function constitutes the justification for noninterpretive review.90

1. Consequences

If non-interpretive review is permissible, one approach to consequences holds that courts should consider the impact of a particular constitutional interpretation on the fundamental principles of justice in which the judge believes.91 A second approach to consequences holds that the courts should consider the impact of a particular constitutional interpretation on the judge’s sense of sound social policy.92 Under either approach, the judge should go beyond interpreting a constitutional provision in light of the principles of justice or sound social policies embedded in the Constitution, as revealed by text,

Political Choice: Further Thoughts—and Second Thoughts—on Love and Power, 30 SAN DIEGO L. REV. 703, 724 n.71 (1993) (citing MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (1994)). To this extent, Professor Perry is now counseling adoption of an instrumentalist decisionmaking style, see infra text accompanying notes 501-07, as is indicated in part by his favorable cite to Justice Brennan’s interpretive methodology. Perry, supra, at 724 n.71 (“According to Justice Brennan, ‘[E]ven high court judges are constrained in issuing rulings[,] . . . not just by precedent and the texts they are interpreting, but also, on any attractive political and jurisprudential theory, by a decent regard for public opinion . . . .’”) (emphasis in original).

88. See infra text accompanying notes 97-105.
89. See infra text accompanying notes 501-06, 528-33, 575-80.
90. Perry, supra note 84, at 275.
91. See infra text accompanying notes 145-47.
92. See infra text accompanying notes 501-07, 514-27.
purpose, structure, history, and subsequent juridical events. Instead, the judge must balance these arguments against the consequences of such an interpretation for the judge's sense of what principles of substantive justice or sound social policy should be part of the Constitution.\textsuperscript{93}

Admittedly, the line between a principles-of-justice approach and a sound-social-policies approach is not capable of clear, bright-line description. General differences can nevertheless be noted. As Professor Ronald Dworkin has written,

\begin{quote}
I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. . . . I call a "principle" a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Thus the standard that automobile accidents are to be decreased is a policy, and the standard that no man may profit by his own wrong is a principle.\textsuperscript{94}
\end{quote}

Of course, a judge following a non-interpretive theory of constitutional review might decide that a judge should take into account both principles and policies, and thus adopt both approaches towards the non-interpretive review discussed above.

2. Politics

Though the impact on interpretation is varied and complex, a number of commentators have suggested that the political views that judges bring to the courts typically have some impact (and perhaps great impact) on how the Constitution is interpreted.\textsuperscript{95} Such views may impact a judge's interpretation whether or not the judge intends there to be such an effect, or even is aware that such political beliefs may unconsciously affect the judge's views.

With regard to political considerations, a judge, like any citizen, may be leftist, liberal, centrist, conservative or on the extreme right. Because all federal

\textsuperscript{93} See Ely, \textit{supra} note 86, at 15 ("The Court's current constitutional jurisprudence . . . involves the Court in the merits of the policy or ethical judgment sought to be overturned . . . ").


\textsuperscript{95} \textit{See}, e.g., \textit{infra} text accompanying notes 518-27. \textit{See also} DAVID M. O'BRIEN, STORM CENTER: \textit{THE SUPREME COURT IN AMERICAN POLITICS} (3d ed. 1993).
court judges must be confirmed by the Senate, most federal judges tend not to be on the extremes of the political spectrum. Thus, they tend to be liberal, centrist, or conservative, and not either leftist or on the extreme right.96

D. Considerations of Individual Bias

Considerations of individual bias are of two kinds: general interpretive bias and specific case bias. Two kinds of specific case bias exist: doctrinal bias and party bias.

1. General Interpretive Bias

As noted earlier, there have been four main judicial decisionmaking styles in American history: natural law, formalism, Holmesian, and instrumentalism.97 Though most judges do not self-consciously adopt one of these four styles, most judges' approach to judicial decisionmaking is reflected more in one style than the others.98

Given the judge's interpretive style, general interpretive bias refers to the fact that any judge is likely to view provisions of the Constitution through the interpretive style generally favored by the judge. Thus, despite the fact that each judge is operating from the same database concerning purposes and history, a formalist judge may view purposes or history somewhat differently than a natural law judge, a Holmesian judge, or an instrumentalist.99 A judge who generally favors one interpretive style may also be more likely to presume that clauses of the Constitution reflect that style. For example, a natural law judge may presume that more clauses of the Constitution were drafted in light of

96. See generally Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model 125-64 (1993) (discussing a number of factors to predict whether a nominee will be confirmed, including the fact that the number of votes for senators will depend upon the ideological differences between the constituents and the nominee and suggesting that if that ideological distance is great, as for judges on the extremes of the political spectrum, confirmation is less likely).

97. See supra text accompanying notes 7-10.

98. See generally Kelso, supra note 7, at 581-608. For categorization of recent members of the Supreme Court in terms of the four judicial decisionmaking styles discussed in this article, see infra Appendix A.

99. See Kelso, supra note 7, at 564-80 (discussing the differences in separation of powers doctrine between Justice Scalia's view of history as supporting a formalist, strict separation of powers approach versus the natural law, Holmesian, and instrumentalist approaches which view history and purposes as supporting a sharing of powers, checks and balances approach towards separation of powers doctrine).
natural law principles than a formalist, Holmesian or instrumentalist judge.\(^{100}\)

General interpretive bias occurs because most judges are likely to think that the judge’s interpretive model is consistent with that of the framers and ratifiers. Thus, formalist judges may tend to see the framers and ratifiers as formalists, Holmesian judges see them as Holmesian, and so forth.\(^{101}\) Sometimes judges hold these positions even in the face of clear historical evidence to the contrary.\(^{102}\)

2. Specific Case Bias

Specific case bias refers to bias which is triggered by the particular case before the court. This bias can be of two kinds: doctrinal bias and party bias. Doctrinal bias refers to the fact that some judges, because of past experiences or idiosyncratic preferences, may have a view about a particular doctrine which is inconsistent with the judge’s general views. Nevertheless, the judge’s views may be consistent within that particular doctrine. Such specific doctrinal bias may be more important in how that judge decides that case than the judge’s general views.\(^{103}\)

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\(^{100}\) *See, e.g.*, infra text accompanying notes 169-71 (contrasting a natural law approach with a formalist approach to interpreting the Eighth Amendment’s “cruel and unusual punishment” clause).

\(^{101}\) The differing views concerning the framers and ratifiers’ intent regarding the Establishment Clause are perhaps a good example of this phenomenon. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2661-62, 2665-67 (1992) (Blackmun, J., joined by Stevens & O’Connor, JJ., concurring) (using instrumentalist reasoning to conclude that the history of the framing and ratifying period is consistent with modern liberal notions of the need for a strict wall of separation between church and state); id. at 2668-76 (Souter, J., joined by Stevens & O’Connor, JJ., concurring) (using Justice Souter's more traditional eighteenth and nineteenth century judicial decisionmaking style to attribute to the framers and ratifiers James Madison and Thomas Jefferson's views, grounded in 18th and 19th century natural law enlightenment philosophy, that “any official endorsement of religion can impair religious liberty”); id. at 2678-81, 2685-86 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting) (using formalist and Holmesian reasoning to conclude that the framers and ratifiers shared their premises that the Establishment Clause should be interpreted to prohibit governmental action only where (1) there exists clear, bright-line prohibitions grounded in clear text or specific traditions (the formalist premise), or (2) deference to the government is inappropriate because the unconstitutionality appears in clear text or clear inferences from history (the Holmesian premise)).

\(^{102}\) *See, e.g.*, Kelso, *supra* note 7, at 571-72 (discussing the fact that some judges, particularly formalists like Justice Scalia, apparently believe that the framers and ratifiers supported a strict separation of powers approach towards separation of powers doctrine despite relatively clear historical evidence to the contrary).

\(^{103}\) For example, Justice White’s background and beliefs regarding his strong commitment to civil rights, see Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L.J. 19, 26-27 (1993), may have affected his decision to join Justice Brennan’s more instrumental, pro-civil rights majority opinion in United Steelworkers v. Weber, 443 U.S. 193, 204-07 (1979), rather than following his more typical Holmesian approach, *see* Kelso, *supra* note 7, at 583-84, 605-06, and
Party bias refers to the fact that in some cases a judge may prefer a particular party, or that party's lawyer, as opposed to the other party, or that other party's lawyer. Though such personal bias is inappropriate for the judge to consider, and rules regarding judicial recusal are meant to prevent such bias from affecting case resolution, nonetheless such party bias may occasionally affect the result in a particular case.

III. THE NATURAL LAW JUDICIAL DECISIONMAKING STYLE: 1789-1872

This summary of the natural law judicial decisionmaking style addresses first how a natural law approach grapples with arguments of text, purpose, structure, history, subsequent juridical events, non-interpretive considerations, and individual bias. The summary then discusses how the natural law approach resolves four basic issues faced in our constitutional history: (1) issues of justiciability and the role of the courts in our democratic system; (2) issues of governmental structure (separation of powers and federalism); (3) issues of protecting economic rights; and (4) issues of protecting civil rights and civil liberties (e.g., Equal Protection, Due Process, and the First Amendment).

A. General Interpretive Principles

1. Text and Purpose Considerations

The first question any style of interpretation must answer is whether to interpret a provision in light of its letter only, or to interpret the provision in light of both its letter and purpose. The natural law decisionmaking style emphasizes the importance of understanding a provision's purpose. As
Professor Michael Moore has written in an article entitled *A Natural Law Theory of Interpretation*,

Once a judge determines the ordinary meaning of the words that make up a text and modifies that ordinary meaning with any statutory definitions or case law developments, there is still at least one more task. A judge must check the provisional interpretation reached from these ingredients with an idea how well such an interpretation serves the purpose of the rule in question.

The necessity for asking this question of purpose Lon Fuller made familiar to us in his famous 1958 debate with H.L.A. Hart. 106

The rules of interpretation ordinarily followed in the eighteenth and early nineteenth century reflected this approach. As Professor William Crosskey has written about interpretation in the eighteenth century,

[T]he over-all purpose of a document was stated carefully in general terms; details were put in, only where, for some particular reason, details seemed required; and the rest was left to the rules of interpretation customarily followed by the courts. [This mode of interpretation was] calculated to give a just and well-rounded interpretation to every document, in the light of its declared general purpose; or, if its purpose was not declared, then, in light of its apparent purpose, so far as this could be discovered.

... “[T]he reason and spirit [of a law]; or the cause which moved the legislator to enact it”—it is, says Blackstone, “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious.”107

106. Moore, supra note 86, at 383-84. On the Hart/Fuller debate generally, see Kelso & Kelso, supra note 10, at 293-95.

107. CROSSKEY, supra note 33, at 364-66. As Crosskey's cite to Blackstone indicates, the "reason and spirit" of the law can be crucial "where words are dubious"; where the plain meaning of the words are clear, arguments of purpose, while still important, see supra/infra text accompanying notes 106-10, are not as weighty. See generally supra notes 31, 36 and accompanying text. Though certain aspects of Professor Crosskey's overall constitutional critique were controversial at the time of publication, and remain so today, see, e.g., Raoul Berger, Michael Perry's Functional Justification for Judicial Activism, 8 U. DAYTON L. REV. 465, 492-95 (1983); Paul Finkelman, The First American Constitutions: State and Federal, 59 TEX. L. REV. 1141, 1156-73 (1981) (book review); Robert C. Power, The Textualist: A Review of the Constitution of 1787: A Commentary, 84 NW. U. L. REV. 711, 713-16 (1990) (book review), and sources cited therein, Professor Crosskey's summary of the general nature of the natural law interpretation style, cited here, is not particularly controversial. See generally Kelso, supra note 7, at 564-66.
This focus on a provision's purpose (or "object," as it was sometimes called, or "mischief to be remedied," or "reason for the remedy") is most famously stated in what has come to be known as "The Rule of Heydon's Case." In Heydon's Case, Lord Coke stated that a judge should inquire into the "mischief and defect" that the drafter was seeking to remedy and "the true reason for the remedy," and that the judge should "make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief . . . and to add force to the cure and remedy, according to the true intent of makers of the act."

The Supreme Court addressed this approach towards interpretation in a number of early nineteenth-century cases. For example, in the famous and important case of McCulloch v. Maryland, Chief Justice Marshall stated,

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . .

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Similarly, Justice Story stated in Martin v. Hunter's Lessee,

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.

110. 14 U.S. (1 Wheat.) 304, 326 (1816).
2. Considerations of Context

The next question to ask concerns the role of context in constitutional interpretation, and the interplay among text, purpose, and context. In his treatise, *Commentaries on the Constitution of the United States*, Justice Story stated in 1833, "In construing the Constitution of the United States, we are, in the first instance, to consider what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts."\(^{111}\)

A famous example of contextual interpretation appears in *McCulloch v. Maryland*. One issue in *McCulloch* was whether Congress had the constitutional power to incorporate a national bank.\(^{112}\) Since there was no express provision in the Constitution granting Congress such power, the argument on behalf of Congress was that the power to incorporate a national bank derived from the "Necessary and Proper" Clause which grants Congress power to do all things "necessary and proper" to effectuate the named powers in the Constitution.\(^{113}\) The argument was that to carry out effectively some of the named powers, like raising taxes, paying debts, and raising money to pay army and navy personnel, a national bank was "necessary and proper."\(^{114}\) Whether this argument would be accepted depended upon whether the Court would give a narrow or broad reading to the phrase "necessary and proper." A narrow reading would restrict the power to acts which are "absolutely necessary." A broad reading would allow Congress to act as long as Congress thought it "proper."

In giving the clause a broad reading, the Court considered arguments of context. The Court noted, "1st. The clause is placed among the powers of Congress [in Article I, section 8], not among the limitations on those powers [in Article I, section 9]. 2nd. Its terms purport to enlarge, not to diminish the powers vested in the government."\(^{115}\) The Court also considered related provisions of the Constitution, noting that the framers used the phrase "absolutely necessary" in Article I, section 10, but chose not to use it in Article I, section 8.\(^{116}\)

With regard to the issues of separation of powers, federalism, and the proper role for the courts, the eighteenth-century natural law approach embraced a sharing of powers, checks and balances approach towards separation of

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111. **STORY, supra note 33, § 405.**
112. **17 U.S. (4 Wheat.) at 401.**
113. **Id. at 407-12.**
114. **Id.**
115. **Id. at 419-20.**
116. **Id. at 413-15.**
powers; a balanced approach towards federal versus state governmental power, which nonetheless acknowledged the need for a strong federal government; and a view that the role of the courts was to hold governmental actions unconstitutional if, on balance, the government violated constitutional limitations. All of these positions are developed more fully below.  

3. History

Because a natural law approach is sensitive to a provision’s purpose, a natural law approach is willing to examine historical sources to help determine a provision’s purpose. The only limitation on this principle was that in the late eighteenth and early nineteenth century, the prevailing mode of interpretation (in both England and the United States) took the view that it was improper to consider the legislative history of a provision to help determine its meaning. Thus, notes of the Constitutional Convention, or statements made on the floor of the House and Senate during consideration of the first ten amendments, were not proper to consider, while contemporaneous statements about the meaning of the Constitution which were not part of the formal legislative history, but were part of the public dialogue prior to ratification of the Constitution, like The Federalist Papers, were proper to consider. This limitation gradually expired during the nineteenth century in America. In England, this ban on using legislative history to determine drafter’s intent is still in force today.

117. See infra text accompanying notes 179-209.
119. See generally Baade, supra note 118, at 1043-62.
120. See Dickerson, supra note 40, at 170-71; Kelso & Kelso, supra note 10, at 315-16; William L. Twining & David Miers, How to Do Things with Rules 202-03, 216-17 (1976). Note that this ban on using legislative history to determine the drafter’s intent does not mean that “the lawmaker’s intent is not the critical object sought.” Kay, supra note 85, at 233. “The rule that the judge cannot consult legislative history merely limits the means by which that intent can be found. English courts still adhere to the well-established maxim that a judge is to construe statutes in light of the mischief the lawmaker was attempting to correct.” Id. Thus, to the extent that Raoul Berger’s criticisms of Professors Baade and Powell, cited supra note 118, are focused on the fact that English courts and colonial American courts did focus on the lawmaker’s intent, that is true. However, that is a proposition with which neither Professor Baade or Powell would disagree. As Professor Kay notes in the quotation above, the real question is whether legislative history can be used to determine the lawmaker’s intent.
Because this limitation expired in America, notes of the Constitutional Convention, or House or Senate statements about amendments, became proper to use as history to determine the framers and ratifiers' intent during the second half of the nineteenth century. Early natural law opinions are thus more "textualist" than later natural law opinions, which involve more historical "originalism."  

Whether a natural law judge would focus on the specific examples held by the framers and ratifiers about a provision, or their general concepts, depends in part on the provision. To the extent that the provision is "relatively directive, specific, and focused," history may suggest that the framers and ratifiers intended the provision to reflect only detailed, specific choices. If so, it can be argued that judges should remain focused on those choices. Where history suggests instead that the framers and ratifiers embedded in the Constitution broad natural law concepts, like those dealing with the First amendment, Equal Protection, and Due Process, history may suggest that the framers and ratifiers intended "to provide no hard-and-fast answers . . . , and to let the answers develop over time in a common-law fashion," against a general background of political and moral philosophy.

121. See Baade, supra note 118, at 1043-62.

122. See FARBER ET AL., supra note 1, at 77-78 (discussing the early "textualist" nature of Chief Justice Marshall's Supreme Court opinions); supra/infra text accompanying notes 106-78 (providing an overview of all of the elements of the natural law "originalist" decisionmaking tradition). Given this evolution in the natural law decisionmaking style concerning the appropriate use of legislative history to determine the framers and ratifier's intent, the disagreements among Hans Baade, Jefferson Powell, and Raoul Berger over court use of legislative history in the post-revolutionary war period, see supra note 118, is of historical interest, but no real jurisprudential interest. All three would agree that eventually during the nineteenth century legislative history became appropriate in determining the framers and ratifiers' intent. Of course, there are many other aspects of statutory and constitutional interpretation where Raoul Berger and Professors Baade and Powell remain in disagreement. See generally infra notes 300-01 and accompanying text (discussing Raoul Berger's version of formalism and its similarities to, and differences from, the natural law, instrumentalist, and Holmesian decisionmaking styles).

123. FARBER ET AL., supra note 1, at 77.

124. Id. at 78-79 ("By merely implementing the intent of the Framers, the Court is supposedly not imposing its own vision of policy, but only requiring current majorities to bow to the original deal, to which we have all implicitly consented."). But see id. at 79 ("[E]ven when some of the Framers addressed specific issues in clear terms, there remains the problem of aggregating individual views into the collective views of a diverse group of individuals. Different [framers] may not have agreed with each other on their interpretation of a provision."). On this problem of aggregating individual framers' intent, but arguing that the problem does not represent an insurmountable barrier to an original intent theory of interpretation, see Kay, supra note 85, at 245-51.

125. FARBER ET AL., supra note 1, at 79.

126. Id. at 78-81 ("Static versus Living Constitution"); infra notes 148-54, 162-68, 173-78 and accompanying text (discussing the framers and ratifiers and the Anglo-American common law tradition against the backdrop of 18th and 19th century political and moral philosophy).
For example, most modern judges in the natural law judicial decisionmaking tradition tend to view the Establishment Clause as reflecting an enlightenment-based natural law concept of the separation of church and state. As Justice Kennedy stated in *Lee v. Weisman*, "[T]he lesson of history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." That general concept would likely counsel a judge to find practices such as officially organized prayer in public schools unconstitutional, despite the fact that such prayer was a specific example thought constitutional by the framers and ratifiers as determined by "historical practices and understandings."

Similarly, Justice Ruth Bader Ginsburg noted a similar contrast between general concepts and specific views during her confirmation hearing. Justice Ginsburg remarked that the general concept of equality in the Declaration of Independence and the Equal Protection Clause of the Fourteenth Amendment is broad enough to embody a principle of equal rights for women, despite the fact that the specific views of Thomas Jefferson and others in the eighteenth and nineteenth century were not ready for women to be equal participants in public life. Justice Ginsburg quoted Jefferson that "'[t]he appointment of women to public office is an innovation for which the public is not prepared. Nor,' Jefferson added, 'am I.'" Nevertheless, as Justice Ginsburg noted, she presumed that if Jefferson were alive today he would have a different specific view on the role of women in public life based on the general concept of equality in which Jefferson believed—each individual's equal and inalienable right to life, liberty, and the pursuit of happiness.

In addition, sometimes a changed social environment will require an individual to change a specific belief because the general concept in which the individual believes now interacts with the social environment in a different way. For example, Justice Ginsburg has stated that one of the main reasons the Supreme Court changed its specific beliefs in gender discrimination cases in the 1970s was the Court's newly formed conclusion that the differential treatment

127. *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) (Kennedy, J.). *See also id.* at 2668-70 (Souter, J., joined by Stevens & O'Connor, JJ., concurring) (discussing the history of the drafting of the Establishment Clause and concluding that "[t]he Framers were vividly familiar with efforts in the colonies and, later, the States to impose general, nonpreferential, assessments and other incidents of ostensibly ecumenical establishments" and that the framers intended the Establishment Clause to condemn "all [such] establishments, however nonpreferentialist . . . .")

128. *Id.* at 2678 (Scalia, J., dissenting).


130. *Id.*

131. *Id.*

http://scholar.valpo.edu/vulr/vol29/iss1/2
of women and men in certain statutes was "burdensome to women,"\textsuperscript{132} and thus violated the Court's general concept of equality. She attributed this result in part to the "[r]apid growth in women's employment outside the home, attended and stimulated by a revived feminist movement; [and] changing patterns of marriage and reproduction;" all of which made the Court better able to see that women were being "unfairly constrained" by laws "ostensibly to shield or favor" them.\textsuperscript{133} This result required an interplay among "change in society's practices, constitutional amendment, and judicial interpretation . . . ."\textsuperscript{134}

Such reasoning from general moral concepts to specific conclusions is, of course, a mainstay of much philosophic inquiry, particularly in the enlightenment tradition. The goal of such reasoning is to convince a person who wishes, in accordance with the enlightenment tradition, to consistently apply a general concept in which the individual believes that the individual may have to adjust one or more specific views which currently are not consistent with that general concept. Through this process, a dynamic is created whereby over time more of an individual's specific views will be a reflection of reasoned elaboration of general moral concepts applied to current social realities, rather than specific views merely being the product of the individual's past experiences, unthinking adherence to tradition, idiosyncratic preferences, or prejudice. In this way, the specific understanding of a concept may evolve over time.\textsuperscript{135}

4. Subsequent Juridical Events

As indicated previously, the traditional eighteenth-century mode of interpretation treated a reasoned elaboration of precedents, or repeated legislative


\textsuperscript{133} Id. at 20-21.

\textsuperscript{134} Id. at 17.

\textsuperscript{135} For general discussion of such reasoning from moral concepts to specific conclusions in the context of constitutional interpretation, see Fallon, \textit{supra} note 28, at 1198-99, 1254-58. For discussion of such reasoned elaboration of principles in moral philosophy generally, with emphasis on the Enlightenment, Kantian, and neo-Kantian traditions, see RICHARD B. BRANDT, \textit{A THEORY OF THE GOOD AND THE RIGHT} 110-95 (1979); ALAN GEWIRTH, \textit{REASON AND MORALITY} 129-98 (1978); RICHARD M. HARE, \textit{MORAL THINKING: ITS LEVELS, METHOD, AND POINT} 107-16, 206-28 (1981), and sources cited therein. In particular, Professor Brandt discusses a methodology to separate "irrational" desires and aversions from "rational" ones. As he states, "I shall call a desire 'irrational' if it cannot survive compatibly with clear and repeated judgements about established facts. What this means is that rational desire [or aversion] can confront, or will even be produced by, awareness of the truth; irrational desire [or aversion] cannot." BRANDT, \textit{supra}, at 113. \textit{See also} Justice Anthony Kennedy, Commencement Address at McGeorge School of Law (May 21, 1988) ("[R]eason, which is the distinguishing mark of the human race, must be embodied in the law if our civilization is to aspire to excellence.").
or executive practice, as a gloss on meaning. As Professor Jefferson Powell observed, "[Madison] consistently thought that 'usus,' the exposition of the Constitution provided by actual governmental practice and judicial precedents, could 'settle the meaning and the intention of the authors.'"

McCulloch once again provides a good example of this principle at work. As indicated previously, Madison changed his position between 1791 and 1816 on the constitutionality of Congress incorporating a national bank based upon legislative and executive practice. The Supreme Court noted this practice, and subsequent judicial practice, stating in McCulloch,

[T]his can scarcely be considered an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

The Court also referred to paying deference to a course of legislative practice in the previously cited case of Martin v. Hunter's Lessee. In Hunter's Lessee, the Court stated, "Hence [the Constitution's] powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interests should require."

The case of Gibbons v. Ogden provides another example of this principle at work. At issue in Gibbons was how to interpret the phrase "[c]ommerce among the states" regarding Congress' power to regulate traffic on navigable rivers. In defining the word "commerce" to include navigation, the Court noted a history of legislative and executive action so defining commerce. As the Court stated,

136. See supra text accompanying notes 73-79.
137. Powell, supra note 75, at 939. See also H. Jefferson Powell, The Modern Misunderstanding of Original Intent, 54 U. CHI. L. REV. 1513, 1539-42 (1987) (providing greater treatment of Madison's views on subsequent governmental practice); STORY, supra note 33, § 391, 408 (drawing inferences from congressional, executive, and state acquiescence in "more than forty years" of "operation" under the Constitution, and from the "practical exposition of the government itself . . . ").
138. See supra text accompanying notes 78-79.
139. 17 U.S. (4 Wheat.) 316, 401 (1819).
141. 22 U.S. (9 Wheat.) 1 (1824).
142. Id. at 186-89, 194.
If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.\(^{143}\)

In addition, following a natural law approach, the Court also relied in *Gibbons* on the purposes behind adoption of the Commerce Clause. The Court stated, "The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense . . . ."\(^{144}\)

5. Non-Interpretive Considerations

Two basic approaches could be taken under a natural law approach towards the appropriateness of non-interpretive considerations in constitutional review. One view is to embrace non-interpretive consideration of principles of justice. Under this approach, whether or not the framers and ratifiers of the Constitution intended each clause to embody natural law principles, judges should take that view today. Thus, judges should always read the Constitution's words against the backdrop of natural law theory.\(^{145}\) This approach would require judges to pay great respect to the ordinary meaning and purpose of the words used in the Constitution. However, under this approach, judges would always be permitted to resort to natural law philosophy in the final instance "so as to check meaning and purpose by an all-things-considered value judgment that acts as a safety-valve against wildly absurd or unjust results."\(^{146}\) In its most extreme form, such an approach to judicial decisionmaking would place judges in the role of Platonic Guardians, deciding constitutional cases in order to promote the judge's natural law vision of the "just state."\(^{147}\)

\(^{143}\) *Id.* at 190.

\(^{144}\) *Id.*

\(^{145}\) See generally Kelso, *supra* note 7, at 548 n.49 (discussing the natural law approach to constitutional interpretation sketched out by Professor Michael S. Moore in articles such as *A Natural Law Theory of Interpretation*, cited in *supra* note 86).


\(^{147}\) This extreme form is the approach criticized by Judge Learned Hand in his famous Oliver Wendell Holmes Lecture at Harvard in 1958. *See Learned Hand, The Bill of Rights* 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."). Most judges and commentators who subscribe to some version of natural law theory reject this approach. *See infra* notes 151-54 and
A second approach, more consistent with the natural law approach to judicial decisionmaking dominant during the framing and ratifying of our Constitution, holds that judges should resort to natural law principles in interpreting the Constitution only to the extent that particular clauses of the Constitution were drafted with natural law principles in mind,\textsuperscript{148} or to the


148. See Kelso, supra note 7, at 548 n.49 (discussing a “third, and more modest, natural law approach” which holds “that judges should resort to natural law in interpreting the Constitution only to the extent that particular clauses were drafted with natural law principles in mind”). As phrased by Justice Clarence Thomas during his confirmation hearing, and cited in Terry Eastland, \textit{Clarence Thomas: The Anti-Holmesian Legal Positivist}, 5 BENCHMARK 71, 75 (1993),

My point has been that the Framers . . . [have been] reduced to positive law in the Constitution aspects of life principles that they believe in; for example, liberty. But when it is in the Constitution, it is not a natural right; it is a constitutional right. . . . But to understand what the framers meant . . . it is important to go back and attempt to understand what they believed. . . . You don’t refer to natural law or any other law beyond that document.

\textit{Id.} See also LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 2-3, 7-33 (1991) (discussing Chief Justice John Marshall’s natural law theory of interpretation and distinguishing it from Raoul Berger’s version of formalism (“intentionalism”); from instrumentalism which embraces non-interpretive (“extratextualist”) review; and from versions of natural law that embrace some form of non-interpretive review (Professor Goldstein’s description of “Dworkinism”). For discussion in this article of these other theories, see \textit{infra} notes 300-01 (Berger’s formalism); notes 501-09 (instrumentalism); \textit{supra} notes 145-47 (“non-interpretive” natural law review).

Of course, there can be great disagreement about how much, and what version of, natural law the framers and ratifiers believed. See generally Kelso, supra note 7, at 549 n.50 & 563 n.101. For example, for two very different versions of the natural law tradition of the framing and ratifying period, compare DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989); David A.J. Richards, \textit{Originalism Without Foundations}, 65 N.Y.U. L. REV. 1373, 1393 (1990) (“[T]he Lockean and Madisonian political and constitutional philosophy of the protection of inalienable human rights must be central to the originalist interpretation of the American constitutional enterprise.”) with STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE (1991); Stephen B. Presser, \textit{Should a Supreme Court Justice Apply Natural Law?: Lessons from the Earliest Federal Judges}, 5 BENCHMARK 103, 104 (1993) (“In the Declaration of Independence, of course, natural law was cast in the form of natural rights to life, liberty, and the pursuit of happiness which governments were formed to perfect, pursuant to Locke’s \textit{Second Treatise of Government}. In the hands of the first federal judges, however, natural law was more about circumscribing the actions of government to protect traditional rights of property and person than it was about the creation of expansive new individual rights.”).

Similarly, there can be disagreement about whether the framers and ratifiers’ natural law views
extent a case can be made that the framers and ratifiers themselves intended judges to resort to natural law principles outside the written text of the Constitution to supplement it. Under this approach, where clear constitutional provisions do not reflect a sound natural law position, as in the case of slavery under the United States Constitution before the Thirteenth Amendment, judges should follow the clear meaning of the Constitution until the natural law position is properly added to the document.

were more in the tradition of Enlightenment reasoning and commitment to "rational liberty" or in a natural law tradition based more upon custom, practice, and common-law precedent. See generally H. Jefferson Powell, The Moral Tradition of American Constitutionalism 224-34, 260-67 (1993). Indeed, Justice Story's natural law philosophy has been described as "two-sided: one half modern in the style of Hobbes, Locke, and even Rousseau; the other half classical and Christian, in the tradition of Cicero, Aquinas, Hooker, and Burke. [Story] seems unaware of the basic conflict between natural law and natural rights." James McClellan, Joseph Story's Natural Law Philosophy, 5 BENCHMARK 85, 86 (1993). Further, even within the Enlightenment tradition, there can be arguments about whether the framers and ratifiers were more influenced by the English or Scottish Enlightenment, or whether within 17th and 18th century English political philosophy the framers and ratifiers were influenced more by classic Lockean ideology or the classic Republican ideology of James Harrington. See Kelso, supra note 7, at 549 n.50, and sources cited therein.

For purposes of this article, however, these disagreements do not have to be resolved. All of these natural law traditions operated within the similar methodology of judicial interpretation discussed in Part III of this article, with slight variations. See, e.g., Goldstein, supra, at 78-84 (discussing Chief Justice Marshall and Justice Chase's interpretation theories against the backdrop of writings by Alexander Hamilton, James Wilson, and James Iredell); Presser, supra, at 109-10 (discussing variations between the interpretation styles of Justice Chase and Chief Justice Marshall); James R. Stoner, Common Law and Natural Law, 5 BENCHMARK 93, 96-97 (1993) ("From the great constitutional law opinions of the Marshall Court common law is on the whole absent as natural law, but legal scholars such as Joseph Story and Chancellor James Kent wrote treatises in the ante-bellum years that sought to elaborate a science of American law within a common law frame."). It is this generally shared methodology which is the focus of this article, not substantive conclusions on specific points. For a more complete discussion of the possible differences among these various versions of natural law methodology, see generally R. Randall Kelso, The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall (1994) (manuscript on file with the author).


Virtually all Supreme Court Justices in our constitutional history have rejected the "Platonic Guardian" model of judicial decisionmaking. This is true even for those Justices who have adopted a natural law judicial decisionmaking style. The natural law decisionmaking tradition of our society follows the Marshall Court's approach to the issue of slavery: If the Constitution has clearly adopted an unsound position from the perspective of natural law, it is up to legislative action, constitutional amendment, or the people's reserved right of revolution, to correct the problem. Justices should enforce only the natural law principles intended by the framers and ratifiers to be enforced. Thus, it was no surprise that Justice Ginsburg rejected the "Platonic Guardian" model of decisionmaking when the issue arose.

151. The closest a sitting Justice may have come to such an approach is Justice Chase's opinion in the classic case of Calder v. Bull, 3 U.S. 386 (1798). Even that opinion, however, is perhaps better understood as an example of the natural law approach cited supra note 149, with Justice Chase resorting only to natural law principles he believed the framers and ratifiers intended judges to adopt. See generally Presser, supra note 148, at 104-08. For a listing of state court decisions of the same era which take an approach similar to that of Justice Chase, see Suzanna Sherry, Natural Law in the States, 61 U. CIN. L. REV. 171, 183-96 (1992).

152. On the people's reserved right of revolution, see JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 240 (1690), cited in HUNTINGTON CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 336 (1949) ("Thus Locke argued that government is established by society, and may therefore be disestablished by it. But who is to judge when the government has betrayed its trust to the extent necessary to justify an act of revolution? Locke answers, "the people.").

Though outside the scope of this article, this doctrine of the people's reserved right of revolution may be the best way to understand the Ninth Amendment. The Ninth Amendment states that the people "retain" rights outside the listed Bill of Rights. U.S. CONST. amend. IX. However, the source for the protection for these rights may not be the courts, as it is for the enumerated rights provisions, such as "privileges and immunities," "equal protection," and "liberty" (including aspects of liberty like "the right of privacy" or "the right to die") under the Fourteenth Amendment and the Fifth Amendment Due Process Clause (including its equal protection component). See Bolling v. Sharpe, 347 U.S. 497 (1954). Instead, the Ninth Amendment may best be understood as the textual reflection of the framers and ratifiers' unquestioned belief, a belief which underlay the Declaration of Independence, in Locke's doctrine of the people's reserved right of revolution. On the importance the framers and ratifiers placed on justifying such a right of revolution, see GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 49-64 (1978). For a somewhat similar analysis of the Ninth Amendment, see John Choon Yoo, Our Declaratory Ninth Amendment, 42 EMORY L.J. 967 (1993). For alternative ways of thinking about the Ninth Amendment, see FARBER ET AL., supra note 1, at 499-503 ("Notes on the Ninth Amendment"); Symposium, The Bill of Rights: An Historical Perspective—The Bill of Rights and the Unwritten Constitution, 16 S. ILL. U. L.J. 267-336 (1992); JoEllen Lind, Liberty, Community, and the Ninth Amendment, 54 OHIO ST. L.J. 1259 (1993). See also 1 THE RIGHTS RETAINED BY THE PEOPLE (Randi Barnett ed., 1991); 2 THE RIGHTS RETAINED BY THE PEOPLE (Randi Barnett ed., 1993).

153. On the issue of the dominant natural law approach to constitutional interpretation, see supra notes 148-51 and accompanying text. On the specific issue of slavery and the natural law judicial decisionmaking style, see supra note 150 and accompanying text.
at her confirmation hearing. 154

In addition to being inconsistent with the framers and ratifiers’ approach to judicial decisionmaking, an additional weakness of the “Platonic Guardian” method is that there is no assurance that the Justices on the Supreme Court personally will hold natural law principles that the rest of the legal community thinks are sound. For example, Chief Justice Taney’s opinion in *Dred Scott v. Sanford*4 permitted slave owners to continue to have enforceable rights to their slaves even if they brought their slaves into “free” states. This holding went beyond the compromise on slavery struck in the Constitution, 156 and was an attempt to impose on free states a competing natural law vision to the abolitionist’s anti-slavery, natural law views. Justice Taney’s natural law vision sprung from arguments concerning property rights and the slave as pure property (and in *no* sense a citizen), a position not part of the original constitutional compromise, but held by numerous individuals in both the north and south before the Civil War. 157

Of course, under the traditional natural law model of judicial decisionmaking, if some governmental action is unconstitutional, judges have a duty to so hold, even if other branches may object. As Justice Ginsburg noted during her confirmation hearing, in *Worcester v. Georgia*, the Supreme Court held that Georgia’s anti-Cherokee laws were unconstitutional because the Indian tribes are a “distinct [sovereign] community . . . in which the laws of Georgia can have no force.” This decision was made over the expressed objection of President Andrew Jackson, who “apocryphally” is reported to have

154. See Ginsburg Hearings, supra note 129, at A12 wherein Justice Ginsburg stated: My approach [toward judging] is rooted in the place of the judiciary . . . in our democratic society. The Constitution’s preamble speaks first of ‘we the people’ and then of their elected representatives. The judiciary is third in line. . . . [O]ne of the most sacred duties of a judge is not to read her convictions into the Constitution.


156. See generally HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 180-90 (1982) (“Given these obstacles, the wonder is not that Taney’s opinion was as unpersuasive as it was, but rather that it was not more obviously absurd. . . . To maintain this position, Taney had to shut his eyes to historical experience under the Northwest Ordinance. . . . Taney’s error-ridden dogmatism . . . invited responses in kind.”).

157. See, e.g., *id.* at 190.

As might be expected, most southerners were delighted with the result [in *Dred Scott*], as were their northern racist fellows. . . . America’s leading pseudo-scientific racist of the time, New York physician John H. Van Evrie, later hailed Taney’s words as implying ‘a universal recognition of “slavery” as the natural relation of the races [as] the basis of the common law.’

*Id.* On slave law as treating the slave as a peculiar kind of commodity for property and contract purposes, see MARK TUSHNET, THE AMERICAN LAW OF SLAVERY: 1810-1860 (1981).

158. 31 U.S. (6 Pet.) 515, 561 (1832).
said, "John Marshall made his decision; now let him enforce it." Of course, 
Worcester did not prevent United States regulation of the Indians, and shortly after 
Worcester, President Jackson embarked on a policy that "forced most Cherokees to march on the 'Trail of Tears' to forced relocation in Oklahoma." 

The Worcester case is also a good reminder of the limits of judicial power to influence events in the absence of a willing Congress, President, and/or public to go along. As Alexander Hamilton noted in The Federalist Papers, the federal judiciary lacks ultimate "influence over either the sword or the purse," and thus "may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive even for the efficacy of its judgments."

Because they were immersed in the Anglo-American system of judicial decisionmaking, the framers and ratifiers' views concerning text, purpose, structure, history, and subsequent events were grounded in the grand traditions of the Anglo-American common law system. This approach, which rejects non-interprettive review, favors such principles as reasoned elaboration of the law, fidelity to precedent, deciding cases on narrower grounds where possible, and deciding most cases only after full briefing and argument.

In part, the principle of "reasoned elaboration" includes clearly defined tests that work in practice; coherence and consistency in legal categories; and avoidance of functional balancing tests that are situation-specific and not easily reconcilable with other aspects of legal doctrine, unless contemporaneous sources and subsequent events mandate the use of such tests. These notions

159. See BREST & LEVINSON, supra note 28, at 140.
160. Id.
161. THE FEDERALIST NO. 78 (Alexander Hamilton).
162. See supra text accompanying notes 148-54.
164. See generally Kelso, supra note 7, at 585 n.205. Reasoned elaboration of the law would also include, in some version, commitment to developing the law according to "neutral principles." See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959); Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 COLUM. L. REV. 982 (1978). For a critique of the possibility of developing the law according to neutral principles, see Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral
are implicit in the Payne and Patterson factors, restated in Planned Parenthood v. Casey, concerning when a judge who treats a sequence of precedents as a gloss on meaning, as does a natural law judge, should then find the extra impetus to overrule. These factors include whether the prior decision becomes unworkable in practice; the decision creates a direct obstacle to important objectives in other laws; the decision has been rendered irreconcilable with related doctrines, or its conceptual underpinnings have been removed or weakened by later decisions, later legislative or executive action, or a changed understanding of the facts; and the extent of reliance on preexisting law.

6. Individual Bias

Though no responsible judge consciously allows considerations of individual bias to influence the result or reasoning of particular cases, judges are human beings, and no human being is perfect. Thus, individual bias in decisionmaking occasionally occurs.

With regard to general interpretive bias, a natural law judge is likely to view the Constitution through a natural law lens. Though acknowledging that some provisions of the original Constitution did not reflect a sound natural law position, as in the case of slavery, a natural law judge can be predicted to view more clauses of the Constitution as embodying natural law principles than judges who adopt other interpretive styles. For example, without regard to who is right, it is no surprise that natural law judges tend to hold that the Eighth Amendment's ban against "cruel and unusual punishment" embodies the natural law principle of proportionality of punishment, while formalist judges tend to reject that view.

With regard to specific case bias, one must consult the past experiences and

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165. See supra text accompanying notes 71-75.
168. See Casey, 112 S. Ct. at 2808-16.
169. See supra text accompanying note 150.
170. See Hudson v. McMillian, 112 S. Ct. 995, 997-1002 (1992) (Justices O'Connor, Kennedy, and Souter applying the principle of proportionality). See generally Solem v. Helm, 463 U.S. 277, 284-85 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. . . . The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment . . . ").
idiosyncratic preferences of the individual judge. Thus, no general comments can be made.

7. Summation of the Natural Law Decisionmaking Style

In sum, under a natural law approach, a judge should pay attention to the eighteenth-century and early-to-middle nineteenth-century judicial decisionmaking traditions, which include such principles as reasoned elaboration of the law in light of the law's purposes (its "mischief to be remedied") and history, fidelity to precedent, and fidelity to a considered and consistent legislative or executive practice. To the extent that certain words in our Constitution were chosen to incorporate a natural law concept, those words should be interpreted in light of that concept. Otherwise, words should be given their ordinary, plain meaning.

This natural law approach towards text, purpose, structure, history, and judicial, legislative, and executive practice providing a gloss on meaning is summed up by James Madison in his approach to constitutional interpretation. As noted by Professor O'Brien,

"[A]mong the obvious and just guides applicable to [interpreting] the [Constitution]," Madison listed: "1. The evils and defects for curing which the Constitution was called for & introduced. 2. The comments prevailing at the time it was adopted. 3. The early, deliberate, and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendancies."

A more complete elaboration of this style of interpretation appears in Justice Story's Commentaries on the Constitution of the United States. Building on Madison's insights, Justice Story also discusses the natural law approach towards separation of powers, federalism, and the role of the courts in our democratic system, embracing a sharing of powers, checks and balances approach, the need for a strong federal government, and a view that courts should hold governmental actions unconstitutional if, on balance, the government

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172. See generally supra text accompanying notes 106-71. See also Kelso, supra note 7, at 546-49.

173. This approach thus accepts the limitations on natural law interpretation, discussed supra notes 148-54 and accompanying text, and rejects the "Platonic Guardian" model of judicial interpretation, discussed supra notes 145-47 and accompanying text.


175. See Story, supra note 33, §§ 373-516.
violated the Constitution. He also indicates an abiding faith in the Anglo-American common law system and its preference for clearly defined legal tests, coherence and consistency in legal categories, and deciding cases on narrower grounds where possible. As Professor McClellan has written,

Among the American lawyers and judges of this creative and resourceful era in legal development [the early nineteenth century], Judge Story stands out as possibly the most learned and influential defender of the natural law tradition. To Story it was imperative that American lawyers understand natural law in interpreting and applying the principles of the Constitution and the common law. Being "a philosophy of morals," natural law was to Story the substratum of the legal system, resting "at the foundation of all other laws."

8. Case Examples

a. Cases Concerning Justiciability and the Role of the Court

As stated by Chief Justice Marshall in Marbury v. Madison, "It is emphatically the province and duty of the judicial department to say what the law is." Thus, as stated in Marbury, where governmental action is unconstitutional, "the constitution, and not such ordinary act, must govern the case to which they both apply." This approach rejects the view stated by Professor James Thayer that courts should defer to governmental action unless the unconstitutionality is "so clear that it is not open to rational question." If contemporaneous sources and subsequent events indicate on balance that governmental action is unconstitutional, under a natural law approach the Court should so find.

Regarding questions of justiciability, the natural law approach starts from the natural law premise that where there is a wrong, there must be a remedy. As stated in Marbury, and cited in Lujan v. Defenders of Wildlife, "[t]he very essence of civil liberty certainly consists in the right of every individual to

176. Id. §§ 306-96, 517-43.
178. MCCCLELLAN, supra note 177, at 65. For similar discussion of Chief Justice John Marshall’s style of constitutional interpretation, see GOLDSTEIN, supra note 148, at 7-33.
179. 5 U.S. (1 Cranch) 137, 177 (1803).
180. Id. at 178.
181. Thayer, supra note 50, at 144.
claim the protection of the laws, whenever he receives an injury." As Chief Justice Marshall continued in *Marbury*, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 183

On the other hand, as noted in *Marbury*:

[Certain] subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. . . . Where the heads of departments . . . act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. 184

This insight provides the inspiration for modern political questions doctrine and is consistent with the emphasis in *Baker v. Carr*, 185 on whether there exists "a textually demonstrable constitutional commitment of the issue to a coordinate political department," an "initial policy determination of a kind clearly for nonjudicial discretion," or a judicial decision would involve a "lack of the respect due coordinate branches of government." Similarly, the natural law concerns with clearly defined tests and coherence and consistency in the law are consistent with the *Baker* concerns of whether a "lack of judicially discoverable and manageable standards" or "the potentiality of embarrassment from multifarious pronouncements by various departments" make an issue a political question. 186

Of course, as indicated by the example of slavery before the Thirteenth Amendment, natural law judges must be sensitive to the fact that not every natural law principle has been incorporated into the Constitution. Article III's "case or controversy" requirement 187 and congressional control over federal court jurisdiction 188 represent textual limitations on the natural law principle that where there is a wrong, there should be a remedy. In addition, traditional common-law notions of "equitable discretion" might limit the relief granted in

183. 5 U.S. (1 Cranch) at 163.
184. Id. at 166.
186. Id.
188. Id. at 36-44.
some cases.\textsuperscript{189}  

However, because of the principle that where there is a wrong, there should be a remedy, natural law judges would be receptive to arguments concerning Congress' ability to provide for judicial remedies and for finding that Article III's "case or controversy" requirement has been met. The natural law preference for clearly defined tests would suggest that any definition of injury and causation to satisfy the "case or controversy" requirement should be as clearly defined as possible. As Justices Kennedy and Souter stated in \textit{Lujan v. Defenders of Wildlife},

Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before... In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.\textsuperscript{190}

b. Cases Concerning Governmental Structure

Cases concerning governmental structure are of two kinds: separation of powers cases and federalism cases. With regard to separation of powers, it is clear that the eighteenth-century natural law political philosophy of Blackstone, Montesquieu, Madison, and John Adams, which formed the basis for the framers and ratifiers' understanding of separation of powers, rejected a strict separation of powers approach and embraced a sharing of powers, checks and balances approach.\textsuperscript{191} As Justice Story stated in 1833,

\begin{quote}
[W]hen we speak of a separation of the three great departments of government[,]... [i]t is not meant to affirm that they must be kept wholly and entirely separate and distinct... [T]he powers belonging to one department ought not to be directly and completely administered by either of the other departments; and, as a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers. ... [But] it will be found, that [preventing tyranny] can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the
\end{quote}

\textsuperscript{189} See, e.g., FARBER ET AL., \textit{supra} note 1, at 1058-59 ("Although the D.C. Circuit allows members of Congress to bring suit alleging structural constitutional violations, it rarely gives them relief, under the doctrine of 'equitable discretion,' first suggested by the late Judge Carl McGowan, in \textit{Congressmen in Court: The New Plaintiffs}, 15 GA. L. REV. 241 (1981)."").

\textsuperscript{190} 112 S. Ct. 2130, 2146-47 (1992) (Kennedy, J., joined by Souter, J., concurring).

\textsuperscript{191} See generally Kelso, \textit{supra} note 7, at 564-72.
others, while the separate existence and constitutional independence of each are fully provided for.  

The Supreme Court has acknowledged this "sharing of powers" view was that of the framers. As stated in Mistretta v. United States, 193

Accordingly, we have recognized, as Madison admonished at the founding, that while our Constitution mandates that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others," the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.

The Court continued,

In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch. 194

With regard to issues of federalism, the eighteenth-century natural law approach adopted a balanced approach towards federal versus state power, which nonetheless acknowledged the need for a strong federal government. Among the framers and ratifiers of the Constitution, there were some, like Alexander Hamilton, who pushed for a very strong federal government. 195 Others, like James Madison, recognized the need for a strong federal government, but preferred a balanced approach with due consideration for states' rights. 196

The Tenth Amendment, which reserves to the states respectively, or the

192. Story, supra note 33, §§ 525, 540.
194. Id. at 381. See also Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 487 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O’Connor, J., concurring) (“This is not to say that each of the three Branches must be entirely separate and distinct, for that is not the governmental structure of checks and balances established by the Framers.”).
196. See generally Braveman et al., supra note 195, at 249-50; Brest & Levinson, supra note 28, at 1-5, 9-14; Farber & Sherry, supra note 195, at 34-36.
people, powers not delegated to the federal government, is reflective of the framers and ratifiers' compromise on this issue. This compromise clearly anticipates a strong role for the federal government. As noted in *McCulloch v. Maryland*, the Tenth Amendment does not include the language from the Articles of Confederation requiring that powers be "expressly delegated" to the federal government. Thus, the framers and ratifiers understood that our federal government could draw on both express and implied powers.

The difference between Hamilton's and Madison's position on federalism is reflected in the differences between the Marshall Court (1803-1835), which reflected Hamilton's position, and the Taney Court (1835-1864), which reflected Madison's greater emphasis on states' rights. Both courts, however, affirmed a strong role for the federal government.

One can see this same tension between Hamilton's and Madison's positions in recent decisions interpreting the Tenth Amendment.
Cities v. Usery, which provided states some minimal Tenth Amendment protection from federal regulation, reflects Madison's position. Garcia v. San Antonio Metropolitan Transit Authority, with Justice Blackmun providing the crucial fifth vote to overrule National League of Cities on the Patterson ground that the National League of Cities doctrine had proved unworkable in practice, reflects Hamilton's position.

Justice O'Connor's synthesis of these two cases in New York v. United States reflects an attempt to balance these two competing visions, both of which anticipate, to slightly differing extents, a strong federal government. Of course, under a natural law approach, this modern synthesis must take into account the gloss of meaning to the Tenth Amendment produced by legislative and executive practice of a strong federal government from the Civil War, to the New Deal, to the Great Society, and the reasoned elaboration of judicial precedents interpreting the breadth of the Tenth Amendment in light of this practice. Justice O'Connor's opinion in New York v. United States seems crafted with such considerations in mind.

203. 426 U.S. 833 (1976). Under the National League of Cities test, states were deemed immune from federal regulation under the Commerce Clause where the federal statute at issue: (1) regulates states as states; (2) over matters that are "indisputably 'attribute[s] of state sovereignty'"; (3) in a way that directly impairs the ability of states "to structure integral operations in areas of traditional governmental functions"; and (4) the relation of state and federal interests does not justify state submission. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 & n.29 (1981) (quoting National League, 426 U.S. at 845, 852-54).

204. 469 U.S. 528 (1985).

205. Id. at 537-547, 556-57 (Justice Blackmun explaining why the National League of Cities doctrine proved "unworkable in practice" and why, despite his crucial fifth vote in his separate concurrence in National League of Cities, he now concluded that National League of Cities should be overruled).


208. See generally HALL, supra note 207, at 226-46, 309-32.

209. See 112 S. Ct. at 2417-25 (discussing a wide range of federalism issues including references to Hamilton's views in The Federalist Papers and Justice Story's views in his Commentaries on the Constitution of the United States). The Court also explained that the "enormous changes in the nature of government" over the past two centuries, with the federal government today taking on activities "unimaginable to the Framers," are nonetheless constitutional because "the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." Id. Finally, the Court recognizes its own jurisprudence with regard to the Tenth Amendment which "has traveled an unsteady path" while acknowledging "[t]he Court's broad construction of Congress' power under the Commerce and Spending Clauses." Id. at 2419. For commentary on Justice O'Connor's opinion which suggests that implicit in her reasoning is more of a states rights' orientation, see H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 VA. L. REV. 633 (1993). See also Richard E. Levy, New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power, 41 U. KAN. L. REV. 493 (1993).
John Locke's theory in *Two Treatises on Government*\(^{210}\) that the basic purpose of government is to protect an individual's life, liberty and property, and Adam Smith's theory in *The Wealth of Nations*\(^{211}\) on the benefits of a competitive marketplace, greatly influenced American thought on economic matters in the late eighteenth and early nineteenth century.\(^{212}\) The balkanization of commerce and the destructive protectionist tariff policy between states that occurred under the Articles of Confederation (1781-1789)\(^{213}\) also convinced the framers and ratifiers of the need for stronger central governmental control over commerce and the free movement of goods between states.\(^{214}\)

These premises greatly influenced the Supreme Court in deciding cases involving economic rights. Under the Commerce Clause, the Supreme Court decided in *Gibbons v. Ogden* that the federal government could regulate any commerce that "concerns more states than one."\(^{215}\) Only commerce which is "completely within a particular state, which do[es] not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government" was appropriately left for exclusive state regulation.\(^{216}\) This strong role for the federal government over commerce survived even the Taney Court's slightly more states' rights-oriented focus.\(^{217}\)

The Contract Clause provides in part that no state may impair "the

\(^{210}\) John Locke, *Two Treatises on Government* (1690).

\(^{211}\) Adam Smith, *The Wealth of Nations* (1776).

\(^{212}\) See Kelso, supra note 7, at 552-54 & nn.54-59.

\(^{213}\) Farber & Sherry, supra note 195, at 24-25 ("Trade suffered under both foreign and domestic restrictions . . . Congress had no power to regulate foreign or interstate commerce, so commercial treaties between foreign countries and the Confederation were of little value . . . Domestic relations were little better. Many states engaged in commercial discrimination against their neighbors.").

\(^{214}\) Id. at 25-26.

All these economic woes, due primarily to the weakness of the national government, created a growing impetus for change. . . . In January of 1786, the Virginia legislature . . . called for a national convention [of] [d]elegates from [all] states to "consider how far a uniform system in their commercial regulations may be necessary for their common interest and permanent harmony."

Id.

\(^{215}\) 22 U.S. (9 Wheat.) 1, 194 (1824).

\(^{216}\) Id. at 195.

\(^{217}\) See, e.g., Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 318-19 (1851). See Nowak & Rotunda, supra note 187, at 140-41. "The Court under the leadership of Chief Justice Taney was more lenient in reviewing state legislation than the Marshall Court, but the Court made no attempt to restrain federal commercial powers . . . Taney seemed ready to defer to federal as well as state legislative judgments." Id. (citations omitted).
Obligation of Contracts." The clause was added to the Constitution to prevent states, through legislation, from altering individuals' contractual rights. This occurred under the Articles of Confederation when some "states enacted debtor relief laws, which modified contractual obligations or the procedures available to creditors for enforcing the obligations (for example, by staying proceedings to foreclose mortgages)," particularly for debts created during the Revolutionary War. Based on John Locke's theory of property rights, and the view that vested rights under contract are a form of property, the Supreme Court gave broad interpretation to the Contract Clause during the first half of the nineteenth century.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The Takings Clause was not made applicable to the states through the Fourteenth Amendment's Due Process Clause until 1897. Before the Civil War, it was typically states, through eminent domain proceedings, not the federal government, that took private property for public use (typically to build roads, bridges, canals, or railroads). Thus, there are virtually no Supreme Court cases developing the Takings Clause during the natural law period.

Various state constitutions, however, did have similar takings clauses, and these were interpreted by state supreme courts. Typically, these decisions followed the prevalent natural law theory of the age, that government could take property for public use as long as compensation was provided. Because eminent domain cases involve a clear taking of property, analysis in these cases was relatively straightforward. The state courts of this period did not have to face the more difficult question, more prevalent today, of the extent to which a governmental regulation which limits an individual's use of property, without

218. U.S. Const. art. I, § 10, cl. 1 provides, in pertinent part, "No State shall . . . pass any . . . law impairing the Obligation of Contracts."

219. E.g., NOWAK & ROTUNDA, supra note 187, at 395.

220. BREST & LEVINSON, supra note 28, at 102.


222. U.S. Const. amend. V.


224. See generally HALL, supra note 207, at 99-100; TRIBE, supra note 199, at 588 n.2.

225. See NOWAK & ROTUNDA, supra note 187, at 424-25 ("The natural law philosophy that so greatly affected the development of American political and legal thought also had an impact on the law of eminent domain. . . . In the first half of the nineteenth century state courts applied this theory of natural law to protect private property interests from state appropriations." (citations omitted)); NICHOLS ON EMINENT DOMAIN § 1.14(1) (1993).
physically taking the property, can constitute a taking.\textsuperscript{226}

Finally, with regard to general commercial law, in \textit{Swift v. Tyson},\textsuperscript{227} the federal courts of the pre-Civil War period federalized the subject of commercial law by holding that in diversity cases the federal courts should decide commercial litigation by reference to "general principles and doctrines of commercial jurisprudence" as developed in the federal courts, rather than deferring to "decisions of the [state] tribunals."\textsuperscript{228} These general principles of commercial law were based on the "law of nations" and "the law merchant," which were grounded in natural law.\textsuperscript{229}

The modern natural law reflection of this early nineteenth-century approach to economic rights must take into account, of course, the gloss on meaning represented by over a century of legislative, executive, and judicial practice.\textsuperscript{230} As discussed later,\textsuperscript{231} judicial decisions during the formalist era strongly protected economic rights through the \textit{Lochner} era's formalist analysis of "liberty of contract." However, legislative and executive practice since the Civil War (and particularly since the Progressive Era of the 1910s),\textsuperscript{232} and legislative, executive, and judicial practice since 1937, during the Holmesian and instrumentalist eras,\textsuperscript{233} have downplayed individual economic rights in favor of broad discretion granted to the government for regulation of the economy. Furthermore, the formalist analysis in \textit{Lochner} is likely inconsistent with the purposes of the Fourteenth Amendment,\textsuperscript{234} and thus is likely inconsistent with a natural law analysis.\textsuperscript{235}

Despite the recent posture of deference to the government in matters of regulation of the economy, a few recent decisions by the Supreme Court increasing protection for economic rights are consistent with the natural law

\textsuperscript{226} See generally NOWAK & ROTUNDA, supra note 187, at 431-45 (discussing various kinds of property use regulations and their relationship to the Takings Clause).

\textsuperscript{227} 41 U.S. (16 Pet.) 1 (1842).

\textsuperscript{228} Id. at 19.

\textsuperscript{229} See generally LEON TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 28 (1983); FARBER & SHERRY, supra note 195, at 260-61. For further discussion of this point, see infra note 449 and accompanying text.

\textsuperscript{230} For discussion of natural law use of continued and consistent legislative, executive, and judicial practice as a gloss on meaning, see supra text accompanying notes 73-79, 136-44.

\textsuperscript{231} See infra text accompanying notes 326-30.

\textsuperscript{232} See generally HALL, supra note 207, at 189-210, 267-85.

\textsuperscript{233} See generally id. at 286-332. See also infra text accompanying notes 426-39, 559-70.

\textsuperscript{234} See infra text accompanying note 333.

\textsuperscript{235} See generally Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-12 (1992) (Justices O'Connor, Kennedy, and Souter agreeing that overruling \textit{Lochner} was proper, despite the judicial precedents of the formalist era, in light of subsequent legislative and executive practice and the \textit{Payne} and \textit{Patterson} factors for when a case should be overruled).
approach to economic rights during the 1789-1872 natural law period. For example, under the Contract Clause, the Supreme Court held recently that while the government is usually entitled to deference under a minimum rationality standard of review, where the government’s action constitutes a substantial infringement on contract rights of the state’s own contracts, or those of a narrow range of contract actors, the state must satisfy a slightly more rigorous standard of review.

Similarly, the Court recently showed willingness to reexamine some aspects of Takings Clause jurisprudence. Rejecting a formalist approach, however, a natural law approach would be sensitive to legislative, executive, and judicial practice regarding governmental regulation since 1872, which would reveal an evolution in thought about aspects of proper governmental regulation.

As discussed below, the *Swift v. Tyson* approach towards a general federal commercial law was inconsistent with a Holmesian approach to law and was overruled in *Erie R.R. Co. v. Tompkins*. However, the uniformity in commercial law promoted by *Swift v. Tyson* has been achieved today through passage of the Uniform Commercial Code, virtually unamended, in all states. Uniform principles of commercial law for international transactions are promoted through various international commercial treaties and United

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239. See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2903 (1992) (Kennedy, J., concurring) (“The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law.”); id. at 2926 (Souter, J., statement) (questioning a “categorically compensable,” that is, formalist, approach to Takings Clause jurisprudence).
240. 304 U.S. 64 (1938). See infra text accompanying notes 443-49.
241. See generally 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 1-6 (3d ed. 1988).
Nations initiatives and agreements. For this reason, there is little need today for general commercial law principles to be developed by the Supreme Court. However, there are a few areas left where economic principles have been left to the courts to develop in common law fashion, even if based on general statutory authority. These "federal common law" areas today include antitrust law, section 301 of the Labor Management Relations Act, and admiralty law.

On the general question of the federal government’s power over commerce, the traditional natural law approach in Gibbons v. Ogden agrees with the Holmesian and instrumentalist approaches that broad federal authority exists to regulate commerce. Indeed, the Holmesian and instrumentalist approaches are perhaps even more willing to grant power to the federal government than the traditional natural law approach of the Marshall Court in Gibbons. Thus, twentieth-century judicial practice, as well as the legislative and executive practice of the New Deal and the Great Society, amplify the Marshall Court’s approach towards strong federal governmental power.

The traditional natural law approach regarding dormant Commerce Clause analysis is likewise amplified by the Holmesian and instrumentalist approaches. This approach involves balancing state interests against the purposes behind the Commerce Clause of a commitment to interstate commerce and rejection of protectionist legislation.

246. See infra text accompanying notes 418-39, 559-70.
247. See infra text accompanying notes 426-29, 560.
248. On twentieth-century judicial, legislative, and executive practice regarding the role of the federal government, see supra text accompanying notes 207-09. On the impact of such practice on the natural law judicial decisionmaking style, see supra text accompanying notes 136-43.
249. See infra text accompanying notes 440-42, 571-72.
d. Cases Concerning Civil Rights and Civil Liberties

A natural law approach would interpret civil rights in the initial Constitution and its amendments, such as the Bill of Rights, in light of their text, their purpose, the history behind the provision and the general concepts embedded in the rights included therein, and judicial, legislative, and executive gloss on meaning.251

For example, a natural law judge would elaborate the general concept of free speech against a background of first amendment precedents. This would likely counsel a judge to hold in Texas v. Johnson,252 that a statute which bans the burning of an American flag is an unconstitutional content-based regulation,253 even if that decision went against the basic emotions of the judge. As Justice Kennedy stated in Johnson, "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."254

Similarly, a natural law judge would likely elaborate the concept of freedom of speech to treat all persons covered equally, whether a corporation or an individual. As Justice Kennedy stated in Austin v. Michigan Chamber of Commerce,255

It is an unhappy paradox that this Court, which has the role of protecting speech and of barring censorship from all aspects of political life, now becomes itself the censor. ... [T]he Court reveals a lack of concern for speech rights [of corporations] that have the full protection of the First Amendment.

Regarding the issue of official organized prayer in public schools, a natural law approach would elaborate the concept of separation of church and state embedded by the framers and ratifiers in the First Amendment, as amended by precedent and subsequent legislative and executive practice. This elaboration would be concerned with whether prayer at a high school graduation constitutes

251. See supra text accompanying notes 106-78 on the natural law judicial decisionmaking style. For discussion of natural law background to the Bill of Rights and the Fourteenth Amendment, see FARBER & SHERRY, supra note 195, at 219-73.
253. Id. at 412-14.
254. Id. at 420-21 (Kennedy, J., concurring).
See infra text accompanying note 347 for why a formalist would join Kennedy's opinion in Austin.
a government endorsement of religion or is coercive.\textsuperscript{256} As stated in \textit{Lee v. Weisman}, "[T]he lesson of history that was and is the inspiration for the Establishment Clause, [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."\textsuperscript{257}

Regarding the right of privacy and abortion, a natural law approach would consider the framers and ratifiers' general concept of liberty, as developed through reasoned elaboration of the law, the \textit{Payne} and \textit{Patterson} factors for overruling precedents, and other natural law principles of interpretation. The joint opinion of Justices O'Connor, Kennedy, and Souter in \textit{Planned Parenthood v. Casey} adopts exactly this approach.\textsuperscript{258}

Regarding the general concept of liberty in the Fourteenth Amendment, as elaborated by precedent, the joint opinion noted,

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Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.\textsuperscript{259}
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This quote is reminiscent of Justice Harlan's dissent in \textit{Poe v. Ullman},\textsuperscript{260} where he noted that liberty is "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly sensitive scrutiny of the state needs asserted to justify their abridgement."

Regarding the \textit{Payne} and \textit{Patterson} factors, the joint opinion canvassed each

\begin{itemize}
\item \textsuperscript{256} As for whether such an elaboration requires a mere endorsement of religion before the governmental act is unconstitutional, or something more akin to coercion, compare \textit{Lee v. Weisman}, 112 S. Ct. 2649, 2667-76 (1992) (Souter, J., joined by Stevens & O'Connor, JJ., concurring) (endorsement only required) with \textit{id.} at 2655 (Kennedy, J., opinion) (coercion present in the facts of the case). For discussion of the interplay between the framers and ratifiers' intent in this area and subsequent judicial precedent, see \textit{id.} at 2673-76 (Souter, J., joined by Stevens & O'Connor, JJ., concurring).
\item \textsuperscript{257} 112 S. Ct. 2649, 2658 (1992) (Kennedy, J., opinion).
\item \textsuperscript{258} \textit{Planned Parenthood v. Casey}, 112 S. Ct. 2791 (1992).
\item \textsuperscript{259} \textit{id.} at 2807.
\item \textsuperscript{260} 367 U.S. 497, 543 (1961).
\end{itemize}
factor—unworkability in practice; extent of reliance; coherence, consistency, and reconcilability with related doctrines; and whether a changed perception of the facts mandate a different result—and concluded that none of these factors supported overruling *Roe v. Wade.*

The Court gave two reasons in *Casey* for drawing the line protecting a woman’s liberty at viability: precedent and justifiable line-drawing. The Court noted that “no line other than viability is more workable” and “there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection.” Using the terminology of judicial decisionmaking styles adopted in this Article, with a co-author I had characterized this position in an earlier article as “perhaps styled natural rights.”

Regarding how to balance these arguments against formalist and Holmesian concerns that no clear constitutional text or history supports a right of privacy, and the limited role of courts in our democratic system, the

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261. 112 S. Ct. at 2809-12. This approach is also reminiscent of Justice Harlan’s respect for, and deference to, precedent. See generally BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 375-76 (1993) stating,

The other group of Justices [Justices O’Connor, Kennedy, and Souter] is more moderate and seems to have taken as their model the second Justice Harlan . . . . “Respect for the Courts,” Harlan once wrote to another Justice, “is not something that can be achieved by fiat.” . . . The true conservative, Harlan believed, adhered to stare decisis, normally following even precedents against which he had originally voted.

Id. (citation omitted). For discussion about Justice Harlan striving to embody the basic principles of the traditional Anglo-American legal system, including the principles of reasoned elaboration of the law around the concept of neutral principles, see Greenawalt, supra note 164, at 984 (“[N]o modern Justice had strived harder or more successfully than Justice Harlan to perform his responsibilities in the manner suggested by [Wechsler’s neutral principles model].”).

262. 112 S. Ct. at 2809-12.

263. Id. at 2817.


265. See *Casey,* 112 S. Ct. at 2874 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., concurring in the judgment in part & dissenting in part).

266. Id. at 2875-76, 2882-85. On the Court’s proper role generally, see infra text accompanying notes 284-85, 294-301 (formalist view); 379-81, 400-02 (Holmesian view). See also Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting). In his dissent, Justice White stated,

The Judiciary . . . . is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. . . . Whenever the Judiciary does so, it unavoindably pre-empt for itself another part of the governance of the country without express constitutional authority.

Id.
joint opinion appealed to "the same capacity which by tradition courts have always exercised: reasoned judgment. . . . That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office."  

This natural law approach also rejects an instrumentalist approach to liberty which would be willing to use leeways in the law of the right of privacy to constitutionalize various collateral decisions regarding abortion regulation. As Justice Ginsburg stated during her confirmation hearing, our system of government does not contemplate a "tripartite" structure of government, with courts being equal participants with the legislative and executive branches in making policy decisions. However, courts do have a role to play ensuring that rights embedded in the Constitution, as elaborated by subsequent legislative, executive, and judicial practice, are not unduly burdened. As the joint opinion noted in *Casey*,

As our jurisprudence relating to all liberties . . . has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. . . . [But] where state regulation imposes an undue burden on a woman's ability to make this decision . . . the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause.

On the broader question of how to define "liberty" generally, the joint opinion in *Casey* explicitly rejected the formalist approach to liberty which would limit liberty to specific provisions of the Bill of Rights, or specific traditions of our history. As the joint opinion noted,

It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty [of the Fourteenth Amendment] encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution. But of course this Court has never accepted that view. It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against

267. 112 S. Ct. at 2806 (joint opinion of O'Connor, Kennedy, & Souter, JJ.).
268. See infra text accompanying notes 585-89.
269. See Ginsburg Hearings, supra note 129, at A12 ("My approach [toward judging] is rooted in the place of the judiciary . . . in our democratic society. The Constitution's preamble speaks first of 'we the people' and then of their elected representatives. The judiciary is third in line.").
270. 112 S. Ct. at 2818-21.
271. See infra text accompanying notes 294-99, 349-52.
government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. 272

With respect to the Equal Protection Clause, the natural law approach would consider the concept of equality embedded in the Equal Protection Clause, its reasoned elaboration in judicial precedents, and preference for coherence and consistency in the law. To the extent that the concept embedded in the Equal Protection Clause is one of legal equality of opportunity, not equality of results, 273 this might suggest that the same standard should be applied to classifications which discriminate against racial minorities (so-called "invidious discrimination") and those which discriminate in favor of racial minorities (so-called "benign discrimination" or "affirmative action"). 274 However, such an approach would be willing to consider arguments that a particular race-conscious remedial scheme was necessary to advance a compelling state interest, and would not be tied to a formalist strict "color-blind" view. 275

With regard to applying the Equal Protection Clause on bases other than race, a natural law judge would interpret the concept of equality against the backdrop of text, purpose, structure, history, and subsequent events. This would involve, in part, asking whether the framers and ratifiers' commitment to legal equality was based in part on the natural law principle that persons should not be punished for things over which they have no control (for example, immutable characteristics such as race), and the natural law concern with reason (and thus rejection of irrational stereotypes). 276 Justice Ginsburg’s successful

272. 112 S. Ct. at 2804-05 (citations omitted).
273. See FARBER & SHERRY, supra note 195, at 268 ("What the Republicans meant by equality was legal equality.").
275. Compare Bakke, 438 U.S. at 311-12 (Powell, J.) (attainment of a diverse student body a compelling state interest); Croson, 488 U.S. at 500 (O'Connor, J.) ("strong basis in evidence" showing discrimination can provide a basis for the conclusion that a race-conscious remedy is "necessary") with id. at 521 (Scalia, J., concurring) (arguing that absent "a social emergency rising to the level of imminent danger to life and limb . . . 'our [c]onstitution is color-blind'" (citations omitted)).
276. These two principles are fundamental parts of most post- enlightenment natural law schemes because they are directly related to the enlightment's concept of moral behavior being the result of reason, or more precisely, "rational choice." The "choice" component of this understanding supports not imposing punishments for things over which people have no choice, such as immutable characteristics. The "rational" component supports the view that moral decisions are the product of reason, not irrational stereotyping or prejudice. For more detailed elaboration of the concept of reason and rational choice, see supra note 135 and sources cited therein. See also Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) ("[T]he basic concept of our system [is] that legal
crusade to expand the Equal Protection Clause to provide heightened scrutiny in gender discrimination cases is consistent with this view.\textsuperscript{277} The same principle supports the heightened scrutiny now given to classifications based upon the illegitimacy of a child.\textsuperscript{278} To the extent that such arguments regarding gender being an immutable characteristic and the basis for stereotypical generalizations can be applied to sexual orientation, this would likewise suggest heightened scrutiny under a natural law approach.\textsuperscript{279}

burdens should bear some relationship to individual responsibility."); \textit{POWELL, supra} note 148, at 225 ("[T]he [enlightenment] liberal concept of rational liberty is based on a quite specific understanding of human nature as constituted by 'basic deliberative capacities' and by the potential for 'some measure of self-direction.' On that basis, liberalism pursues 'the preservation and enhancement of human capacities for understanding and reflective self-direction' as 'the core of the liberal political and moral vision.'" (citations omitted)).

\textsuperscript{277} See, e.g., Craig v. Boren, 429 U.S. 190, 198-99 (1976) (concluding that "'[a]rchaic and overbroad' generalizations . . . [and] increasingly outdated misconceptions concerning the role of females in the home" cannot be used to support gender discrimination in statutes) (citation omitted); Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . . [O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes . . . . Moreover . . . sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.").

\textsuperscript{278} See, e.g., Clark v. Jeter, 486 U.S. 456 (1988). This is true despite the fact that concerns about illegitimacy, like concerns about women, were not part of the specific intent of the framers and ratifiers of the Fourteenth Amendment. However, illegitimate children are not responsible for their status, and a clear historical record exists of irrational stereotyping. See \textit{FARBER ET AL., supra} note 1, at 365-66 ("In essence, the[se] decisions are based on the premises that persons born outside of marriage have suffered from irrational societal prejudice that imposes burdens upon them bearing no relation to their own responsibility or wrongdoing.").


A similar argument can perhaps be made with regard to the mentally and physically disabled. \textit{See TRIBE, supra} note 199, at 1594-98, 1600 n.30. The Supreme Court has addressed the question of heightened review for statutes dealing with the mentally disabled in two recent cases. See Heller v. Doe, 113 S. Ct. 2637 (1993); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). In both of these cases, the Court failed to resolve clearly whether only minimum rationality review, or some higher standard of review, such as "second-order" rational review or intermediate scrutiny, should be applied. In \textit{Cleburne}, though the Court purported to be applying only minimum rationality review, in fact the review seemed to be a more searching inquiry on the order of "second-order" rational review. \textit{See Kelso, supra} note 237, at 499-500, 593-94. In \textit{Heller}, the Court majority dodged the issue by noting that the case had been tried below on a minimum rationality review standard, and thus "[e]ven if respondents were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here." 113 S. Ct. at 2642.

Nevertheless, an instrumentalist and natural law majority may now be on the Court to apply at least the "second-order" rational review approach adopted \textit{sub silentio} in \textit{Cleburne}. Justice Souter's dissent in \textit{Heller} applied the \textit{Cleburne} standard, and he was joined by Justices Blackmun, Stevens, and O'Connor. \textit{Id.} at 2650-52. With the addition of Justice Ginsburg to the Court, the approach of the \textit{Heller} dissent may now represent the majority approach of the Court. And, when properly presented, perhaps Justice Kennedy, the author of the majority opinion in \textit{Heller, id.} at 2640, would join Justices Souter and O'Connor in applying something more than minimum
The same approach to general concepts embedded in the Constitution would likely support a "substantive neutrality" approach over a "formal neutrality" approach regarding governmental legislation under the Free Exercise Clause. As Justice Souter noted in Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 280 "If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality." This approach may be the wave of the future, with Justice Scalia's more formalist approach in Employment Division v. Smith 281 likely to be overruled. 282

IV. THE THREE REMAINING JUDICIAL DECISIONMAKING STYLES: FORMALISM, HOLMESIAN, AND INSTRUMENTALISM

A. The Formalist Approach: 1872-1937

1. General Interpretive Principles

In its purest form, the formalist decisionmaking style views the judge's role as the logical, mechanical restatement of the meaning placed into the Constitution by the framers and ratifiers. 283 Being a positivist theory of law,

rationality review to statutes affecting the mentally or physically impaired. Of course, fewer constitutional cases on this topic are likely to come before the Court in the future because of the passage of statutes like the Americans with Disabilities Act, which provides disabled Americans with some protections which are greater than the Equal Protection Clause would grant even under some heightened form of scrutiny. See generally IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS (Lawrence O. Gostin & Henry A. Berger eds., 1993).

280. 113 S. Ct. 2217, 2242 (1993) (Souter, J., concurring in part and concurring in the judgment).
282. I make this prediction because of Justice Souter's concurrence in Hialeah, 113 S. Ct. 2217, 2240-50 (Souter, J., concurring), where Justice Souter indicated a willingness to reconsider the holding in Smith. Justice O'Connor and Blackmun, who dissented in Smith, also registered in Hialeah their continuing disagreement with the holding of Smith. See id. at 2250 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). If Justice Ginsburg were to take an anti-Smith position as well, this would mean only one additional vote would be necessary to overrule Smith. Further, even in Hialeah, Justice Scalia, the author of Smith, felt a need to file a concurrence to Justice Kennedy's majority opinion in which he indicated that "I would draw a line somewhat different from the Court's." Id. at 2239 (Scalia, J., joined by Rehnquist, C.J., concurring in part and concurring in the judgment). This disagreement among those Justices in the Smith majority also suggests a weakness in the Smith rationale.
283. See generally Kelso, supra note 7, at 533-38 (discussing generally the formalist style of judicial decisionmaking). See also BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 143-45, 147-50 (1994); Frederick
the formalist sees the judge as a scientist who attempts to decide cases in light of existing positive law. Being an analytic, positivist theory of law, formalism has a preference for clear, bright-line rules which are capable of formal, mechanical application.

On the question of literal meaning versus purpose in interpreting constitutional provisions, formalists emphasize the literal, plain meaning of the words. Formalists are concerned that attempting to determine a provision's purpose, or purposes, is not a clear, mechanical process that can yield unambiguous results.

The same concern with ambiguous results leads formalists to minimize arguments of context vis-a-vis the literal meaning of the specific words under review, unless some argument of context yields clear, determinate insights, and the literal meaning produces an absurd or outrageous result. This preference for clear, bright-line rules also leads formalists to adopt a strict separation of powers approach towards separation of powers issues, and to propose clear, bright-lines for areas of federal versus state power.

With regard to history, the formalist approach is similarly concerned about

Schauer, Formalism, 97 YALE L.J. 509 (1988). Consistent with common usage, the term "formalism" is used in this article to describe only analytic positivist approaches to law, as distinct from the analytic, normative approaches of the natural law and natural rights tradition. Thus, this article does not follow Professor Ernest Weinrib's broader use of the term "formalism" which includes aspects of the natural law tradition. See Symposium on Legal Formalism, 16 HARV. J.L. & PUB. POL'Y 579-699 (1993). For further discussion distinguishing formalism from natural law approaches to judicial decisionmaking, see generally Kelso, supra note 7, at 533-38, 546-54. For further discussion of the specific point made here regarding not adopting Professor Weinrib's use of the term formalism, see id. at 547 n.44. For discussion of the fact that each of the four decisionmaking styles described in this article necessarily represent "ideal types," and not the exact decisionmaking style of any judge, see supra note 10.

284. See generally Kelso, supra note 7, at 533-38.
287. See, e.g., Schauer, supra note 283, at 532-34.
288. Id. at 544-48 (discussing a "presumptive formalism" where factors outside the "literal" rule can affect interpretation if "predictability, stability, and decisionmaker restraint" are not decreased too much and literalism would lead to "especially outrageous" results). See also Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 CARDOZO L. REV. 1597, 1615-18 (1991).
289. See infra text accompanying notes 313-17.
290. See infra text accompanying notes 318-25.
the possible ambiguity represented by a broad-based approach to historical investigation. Thus, when using history, the formalist typically searches for the specific historical views held by the framers and ratifiers on specific issues. As a result, the formalist approach rejects the natural law dynamic of reasoned elaboration of constitutional concepts and thus is more tied to specific views which may be the product of unthinking adherence to tradition, idiosyncratic preferences, or prejudice.

Because the formalist style views the judge's role as the logical, mechanical restatement of the meaning placed into the Constitution by the framers and ratifiers, theoretically the formalist style should focus exclusively on contemporaneous sources. Only such sources, not subsequent events or non-interpretive considerations, are directly related to the meaning placed into the Constitution by the framers and ratifiers. Nevertheless, in practice, most formalists make one exception. Most formalists will allow a continued and consistent legislative or executive practice which indicates a clear tradition on a specific issue to provide some gloss on meaning.

For example, even Justice Scalia, the most formalist Justice on the current Supreme Court, will allow a court to consider a tradition of legislative enactments since 1868 to influence the meaning of liberty under the Due Process Clause of the Fourteenth Amendment. However, for Justice Scalia, this gloss affects meaning only to the extent that this tradition involves "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Further, such a tradition will not be allowed to override clear textual commands of the Constitution. In addition,

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291. See infra text accompanying notes 295-99.
292. See supra text accompanying notes 123-35.
293. For discussion of an individual's specific view at any particular time possibly being the product of irrational preferences, prejudices, or unthinking adherence to tradition, and the possibility of making such views more rational, see supra note 135 and accompanying text.
294. See generally infra notes 295-99 and accompanying text. Similarly, with regard to statutory interpretation, most formalists will allow later administrative agency practice to provide some gloss on meaning of the statute, though such later agency practice is not directly related to the legislature's intent. See, e.g., Michael Herz, Textualism and Taboo: Interpretation and Deference for Justice Scalia, 12 CARDOZO L. REV. 1663, 1663 (1991) ("Justice Scalia is a fierce, sometimes strident defender of Chevron," 467 U.S. 837 (1984), the case most closely associated with the principle of judicial deference to agency interpretation of ambiguous statutes) (citation omitted).
297. See Planned Parenthood v. Casey, 112 S. Ct. at 2874 n.1 (Scalia, J.) (stating that the clear text of the Equal Protection Clause requires a "color-blind" Constitution, which overrides specific historical traditions, such as banning interracial marriages, or, presumably, permitting segregated public schools). For a discussion comparing Justice Scalia's "textualist" version of formalism with
for Justice Scalia, a judge in determining an evolving societal tradition may not consider broad historical evidence of "public opinion polls, the views of interest groups, and the positions adopted by various professional associations." Rather, "[a] revised national consensus . . . must appear in the operative acts (laws and the application of laws) that the people have approved." 299

Of course, there are other variations of the formalist approach. For example, Raoul Berger rejects Justice Scalia's "textualist"-driven formalism and argues for a formalist "originalism" which would hold that the specific views of the framers and ratifiers should be determinative, even as to segregated public schools, 300 and that all sources of historical inquiry, including any reliable evidence of societal traditions, should be examined to determine these views. 301

that of another "textualist" formalist, see Michael J. Gerhardt, A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia, 74 B.U. L. REV. 25 (1994) (arguing, in part, that both Justices Scalia and Black occasionally let their substantive preferences about doctrinal outcomes affect how they viewed the clear or plain meaning of the Constitution's text).


299. Id.


301. See generally id. at 363-72. This version of formalism, with its focus on literal meaning and specific historical intent, obviously disagrees with the standard natural law model, with its willingness to consider both letter and purpose, and both specific historical intent, where present, and general concepts embedded in constitutional provisions. Thus, Raoul Berger has had continuing disagreements with contemporary writers in the natural law tradition. See, e.g., Raoul Berger, The Founders' Views—According to Jefferson Powell, 67 TEX. L. REV. 1033 (1989); H. Jefferson Powell, The Modern Misunderstanding of Original Intent, 54 U. CHI. L. REV. 1513 (1987) (book review). See also GOLDSTEIN, supra note 148, at 8-12 (discussing the differences between Chief Justice John Marshall's interpretation style and the interpretation style of Raoul Berger).

Raoul Berger's version of formalism is also in sharp contrast to the more activist interpretation style of modern-day instrumentalists, discussed infra notes 501-41. See, e.g., Raoul Berger, Constitutional Interpretation and Activist Fantasies, 82 KY. L.J. 1 (1993-94).

With a focus on literal meaning and specific historical intent, Raoul Berger's views are not that different from the Holmesian approach of Robert Bork or Edwin Meese, when they are in their "narrower" mode. For discussion of this "narrower" mode, see supra note 86. Thus, Raoul Berger has not had the same kind of intellectual interchange with contemporary writers in the Holmesian tradition as he has had with instrumentalist and natural law writers. To the extent that a Holmesian judge were to adopt the "broader" mode of Holmesian analysis, see infra text accompanying notes 382-93, Raoul Berger would be in sharp disagreement. See, e.g., BERGER, supra note 300, at 131-33 (leveling criticism against Justice Felix Frankfurter for Frankfurter's statement, in a file memorandum against the background of deciding Brown v. Board of Education, 347 U.S. 483 (1954), that "the equality of laws enshrined in a constitution which was 'made for an undefined and expanding future . . . .' . . . is not a fixed formula defined with finality at a particular time"). Presumably, Berger would also disagree with Judge Bork's justification for supporting the holding in Brown. See infra notes 487-89 and accompanying text.

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2. Case Examples

a. Cases Concerning Justiciability and the Role of the Court

_Frothingham v. Mellon_\(^{302}\) represents the classic formalist case concerning justiciability. As the Court indicates, were the case to involve "rights of person or property," "rights of dominion over physical domain," or "quasi sovereign rights actually invaded or threatened," the case would be justiciable.\(^{303}\) However, concerning the suit by Massachusetts against the United States,

In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political, and not judicial in character . . . \(^{304}\)

The case involves only "abstract questions of political power, of sovereignty, of government."\(^{305}\)

On the question of taxpayer standing, the Court focused on a formalist concern with certainty and predictability, noting,

His interest in the moneys of the treasury . . . is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.\(^{306}\)

In addition, the Court emphasized existing positive law, noting, "It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, . . . a large number of statutes appropriating or involving the expenditure of moneys for nonfederal purposes have been enacted and carried into effect."\(^{307}\)

The Court also emphasized in _Frothingham_ an interplay between justiciability and separation of powers concerns. The Court stated,

302. 262 U.S. 447 (1923).
303. Id. at 484-85.
304. Id. at 483.
305. Id. at 485.
306. Id. at 487.
Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.  

Justice Scalia echoed this same concern in *Lujan v. Defenders of Wildlife*, when he stated,

If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.”

Despite being concerned with existing doctrine, if a formalist judge decides a prior court has misinterpreted a constitutional provision, the judge will be quite willing to overrule that case and adopt the interpretation that the formalist judge thinks is the provision’s “true” meaning, unless overwhelming considerations of reliance counsel otherwise. Similarly, if a formalist judge thinks that the government has engaged in unconstitutional action, and the case is justiciable, the judge will be quite willing to hold unconstitutional the governmental action.

b. Cases Concerning Governmental Structure

The formalist’s preference for clear, bright-line rules means that formalists tend to prefer a strict separation of powers approach to separation of powers

308. Id. at 488-89.
311. For example, Justice Scalia joined Chief Justice Rehnquist’s opinion in *Payne*, discussed supra note 73. See also Justice Scalia’s dissent in *Casey*, discussed supra note 72 (“Has *Roe* succeeded in producing a settled body of law?”).
312. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) and its progeny (holding unconstitutional many government economic regulations because of the Court’s belief the laws did not advance legitimate governmental ends), discussed in infra text accompanying notes 327-30.
doctrine.\textsuperscript{313} Such an approach avoids having to determine if a sharing of powers scheme impermissibly grants one branch too much power.\textsuperscript{314} Thus, the formalist approach believes in "strong substantive separations between the branches of government. . . . Moreover, formalism, at least as promoted by Justice Scalia, appears to be concerned . . . with forcing the Court to adhere to bright-line rules to foster predictability and restraint in judging."\textsuperscript{315} Justice Scalia's dissents in \textit{Morrison v. Olson}\textsuperscript{316} and \textit{Mistretta v. United States}\textsuperscript{317} are classic examples of a formalist approach to separation of powers doctrine.

As with separation of powers, formalists prefer strict, bright-lines rules when dealing with questions of federalism.\textsuperscript{318} Because such rules provide states with clearly defined areas of state authority, such rules tend to advance "states' rights." For example, between 1888 and 1937, the formalist approach to federal power under the Commerce Clause\textsuperscript{319} drew sharp distinctions between what the federal government could regulate (buying, selling or transporting goods across state lines, or commerce which directly affects interstate commerce, like use of the interstate mails),\textsuperscript{320} and what only state governments could regulate (manufacturing, mining, or growing crops within a state, or wage and labor conditions within a state).\textsuperscript{321}

Formalists today would probably reject this interpretation of the Commerce Clause based upon the continued and consistent legislative and executive practices since 1937 which have specifically favored the constitutionality of broad federal regulation over commerce.\textsuperscript{322} In addition, the specific historical views held by the framers and ratifiers suggest that they did not have in mind such a rigid \textit{Carter Coal} approach to federal power.\textsuperscript{323} However, the formalist preference for some line defining a realm of protected state power supports the approach to the Tenth Amendment adopted in \textit{National League of

\textsuperscript{313} See Kelso, supra note 7, at 572-76.
\textsuperscript{314} Id. at 572-73.
\textsuperscript{316} 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). Justice Scalia's dissent in \textit{Morrison} is discussed more fully as an example of a formalist approach in Kelso, supra note 7, at 621-22.
\textsuperscript{317} 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). Justice Scalia's dissent in \textit{Mistretta} is discussed more fully as an example of a formalist approach in Kelso, supra note 7, at 626.
\textsuperscript{318} See Kelso, supra note 7, at 573-74.
\textsuperscript{319} See generally NOWAK & ROTUNDA, supra note 187, at 143-54.
\textsuperscript{320} See, e.g., Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914); Hoke v. United States, 227 U.S. 308 (1913); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911); Champion v. Ames, 188 U.S. 321 (1903).
\textsuperscript{322} On this legislative and executive practice, see supra text accompanying notes 232-33.
\textsuperscript{323} See supra text accompanying notes 215-17 (discussing \textit{Gibbons v. Ogden}).
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Cities v. Usery, which has since been overruled in Garcia v. San Antonio Metropolitan Transit Authority.

c. Cases Concerning Economic Rights

The formalist-era approach to economic rights is best seen in Lochner v. New York and its progeny. Between 1888 and 1937, the formalists on the Court used the term "liberty" in the Fourteenth Amendment to create the Lochner-era doctrine of "liberty of contract." Under this approach, the government could regulate the economy only for certain "bright-line" reasons: health and safety, morals, limiting the negative economic impact of monopolies, or regulating public municipal corporations. Other kinds of economic regulations, such as economic regulation represented by minimum wage laws, maximum hours laws, or labor laws, were held to be unconstitutional. As stated by Professors Nowak and Rotunda,

Freedom in the marketplace and freedom to contract were viewed as liberties which were protected by the [D]ue [P]rocess [C]lause. Thus, the justices would invalidate a law if they thought it restricted economic liberty in a way that was not reasonably related to a legitimate end. Because they did not view labor regulation, price control, or other economic measures as legitimate "ends" in themselves, only a limited amount of business regulation could pass this test.

As with the formalist-era interpretation of the Commerce Clause, formalists today would be likely to reject the Lochner line of cases based upon the continued and consistent legislative and executive practices since 1937 that have favored governmental regulation of the economy and the specific historical views held by the framers and ratifiers. This history suggests that the Fourteenth Amendment was more concerned with eradicating the legacy of slavery and clarifying the constitutionality of the Civil Rights Act of 1866, than protecting the economic rights of corporations or individual entrepreneurship under "liberty of contract." However, the formalist preference for some
clear line defining a realm of individual economic rights suggests that a formalist today would be willing to expand Takings Clause or Contract Clause protection from the more deferential Holmesian or instrumentalist approach to these doctrines.\textsuperscript{334}

For example, with regard to the Takings Clause, Justice Scalia has taken the lead in trying to breathe new life into modern Takings Clause doctrine.\textsuperscript{335} This effort seems to have stalled somewhat, however, as Justice Scalia's five-person majority in \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{336} has now been lost with the retirement of Justice White.\textsuperscript{337}

With regard to the Contract Clause, the formalist approach would likely agree that the standard of review higher than minimum rationality that was applied in a few recent cases is appropriate.\textsuperscript{338} This higher standard was applied consistently with a formalist focus on the specific text of the Contract Clause which provides individuals specific protection from state impairment of their contract rights, and a formalist concern with bright-line rules that called for higher review in clearly defined circumstances—a substantial impairment of contract rights either of the state's own contracts, or of contracts of a narrow group of contract actors.\textsuperscript{339}

The formalist preference for clear, bright-line rules also suggests that formalists would be skeptical of doctrines which require judicial balancing of factors to yield a particular result,\textsuperscript{340} as currently occurs under dormant

\begin{footnotes}
\footnote{334. See infra text accompanying notes 434-39, 569-70 (discussing Holmesian and instrumentalist approaches to the Contract Clause and Takings Clause).}
\footnote{335. See, e.g., \textit{Nollan v. Coastal Comm'n}, 483 U.S. 825, 841 (1987) (Scalia, J.) (suggesting some form of heightened scrutiny might be appropriate in certain Takings Clause cases by adopting the requirement that "the condition for abridgement of property rights through the police power [be] \ldots substantial advance[ing] of a legitimate state interest," not the usual minimum rationality requirement of a mere rational relationship).


\footnote{337. Thus, the formalist language in \textit{Lucas} regarding providing a narrow bright-line exception permitting governments to effectuate physical occupations or complete takings of private property for public use without compensation only in the event of "activities akin to public nuisances," \textit{id.} at 2897, or "proscribed use interests were not part of his title to begin with," \textit{id.} at 2899, will likely give way in the future to the more flexible standard enunciated in Justice Kennedy's concurring opinion and Justice Souter's statement in the case. See supra note 239 and accompanying text. See also Dolan \textit{v. City of Tigard}, 114 S. Ct. 2309 (1994) (Justice Kennedy providing the crucial fifth vote to form the five-person majority).


\footnote{339. See generally supra notes 236-37 and accompanying text.

\footnote{340. See supra note 285 and accompanying text.}}}

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Thus, it is not surprising that Justice Scalia has indicated he would abandon traditional court scrutiny of state regulations under the dormant Commerce Clause, and would only strike down state statutes which involve "rank discrimination against citizens."Thus, in Texas v. Johnson, Justice Scalia followed a literal application of free speech analysis, and joined the majority opinion which held that a statute banning flag burning constitutes unconstitutional viewpoint discrimination. In Austin v. Michigan Chamber of Commerce, Justice Scalia also followed a literal application of free speech analysis, joining Justice Kennedy's dissent which embraced the "central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."

Regarding the issue of official organized prayer in public schools, Justices Scalia and Thomas dissented in Lee v. Weisman, stating that a non-denominational prayer at a high school graduation ceremony is constitutional based upon the specific history of prayer in schools at the time of the First and Fourteenth Amendments, and our tradition of permitting such prayer. Similarly, faced with an absence of text regarding a right of privacy, and the specific

341. See supra text accompanying notes 249-50; infra text accompanying notes 440-42, 571-72.
343. See supra text accompanying note 284.
344. See supra note 285 and accompanying text.
345. See supra text accompanying notes 286, 294-301.
history and tradition of legislatures being permitted to regulate abortion,\textsuperscript{350} Justices Scalia and Thomas dissented in Planned Parenthood v. Casey,\textsuperscript{351} stating that Roe v. Wade was wrongly decided in holding that a right of privacy regarding abortion exists as part of the liberty component of the Fourteenth Amendment. As Justice Scalia, joined by Justice Thomas, noted more generally in TXO Production Corp. v. Alliance Resources Corp.,\textsuperscript{352}

I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights.\ldots

With regard to the Equal Protection Clause, the formalist emphasis on logic and specific traditions would support applying heightened scrutiny not only for racial classifications, the core concern of the framers and ratifiers of the Fourteenth Amendment,\textsuperscript{353} but also for the closely related categories of ethnicity or national origin.\textsuperscript{354} A formalist could also support some heightened scrutiny for gender classifications based upon the legislative and executive gloss regarding equal citizenship for women represented by the Nineteenth Amendment’s extension of the right to vote to women in 1920,\textsuperscript{355} though no formalist-era case so held.\textsuperscript{356} The attempt to extend heightened scrutiny to other groups, however, such as the indigent,\textsuperscript{357} the elderly,\textsuperscript{358} or the mentally or physically impaired,\textsuperscript{359} is not likely to be supported by formalist judges.

With regard to affirmative action, the formalist concern with logic and mechanical application of doctrine\textsuperscript{360} would suggest that the equal protection analysis ought to be the same for classifications which discriminate against, or in favor, of racial minorities. Justice Scalia’s view in City of Richmond v. J.A.

\textsuperscript{350} Id. at 2859-60 (Rehnquist, C.J., joined by White, Scalia, & Thomas, JJ. dissenting).

\textsuperscript{351} Id. at 2873 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

\textsuperscript{352} 113 S. Ct. 2711, 2726-27 (1993) (Scalia, J., joined by Thomas, J., concurring).

\textsuperscript{353} See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72, 81-82 (1872).


\textsuperscript{355} See Ginsburg, supra note 132, at 18. On formalist use of legislative and executive practice being a gloss on meaning, see supra text accompanying notes 294-99.

\textsuperscript{356} Ginsburg, supra note 132, at 18.


\textsuperscript{360} See supra text accompanying notes 283-85.
CONSTITUTIONAL INTERPRETATION

Croson Co. that all laws must be “color-blind” exemplifies a formalist approach towards equal protection. 361

It should be noted that this “color-blind” interpretation differs from the initial formalist-era interpretation of equal protection. That initial interpretation is the “separate, but equal” doctrine of Plessy v. Ferguson. 362 However, just as no modern formalist would likely counsel a return to the Lochner-era interpretation of liberty as protecting “liberty of contract,” 363 no modern formalist, except perhaps for Raoul Berger, 364 would likely counsel a return to the “separate, but in form equal” doctrine of Plessy. In Planned Parenthood v. Casey, Justice Scalia rejected both Lochner and Plessy. 365

B. The Holmesian Approach: 1937-1954

1. General Interpretive Principles

As a positivist theory of law, the Holmesian approach shares with the formalist approach a strong belief in judicial restraint and a limited role for the judge as a scientist who attempts to decide cases in light of existing positive law. 366 However, because the Holmesian approach is a functional approach to decisionmaking, not an analytical approach, the Holmesian judge does not have a predisposed preference for mechanically applied rules. As Oliver Wendell Holmes stated in The Common Law,

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. 367

Thus, as Holmes stated in New York Trust Co. v. Eisner, “[A] page of history

362. 163 U.S. 537 (1896).
363. See supra text accompanying notes 331-34.
364. See supra text accompanying notes 300-01.
366. See Kelso, supra note 7, at 538-43.
is worth a volume of logic." The Holmesian approach also has a strong preference for certain and predictable rules, which are prized for their functional utility in helping society to better govern itself.

Being a functional approach to judicial decisionmaking, the Holmesian approach emphasizes the functional purpose behind a constitutional or statutory provision, not merely the words' formal, literal meaning. As Holmes stated in United States v. Whitridge, "The general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." Justice Felix Frankfurter made the same point in an article on statutory interpretation.

The same functional concern leads Holmesians to be sensitive to arguments of context, in addition to arguments of text and purpose, in order to effectuate

368. 256 U.S. 345, 349 (1921) (Holmes, J.). For further discussion of this functional aspect of the Holmesian decisionmaking style, see Kelso, supra note 7, at 544-45. For a general discussion of the breakdown of Formalism and the rise of the Holmesian functional approach and its concern with how facts actually functionally interact with the law in practice, see JOHN W. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940 (1981).


Holmes believed a judge could do a number of things to improve the law within the limits imposed by his society's prevailing beliefs. First, a judge can increase the effectiveness of current law in achieving its socially desirable consequences by making it more fixed, definite, and certain. ... So, too, the positivist judge ought to adhere strenuously to the doctrine of stare decisis, as that makes the law more reliable, certain, and knowable, and hence more effective in achieving its socially beneficial consequences.

In contrast, under the formalist tradition, certain and predictable rules are prized more for their analytical, logical clarity, or neatness. See supra text accompanying notes 283-90.

370. See Kelso, supra note 7, at 544-45.


372. Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 538-44 (1947) (discussing the interpretation theory of Holmes under the headings "Proliferation of Purpose" and "Search for Purpose"). Judge Learned Hand, a similar believer in the Holmesian style of judicial restraint, made a similar point about considering background purposes in constitutional interpretation in his 1958 Oliver Wendell Holmes Lecture at Harvard. He stated, "For centuries it has been an accepted canon of interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand [ut res magis valeat quam pereat]; and this applies with especial force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general language, unless they are constantly amended." HAND, supra note 147, at 14. Note that use of this maxim to advance the purposes behind a document is also consistent with the natural law sensitivity to purpose. See supra note 36 (Justice Story citing with approval the ut res magis principle of construction).
the true intent of the framers and ratifiers. This functional concern also leads Holmesians to adopt a pragmatic, sharing of powers, checks and balances approach to issues of separation of powers, and to be sensitive to the functional needs of governmental power when considering federalism issues of federal versus state power.

This functional concern with sensitivity to the needs of governmental power also animates the Holmesian view concerning the proper role of the courts in our democratic system. As indicated earlier, like the formalist approach, the Holmesian view adopts a posture of judicial restraint. Thus, in the absence of clear commands on point, the Holmesian view counsels deference to governmental activity. However, because of the Holmesian willingness to consider purposes in addition to literal meaning, unlike a formalist judge, a Holmesian judge could find such clear commands either in clear constitutional text or clear inferences from the purposes behind a constitutional text.

The Holmesian approach is different from a formalist approach in another regard. As noted above, the Holmesian approach rejects the pure logic of the formalists in favor of the "felt necessities of the time." Because of the difficulty sometimes in determining these "intuitions of public policy," Holmesian judges are very cautious before deciding that some "intuition" in a constitutional provision renders governmental action unconstitutional. Thus, while formalist and Holmesian judges share a belief in judicial restraint, the Holmesian approach is the only approach to adopt as a general theory Professor Thayer's strong judicial restraint view that courts should defer to governmental action out of respect for other branches of government, unless the unconstitutionality of the governmental action is "so clear that it is not open to rational question."

374. See infra text accompanying notes 410-17.
375. See infra text accompanying notes 418-29.
376. See supra text accompanying note 366.
377. See Kelso, supra note 7, at 543, 576, 583-84. See also infra text accompanying notes 400-52 (discussing examples of such deference).
378. See Kelso, supra note 7, at 544-45, 576.
379. See supra text accompanying note 368.
380. Id.
Regarding history, the Holmesian approach’s functional concern with text, purpose, and context means that a Holmesian judge will engage in a broad-based historical inquiry to help determine a provision’s purpose and context.\textsuperscript{382} Similarly, a true Holmesian would reject the formalist view in \textit{Stanford v. Kentucky} that historical investigation should be limited to “laws and the application of laws” for purposes of determining our societal traditions,\textsuperscript{383} and a true Holmesian would follow Justice Holmes’ view in \textit{Lochner}\textsuperscript{384} that our tradition derives from both “our people and our law.” Nevertheless, perhaps because of the Holmesian posture of deference to government unless the unconstitutionality is clear, some Holmesian judges have adopted the \textit{Stanford} limitation of looking only to governmental acts (legislative and executive practice) to determine societal traditions.\textsuperscript{385}

Likewise, a true Holmesian would be willing to ask whether history suggests that the framers and ratifiers intended a particular provision to reflect a general concept.\textsuperscript{386} However, because the Holmesian approach rejects any notion of natural rights as “naive,”\textsuperscript{387} considerations of general interpretive bias suggest that Holmesian judges are less likely than natural law judges\textsuperscript{388} to conclude that the framers and ratifiers intended a particular provision of the Constitution to reflect some general enlightenment natural law concept. Thus, instead of concluding that the framers and ratifiers expected some concept to evolve over time in response to enlightenment-style reasoning and interplay between social change and constitutional concepts,\textsuperscript{389} Holmesian judges are more likely to conclude that the framers and ratifiers expected the concept to

\textsuperscript{382} This “broad-based” historical inquiry in constitutional interpretation mirrors the Holmesian approach to statutory interpretation, which always permits resort to legislative history to help determine the legislature’s intent. See generally Kelso, supra note 7, at 544-45. Of course, as with statutory interpretation, under the Holmesian approach a judge must be careful to use historical evidence only to advance the intent of the framers and ratifiers, not to enlarge or narrow it. As Justice Frankfurter stated when talking about statutory interpretation, “Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it.” Frankfurter, supra note 372, at 543.

\textsuperscript{383} See supra text accompanying notes 298-99.

\textsuperscript{384} See infra text accompanying notes 431-33.


\textsuperscript{386} See infra text accompanying notes 486-88 (quoting Judge Robert Bork).

\textsuperscript{387} See FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 40-41 (1961) (“[T]he jurists who believed in natural law seemed to [Holmes] to be ‘in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.’”).

\textsuperscript{388} See supra text accompanying notes 125-26.

\textsuperscript{389} See supra text accompanying notes 127-35.
remain static. For a Holmesian, it is up to the legislature and executive to respond to social change and "the felt necessities of the times," not the courts. Reflecting this fact, virtually all Holmesian references to a notion of evolving concepts in the Constitution occur in the context of deference to a governmental decision. In addition, many Holmesian judges in practice tend to focus on evidence of the framers and ratifiers' specific views, perhaps because such views provide a clearer and more certain basis for decision, and the Holmesian posture of deference to government unless the unconstitutionality is clear.

As a positivist theory of law, a Holmesian approach rejects the propriety of non-interpretive review, which is embraced by instrumentalist judges. For Holmesian judges, non-interpretive review represents a usurpation by courts of their proper role in our democratic system. As Holmesian Justice Felix Frankfurter noted about statutory interpretation, a judge should not use a

390. This is mostly a product of the fact that the Holmesian approach to judicial decisionmaking is a positivist approach, and thus shares the formalist view that judges should not test their decisions by an external standard of moral rightness. See Kelso, supra note 7, at 541-43. Judges holding such a view are more likely to conclude that the framers and ratifiers of a provision had in mind some specific intent which it is the task of the judge to implement.

Nevertheless, to the extent that a Holmesian judge can be convinced that the framers and ratifiers themselves embedded in the Constitution a particular general concept which was expected to be elaborated over time by judges against a background of purpose and context, a Holmesian judge should remain faithful to that intent. As examples of such a conclusion, see Stoner, supra note 148, at 100-101 (discussing Justice Frankfurter's approach to incorporation of the Bill of Rights under the Fourteenth Amendment's Due Process Clause in his concurrence in Adamson v. California, 332 U.S. 46, 59 (1947)). Justice Frankfurter's basic conclusion was that due process involves "those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . . These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But . . . [judges] must move within the limits of accepted notions of justice." Id. at 67-68; BERGER, supra note 300, at 131-33 (discussing Justice Frankfurter's approach to equal protection against the background of Brown v. Board of Education, cited and discussed more fully at supra note 301). See also LOUIS LUSKY, OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA 136-40 (1993) (discussing use of the maxim of construction ut res magis so that judicial review is "not confined to the written text but still kept within some verifiable, 'principled' limit"; this ut res magis maxim of construction is discussed more fully at supra note 372). 391. See Kelso, supra note 7, at 542-43, 576, 583-84.

392. See, e.g., supra text accompanying notes 82-83 (discussing Missouri v. Holland); infra text accompanying notes 434-35 (discussing Home Bldg. & Loan Ass'n v. Blaisdell).


394. See, e.g., William H. Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693 (1976) (embracing Justice Holmes' notion of an evolving Constitution as stated in Holland, see supra text accompanying notes 82-83, 386-92, but rejecting an evolving Constitution based upon later judicial values). For discussion of the instrumentalist approach which embraces such non-interpretive review, see infra text accompanying notes 501-07, 515-33, 573-80.

395. See Kelso, supra note 7, at 542-45.
provision’s words as “‘empty vessels into which [the judge] can pour anything he will’—his caprices, fixed notions, even statesmanlike beliefs in a particular policy.”

Because of the Holmesian posture of deference to government, a Holmesian will allow a continued and consistent legislative or executive practice on an issue to provide a gloss on meaning. However, judicial deference to the other branches of government counsels that a pattern of judicial interpretation should not be allowed to create a gloss on meaning which can override the framers and ratifiers’ intent, at least in the absence of a strong concern with reliance on prior decisions, the kind of reliance discussed in Payne v. Tennessee regarding property or contract rights.

2. Case Examples

a. Cases Concerning Justiciability and the Role of the Court

As noted earlier, the Holmesian approach adopts Professor Thayer’s view that courts should defer to governmental action unless the unconstitutionality of the action “is so clear that it is not open to rational question.” Holmesian judges could also adopt another of Professor Thayer’s views. Even more deferential towards government, this view states that too “common and easy resort” to the courts would “dwarf the political capacity of the people [and] deaden its sense of moral responsibility.” Under this more extreme view, people should primarily appeal to elected representatives (for example, legislators, governors, and the President), and not the courts, to correct constitutional violations.

With regard to issues of justiciability, the Holmesian posture of judicial deference (whether based on Professor Thayer’s basic view, or his more extreme view) suggests that courts should decide cases only when it is clear that the parties have standing, the case is ripe for resolution, not moot, and does not represent a political question. This approach is reflected in the Supreme Court’s list, in Ashwander v. Tennessee Valley Authority, of factors the Court has developed “for its own governance in the cases confessedly within its

396. Frankfurter, supra note 372, at 529.
397. See supra text accompanying notes 81-83 (citing Justices Holmes and Frankfurter in support of this proposition).
398. See supra text accompanying notes 75-80.
399. See supra text accompanying notes 71-73.
400. See supra text accompanying notes 379-81.
401. See JOHN MARSHALL, supra note 381, at 86.
402. See FARBER ET AL., supra note 1, at 128-31.
These factors involve considerations such as: 1) the Court will not anticipate a constitutional issue in advance of the necessity of deciding it; 2) the Court will not formulate a rule of constitutional law broader than necessary to resolve the case; 3) the Court will not pass upon a constitutional question if there is another ground on which the case may be decided; and 4) the Court will first ascertain whether there is a permissible construction of the statute which will avoid the constitutional question.

This approach is also reflected in Justice Frankfurter's emphasis on "prudential limitations" to a case being justiciable in Poe v. Ullman, and in Professor Bickel's "passive virtues" for when a court should refuse to reach a decision on the merits. As stated by Justice Frankfurter in Poe, "[These limitations] have derived from the historically defined, limited nature and function of courts," and from "the fundamental federal and tripartite character of our National Government and from the role—restricted by its very responsibility—of the federal courts, and particularly this Court, within that structure."

b. Cases Concerning Governmental Structure

As with other constitutional issues, the Holmesian approach towards separation of powers counsels deference to the government unless clear text or clear inferences of purpose require otherwise. In recent cases, Holmesian Justice Rehnquist found such clear language in INS v. Chadha and Public Citizen v. United States Department of Justice, and clear inferences regarding removal power in Bowsher v. Synar, particularly in the legislative gloss given the actions of the first Congress regarding removal power. Where no such clear text or purpose was present, Justice Rehnquist was willing to defer

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404. Id. at 346.
405. Id. at 346-48.
408. 367 U.S. at 503.
409. Id.
410. See supra text accompanying notes 376-85.
to the government in Morrison v. Olson, Mistretta v. United States, and Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc. Holmesian Justice White found a way using functional analysis to defer to the government even in Chadha and Bowsher.

With regard to issues of federalism, a Holmesian approach would counsel following the views of the framers and ratifiers, as amended by later legislative and executive gloss on meaning. As discussed earlier, the framers and ratifiers had mixed views regarding issues of federalism. Some of the framers and ratifiers, like Hamilton, counseled for a very strong federal government; others, like Madison, counseled for a more balanced view between federal and state power. Justice Rehnquist’s opinion in National League of Cities v. Usery, and his participation in the dissent in Garcia v. San Antonio Metropolitan Transit Authority, are probably closer to Madison’s position. Justice White’s participation in the dissent in Usery and the majority in Garcia are probably closer to Hamilton’s approach. Given the legislative and executive gloss on meaning represented by events such as the Civil War, the New Deal, and the Great Society, Justice White’s position reflecting Hamilton’s preference for very strong federal governmental power is probably more faithful to a Holmesian approach today.

This Holmesian embrace of a strong role for the federal government is likewise reflected in the Holmesian approach to the Commerce Clause. Rejecting the formalist approach to interpreting the phrase “commerce among the states,” the Holmesian approach counsels deference to congressional regulation of the economy, “whatever indirect effect they may have upon the activities of the States,” as long as the activity has a substantial effect on

417. See Chadha, 462 U.S. at 967-96 (White, J., dissenting); Bowsher, 478 U.S. at 759-67 (White, J., dissenting). These cases are discussed more fully in Kelso, supra note 7, at 608-38.
418. See supra text accompanying notes 394-99.
419. See supra text accompanying notes 195-209.
422. See supra note 203 and accompanying text.
423. See supra notes 204-05 and accompanying text.
424. See supra text accompanying notes 207-08.
426. See supra text accompanying notes 318-23.
interstate commerce. Every congressional act since 1937 has met this test.429

c. Cases Concerning Economic Rights

As with cases involving the Commerce Clause, the Holmesian approach also rejects the formalist approach to “liberty of contract” represented by Lochner and its progeny.430 Dissenting in Lochner, Holmes stated,

[A] constitution is not intended to embody a particular economic theory . . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us.431

For this reason, Holmes counseled deference to the legislature and, when his approach was adopted as the majority approach, it allowed economic regulations struck down during the Lochner era to stand. This adoption occurred in fits-and-starts in the early 1930s,432 and then more clearly in 1937 and thereafter.433

A similar policy of deference to the government is reflected in the Holmesian approach to the Contract Clause. Taking into account legislative and executive practice since 1789, and a functional, pragmatic approach towards the needs of society, a Holmesian judge is more willing to allow governmental regulation which might skirt the edge of constitutionality as understood in the initial natural law period.434 As stated in Home Building & Loan Ass’n v. Blaisdell,

430. See supra text accompanying notes 326-33.
434. On the natural law approach to the Contract Clause, see supra text accompanying notes 218-21.
Conditions may . . . arise in which a temporary restraint of [contract] enforcement may be consistent with the spirit and purpose of the constitutional provision. . . . It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If . . . it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a constitution we are expounding" [McCulloch v. Maryland]—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."435

This approach is also reflected in the dissent in more recent cases such as Allied Structural Steel v. Spannaus.436

The Holmesian approach also counsels a functional approach to issues arising under the Takings Clause of the Fifth and Fourteenth Amendments. Rejecting a rigid formalist approach to the Takings Clause, which might suggest that only physical takings or occupation of property could raise constitutional issues,437 the Holmesian approach embraces the view that any governmental action, whether a physical taking or a governmental regulation, can trigger a Takings Clause analysis as long as the regulation functionally operates as a taking by drastically reducing the value of the individual’s property.438 Reflecting the Holmesian posture of deference, however, typically only governmental regulation which involves almost a complete destruction of the value of the individual’s property can raise serious Takings Clause concerns.439

Regarding the dormant Commerce Clause, the Holmesian approach counsels the Court to balance the legitimate state interests in economic regulation against the framers and ratifiers’ commitment embedded in the Commerce Clause

favoring interstate commerce and rejecting protectionist legislation. This can be seen in cases such as *South Carolina State Highway Department v. Barnwell Bros. Inc.* and *Southern Pacific Co. v. Arizona.*

Finally, the Holmesian approach towards *Swift v. Tyson*, a case which had survived as a precedent during the formalist era, was to overrule it. In *Swift*, the Court had substantially federalized commercial law by permitting federal courts to decide commercial litigation by reference to principles developed in the federal courts, rather than deferring to decisions of state tribunals. The Court overruled *Swift* in *Erie Railroad Co. v. Tompkins* based upon a Holmesian emphasis on both positivist and functional concerns. The positivist concern was that the *Swift* Court was exercising a general jurisdictional power not granted by any positive statutory authority, and the fact that no general federal common law power properly exists under our Constitution. The functional concern was that *Swift* had created a lack of uniformity where different law would apply in diversity cases depending upon whether the case was heard in state court, where state common law would apply, or federal court, where federal common law would apply.

As if to underscore the Holmesian roots of *Erie*, the Court quoted an earlier statement by Justice Holmes that *Swift* constituted an "unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." It may also be that Holmesian rejection of natural law, and *Swift v. Tyson*’s roots in the natural-law based law of nations and law merchant, marked *Swift* for overruling.

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440. See generally NOWAK & ROTUNDA, supra note 187, at 284-91.
441. 303 U.S. 177 (1938).
442. 325 U.S. 761 (1945).
443. See Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 530-31 (1928), and cases cited therein.
444. See supra text accompanying notes 227-29, 240-44.
445. 304 U.S. 64 (1938).
446. Id. at 71-74. See generally Rutherglen, supra note 243, at 285-90.
448. 304 U.S. at 79.
449. See Rutherglen, supra note 243, at 289 ("Justice Holmes had discredited natural law," particularly the natural law belief underlying *Swift* that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," Black & White Taxicab, 276 U.S. at 533 (Holmes, J., dissenting)); Henry M. Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579, 607 n.55 (1940) (discussing "Story’s natural-law phrasing of his decision as a necessary deduction from the nature of law itself").
d. Cases Concerning Civil Rights and Civil Liberties

Consistent with the Holmesian posture of judicial deference to government, a Holmesian judge will uphold the constitutionality of a governmental regulation that may burden the exercise of an individual's civil rights or liberties, unless the government's action is clearly unconstitutional. As Professor Edward White has written,

Holmes' job at the Supreme Court consisted of, in many instances, reviewing the constitutionality of actions of a legislature. In such cases Holmes forged his famous attitude of deference, which was seen as humility and "self-restraint" by admirers and had the added advantage of sustaining "progressive" legislation about which a number of early 20th-century intellectuals were enthusiastic. ... During Holmes' tenure judicial deference resulted in legislation that helped alleviate some of the inequalities of rampant industrialization; in the 1950's and 1960's a similar version of deference would have perpetuated malapportioned legislatures, racially segregated facilities, the absence of legal representation for impoverished persons, and restrictions on the use and dispensation of birth control devices.

Professor Rogat has also noted that between 1908 and 1928, in twenty-five non-unanimous civil rights cases, Holmes was only once on the side of what in the 1960s would be called protecting civil liberties; in all other cases he deferred to the political process.

Of course, a Holmesian judge will find governmental action unconstitutional if consideration of the text in question, its purpose, arguments of governmental structure, historical inquiry into the framers and ratifiers' specific views and their general concepts, and legislative and executive gloss on meaning clearly indicate that finding is required.

For example, regarding the general concept behind freedom of speech, Justice Holmes stated in Abrams v. United States, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market

450. See supra text accompanying notes 366-81.
453. For discussion of the limitations on Holmesian use of these concepts, see supra text accompanying notes 386-93.
454. See supra text accompanying notes 366-99.
455. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
That at any rate is the theory of our Constitution." Regarding subsequent legislative and executive gloss on meaning, Holmes continued,

I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.\(^{456}\)

Thus, Holmes stated that the test under the Free Speech Clause should be "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."\(^{457}\)

More generally, though typically deferring to governmental action, a Holmesian judge might be willing to engage in more stringent review of governmental action where (1) fundamental rights clearly specified in the Bill of Rights are involved, or (2) there are deficiencies in the political process which suggest that deference to the legislature and executive is not appropriate, or (3) the legislation impacts negatively upon discrete and insular minorities who are not likely to be adequately represented in the political process.\(^{458}\) This approach has been called by Professor John Hart Ely a "representation-reinforcing" model of judicial review because it counsels courts to be particularly sensitive to when the existing political process is not working properly.\(^{459}\)

This approach is perhaps consistent with a Holmesian approach. The first rationale in *United States v. Carolene Products Co.* is consistent with Holmes' views about clear constitutional text and his focus in his *Lochner* dissent on fundamental rights.\(^{460}\) The second and third rationales of *Carolene Products* are consistent with the Holmesian preference to defer to the political process where that process is operating properly. If clear deficiencies exist in the political process, however, like malapportioned legislatures, deference to that deficient political process would be difficult even for a Holmesian to justify.\(^{461}\)

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456. *Id.*
459. *See JOHN HART ELY, DEMOCRACY AND DISTRUST* 87-104 (1980).
460. *See KELSO & KELSO, supra* note 10, at 395. *See also supra* text accompanying note 431.
person/one vote" rule of Reynolds v. Sims. 462

On the other hand, increased scrutiny for clearly specified fundamental rights or to correct deficiencies in the political process are departures from the usual posture of Holmesian deference to government. Thus, even the limited amount of judicial scrutiny called for by the Carolene Products doctrine might be too much for some Holmesian judges. For example, Holmesian Justice Felix Frankfurter never agreed with the first rationale of Carolene Products which distinguishes fundamental rights from other kinds of rights, 463 and Justice Frankfurter, dissenting in Baker v. Carr, 464 thought that it was up to the federal and state legislatures to deal with malapportionment, not the courts. 465 In addition, some versions of public choice theory suggest that perhaps "discrete and insular" minorities may be better able to protect themselves in the political process than groups which are "discrete and anonymous," "diffuse and noninsular," or "diffuse and anonymous," 466 thus undermining the third rationale of Carolene Products.

One can perhaps see the purest modern implementation of the Holmesian approach to civil rights and liberties in the opinions of Justice Frankfurter during the 1940s, 1950s, and early 1960s, 467 and Justices Rehnquist and White during the 1970s, 1980s, and early 1990s. 468 For example, the Holmesian "deference to government" approach counsels against finding that the First Amendment's Freedom of Speech Clause is so expansive that it protects the right to burn an American flag. In a dissent which Justice White joined, Chief Justice Rehnquist

462. Id. (discussing Reynolds v. Sims, 377 U.S. 533, 568-69 (1964)).
463. See KELSO & KELSO, supra note 10, at 395.
465. See generally LUSKY, supra note 390, at 14-23, 119-32 (supporting Justice Frankfurter's conclusions that an ardent adherent of the Holmesian tradition and the political process rationale of Carolene Products can disagree with the fundamental rights part of Carolene Products, with Reynolds v. Sims, and with modern instrumentalist interpretation of the Constitution generally); KELSO & KELSO, supra note 10, at 394-96.
466. See FARBER ET AL., supra note 1, at 109-12.
467. For evidence that Justice Frankfurter followed a Holmesian approach to judicial interpretation, see Kelso, supra note 7, at 544-45 and sources cited therein. See also FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938); LEVINSON, supra note 150, at 68 (“Holmes was one of the most influential shapers of modern American legal consciousness, as was his most notable disciple, Felix Frankfurter. Both defined the task of courts in a democracy as giving almost unrestrained enforcement to popular will as measured by legislative prowess.”).
468. For discussion of Chief Justice Rehnquist and Justice White as Holmesian justices, see infra Appendix A. See also Stith, supra note 103 (discussing Justice White as "the last of the New Deal liberals" on the Court, with his general posture of deference to government); Denvir, supra note 439 (discussing Justice Rehnquist's posture of deference to government unless the unconstitutionality is clear in light of the framers' intent).
stated in \textit{Texas v. Johnson},\textsuperscript{469}

In holding this Texas statute unconstitutional, this Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

This opinion tracks many of the concerns raised by Justice Frankfurter in \textit{Board of Education v. Barnette}.	extsuperscript{470} In \textit{Barnette}, Justice Frankfurter dissented from the Court's conclusion that statutes requiring students to salute the American flag were unconstitutional.\textsuperscript{471}

Similarly, the Holmesian posture of judicial deference supports upholding a state statute regulating the right of corporations to spend money acquired in commercial transactions for political purposes.\textsuperscript{472} In an opinion joined by Chief Justice Rehnquist and Justice White, the Court stated in \textit{Austin v. Michigan Chamber of Commerce},\textsuperscript{473}

State law grants corporations special advantages . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. . . . We therefore have recognized that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form."

With respect to the issue of whether officially organized prayer in public schools is constitutional, Justice Rehnquist examined the historical evidence and purposes behind the Establishment Clause in \textit{Wallace v. Jaffree}.	extsuperscript{474} Based

\textsuperscript{469} 491 U.S. 397, 421 (1989) (Rehnquist, C.J., joined by White & O'Connor, J.J., dissenting) (citation omitted). For discussion of Justice O'Connor occasionally adopting a more Holmesian posture as a departure from her usual natural law judicial decisionmaking style, see Kelso, \textit{supra} note 7, at 602 n.266.

\textsuperscript{470} 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting).

\textsuperscript{471} \textit{Id.} at 646-47.

\textsuperscript{472} As foreshadowed by Professor David Shapiro, given a conflict between the power of a state to regulate versus corporations raising First Amendment rights, a Holmesian like Justice Rehnquist, with the Holmesian preference for deference to government, is likely to rule on the side of the state. \textit{See} David L. Shapiro, \textit{Mr. Justice Rehnquist: A Preliminary View}, 90 HARV. L. REV. 293, 294 n.3 (1976). This is particularly true with respect to corporations which legally are creations of the state pursuant to state charters of incorporation.

\textsuperscript{473} 494 U.S. 652, 658-59 (1990) (citation omitted).

\textsuperscript{474} 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).
upon this analysis, he concluded that the purposes of the Establishment Clause were to prevent the formal establishment of an official national religion, and to prevent government from preferring one religion over another, not to ban reasonable accommodation between church and state.475 Given these purposes, the legislative and executive practice which has sanctioned prayer in public schools and at public school graduation ceremonies for most of our history,476 and the Holmesian preference for deference to governmental action,477 a Holmesian approach would likely agree with a formalist that a non-denominational prayer at a high school graduation is constitutional.478

Regarding the right of privacy and abortion, a Holmesian approach would ask whether arguments from text, purpose, structure, history, and legislative and executive gloss on meaning clearly support the view that governmental regulation of abortion is unconstitutional. Justice Holmes phrased this inquiry as whether “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”479 It is possible, perhaps, to make an argument that governmental regulation regarding marriage, procreation, child-rearing, and access to contraceptives do infringe on “fundamental principles” as they would be defined by a Holmesian judge.480 This could have been true by 1950 even regarding access to contraceptives given early 20th-century legislative and executive practice on access to contraceptives,481 and the fact that such practice can be a gloss on meaning.482

475. Id.
477. See supra text accompanying notes 379-81.
478. See Weisman, 112 S. Ct. 2649, 2678-79 (1992) (Scalia, J., joined by Rehnquist, C.J., White and Thomas, JJ., dissenting) ("[T]he meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings." . . . Justice Holmes’ aphorism that ‘a page of history is worth a volume of logic’ applies with particular force to our Establishment Clause jurisprudence . . . From our Nation’s origin, prayer has been a prominent part of governmental ceremonies and proclamations.") (citations omitted).
479. Lochner, 198 U.S. at 75-76 (Holmes, J., dissenting).
482. See supra text accompanying notes 80-82, 397.
However, absent such legislative or executive gloss on meaning, the Holmesian approach towards recognizing fundamental rights is likely to be much more restrained.\footnote{483} Thus, a Holmesian judge would likely conclude that the Constitution does not include a fundamental right regarding abortion. As stated by Justices White and Rehnquist in \textit{Roe v. Wade},\footnote{484} "I find nothing in the language or history of the Constitution to support the Court's judgments." As stated in \textit{Planned Parenthood v. Casey},\footnote{485}

[Twenty-one] of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when \textit{Roe} was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. . . . On this record, it can scarcely be said that any deeply rooted tradition [supports] the classification of the right to abortion as "fundamental."

Finally, regarding the Equal Protection Clause, a Holmesian judge would be willing to consult history and ask whether the phrase equal protection embodies a general concept. Such historical investigation would reveal that the concept at the core of the Equal Protection Clause is one of racial equality.\footnote{486} Thus, a Holmesian would be willing to interpret the Equal Protection Clause in light of this general concept, and not merely in light of the specific examples held by the framers and ratifiers about equal protection, as might a formalist such as Raoul Berger.\footnote{487} As stated by Judge Robert Bork,

The Court cannot conceivably know how [the framers] would have resolved [specific] issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws. But one thing the Court does know: [the Equal Protection Clause] was intended to enforce a core idea of black equality against governmental discrimination.\footnote{488}
Based upon text, purpose, structure, history, and legislative and executive gloss, a Holmesian would be willing to grant heightened scrutiny under the Equal Protection Clause for ethnicity or national origin. A Holmesian could also grant heightened scrutiny for gender classifications based upon events like the Nineteenth Amendment granting women the right to vote in 1920, though no Holmesian-era case so held. Like the formalist approach, however, the positivist Holmesian theory, with its deference to government posture, is not likely to extend heightened scrutiny broadly to other groups, such as the indigent, the elderly, the mentally or physically impaired, or persons based upon sexual orientation.

With regard to affirmative action, the Holmesian approach would have to resolve competing tensions. The Holmesian deference to government posture would suggest that the Court should defer to governmental affirmative action programs. On the other hand, arguments of text, purpose, structure, and history may suggest that equal protection analysis ought to be the same for classifications which discriminate against, or which favor, racial minorities. One can see this tension at work in Justice White’s votes in *City of Richmond v. J.A. Croson Co.*, and *Metro Broadcasting, Inc. v. FCC.* Justice White joined the formalist and natural law judges to form a majority in *Croson* which held that strict scrutiny should be applied to state and local laws which discriminate against or in favor of racial minorities. In contrast, Justice

“subjective intent,” but rather Judge Bork searches for the “objective” understanding of how a reasonable person of the time would have interpreted the words used). For similar discussion of the Holmesian rejection of “subjective intent” and search for “objective” meaning, see also Kelso, supra note 7, at 541-42.


490. See Ginsburg, supra note 132, at 18. On Holmesian use of legislative and executive practice as a gloss on meaning, see supra note 397 and accompanying text.


495. See *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992) (applying rational review to Department of Defense’s policy of banning persons from military service based upon sexual orientation). See also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (White, J.). Though the specific constitutional challenge in *Bowers* was under the Due Process Clause, not the Equal Protection Clause, as has been noted, “both the rhetoric and reasoning of the opinion seem unfavorable to [a heightened scrutiny] claim [under the Equal Protection Clause].” FARBER ET AL., supra note 1, at 367.


498. See *Croson*, 488 U.S. at 476, 493-94.
White joined the instrumentalist judges to form a majority in *Metro Broadcasting* which held that for congressional affirmative action programs, the Court should apply only intermediate scrutiny. In part, this decision was based on special deference to Congress.

C. Instrumentalism: 1954-1986

1. General Interpretive Principles

The instrumentalist approach to deciding cases differs from the three other decisionmaking styles most markedly in its willingness to embrace non-interpretive considerations to resolve individual cases where leeways exist in the law. For an instrumentalist judge, the act of interpreting the Constitution, a statute, or a common law rule will often reveal leeways in the law which call for judicial consideration of social policy to resolve. These leeways can be created because no law exactly covers the particular situation, ambiguities exist in a particular law which clearly does apply, or two or more conflicting rules each arguably apply.

Of course, as Professor Michael Perry noted earlier, judges who engage in non-interpretive review do not always acknowledge that fact. For Professor Perry, however, "[That] is presently beside the point. What matters is that many, indeed most . . . modern constitutional cases of consequence . . . cannot be plausibly explained except in terms of noninterpretive review . . . ." This non-interpretive review can involve judges embracing sources of value which the judge determines should be part of the Constitution because they reflect a supposed community consensus, they reflect values the judge thinks the community eventually will hold, or they reflect the judge's own values. In advancing an activist agenda through non-interpretive review, instrumentalist

500. *Id.* at 563 ("It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed mandated—by Congress.").
501. See *Perry*, supra note 84, at 265 ("The decisions in virtually all modern constitutional cases of consequence . . . cannot plausibly be explained except in terms of noninterpretive review, because in virtually no such case can it plausibly be maintained that the Framers constitutionalized the determinative value judgment.") (citations omitted).
502. See generally *Kelso*, supra note 7, at 534-38. See also *KELSO & KELSO*, supra note 10, at 113-23, 191-95, 286-91, 388-405 (discussing instrumentalism as a judicial decisionmaking style in common law, statutory interpretation, and constitutional law cases).
503. See *Kelso*, supra note 7, at 534; *KELSO & KELSO*, supra note 10, at 113-14, 193, 288-90.
504. *Perry*, supra note 84, at 265. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (Douglas, J.) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").
505. *Perry*, supra note 84, at 265.
506. See *supra* note 86 and accompanying text.
judges have been willing to appeal to both arguments of principle and arguments of policy.\(^{507}\)

With regard to literal versus purposive interpretation of texts, the instrumentalist approach states that the judge must test the formulation and application of each rule by its purpose.\(^{508}\) As stated by Professor Karl Llewellyn in *Jurisprudence: Realism in Theory and Practice*,\(^{509}\) and Professor Grant Gilmore in *The Ages of American Law*,\(^{510}\) where the reason for the rule stops, there stops the rule. Rules are not tested merely by literalness or logical symmetry; rather, rules must be interpreted functionally in light of the social ends to which they are the means.\(^{511}\)

The instrumentalist emphasis on functional interpretation means that, like a Holmesian judge, an instrumentalist judge will be sensitive to arguments of context, in addition to arguments of text and purpose.\(^{512}\) This functional concern also leads instrumentalists, like Holmesians, to adopt a sharing of powers approach to issues of separation of powers,\(^{513}\) and to be sensitive to the functional needs of governmental power when considering issues of federal versus state power.\(^{514}\)

This functional concern with the needs of governmental power also animates the instrumentalist view concerning the proper role of the courts in our

\(507\). See Ely, supra note 86, at 15 ("The current Court's constitutional jurisprudence . . . involves the Court in the merits of the policy or ethical judgment sought to be overturned, measuring those merits against some set of 'fundamental' value judgments.").

\(508\). See Kelso, supra note 7, at 534.


\(511\). See generally Kelso, supra note 7, at 534. Cf. Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981). Though citing Professor Summers' article here, which is useful for its discussion of instrumental versus formalist reasoning, it must be noted that Summers uses the phrase pragmatic instrumentalism to include both the positivist functional pragmatism of Holmes and the instrumental pragmatism of modern-day instrumentalism. However, as developed in the discussion here and elaborated more fully in Kelso, supra note 7, at 532-45, there are clear and defined differences between an instrumentalist and Holmesian decisionmaking style. The differences between Holmesian Justices Frankfurter, White, and Rehnquist and instrumentalist Justices Douglas, Warren, Brennan, and Marshall underscore this fact. Thus, it seems better to recognize, notwithstanding Summers, that they represent two separate judicial decisionmaking traditions.

\(512\). This is so because arguments of context can help a judge place into context the social ends to which a provision is the means.

\(513\). See infra text accompanying notes 553-58.

\(514\). See infra text accompanying notes 559-66.
democratic system. However, unlike a Holmesian approach,515 the instrumentalist approach does not adopt a deferential posture of judicial restraint. Instead, instrumentalist judges tend to see the judiciary more as a co-equal third branch in a "tripartite" system of government, and thus strongly reject Professor Thayer's rule of only striking down statutes that are clearly unconstitutional.516 Under the instrumentalist view, judges, as well as legislators, have responsibility to advance functionally and pragmatically sound social policies, at least where leeways exist in current, positive law.517 And, according to a number of theorists, such leeways will often (or perhaps always) exist in the law.

These theories can be leftist "critical" theories which assume that all law is "indeterminate" and thus decisions are always grounded ultimately in political views,518 which tend "systematically" to embody aspects of class,519 gender,520 or racial bias.521 They can be liberal "normativist" theories, which create leeways in the law by appealing to the "new jurisprudence of interpretation,"522 or the recently emergent "feminine voice" in moral developmental psychology,523 or asking whether our constitutional tradition is

515. See supra text accompanying notes 379-81, 394-96.
516. See, e.g., Brennan, supra note 53, at 436 ("A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such presumption . . . .").
517. Id.
The view that all matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do . . . . It is the very purpose of our Constitution . . . to declare certain values transcendent, beyond the reach of temporary political majorities . . . . To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices and must accept the ambiguity inherent in the effort to apply them to modern circumstances.
518. See generally FARBER ET AL., supra note 1, at 120 (discussing the Critical Legal Studies movement and its critique of constitutional law).
523. FARBER ET AL., supra note 1, at 114. See also Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986).
based on the recently revived "republican" rather than Lockean tradition. They can also involve centrist "practical legal studies," whose focus is not on one "right" answer, but on a "supportable" answer which emerges from balancing a number of factors pragmatically to achieve results at the center of American politics. Instrumentalist judges are thus often described as judicial activists, both by their supporters and detractors.

With regard to history, the instrumentalist's functional concern with text, purpose, and context means that, like a Holmesian, an instrumentalist will engage in broad-based historical investigation to help determine a provision's overall purpose and context. Like Holmesian and natural law judges, instrumentalist judges will be willing to adopt a view of history which suggests that the framers and ratifiers intended a particular provision to reflect a general concept, if history implies such a result. Similarly, like Holmesian and natural law judges, instrumentalist judges will permit later legislative and executive practice to provide a gloss on meaning. This will be particularly

525. FARBER ET AL., supra note 1, at 125-28.
527. See, e.g., JOHN DENTON CARTER, THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM (1973); LOUIS LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION (1975). See also BERGER, supra note 300; BORK, supra note 480.
528. As with the Holmesian approach, see supra note 382 and accompanying text, this "broad-based" historical inquiry in constitutional interpretation mirrors the instrumentalist approach to statutory interpretation. That approach always permits broad resort to legislative history to help determine the legislature's intent. See generally Kelso, supra note 7, at 595-96; KELSO & KELSO, supra note 10, at 286-91.
529. See, e.g., Brennan, supra note 53, at 435, 439.

Typically, all that can be gleaned [from history] is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality. ... As augmented by the Bill of Rights and the Civil War amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual. ... It is a vision that has guided us as a people throughout our history ...

Id.
530. See, e.g., id. at 437, 445:
The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluate quite different historical practices. ... For the political and legal ideals that form the foundation of much that is best in American institutions—ideals jealously preserved and guarded throughout our history—still form the vital force in creative political thought and activity within the nation today.
true for instrumentalist judges if such a practice is consistent with the judge’s views of non-interpretive considerations.\textsuperscript{531}

These views on history and subsequent practice are consistent with the instrumentalist view that the Constitution is an evolving document which must be interpreted in the context of an evolving society.\textsuperscript{532} As Justice William Brennan has written, "[T]he 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."\textsuperscript{533}

Because instrumentalist judges see an evolving constitution, they do not want to be constrained by a reasoned elaboration of precedents if those precedents are against the instrumentalist’s view of text, purpose, context, history, and non-interpretive considerations. Thus, instrumentalist judges have been quite willing to overrule precedents and create new doctrine, if they think that the old doctrine was wrongly decided or is wrong for society today.\textsuperscript{534} Thus, while instrumentalist judges will consider the factors in \textit{Payne}\textsuperscript{535} and \textit{Patterson}\textsuperscript{536} concerning when a case should be followed or overruled, instrumentalist judges will not be obsessed with the need to follow precedent based on reliance.\textsuperscript{537}

Of course, as revealed in Justice Thurgood Marshall’s dissent in \textit{Payne v. Tennessee}, where the proper social policies would be advanced by maintaining an adherence to instrumentalist-era precedents, an instrumentalist judge will be as willing as any other judge to emphasize the importance of precedents.\textsuperscript{538} However, given the willingness of instrumentalist judges to embrace the

\textit{Id.}

\textsuperscript{531} \textit{Cf. id. at 444} (discussing Justice Brennan’s unwillingness to change his view regarding the unconstitutionality of the death penalty despite historical arguments suggesting its constitutionality and clear legislative and executive practice supporting the use of the death penalty in some circumstances).

\textsuperscript{532} \textit{See, e.g., id. at 436} ("Those who would restrict the claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaption of overarching principles to changes of social circumstance.").

\textsuperscript{533} \textit{Id. at 438}.

\textsuperscript{534} \textit{See id. at 441-42} (summarizing the changes between 1961 and 1986 in the Supreme Court’s interpretation of the Fourteenth Amendment).

\textsuperscript{535} \textit{See supra text accompanying notes 72-73}.

\textsuperscript{536} \textit{See supra text accompanying notes 74-76}.

\textsuperscript{537} \textit{See Payne}, 111 S. Ct. at 2622-23 (Marshall, J., joined by Blackmun, J., dissenting) (criticizing the \textit{Payne} reliance formulation).

\textsuperscript{538} \textit{Id. at 2619} (Marshall, J., dissenting) ("Because I believe this Court owes more to its constitutional precedents in general and to \textit{Booth} and \textit{Gathers} in particular, I dissent.").
overruling of precedents between 1954 and 1986, one must take with a grain of salt Justice Marshall's statements in Payne on the importance of stare decisis, or perhaps presume that Marshall was merely "tweaking the nose" of the formalist, Holmesian, and natural law judges in Payne, all of whom refused to follow precedent in this case. If so, that plan certainly worked.

2. Case Examples

a. Cases Concerning Justiciability and the Role of the Court

Because of the instrumentalist concern with individuals being able to vindicate their rights in court, an instrumentalist approach is more willing than any other decisionmaking style to find that a party has standing, that the case is ripe, is not moot, and that the case does not present a political question. Rejecting Professor Bickel's "passive virtues" approach to constitutional adjudication, Justice Brennan has written:

[C]onstitutional interpretation for a federal judge is, for the most part, obligatory. When litigants approach the bar of court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions.

Thus, with regard to standing, an instrumentalist approach would be more willing than the other decisionmaking styles to find standing to permit

539. See Brennan, supra note 53, at 441-42.
541. See id. at 2613 (Scalia, J., joined by O'Connor, J., and Kennedy, J., concurring) ("The response to Justice Marshall's strenuous defense of the virtues of stare decisis can be found in the writings of Justice Marshall himself. . . . It seems to me difficult for those who were in the majority in Booth to hold themselves forth as ardent apostles of stare decisis.").
542. See, e.g., Brennan, supra note 53, at 438-39 ("[T]he Constitution is a sublime oration on the dignity of man protected through law. . . . As augmented by the Bill of Rights and the Civil War amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual.").
543. See Archibald Cox, The Role of the Supreme Court: Judicial Activism or Self-Restraint, 47 MD. L. REV. 118, 127-28 (1987) ("Measured in institutional terms, the constitutional decisions of the Warren and early Burger Courts . . . encouraged constitutional litigation by easing access to the federal courts in constitutional cases and also by loosening the rules determining whether, when, and upon whose complaint a court will decide a constitutional question.").
544. See supra text accompanying notes 406-09.
545. Brennan, supra note 53, at 434.
individuals to vindicate their rights in court.\textsuperscript{546} For example, in \textit{Lujan v. Defenders of Wildlife},\textsuperscript{547} Justice Stevens stated broadly that in the context of an environmental lawsuit, "In my opinion a person who has visited the critical habitat of an endangered species, has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction." Indeed, an extreme instrumentalist might support standing without regard to a particularized finding of injury, as long as the litigant was able to be a vigorous advocate and thus ensure sufficient concrete adversariness to sharpen the issue for court resolution.\textsuperscript{548}

With regard to the issue of whether taxpayers can have standing to challenge governmental action, an instrumentalist approach would be more willing to find such standing than the other decisionmaking styles.\textsuperscript{549} With regard to mootness, instrumentalists would look for ways to say that the case is not moot, and thus would permit a decision on the merits.\textsuperscript{550} Similarly, instrumentalists would look for ways to say that a case is ripe for resolution.\textsuperscript{551} The instrumentalist approach to political questions doctrine similarly counsels that most issues are not political questions, and thus are appropriate for court resolution.\textsuperscript{552}

b. Cases Concerning Governmental Structure

For separation of powers issues, the instrumentalist approach counsels attention to the purposes behind the separation of powers doctrine.\textsuperscript{553} The basic purpose of this doctrine is to avoid tyranny by any one branch of the government by maintaining the checking and balancing function through the separation of powers.\textsuperscript{554} Attempts to short-circuit checks and balances, such as the one-house veto in \textit{INS v. Chadha},\textsuperscript{555} or the legislature delegating appropriation power to a sub-part of itself, Justice Stevens and Marshall's

\textsuperscript{546} See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 94-106 (2d ed. 1991) (discussing the "broadening" of standing doctrine during the 1960s and early 1970s, and reflecting on the Brennan and Marshall dissents in standing cases as standing doctrine narrowed during the late 1970s and 1980s).

\textsuperscript{547} 112 S. Ct. 2130, 2147 (1992) (Stevens, J., concurring).


\textsuperscript{553} See Kelso, supra note 7, at 579-80.

\textsuperscript{554} Id. at 580.

\textsuperscript{555} 462 U.S. 919, 949-56 (1983).
explanation for their vote in Bowsger v. Synar,556 are thus viewed with great disfavor. On the other hand, attempts to strengthen checks and balances, such as requiring judicial appointment of independent prosecutors to investigate high-level executive official wrongdoing, as in Morrison v. Olson,557 or use of official expertise which does not harm checks and balances, such as Mistretta v. United States,558 are viewed with favor.

With regard to federalism, the instrumentalist preference in the modern era has been for a strong federal government which can better exercise strong central control to advance the proper social policies nationwide.559 Thus, the instrumentalist approach favors broad federal control over commerce.560 It also favors using the Commerce Clause as a source for granting Congress constitutional power to enact governmental regulation which, though not directly related to the economy, involves activity which affects interstate commerce, such as civil rights laws concerning places of public accommodation,561 or laws regulating organized crime.562

With regard to the Tenth Amendment, the instrumentalist preference for a strong federal government results in viewing the amendment's reservation of powers to the states respectively, or the people, as "but a truism that all is retained which had not been surrendered."563 The instrumentalist approach thus favors the majority opinion in Garcia v. San Antonio Metropolitan Transit Authority,564 which overruled National League of Cities v. Usery.565 The instrumentalist approach is also reflected in Justice Stevens' dissent in New York v. United States.566

558. 488 U.S. 361 (1989). These cases are discussed more fully in Kelso, supra note 7, at 608-38.
559. See HALL, supra note 207, at 271-06 (discussing the "Administrative Law and the Regulatory State since World War II," and the federal judiciary granting "broad discretion to regulatory bodies based on their supposed expertise and experience in dealing with the areas they regulated. The growing influence of the agencies further weakened the traditional dichotomy between public and private spheres of responsibility.").
c. Cases Concerning Economic Rights

Given the instrumentalist preference for interpreting the Constitution to permit governmental regulation of the economy, the instrumentalist view agrees with the Holmesian view concerning the overruling of *Lochner*. For the same reason, the instrumentalist approach agrees with the Holmesian approach in counseling for a limited reading of the Contract Clause which would permit broad state legislation regarding economic matters. Likewise, the instrumentalist approach counsels for the Takings Clause to be read functionally against the background concerns of the needs of governmental regulation.

Regarding the dormant Commerce Clause, an instrumentalist approach, like a Holmesian approach, counsels the Court to balance functionally the legitimate state interests in economic regulation against the framers and ratifiers' commitment embedded in the Commerce Clause favoring interstate commerce and rejecting protectionist legislation. This tension between legitimate state interests versus protectionist legislation is most severe when the state itself engages in business decisions that may prefer in-state customers and contracting partners. Thus, not surprisingly, the "state as market participant" doctrine has divided instrumentalist judges.

d. Cases Concerning Civil Rights and Civil Liberties

Many protections of civil rights and liberties in our Constitution are found in texts which involve broad, "open-textured" language, such as Equal Protection, Due Process, and the First Amendment. Given this language, and the instrumentalist willingness to resolve leeways in the law in light of sound

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567. See *supra* text accompanying note 559.
570. See Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124-25 (1978) (Brennan, J.) (discussing the summary of factors to be used to determine whether an unconstitutional taking has occurred, which acknowledges that the Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."); Dolan v. City of Tigard, 114 S. Ct. 2309, 2323 (1994) (Stevens, J., dissenting).
571. See generally *Maine v. Taylor*, 477 U.S. 131 (1986); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). As discussed in Kelso, *supra* note 237, at 519-20, this balancing test varies in rigor depending upon whether the state statute involves facial discrimination against interstate commerce or instead is even-handed on its face, but in application has a disparate impact on interstate commerce.
573. See *FAWER ET AL.*, *supra* note 1, at 77-78.
social policies, the instrumentalist approach is willing to go farther than any of the other decisionmaking styles to use open-textured provisions to effectuate sound social policy results.

This approach builds on the *Carolene Products* view that special court scrutiny is necessary for legislation impacting on specific fundamental rights in the Bill of Rights, or in situations in which the political process cannot be fully trusted to behave fairly, such as for legislation impacting against discrete and insular minorities. Taking this insight as its inspiration, instrumentalist judges during the 1960s and 1970s were willing to have courts engage in special scrutiny on the side of the unempowered in society, including the indigent, the disadvantaged, criminal defendants, individuals who wish to protest against their government, and other such groups. As Justice Brennan wrote about criminal defendants, "[I]t has been well said that there is no better test of a society than how it treats those accused of transgressing against it." Reflecting the instrumentalist vision of an evolving Constitution, Justice Brennan added,

I do not mean to suggest that we have in the last quarter-century achieved a comprehensive definition of the constitutional ideal of human dignity. We are still striving toward that goal, and doubtless it will be an eternal quest. For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.

With regard to specific First Amendment cases, the instrumentalist approach's concern with protecting an individual's right to protest would support recognizing a First Amendment right to burn the American flag. Similarly, the instrumentalist concern with protecting the unempowered supports allowing

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574. See supra text accompanying notes 501-03.
575. See supra text accompanying notes 458-62.
576. See Brennan, supra note 53, at 439-43.
577. *Id.* at 442.
578. See generally JOHNSON HART ELY, DEMOCRACY AND DISTRUST ch. 3 (1980) (criticizing instrumentalist-era decisions on just this ground).
579. Brennan, supra note 53, at 442.
580. *Id.* at 443.
states to limit corporate political speech from monies gained in ordinary commercial transactions in order to equalize political broadcasting and to diminish the threat of distortion posed by unlimited corporate spending. 582

With regard to officially organized prayer in public schools, the instrumentalist approach would likely ban such prayer under the authority of Lemon v. Kurzman 583 in order to best protect each individual's religious sensibilities and human dignity through vigorous separation of church and state. This would support Justice Blackmun's position in Lee v. Weisman. 584

The instrumentalist approach would also support the recognition in Roe v. Wade 585 of a fundamental right of privacy concerning abortion. For an instrumentalist judge, the basis of this right, though unenumerated in the Constitution, derives from a broad concept of liberty and the specific and direct harm that failure to recognize such a right may involve. 586 As stated in Roe,

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into the family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. 587

This approach was criticized by the Holmsian dissent in Roe as a form of judicial legislation. Justice Rehnquist stated in Roe, "The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one . . . partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth

583. 403 U.S. 602 (1971). The Lemon test, particularly as applied by Justices Brennan, Marshall, Blackmun, and Stevens, reflects the instrumentalist approach towards examining statutes under the Establishment Clause, and requires a relatively strict wall of separation between church and state. See NOWAK & ROTUNDA, supra note 187, at 1161-1256. In recent years, however, the Lemon approach has come under increasing attack by non-instrumentalist judges who view its wall of separation as not sufficiently accommodating to religion. See id. at 1162 n.1. See also supra text accompanying notes 256-57, 348, 474-78 (discussing natural law, formalist, and Holmsian approaches to the Establishment Clause).
586. Id. at 153.
587. Id.
Nonetheless, instrumentalist judges can be expected to remain faithful to the entire Roe framework.

With regard to the Equal Protection Clause, the instrumentalist approach would be willing to apply heightened scrutiny not only for racial classifications, for the closely related categories of ethnicity or national origin, or for gender classifications, but also would be willing to extend heightened scrutiny to additional unempowered groups in society. This could involve groups such as the indigent, the elderly, or the mentally or physically impaired.

The instrumentalist approach would also be willing to extend heightened scrutiny under the Equal Protection Clause or Due Process Clause to rights not historically thought to be fundamental. This could involve cases like Board of Regents v. Roth, San Antonio Independent School District v. Rodriguez, and Bowers v. Hardwick.

588. 410 U.S. at 174 (Rehnquist, J., dissenting).
590. See Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (Brennan, J., opinion) (holding that race is a "suspect class" triggering strict scrutiny).
591. Id. (arguing that national origin is as much a "suspect class" as race).
592. Id. (arguing that gender should also be treated as a "suspect class" entitled to strict scrutiny).
596. 408 U.S. 564, 588-89 (1972) (Marshall, J., dissenting) ("In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment.").
597. 411 U.S. 1, 71 (1973) (Marshall, J., joined by Douglas, J., dissenting) (arguing that the "right to an equal start in life" makes the right to an equal education a fundamental right).
598. 478 U.S. 186, 199 (1986) (Blackmun, J., joined by Brennan, Marshall, & Stevens, JJ., dissenting) (arguing that the "right to be let alone" should be extended to find unconstitutional a state statute criminalizing sodomy as applied to homosexual conduct).

As a general matter under the Equal Protection Clause, one can note the following differences among the four decisionmaking styles. In addition to arguments of literal text, formalist judges are likely to pay close attention to the specific views (or conceptions) of the framers and ratifiers in determining the breadth of the Equal Protection Clause. See supra notes 291-301, 353-59 and accompanying text. A Holmesian judge would be more likely to look beyond the framers and ratifiers' specific examples, and instead look at the general concept of equality behind the Fourteenth Amendment. However, Holmesian judges would be likely to restrict that concept to a more static view of how that concept was specifically understood by the framers and ratifiers. See supra notes
With regard to affirmative action, the instrumentalist concern with special court solicitude for the unempowered would suggest that equal protection analysis should be different for classifications which discriminate against racial minorities and those which favor racial minorities. Under this approach, affirmative action should be tested only by intermediate scrutiny, not more rigorous strict scrutiny, whether it involves state or local affirmative action, or federal affirmative action.

386-93, 486-88. A natural law judge who rejects non-interpretive review would be willing to conclude that the framers and ratifiers intended judicial understanding of their concept of equality to evolve consistent with more enlightened reasoning and changed social circumstances, but that this evolution must stay faithful to the framers and ratifiers' understanding of equality which involved "legal equality," or equality of opportunity. See supra notes 123-35, 273-79. A natural law judge who embraces non-interpretive review, or an instrumentalist judge, might conclude that equality should be interpreted more as "substantive equality," or equality of result, if the judge could be convinced that such an understanding of equality represents a better natural law theory, see, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1971), or is better under some utilitarian calculation regarding sound social policy.

The current "controlling" votes on the Supreme Court seem to lie with that group of Justices that I have categorized as natural law judges who, consistent with the dominant natural law decisionmaking tradition in our legal history, reject non-interpretive review (Justices O'Connor, Kennedy, Souter, and Ginsburg). To the extent this is so, even if this group of Justices could be convinced that the more egalitarian, equality of results understanding of equality represents a sounder natural law approach, this would likely not translate into any change in equal protection doctrine. Like the issue of slavery before ratification of the Thirteenth Amendment, see supra notes 150-57 and accompanying text, for these Justices it would likely take a constitutional amendment to change their interpretation of equal protection from the current evolving understanding of a liberty-focused, equality of opportunity or legal equality interpretation of equal protection to a more egalitarian interpretation of equal protection.

599. See FARBER ET AL., supra note 1, at 246-56. See also id. at 136 ("Crenshaw's position").


In addition to the examples discussed in this article, other aspects of constitutional interpretation are similarly capable of being analyzed against a backdrop of the four main judicial decisionmaking styles. For example, under procedural due process analysis, the instrumentalist concern with protecting individual rights from government infringement suggests that instrumentalist judges typically will require that more procedures be used to satisfy the Due Process Clause before allowing a deprivation of liberty or property to occur. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 349-50 (1976) (Brennan, J., joined by Marshall, J., dissenting). Holmesian judges, with their deference to government posture, will typically require less procedures. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 155 (1974) (Rehnquist, J., opinion). Formalist judges are more likely to focus on procedures which have the sanction of specific historical practice. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24 (1991) (Scalia, J., concurring). Natural law judges, concerned with rational decisionmaking, will be more concerned than Holmesian or formalist judges that proper procedures are used, but will probably not require as many procedures as would an instrumentalist judge. See, e.g., Mathews, 424 U.S. at 332-49 (Powell, J.).
V. CONCLUSION

Any judge faced with the task of constitutional interpretation must decide, among other things, how much weight to give arguments about the plain meaning of the Constitution's text, the text's purpose or spirit, historical evidence concerning the intent of the framers and ratifiers of the Constitution, judicial precedent interpreting the Constitution, legislative and executive practice under the Constitution, and arguments concerning the consequences of a particular judicial decision, that is, arguments of policy.

This Article has discussed the various ways judges might balance competing sources of constitutional meaning and has suggested that in our constitutional history, four main approaches to interpretation have predominated at different times. These four interpretation styles are natural law, formalism, Holmesian, and instrumentalism.602 With respect to each of these styles, this article has discussed the elements of that style of constitutional interpretation, and has addressed how that style approaches the four basic issues faced in our constitutional history: (1) issues of justiciability and the role of the courts in our democratic system; (2) issues of governmental structure (separation of powers and federalism); (3) issues of protecting economic rights; and (4) issues of protecting civil rights and civil liberties.

As this Article suggests, there are currently Justices on the Supreme Court who appear to follow each of these four interpretation styles.603 Thus, by describing these four interpretation styles, and their consequences for constitutional decisionmaking, it is hoped that this Article has contributed to a more informed debate about current Supreme Court jurisprudence.

602. For discussion of when each of these four decisionmaking styles predominated, see supra notes 7-9 and accompanying text.
603. See generally supra note 10; infra Appendix A.
APPENDIX A. SUMMARY OF THE FOUR JUDICIAL DECISIONMAKING STYLES

<table>
<thead>
<tr>
<th>Law as Analytic:</th>
<th>Positivism:</th>
<th>Prescriptivism:</th>
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<tbody>
<tr>
<td>Judges as</td>
<td>Judges as</td>
<td>Judges as</td>
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<tr>
<td>Scientists</td>
<td>Scientists</td>
<td>Normative Actors</td>
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<tr>
<td>Formalism</td>
<td>Formalism</td>
<td>Natural Law</td>
</tr>
<tr>
<td>SCALIA</td>
<td>THOMAS</td>
<td>KENNEDY GINSBURG</td>
</tr>
<tr>
<td>Burger</td>
<td>SOUTER</td>
<td>Powell</td>
</tr>
<tr>
<td>REHNQUIST</td>
<td>BREYER</td>
<td></td>
</tr>
<tr>
<td>Blackmun</td>
<td>STEVENS</td>
<td></td>
</tr>
<tr>
<td>Law as Means to an End:</td>
<td>Holmesian</td>
<td>Instrumentalism</td>
</tr>
<tr>
<td>Logical or</td>
<td>Functional</td>
<td>Brennan</td>
</tr>
<tr>
<td>Conceptualist</td>
<td>or Pragmatic</td>
<td>Marshall (O'Connor)</td>
</tr>
<tr>
<td>Attitude</td>
<td>Functional</td>
<td></td>
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<tr>
<td></td>
<td>or Pragmatic</td>
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604. With respect to the basic structure of this table, as is discussed in my previous article, any judge must answer two basic questions with regard to judicial decisionmaking. First, the judge must decide whether law is separable from moral or social value considerations (the positivist assumption, or law as science) or whether law is a body of rules testable by reference to some external standard of rightness (law as normative, or prescriptive). Kelso, supra note 7, at 535-36. Second, the judge must decide whether law should be represented as a set of logically consistent and coherent rules (the analytic, or conceptualist, assumption), or whether rules are ultimately to be judged in terms of their effectiveness as a means to a social end (the functional, or pragmatic assumption). Id. at 536. As the table indicates, the four decisionmaking styles differ in how judges under these styles answer these two basic jurisprudential questions.

For discussion of this table and the placement of the Justices therein (except Justices Ginsburg and Breyer), see Kelso, supra note 7, at 532-563, 581-608 (1993) (particularly pages 538, 557, 602). For placement of Justice Ginsburg, see supra notes 129-34, 154, 276-77 and accompanying text.

With respect to Justice Breyer, it is likely that he will also fit comfortably within the natural law tradition now that he has been confirmed for the Supreme Court. See Stephen Breyer, The Legislative Veto After Chadha, 72 GEO. L.J. 785, 790-92 (1984) (adopting an approach, later described in Kelso, supra note 7, at 564-72, 628-32, as the traditional “common law” or “natural law” approach to separation of powers doctrine, which holds that judges should consider the effects of a particular constitutional interpretation in light of the Constitution’s purposes and practical considerations, unless the plain meaning of the text is so clear as to be determinative); Stephen Breyer, On Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845 (1992) (adopting the view that it should always be permissible to consult legislative history to help illuminate the legislature’s “reasonable purpose” in passing a statute, based upon such considerations as “workability,” “coherence,” “fairness,” and promoting “reasonable expectations,” while acknowledging that some modern “abuse” of legislative history to defend result-oriented decisions not consistent with legislative intent is inappropriate, the approach described earlier in KELSO &
On "workability," "coherence," and "reasonable elaboration" of the law in the natural law tradition generally, see supra text accompanying notes 162-68; Howard Latin, Legal and Economic Considerations in the Decisions of Judge Breyer, 50 LAW & CONTEMP. PROBS, Autumn 1987, at 57 (arguing that as a judge considering regulatory and antitrust issues, Judge Breyer utilizes conventional common-law legal analysis and is not a law-and-economics ideologue).

Statements by Judge Breyer at his confirmation hearing also suggest aspects of the natural law approach. As Judge Breyer stated in his opening remarks,

That vast array of Constitution, statutes, rules, regulations, practices, procedures—that huge vast web—has a single basic purpose. . . . Its purpose is to help [individuals] live together productively, harmoniously, and in freedom. Keeping that ultimate purpose in mind helps guide a judge. . . . I will try to interpret the law carefully in accordance with its basic purposes. . . . I must do my absolute utmost to see that [my] decisions reflect both the letter and the spirit of a law that is meant to help [individuals].

Excerpts from Senate Hearings on Supreme Court Nominee, N.Y. TIMES, July 13, 1994, at A8. This quote can be compared with the natural law resort to purposes, see supra text accompanying notes 106-10. During his confirmation hearing, Judge Breyer also noted that in interpreting terms such as liberty under the Due Process Clause, he would start with the text.

One goes back to history and the values that the framers enunciated. One looks to history and tradition, and one looks to the precedents that have emerged over time. One looks as well to what life is like at the present as well as in the past. And one tries to use a bit of understanding as to what a holding one way or the other will mean for the future.

Excerpts from Hearing on Breyer Nomination to High Court, N.Y. TIMES, July 14, 1994, at D22. This approach fits comfortably with the framework of the natural law approach towards text, purpose, history, precedent, and reasoning about consequences in light of the framers' purposes, which are elaborated at supra notes 105-78 and accompanying text.

Despite this tendency toward the natural law style, Justice Breyer may turn out, like Justice Blackmun (see Kelso, supra note 7, at 602-04 n.266) to be a mixture of natural law and liberal instrumentalist judicial decisionmaking styles. See generally Excerpts from Senate Hearings on Supreme Court Nominee, N.Y. TIMES, July 13, 1994, at A8.

[The Supreme Court] "works within a grand tradition that has made meaningful in practice the guarantees of fairness and freedom that the Constitution provides. Justice Blackmun certainly served that tradition well. Indeed, so have those who—all of those who have served in the recent past: Justice White, Justice Brennan and Justice Marshall.

Id. (opening remarks).

For discussion of the fact that no judge can be predicted to be a perfect model of any one decisionmaking style, and therefore most judges merely tend towards one style, while embodying some elements of another style, see supra note 10.
A. Contemporaneous Sources

1. Text
   (a) consider only the letter of the words used or
   (b) consider both letter and spirit (purpose) of the words used

2. Structure
   (a) contextual interpretation
      (1) minimize elements of context; focus mostly on text or
      (2) take fully into account arguments of text and context
   (b) arguments of constitutional structure
      (1) separation of powers considerations
         (a) strict separation of powers approach or
         (b) sharing of powers, checks and balances approach
      (2) federalism issues
         (a) states' rights orientation or
         (b) strong federal government orientation
      (3) role of the court
         (a) defer to government unless unconstitutionality clear or
         (b) no special deference, follow what on balance other
            sources require or
         (c) courts have a special role to protect the unempowered,
            particularly in individual rights cases

3. History of the Framing/Ratifying Period
   (a) the specific examples or conceptions held by the framers and
      ratifiers or
   (b) the general concepts held by the framers and ratifiers
      (1) who believed that concepts can evolve over time or
      (2) who believed in a static view of concepts

IN LIGHT OF (c) various historical sources—
   (1) prior precedents and prior legislative/executive practice;
   (2) legislative history of the provision in question, like Notes of the
      Constitutional Convention, Records of State Ratifying Conventions, or
      House/Senate statements on Amendments;
   (3) thoughtful contemporaneous statements, like The Federalist Papers;
and/or
(4) other typical sources of historical inquiry (newspaper accounts, statements of respected organizations, reliable evidence of public opinion generally, etc.)

B. Subsequent Juridical Events

1. Judicial Precedents

(a) follow subsequent precedents to the extent they represent an accurate reflection of contemporaneous sources (or non-interpretive considerations, if permissible to consider) or
(b) reasoned elaboration of precedents provides gloss on meaning

2. Legislative and/or Executive Practice

(a) follow subsequent practice to the extent it aids understanding of contemporaneous sources (or non-interpretive considerations, if permissible to consider) or
(b) legislative/executive practice provides gloss on meaning

C. Non-Interpretive Review

1. As a Source of Constitutional Interpretation

(a) Such review impermissible, stick with sources above or
(b) Non-interpretive review permissible

2. If Permissible, Consider

(a) consequences
   (1) consider impact on principles of justice or
   (2) consider impact on sound social policies or
   (3) consider both or
   (4) impermissible to engage in non-interpretive review of consequences (non-interpretive review of politics only)
(b) politics (may be an unconscious factor even if the judge rejects non-interpretive review)
   (1) conservative or
   (2) centrist or
   (3) liberal
D. Individual Bias

1. General Interpretive Bias

   (a) natural law style or
   (b) formalist style or
   (c) Holmesian style or
   (d) instrumentalist style

2. Specific Case Bias

   (a) doctrinal bias (for some specific doctrines) and
   (b) party bias (always inappropriate to take into account)
### APPENDIX C. STYLES OF CONSTITUTIONAL INTERPRETATION TABLE

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<tbody>
<tr>
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<td>Letter and Purpose</td>
<td>Letter and Purpose</td>
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<td>2. Structure</td>
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<td>Unempowered</td>
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<tr>
<td>3. History</td>
<td>General Concepts of</td>
<td>Specific Views of the</td>
<td>In Theory: Concepts</td>
<td>General Concepts of</td>
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<td>Framers and Ratifiers;</td>
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<td>Framers and Ratifiers;</td>
<td>In Practice: Focus on</td>
<td>the Framers and</td>
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<td>Concepts</td>
<td>Concepts are Static</td>
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### CONSTITUTIONAL INTERPRETATION

<table>
<thead>
<tr>
<th>Era</th>
<th>Interpretation Type</th>
<th>Judicial Considerations</th>
<th>Legislative/Executive Practice</th>
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</thead>
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<tr>
<td>Instrumentalism (1954-1986)</td>
<td>No Gloss to Precedents, Overrule if Wrongly Decided, Unless Payne Reliance</td>
<td>Non-Interpr. Review Permissible</td>
<td>Can Be Conservative, Central, or Liberal</td>
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<tr>
<td>Holmestian (1937-1954)</td>
<td>No Gloss to Precedents, Overrule if Wrongly Decided, Unless Payne Reliance</td>
<td>Non-Interpr. Review Permissible</td>
<td>Can Be Conservative, Central, or Liberal</td>
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<tr>
<td>Formalism (1872-1897)</td>
<td>Sequence of Precedents Can Be Gloss on Meaning, Payne Factors to Overrule</td>
<td>Non-Interpr. Review Impermissible</td>
<td>Usually Conservative or Centrist</td>
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<td>Natural Law (1769-1872)</td>
<td>Legislative/Executive Practice Can Be Gloss on Meaning</td>
<td>Non-Interpr. Review Impermissible</td>
<td>Can Be Conservative, Central, or Liberal</td>
</tr>
</tbody>
</table>

#### B. Subsequent Events

1. Judicial Precedents
2. Legislative or Executive Practice

#### C. Non-Interpretive Considerations
1. Consequences of the Decision
2. Considerations of Politics

#### D. Individual Bias
1. Interpretive Bias
2. Case Bias

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