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# Swing Votes on the Current Supreme Court: The Joint Opinion in *Casey* and Its Progeny

R. Randall Kelso & Charles D. Kelso\*

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## I. INTRODUCTION

In 1992, United States Supreme Court Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter published their famous "joint opinion" in *Planned Parenthood v. Casey*.<sup>1</sup> That opinion presented a relatively detailed theory on how to give content to general constitutional provisions, like the meaning of liberty under substantive due process analysis,<sup>2</sup> and the relative weight to be given to precedent in deciding constitutional cases.<sup>3</sup> Given their "joint" signing of this opinion, many commentators predicted that these three Justices would form a relatively reliable "block" which would control the outcome of Supreme Court cases for the foreseeable future.<sup>4</sup>

It has certainly turned out that Justices O'Connor, Kennedy, and Souter are the swing votes on the Court today. In most close cases, there is a conservative block of Chief Justice Rehnquist and Justices Scalia and Thomas on one side,<sup>5</sup> and a more liberal block of Justices Stevens, Ginsburg, and Breyer on the other side.<sup>6</sup> However, it has not turned out that Justices

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1. 505 U.S. 833 (1992).

2. *Id.* at 844-53. On the decision-making philosophy represented by the joint opinion in *Casey*, see *infra* text accompanying notes 18-29; R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American History*, 29 VAL. U. L. REV. 121, 166-67, 178-84 (1994) [hereinafter R. Kelso, *Styles of Constitutional Interpretation*].

3. 505 U.S. at 854-69. On the force of precedent in this approach, see *infra* text accompanying notes 46-48; R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing with Precedents in Constitutional Cases*, 62 BROOKLYN L. REV. 973, 995-96 (1996) [hereinafter R. Kelso & C. Kelso, *Dealing With Precedents*].

4. See, e.g., R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 20 PEPP. L. REV. 531, 596 n.245 (1993) [hereinafter R. Kelso & C. Kelso, *Separation of Powers*] (citing Linda Greenhouse, *Changed Path for the Court?: New Balance is Held by 3 Cautious Justices*, N.Y. TIMES, June 26, 1992, at A1) ("[E]ffective control has passed to a subgroup of the majority, a moderately conservative middle group of three Justices, Sandra Day O'Connor, Anthony M. Kennedy, and David H. Souter."); Paul M. Barrett, *High Court Wanders from Path to Right*, WALL. ST. J., July 1, 1992, at B6 ("Emerging Center Justices: Sandra O'Connor, Anthony Kennedy and David Souter voted for the same results 71% of the time.").

5. For example, during the 1999 Term, the most conservative member of the Court, Justice Scalia, voted most often with Justice Thomas (89.6%) and Chief Justice Rehnquist (74.0%). *The Supreme Court: 1999 Term*, 114 HARV. L. REV. 390, 391 (2000). This was also true in each of the previous five years of the Court's current membership. See *The Supreme Court: 1998 Term*, 113 HARV. L. REV. 400-401 (1999) (explaining that Justices Scalia and Thomas voted together 77.2%; Justice Scalia and Chief Justice Rehnquist voted together 73.7%); *The Supreme Court: 1997 Term*, 112 HARV. L. REV. 366, 367 (1998) (showing Justices Scalia and Thomas voting together 87.1%; Justice Scalia and Chief Justice Rehnquist voting together 74.2%); *The Supreme Court: 1996 Term*, 111 HARV. L. REV. 431, 432 (1997); *The Supreme Court: 1995 Term*, 110 HARV. L. REV. 367, 368 (1996); *The Supreme Court: 1994 Term*, 109 HARV. L. REV. 340, 341 (1995).

6. For example, in each of the five terms of the Court prior to 1999, the most liberal member of the Court, Justice Stevens, voted most often with Justice Ginsburg, and then with Justice Breyer. *The Supreme Court: 1998 Term*, 113 HARV. L. REV. 400, 401 (1999) (describing that Justice Stevens and Ginsburg voted together 63.2%; Justice Stevens and Breyer voted together, 57.1%); *The*

O'Connor, Kennedy, and Souter always vote together. Indeed, in close cases they will often split 2-1, sometimes with two joining the conservative block,<sup>7</sup> and other times two joining the more liberal block.<sup>8</sup> This split occurs because although these three share the decision-making philosophy represented in *Casey*, nuances in how the theory is understood and applied in different circumstances have led to different results.

Exploring these different nuances is the subject of this article. For purposes of this exploration, every 5-4 opinion of the Supreme Court over the last four Terms (1997-2000) will be considered, as well as other notable 5-4 opinions of the Court since *Casey* was decided in 1992. A complete tabulation of the voting patterns in these cases appears in Appendix A of this article.

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*Supreme Court: 1997 Term*, 112 HARV. L. REV. 366, 367 (1997) (noting that Justices Stevens and Ginsburg voted together 77.4%; Justices Stevens and Breyer voted together 76.3%); *The Supreme Court: 1996 Term*, 111 HARV. L. REV. 431, 432 (1997); *The Supreme Court: 1995 Term*, 110 HARV. L. REV. 368 (1996); *The Supreme Court: 1994 Term*, 109 HARV. L. REV. 340, 341 (1995). During the 1999 Term, Justice Stevens again voted most often with Justice Ginsburg (85.7%), followed by Justice Souter (84.4%) and then Justice Breyer (76.6%). *The Supreme Court: 1999 Term*, 114 HARV. L. REV. 391 (2000). The phrase "more liberal" block, rather than "liberal block", is used in this article, because while Justices Stevens, Ginsburg and Breyer are more liberal than other members on the current Court, they are not classic liberals in the tradition of Chief Justice Earl Warren, or Justices Douglas, Brennan, Marshall, or Fortas. See generally R. Kelso, *Separation of Powers*, *supra* note 4, at 581-83, 598-99; R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 227-28.

7. See, e.g., *The Supreme Court: 1999 Term*, 114 HARV. L. REV. 390, 395 (2000) (recognizing that eleven of the eighteen 5-4 opinions involved this pattern); *The Supreme Court: 1998 Term*, 113 HARV. L. REV. 405 (1999) (noting that eight of the sixteen 5-4 opinions involved this pattern); *The Supreme Court: 1997 Term*, 112 HARV. L. REV. 366, 371 (1998) (showing six of the fifteen 5-4 opinions involved this pattern); *The Supreme Court: 1996 Term*, 111 HARV. L. REV. 431, 434 (1997) (stating that nine of the eighteen 5-4 opinions involved this pattern).

8. See, e.g., *The Supreme Court: 1999 Term*, 114 HARV. L. REV. 390, 395 (2000) (noting that only one of the remaining seven 5-4 opinions involved this pattern); *The Supreme Court: 1998 Term*, 113 HARV. L. REV. 400, 405 (1999) (explaining that six of the remaining eight 5-4 opinions involved this pattern); *The Supreme Court: 1997 Term*, 112 HARV. L. REV. 366, 371 (1998) (stating that four of the remaining nine 5-4 opinions involved this pattern); *The Supreme Court: 1996 Term*, 111 HARV. L. REV. 431, 434 (1997) (displaying that four of the remaining nine 5-4 opinions involved this pattern). Of course, in some cases, these three Justices continue to vote together, making the close case a 6-3 decision. See, e.g. *United States v. LaBonte*, 520 U.S. 751, 753 (1997) (noting that the three Justices joined the conservative block to interpret the phrase "maximum term authorized" under the Sentencing Commission guidelines as including "applicable statutory sentencing enhancements."); *Romer v. Evans*, 517 U.S. 620 (1996) (displaying that the three Justices joined the more liberal block to rule unconstitutional provisions based upon animus towards gays).

## II. THE BASIC COMMON LAW/NATURAL LAW APPROACH OF THE JOINT OPINION IN *CASEY*

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 to six kinds of considerations.<sup>9</sup> The first three of these considerations involve sources of constitutional meaning which were present at the time the constitutional provision was ratified:

- (1) The Constitution's text, including
  - (a) the literal meaning of the text, and
  - (b) the text's purpose or spirit;<sup>10</sup>
- (2) Arguments derived from the context of the particular provision, including
  - (a) related provisions and maxims of construction, and
  - (b) arguments derived from the overall structure of the Constitutional design;<sup>11</sup> and
- (3) Historical evidence concerning the framers and ratifiers'
  - (a) specific intent, and
  - (b) general intent.<sup>12</sup>

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9. These considerations are an elaboration of the approach to constitutional interpretation provided by Professor Philip Bobbitt of the University of Texas School of Law. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THE THEORY OF THE CONSTITUTION* 9-119 (Oxford University Press 1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 31-42, 56-57 (Oxford University Press 1991).

10. On arguments of literal text versus the purpose or spirit of the text, which might lead to a different interpretation, see generally R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 128-30, and sources cited therein. As discussed there, on the one hand, "[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States v. Whitridge*, 197 U.S. 135, 143 (1905). On the other hand, judges must be careful in using arguments of purpose or spirit, since "[t]he 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." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring).

11. On related provisions and maxims of construction, see generally R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 131-32 (discussing interpreting constitutional provisions in light of "related provisions in the same section or other parts of the Constitution"; verbal maxims of construction, like *expressio unius est exclusio alterius* (expression of one thing excludes another) or *ejusdem generis* (where general words follow a list of specific words, the general words should be held to apply only to the same kind or class as the specific words); and policy maxims of construction, like construe penal provisions strictly and remedial provisions broadly, or clear expression is needed for a provision to have retroactive effect). For an example of use of related provisions in the classic case, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-20 (1819), see *id.* at 152. On structural arguments, see *id.* at 132-34; *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) ("[T]he various structural elements in the Constitution [are] separation of powers, checks and balances, judicial review, and federalism.").

12. On the differences between specific versus general intent, see R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 135-36 (citing, *inter alia*, Richard H. Fallon, Jr., A

The last three considerations involve sources of meaning which come into existence after the constitutional provision is ratified.<sup>13</sup> They are:

- (4) legislative and executive practice under the Constitution;<sup>14</sup>
- (5) judicial precedent interpreting the Constitution;<sup>15</sup> and
- (6) arguments concerning the consequences of a particular judicial decision, including
  - (a) consequences in light of the provision's text, context, and history, and
  - (b) consequences in terms of policy considerations.<sup>16</sup>

*Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198-99 (1987)).

One helpful distinction distinguishes between "specific" or "concrete" and "general" or "abstract" intent. Specific intent involves the relatively precise intent of the framers to control the outcome 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. . . . [For example], the authors of the fourteenth amendment 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.*

Another example was given by Justice Ginsburg during her confirmation hearing. As she noted, the general concept of equality in the Declaration of Independence and Equal Protection Clause of the Fourteenth Amendment is broad enough to embody the principle of equal rights for women, despite the fact that the specific views of many of the framers and ratifiers of the Constitution and the Fourteenth Amendment were not receptive to women being full participants in public or private life. See R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 156-57.

13. Because these last three sources involve the Court considering material not in existence when the provision was ratified, they can be called "subsequent" sources of meaning, rather than sources "contemporaneous" to the provision's ratification. *Id.* at 123, 126-28.

14. On legislative and executive practice, see generally R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 140-42 (citing, *inter alia*, David M. O'Brien, *The Framers' Muse on Republicanism, The Supreme Court, and Pragmatic Constitutional Interpretation*, 8 CONST. COMMENTARY 119, 145 (1991) (quoting from a letter by James Madison) ("[T]he early, deliberate and continued practice under the Constitution" is relevant in determining constitutional meaning)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President.").

15. On judicial precedent, see generally R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 138-40; R. Kelso & C. Kelso, *Dealing With Precedents*, *supra* note 3, at 983-86, 995-96 (discussing whether to overrule a precedent based upon such factors as whether the precedent represents settled law, there has been substantial reliance on the precedent, the precedent is unworkable in practice, the precedent is inconsistent or incoherent with related doctrines in the law, a changed understanding of facts has undermined the basis for the precedent, the precedent represents a substantially wrong or unjust interpretation of the law, or the precedent raises concerns about a commitment to the rule of law).

16. On use of consequences in light of a provision's text, context, and history, see R. Kelso,

Naturally, different judges balance the weight to be given to these sources of constitutional interpretation differently. In general, as with common law or statutory interpretation, there are four main approaches that a judge could adopt: natural law, formalism, Holmesianism, or instrumentalism.<sup>17</sup> The various opinions of the Supreme Court Justices in *Casey* provide good examples of each of these four approaches in use.

#### A. Sources of Constitutional Law in *Casey*

##### 1. The Common Law/Natural Law Approach of the Joint Opinion in *Casey*

The joint opinion in *Casey* of Justices O'Connor, Kennedy, and Souter used the traditional common law approach to constitutional interpretation. Under this approach, a judge should pay great attention to the eighteenth-century and early-to-middle nineteenth century American judicial decision-making traditions. This includes 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."<sup>18</sup> To the extent that certain words in the

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*Styles of Constitutional Interpretation*, *supra* note 2, at 145-46. On use of policy considerations in constitutional interpretation, see *id.* at 142-44, 146. Note that in considering consequences in light of a provision's text, context, and history, a judge is still attempting to carry out the intent of the framers and ratifiers, and thus is engaged in "interpretive review." *Id.* at 145. If a judge resorts to policy considerations independent of text, context, and history, the judge is engaged in "non-interpretive" review, interpreting the Constitution "in light of value considerations that the judge determines should be part of the Constitution." *Id.* at 143.

17. On these four judicial decision-making approaches generally, see R. Kelso, *Separation of Powers*, *supra* note 4, at 532-63. On these four approaches applied to constitutional decision-making, see R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 150-225. On these four approaches applied to statutory interpretation, see J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81 (2000) [hereinafter J. Kelso & C. Kelso, *Four Theories in Disarray*]; R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 PEPP. L. REV. 37, 41-58 (1997) [hereinafter R. Kelso, *Statutory Interpretation Doctrine*]. For further discussion of these four decision-making styles in the context of common law, statutory, and constitutional adjudication, see R. Randall Kelso & Charles D. Kelso, *STUDYING LAW: AN INTRODUCTION* 101-23, 261-310, 388-423 (West Pub. Co. 1984).

18. R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 166 (citing, *inter alia*, David M. O'Brien, *The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretation*, 8 CONST. COMMENTARY 119, 145 (1991)).

[A]mong the obvious and just guides 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 ascendencies.

*Id.* See also *id.* at 139 (citing Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 939 (1985) (explaining that for Madison, "'usus,' the exposition of the Constitution provided by actual governmental practice and judicial precedents, could 'settle its

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.<sup>19</sup> A more complete elaboration of this style of interpretation appears in Justice Story's *Commentaries on the Constitution of the United States*.<sup>20</sup>

In terms of the six considerations listed above, this approach adopts as relevant all of the above considerations except (6)(b), considerations of policy. Policy considerations are viewed as appropriate only for the legislative or executive branch, not the courts.<sup>21</sup> However, under this approach, a judge should give full weight not only to the contemporaneous sources of text, purpose, structure, and history of the Constitution, but also to subsequent events of legislative practice, executive practice, and judicial precedent as part of "reasoned elaboration" of the law.<sup>22</sup>

meaning . . . .").

19. See generally R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 166; R. Kelso, *Separation of Powers*, *supra* note 4, at 546-49 (citing, *inter alia*, KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 58 (1989)).

Beginning in the 1760s, Americans [tied] the idea of a written constitution to two related notions, natural law and social contract. . . . Natural law theory and the social contract gave American public law its emphasis on limited governmental power. If government violated the social contract and if it denied natural rights and abused public trust, the people retained a right to overthrow it.

*Id.* See also DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 3-21, 219-21, 253-73 (1990); Edwin S. Corwin, *The "Higher Law" Background of American Constitutional Law I, II*, 42 *HARV. L. REV.* 149, 365 (1928-29).

20. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 373-516 (5th ed. 1891) (1833). Building on Madison's insights, Justice Story discusses the natural law approach to separation of powers, federalism, and the role of the courts in our democratic system. His discussion embraces a sharing of powers, checks and balances approach, the need for a strong federal government within a federal commitment to a dual theory of sovereignty, and a view that courts should hold governmental actions unconstitutional if, on balance, the government violated the Constitution. *Id.* §§ 306-96, 517-43. Story also indicates great 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. *Id.* §§ 377-78, 399-407, 1568-70. On this approach representing a natural law approach to interpretation, see JAMES MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 65 (reissued ed. 1990) (1971) ("Among the American lawyers and judges of [the early nineteenth century] Judge Story stands out as possibly the most learned and influential defender of the natural law tradition.").

21. See R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 159-64 (discussing that our natural law tradition has consistently rejected any "Platonic Guardian" model of judicial decision-making). As Justice Ginsburg stated at her confirmation hearing, "[O]ne of the most sacred duties of a judge is not to read her convictions into the Constitution." *Id.* at 163 n.154.

22. *Id.* at 157-59, 164-65. For example, in Justice Kennedy's recent opinion for the Court in *Alden v. Maine*, 527 U.S. 706 (1999), Justice Kennedy explicitly considered each of the arguments of "text," *id.* at 730, and "history, practice, precedent, and the Constitution's structure," *id.* at 707, to define the limits of the state sovereign immunity doctrine. And, with regard to text, Justice Kennedy's opinion went beyond the "bare" literal text to consider background purposes of the



With regard to text, the natural law approach requires weight be given to both literal text and the text's purpose or spirit.<sup>23</sup> Thus, in *Casey*, the joint opinion noted that while "a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive

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Eleventh Amendment. *Id.* at 734-35. For a classic article discussing the commonalities between this concept of "reasoned elaboration" of the law and the methodology of the common law in general, see Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). See also Catherine Kemp, *Habermas Among the Americans: Some Reflections on the Common Law*, 76 DENV. U.L. REV. 961, 971 (1999) (arguing that according to Phillip Bobbitt in CONSTITUTIONAL FATE, *supra* note 9, "common law forms – conventions – are the source of the forms of constitutional argument.").

Note that the use of subsequent events means that a particular case result under the Constitution may be different today than it would have been two-hundred years ago. Under this approach, the Constitution is a "living" document, rather than a "static" document, as it is for a formalist judge. See *infra* text accompanying notes 30-34. One of the most famous examples of this from a natural law perspective is President Madison's statement in 1816 that, although he viewed a national bank as unconstitutional in 1791, he now supported the constitutionality of a national bank based upon "repeated recognitions, under varied circumstances, of the validity of such an institution." See R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 141. This mode of constitutional interpretation was adopted by the Supreme Court in Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) ("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."), discussed in R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 158. A Holmesian statement of this principle occurred in Justice Holmes' opinion for the Court in *Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("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."), and in Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) ("[A] systematic, unbroken executive practice, long pursued by the knowledge of Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President."). See generally R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 141-42. An instrumentalist judge might phrase this "living" aspect of the Constitution as the Constitution itself not changing, but rather its meaning—particularly its general principles, like liberty, equality, or freedom of speech—being "illuminated" better over time by later events. As Justice Cardozo noted in his famous opinion in *MacPherson v. Buick*, 111 N.E. 1050 (1916), when he was Chief Justice of the New York Court of Appeals, "The principle that the danger must be imminent does not change, but the things subject to the principle do change." *Id.* A more "realist" statement of this fact might state that the Constitution does in fact "evolve" over time in response to its interaction with later events. See KARL LLEWELLYN, *THE COMMON LAW TRADITION* 436-37 (1960) ("But so far as it suggests that principles themselves do not change, the suggestion is legal convention and not legal fact. Principles are born in travail, and some of them die, and sometimes, like the one here, they take new shape in mid-career."). On this concept of a "living" Constitution, see generally Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627 (1997), cited in Daniel A. Farber, *Disarmed by Time: The Second Amendment and The Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 189 n.93 (2000). See also *supra* note 18 & *infra* note 98.

23. See R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 150-52 (citing, *inter alia*, Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 383-84 (1985)).

Once a judge determines the ordinary meaning of the words that make up a text . . . [the] judge must check . . . 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.

*Id.*

persons of liberty . . . the Clause has been understood to contain a substantive component as well. . . .<sup>24</sup> When considering history, the natural law approach moves beyond the specific intent of the framers and ratifiers to consider arguments of general intent.<sup>25</sup> Thus, in *Casey*, the joint opinion rejected the view that “the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.”<sup>26</sup> Instead, the joint opinion concluded in general terms that “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.”<sup>27</sup>

The natural law approach of “reasoned elaboration” also recognizes the weight given to subsequent events, “living” traditions determined both by legislative and executive action and by judicial precedents decided after the relevant constitutional provision was ratified.<sup>28</sup> The natural law approach in *Casey* utilizes reasoning about consequences, to the extent those consequences illuminate arguments of text, structure, history, practice, and precedent, and do not represent policy decisions by the Court.<sup>29</sup>

24. 505 U.S. at 846.

25. R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 154-57.

26. 505 U.S. at 847. This rejection was foreshadowed by Justices O’Connor and Kennedy’s refusal to join footnote 6 of Justice Scalia’s opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1988), which adopted the specific intent approach. *See id.* at 132 (O’Connor, J., concurring in part) (“On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be ‘the most specific level’ available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.” (citation omitted)).

27. 505 U.S. at 851.

28. *Id.* at 850 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1960) (Harlan, J., dissenting) (“The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”)).

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.’ . . . [I]n some critical respects the abortion decision is of the same character as the decision to use contraception, to which [*Griswold*, *Eisenstadt*, and *Carey v. Population Services International*] afford constitutional protection. We have no doubt as to the correctness of those decisions.

*Id.* at 851-52. *See also supra* text accompanying note 22 (discussing “living” versus “static” interpretations of the Constitution).

29. *Id.* at 851-52 (discussing the fact that abortion is “an act fraught with consequences” in terms of the “liberty of the woman,” and it is relevant that it is “intimate and personal” because the constitutional definition of liberty protects “the most intimate and personal choices a person may make in a lifetime”). An approach that goes beyond the *Casey* joint opinion’s consideration of consequences to consideration of social policy appears in Justice Blackmun’s opinion in *Roe v. Wade*, where Justice Blackmun explicitly considered the “specific and direct harm,” both medical and psychological, that laws restricting abortion may have. *Roe v. Wade*, 410 U.S. 113, 153 (1973). *See infra* text accompanying note 40.

## 2. Formalist & Holmesian Approaches in the Dissents in *Casey*

### a. *The Formalist Approach in Casey*

A formalist approach to constitutional interpretation rejects the view of the Constitution as a living document. Rather, it views the Constitution as having a fixed, static meaning that can only be changed by the formal process of constitutional amendment. Thus, the formalist approach to constitutional interpretation focuses almost exclusively on contemporaneous sources of meaning. This is because they existed at the time the document was ratified, which is the time the document's meaning is fixed. Under this approach, the literal meaning of constitutional text, and the framers and ratifiers' specific historical intent, are the critical sources of meaning to consider. For formalist judges, arguments of purpose, general intent, or structure are typically too vague or easily manipulated by judges wishing to impose their own policy preferences on the Constitution; focusing on literal meaning and specific historical intent leads to more certain and predictable rulings.<sup>30</sup> The only major exception to this focus on contemporaneous sources of meaning is for well-established precedents that represent settled law, which a formalist judge may follow despite disagreeing with the doctrine's statement of the law.<sup>31</sup>

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30. On this formalist approach to constitutional interpretation, see generally R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 184-87, and sources cited therein (citing, *inter alia*, Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 532-35, 544-48 (1988) (discussing a "presumptive formalism" where factors outside the "literal" rule, such as purpose, can affect interpretation if "predictability, stability, and decision-maker restraint" are not decreased too much and literalism would lead to "especially outrageous" results). See also JUSTICE ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton University Press 1997). Some individuals call this a "strict constructionist" approach to the Constitution, based on the fact that only contemporaneous sources of meaning are used, and thus the Constitution has a strictly fixed, rather than living, meaning. However, as Justice Scalia has noted, the formalist approach does not necessarily adopt a strict, or narrow, construction of all constitutional provisions. While there is a policy maxim of strict construction of penal statutes, see *supra* text accompanying note 11, that policy maxim does not apply to constitutional provisions in general. Thus, Justice Scalia rejects use of the phrase "strict constructionist" to describe his formalist, or as he calls it "textualist," approach to constitutional interpretation. SCALIA, *supra*, at 23-25. The phrase "textualism" is not used in this article because all four judicial decisionmaking styles start their constitutional analysis with "text." The differences among the four styles emerge when considering what other sources to use in addition to text, and how to use them. Further, note that this strict constructionist/textualist/formalist approach is not necessarily synonymous with interpreting the Constitution according to the "original intent" of the framers and ratifiers. The framers and ratifiers probably had more in mind the common law/natural law theory of interpretation with which they were familiar. See generally *supra* text accompanying notes 18-29; R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 150-84.

31. On this aspect of the formalist approach to precedent, see *infra* text accompanying notes 34, 44; R. Kelso & C. Kelso, *Dealing With Precedent*, *supra* note 3, at 990-93, and sources cited therein. In addition, some formalists will make an exception to exclusive reliance on contemporaneous sources of meaning for "a continued and consistent legislative or executive practice which indicates a clear tradition on a specific issue to provide some gloss on meaning," as long as that practice does

In *Casey*, the formalist approach is represented by Justice Scalia's dissenting opinion. Justice Scalia's opinion excoriated the joint opinion for its commitment to "reasoned elaboration" of the law, rather than fixed constitutional meaning, and for its "emptiness" because based upon "theoretical" and "abstract" reasoning.<sup>32</sup> Based upon literal text and specific historical intent, Justice Scalia concluded that *Roe v. Wade* was wrongly decided.<sup>33</sup> As *Roe* was wrongly decided, and it did not represent settled law, *Roe* should be overruled.<sup>34</sup>

*b. The Holmesian Approach in Casey*

While sharing the formalist emphasis on literal meaning and specific historical intent, a Holmesian approach is willing to go beyond literal meaning and specific intent either where strong purpose or general intent arguments exist, or strong legislative or executive practice arguments so counsel. This is because the Holmesian approach is a functional approach which understands that constitutional provisions have purposes which should be followed and thus interpretation is not just an exercise in dictionary definitions, and because the Holmesian approach has a strong deference to government component which counsels great attention be paid to legislative and executive practice.<sup>35</sup> As a functional approach, the Holmesian approach is also willing to consider following precedents on which individuals have substantially relied, in addition to the formalist approach of following precedents so well-established that they represent settled law.<sup>36</sup>

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not "override clear textual commands of the Constitution." R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 186 (discussing, *inter alia*, Justice Scalia's stated willingness to consider a tradition of specific legislative enactments since 1868 to influence the meaning of liberty under the Due Process Clause of the Fourteenth Amendment).

32. 505 U.S. at 981-85 (Scalia, J., dissenting).

33. *Id.* at 979-81.

34. *Id.* at 999. It should be noted that from a formalist perspective Justice Scalia is probably right. Based upon literal text and specific historical intent, *Roe* probably is wrongly decided as inconsistent with the specific intent of the framers and ratifiers in 1868, and not based on any literal text in the Constitution. Additionally, because it is difficult to argue that *Roe* is settled law, given the controversy that has always surrounded *Roe*, *Roe* should be overruled from a formalist approach to precedent.

35. See R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 195-200 (citing, *inter alia*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)).

36. On this aspect of the Holmesian approach to precedent, see R. Kelso & C. Kelso, *Dealing With Precedent*, *supra* note 3, at 993-95, and sources cited therein. As stated therein,

In the classic case of substantial reliance, an individual has made a financial or employment decision based on the current state of the law. If the law changes, there is no

In *Casey*, as in *Roe* itself, this approach is represented by Chief Justice Rehnquist's opinion. Under a Holmesian deference to government approach, great emphasis should be paid to legislative and executive practice subsequent to 1868 to determine the meaning of liberty for purposes of substantive due process analysis. In terms of this legislative and executive practice, the relative lack of legislative and executive enforcement regarding access to contraception at the time of *Poe v. Ullman* and *Griswold v. Connecticut* is different than the more vigorous enforcement practice regarding access to abortion at the time that *Roe* was decided; thus, *Griswold* is arguably right, while *Roe* is wrong.<sup>37</sup> As *Roe* is wrong, unsettled law, and there has been no substantial irreversible reliance on *Roe*, from a Holmesian perspective *Roe* should be overruled.<sup>38</sup>

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practical way to restore the status quo. Time has passed and other financial or employment opportunities have gone by the board. In a practical sense, reliance is irreversible. Yet there are other cases where persons can modify their behavior with respect to a new law, and prior reliance is reversible. Such cases do not present compelling circumstances for the application of stare decisis based upon concern for substantial reliance.

*Id.* at 994. On this Holmesian approach to precedent, see also *infra* text accompanying note 38.

37. Compare *Casey*, 505 U.S. at 952 (Rehnquist, C.J., dissenting)

[I]n 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. . . . By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws then in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of States prohibited abortion unless necessary to preserve the life or health of the mother.

*Id.* and *id.* at 953 ("The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce, Meyer, Loving, and Griswold*") with *Poe v. Ullman*, 367 U.S. 497, 554-55 (1961) (Harlan, J., dissenting).

But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.

*Id.*

Note that while Justice White, who typically follows a Holmesian approach, see R. Kelso, *Separation of Powers*, *supra* note 4, at 583-84, dissented in *Roe* and *Casey*, 410 U.S. 113, 221 (1973); 505 U.S. 833, 944 (1992), White agreed that Connecticut's statute regarding access to contraceptives in *Griswold* was unconstitutional. *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965).

38. See *Casey*, 505 U.S. at 956 ("[R]eliance interests would not be diminished were the Court to go further and acknowledge the full error of *Roe*, as 'reproductive planning could take virtually immediate account of' this action."). Note that the joint opinion in *Casey* did suggest that reliance interests favored upholding *Roe*, based upon the argument that

The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. . . . [W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be diminished.

*Id.* at 856.

In response, Chief Justice Rehnquist noted,

### 3. The Instrumentalist Approach in the Blackmun Concurrence in *Casey*

The instrumentalist approach is represented in *Casey* by Justices Blackmun and Stevens. They would follow *Roe v. Wade* in its entirety, making every burden on abortion rights subject to strict scrutiny,<sup>39</sup> following *Roe's* concern about specific harm if a pro-choice position is not adopted.<sup>40</sup> This approach differs from the natural law approach, where policy considerations do not come into play, and the Court does not sit as a super-legislature. Thus, the specific harm paragraph in *Roe*, central to Justice Blackmun's opinion, is not present in the joint opinion in *Casey*, and not every regulation of abortion is constitutionalized under a strict scrutiny approach.<sup>41</sup> The importance of the undue burden analysis is to ensure that not every regulation triggers strict scrutiny, and thus the Court does not act as a super-legislature second-guessing every aspect of abortion regulation.<sup>42</sup>

The joint opinion thus turns to what can only be described as an unconventional—and unconvincing— notion of reliance . . . . Surely it is dubious to suggest that women have reached their 'places in society' in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.

*Id.* at 956-57. The joint opinion also noted the possible argument that since *Roe* persons may have organized their intimate relationships in reliance on the availability of abortion in the event that contraception should fail. *Id.* at 856. However, this argument provides little additional support to uphold *Roe* on reliance grounds, since that kind of reliance is not irreversible if, as Chief Justice Rehnquist stated, reproductive planning could take virtually immediate account of this action. On the reversibility of the reliance being an important fact in the reliance analysis, see *supra* note 36; R. Kelso & C. Kelso, *Dealing With Precedent*, *supra* note 3, at 994-95.

39. 505 U.S. at 917 (Stevens, J., concurring in part and dissenting in part); *id.* at 929-34 (Blackmun, J., concurring in part and dissenting in part).

40. See *id.* at 927-28 (Blackmun, J., concurring in part and dissenting in part) (“[C]ompelled continuation of a pregnancy . . . impos[es] substantial physical intrusions and significant risks of physical harm. . . . [M]otherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination . . . .”); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (Blackmun, J.) (“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 . . .”).

41. Compare 505 U.S. at 934-40 (Blackmun, J.) (applying strict scrutiny to all of the legislative regulations at issue in *Casey*) with *id.* at 879-901 (joint opinion in *Casey*) (applying rational review to less than undue burdens on abortion choice; strict scrutiny applied only to the spousal notification provision which was held to constitute an undue burden on abortion choice).

42. Note that it could be argued that the joint opinion in *Casey* summarily concluded that the spousal notification provision was unconstitutional once it was held to be an undue burden. 505 U.S. at 877 (“In our considered judgment, an undue burden is an unconstitutional burden.”). However, the better analysis of *Casey* is that when the joint opinion stated it was upholding the core holding of *Roe*, that meant a court should apply *Roe's* strict scrutiny analysis to undue burdens on abortion rights. *Id.* at 846, 869-71. The Court seems to apply the undue burden analysis in this way in other

## B. Theories of Precedent in Casey

In addition to disagreeing about sources of constitutional interpretation, the opinions in *Casey* presented different theories of precedent. As discussed in a previous article, those theories are:

- (1) the instrumentalist focus: was the precedent wrongly decided?;<sup>43</sup>
- (2) the formalist focus: follow precedent that is settled law, even if wrongly decided;<sup>44</sup>
- (3) the Holmesian focus: follow precedent that is substantially relied upon, even if not settled law and wrongly decided;<sup>45</sup> and
- (4) the natural law focus: follow precedent, even if not relied upon, not settled law, and wrongly decided, unless some additional special circumstances exist.<sup>46</sup>

For the natural law judge, these special circumstances can involve:

- (1) the precedent is unworkable in practice;
- (2) the precedent creates an inconsistency or incoherence in the law;
- (3) a changed understanding of facts has undermined the precedent's factual basis;
- (4) the precedent represents a substantially wrong or substantially unjust interpretation of the Constitution; or
- (5) the precedent raises a concern about the Court's commitment to the "Rule of Law."<sup>47</sup>

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unenumerated fundamental rights cases. For example, in cases involving the right to marry, the Court has applied strict scrutiny to the significant infringement at issue in *Zablocki v. Redhail*, 434 U.S. 374 (1978), but only rational review to a burden on the right to marry of a prisoner, *Turner v. Safley*, 482 U.S. 78 (1987). Similarly, the Court has applied strict scrutiny to significant burdens on the right to travel, as in *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), while applying only rational review to other burdens on the right to travel, as in *Zobel v. Williams*, 457 U.S. 55 (1982) and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). For further discussion suggesting understanding the undue burden analysis in this way, see R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to the Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493, 510-12 (1992); R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1, 9-11 (1995).

43. R. Kelso & C. Kelso, *Dealing With Precedent*, *supra* note 3, at 986-89.

44. *Id.* at 990-93 (citing, *inter alia*, *Casey*, 505 U.S. at 999 (1992) (Scalia, J., dissenting) ("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.")).

45. *Casey*, 505 U.S. at 956 ("Any traditional notion of reliance is not applicable here [in *Casey*]."); R. Kelso & C. Kelso, *Dealing With Precedent*, *supra* note 3 at 993-95 (citing, *inter alia*, *Payne v. Tennessee*, 501 U.S. 808, 928 (1991) (Rehnquist, J.) ("Considerations in favor of *stare decisis* are at their acme in cases . . . where reliance interests are involved.") On this reliance inquiry, see *supra* notes 36, 38.

46. R. Kelso & C. Kelso, *Dealing With Precedent*, *supra* note 3 at 995-97 (citing, *inter alia*, *Casey*, 505 U.S. at 855-69 (joint opinion)).

47. See *id.* at 995-1030 (1996) (discussing recent cases where these factors to overrule precedent have been used by the Court). The factor regarding the "Rule of Law" involves such considerations

The extent to which a judge commits to one of these theories of precedent will naturally affect the weight given to prior judicial decisions. In particular, natural law judges are likely to give the greatest weight to precedent because they seek an additional special circumstance before overruling precedent.<sup>48</sup> Thus, in *Casey*, once Justice Scalia determined that *Roe* was wrongly decided and not settled law, and in addition Chief Justice Rehnquist decided that no substantial reliance existed upon *Roe*, *Roe* was ripe for overruling.<sup>49</sup> In contrast, absent an additional special circumstance, Justices O'Connor, Kennedy, and Souter concluded that their theory of precedent called for the basic holding in *Roe* to be reaffirmed.<sup>50</sup>

### III. POINTS OF STRESS IN THE COMMON LAW/NATURAL LAW THEORY

Predictably, Justices O'Connor, Kennedy, and Souter have continued to vote together in a majority of cases decided after *Casey*. In cases decided by a 5-4 margin, however, they have usually split.<sup>51</sup> From considering these 5-4 opinions, it becomes clear that three main points of stress exist in applying the natural law theory of interpretation. These points of stress help explain the split in case results among Justices O'Connor, Kennedy and Souter when

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as whether to follow the common-law practice that decisions are applied retroactively to all similar cases pending on direct review, or whether to make the decision prospective only; whether the rule is based not on proper legal argument, but as a response to political pressure, or whether the rule was adopted without full briefing and argument on the issue. *Id.* at 1026-29.

48. *See id.* at 984-86, 995-96. One practical consequence of this is that those who would try to persuade a natural law judge to overrule a precedent should do more than contend that the precedent was wrongly decided. Reference should also be made to one or more of these "special circumstances" for overruling precedent. And, as noted in a previous article, the current Court "has reserved a finding of 'substantial error' almost exclusively for cases involving structural issues of separation of powers, federalism, checks and balances or judicial review." *Id.* at 1037.

49. *See e.g., supra* notes 34, 44 and accompanying text (formalist approach); *supra* notes 38, 45 and accompanying text (Holmesian approach).

50. *See Casey*, 505 U.S. at 853 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."). Since they believed that *Roe* was rightly decided in its entirety, Justices Blackmun and Stevens easily concluded that *Roe* should be followed in *Casey*. *See supra* note 39 and accompanying text.

51. Since *Casey*, Justices O'Connor, Kennedy, and Souter have split in 146 of the Court's 150 5-4 cases. The exceptions are *Rogers v. Tennessee*, 532 U.S. 451 (2001); *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *BMW of North America v. Gore*, 517 U.S. 559 (1996); and *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), where they were in the majority in each. As noted in the Introduction, every 5-4 opinion from the 1997-2000 Terms of the Court, as well as selected 5-4 opinions from the 1992-96 Terms of the Court, are considered in the rest of this article. *See infra* Appendix A (tabulating the split among the Justices in these 85 cases).



applying the natural law approach to different issues. These three points of stress are the tension between:

(1) what the sources of interpretation suggest the meaning should be to a natural law judge versus prior Supreme Court precedent (which may reflect a formalist, Holmesian, or instrumentalist approach to the Constitution);

(2) whether the natural law judge adopts a classic/Christian natural law approach or an Enlightenment/common law approach to interpreting the Constitution; and

(3) whether the natural law judge has leanings in the direction of adopting formalist, Holmesian, or instrumentalist results in some circumstances, which may affect the reasoning and outcome in a particular case.

#### A. Sources of Constitutional Law Versus Precedent

In any case, it is possible there will be a tension between what the sources of constitutional law other than precedent suggest the answer should be to a constitutional issue, and what the Supreme Court's precedents hold. Given the great respect natural law judges pay to precedent,<sup>52</sup> this tension between sources and precedent is most acute for a natural law judge. This is particularly likely to occur for a precedent whose majority was made up of formalist Justices (1873-1937), Holmesian Justices (1937-54), or instrumentalist-era Justices (1954-1986). In such a case, the precedent may not reflect how a natural law judge would interpret the Constitution (the original natural law era on the Court being 1789-1872), making it more likely that a tension may exist between sources and precedent.<sup>53</sup>

The clearest recent examples of this tension between what the sources of constitutional law suggest and judicial precedents arose in *United States v. Lopez*<sup>54</sup> and *United States v. Morrison*.<sup>55</sup> As Justices Kennedy and O'Connor indicated in their concurrence in *Lopez*, using constitutional law sources rather than precedent suggests that Congress overstepped its bounds when it passed the Gun-Free School Zones Act of 1990, relying on the Commerce Clause.<sup>56</sup> Here, "neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus."<sup>57</sup> This is further supported by arguments about

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52. See *supra* notes 46-48 and accompanying text.

53. On the Supreme Court, majorities typically followed these theories of interpretation in these years. See R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 184-225. See also R. Kelso, *Separation of Powers*, *supra* note 4, at 552-63 (discussing more broadly the ages of American law in terms of natural law, formalist, Holmesian, and instrumentalist eras).

54. 514 U.S. 549 (1995).

55. 529 U.S. 598 (2000).

56. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

57. *Id.*

federalism embedded in the structure of our Constitution,<sup>58</sup> and the fact that “it is well established that education is a traditional concern of the States.”<sup>59</sup> Nonetheless, as Justices Kennedy and O’Connor pointed out, “Stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.”<sup>60</sup> Thus, Kennedy and O’Connor “join[ed] the Court’s opinion with . . . observations on what [we] conceive to be its necessary though limited holding.”<sup>61</sup>

In his dissent in *Lopez*, Justice Souter gave even greater respect to precedent than did Justices O’Connor and Kennedy.<sup>62</sup> As Justice Souter observed, for the last fifty years the Court has deferred to rationally based congressional judgments regarding whether Congress was regulating an activity affecting interstate commerce.<sup>63</sup> Applying that deferential standard here would lead to a conclusion that Congress’ exercise of power should be upheld, despite the reservations one might have from text, structure, and history arguments alone.<sup>64</sup>

On balance, one can say that a judge might have a strong natural law view of precedent, a medium natural law view, or a weak natural law view.<sup>65</sup> In *Lopez*, Justice Souter adopted a strong natural law view of precedent, following the instrumentalist-era precedents which give virtual plenary power to Congress to regulate under the Commerce Clause, which is a broader power than a natural law judge would be likely to find absent those precedents.<sup>66</sup> In *Lopez*, Justices Kennedy and O’Connor held a medium

58. *Id.* at 576 (“The theory that two governments accord more liberty than one requires . . . two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.”).

59. *Id.* at 580.

60. *Id.* at 574. Thus, as their concurrence indicated, “deference given to Congress has since been confirmed,” and decisions should not be “called into question” when extending the Commerce Clause to uphold civil rights laws with an economic nexus, such as *Katzenbach v. McClung*, 379 U.S. 294 (1964) (banning racial discrimination at public restaurants), or criminal laws with an economic nexus, such as *Perez v. United States*, 402 U.S. 146 (1971) (extortionate credit transactions). *Lopez*, 514 U.S. at 573-74.

61. *Id.* at 568.

62. *See id.* at 603 (Souter, J. dissenting).

63. *Id.* at 603-04, 608.

64. *Id.* at 604-07, 614-15 (expressing concern about abandoning recent consensus in Commerce Clause cases).

65. In addition, of course, are the weaker views of precedent of Holmesian, formalist, and instrumentalist decisionmaking styles. *See supra* notes 43-45 and accompanying text.

66. For example, while Chief Justice Marshall’s opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), gave the federal government wide power to regulate under the Commerce Clause, it is clear that Marshall assumed that there were some activities “which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for

natural law view of precedent, balancing the precedents against the other sources.<sup>67</sup>

The same split between Justice Souter and Justices O'Connor and Kennedy occurred in *United States v. Morrison*.<sup>68</sup> Again, Justice Souter followed the instrumentalist-era precedents, whose reasoning permits Congress to regulate any activity under the Commerce Clause that has a significant effect on interstate commerce. Based upon congressional findings regarding the economic impact of violence against women, Justice Souter supported congressional power to pass the Violence Against Women Act of 1994.<sup>69</sup> Once again, Justices O'Connor and Kennedy took a medium approach to precedent, following the core holdings of the instrumentalist-era cases, which upheld the power of Congress to ban economic criminal activity, as in *Perez*,<sup>70</sup> but concluding that regulation of noneconomic, criminal conduct, an issue not directly before the Court in the instrumentalist-era cases, could not be justified under Congress' Commerce Clause power.<sup>71</sup> Further, note that this approach is not as deferential to state governments as a Holmesian deference to government approach.<sup>72</sup>

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the purpose of executing some of the general powers of the government." *Id.* at 195. With over forty states already having criminal laws outlawing possession of firearms around schools, including Texas where the case arose, *Lopez* is a classic case where no federal interference is necessary. *Lopez*, 514 U.S. at 551, 581. Of course, from a natural law perspective, it is appropriate to follow a pattern of precedents as part of reasoned elaboration of the law even if those precedents lead to a different result today than would have been reached two-hundred years ago. See *supra* note 22. And, because of the force of precedent, it is appropriate to follow precedent even if one disagrees with the precedent's analysis of the text, structure, history, and practice, unless some special circumstance suggests the precedent should be overruled. See *supra* note 47. During his confirmation hearing, Justice Souter indicated that while on the New Hampshire Supreme Court he had voted to uphold precedents with which he disagreed and that the rule that the Court should ordinarily adhere to its precedents "is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law." Linda Greenhouse, *Defining Souter, Some*, N.Y. TIMES, Sept. 18, 1991, at A16. See also Liang Kan, Comment, *A Theory of Justice Souter*, 45 EMORY L. REV. 1373, 1383-1417 (1996) (discussing Justice Souter's decision-making under the heading, "Justice Souter's Response: Stick to Precedent").

67. See *supra* text accompanying notes 56-60.

68. 529 U.S. 598 (2000).

69. *Id.* at 634 (Souter, J., dissenting).

70. See *supra* note 60.

71. *Morrison*, 529 U.S. at 601, 610. Even if there had been an instrumentalist-era case on point, Justice O'Connor and Kennedy probably would have called for that case to be overruled, based on the "special circumstance" that such a case would be "substantially wrong," see *supra* text accompanying note 47, a conclusion that Justice Kennedy and O'Connor have reserved almost exclusively for cases involving the structural issues of separation of powers, federalism, checks and balances, and judicial review. See R. Kelso & C. Kelso, *Dealing With Precedent*, *supra* note 3, at 1008-25, 1037. Similar to Justice Marshall in *Gibbons v. Ogden*, for Justices O'Connor and Kennedy, the "Constitution requires a distinction between what is truly national and truly local." 529 U.S. at 617-18. See *supra* note 64. For a similar split among Justices O'Connor, Kennedy, and Souter in a statutory interpretation case, see *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng.*, 531 U.S. 159, 167-72 (2001) (showing that because of constitutional concerns regarding the extent of Congress' Commerce Clause power, Justices O'Connor and Kennedy joined the majority opinion which held as a matter of statutory interpretation that the Clean Water Act does

A similar difference between Justices O'Connor and Kennedy versus Justice Souter also appears in cases involving the criminal justice system. Typically, where these three Justices disagree in criminal cases, it is because Justice Souter has chosen, as in *Lopez* and *Morrison*, to follow the broader reasoning of instrumentalist-era precedents, which is more favorable to criminal defendants' rights. In contrast, Justices O'Connor and Kennedy, while not overruling the core holdings of those cases, have found a way, as in *Lopez* and *Morrison*, to distinguish the prior cases and reach a result more consistent with their understanding of constitutional text, purpose, structure, history, and practice, which is often more favorable to the government.

For example, in *Pennsylvania Board of Probation and Parole v. Scott*,<sup>73</sup> the Supreme Court was faced with the question of whether to apply the exclusionary rule to bar the introduction at parole revocation hearings of evidence seized in violation of the parolees' Fourth Amendment rights. Dissenting with Justices Ginsburg and Breyer, Justice Souter argued that the deterrent function of the exclusionary rule is implicated just as much in a parole revocation proceeding as in a criminal trial.<sup>74</sup> Thus, the reasoning of

not apply to an isolated sand and gravel pit in Northern Illinois which provides a habitat for migratory birds); *id.* at 4052-58 (Stevens, J., dissenting) (joining because he did not share these constitutional concerns, Justice Souter joined the Stevens dissent which held that the Clean Water Act did apply to this pit). On the other hand, as Justices O'Connor and Kennedy have noted, their approach does not adopt the static view of the Constitution propounded by formalist judges. *See supra* note 22. Thus, as they have noted,

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet 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.

*Lopez*, 514 U.S. at 574-75 (Kennedy, J., concurring) (citing *New York v. United States*, 505 U.S. 144, 157 (1992)).

72. *See* Earl M. Maltz, *Justice Kennedy's Vision of Federalism*, 31 RUTGERS L.J. 761 (2000) (criticizing Justice Kennedy on the grounds that his theory of federalism is not as deferential to state governments as Chief Justice Rehnquist's approach). As discussed by Justice Kennedy in his concurrence in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995), the framers and ratifiers adopted a dual theory of sovereignty, "establishing two orders of government, each with its own direct relationship, its own privity, and its own set of mutual rights and obligations to the people who sustain it and are governed by it." As Justice Kennedy noted, *id.* at 839-41, this theory was emphatically embraced by the Supreme Court, per Justice Marshall, in the famous case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-05 (1819). For why Justice O'Connor might have joined Chief Justice Rehnquist's more Holmesian dissent in *Thornton*, despite her usually adopting a natural law theory of interpretation, *see infra* notes 126-30, 135, 137 and accompanying text.

73. 524 U.S. 357 (1998).

74. *Id.* at 370 (Souter, J. dissenting).

prior Court precedents applying the exclusionary rule to criminal trials despite the loss of potentially reliable evidence should be extended to apply the exclusionary rule to parole revocation hearings.<sup>75</sup> In contrast, Justices O'Connor and Kennedy joined Justice Thomas' majority opinion which noted that no prior precedent had explicitly addressed the applicability of the exclusionary rule to parole revocation hearings, and that in terms of structural arguments regarding our federal system the Court has "long been adverse to imposing federal requirements upon the parole systems of the States."<sup>76</sup>

A similar split among Justices O'Connor, Kennedy, and Souter occurred in *Ramdass v. Angelone*.<sup>77</sup> At issue in *Ramdass* was whether to extend Justice Blackmun's opinion in *Simmons v. South Carolina*.<sup>78</sup> *Simmons* held that where the State puts the defendant's future dangerousness at issue in a death penalty case, due process requires the jury to be informed if a life sentence would be without the possibility of parole. In *Ramdass*, the defendant had not yet become parole ineligible because a separate court had not yet entered judgment on a jury's verdict which would make the defendant parole ineligible.<sup>79</sup> With Justices Ginsburg and Breyer, Justice Souter joined Justice Stevens' dissent, which argued the "acute unfairness in permitting a State to rely on a recent conviction to establish a defendant's future dangerousness while simultaneously permitting the State to deny that there was such a conviction when the defendant attempts to argue that he is parole ineligible" and that "[e]ven the most miserly reading of the opinions in *Simmons*" supports the defendant's argument in this case.<sup>80</sup> In contrast, the majority noted that technically the defendant was not parole ineligible at the time the jury instruction was given, and thus the *Simmons* precedent did not directly govern resolution of the case. Structural arguments suggested to

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75. *Id.* As Justice Souter noted, cases involving the ordinary administration of the criminal law, such as criminal trials or parole hearings, implicate different kinds of concerns than noncriminal cases, such as civil tax proceedings or deportation proceedings, or specialized kinds of criminal proceedings, such as habeas petitions or grand jury proceedings. Thus, it is understandable that in these other contexts the Court's precedents had held that the benefits of the exclusionary rule "would be so marginal as to be outweighed by the incremental costs." *Id.* at 371-72. In contrast,

[A] revocation proceeding often serves the same function as a criminal trial, and the revocation hearing may very well present the only forum in which the State will seek to use evidence of a parole violation, even when that evidence would support an independent criminal charge. The deterrent function of the exclusionary rule is therefore implicated as much by a revocation proceeding as by a conventional trial. . . .

*Id.* at 370. In a stronger instrumentalist dissent, Justice Stevens urged the Court to adopt the view that the exclusionary rule is constitutionally required, and thus no balancing of the value of its deterrent effect versus the loss of reliable evidence need be done. *Id.* at 369-70 (Stevens, J., dissenting).

76. *Id.* at 369.

77. 530 U.S. 156 (2000).

78. 512 U.S. 154 (1994).

79. 530 U.S. at 178-79.

80. *Id.* at 182 (Stevens, J., dissenting).

the majority that “state trial judges and appellate courts [should] remain free, of course, to experiment,” and thus this aspect of criminal procedure should not be imposed on all fifty states as a constitutional requirement.<sup>81</sup>

This split among Justices O’Connor, Kennedy, and Souter, with Justice Souter remaining more faithful to the reasoning of instrumentalist-era precedents, and Justices O’Connor and Kennedy more faithful to their understanding of text, purpose, structure, history, and practice, appears in case after case involving the criminal justice system, both in non-death penalty cases like *Scott*<sup>82</sup> and in cases involving the death penalty like *Ramdass*.<sup>83</sup> Of course, in cases where there are no clear precedents on point, or in cases where the instrumentalist precedents should be overruled consistent with even a strong natural law approach to precedent, Justice Souter has been willing to join Justices O’Connor and Kennedy and reach a result consistent with a natural law approach to the other sources of constitutional interpretation: text, purpose, structure, history, and practice.<sup>84</sup>

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81. *Id.* at 171, 177-78. The majority did note that Virginia has now amended their procedures to permit a *Simmons* instruction to be given on the *Ramdass* facts. *Id.* at 178.

82. *See, e.g.*, *Texas v. Cobb*, 532 U.S. 162 (2001) (considering whether the follow the *Blockbuster* test which holds that the Sixth Amendment right to counsel attaches only to charged offenses, or offenses that even if not charged would be considered the same offense; dissent follows instrumentalist-era precedents in the Courts of Appeals and state courts to hold that the Sixth Amendment right also attaches to criminal acts that are “closely related to” or “inextricably intertwined with” the particular crime charged); *Ohler v. United States*, 529 U.S. 753 (2000) (considering how to apply the instrumentalist-era *Luce* exception governing waiving the right to appeal an *in limine* ruling that a prior conviction is admissible as character evidence or for impeachment purposes); *Smith v. Robbins*, 528 U.S. 259 (2000) (considering application of the instrumentalist-era *Wende* brief procedure for an indigent appeal of a criminal conviction); *Illinois v. Wardlow*, 528 U.S. 119 (2000) (considering the constitutionality of a warrantless investigatory stop under the instrumentalist-era *Terry* case); *Calderon v. Coleman*, 525 U.S. 114 (1998) (considering how to apply the instrumentalist-era *Brecht* test in habeas proceedings). *See also* *Daniels v. United States*, 532 U.S. 374 (2001) (holding that federal post-conviction relief is not available to a prisoner through a motion to vacate on the ground that the current sentence was enhanced based upon an allegedly unconstitutional prior conviction for which the petitioner is no longer in custody); *Lackawanna Cty. Dist. Att. v. Coss*, 532 U.S. 394 (2001) (finding that federal post-conviction relief is similarly not available through a petition for a writ of habeas corpus).

83. *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225 (2000) (holding that a jury verdict of death cannot be set aside by a slight possibility, rather than reasonable likelihood, that the jury felt compelled by the jury instructions not to consider mitigating evidence); *Jones v. United States*, 527 U.S. 373 (1999) (unwilling to impose in a death penalty case a constitutional requirement that a trial judge must instruct the jury as to the legal consequence of jury deadlock); *Calderon v. Thompson*, 523 U.S. 538 (1998) (considering whether the Ninth Circuit abused its discretion in ordering a belated en banc vote on a death penalty case when two judges, because of administrative mistakes, did not request an en banc vote in a timely manner; Supreme Court majority holds that granting the habeas petition to ensure that the votes of all the judges are counted would be an abuse of discretion).

84. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that traditional common-law history and more recent legislative and executive practice support the view that it is

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constitutional for the police to make a warrantless arrest for a minor criminal offense, such as a misdemeanor seat-belt violation punishable only by a fine; Justice O'Connor, departing from her usual voting pattern, joined Justice Stevens, Ginsburg, and Breyer in dissent, concluding that under instrumentalist-era precedents such an arrest would be "unreasonable" and thus in violation of the Fourth Amendment); *Hopkins v. Reeves*, 524 U.S. 88 (1998) (Stevens, J. dissenting) (arguing that state trial courts, in capital cases, are not constitutionally required to instruct juries on offenses that are not lesser-included offenses; instrumentalist Justice Stevens dissenting); *United States v. Scheffer*, 523 U.S. 303 (1998) (Stevens, J. dissenting) (arguing that the rule against admission of polygraph evidence in a court martial proceeding does not violate Fifth or Sixth Amendment rights of the accused to present a defense; instrumentalist Justice Stevens dissenting).

Of course, in cases where a natural law approach would differ from a formalist approach—often because the natural law approach weighs arguments of a text's purpose more strongly than the formalist approach, which focuses more on literal interpretation of text, *see supra* notes 18-20, 23-24, 30 and accompanying text, Justices O'Connor, Kennedy, and Souter usually can be found on one side of the opinion, and Justices Scalia and Thomas can be found on the other side. *See, e.g.*, *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998) (finding petitioner's claim raised for a second time, after the first claim was dismissed as not ripe for resolution, was not a "second" application under the Antiterrorism and Effective Death Penalty Act because the first application was not heard on the merits; following a literal approach would produce a "perverse" result); *Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (explaining that petitioner who can make a showing of actual innocence entitled to have his defaulted claim of an unintelligent plea considered on the merits, despite the fact that the claim was literally defaulted). The greater respect for precedent in the natural law approach than in the formalist approach can also cause disagreements in case results. *See supra* notes 43-50 and accompanying text. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (Scalia, J. dissenting) (2000) (arguing that principles of *stare decisis* weigh heavily against overruling *Miranda*); *Harmelin v. Michigan*, 501 U.S. 957, 996-1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (arguing that principles of *stare decisis* counsel the Court to follow its precedents and apply a proportionality principle as part of determining what is "cruel and unusual punishment" under the Eighth Amendment; Justice Scalia's emphasis on literal text and specific intent leads him to conclude that the framers and ratifiers rejected any proportionality requirement under the Eighth Amendment, and thus later Supreme Court cases adopting that requirement, like *Solem v. Helm*, 463 U.S. 277 (1983), should be overruled).

The same split between the natural law approach's greater focus on purpose, versus the formalist greater focus on literal meaning, was also evident in *Rogers v. Tennessee*, 532 U.S. 451 (2001). There, for the Court, Justice O'Connor held that the purpose behind the Ex Post Facto Clause and Due Process Clause to assure "fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct" would not be violated by permitting the Tennessee Supreme Court to abolish retroactively the common law "year and a day rule." *Id.* at 1698-99. In dissent, Justice Scalia noted that literally this result permitted the Court to approve "the conviction of a man for murder that was not murder (but only manslaughter) when the offense was committed." *Id.* Justice Scalia's dissent was joined not only by Justice Thomas, but also by Justices Stevens and Breyer, in part, as their separate dissents point out, because of instrumentalist social policy reasons that "the majority has undervalued the threat to liberty that is posed whenever the criminal law is changed retroactively," *id.* at 1703 (Stevens, J., dissenting), and by failing to consider "'considerations of convenience, of utility, and of the deepest sentiments of justice.'" *Id.* at 1710 (Breyer, J., dissenting) (citing BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 148-49 (1921)). Formalist and instrumentalist-leaning Justices also joined forces in *Kyllo v. United States*, 533 U.S. 27 (2001), where Justice Scalia, joined by Justices Souter, Thomas, Ginsburg, and Breyer, concluded that thermal imaging aimed at a private home to detect relative amounts of heat was an unconstitutional search within the meaning of the Fourth Amendment. In dissent, Justices Stevens, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, concluded that the thermal imaging was aimed at a house in plain view, and thus the plain view exception to the Fourth Amendment should be applied to the case. *Id.* at 2047-48.

*B. Classic/Christian Natural Law v. Enlightenment Natural Law/Common Law*

A second reason that leads to different results among Justices O'Connor, Kennedy, and Souter is a different substantive understanding of which natural law tradition most affected the framing and ratifying of the Constitution. Naturally, a judge will view the text, purpose, structure, and history of the Constitution differently depending on which natural law view the judge believes the framers and ratifiers held.

In general, there were two competing natural law approaches in the Eighteenth century to which the framers and ratifiers turned for guidance. One approach was the classic/Christian natural law tradition, that developed from Aristotle, through Aquinas, and affected such writers as Hooker and Burke.<sup>85</sup> This tradition is what many writers think of when they use the term "natural law," that law being an emanation of God's reason and will, and is reflected in the views of William Blackstone and some of the early Federalist Justices on the Supreme Court, including Justice Samuel Chase.<sup>86</sup>

The second tradition is the Enlightenment natural law tradition of the English, Scottish, and French Enlightenments.<sup>87</sup> Under this social contract approach, rights derive from man and man's reason. In the Anglo-American context, rights emerge from the common-law process of judicial, legislative,

85. 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*, 26 ST. MARY'S L.J. 1051, 1053-55 (1995) [hereinafter R. Kelso, *Natural Law Tradition*] (comparing the two competing natural law traditions).

86. *Id.* at 1054-55. Of course, the classic natural law approach of Aristotle and the Christian natural law approach of Aquinas and subsequent writers are not identical in every respect. For example, Aristotle approved of slavery, while the Christian natural law tradition, in its best moments (as opposed to being an apologist for European colonialization during the Sixteenth and Seventeenth centuries), has forcefully rejected that. See generally M. STANTON EVANS, *THE THEME IS FREEDOM: RELIGION, POLITICS AND THE AMERICAN TRADITION* 133-48 (1994).

On balance, however, there is a clear distinction between a natural law tradition resting on Aristotelian and Thomist foundations, and the Enlightenment tradition of the English, Scottish, and French Enlightenments. See R. Kelso, *Natural Law Tradition*, *supra* note 85, at 1053-56, 1067-73. Similarly, while there are naturally differences between Protestant and Catholic natural law traditions, see, e.g., Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 55-57 (1964) (discussing the Catholic natural law concept of the "just price", which differs from the Protestant's tradition greater acceptance of market capitalism), and differences among Protestant traditions themselves, when compared to the Enlightenment philosophic traditions, all of these other religiously grounded traditions fall on the classic/Christian, not the Enlightenment, side of the divide.

87. This tradition includes such writers as Hobbes, Locke, and Berkeley of the English Enlightenment; Hutcheson, Hume, and Adam Smith of the Scottish Enlightenment; and Montesquieu, Rousseau, and Voltaire of the French Enlightenment. See generally R. Kelso, *Natural Law Tradition*, *supra* note 85, at 1055-56.



and executive interaction. This is often called the “natural rights” or “common law” approach.<sup>88</sup>

The Supreme Court in the recent case of *Alden v. Maine* addressed the difference between these two traditions in terms of case outcomes.<sup>89</sup> This case involved the question of what sovereign immunity rights states were intended to have upon entering into the Constitutional system of governance. As discussed in Justice Souter’s opinion, there were two eighteenth century theories of sovereignty, what Souter called the “natural law” approach (reflecting the classic/Christian natural law tradition), and what Souter called the “common law” approach (reflecting the Enlightenment social contract/common law tradition).<sup>90</sup> The classic/Christian natural law tradition

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88. While, analytically, one can draw a distinction between a “natural rights” approach based upon deducing principles of justice from an application of “reason,” and a “common law” approach grounded in judicial elaboration of societal “custom,” in the Eighteenth century writers and scholars often confused “custom” and “reason,” and thus for them, a natural law approach toward “reason” was consistent with the “common law” methodology which emphasized “custom.” See generally James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991) (discussing the synthesis of “natural law” and “common law” in revolutionary era legal writings). Thus, though distinct in our understanding today, it is accurate to place “common law” and Enlightenment “natural rights” on one side of the Eighteenth century natural law debates, and the classic/Christian natural law tradition on the other side. Similarly, though differences exist among the English, Scottish and French Enlightenment traditions, and between these traditions and the Civic Republican tradition of James Harrington and others, for purposes of this discussion, all these traditions fall broadly on one side of a divide, and the classic/Christian tradition falls on the other side. See generally R. Kelso, *Natural Law Tradition*, supra note 85, at 1074 n.75-76 (contrasting classical/Christian tradition with the Humanist tradition). The “humanist” continental natural law writers of the Seventeenth and Eighteenth centuries, such as Pufendorf, Burlamaqui, and Vattel, also fall on the Enlightenment, rather than the classic/Christian, side of the divide. *Id.*

89. 527 U.S. 706 (1999). As we noted in a previous article, the difference between these two approaches in terms of political philosophy was reflected at the founding by the difference between the Federalist Party, which “drew much of their political philosophy from the classic and Christian natural law tradition, which in its English version was represented by Hooker, Blackstone, and Burke,” versus Thomas Jefferson’s Republican Party, which “was billed more as the party of the working man, and had its philosophical roots in the Enlightenment natural law tradition.” Charles D. Kelso & R. Randall Kelso, *Politics and the Constitution: A Review of Judge Malcolm Wilkey’s Call for a Second Constitutional Convention*, 27 PAC. L.J. 1213, 1228 (1996). More broadly, one can note that as a philosophic matter, the “Enlightenment project emphasized four central goals of liberalism: ‘civil peace, material prosperity through economic growth, scientific progress, and rational liberty.’” R. Kelso, *Natural Law Tradition*, supra note 85, at 1065 (citing ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 116-19 (1985)). In contrast,

[T]he natural law principles that flow from Burke, Blackstone, and others in the eighteenth-century classical and Christian natural law tradition are more elitist, aristocratic, and conservative. . . . [A]s Professor Presser has noted, “The conservatives, as would Burke in 1791, conceived of the state as an organic entity, with hierarchical control, and a single set of correct answers to political problems to be elaborated and pronounced from the top down. Sovereignty in England, in other words, rested not in the people but in the ‘holy trinity’ of crown, lords, and commons.”

R. Kelso, *Natural Law Tradition*, supra note 85, at 1066 (citing STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTICS OF FEDERALIST JURISPRUDENCE* 51 (1991)).

90. *Alden*, 527 U.S. at 760-61 (Souter, J., dissenting).

adopts a strong theory of sovereign immunity, based upon the King, or Pope, as sovereign, and thus not subject to suit without consent.<sup>91</sup> The fully developed Enlightenment theory of the social contract rests sovereignty on common law grounds, which can be limited by later enacted statutes.<sup>92</sup> However, some early Enlightenment thinking, like that of Hobbes or Locke, though rejecting the metaphysics of the classic/Christian tradition, clearly adopted strong state sovereign immunity notions.<sup>93</sup>

Looking over the historical evidence, both at the time of ratification, and legislative, executive and judicial practice soon thereafter, Justice Souter concluded that the framers and ratifiers of the Constitution had more in mind than the common law approach, based upon a strong social contract/Enlightenment/common law commitment to natural law.<sup>94</sup> And, as Justice Souter noted, this approach to sovereign immunity reflects an analytically consistent approach which meshes well with a range of background natural law principles, like “where there is a right, there must be a remedy.”<sup>95</sup>

On the other hand, there is a significant amount of evidence, cited by Justice Kennedy in his opinion for the Court, supporting the view that on this issue of state sovereign immunity the framers and ratifiers of both the original Constitution, and the later Eleventh Amendment, had more in mind the classic/Christian natural law approach.<sup>96</sup> And, as even Justice Souter acknowledged, this is consistent with Hobbes and Locke’s early Enlightenment natural law approach, and reflects statements made by Alexander Hamilton, James Madison, and John Marshall during the

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91. *Id.* at 764-68.

92. *Id.* at 768-72.

93. Thus, as Justice Souter noted, while certain Seventeenth century Enlightenment thinkers, like Hobbes and Locke, rejected religious grounding for natural law, and placed rights in the secular concept of the consent of the governed, they nonetheless retained in their writing the strong theory of state sovereign immunity typical of the classic/Christian natural law tradition. *See id.* at 767 n.6. Only in the Eighteenth century, with more fully developed Enlightenment political philosophy of Montesquieu and others regarding separation of powers and checks and balances, did the full common law approach to sovereignty emerge. *Id.* at 768-72. Thus, Hobbes or Locke do not reflect the well-developed Enlightenment position on sovereign immunity.

94. *Id.* at 772-94.

95. *See id.* at 810-14. Note that respect for the principle that “there must be a remedy” appears even in the approach to immunity developed by Justice Kennedy. *See infra* notes 96-99 and accompanying text. As Justice Kennedy stated in *Alden v. Maine*, “In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government . . . [and] Congress may authorize private suits against non-consenting States pursuant to its § 5 enforcement power.” *Id.* at 755-56. And, of course, individuals can bring private actions for injunctive relief as authorized under *Ex Parte Young*, 209 U.S. 123 (1908).

96. *Id.* at 715-24.

ratification debates.<sup>97</sup> Thus, a Justice viewing the framers and ratifiers as holding a balanced view between classic/Christian versus Enlightenment/common law approaches would likely adopt this approach.<sup>98</sup> With regard to the other decision-making styles, formalists and Holmesian judges are likely to adopt a strong theory of state sovereign immunity because they adopt positivist theories of law where the law's force derives from the will of the sovereign, which can consent to being sued or not.<sup>99</sup> This split between Justices Kennedy and Souter has been played out in a sequence of cases involving the Eleventh Amendment and related issues of state sovereign immunity over the past few years.<sup>100</sup>

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97. *Id.* at 767 n.6, 773-75, 800.

98. Note that the focus of this analysis is not on which natural law approach, if any, the Justices believe is most valid. The relevant question is what was the natural law approach favored by the framers and ratifiers of the Constitution and the Eleventh Amendment. Thus, as Justice Kennedy noted, "[T]he contours of sovereign immunity are determined by the founders' understanding, not by the principles or limitations derived from natural law." *Id.* at 734. In this regard, note that regardless of whether individual framers and ratifiers adopted an Enlightenment/ common law approach or a classic/Christian approach, like that of Edmund Burke, both reject the formalist emphasis, *see supra* text accompanying note 30, on a "static" Constitution and "specific intent." In contrast, both adopt the view of a "living" Constitution, *see supra* note 22, with great judicial faithfulness to precedent, and to considering not only "specific" intent, but also the "general" intent or principles behind constitutional provisions. *See generally* R. Kelso, *Natural Law Tradition, supra* note 85, at 1057-64 (citing, *inter alia*, Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994)). *See also* Farber, *supra* note 22, at 189 n.93 ("Although the idea of an evolving constitutional regime is often considered liberal, it can also be defended as the truest embodiment of conservatism."), *citing* Young, *supra*.

99. *See generally* R. Kelso, *Separation of Powers, supra* note 4, at 535-45. Thus, as Justice Souter noted in *Alden*, "Justice Holmes said so expressly: 'A sovereign is exempt from suit, not because of any formal conception or obsolete [natural law] theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" 527 U.S. at 796. On the other hand, the instrumentalist preference for protecting rights of individuals against the state, *see* R. Kelso, *Styles of Constitutional Interpretation, supra* note 2, at 221-25, means that the instrumentalist position is to give a limited reading to the Eleventh Amendment and related theories of sovereign immunity. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (Stevens, J. dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., joined by Marshall, J., Blackmun, J., & Stevens, J., dissenting); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 890, 126 (1984) (Stevens, J., joined by Brennan, J., Marshall, J., & Blackmun, J., dissenting).

100. *See* *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 530 U.S. 1303 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Note that in each of these cases Justice O'Connor has joined with Justice Kennedy to form a 5-Justice majority for his views. As discussed with regard to the Establishment and Takings Clauses (*see infra* text accompanying notes 100-104 and 106-116) Justice O'Connor's voting pattern is consistent with the view that the framers and ratifiers adopted an Enlightenment/common law approach towards natural law, particularly its earlier Lockean form, rather than a balanced classic/Christian versus Enlightenment/common law approach. Since Justice Kennedy's approach toward state sovereign immunity is consistent with the early Enlightenment doctrines of Hobbes and Locke, and with statements made during the ratification debates by Hamilton, Madison, and Marshall (*see supra* text accompanying notes 97-98) it is not surprising that a judge, like Justice O'Connor, committed to the Enlightenment/common law vision, particularly in its Lockean aspects, would join with Justice Kennedy in these cases.

Views about the Establishment Clause also reflect variations in a natural law approach to the Constitution. The Enlightenment/common law view is reflected in Jefferson's famous reference to a "wall of separation between church and State,"<sup>101</sup> and in the views of James Madison and others at the beginning of our constitutional history that official endorsement of religion can impair religious liberty.<sup>102</sup> This approach underlays Justice O'Connor and Souter's adoption in *Lee v. Weisman*<sup>103</sup> of the endorsement test to determine violations of the Establishment Clause. A recent application of this approach to the Establishment Clause occurred in the case of *Santa Fe Independent School District v. Doe*.<sup>104</sup> The classic/Christian natural law tradition would naturally be much more accommodating to expressions of religious faith, concluding, as perhaps did Justice Story, that "government could promote a generalized or nondenominational Christianity, so long as it did so in a manner that tolerated non-Christian religions."<sup>105</sup> A Justice

101. See *Lee v. Weisman*, 505 U.S. 577, 600-01 (1992) (Blackmun, J., concurring).

102. See *id.* at 612-26 (Souter, J., concurring). See generally Douglas Laycock, *Non-Preferential Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986) (examining the meaning of the establishment clause).

103. 505 U.S. at 612-26 (Souter, J., concurring). On the endorsement inquiry in general, see R. Kelso, *Natural Law Tradition*, *supra* note 85, at 1084 n.110.

104. 530 U.S. 290 (2000). Note that the instrumentalist position regarding the Establishment Clause is even more insistent on a rigid separation of church and state than represented by the endorsement inquiry. See generally R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 223 (discussing instrumentalist preference for *Lemon v. Kurtzman*, 403 U.S. 602 (1971), particularly as applied by Justices Brennan, Marshall, Blackmun and Stevens, an approach geared to protecting vigorously each individual's religious sensibilities and human dignity).

105. See Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 249 (1991). See generally R. Kelso, *Natural Law Tradition*, *supra* note 85, at 1076 n.84, 1085 n.111 (discussing Justice Story's approach to the Establishment Clause). For a suggestion that Justice Thomas shares some sympathy for this classic/Christian mode of reasoning, see R. Kelso, *Natural Law Tradition*, *supra* note 85, at 1084-85; R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 160 n.148 (noting that Justice Thomas commented during his confirmation hearing that "to understand what the framers meant . . . it is important to go back and attempt to understand what they believed," which was a theory of "natural rights." But consistent with Justice Kennedy's statement in *Alden v. Maine*, 527 U.S. 706, 734 (1999), that the Court's task is only to determine the founder's understandings, Justice Thomas noted, "[y]ou don't refer to natural law or any other law beyond that document [the Constitution]."). In general, formalist and Holmesian judges share the accommodationist approach to the Establishment Clause based upon their view that this approach is consistent with the specific intent of the framers and ratifiers, and the Holmesian preference for deference to government. See generally *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (claiming the Establishment Clause should not invalidate longstanding traditions and should be applied using the government policies of accommodation); *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting) (arguing that the Establishment Clause is misapplied if construed in light of Jefferson's statement that the Clause was intended to separate church and state). Thus, though not explicitly adopting the classic/Christian mode of reasoning, application of this approach would be consistent with the results reached by the dissent in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318

viewing the framers and ratifiers as holding a balanced view between classic/Christian versus Enlightenment/common law approaches would likely adopt an intermediate approach between these two outcomes—like the no “coercion” or proselytizing test propounded by Justice Kennedy in his opinion in *Lee v. Weisman*.<sup>106</sup>

Views about contract and property rights, critical for Contract Clause and Takings Clause analyses, are also influenced by which natural law tradition the Justice holds. Similar to the issue of state sovereign immunity, the early Enlightenment approach of John Locke, the classic/Christian tradition of writers like William Blackstone, and the views of some of the early Justices on the Supreme Court, including John Marshall and Joseph Story, share a similar position—strongly supportive of individual contract and property rights.<sup>107</sup> The later Enlightenment/common law approach placed less emphasis on individual property rights, and more emphasis on the ability of the state to regulate property and contract matters.<sup>108</sup> The classic early case where the Court split on this issue was the famous case of *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, Co.*<sup>109</sup> In that case, the majority adopted the Enlightenment/common law approach, permitting a state legislature to change a monopoly grant to use of a bridge.<sup>110</sup> The dissent, per Justice Story, adopted the early

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(2000) (Rehnquist, C.J., dissenting).

106. 505 U.S. 577, 589-92 (1992). In *Weisman*, Justice Kennedy concluded that a nondenominational prayer at a high school graduation would involve coercion, rejecting the formalist argument that students do not have to attend graduation and therefore no coercion is involved. *Id.* at 593-95. As Justice Kennedy stated, “The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.” *Id.* at 595. For discussion of the “coercion” approach generally, see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

107. See generally DOUGLAS W. KMIEC & STEPHEN B. PRESSER, AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 759-78, 800-09 (1998) (discussing, *inter alia*, the views of Justices Marshall and Story on the importance of contract and property rights against a backdrop of Lockean political philosophy, the views of William Blackstone, and the Protestant natural law tradition in general).

108. See generally Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 535 (2000) (noting that while John Locke stressed the critical importance of private property rights, “[p]rotection of private property rights . . . has never been an absolute in the U.S. legal system.”); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 792 (1995) (“[T]he majority view was that consequential damages—those from activities that did not involve physical invasions or appropriations of property for a public use, but that nonetheless had physical consequences, such as subsidence occasioned by a road-building project—were not compensable takings”); Sax, *supra* note 86, at 54-55 (discussing Seventeenth and Eighteenth century philosophers Pufendorf, Burlamaqui, and Vattel, and citing them for the proposition that government has “the duty so to regulate and adjust economic power so to ‘make life pleasant and agreeable’ for all the ‘fellow creatures’ in the society.”) (quoting THE LAW OF NATIONS, Bk. I, ch. VIII, § 88 (1758)).

109. 36 U.S. (11 Pet.) (1837).

110. *Id.* at 547-48

Enlightenment and classic/Christian approach, protecting the individual from a newly imposed burden of competition when the individual had initially been granted monopoly rights.<sup>111</sup>

One can see the same kind of tension among Justices O'Connor, Kennedy and Souter in cases involving the Takings Clause today. As with the state sovereign immunity cases, typically Justices O'Connor and Kennedy opt for the early Enlightenment and classic/Christian approach, while Justice Souter opts for the more well developed, later Enlightenment/common law approach. For example, in *Eastern Enterprises v. Apfel*,<sup>112</sup> Justice O'Connor, in a plurality opinion, held that an unconstitutional taking occurred when a statute imposed upon a coal company a large, retroactive liability for lifetime health care of former employees and their families.<sup>113</sup> Justice Kennedy concurred in the result, though he found the retroactivity of the statute violated due process without regard to a Takings Clause analysis.<sup>114</sup> In contrast, Justice Souter joined the dissent, which noted that the defendant, while still in the coal business, had participated in negotiations with other operators and miners where there was an implicit understanding on all sides "that the operators would provide the miners with lifetime health benefits." Thus, new burdens were foreseeable and could be constitutionally imposed, thus upholding the state regulatory initiative in the case.<sup>115</sup>

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[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . . . A State ought never to be presumed to surrender this power [to public grants], because, like the taxing power, the whole community has an interest in preserving it undiminished.

*Id.*

111. *Id.* at 604, 608 (Story, J., dissenting).

It is a contract, whose obligation cannot be constitutionally impaired. . . . For my own part, I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain and questionable both as to security and as to productiveness.

*Id.* For a discussion of Nineteenth century Takings Clause cases, which also favored the later Enlightenment/ common law approach, and which thus placed great emphasis on the ability of government to act for the public interest, see Treanor, *supra* note 108, at 794-97 ("[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.") (quoting *N. Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879)).

112. 524 U.S. 498 (1998).

113. *Id.* at 538.

114. *Id.* at 539, (Kennedy, J., concurring in the judgment and dissenting in part).

115. *Id.* at 550-51 (Stevens, J., dissenting); *id.* at 553-54 (Breyer, J., dissenting).

A similar split occurred in *Phillips v. Washington Legal Foundation*.<sup>116</sup> The majority, which included Justices O'Connor and Kennedy, followed the strong property rights view typical of John Locke and the classic/Christian tradition in holding that interest earned on a client's funds held in a state-created IOLTA program were property of the client.<sup>117</sup> The four-Justice dissent, including Justice Souter, followed a *Charles River Bridge* approach deferential to state regulatory initiatives and held that because "absent the [state-created] IOLTA program' no 'interest' could have been earned" on the trust funds, "the interest earned is *not* the client's 'private property.'"<sup>118</sup>

### C. Natural Law Versus Formalist, Holmesian, and Instrumentalist Decision-making Styles

A third reason that might lead judges operating out of the same natural law/common law judicial decision-making tradition to disagree in some cases might be that the judge has some sympathy for some strength in one of the other decision-making styles. This sympathy could lead to differing results in close cases.

For example, a natural law judge might have sympathy for the formalist emphasis on certainty and predictability in the law.<sup>119</sup> Thus, a natural law judge with some formalist leanings, like Justice Kennedy,<sup>120</sup> might prefer

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116. 524 U.S. 156 (1998).

117. *Id.* at 172 ("The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's. Not surprisingly, this rule has become firmly embedded in the common law of the various States.") (citations omitted).

118. *Id.* at 183 (Breyer, J., dissenting). See also *Palazzolo v. Rhode Island*, 533 U.S. 606, 619-32 (2001) (explaining that the *Penn Central* balancing test can apply even to a petitioner who acquired the property after the government restriction upon the property was enacted; dissenting Justices Stevens, Souter, Ginsburg, and Breyer would have refused to address this issue either on ripeness or standing grounds); *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 714-15, 733-740 (1999) (holding that in a regulatory takings case seeking damages under § 1983 the case is properly submitted to a jury, as is typical in actions at common law (citing 3 WILLIAM BLACKSTONE COMMENTARIES Ch. 12-13 (1768)); the dissent, per Justice Souter, focused on actual common law practice, both at time of ratification and thereafter, to hold that the action was analogous to an ordinary condemnation proceeding where no jury is required. Based upon this strong showing of practice, Justice O'Connor joined the dissent, as did Justices Ginsburg and Breyer. Surprisingly, Justice Stevens joined the majority, perhaps better to protect the rights of individuals by a jury trial).

119. On the formalist desire for certainty and predictability in the law, see *supra* note 30 and accompanying text. This is particularly true given that the natural law and formalist theories share an affinity for analytic, as opposed to functional, approaches to the law. From an analytic perspective, logical consistency and predictability in doctrinal categories are critically important. On this aspect of natural law and formalist theory, see R. Kelso, *Separation of Powers*, *supra* note 4, at 536 n.18, 546-52. For how natural law and formalist theories disagree with Holmesian and instrumentalist theories on this point, see *id.* at 536-38, 541-45.

120. See R. Kelso, *Separation of Powers*, at 600 n.262, and sources cited therein (noting that "[m]ore than Justice O'Connor has done, Justice Kennedy has flirted with the Scalia view of using literal text and a rigid view of tradition to curb expansive interpretation of constitutional protections.") (quoting Paul M. Barrett, *Despite Expectations, Scalia Fails to Unify Conservatives on the Court*, WALL ST. J., Apr. 28, 1992, at A6). On the other hand, Justice Kennedy is in no sense a

more certain, predictable, and rigid First Amendment categories, as did Justice Kennedy when he joined the dissent in *Madsen v. Women's Health Center, Inc.*<sup>121</sup> and *Hill v. Colorado*.<sup>122</sup> Justice Kennedy's occasional preference for formalism also appeared in his joining dissents in a Sixth Amendment case,<sup>123</sup> and in two cases involving rights of Native Americans.<sup>124</sup> An additional example of Justice Kennedy joining a formalist dissent occurred in *Brentwood Academy v. Tennessee Secondary School Athletic Association*.<sup>125</sup>

On the other hand, a natural judge might have some sympathy for the Holmesian deference to the government model of decision-making, as does

committed formalist. *See id.* at 594-96 (discussing a range of differences between Justice Kennedy and Justice Scalia's decision-making approaches); *supra* notes 26, 71, 84, 106 (giving specific examples in this article of Justice Kennedy rejecting formalism in the application of a number of constitutional doctrines).

121. 512 U.S. 753, 792-94 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that "speech-restricting injunction[s]" should always be given strict scrutiny).

122. 530 U.S. 703, 742 (2000) (Scalia, J., dissenting) (claiming that regulation of speakers around abortion clinics is content-based, and thus should trigger traditional strict scrutiny analysis); *id.* at 765 (Kennedy, J., dissenting) ("In my view, Justice Scalia's First Amendment analysis is correct and mandates outright reversal."). *See also* Fed. Election Comm'n v. Col. Republican Fed. Campaign Comm., 533 U.S. 431, 488-99 (2001) (Thomas, J., dissenting) (concluding in Part I that a campaign finance statute's limits on coordinated expenditures between a candidate and a state political party should always be tested by strict scrutiny, and the law at issue in this case fails strict scrutiny; Part II concludes that even under the Court's traditional *Buckley* analysis the regulations at issue in this case are unconstitutional).

123. *Gray v. Maryland*, 523 U.S. 185, 197 (1998) (holding that only replacing a defendant's name with a symbol of deletion in a co-defendant's confession violates the defendant's right to cross-examine witnesses when the co-defendant refuses to testify. A more formalist dissent would have drawn a bright-line distinction between statements that incriminate a defendant directly, and those that only incriminate inferentially, as in this case where the defendant's name is redacted).

124. *Idaho v. United States*, 533 U.S. 262, 2146-50 (2001) (holding that the federal government holds, in trust for the Coeur d'Alene Tribe, title to lands underlying portions of Lake Coeur d'Alene and the St. Joe River in Idaho. The dissent argued that since official congressional ratification of this trust relationship was not formally completed until after Idaho became a State, Idaho took title to this land on the date Idaho became a State and the trust is invalid); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding that Chippewa Indians retain certain hunting, fishing, and gathering rights on land they ceded to the United States in 1837, and that President Taylor's attempt in 1850 to remove the Chippewas from the land lacked statutory or constitutional authority; more formalist dissent argues that certainty in the law requires that when a President acts with express or implied congressional authorization, there be a strong presumption of validity, and that President Taylor's action in terminating these rights under the treaty should be upheld).

125. 531 U.S. 288 (2001). There, the majority held that a state high school athletic association, that includes sixteen percent private and parochial high schools, is nevertheless a state actor for purposes of its regulatory rules because of the significant "entwinement" between the State and the association. *Id.* at 314. A more formalist dissent concluded that certainty and predictability in the law requires that the Court restrict finding state action to where the organization "performs a public function; [is] created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government"; the "entwinement" test is too "unclear." *Id.* at 315.



Justice O'Connor.<sup>126</sup> Thus, Justice O'Connor can be predicted occasionally to depart from a standard natural law analysis to give deference to a governmental Holmesian decision. This occurred, for example, in *Florida Bar v. Went for It, Inc.*,<sup>127</sup> a case involving attorney advertising, where Justice O'Connor wrote the majority opinion. Justice O'Connor's occasional preference for Holmesian deference also was evident in her joining the dissents in *Crawford-El v. Britton*;<sup>128</sup> *Hohn v. United States*;<sup>129</sup> and *I.N.S. v. Enrico St. Cyr*.<sup>130</sup>

Similarly, a natural law judge might have sympathy for instrumentalist reasoning, as both reject a positivist approach to the law, and share the view that the judicial task has a normative component.<sup>131</sup> One can perhaps see this

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126. See R. Kelso, *Separation of Powers*, *supra* note 4, at 602 n.266, and sources cited therein (discussing the evolution in Justice O'Connor's voting patterns, which during her early years on the Court in 1983 and 1984 were more Holmesian, and most similar to the voting patterns of Holmesian judges Chief Justice Rehnquist and Justice White, while by 1989 and 1990 Justice O'Connor had moved to joining most often Justice Kennedy and Souter, while still retaining some affinity for the Holmesian approach). On Justice O'Connor's tenure of the Supreme Court generally, see Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made A Difference in Constitutional Law*, 32 MCGEORGE L.J. 915 (2001).

127. 515 U.S. 618 (1995) (applying the standard intermediate scrutiny commercial speech test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980), in a very deferential way to uphold a government regulation of attorney advertising); *id.* at 635 (Kennedy, J., dissenting).

128. 523 U.S. 574 (1998) (following the standard rule that qualified immunity for government officials exists as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware; more Holmesian dissent amends the rule to provide greater protection for government officials by permitting immunity if the government official can offer a legitimate reason for the action being challenged and the plaintiff cannot establish that the offered reason is a pretext).

129. 524 U.S. 236 (1998) (holding that the Supreme Court has jurisdiction to review decisions denying applications for certificates of appealability in habeas corpus cases; more Holmesian dissent concluded that Congress intended to prevent further review in habeas cases unless a Court of Appeals judge or a Circuit Justice finds a reasonable basis for an appeal).

130. 533 U.S. 289 (2001) (holding that habeas corpus writs are still permissible under certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 and Immigrant Responsibility Act of 1996; more Holmesian dissent holds that the relevant statutory provisions barred habeas corpus review, thus deferring to the government by making the government action unreviewable in court). See also *Calcano-Martinez v. I.N.S.*, 533 U.S. 348 (2001) (reaching the same conclusion that the relevant statutes do not clearly strip district courts of habeas corpus review); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding unconstitutional as a violation of free speech a welfare reform provision that barred attorneys funded by the federal Legal Services Corporation from accepting cases that challenged welfare laws; more Holmesian dissent permits government limits on individuals receiving government funds); *Mitchell v. United States*, 526 U.S. 314 (1999) (holding that a guilty plea does not waive the privilege of self-incrimination in the sentencing phase of a case; more Holmesian dissent concludes that there is no reason why the privilege against self-incrimination should shield a defendant from the natural consequences of the defendant's uncooperativeness at the sentencing phase). For a pre-*Casey* example of Justice O'Connor joining a Holmesian dissent in a free speech case, see *Texas v. Johnson*, 491 U.S. 397 (1989) (Rehnquist, C.J., joined by White, J., & O'Connor, J., dissenting) (departing from standard First Amendment analysis, more Holmesian dissent creates a special exception permitting governments to ban flag burning).

131. See R. Kelso, *Separation of Powers*, *supra* note 4, at 546-52. Of course, the normative task

influence in some of Justice Souter's opinions, as in his approach to racial redistricting cases, where in order to support racial redistricting in favor of minority groups, he exaggerated the difficulty of defining the cognizable harm to grant standing and the difficulty of developing standards to govern when a violation has taken place in *Bush v. Vera*.<sup>132</sup> Similarly, in order to support race-based affirmative action in contracting, Justice Souter dissented from Justice O'Connor's majority opinion in *Adarand Constructors, Inc. v. Pena*,<sup>133</sup> which held that traditional strict scrutiny should be applied to federal, as well as state, race-based affirmative action programs.<sup>134</sup>

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for natural law judges under an Enlightenment social contract theory is to follow the normative natural law principles of the framers and ratifiers of the Constitution. *Id.* at 548 n.49, 551 n.52. See also R. Kelso, *Natural Law Tradition*, *supra* note 85, at 1067. For instrumentalist judges, where leeways exist in the law, a judge might take into account the judge's view of the social policy consequences of a decision, an approach rejected by natural law judges. See *supra* notes 16, 21, 41-42 and accompanying text; R. Kelso, *Styles of Constitutional Interpretation*, *supra* note 2, at 162-63, 213-18. It should be noted that the classic/Christian natural tradition may be slightly more receptive to judges supplementing the framers and ratifiers' natural law principles with natural law principles derived from other sources, including religion, because that tradition sees natural law as an emanation of God's will and reason and is not dependent on a social contract. However, even that tradition may stick with the framers and ratifiers' natural law principles. See R. Kelso, *Natural Law Tradition*, *supra* note 85, at 1072-73.

132. See 517 U.S. 952, 1050-64 (1996) (Souter, J., dissenting). Compare *id.* at 1054 n.6 ("[T]he Court has never succeeded in identifying how much is too much, having adopted a 'predominant purpose' test that amounts to a practical repudiation of any hope of devising a workable standard.") with *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (stating "that discriminatory purpose was a motivating factor" a certain enough standard for traditional discriminatory intent analysis). Justice Souter has typically been in the dissent in the Court's recent racial redistricting cases. See, e.g., *Abrams v. Johnson*, 521 U.S. 74 (1997) (upholding a district court's redistricting plan which contained only one African-American majority district in the Atlanta area because creation of a second such district would have required subordinating Georgia's traditional districting policies to consider race predominantly; Justice Breyer, dissenting with Justices Stevens, Souter, and Ginsburg, argued that the court should not have departed from the Georgia legislature's intent to create two such districts around Atlanta), and cases cited therein. But see *Easley v. Cromartie*, 532 U.S. 234 (2001). Justice Breyer wrote an opinion, where Justice O'Connor joined the four dissenters in *Abrams*, in concluding that use of race was not a "predominant factor" in the redrawing of the much-litigated Twelfth Congressional District in North Carolina; the dissent would have deferred to the factual judgment of the District Court that racial considerations did predominate. *Id.*; see also *id.* at 1470 (Thomas, J., dissenting). In *Lawyer v. Dep't of Justice*, 521 U.S. 567 (1997), Justice Souter, wrote an opinion, where the four dissenters in *Abrams* were joined by Holmesian Chief Justice Rehnquist in deferring to a three-judge federal district court's reapportionment of a Florida Senate district; the dissent did not reach the constitutionality of the court-drawn district, but argued that the district court should first have offered the Florida legislature a more reasonable opportunity to craft its own solution. *Id.*

133. 515 U.S. 200 (1995).

134. *Id.* at 227; *id.* at 264 (Souter, J., dissenting). Of course, Justice Souter's dissent may also reflect his strong commitment to the natural law theory of precedent, and his belief that the Court should follow the precedent of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), absent "any of the factual premises on which *Fullilove* rested as having disappeared since that case was decided." 515 U.S. at 265.

Although not the focus of this article, the same inclination towards formalist, Holmesian, or instrumentalist decision-making styles is also occasionally in evidence in the approach of Justices O'Connor, Kennedy, and Souter towards issues of statutory interpretation.<sup>135</sup> Thus, considering the 5-4 cases of the last four terms, Justice Kennedy will occasionally read a statute in a more formalist fashion than Justices O'Connor and Souter.<sup>136</sup> Justice O'Connor will occasionally read a statute in a more Holmesian deference to government fashion than Justices Kennedy and Souter.<sup>137</sup> And Justice Souter will occasionally read a statute in a more instrumentalist fashion than Justices Kennedy and O'Connor.<sup>138</sup> In addition, sometimes both

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135. On natural law, formalist, Holmesian, and instrumentalist theories of statutory interpretation, see R. Kelso, *Statutory Interpretation Doctrine*, *supra* note 17, at 41-58; J. Kelso & C. Kelso, *Four Theories in Disarray*, *supra* note 17, at 85-88.

136. See, e.g., *Zadvydas v. Davis*, 121 S. Ct. 2491, 2498-2500, 2505 (2001) (holding that a statute providing that government "may" detain removable alien beyond ninety day statutory removal period does not authorize indefinite detention, but instead authorizes detention only for a time reasonably necessary to secure removal; more formalist dissent would read the statute literally to give the Attorney General discretion to determine how long the removable alien may be detained); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-43, 660 (1999) (finding that a damage action is permissible against recipient of funds under Title IX in cases of student-on-student harassment if the recipient is deliberately indifferent to the sexual harassment; more formalist dissent holds that since the literal text of the law only prohibits misconduct by recipients, the discrimination must be of a kind that is within the control of the recipient); *West v. Gibson*, 527 U.S. 212, 214, 224 (1999) (stating EEOC has the legal authority to require federal agencies to pay damages for employment discrimination under Title VII; more formalist dissent argues that statutes relating to EEOC enforcement did not clearly contain a waiver of sovereign immunity by the United States).

137. See, e.g., *NASA v. Fed. Labor Relations Auth.*, 527 U.S. 229, 234-40, 262 (1999) (holding that Office of the Inspector General representatives employed by NASA were representatives of NASA, so that barring a union representative from participating in an investigation of was an employee an unfair labor practice; more Holmesian dissent defers to NASA's position that the OIG inspector was sufficiently independent of NASA and that the inspector was not a representative of the agency); *Nat'l. Fed'n. of Fed. Employees, Local 1309 v. Dep't of the Interior*, 526 U.S. 86, 88, 102-03 (1999) (finding that Federal Labor Relations Authority has the power to order federal agencies to bargain mid-term under a collective bargaining agreement; more Holmesian dissent defers to each agency to decide whether to bargain mid-term or not).

138. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 162 (2000) (stating that the FDA lacks authority to regulate tobacco products based upon lack of explicit authorization and the FDA's long-standing view that it lacked jurisdiction; a more instrumentalist dissent grants FDA the power to regulate tobacco based upon Congress' overall desire to protect health and new knowledge about the effects of smoking); *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 334 (1999) (concluding that the use of statistical sampling in census taking not authorized by the explicit language of the Census Act; the more instrumentalist dissent concludes that because sampling might yield a more accurate estimate of population, sampling should be allowed to be used); *Grupo Mexicana de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333, 340 (1999) (holding that the district court does not have power to issue a preliminary injunction preventing defendant from transferring assets in which a non-lien or equitable interest is claimed because such a power was historically unavailable from a court of equity; more instrumentalist dissent argues that as a policy matter such a power would not be that troubling because under standards governing preliminary injunctions the plaintiff must show likelihood of success on the merits and irreparable injury in the absence of an injunction); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277, 297-99 (1998) (finding that a school district was not liable for sexual harassment of a student by a teacher unless the school district official who had authority to institute corrective measures had notice of the teacher's misconduct and was deliberately indifferent

Justices Kennedy and O'Connor will interpret a statute in a formalist or Holmesian fashion, leaving Justice Souter alone, almost always therefore in dissent, to give the principled natural law/common law interpretation of the statute.<sup>139</sup>

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to that information; more instrumentalist dissent permits an action, based on the policy of placing protection of high school students above the school district's financial concerns); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 379-80, 388-89 (1998) (holding that NLRB conclusion that an employer lacked a "good faith reasonable doubt" about a union's majority support, and thus the employer must conduct an internal poll of employee support was not supported by record as a whole; more instrumentalist dissent defers to the NLRB's conclusion, thus supporting a pro-employee result that would have required the employer to conduct the poll.).

*See also* *Tyler v. Cain*, 121 S. Ct. 2478, 2480, 2489-90 (2001) (finding that under 28 U.S.C. § 2244(b)(2)(A), the constitutional rule announced in *Cage v. Louisiana*, 498 U.S. 39 (1990), was not made retroactive to cases on collateral review by the Supreme Court, based upon literal holdings of prior cases; the dissent found retroactivity based on dicta in prior court opinions); *NLRB v. Ky. River Cmty. Care, Inc.*, 533 U.S. 706 (2001) (holding that the NLRB's interpretation that employees do not exercise "independent judgment" when they exercise "ordinary professional or technical judgment" was in error; the dissent defers to the NLRB's more pro-employee interpretation); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 528 U.S. 598 (2001) (concluding that a plaintiff is not a "prevailing party" for purposes of obtaining attorneys fees when that party has "failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct"; the dissent followed the instrumentalist-era precedents in the Courts of Appeals to hold that plaintiff was a "prevailing party" if the plaintiff was a "catalyst" for the change they sought); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (deciding that Federal Arbitration Act's exclusion from coverage for "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applies only to transportation workers, following the *ejusdem generis* maxim of construction and recent Courts of Appeals precedent; a more instrumentalist dissent read the exception broadly to free all employees in interstate commerce from the enforceability of mandatory arbitration clauses).

139. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (deferring to the government by following the literal holdings of prior cases, not their more general reasoning, to conclude that Congress did not intend a private right of action to enforce disparate-impact regulations under Title VI of the Civil Rights Act of 1964; the dissent noted that a faithful reading of the "prevailing principles of statutory construction" in existence at the time Congress passed the "groundbreaking and comprehensive civil rights Act," as well as dicta in many cases interpreting this statute, supported finding a private right of action in this case); *Carter v. United States*, 530 U.S. 255, 258, 275 (2000) (finding the majority deferring to government by adopting a literal approach which holds that carrying away something from a bank with an intent to steal was not an included offense for the crime of taking by force or violence any thing of value from a bank, because the lesser offense did not literally include every element of the greater offense; the dissent noted that the majority departed from the old common law rule that robbery was an aggravated form of larceny); *Miller v. French*, 530 U.S. 327, 337-38, 350-51 (2000) (interpreting the Prison Litigation Reform Act literally in favor of the government to eliminate a court's traditional equitable authority to suspend an automatic stay of relief after thirty days; Justice Souter's dissent would have remanded the case to determine whether the statute provided sufficient time to make the required findings before determining that the statute removed a court's traditional equitable authority); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 329, 336, 241-42 (2000) (deferring to government by holding that § 5 of the Voting Rights Act does not clearly prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose; the dissent holds that any purpose to give less weight to minority

#### D. Additional Considerations

A few cases remain to be considered in order to complete the review of all 5-4 Supreme Court opinions over the last four terms. A number of these cases involve Justices other than Justices O'Connor, Kennedy, and Souter switching sides from their usual voting pattern. These cases are thus not directly relevant to the focus of this article, though they may suggest something about other Justices on the Court. A number of these cases involve criminal law matters, where Justices O'Connor, Kennedy, and Souter are split, as described earlier in this article,<sup>140</sup> with an unusual switch from Justices Scalia, Thomas, or Breyer.<sup>141</sup> An additional criminal case with an unusual alignment occurred in *Carmell v. Texas*.<sup>142</sup> In a few non-criminal cases, Justice Stevens,<sup>143</sup> Justice Thomas,<sup>144</sup> or Justice Ginsburg,<sup>145</sup> have departed from their usual voting patterns.

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participation in the electoral process is a purpose to discriminate and thus abridges § 5 of the Voting Rights Act).

140. See *supra* text accompanying notes 73-84 (siding with the government were Justices O'Connor and Kennedy; Justice Souter siding with the defendant).

141. In two of these cases, both Justices Scalia and Thomas joined Justices Stevens, Souter and Ginsburg to treat sentence enhancement provisions as the formal equivalent of a separate offense, thus requiring proof to a jury beyond a reasonable doubt of the elements of that sentence enhancement. See *Appendi v. New Jersey*, 530 U.S. 466 (2000) (explaining that any fact, other than recidivism, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt); *Jones v. United States*, 526 U.S. 227 (1999) (holding it to be unconstitutional to remove from the jury the assessment of facts which alter the congressionally prescribed range of penalties to which a criminal defendant is exposed). In two earlier sentence enhancement cases, only Justice Scalia joined Justices Stevens, Souter, and Ginsburg, and thus they were in the dissent. See *Monge v. California*, 524 U.S. 721 (1998) (concluding in dissent that where an appellate court finds the evidence at trial insufficient to sustain an enhancement finding, the state does not get a second chance to prove enhancement because the initial finding was a functional acquittal on the enhancement charge); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (dissenting that a possible twenty-year term if alien deportation is subsequent to a conviction for aggravated felony is a separate crime, because Congress would have been aware of a constitutional question of enhancement for recidivism).

Justice Breyer joined Justices O'Connor and Kennedy in siding with the government's position in each of these cases, as well as in *Muscarello v. United States*, 524 U.S. 125 (1998) (finding that a mandatory 5-year term for a person who "uses or carries a firearm" during and in relation to a "drug trafficking crime" includes carrying a firearm in the locked glove compartment of a vehicle). Note that Justice Breyer also adopted a deference to the government approach to create a five person majority in *Florida Bar v. Went for It, Inc.*, discussed *supra* note 127, and joined deference to government dissents in *Sims v. Apfel*, *United States v. Playboy Enter. Group, Inc.*, and *California Dental Ass'n v. FTC*, discussed *infra* notes 144, 152, 155 respectively.

142. 529 U.S. 513, 516-530, 553-555 (2000). Justices Scalia and Thomas joined with Justices Stevens, Souter, and Breyer to hold that the Ex Post Facto Clause applied to a Texas law because that law, which "authorized conviction of certain sexual offenses on the victim's testimony alone" rather than requiring a "corroborating witness," literally altered "the legal rules of evidence," triggering the Ex Post Facto clause; the dissent viewed the law as a "witness competency rule" which prior Court precedents had held "validly may be applied to offenses committed before its enactment." *Id.*

143. See *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) (holding that federal-question jurisdiction does not extend to a challenge by an association of nursing homes to regulations promulgated by the Secretary of Health and Human Services, and that the case must first

A second group of cases involve Justices O'Connor, Kennedy, and Souter substantially agreeing on the relative legal standard to be applied, but disagreeing about some aspect of how the facts in the particular case apply to the law. For example, in *Stenberg v. Carhart*,<sup>146</sup> Justices O'Connor and Souter joined in Justice Breyer's majority opinion to strike down as unconstitutional Nebraska's ban on partial-birth abortion. In the view of the majority opinion, the Nebraska statute did not contain, as required by *Casey*, a sufficient exception to permit a partial-birth abortion when necessary to preserve the life or health of the mother.<sup>147</sup> In contrast, Justice Kennedy, in dissent, concluded that the Nebraska statute did indeed have a sufficient exception for the life or health of the mother, and thus he concluded that the statute was constitutional.<sup>148</sup>

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go through normal administrative hearings; the more formalist dissent of Justices Thomas, Scalia, and Kennedy, based on following the Court's traditional presumption of pre-enforcement review, was joined by Justice Stevens, possibly because of a practical concern that in this context delaying judicial review until after agency action might mean no review at all).

144. In a couple of cases, Justice Thomas has favored the rights of parties who were at a disadvantage relative to the government, either because of lacking resources or a burdensome statutory scheme. See *Sims v. Apfel*, 530 U.S. 103 (2000) (holding by Justices Stevens, O'Connor, Souter, Thomas and Ginsburg that a social security claimant does not waive judicial review of an issue even though the claimant fails to exhaust that issue by presenting it to the Social Security Appeals Council for review); *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding by Justices Stevens, Souter, Thomas, Ginsburg, and Breyer that forfeiture of entire amount of money, \$357,144, merely for failure to report the money was concealed in defendant's luggage, was a violation of the Excessive Fines Clause; dissent concluded that forfeiture was not unconstitutional because the crime was serious, the defendant's smuggling and failure to report was willful, and was followed by many lies about the money).

145. See *National Credit Union Admin. v. First Nat'l Bank & Trust*, 522 U.S. 479 (1998) (finding that banks have standing under the Administrative Procedure Act to challenge an administrative rule permitting credit unions to be composed of unrelated employer groups, and thus to offer more competition for banks; Justice O'Connor, dissenting with Justices Stevens, Souter, and Breyer, argued that avoiding competitive injury to plaintiff banks was not arguably within the zone of interests of the statute, and thus the majority was depriving the zone of interest test of any real content). This case is complicated by the fact that while the dissent may have a more practical view of the zone of interest test, recent cases suggest that the zone of interest test has become something of an anomaly in the law, applicable rarely outside the context of the APA, see Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformation in Supreme Court Methodology, Doctrine, and Results*, 28 U. TOL. L. REV. 93, 146 (1996) ("All of these considerations suggest that the modern Court will not extend the use of the zone of interest test much beyond the confines of section 702 of the [APA]."), and now not used much within the APA either. In addition to *Nat'l Credit Union*, see *Bennett v. Spears*, 520 U.S. 154 (1997) (recognizing that developers have standing under the Endangered Species Act because the Act represents a balance between environmental and developer interests, making virtually any party with an Article III injury-in-fact within the zone of interest of the Act).

146. 530 U.S. 914 (2000).

147. *Id.* at 938 ("Requiring such an exception in this case is no departure from *Casey*, but simply a straightforward application of its holding.")

148. *Id.* at 967 (Kennedy, J., dissenting) ("Substantial evidence supports Nebraska's conclusion

A second factual disagreement occurred in *Boy Scouts of America v. Dale*.<sup>149</sup> There, Justices O'Connor and Kennedy joined Chief Justice Rehnquist's opinion which held that since the Boy Scouts had sufficiently indicated that their organization disapproved of homosexual activity, the Boy Scouts could exclude an avowed homosexual from being a scoutmaster as part of the Boy Scout's First Amendment freedom of association.<sup>150</sup> Justice Souter, in dissent, joined by Justices Ginsburg and Breyer, concluded that the Boy Scouts had not clearly enough identified their organization as anti-homosexual, and thus they could not exclude this individual until their position was clearer.<sup>151</sup>

A third factual disagreement occurred in *United States v. Playboy Entertainment Group, Inc.*<sup>152</sup> In this case, the majority opinion, written by Justice Kennedy, and joined by Justice Souter, invalidated a government regulation banning cable operators from showing sexually-oriented programming unless the programming is fully blocked or shown only when children are not likely to be in the audience, set by administrative regulation as between ten o'clock p.m. and six o'clock a.m. Justice Kennedy's opinion concluded the regulation was infirm because the government had not shown that the alternative of allowing customers to have their transmissions blocked would be an ineffective, less burdensome alternative.<sup>153</sup> The dissent, joined by Justice O'Connor, concluded that as a factual matter that

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that its law denies no woman a safe abortion.”).

149. 530 U.S. 640 (2000).

150. *Id.* at 656 (“The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.”).

151. *Id.* at 701 (Souter, J., dissenting) (“[N]o group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way.”). In his dissent, which was joined by these other Justices, Justice Stevens appeared to go further to suggest that even if the Boy Scouts took a clear position against homosexuality, they had no constitutional right to deny an avowed homosexual the ability to be a scoutmaster. *Id.*

That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts or the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers.

*Id.* at 700 (Stevens, J., dissenting). However, as Justice Souter noted in his dissent,

The fact that we are cognizant of [a] laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case. Boy Scouts of America (BSA) is entitled, consistently with its own tenets and the open doors of American courts, to raise a federal constitutional basis for resisting the application of New Jersey's law.

*Id.* at 701.

152. 529 U.S. 803 (2000).

153. *Id.* at 816 (“When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here.”).

alternative would not be effective because of the difficulty in notifying parents of their rights and problems with blocking technology. Thus, the dissent concluded that the government regulation was valid because the proposed, less burdensome alternative would not be effective.<sup>154</sup>

A fourth factual disagreement occurred in *California Dental Association v. Federal Trade Commission*.<sup>155</sup> In this case, Justice Souter, joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas, concluded that the FTC's attempt through a "quick look" analysis to ban the Dental Association's limitations on discount advertising was invalid because it was not that clear that the rule had the met anticompetitive effects stated by the FTC.<sup>156</sup> In contrast, Justice Breyer's dissent concluded that the Dental Association's rules did have a clear potential for genuine adverse effects on competition; thus the FTC's ban was justified under the "quick look" doctrine.<sup>157</sup>

154. *Id.* at 843-45 (Breyer, J., dissenting) ("[T]he record contains considerable evidence that those problems matter, i.e., evidence of endlessly delayed phone call responses, faulty installations, blocking failures, and other mishaps . . . . All these considerations show that § 504's opt-out, even with the Court's plan for 'better notice,' is *not* similarly effective in achieving the [statute's] legitimate goals. . . .").

155. 526 U.S. 756 (1999).

156. *Id.* at 781 ("[A] less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment . . . .").

157. *Id.* at 784 (Breyer, J., concurring in part and dissenting in part) ("I should have thought that the anticompetitive tendencies of the three restrictions were obvious."). An additional factual disagreement occurred in *Bragdon v. Abbott*, 524 U.S. 624 (1998). In this case, Justice Souter joined Justices Kennedy's majority opinion, which held that respondent's asymptomatic HIV met the statutory definition of a disability, in that it substantially limited her ability to reproduce and bear children. *Id.* at 646. Justice O'Connor did not join the majority opinion, concluding that

[Respondent] has not proved that her asymptomatic HIV status substantially limited one or more of her major life activities. In my view, the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons—"caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"—listed in regulations relevant to the Americans with Disabilities Act of 1990.

*Id.* at 664-65 (O'Connor, J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist, and Justices Scalia and Thomas, dissented in the case. *Id.* at 657.

A further disagreement occurred in *Printz v. United States*, 521 U.S. 898 (1997). In an earlier case, *New York v. United States*, 505 U.S. 144, 161 (1992), Justices O'Connor, Kennedy, and Souter all agreed that under the Tenth Amendment, Congress cannot "commandeer" a State's legislative process for federal ends. In *Printz*, all suggested in *dicta* that Congress can commandeer State judicial officers. 521 U.S. at 906-08; *id.* at 939 (Stevens, J., dissenting). The Justices disagreed, however, on whether Congress can commandeer State executive officers. Based on his reading of the Federalist Papers, Justice Souter concluded that framers intended the federal government to be able to commandeer state executive officers. *Id.* at 971-76 (Souter, J., dissenting). The majority opinion, joined by Justices O'Connor and Kennedy, read the Federalist Papers differently, and in support of the proposition that no commandeering of state executive officers was



A fifth factual disagreement occurred in *Nguyen v. I.N.S.*<sup>158</sup> In this case, all the Justices agreed that the gender discrimination involved in a citizenship statute that imposed different requirements for the child's citizenship depending upon whether the citizen parent is the mother or the father triggered an intermediate scrutiny approach. Justice Kennedy, joined by Chief Justice Rehnquist, and Justices Stevens, Scalia, and Thomas, concluded that the statute could pass intermediate scrutiny.<sup>159</sup> In dissent, Justice O'Connor, joined by Justices Souter, Ginsburg, and Breyer, concluded that the statute was not substantially related to important government interests, and thus could not pass intermediate scrutiny.<sup>160</sup>

A final case involving a factual disagreement, and one perhaps of major proportions, occurred in *Bush v. Gore*.<sup>161</sup> While Justices O'Connor, Kennedy, and Souter all agreed that there were equal protection problems with the recount ordered by the Florida Supreme Court,<sup>162</sup> Justices O'Connor and Kennedy concluded there was no way factually for a constitutionally adequate recount to be completed in time.<sup>163</sup> In contrast, Justice Souter concluded that the majority should not presume that a constitutionally adequate recount could not be completed in time.<sup>164</sup>

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contemplated. *Id.* at 910-15.

An additional factual disagreement occurred in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). In this case, the majority concluded that federal rules regarding air bag installation preempted a state common-law "no airbag" action because the federal law, rather than merely setting "a minimum airbag standard," made clear that "the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id.* at 874-75. Justice Stevens' dissent, joined by Justices Souter, Thomas, and Ginsburg, concluded that

[T]he objectives that the Secretary [of Transportation] intended to achieve through the adoption of [the federal standards] would not be frustrated one whit by allowing state courts to determine whether in 1987 [when the car at issue in the case was manufactured] the life-saving advantages of airbags had become sufficiently obvious that their omission might constitute a design defect in some new cars.

*Id.* at 888. See also *Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001) (holding that federal law preempts state and local regulation of tobacco advertising; Justice Stevens, joined in dissent by Justices Souter, Ginsburg, and Breyer, concluded that Congress did not intend to preempt such state and local regulation).

158. 533 U.S. 53 (2001).

159. *Id.* at 123-34.

160. *Id.* at 134-50 (O'Connor, J., dissenting).

161. 531 U.S. 98 (2000) (*per curiam*).

162. *Id.* at 111 ("Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court. . . ."); *id.* at 134 (Souter, J., dissenting) ("I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights.").

163. *Id.* at 110 ("[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.").

164. *Id.* at 135 (Souter, J., dissenting) ("Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply . . . before the date set for the meeting of electors, December 18. . . . There is no justification for denying the State the opportunity to try to count all disputed ballots now."). It should be noted that Justices O'Connor, Kennedy, and Souter did disagree on whether the Court should have taken the case at all. Strong arguments made in

IV. THE THREE JUSTICES ANALYZED PER *MITCHELL v. HELMS*

The Supreme Court's recent decision in *Mitchell v. Helms*<sup>165</sup> provides a good opportunity to examine the three different points of stress at work. The basic issue in *Mitchell* was whether governmental aid in the form of "secular, neutral, and nonideological" educational materials and equipment to public and private schools violated the Establishment Clause if some of the private schools receiving this aid had religious affiliations.<sup>166</sup> Justices Souter, O'Connor, and Kennedy each joined different opinions in the case, reflecting different approaches to the three varied points of stress, as discussed above.

dissenting opinions in *Bush v. Gore* suggested that the case was either a political question, or was not yet ripe for resolution. *Id.* at 129 (Souter, J., dissenting)

If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedures provided in 3 U.S.C. § 15.

*Id.* (Souter, J., dissenting).

[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. . . . [T]here is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to think that the Constitution's Framers would have reached a different conclusion.

*Id.* at 153-54 (Breyer, J., dissenting). The majority *per curiam* opinion did not directly address these issues of ripeness and political questions. Justice Scalia did address indirectly the ripeness argument in his concurrence to the Emergency Stay Order, which also served as a grant of a petition for certiorari in the case. *See Bush v. Gore*, 531 U.S. 1046 (2000) (Emergency Stay Order) (Scalia, J., concurring) ("irreparable harm" would result to "petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election"). One can ask, however, whether it was ripe to conclude there would be a "cloud" on the "legitimacy" of the election if Congress were simply allowed to follow the constitutionally proscribed procedures for counting electoral votes without prior court intervention? During oral argument in the case, Justice Kennedy did observe that there are judicially manageable standards under the Equal Protection Clause to govern resolution of this dispute, thus making reference to one of the six factors used in *Baker v. Carr*, 369 U.S. 186, 217 (1962), to determine if a political question exists. The opposing political questions argument is that while the Court routinely addresses equal protection complaints regarding elections, the issue of selecting electors is a special circumstance under the Twelfth Amendment, which commits to Congress the responsibility to count electoral votes, and under Article II, sec. 1, cl. 2 of the Constitution, which commits the method of selecting electors to the exclusive power of the State legislature, *see Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("[I]n such manner as the legislature thereof may direct" means that this exclusive legislative power cannot be circumscribed by the Florida Constitution); *cf. Nixon v. United States*, 506 U.S. 224 (1993) (explaining that the "sole" power of Senate to try impeachments means Senate decisions regarding impeachment are political questions not subject to Court review even if the Senate procedures would otherwise violate equal protection). Thus, under these provisions, there are "textually demonstrable constitutional commitments" to "coordinate political department[s]," and thus the issue is a political question. *Baker v. Carr*, 369 U.S. at 217.

165. 530 U.S. 793 (2000).

166. *Id.* at 802.

### A. Justice Souter

As suggested above, Justice Souter has a strong natural law commitment to precedent, and believes the framers and ratifiers had an Enlightenment/common law commitment to natural law, and occasionally has demonstrated some sympathy for an instrumentalist decisionmaking style.<sup>167</sup> These leanings are all on display in his dissent in *Mitchell*, which was joined by Justices Stevens and Ginsburg.<sup>168</sup> In this dissent, Justice Souter demonstrated a strong commitment to existing Establishment Clause precedent,<sup>169</sup> and a strong belief in the Enlightenment vision of “separation of church and state.”<sup>170</sup> Further, Justice Souter demonstrated a preference for the instrumentalist-era phrasing of Establishment clause doctrine, which holds that a “substantial risk” that neutral aid will be diverted for religious use is enough to invalidate a government aid program.<sup>171</sup> These considerations caused Justice Souter to conclude that the government program at issue in *Mitchell* was unconstitutional.<sup>172</sup>

### B. Justice O’Connor

As suggested above, Justice O’Connor has a medium natural law commitment to precedent, believes the framers and ratifiers shared the Enlightenment/common law vision of natural law, particularly its Lockean vision, and has occasionally demonstrated some sympathy for a Holmesian deference to government decision-making style.<sup>173</sup> These leanings are on display in her concurrence in *Mitchell*.<sup>174</sup> In her concurrence, Justice O’Connor bases her opinion on her “endorsement” approach to the Establishment Clause,<sup>175</sup> which, as noted above, derives from an Enlightenment view about the relationship between church and state.<sup>176</sup> However, Justice O’Connor has been willing to depart in Establishment Clause cases from the more extreme version of the separation of church and state concept evidenced in some of the opinions of the instrumentalist era.<sup>177</sup>

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167. See *supra* notes 62-84, 94-118, 131-39, 146-47 and accompanying text.

168. 530 U.S. at 867 (Souter, J., dissenting).

169. See *id.* at 870-899.

170. *Id.* at 873 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”).

171. *Id.* at 909 (“A substantial risk of diversion in this case was more than clear, as the plurality has conceded. The First Amendment was violated.”).

172. *Id.* at 911-13.

173. See *supra* notes 67-83, 96-113, 126-130, 135, 137, 139 and accompanying text.

174. 530 U.S. 836 (O’Connor, J., concurring).

175. *Id.* at 838-44.

176. See *supra* notes 106-108 and accompanying text.

177. See 530 U.S. at 844-47 (embracing *Agostini v. Felton*, 521 U.S. 203 (1997), and its rejection of the presumption in *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Sch. Dist. of Grand Rapids v. Ball*,

In this case, absent a showing of actual diversion, Justice O'Connor was not willing to assume that either the government or the schools would wrongly divert secular aid for religious purposes.<sup>178</sup> Justice O'Connor followed a Holmesian approach and counseled that the Court should defer to the government and schools since, on its face, secular, neutral aid does not constitute a government endorsement of religion.<sup>179</sup>

### C. Justice Kennedy

As suggested above, Justice Kennedy has a medium natural law commitment to precedent, believes the framers and ratifiers shared a mixture of classic/Christian and Enlightenment/common law visions of natural law, and has occasionally demonstrated some sympathy for a formalist decision-making style.<sup>180</sup> These leanings were on display in his joining with Justice Thomas' plurality opinion in *Mitchell*.<sup>181</sup> The plurality opinion in *Mitchell* concluded that as long as the government aid was distributed equally to public and private schools, then no serious Establishment Clause claim could be raised.<sup>182</sup> By removing from consideration how the aid was being used, it raised predictability and certainty in the law, a formalist concern.<sup>183</sup> The opinion reflected an accommodationist view of the Establishment Clause, which is consistent with the classic/Christian tradition.<sup>184</sup> It also

473 U.S. 373 (1985), that "the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination.")

178. 530 U.S. 857-60 ("To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes.")

179. *Id.* With regard to the question of actual diversion, Justice O'Connor was similarly Holmesian in her approach, willing to defer to the government's position that no diversion occurred, despite both the four Justice plurality, and three Justice dissent, disagreeing with her analysis on this point. See *id.* at 861. Instead, Justice O'Connor concluded that the "limited evidence amassed by respondents during four years of discovery (which began approximately fifteen years ago) is at best *de minimis* and therefore insufficient to affect the constitutional inquiry." *Id.* As he sometimes does in other cases, see *supra* note 141, Justice Breyer joined Justice O'Connor in adopting this Holmesian deference to government approach in *Mitchell*. See *supra* note 173.

180. See *supra* notes 67-83, 93-113, 119-25, 135, 139 and accompanying text.

181. 530 U.S. at 801 (Thomas, J., plurality opinion).

182. *Id.* at 809-25.

183. See, e.g., *id.* at 825 ("It is perhaps conceivable that courts could take upon themselves the task of distinguishing among the myriad kinds of possible aid based on the ease of diverting each kind. But it escapes us how a court might coherently draw any such line.")

184. See *supra* note 105-106 and accompanying text. Indeed, under this view, a finding that such "neutral" aid is unconstitutional may be viewed as an attempt to undermine classic/Christian traditions. See, e.g., *Mitchell*, 530 U.S. at 828-29

[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to 'sectarian' schools acquired prominence in the 1870's . . . at a time of pervasive hostility to the Catholic Church and to Catholics in

reflected a medium respect for existing Establishment Clause precedents, along with a willingness, as in *United States v. Lopez* and *United States v. Morrison*<sup>185</sup> to depart from instrumentalist-era precedents if those precedents can be distinguished, are substantially wrong, or create inconsistency or incoherence in the law.<sup>186</sup> It is thus no surprise that of the three Justices in the *Casey* joint opinion, Justice Kennedy would be the one to join Justice Thomas' plurality opinion in this case.

## V. CONCLUSION

In 1992, Justices O'Connor, Kennedy, and Souter published their famous "joint opinion" in *Planned Parenthood v. Casey*.<sup>187</sup> At the time, many commentators predicted that these three Justices would form a relatively reliable "block" that would control the outcome of Supreme Court cases for the foreseeable future. However, it has not turned out that Justices O'Connor, Kennedy, and Souter always vote together. Despite sharing the same basic natural law/common law theory of judicial decision-making, in close cases they will often split 2-1, sometimes with two joining the conservative block on the Court (Chief Justice Rehnquist, and Justices Scalia and Thomas), and other times two joining the more liberal block (Justices Stevens, Ginsburg, and Breyer).

This article has explored these differences along three different dimensions: whether the Justice has a strong, medium, or weak commitment to the natural law theory of precedent; whether the Justice believes the framers and ratifiers of the Constitution believed more in the Eighteenth century Enlightenment/common law natural law tradition or the Eighteenth century classic/Christian natural law tradition; and whether the Justice, despite primarily adhering to a natural law theory of constitutional interpretation, has some sympathies for formalist, Holmesian, or instrumentalist decision-making styles.

The article concludes that Justice Souter has strong commitment to precedent, to the Enlightenment/common law natural law tradition, and a slight affinity for instrumentalism. Justice O'Connor has a medium natural law commitment to precedent, a commitment to the Enlightenment/common

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general. . . . This doctrine, born of bigotry, should be buried now.

*Id.* (citations omitted).

185. See *supra* notes 54-72 and accompanying text.

186. See *Mitchell*, 530 U.S. 835-36 (holding that *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977) (holding unconstitutional various material and in-kind aid to non-public, religious schools), were irreconcilable, and thus inconsistent, with more recent Establishment Clause cases like *Agostini v. Felton*, 521 U.S. 203 (1997) (sending public school teachers into parochial schools permissible to provide remedial education), and thus were overruled). On inconsistency or incoherence being one of the special factors to overrule a prior precedent in the natural law tradition, see *supra* note 47 and accompanying text.

187. 505 U.S. 833 (1992).

law natural law tradition, particularly in its early Lockean form, and a slight affinity for the Holmesian decision-making style. Justice Kennedy has a medium natural law commitment to precedent, a balanced view concerning the Enlightenment/common law versus classic/Christian natural law tradition, and a slight affinity for formalism. These differences lead these three Justices to reach different results in some cases, despite the fact that they share the same basic decision-making philosophy.

**APPENDIX A**

**Table 1: 5-4 Decisions of the Supreme Court Discussed in This Article, with Citations to Where Each Case is Discussed<sup>188</sup>**

Justices Constituting the Majority	Number of Decisions in Each Court Term					
	1992 - 1996	1997	1998	1999	2000	Total
<b>O'CONNOR/KENNEDY/SOUTER IN THE MAJORITY</b>						
Rehnquist, O'Connor, Kennedy, Souter, Ginsburg	0	0	0	0	1	1 <sup>189</sup>
<b>O'CONNOR/KENNEDY BOTH IN THE MAJORITY</b>						
Rehnquist, O'Connor, Scalia, Kennedy, Thomas	7	6	7	12	13	45 <sup>190</sup>
Rehnquist, O'Connor, Scalia, Kennedy, Breyer	0	0	0	1	0	1 <sup>191</sup>
Rehnquist, O'Connor, Kennedy, Thomas, Breyer	0	2	0	0	0	2 <sup>192</sup>
Stevens, O'Connor, Kennedy, Thomas, Breyer	0	1	0	0	0	1 <sup>193</sup>
<b>O'CONNOR/SOUTER BOTH IN THE MAJORITY</b>						
Rehnquist, O'Connor, Scalia, Souter, Thomas	0	0	1	0	0	1 <sup>194</sup>

188. Only selected 5-4 opinions are considered for the 1992-96 Terms of the Court; for the 1997-99 Terms, all 5-4 cases are considered as compiled by *The Supreme Court Term* issues of the *Harvard Law Review*, 114 HARV. L. REV. 395 (2000); 113 HARV. L. REV. 405 (1999); 112 HARV. L. REV. 371 (1998), plus *Miller v. French*, 536 U.S. 327 (2000) (not included in the HARV. L. REV. compilation); for the 2000 Term, all 5-4 cases are considered are compiled from issues of *United States Law Week*.

189. *Rogers v. Tennessee*, 532 U.S. 374 (2001).

190. For citations to these cases, see *infra* Table 3.

191. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

192. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Monge v. California*, 524 U.S. 721 (1998).

193. *Muscarello v. United States*, 524 U.S. 125 (1998).

194. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Justices Constituting the Majority	Number of Decisions in Each Court Term					
	1992 - 1996	1997	1998	1999	2000	Total
Rehnquist, O'Connor, Souter, Ginsburg, Breyer	0	0	0	1	0	1 <sup>195</sup>
Stevens, O'Connor, Souter, Thomas, Ginsburg	0	0	0	1	0	1 <sup>196</sup>
Stevens, O'Connor, Souter, Ginsburg, Breyer	0	1	3	1	5	10 <sup>197</sup>
<b>KENNEDY/SOUTER BOTH IN THE MAJORITY</b>						
Rehnquist, Scalia, Kennedy, Souter, Thomas	0	0	0	0	1	1 <sup>198</sup>
Stevens, Kennedy, Souter, Thomas, Ginsburg	0	0	0	1	0	1 <sup>199</sup>
Stevens, Kennedy, Souter, Ginsburg, Breyer	1	3	3	0	3	10 <sup>200</sup>
<b>ONLY O'CONNOR IN THE MAJORITY</b>						
Rehnquist, O'Connor, Scalia, Thomas, Breyer	1	0	0	0	0	1 <sup>201</sup>

195. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).

196. *Sims v. Apfel*, 530 U.S. 103 (2000).

197. *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Federal Election Comm'n v. Col. Rep. Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Idaho v. United States*, 533 U.S. 262 (2001); *Brentwood Academy v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288 (2001); *Hunt v. Cromartie*, 532 U.S. 234 (2001), *supra* note 126; *Stenberg v. Carhart*, 530 U.S. 914 (2000); *West v. Gibson*, 527 U.S. 212 (1999); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 572 (1999); *Gray v. Maryland*, 523 U.S. 185 (1998).

198. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

199. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

200. *Calcano-Martinez v. I.N.S.*, 533 U.S. 348 (2001); *I.N.S. v. Enrico St. Cyr*, 513 U.S. 533 (2001); *Legal Services Corp. v. Velazquez*, 527 U.S. 229 (2001); *NASA v. Fed. Labor Rel. Auth.*, 527 U.S. 229 (1999); *Nat'l Fed. of Employers, Local 1309 v. Dep't of the Interior*, 526 U.S. 86 (1999); *Mitchell v. United States*, 526 U.S. 314 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Hohn v. United States*, 524 U.S. 236 (1998); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

201. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).



Justices Constituting the Majority	Number of Decisions in Each Court Term					
	1992 - 1996	1997	1998	1999	2000	Total
ONLY KENNEDY IN THE MAJORITY						
Rehnquist, Stevens, Scalia, Kennedy, Thomas	0	0	1	0	1	2 <sup>202</sup>
Rehnquist, Scalia, Kennedy, Thomas, Ginsburg	0	1	0	0	0	1 <sup>203</sup>
ONLY SOUTER IN THE MAJORITY						
Rehnquist, Stevens, Souter, Ginsburg, Breyer	1	0	0	0	0	1 <sup>204</sup>
Stevens, Scalia, Souter, Thomas, Ginsburg	0	0	1	1	0	2 <sup>205</sup>
Stevens, Scalia, Souter, Thomas, Breyer	0	0	0	1	0	1 <sup>206</sup>
Stevens, Souter, Thomas, Ginsburg, Breyer	0	1	0	0	0	1 <sup>207</sup>
Scalia, Souter, Thomas, Ginsburg, Breyer	0	0	0	0	1	1 <sup>208</sup>
TOTAL	10	15	16	19	25	85 <sup>209</sup>

202. *Nguyen v. I.N.S.*, 533 U.S. 53 (2001); *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687 (1999).

203. *Nat'l Credit Union Admin. v. First Nat'l Bank v. Trust Co.*, 522 U.S. 479 (1998).

204. *Lawyer v. Dep't of Justice*, 521 U.S. 567 (1997).

205. *Appendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999).

206. *Carmell v. Texas*, 529 U.S. 513 (2000).

207. *United States v. Bajakajian*, 524 U.S. 321 (1998).

208. *Kyllo v. United States*, 533 U.S. 27 (2001).

209. For a tabulation of ultimate agreement or disagreement among Justices O'Connor, Kennedy, and Souter in these cases, *see infra* Table 2.

**Table 2: Overall Pattern of Agreement or Disagreement Among Justices  
O'Connor, Kennedy, and Souter in the Post-Casey 5-4 Decisions  
Discussed in this Article**

<b>In the Majority</b>	<b>Dissenting</b>	<b>All 5-4 Decisions 1997-2000 Terms</b>	<b>Selected 5-4 Decisions 1992-1996 Terms</b>
O'Connor, Kennedy, Souter		1	0
O'Connor, Kennedy	Souter	42	7
O'Connor, Souter	Kennedy	13	0
Kennedy, Souter	O'Connor	11	1
O'Connor	Kennedy, Souter	0	1
Kennedy	O'Connor, Souter	3	0
Souter	O'Connor, Kennedy	5	1
<b>TOTAL</b>		<b>75</b>	<b>10=85</b>

Table 3: Case Citations for the 45 5/4 Cases Discussed in this Article with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas in the Majority

A. Criminal Cases

1. Death Penalty Cases

Ramdass v. Angelone, 530 U.S. 156 (2000).  
Weeks v. Angelone, 528 U.S. 225 (2000).  
Jones v. United States, 527 U.S. 373 (1999).  
Caleron v. Thompson, 523 U.S. 538 (1998).

2. Non-Death Penalty Cases

Daniels v. United States, 532 U.S. 374 (2001).  
Lackawanna County Dist. Atty. v. Coss, 532 U.S. 394 (2001).  
Texas v. Cobb, 532 U.S. 162 (2001).  
Ohler v. United States, 529 U.S. 753 (2000).  
Smith v. Robbins, 528 U.S. 259 (2000).  
Illinois v. Wardlow, 528 U.S. 119 (2000).  
Calderon v. Coleman, 525 U.S. 141 (1998).  
Pennsylvania Bd. of Probation v. Scott, 524 U.S. 357 (1998).

B. Federalism Cases

1. Commerce Clause, Tenth Amendment, and Related Statutory Interpretation Cases

Solid Waste Agency v. United States Army Corps of Eng., 531 U.S. 159 (2001).  
United States v. Morrison, 529 U.S. 598 (2000).  
Printz v. United States, 521 U.S. 898 (1997).  
United States v. Lopez, 514 U.S. 549 (1995).

2. 11th Amendment and State Sovereign Immunity Cases

Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 98 (2001).  
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).  
Alden v. Maine, 527 U.S. 706 (1999).  
College Sav. Bk. v. Florida Prepaid Postsec. Educ. Exp. Bd., 527 U.S. 666 (1999).  
Florida Prepaid Postsec. Educ. Exp. Bd. v. College Sav. Bk., 527 U.S. 627 (1999).  
Seminole Tribe v. Florida, 517 U.S. 44 (1996).

C. Equal Protection Clause, Due Process Clause, and First Amendment Cases

Bush v. Gore, 531 U.S. 98 (2000).  
Boy Scouts of America v. Dale, 530 U.S. 640 (2000).  
Agostini v. Felton, 521 U.S. 203 (1997).  
Bush v. Vera, 517 U.S. 952 (1996).  
Adarand v. Peña, 515 U.S. 200 (1995).  
Abrams v. Johnson, 521 U.S. 74 (1997).

D. Contract & Takings Clause Cases

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001).  
Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).  
Phillips v. Washington Legal Found., 524 U.S. 156 (1998).

E. Statutory Interpretation Cases

Tyler v. Cain, 121 S. Ct. 2478 (2001).  
Lorillard Tobacco v. Reilly, 121 S. Ct. 2404 (2001).  
NLRB v. Kentucky River Comm. Care, Inc., 121 S. Ct. 1861 (2001).  
Alexander v. Sandoval, 121 S. Ct. 1511 (2001).  
Buckannon Bd. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598 (2001).  
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).  
Miller v. French, 530 U.S. 327 (2000).  
Carter v. United States, 530 U.S. 255 (2000).  
Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000).  
FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120 (2000).  
Dep't of Commerce v. House of Representatives, 525 U.S. 316 (1999).  
Grupo Mex. de Desarrollo v. Alliance Bound Fund, Inc., 527 U.S. 308 (1999).  
Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).  
Allentown Mack Sales & Serv. Inc. v. NLRB, 522 U.S. 359 (1998).

Table 4: Additional Noteworthy Cases Discussed in this Article,  
Which Are Not 5-4 Decisions from the 1992-2000 Terms of the Court

A. 5-4 Decisions Prior to the 1992 Term of the Court

Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Lee v. Weisman, 505 U.S. 577 (1992).

Texas v. Johnson, 491 U.S. 397 (1989).

B. Non-5-4 Decisions from the 1992-2000 Terms of the Court

Mitchell v. Helms, 120 S. Ct. 2530 (2000).

Hill v. Colorado, 120 S. Ct. 2480 (2000).

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

Madsen v. Woman's Health Center, Inc., 512 U.S. 753 (1994).